

# THE MARITIME LABOUR CONVENTION, 2006: THE SEAFARER AND THE FISHER

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## 1 Introduction

Without those who work at sea, ‘half the world would freeze and the other half starve.’<sup>1</sup> To the non-seafarer, the scale of the shipping industry is almost unfathomable. There are over 50,000 merchant ships trading internationally, registered in 150 nations.<sup>2</sup> At the beginning of 2015, the world’s commercial fleet consisted of 89,464 ships with a total of 1.75 billion dead-weight tonnage.<sup>3</sup> In 2013, developed countries imported goods worth US\$ 10 trillion,<sup>4</sup> and more than 90 per cent of those goods were moved by ship. Without ships, ‘the commercial world would grind to a halt’.<sup>5</sup> Currently 1.2 million seafarers ensure that 90 per cent of ‘everything’<sup>6</sup> reaches its destination safely via maritime transport.<sup>7</sup>

Cargo transport is but one type of work at sea. The global cruise ship sector employed 939,000 people in 2014<sup>8</sup> and that sector continues to grow. An estimated 35 million fishers, employed in industrial capture fisheries,<sup>9</sup> supply the world with 57.75 million tonnes of fish.<sup>10</sup> Yet, despite the enormous scale of the industries, those who work at sea remain invisible to the majority of consumers.

Work at sea is extremely dangerous, and not just because of the inherent dangers of machinery, ships and seas. Seafarers spend ‘most of their working life stuck on a confined metal box ... where intimidation is easier than in most workplaces’.<sup>11</sup> The isolated and isolating workplace leaves them vulnerable to bullying and harassment, abandonment and non-payment of wages. Couple this with the changes in patterns of ship ownership<sup>12</sup> and management over the last 60 years, and seafarers are potentially exposed to serious abuse.<sup>13</sup> Fishers are arguably subject to even greater risk of abuse due to the criminal elements of illegal, unreported and unregulated fishing and human trafficking present in that industry.

This article evaluates the impact of the *2006 Maritime Labour Convention* (‘MLC, 2006’) on the unique working conditions of seafarers through the lens of Australia’s implementation. The Australian experience is interesting as it has taken a strong stance on foreign flagged ships via Port State Control (PSC) while at the same time there have been vigorous debates regarding Australian cabotage laws including seafarer unions accusing the Australian

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<sup>1</sup> Efthimios Mitropoulos, ‘Putting the Seafarer First’ (2005) 20 *Transport International Magazine*.

<sup>2</sup> International Chamber of Shipping, Shipping and World Trade (2015) <[www.ics-shipping.org/shipping-facts/shipping-and-world-trade](http://www.ics-shipping.org/shipping-facts/shipping-and-world-trade)>.

<sup>3</sup> United Nations Conference on Trade and Development, Review of Maritime Transport, UNCTAD/RMT/2015 (14 October 2015) 30.

<sup>4</sup> United Nations Conference on Trade and Development, Key Statistics and Trends in International Trade 2014, UNCTAD/DITC/TAB/2014/2 (2015) 2.

<sup>5</sup> Edgar Gold, ‘Bloodhounds, Scapegoats and Fatcats: Criminal Action, Professional Duty and Corporate Responsibility in the Maritime Menagerie’ (2005) 24 (2) *University of Queensland Law Journal* 251, 258.

<sup>6</sup> United Nations, IMO (International Maritime Organization) <<https://business.un.org/en/entities/13>>.

<sup>7</sup> International Labour Organization, International Labour Standards on Seafarers <<http://www.ilo.org/global/standards/subjects-covered-by-international-labour-standards/seafarers/lang--en/index.htm>>.

<sup>8</sup> Kate Lewins, *International Carriage of Passengers by Sea*, (Sweet & Maxwell, 2016) 4.

<sup>9</sup> International Labour Organization, *Danger at Sea – Working in the fishing sector* <[http://www.ilo.org/global/about-the-ilo/newsroom/features/WCMS\\_075579/lang--en/index.htm](http://www.ilo.org/global/about-the-ilo/newsroom/features/WCMS_075579/lang--en/index.htm)> Fisheries and Aquaculture Department, Fishing People (2015) Food and Agriculture Organization of the United Nations <[www.fao.org/fisher/topic/1387/en](http://www.fao.org/fisher/topic/1387/en)>. The FAO defines industrial capture fishing as ‘[c]apital-intensive fisheries using relatively large vessels with a high degree of mechanization and that normally have advanced fish finding and navigational equipment’.

<sup>10</sup> United Nations Department of Public Information, Resumed Review Conference on the Agreement Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (May 2010) <[www.un.org/depts/los/convention\\_agreements/reviewconf/FishStocks\\_EN\\_A.pdf](http://www.un.org/depts/los/convention_agreements/reviewconf/FishStocks_EN_A.pdf)>.

<sup>11</sup> Rose George, *Ninety Percent of Everything* (Metropolitan Books, 2013) 178.

<sup>12</sup> The traditional family owned shipping company is a thing of the past and today vessels are more likely to be owned by financial institutions that may not be interested in actual ship operations. See Gold, above n 5, 252.

<sup>13</sup> Thomas A Menash, ‘Seafarers in the modern maritime industry: the need for reform’ (2006) 2 *Lloyds Maritime Quarterly* 172. See also A D Couper, C J Stanberry and G L Boerne, *Voyages of Abuse, Seafarers, Human Rights and International Shipping* (Pluto Press, 1995); Alastair Couper, Hance D Smith and Bruno Ciceri, *Fishers and Plunderers. Theft, Slavery and Violence at Sea* (Pluto Press, 2015) and the International Commission on Shipping, ‘Inquiry into Ship Safety: Ships, Slaves and Competition’ (2000).

government of breaches of the MLC, 2006.<sup>14</sup> The article uses the results of this evaluation to predict the likely impact of the MLC, 2006's sister convention, the *2007 Working in Fishing Convention* ('WIFC, 2007') and highlights the additional challenges the WIFC, 2007 will face due to the vein of criminality that runs through the fishing industry.

## 1.1 Historical Perspective

Historically, courts have recognised that seafarers should be afforded special legal protection. In England, the Court of Admiralty was concerned with the 'unconscionable use of legal rights'<sup>15</sup> and retained jurisdiction over the interests of seafarers. It displayed a 'singular sympathy for the seafarer as a result of its awareness of the harshness of his working environment' and the power imbalance between shipowner and seafarer.<sup>16</sup>

In 1825, Lord Stowell described seafarers as:

[M]en generally ignorant and illiterate, notoriously and proverbially reckless and improvident, ill provided with the means of obtaining useful information, and almost ready to sign any instrument that may be proposed to them; and on all accounts requiring protection, even against themselves.<sup>17</sup>

Seafarers were the 'favourites of the law'<sup>18</sup> and by the end of the 19<sup>th</sup> Century, they were protected by the *Merchant Shipping Act 1894* (UK). This legislation shared many similarities with our modern regulatory code regarding seafarers. For example, it required that seafarers were provided with a written agreement that covered the nature and duration of the voyage, the hours of work, their role, wages and provisions. It even specified that where the number of crew exceeded 100 there was to be a medical practitioner on board.<sup>19</sup>

The end of World War One generated a new awareness of workers' rights. The International Labour Organization ('ILO') was created in 1919 as part of the Treaty of Versailles and was the first of the United Nations' ('UN') specialized agencies. Some of the first ILO conventions concerned the protection of seafarers; for example, the *Unemployment Indemnity (Shipwreck Convention)*<sup>20</sup> and the *Placing of Seamen Convention*.<sup>21</sup> Therefore, the uniquely exposed position of the seafarer continued to be recognised.

Despite recognition and intervention in the early part of the 20<sup>th</sup> century, the vulnerability of seafarers remained acute as the century drew to a close. In 1992, the Australian government produced the ground-breaking 'Ships of Shame' Inquiry in response to the loss of six bulk carriers off the coast of Western Australia. The inquiry found that, despite the legal recognition of the special vulnerability of seafarers almost 200 years ago, seafarers remained subject to enduring risks of exploitation and abuse. Often seafarers were unable to communicate in English, were not adequately trained and on several occasions crew members had been maltreated by shipowners and operators.<sup>22</sup> The inquiry provided the following examples of the poor treatment:

- the denial of food and the provision of inadequate food
- bashing of crew members by ships' officers
- maintenance of two pay books, one for official records ... the other for the real lower level of pay
- under or non-payment of wages and overtime
- inadequate accommodation and washing facilities
- sexual molestation and rape
- depriving access to appropriate medical care
- crew members being considered as 'dispensibles'.<sup>23</sup>

This inquiry was followed in 2000 by the Australian chaired International Commission on Shipping ('ICoNS') report, which found that seafarers continued to be subject to significant abuse, non-payment of wages and

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<sup>14</sup> International Transport Workers' Federation, 'Australia's cabotage undermining attacked at ILO' (Press Release, 12 December 2016) <<http://www.itfglobal.org/en/news-events/press-releases/2016/february/australias-cabotage-undermining-attacked-at-ilo/>>.

<sup>15</sup> E J Black, 'The F S Dethridge Memorial Address 1999, Admiralty Jurisdiction and the Protection of Seafarers' (2000) 15 *Australian and New Zealand Maritime Law Journal* 1, 5.

<sup>16</sup> *Ibid.*

<sup>17</sup> *The Minerva* (1825) 1 Hagg 347, 355; 166 ER 123, 126-127.

<sup>18</sup> *Ibid.*, 127.

<sup>19</sup> *Merchant Shipping Act 1894* (UK) s 209. Today this is required by the Maritime Labour Convention 2006.

<sup>20</sup> *Unemployment Indemnity (Shipwreck) Convention*, opened for signature 15 June 1920, C008 (entered into force 16 March 1923).

<sup>21</sup> *Placing of Seamen Convention*, opened for signature 10 July 1920, C009 (entered into force 23 November 1921).

<sup>22</sup> House of Representatives Standing Committee on Transport Communications and Infrastructure, Parliament of Australia, *Ships of Shame Inquiry into Ship Safety* (1992) 32-36 [3.21] – [3.31].

<sup>23</sup> *Ibid.*, 36 [3.31].

abandonment.<sup>24</sup> The report also highlighted issues that exacerbate the abuse of fishers; in particular the fact that many fishing vessels engage in illegal, unreported and unregulated fishing, are mostly not subject to port state control, and recruit 'passport holders' as irregular crew. In this context, passport holders are defined as:

people recruited for service on ships or fishing vessels through illegitimate sources rather than the normal maritime channels, and who leave their home country to join vessels abroad under the guise of tourists. They have no training and bypass normal employment safeguards. They have no medical inspections, no safety training and no records of engagement as seafarers.<sup>25</sup>

The on-going exploitation of seafarers is often blamed upon the use of 'flags of convenience'.<sup>26</sup> According to the International Transport Workers Federation (ITF)<sup>27</sup> this can mean that seafarers working on ships flying a flag of convenience receive very low wages, poor conditions, inadequate food and clean drinking water and long periods of work without adequate rest.<sup>28</sup>

Flags of convenience are also used in the fishing industry. The conditions on board these fishing vessels can be so bad that they have earned the nickname 'floating coffins'.<sup>29</sup> Crews have reported beatings, sleep deprivation, and even imprisonment without food or water.<sup>30</sup>

One result of the 1992 Ships of Shame report was an increased awareness of the importance of safety on-board ships and the enhanced use of port state safety inspections in the Asia-Pacific region. The international community had adopted PSC as a result of coastal states' concerns about flag states failing to enforce their own safety rules.<sup>31</sup> In Europe, the Paris Memorandum of Understanding on Port State Control ('Paris MOU') came about as a result of the political and public outcry following the grounding of the crude oil tanker, the 'Amoco Cadiz'.<sup>32</sup> Coastal states gave their port authorities extensive powers to inspect and detain ships that do not comply with international safety standards with respect to safety of life at sea, prevention of pollution by ships, and living and working conditions on board ships.<sup>33</sup>

Regional port state control organisations, such as the Tokyo MOU,<sup>34</sup> Paris MOU,<sup>35</sup> and Indian Ocean MOU,<sup>36</sup> of which Australia is a member, have the objective of eliminating sub-standard shipping through regional co-operation and harmonised port state control.<sup>37</sup> The authorities of the port state have the power to inspect and detain foreign ships that are unseaworthy and require that deficiencies are rectified before they are allowed to sail. This information is shared with members of the MOU to assist them in the selection of foreign vessels for inspection in the next port.

PSC has been extremely effective in improving the safety of ships. It remains one of the most powerful mechanisms for enforcing compliance with international maritime law.<sup>38</sup>

## 1.2 Current International Labour Conventions

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<sup>24</sup> International Commission on Shipping, 'Inquiry into Ship Safety: Ships, Slaves and Competition' (2000) 29-30.

<sup>25</sup> Ibid 28.

<sup>26</sup> Menash, above n 13, 2.

<sup>27</sup> The ITF is an international transport unions' federation. Around 700 unions, representing more than 4.5 million transport workers from 150 countries, are members of the ITF. <<http://www.itfglobal.org/en/about-itf/>>.

<sup>28</sup> International Transport Workers Federation, *Flags of Convenience, Avoiding the rules by flying a convenient flag* <<http://www.itfglobal.org/en/transport-sectors/seafarers/in-focus/flags-of-convenience-campaign/>>.

<sup>29</sup> Environmental Justice Foundation, 'Lowering the Flag - Ending the use of Flags of Convenience by Pirate Fishing Vessels' (EJF, 2009) 22.

<sup>30</sup> Ibid.

<sup>31</sup> Richard Shaw and Mikis Tsimplis, 'The Liabilities of the Vessel' in Yvonne Baatz (ed) *Maritime Law* (Sweet and Maxwell, 2nd ed, 2011) 300.

<sup>32</sup> In 1978, a number of maritime authorities in Western Europe drafted the 'Hague Memorandum'. It dealt mainly with enforcement of shipboard living and working conditions as required by ILO Convention no. 147. As it was about to enter into force, the Amoco Cadiz oil spill occurred causing such an outcry that a new MOU was drafted to deal with the safety of ships. For more detail on the formation of the Paris MOU see Paris Memorandum of Understanding on Port State Control, *History*, <<https://www.parismou.org/about-us/history>>.

<sup>33</sup> Ibid 301.

<sup>34</sup> Tokyo Memorandum of Understanding on Port State Control in the Asia-Pacific Region.

<sup>35</sup> Paris Memorandum of Understanding on Port State Control.

<sup>36</sup> Indian Ocean Memorandum of Understanding on Port State Control.

<sup>37</sup> Paris MOU, <[www.parismou.org/about-us/organisation](http://www.parismou.org/about-us/organisation)>.

<sup>38</sup> The Paris and Tokyo MOUs undertake Concentrated Inspection Campaigns (CIC) on various compliance issues and publish the results on their websites.

The beginning of a new century heralded a paradigm shift in the legal protection of seafarers as the legal focus swung towards the living and working conditions of seafarers. The *2006 Maritime Labour Convention* ('MLC, 2006'),<sup>39</sup> which entered into force in August 2013, is the result of years of discussions and review at the ILO. It consolidates and updates almost all existing labour conventions<sup>40</sup> while seeking to create uniformity of labour standards in global shipping. To date, 81 countries representing over 90 per cent of the world's gross tonnage have ratified the MLC, 2006,<sup>41</sup> including Australia and New Zealand. The MLC, 2006 is praised for having 'the potential to make a real difference to all seafarers'.<sup>42</sup> The MLC, 2006 is seen as an effective instrument because it combines seafarer rights and principles with specific standards and guidance as to implementation.<sup>43</sup>

The MLC, 2006 is a comprehensive and practical convention that applies to the ships registered in a signatory state. However, fishing vessels are excluded from its scope. The Governing Body of the International Labour Office considered the fishing industry too diverse to be covered by the MLC, 2006 and preferred a separate convention.<sup>44</sup> Therefore, the ILO drafted the *2007 Work in Fishing Convention* ('WIFC, 2007') to complement the MLC, 2006. The WIFC, 2007 will enter into force 16 November 2017.<sup>45</sup> Fishing is one of the most dangerous and unregulated industries in the world. Arguably, fishers are exposed to even greater risks than seafarers. The working conditions of many fishers are perilous — even bordering on slavery. Yet, as this article will show, even when the WIFC, 2007 enters into force, the majority of those employed in the global fishing industry will nonetheless be without legal protection.

As the MLC, 2006 was a relatively new convention when I began this research in 2015 there was little published data measuring its effectiveness.<sup>46</sup> I therefore conducted semi-structured interviews with maritime industry stakeholders to investigate this issue.<sup>47</sup> While the same general questions were asked of all participants, their different perspectives were allowed to develop by adopting a conversational style of interview. As the interviews took place in Western Australia, this article has taken a largely Australian perspective while remaining mindful of the global nature of seafaring and fishing.

The conclusions reached in this article are based upon those responses combined with desk-based research. The findings of this article are that the MLC, 2006 is a successful and useful convention when it is enforced. The WIFC, 2007, will likely provide more security and protection to fishers when it enters into force. However, as will be discussed, while the living and working issues facing seafarers and fishers are, *prima facie*, similar, there is a vein of criminality running through the global fishing industry that makes the protection of some workers almost impossible.

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<sup>39</sup> *Maritime Labour Convention*, opened for signature 23 February 2006, MLC, 2006, (entered into force 20 August 2013) (hereinafter 'MLC, 2006'). It became law in Australia on the same day and is given effect by the *Navigation Act 2012* (Cth).

<sup>40</sup> Listed in MLC, 2006, Art X.

<sup>41</sup> International Labour Organization, *Maritime Labour Convention 2006* <<http://www.ilo.org/global/standards/maritime-labour-convention/lang--en/index.htm>>.

<sup>42</sup> Seafarers International Union, 'Unions, Employers Praise Maritime Labor Convention Development' (News Release, 8/20, 20 August 2012) <[www.seafarers.org/news/2012/Q3?ITFandISFCommentonMLC,2006.htm](http://www.seafarers.org/news/2012/Q3?ITFandISFCommentonMLC,2006.htm)>.

<sup>43</sup> Patrick Bollé, 'The ILO's new Convention on maritime labour: An innovative instrument' (2006) 145 *International Labour Review* 135, 140.

<sup>44</sup> Preparatory Technical Maritime Conference, *Consolidated Maritime Labour Convention: Commentary to the Recommended Draft*, ILO Doc PTMC/04/2 (13-24 September 2004) 9.

<sup>45</sup> International Labour Organization, *ILO Work in Fishing Convention No.188 (2007) to enter into force* <[http://ilo.org/global/about-the-ilo/newsroom/news/WCMS\\_535063/lang--en/index.htm](http://ilo.org/global/about-the-ilo/newsroom/news/WCMS_535063/lang--en/index.htm)>.

<sup>46</sup> Subsequently more projects have investigated the effectiveness of MLC, 2006. See Seafarers Rights International (SRI) <<http://seafarersrights.org/press-releases/>>. The Paris MOU also recently undertook a CIC on compliance with the MLC 2006. Paris Memorandum of Understanding on Port State Control, 'Launch of Concentrated Inspection Campaign on MLC, 2006' (Press Release, 28 July 2016) <<https://www.parismou.org/launch-concentrated-inspection-campaign-mlc2006>>.

<sup>47</sup> The interviewees are anonymised in this article and identified by their profession. They are: a Marine Consultant whose roles have included: ship's officer, marine surveyor, nautical college lecturer and administrator and maritime regulator. The Marine Consultant served on the Australian Government's Ships of Shame enquiries and the International Transport Federation's (ITF) IConS Commission. A Marine Pilot with over 27 years' marine industry experience including working as a ship's officer trading domestically and internationally, a dredge master; and an offshore oil and gas operator. The Marine Pilot has been a marine pilot/load master/cargo surveyor since 2009; Manager – Ship Safety (with the Australian Maritime Safety Authority (AMSA)) and Master Mariner.

In addition, three ship's officers from foreign flagged ships on shore leave at the Flying Angel Club in Fremantle kindly consented to be interviewed: A Ship's Captain; an Engineer and a Second Officer. I am immensely grateful to all interview participants for their participation and generosity with their time.

## 2 The unique nature of maritime labour law

Maritime labour law is particularly complex because it straddles domestic and international law.<sup>48</sup> The global nature of shipping, combined with the extensive use of flags of convenience, means that seafarers and shipowners rarely have the same nationality.<sup>49</sup> Neither the seafarer nor the shipowner is likely to share the nationality of the flag state of the ship but, nonetheless, the law of the flag state applies on-board. The international maritime regulatory regime is based on the international law of the sea whereas employment law, even if it is giving effect to an international instrument, is normally dealt with by domestic law based on territorial jurisdiction.

The protection of maritime workers is crucial, not only to ensure quality shipping that is respectful of the marine environment, but also to provide occupational health and safety and prevent the abuse of human rights.<sup>50</sup> According to the ILO, seafarers are exposed to:

...difficult working conditions and particular occupational risks. Working far from home, they are vulnerable to exploitation and abuse, non-payment of wages, non-compliance with contracts, exposure to poor diet and living conditions, and even abandonment in foreign ports.<sup>51</sup>

### 2.1 Background to the MLC, 2006

Recognising the unusual vulnerability of seafarers, the ILO developed a range of conventions<sup>52</sup> which were designed to reflect unique nature of the shipping industry. However, not all those instruments achieved widespread acceptance.<sup>53</sup> While the standards set in the conventions were considered valid, they failed to translate into real changes in seafarers' working conditions.<sup>54</sup>

The ineffectiveness of these conventions was due to a number of factors. Often the conventions only dealt with one topic, so ratification was 'patchy'.<sup>55</sup> Furthermore, ratification and enforcement often put shipowners and governments at an 'economic disadvantage'<sup>56</sup> compared to those that did not ratify. Additional impediments to wider ratification were: the excessive detail in the conventions; the inflexibility to respond to developments in the shipping industry; and standards that were complex and difficult to understand.<sup>57</sup>

In January 2001 the Joint Maritime Commission ('JMC')<sup>58</sup> recommended a consolidation of the ILO's maritime conventions.<sup>59</sup> This recommendation was not only welcomed but driven by shipowners, who hoped that it would lead to uniform compliance costs.<sup>60</sup> The JMC resolved that;

the emergence of the global labour market for seafarers has effectively transformed the shipping industry into the world's first genuinely global industry, which requires a global response with a body of global standards applicable to the whole industry.

The week-long session agreed that the existing ILO maritime instruments should be consolidated and brought up to date by means of a new, single "framework Convention" on maritime labour standards.<sup>61</sup> Negotiations on the

<sup>48</sup> Moira McConnell, Dominick Devlin and Cleopatra Doumbia-Henry, *The Maritime Labour Convention 2006: a legal primer to an emerging international regime* (Martinus Nijhoff, 2011) 4.

<sup>49</sup> Menash above n 13, 173.

<sup>50</sup> Iliana Christodoulou-Varotsi, 'Critical Review of the Consolidated Maritime Labour Convention (2006) of the International Labour Organization: Limitations and Perspectives' (2012) 43 *Journal of Maritime Law and Commerce* 467.

<sup>51</sup> International Labour Organization, International Labour Standards on Seafarers <<http://www.ilo.org/global/standards/subjects-covered-by-international-labour-standards/seafarers/lang--en/index.htm>>.

<sup>52</sup> Prior to the adoption of the MLC, 2006, there were over 60 maritime labour conventions and recommendations in force, dating back to 1920. See the General Comments of the Preparatory Technical Maritime Conference, Consolidated Maritime Labour Convention: Commentary to the Recommended Draft, ILO Doc PTMC/04/2 (13-24 September 2004).

<sup>53</sup> International Labour Conference, 94th (Maritime) sess, Report of the Committee of the Whole ILO Doc ILC94-PR7(Part I)-2006-02-0376-1-En.doc (7 February 2006).

<sup>54</sup> Bollé, above n 43, 138.

<sup>55</sup> Ibid.

<sup>56</sup> Ibid.

<sup>57</sup> Ibid.

<sup>58</sup> The Joint Maritime Commission (JMC) is a bipartite body made up equally of representatives from shipowners and seafarers. It was established in 1920 to advise the ILO governing body on maritime questions. McConnell, above n 48, 38.

<sup>59</sup> Joint Maritime Committee, *Report of the Joint Maritime Commission*, 29th sess, ILO Do GB280-5-2001-02-0182-1-EN.Doc (22-26 January 2001).

<sup>60</sup> John Isaac Blanck Jr, 'Reflections on the Negotiation of the Maritime Labor Convention 2006 at the International Labor Organization' (2006) 31 *Tulane Maritime Law Journal* 35, 39.

<sup>61</sup> International Labour Organization, International Shipping Industry adopts "Geneva Accord" <[http://www.ilo.org/global/about-the-ilo/media-centre/press-releases/WCMS\\_007832/lang--en/index.htm](http://www.ilo.org/global/about-the-ilo/media-centre/press-releases/WCMS_007832/lang--en/index.htm)>.

text of the proposed convention commenced almost immediately and on 23 February 2006, after five years of negotiations, the MLC, 2006 opened for signature.<sup>62</sup>

The Director General of the International Labour Office described it as ‘a “bill of rights” for the world’s maritime workers and a framework for creating a level playing field for shipowners’.<sup>63</sup> This ‘level playing field’ is achieved via the enforcement and compliance procedures that prevent non-ratifying countries gaining a commercial advantage over ratifying countries.<sup>64</sup>

The MLC, 2006 is labelled as the ‘Fourth Pillar’ of the international regulatory regime for safe shipping,<sup>65</sup> complementing three existing conventions of the International Maritime Organisation (IMO): the *International Convention on Standards of Training, Certification and Watchkeeping for Seafarers*,<sup>66</sup> the *International Convention for the Safety of Life at Sea*,<sup>67</sup> and the *International Convention for the Prevention of Pollution from Ships*.<sup>68</sup>

The MLC, 2006 addresses a significant gap in the *United Nations Convention on the Law of the Sea*, (UNCLOS),<sup>69</sup> namely, the failure to acknowledge the ocean as a workplace or ‘human rights site’.<sup>70</sup> Therefore, its truly innovative feature is the focus on the rights of seafarers to decent working and living conditions.<sup>71</sup>

## 2.2 Aims and Scope of the MLC, 2006

The primary aims of the MLC, 2006 are to ensure comprehensive worldwide protection of the rights of seafarers and to ‘level the playing field’ for operators by protecting shipowners and countries committed to the protection of seafarers from unfair competition on the part of substandard ships.<sup>72</sup> The system of compliance and enforcement should ensure that the MLC, 2006 is effective in practice by virtue of the ‘no more favourable treatment principle’.<sup>73</sup> The MLC, 2006 has three underlying purposes:

- (a) to lay down (in its Articles and Regulations) a firm set of principles and rights;
- (b) to allow (through the Code) a considerable degree of flexibility in the way Members implement those principles and rights; and
- (c) to ensure (through Title 5) that the principles and rights are properly complied with and enforced.<sup>74</sup>

The Preamble<sup>75</sup> states that the Convention should embody the fundamental principles to be found in the ILO’s other labour conventions<sup>76</sup> within the legal framework of UNCLOS.<sup>77</sup> In other words, the MLC, 2006 acknowledges the primacy of flag state jurisdiction.<sup>78</sup>

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<sup>62</sup> MLC, 2006. See also International Labour Office, *Ratification and implementation information for the Maritime Labour Convention, 2006* <<http://ilo.org/global/standards/maritime-labour-convention/database-ratification-implementation/lang--en/index.htm>>.

<sup>63</sup> International Labour Office, *Compendium of Maritime Labour Instruments (ILO and European Union, 2nd ed, 2015)*.

<sup>64</sup> McConnell, above n 48, 82.

<sup>65</sup> International Labour Office, above n 54.

<sup>66</sup> *International Convention on Standards of Training, Certification and Watchkeeping for Seafarers*, opened for signature 7 July 1978, (hereinafter STCW, 1978) (entered into force 28 April 1984).

<sup>67</sup> *International Convention for the Safety of Life at Sea*, opened for signature 1 November 1974, SOLAS (entered into force 25 May 1980).

<sup>68</sup> *International Convention for the Prevention of Pollution from Ships*, opened for signature 2 November 1973, MARPOL (entered into force 2 October 1983).

<sup>69</sup> *United Nations Convention on the Law of the Sea*, opened for signature 16 December 1982, UNTS 1833 (entered into force 16 November 1994).

<sup>70</sup> McConnell, above n 48, 23.

<sup>71</sup> *Ibid* 77.

<sup>72</sup> International Labour Organization, ‘Maritime Labour Convention, 2006 (MLC, 2006) Frequently Asked Questions (FAQ)’ (2015), 5.

<sup>73</sup> Bollé, above n 43, 141.

<sup>74</sup> MLC, 2006, Explanatory Note.

<sup>75</sup> The Preamble is not binding but an authoritative expression of the parties’ intentions. See, Preparatory Technical Maritime Conference, *Consolidated Maritime Labour Convention: Commentary to the Recommended Draft*, ILO Doc PTMC/04/2 (13-24 September 2004).

<sup>76</sup> Listed as *Forced Labour Convention 1930* (No 29); *Freedom of Association and Protection of the Right to Organise Convention, 1948* (No 87); *Right to Organise and Collective Bargaining Convention 1949* (No 98), *Equal Remuneration Convention 1951* (No 100), *Abolition of Forced Labour Convention 1957* (No 105); *Discrimination (Employment and Occupation) Convention 1958* (No 111); *Minimum Age Convention 1973* (No 138); *Worst Forms of Child Labour Convention 1999* (No 182).

<sup>77</sup> MLC, 2006, Preamble.

<sup>78</sup> *United Nations Convention on the Law of the Sea*, opened for signature 16 December 1982, UNTS 1833 (entered into force 16 November 1994) art 94. Article 94 of UNCLOS establishes flag state jurisdiction ‘under its internal law over each ship flying its flag and its master, officers and crew in respect of administrative, technical and social matters concerning the ship.’

The Preamble further explains that the ILO is determined to secure the widest acceptability for the MLC, 2006 among governments, shipowners and seafarers committed to the principles of decent work. Therefore the MLC, 2006 should be 'readily updateable' and 'lend itself to effective implementation and enforcement'.<sup>79</sup>

The general obligations placed on a member are; first, to give effect to the provisions of the MLC, 2006 in order to secure the right of all seafarers to decent employment; and, second, to co-operate with other members to ensure the effective implementation and enforcement of the MLC, 2006.<sup>80</sup>

The application of the MLC, 2006 is broad. While the MLC, 2006 excludes fishing vessels (and consequently fishers) as the diversity of that industry warranted a separate convention, there is nothing to prevent a state including them through its domestic law.<sup>81</sup> It applies to all seafarers<sup>82</sup> and all ships engaged commercial activities.<sup>83</sup> A seafarer is defined as 'any person who is employed or engaged or works in any capacity on board a ship to which [the] Convention applies'.<sup>84</sup> This definition reflects the awareness that there are a broad range of people who are employed at sea and carry out jobs not traditionally understood to be part of the seafaring workforce; for example, those who work on passenger ships as entertainers or in hospitality services.<sup>85</sup> This definition is also broad enough to include seafarers who are self-employed or employed by third parties.<sup>86</sup> Ship is defined as 'as ship other than one which navigates exclusively in inland waters or waters within, or closely adjacent to, sheltered waters or areas where port regulations apply'.<sup>87</sup>

### **2.3 MLC, 2006: Successes, criticisms and omissions**

The MLC, 2006 contains three interrelated sections, the Articles, Regulations and Code.<sup>88</sup> The Articles and Regulations provide the core rights and principles and the 'basic' obligations of members ratifying the MLC, 2006.<sup>89</sup> The Code contains the details for implementing the regulations. It comprises of mandatory standards (Part A) and non-mandatory guidelines (Part B).<sup>90</sup> The Regulations and Code are organised into five titles.

These five titles are arranged in a chronological structure. Title 1 covers the pre-employment stage, Title 2 covers employment conditions, Title 3 covers on-board requirements, Title 4 covers health and social security and Title 5 covers compliance and enforcement.

Detailed analysis of each provision contained in the MLC, 2006 is comprehensively covered elsewhere<sup>91</sup> and will not be addressed here. Instead, the next part of the discussion will centre on aspects of the MLC, 2006 flagged as being of particular interest by both commentators and stakeholders alike.

#### **2.3.1 Recruitment**

The details contained in the Code under regulation 1.4 are largely drawn from the *Recruitment and Placement of Seafarers Convention*<sup>92</sup> and are among the most complex in the MLC, 2006. The main concerns for seafarers regarding recruitment and placement services are; that they have largely been unregulated; engage in blacklisting;<sup>93</sup> charge large fees for access to employment; and place a barrier between the seafarer and their employer which creates ambiguity over liability and responsibility.<sup>94</sup>

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<sup>79</sup> MLC, 2006, Preamble.

<sup>80</sup> Ibid art I.

<sup>81</sup> McConnell et al, above n 48, 18.

<sup>82</sup> Ibid art II, para 2.

<sup>83</sup> Ibid art II, para 4.

<sup>84</sup> Ibid art I, para 1.

<sup>85</sup> Preparatory Technical Maritime Conference, Consolidated Maritime Labour Convention: Commentary to the Recommended Draft, ILO Doc PTMC/04/2 (13-24 September 2004) 8.

<sup>86</sup> See the discussion in the International Labour Conference, 94th (Maritime) sess, Report of the Committee of the Whole ILO Doc ILC94-PR7(Part I)-2006-02-0376-1-En.doc (7 February 2006).

<sup>87</sup> MLC, 2006, art II, para 1.

<sup>88</sup> Ibid, Explanatory Note to the regulations and Code of the Maritime Labour Convention, 2.

<sup>89</sup> Ibid 3.

<sup>90</sup> Ibid 4.

<sup>91</sup> McConnell et al, above n 48, 82 provide a detailed and in-depth review of each provision.

<sup>92</sup> *Recruitment and Placement of Seafarers Convention* 1996, opened for signature 22 October 1996, C179, (entered into force 22 April 2000) as discussed in the Preparatory Technical Maritime Conference, Consolidated Maritime Labour Convention: Commentary to the Recommended Draft, ILO Doc PTMC/04/2 (13-24 September 2004), 22.

<sup>93</sup> Blacklisting is where a seafarer's name is put on a list of seafarers who are not good employees and circulated among all the seafarer recruitment agencies in their country. It is used as a form of discipline to ensure they behave when they are at sea.

<sup>94</sup> International Labour Organization, 'Handbook: Guidance on implementing the Maritime Labour Convention 2006 - Model National Provisions' (International Labour Office, 2012) 12.

The purpose of this regulation is to ensure seafarers have access to an efficient and well-regulated recruitment placement system. Seafarers must not be charged for finding employment. Seafarer recruitment and placement services operating in a member's territory must comply with national provisions implementing the Code. Flag states must require that shipowners using recruitment services in territories in which the MLC, 2006 does not apply nonetheless ensure the services conform to the standards in the Code.<sup>95</sup> This means a shipowner can find themselves penalised for using such services from a non-ratifying state that do not meet the requirements of the MLC, 2006.<sup>96</sup>

The provisions in Standard A1.4 and Guideline B1.4 are detailed as they cover both public and private placement services as well as the relatively rare union operated services. Private recruitment placement services are to be regulated by the member state's competent authority.<sup>97</sup> It is worth noting that Germany and Australia submitted the amendment to Standard A1.4 paragraph 2: 'recruitment and placement services...whose *primary* purpose is the recruitment and placement of seafarers' (emphasis added).<sup>98</sup> This wording was in response to members' concerns that regulation of employment agencies, who also recruit workers for non-maritime professions, should not be undertaken by a maritime regulatory authority.<sup>99</sup>

Standard 5(a)(c)(vi) requires that placement services establish a system of protection to compensate seafarers for monetary loss resulting from the failure of a recruitment and placement service or the relevant shipowner under the seafarers' employment agreement to meet its obligations to them. McConnell et al submit that this is an indirect method of creating a level playing field for quality shipping.<sup>100</sup> While monetary loss is not defined in the MLC, 2006 the scope of that term may include any financial loss including damages for breach of contract, non-payment of wages and failure to repatriate. The manning service may be held jointly and severally liable for the actions of shipowners. Therefore manning services may avoid placing seafarers on ships which are high risk or likely to fail to meet their requirements under the MLC, 2006.<sup>101</sup>

### 2.3.2 Seafarers' Employment Agreements (SEA)

The requirement for an SEA in regulation 2.1 should be considered the 'heart' of the MLC, 2006.<sup>102</sup> The SEA must be in a clearly written legally enforceable agreement consistent with the Code,<sup>103</sup> to ensure that seafarers have a fair employment agreement. The seafarer must be given the opportunity to review and seek advice on the SEA before entering the contract.<sup>104</sup> Standard A2.1 (1)(b) requires that non-employees should also have an SEA to prevent shipowners 'contracting out' of the MLC, 2006's requirements.<sup>105</sup>

In the past, the engagement of seafarers has been subject to coercion and abuse.<sup>106</sup> The SEA is intended to prevent this by providing clear information to seafarers, shipowners, flag state inspectors and port state inspectors alike in order to readily demonstrate compliance with the MLC, 2006.<sup>107</sup>

Seafarers' employment conditions should be enhanced through the use of the SEAs.<sup>108</sup> These agreements are to be signed by both the seafarer and the shipowner with each retaining a signed original. In addition, a copy of the agreement is to be kept on board for inspection.<sup>109</sup> The content of the agreement must contain information about wages, annual leave and conditions for termination.<sup>110</sup> Clear information about seafarers' employment conditions must be kept on board.<sup>111</sup> These requirements should ensure that seafarers are aware of their rights.<sup>112</sup>

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<sup>95</sup> MLC, 2006, regulation 1.4 para 1.

<sup>96</sup> McConnell, above n 48, 82.

<sup>97</sup> Australia's competent authority is the Australian Maritime Safety Authority.

<sup>98</sup> McConnell, above n 48, 272.

<sup>99</sup> Ibid.

<sup>100</sup> Ibid, 272

<sup>101</sup> Ibid.

<sup>102</sup> McConnell above n 48, 278.

<sup>103</sup> MLC, 2006, title 2 reg 2.1.

<sup>104</sup> Ibid.

<sup>105</sup> Preparatory Technical Maritime Conference, Consolidated Maritime Labour Convention: Commentary to the Recommended Draft, ILO Doc PTMC/04/2 (13-24 September 2004) 23.

<sup>106</sup> High Level Tripartite Working Group on Maritime Labour Standards, 'Final Report TWGMLS/2004/19' (2004).

<sup>107</sup> International Labour Organisation, above n 78, 18.

<sup>108</sup> Christodoulou-Varotsi, above n 50, 478.

<sup>109</sup> MLC, 2006, Standard A2.1.

<sup>110</sup> Ibid.

<sup>111</sup> Ibid.

<sup>112</sup> Seafarers Rights International, SRI Annual Review (2013) <[www.seafarersrights.org/sri-annual-review-2013/#rights](http://www.seafarersrights.org/sri-annual-review-2013/#rights)> .



The increase in the minimum notice period for early termination from 24 hours to 7 days<sup>113</sup> is a new right given to seafarers (and shipowners) by the MLC, 2006.<sup>114</sup> Although it is possible for national law/regulations/collective bargaining agreements to allow for shorter notice periods in specific situations.<sup>115</sup> The increase in the minimum notice period was a particular positive for one of the interviewees who said:

We are protected by this MLC because we are protected on board ship. We can use this deterrent because we are under MLC. For example this time we cannot send them home like before. If the captain or chief engineer don't like you, you can be sent home. The MLC is good for the seafarer.<sup>116</sup>

### 2.3.3 Wages

The MLC, 2006 helps ensure that seafarers are paid for their services.<sup>117</sup> Seafarers must be paid at least monthly and be enabled to transmit their earnings to their families.<sup>118</sup> The issue of non-payment of wages was the single biggest source of complaints by seafarers working on foreign flagged ships to the Australian Maritime Safety Authority (AMSA)<sup>119</sup> in 2014.<sup>120</sup>

### 2.3.4 Hours of Work and Rest

The MLC, 2006 provides that seafarers' work must be regulated with reference to maximum hours of work or minimum hours of rest.<sup>121</sup> Both work hours and rest hours are defined in Standard A2.3 (a) and (b) which consolidates Article 5 of the *1996 Seafarers' Hours of Work and the Manning of Ships Convention*. Hours of work means time during which seafarers are required to do work on account of the ship; and rest hours means time outside hours of work. This term does not include short breaks.<sup>122</sup> The maximum number of hours that a seafarer is permitted to work is 72 hours in a seven-day period or 14 hours in a 24-hour period.<sup>123</sup> The minimum rest hours are ten hours in any 24-hour period; and 77 hours in any seven-day period.<sup>124</sup> This means that if the seafarers' working hours are regulated by hours of *rest*, as is usual,<sup>125</sup> they will be legally allowed to work five hours longer in a seven-day period than if their working hours are regulated by hours of *work*.

The European Working Time Directive prescribes a maximum of 48 working hours in a seven-day period.<sup>126</sup> However, this does not apply to seafarers. They are subject to a separate working time directive that prescribes a maximum of 72 working hours in a seven-day period.<sup>127</sup> It is beyond the scope of this article to discuss European Union directives, but it is useful to note that, globally, seafarers are expected to work considerably longer hours than other workers.

The daily hours of work or daily hours of rest of each seafarer must be recorded to allow monitoring of compliance.<sup>128</sup> The standards do allow a degree of flexibility. A member may permit exceptions to the limits set out in the regulation for those working on short voyages or for those who have longer leave periods.<sup>129</sup>

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<sup>113</sup> MLC, 2006, standard A2.1.

<sup>114</sup> Christodoulou-Varotsi, above n 50, 479.

<sup>115</sup> MLC, 2006, Standard A2.1.6.

<sup>116</sup> Interview with Ship's Engineer (Fremantle, 30 July 2015).

<sup>117</sup> MLC, 2006, reg 2.2.

<sup>118</sup> Ibid standard A2.2.

<sup>119</sup> AMSA is a statutory authority established under the *Australian Maritime Safety Authority Act 1990*. AMSA's principal functions are: promoting maritime safety and protection of the marine environment; preventing and combating ship-sourced pollution in the marine environment; providing infrastructure to support safety of navigation in Australian waters; providing a national search and rescue service to the maritime and aviation sectors. See <<https://www.amsa.gov.au/about-amsa/>>.

<sup>120</sup> 25% of complaints were related to wages, Australian Maritime Safety Authority, 'Port State Control Report Australia' (2014) 8.

<sup>121</sup> MLC, 2006, reg 2.3.

<sup>122</sup> Ibid standard A2.3, 1 (b).

<sup>123</sup> Ibid standard A2.4, 5(a).

<sup>124</sup> Ibid standard A2.4, 5(b).

<sup>125</sup> Marine Order 11 (Living and working conditions on vessels) 2015 (Australia) regulates hours of rest as does Merchant Shipping (Hours of Work) Regulations 2002/2125 (UK) r 5.

<sup>126</sup> *Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time* [2003] OJ L299/009.

<sup>127</sup> *Council Directive 1999/63/EC of 21 June 1999 concerning the Agreement on the organisation of working time of seafarers concluded by the European Community Shipowners' Association (ECSA) and the Federation of Transport Workers' Unions in the European Union (FST) - Annex: European Agreement on the organisation of working time of seafarers* [1999] OJ L 167/0037.

<sup>128</sup> MLC, 2006, standard A2.3, 12.

<sup>129</sup> Ibid standard A2.3, 13.

Additionally, these limits do not apply in emergency situations including providing assistance to others in distress at sea.<sup>130</sup> This regulation applies to all seafarers.<sup>131</sup>

All the officers who were interviewed stated that working conditions had improved under the MLC. Comments included, ‘... if you look at this MLC it improves the working conditions really’;<sup>132</sup> ‘I like this MLC. It’s on our side’;<sup>133</sup> ‘It has a big difference before and after MLC’<sup>134</sup> and ‘our condition on board ship it has a big difference compared to before’.<sup>135</sup> Specifically, all officers welcomed the improvement in rest periods for seafarers. This may seem surprising given that the officers would have been subject to the almost identical STWC minimum rest periods<sup>136</sup> prior to the MLC, 2006 entering into force. However, the improvements referred to in the interviews probably reflect the fact that the STWC minimum rest periods protect only seafarers with watchkeeping duties and to those with designated safety, prevention of pollution and security duties,<sup>137</sup> whereas the MLC, 2006 provisions apply to and protect *all* seafarers.

### 2.3.5 Annual Leave and Shore Leave

Regulation 2.4 is concerned with seafarers’ entitlement to leave. Seafarers are to be given 2.5 days paid annual leave for each month worked.<sup>138</sup> They must also be granted shore leave to benefit their health and well-being.<sup>139</sup>

Shore leave is essential for the health and wellbeing of seafarers.<sup>140</sup> The provision is targeted at shipowners and masters. However, in reality, it can be the port state that may prohibit seafarers from disembarking. Bauer expresses concern that, while the MLC, 2006 has recognised that shore leave is important, it has not ensured that it will be provided. He specifically points to the visa requirements of the United States and Australia which may prevent seafarers obtaining shore leave.<sup>141</sup>

All of the interviewees agreed that shore leave is being denied to seafarers because of security issues around ports following the 9/11 attacks on the United States of America in 2001. Interviewees were asked: ‘Are you aware of a seafarer being denied shore leave because they were not in possession of a visa to enter Australia or any other reason?’ The answers included:

Here in Australia on my previous trips last year one of the reasons on my particular ship was a very short stay in the port. Can’t remember if they were denied but in other countries especially in the United States you are not allowed to go down the ship get out of the ship without a visa. You are not even allowed to repatriate with no visa in United States. Here in Australia it is not so bad. The fast turnarounds the crew cannot go. Sometimes 7-8 hours. In Australia we have Maritime Crew Visa. The company will arrange it. It is not a problem here. I send the crew list to the company and they arrange the Australian Maritime Visa but in the United States no crew list visa after 9/11. They must have an individual visa and apply in their home country. A lot of seafarers because sometimes they interview and ask questions. They are very strict. Sometimes if you have breached the previous visa you can be denied. It is much worse than other countries even though they are democratic you are not allowed to go down even in the port. I think they think that we are a threat to their security because sometimes there are seafarers who jump ship. It happens especially when they have no visa.<sup>142</sup>

I am aware of issues around shore leave in many countries around the world not just Australia and part of it’s around security arrangement in ports. And the ability of a seafarer to take an afternoon off and walk down a gangway to go shopping is effectively gone.<sup>143</sup>

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<sup>130</sup> Ibid standard A2.3, 14.

<sup>131</sup> Some governments had expressed a desire to exclude Masters from the ‘hours of rest requirement’. See Preparatory Technical Maritime Conference, Consolidated Maritime Labour Convention: Commentary to the Recommended Draft, ILO Doc PTMC/04/2 (13-24 September 2004), 24.

<sup>132</sup> Interview with Ship’s Captain (Fremantle 30 July 2015).

<sup>133</sup> Ibid.

<sup>134</sup> Interview with Ship’s Engineer (Fremantle, 30 July 2015).

<sup>135</sup> Ibid.

<sup>136</sup> STWC Code, Chapter VIII, Standards regarding watchkeeping, Section A-VIII/1.

<sup>137</sup> Ibid.

<sup>138</sup> MLC, 2006, standard A2.4(2).

<sup>139</sup> Ibid reg 2.4.

<sup>140</sup> ‘A very important thing for mental health is the ability for solitude in the crowd’. Interview with Marine Consultant (Murdoch University, 21 July 2015).

<sup>141</sup> Paul J Bauer, ‘The Maritime Labour Convention: An Adequate Guarantee of Seafarer Rights or an Impediment to True Reform?’ (2008) 8 (2) *Chicago Journal of International Law* 643, 654.

<sup>142</sup> Interview with Ship’s Captain (Fremantle 30 July 2015).

<sup>143</sup> Interview with Marine Consultant (Murdoch University, 21 July 2015).

This is about for example in the US we seafarers are supposed to be granted freedom to enjoy our time in port but this time it seems like we are not going into the port. We are not allowed to go on shore. They are the ones who...that's one of the reasons we enjoy our life better than before but this time it seems like we are not welcome to visit the port because we are not allowed to go out. US visa was not issued to us. Supposed to be everyone of us have US visa. I think maybe our company does not provide us with the US visa to enjoy our freedom. We don't have problem in Australia because Flying Angel comes to us and we are very grateful for that. We can come here and relax.<sup>144</sup>

No we don't have any problems because we have to ask permission to our senior officers and if no operations, just can leave. No problem with visa in US ... Ah, just before when I started I was almost in prison I think. This is a bad memory for first-timer! First time to go international and I have a connecting flight in New York and I have been stopped by immigration they saw that my visa is only D supposed to be C1D and they told me it was a big offence and it was in detention for 7 hours and it's nice that my flight connection was 8 hours so 1 hour to get flight. I been asked so many questions about what do I do on board. I think that, I don't know if they see me as a seafarer because I'm a lady and I'm a small person. They don't believe me I think then the agent comes by and asks what I'm doing inside because I have 2 crew with me electrician and chief engineer and they keep asking 'what happened what happened?' our flight will be 1 hour already. I said just wait just wait I will be coming outside soon. I told person I won't be joining US again!<sup>145</sup>

There has been at least 5 or 6 occasions where the master has denied shore leave, that is not allowed and we have taken action. That is their right unless there is an emergency they are entitled to come ashore so we have fixed that one. That's catered for. But for visa problems that's a really big problem at the moment. In our meeting (Fremantle Port Welfare Committee)<sup>146</sup> if you remember, one of our objectives of our committee is to bring those issues to the attention of our members and that's why it's so important that our members be diverse and include those people. For example in the case of allowing people to go ashore. All those people, immigration, customs, security, they need to be aware ... September 11 did a lot of damage. They just ruined the seafarers' lives. I don't know which group of people in the world got the worst part of it but I think seafarers must be part of them. They really got the blunt end of things.<sup>147</sup>

Shore leave. You know what's killed it? Security. It's killed it for all seafarers to the point that I have known ships who are waiting for food and it's sitting on the other side of the fence and they're not allowed to get and they have to leave.<sup>148</sup>

Shore leave is clearly a major issue for seafarers. In Western Australia, the Fremantle Port Welfare committee<sup>149</sup> is addressing this issue by communicating with the relevant authorities in order to improve seafarers' ability to access shore leave. However, port states are not obliged to reduce or waive visa requirements. Bauer suggests that the ILO should pressure the US and Australia to rework their visa requirements to stop seafarers being deprived of shore leave.<sup>150</sup> The *2003 Seafarers' Identity Documents Convention (Revised)* (No. 185) which entered into force on 9 February 2005 seeks to resolve the issue of shore leave for seafarers but has not been widely ratified. In 2015, the ILO convened a meeting of experts to discuss biometric Seafarer Identity Documents to address the problem.<sup>151</sup> Given that biometric identification is becoming more commonly used, it seems likely that a solution will be found in due course. In the meantime the onus is on shipowners to assist their crews with obtaining the required visas for these countries in order to ensure their compliance with the MLC, 2006.

### **2.3.6 Compliance and Enforcement**

Title 5 is concerned with compliance and enforcement in line with the Geneva Accord 2001.<sup>152</sup> The regulations specify each member's responsibility to implement and enforce the principles and rights set out in the Articles and Titles 1-4 of the MLC, 2006.<sup>153</sup> The title is divided into three core regulations and 'sub-regulations'.<sup>154</sup> These

<sup>144</sup> Interview with Ship's Engineer (Fremantle, 30 July 2015).

<sup>145</sup> Interview with Second Officer (Fremantle 30 July 2015).

<sup>146</sup> Port welfare committees provide a forum where people from organisations that deal with the welfare of resident and visiting seafarers can meet to discuss and coordinate their actions. For more information see <<http://www.seafarerswelfaretoolkit.org/index.php/our-toolkits/port-welfare-committees/everything-you-need-to-know-about-port-welfare-committees>>.

<sup>147</sup> Interview with Manager – Ship Safety (Fremantle, 4 August 2015).

<sup>148</sup> Interview with Marine Pilot (Fremantle, 14 August 2015).

<sup>149</sup> Created following MLC, 2006, Guideline B4.4.3 – Welfare boards.

<sup>150</sup> Bauer, above n 141, 655.

<sup>151</sup> International Labour Organization, International Labour Standards Department, Sectoral Policies Department, *Technical background paper for discussion at the Meeting of Experts concerning Convention No. 185* (Geneva, 4–6 February 2015).

<sup>152</sup> McConnell, above n 48, 78.

<sup>153</sup> MLC, 2006, title 5.

<sup>154</sup> McConnell, above n 48, 476.

are Flag State responsibilities<sup>155</sup>, Port State responsibilities<sup>156</sup> and Labour-supplying State responsibilities.<sup>157</sup> Title 5 builds on the provisions found in the *Merchant Shipping (Minimum Standards) Convention*<sup>158</sup> with respect to Port State control and consolidates the provisions of the *Labour Inspection (Seafarers) Convention*.<sup>159</sup> In addition, it establishes a certification system to ensure ongoing compliance which reflects the certificate-based system used by the IMO for conventions such as the *International Convention for the Safety of Life at Sea* ('SOLAS') and the *International Convention for the Prevention of Pollution by Ships* ('MARPOL').<sup>160</sup>

### Flag State Responsibilities

Regulation 5.1 requires that each member implements its responsibilities under the MLC, 2006 with respect to ships that fly its flag.<sup>161</sup> This is implemented via a system for inspection and certification of maritime labour conditions.<sup>162</sup> The inspections may be delegated to a recognized organization (RO),<sup>163</sup> but the member remains responsible for the inspection and certification of the living and working conditions of the seafarers on the ships that fly its flag.<sup>164</sup>

Ships over 500 gross tonnage engaged in international voyages and ships over 500 gross tonnage flying the flag of the member and operating from or between ports in another country<sup>165</sup> must carry and maintain a maritime labour certificate<sup>166</sup> and a declaration of maritime labour compliance.<sup>167</sup> The certification and declaration must relate to the requirements of national law as the mandatory details of the MLC, 2006 will be given effect by integrating into domestic law.<sup>168</sup>

The MLC, 2006 came into effect in Australia on 20 August 2013. It has been implemented primarily through the *Navigation Act 2012* (Cth) (the *Navigation Act 1912* (Cth) was rewritten partly to give effect to the MLC,<sup>169</sup>) and associated delegated legislation (Marine Order 11).<sup>170</sup> Seafarers working on Australia flagged ships are subject to the *Fair Work Act 2009* (Cth)<sup>171</sup> even if the ship is outside the outer limits of the exclusive economic zone and the continental shelf.<sup>172</sup> The *Fair Work Act*<sup>173</sup> also applies to non-Australian flagged ships if the majority of the crew are Australian.<sup>174</sup>

Certification gives rise to rights and obligations between ratifying members rather than between the member and the ILO.<sup>175</sup> It also confers rights on shipowners in that they have the right to be absolved from port state inspections if they are certified.<sup>176</sup>

Regulation 5.1.4 requires the member to verify compliance with the MLC, 2006 via regular<sup>177</sup> inspections of ships that fly its flag.<sup>178</sup> Regulation 5.1.5 obliges members to ensure that ships that fly its flag have on-board procedures for handling seafarer complaints. It is prohibited for a seafarer to be victimised for filing a complaint which is not

<sup>155</sup> MLC, 2006, reg 5.1.

<sup>156</sup> Ibid, reg 5.2.

<sup>157</sup> Ibid, reg 5.3.

<sup>158</sup> *Merchant Shipping (Minimum Standards) Convention*, opened for signature 29 October 1976, C147 (entered into force 28 November 1981).

<sup>159</sup> *Labour Inspection (Seafarers) Convention*, opened for signature 22 October 1996, C178 (entered into force 22 April 2000).

<sup>160</sup> Preparatory Technical Maritime Conference, Consolidated Maritime Labour Convention: Commentary to the Recommended Draft, ILO Doc PTMC/04/2 (13-24 September 2004), 33. The ILO has also produced Guidelines that provide practical information for flag state and port state inspections available at <[http://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---normes/documents/publication/wcms\\_101788.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_101788.pdf)>.

<sup>161</sup> Ibid, regulation 5.1.1.1.

<sup>162</sup> Ibid, regulation 5.1.1.2.

<sup>163</sup> Ibid, regulation 5.1.2.

<sup>164</sup> Ibid, regulation 5.1.1.3.

<sup>165</sup> Ibid, regulation 5.1.3.1.

<sup>166</sup> Ibid, regulation 5.1.3.3.

<sup>167</sup> Ibid, regulation 5.1.3.4.

<sup>168</sup> Preparatory Technical Maritime Conference, Consolidated Maritime Labour Convention: Commentary to the Recommended Draft, ILO Doc PTMC/04/2 (13-24 September 2004) 35.

<sup>169</sup> Commonwealth, Parliamentary Debates, House of Representatives, 19 June 2012, 7028 (Jane Prentice).

<sup>170</sup> Australian Maritime Safety Authority, 'Maritime Labour Convention 2006, A Guide to the implementation of the MLC in Australia' (2013), 4. Parts 3-5 of the *Navigation Act 2012* (Cth) deal with MLC related matters.

<sup>171</sup> For example, seagoing employees in Australia are covered by the Seagoing Industry Award 2010.

<[www.fwc.gov.au/documents/documents/modern\\_awards/pdf/MA000122.pdf](http://www.fwc.gov.au/documents/documents/modern_awards/pdf/MA000122.pdf)>.

<sup>172</sup> *Fair Work Act 2009* (Cth) s 34(1).

<sup>173</sup> Ibid.

<sup>174</sup> *Fair Work Regulations 2009* (Cth) reg 1.15b. See also *Fair Work Ombudsman v Pocomwell Ltd* [No 2] (2013) 218 FCR 94.

<sup>175</sup> McConnell, above n 48, 80.

<sup>176</sup> Ibid.

<sup>177</sup> Defined as no less than every 3 years. MLC, 2006, regulation 5.1.4.4.

<sup>178</sup> Ibid regulation 5.1.4.

‘manifestly vexatious or maliciously made’.<sup>179</sup> Victimisation is defined as ‘any adverse action taken by any person’.<sup>180</sup>

Shipowners and masters can be liable for fines and/or imprisonment for breaches of the MLC, 2006 regulations.<sup>181</sup> In Australia, the *Navigation Act 2012* provides civil and criminal penalties for breaches.<sup>182</sup> To date there have been no reported cases of prosecution in Australia.<sup>183</sup> However, in the UK, in *Wilson v Secretary of State for Transport*<sup>184</sup> a seafarer employed as a trainer on a cruise vessel had complained to senior figures in the company about the way it was run. He was subsequently sent home from the voyage and dismissed. He brought a complaint to the Maritime and Coastal Agency claiming that he had suffered a detriment as a result of complaining of a breach of MLC, 2006 regulations. His claim failed because the court held his grievances were not related to the MLC, 2006 but the case is interesting as it highlights how shipowners and masters may find themselves exposed to fines or imprisonment for incorrectly handling employee complaints.

### Port State Responsibilities

The purpose of port state responsibilities is ‘to enable each Member to implement its responsibilities under this Convention regarding international cooperation in the implementation and enforcement of the Convention standards on foreign ships’.<sup>185</sup> It provides that *every* foreign ship (emphasis added) entering the port of a member may be inspected for the purpose of reviewing compliance with the MLC, 2006.<sup>186</sup> This reflects the ‘no more favourable treatment’ requirement of the MLC, 2006,<sup>187</sup> and applies equally to ships flying the flags of ratifying and non-ratifying members to prevent ships registered in non-ratifying states from gaining an economic advantage.

The accompanying Code to regulation 5.2 explains when and how a detailed inspection may be carried out. It further explains the obligations on the port state authority in circumstances where the working and labour conditions are found not to conform including preventing the ship from proceeding to sea.<sup>188</sup> This is a powerful tool to ensure that ships comply. In 2014, AMSA detained 17 ships for breaches of the MLC, 2006.<sup>189</sup>

The port state authority is required to deal with onshore seafarer complaints by reporting complaints to the authorities of the flag state.<sup>190</sup> The explanatory notes to the draft MLC, 2006 highlight the principle of ‘international comity’ where courts decline to hear matters where there is a more appropriate judicial authority. Therefore, as the MLC, 2006 sits within the framework of UNCLOS,<sup>191</sup> the more appropriate judicial or administrative bodies are those of the flag state.<sup>192</sup>

In Australia, AMSA has the power to inspect and detain both Australian and foreign vessels, in an Australian port or internal waters, for breaches of the MLC, 2006.<sup>193</sup> In 2014, AMSA received 114 complaints about breaches in the living and working conditions on board vessels.<sup>194</sup> The complaints came from a variety of sources including, seafarers, other government agencies, seafarer welfare groups, agents, pilots and members of the general public and led to eight ships being detained. AMSA identified 1652 MLC, 2006 related deficiencies in 2014 which represented 15.1% of the total deficiencies issued. Seventeen vessels were detained.

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<sup>179</sup> Ibid standard A5.1.5.3.

<sup>180</sup> Ibid.

<sup>181</sup> Ibid, regulation 5.1.5.2.

<sup>182</sup> *Navigation Act 2012* (Cth).

<sup>183</sup> This is unsurprising because there are very few registered ships in Australia. There are only 8 registered bulk carriers and 30 registered cargo vessels. Australian Maritime Safety Authority, List of Registered Ships (2 November 2015) <[www.amsa.gov.au/vessels/shipping-registration/list-of-registered-ships](http://www.amsa.gov.au/vessels/shipping-registration/list-of-registered-ships)>.

<sup>184</sup> *Wilson v Secretary of State for Transport* [2015] All ER (D) 04.

<sup>185</sup> MLC, 2006 regulation 5.2.

<sup>186</sup> Ibid regulation 5.2.1.

<sup>187</sup> Ibid art VI para 7.

<sup>188</sup> MLC, 2006, standard A5.2.1 paragraph 6.

<sup>189</sup> Australian Maritime Safety Authority, above n 119, 9.

<sup>190</sup> Regulation 5.2.2

<sup>191</sup> *United Nations Convention on the Law of the Sea*, opened for signature 16 December 1982, UNTS 1833 (entered into force 16 November 1994).

<sup>192</sup> Preparatory Technical Maritime Conference, Consolidated Maritime Labour Convention: Commentary to the Recommended Draft, ILO Doc PTMC/04/2 (13-24 September 2004) 41.

<sup>193</sup> *Navigation Act 2012* (Cth) s 248.

<sup>194</sup> Australian Maritime Safety Authority, above n 7, 8.

AMSA publishes the details of all ships that have been detained on a monthly basis in accordance with the *Navigation Act* and *Marine Order 55*.<sup>195</sup> These lists are publically available on the AMSA website.<sup>196</sup>

Such detentions are costly to shipowners. Not only can the detention cause the ship to be 'off-hire' in a time charter,<sup>197</sup> but appearing on these lists damages the reputation of the shipowner: 'no charterer will touch you.'<sup>198</sup> The effect of Australia's strict enforcement of global conventions is that 'bad ships' don't come to Australia<sup>199</sup> and shipowners will trade in another sector to avoid Australian waters.<sup>200</sup>

Australia is renowned for its rigorous port state control. At the time of writing, three vessels have been banned from entering Australian ports for repeated failures to comply with the MLC, 2006.<sup>201</sup> Two of the interviewed officers remarked on how the port state control in Australia is thorough. According to the Ship's Captain, 'in Australia they are checking the certification and implementation. Checking the accommodation, checking the food and the water. For the seafarers it is good'.<sup>202</sup> The Second Officer said, 'here in Australia it is stricter'.<sup>203</sup> Both officers commented that other countries are more lenient. This supports the concern raised by Michael Kabai that it may be difficult to enforce global compliance with the MLC, 2006.<sup>204</sup>

A positive effect of the MLC, 2006 is the establishment of port state welfare boards. This is not compulsory but 'encouraged'.<sup>205</sup> The welfare boards' function is to review the adequacy of existing on-shore welfare facilities while assisting those providing the facilities.<sup>206</sup> AMSA has established such boards, and they have already made a big impact on foreign seafarers who have suffered workplace accidents.<sup>207</sup>

The main purpose of the Fremantle Port Welfare Committee<sup>208</sup> is to communicate with other government authorities such as Customs and Immigration in order to help those authorities better understand the particular issues that seafarers face; for example, seafarers' access to shore leave.<sup>209</sup>

### 2.3.7 Flags of Convenience

Many of the states that operate open registries have not insisted on shipowners complying with international conventions even if the State has ratified the Convention in question. As a consequence, many seafarers employed on these ships:

[have received] shockingly low wages, live in very poor on-board conditions, and work long periods of overtime without proper rest. They get little shore leave, inadequate medical attention and often safety procedures and vessel maintenance are neglected.<sup>210</sup>

It is questionable whether open registries will effectively enforce the provisions of the MLC, 2006 even if they have ratified it.<sup>211</sup> This view is based on the fact that many flag of convenience states have ratified previous conventions such as the International Convention for the Safety of Life at Sea ('SOLAS') and the International

<sup>195</sup> *Navigation Act 2012* (Cth) s 336 and *Marine Order 55 (Publication of Information about vessels) 2004* (Cth).

<sup>196</sup> For example, Australian Maritime Safety Authority, Ship detention list (May 2015) AMSA <[www.amsa.gov.au/vessels/ship-safety/port-state-control/ship-detention/2015/may-2015/index.asp](http://www.amsa.gov.au/vessels/ship-safety/port-state-control/ship-detention/2015/may-2015/index.asp)>.

<sup>197</sup> *Hyundai Merchant Marine Co Ltd v Furness Withy (Australia) Pty (The "Doric Pride")* [2005] EWHC 945 (Comm).

<sup>198</sup> Interview with Manager – Ship Safety (Fremantle, 4 August 2015).

<sup>199</sup> Ibid.

<sup>200</sup> Interview with Marine Pilot (Fremantle, 14 August 2015).

<sup>201</sup> Australian Maritime Safety Authority, 'AMSA bans third vessel from Australian ports' (Media Release, 9 January 2015).

<sup>202</sup> Interview with Ship's Captain (Fremantle 30 July 2015).

<sup>203</sup> Interview with Second Officer (Fremantle 30 July 2015).

<sup>204</sup> Michael Kabai, 'The Maritime Labour Convention and Open Registries, Hand in Glove or Chalk and Cheese?' (2015) 30 *International Journal of Marine and Coastal Law* 189.

<sup>205</sup> MLC, 2006, standard A4.4.

<sup>206</sup> Ibid guideline B4.4.3.

<sup>207</sup> For example, a foreign seafarer was crushed between the hatch lids and bulk head on a ship in Port Hedland. Both his legs had to be amputated. The Port Hedland and Fremantle Port Welfare Committees worked together to ensure the operators paid for his expenses, visited him in hospital daily and the Fremantle committee's doctor flew home with him when he was well enough to leave. Another seafarer was injured in Port Hedland and lost his foot. The two committees ensured the operators paid for his medical expenses and again the Fremantle committee's doctor accompanied the seafarer back to India. The Port Hedland committee raised \$48,000 and paid off the seafarer's mortgage in Mumbai. Interview with, Manager – Ship Safety (Fremantle, 4 August 2015).

<sup>208</sup> As part of my research I attended two of their quarterly meetings. The committee has representatives from AMSA; the Fremantle Port Authority; seafarers' missions; the ITF; local and state government, shipping agents, pilots, Border Force; Department of Agriculture as well as other independent people concerned with seafarer welfare.

<sup>209</sup> Interview with Manager – Ship Safety (Fremantle, 4 August 2015).

<sup>210</sup> Kabai, above n 204, 189.

<sup>211</sup> Ibid 195.

Convention for the Prevention of Pollution from Ships ('MARPOL'), yet they still 'top the list when it comes to violation of these conventions'.<sup>212</sup>

Michael Kabai cites examples of 'flag of convenience' vessels detained in the United Kingdom in 2013 for breaches of the MLC, 2006.<sup>213</sup> One of them was a Marshall Islands flagged bulk carrier which had recently been inspected and issued a Maritime Labour Certificate by its flag state despite having rotten food, out of date provisions and a cockroach infestation of the galley and crew accommodation areas.<sup>214</sup> While this incident is an alarming indictment of the flag state, it also demonstrates the effectiveness of the PSC regime in enforcing seafarers' rights.

During the period of January 2015-May 2015, AMSA detained 13 vessels for breaches of the MLC, 2006. Seven of those vessels were flagged in flags of convenience states.<sup>215</sup> The interview participants were asked if they saw a noticeable difference in levels of compliance between flags of convenience and other flag states. The respondents generally agreed that, currently, compliance is effected by the operator rather than the flag. One respondent answered 'I think you get bad ships in either camp. It depends on the operator so much.'<sup>216</sup> Another answered, 'I don't think so. The statistics suggest that it is not different at all. Honestly it is just the difference between the operators.'<sup>217</sup>

AMSA's detention lists provide evidence that supports the conclusions drawn by the interviewees; a 'bad' ship is not necessarily a FOC ship. Furthermore, the Paris Memorandum of Understanding's<sup>218</sup> list of flag states who are deemed 'low risk' for non-compliance with safety standards and the MLC, 2006 now includes 12 'flag of convenience' states out of a total of 43 states.<sup>219</sup> This indicates that their compliance with international conventions is beginning to improve.

### 2.3.8 Right to Strike

Bauer criticises the MLC, 2006's silence on the right of seafarers to strike.<sup>220</sup> He points out that strike action was used by seafarers in 2006 and 2007 to receive unpaid wages.<sup>221</sup> However, these strike actions took place in ports, not at sea. It is arguable that today, under the MLC, 2006, those seafarers would have been able to make a complaint to the port state authority that has the power to detain vessels until the wages are paid.<sup>222</sup> Of course, under general maritime law (and the Arrest of Ships conventions) in most States a ship can be arrested and sold under an *in rem* action for failure to pay wages. But this is not always a good solution for seafarers as they want to keep working, not lose the ship.

While strike action is an acceptable form of asserting labour rights in countries like Australia and the US, it is not a globally acceptable practice. For example, China does not recognise the right to strike,<sup>223</sup> and in the United Kingdom it is illegal to strike on UK registered vessels while at sea.<sup>224</sup> The right of workers to strike is a major issue under consideration by the ILO<sup>225</sup> and it is not clear if the *1948 Freedom of Association and Protection of the Right to Organise Convention* (No. 87) provides such a right. It is therefore unsurprising that the MLC, 2006 did not address the issue.

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<sup>212</sup> Ibid.

<sup>213</sup> Ibid 196.

<sup>214</sup> Nautilus International, MLC-Certificated Ship had Cockroach Infestation (4 November 2013) <[www.nautilusint.org/en/what-we-say/nautilus-news/mlc-certificated-ship-had-cockroach-infestation/](http://www.nautilusint.org/en/what-we-say/nautilus-news/mlc-certificated-ship-had-cockroach-infestation/)>.

<sup>215</sup> Australian Maritime Safety Authority, Monthly Ship Detention Lists <[www.amsa.gov.au/vessels/ship-safety/port-state-control/ship-detention/](http://www.amsa.gov.au/vessels/ship-safety/port-state-control/ship-detention/)>. The ship's flags were: Panama (3), India (2), Marshall Islands (1), Indonesia (1), Singapore (2), Saudi Arabia (1), Cayman Islands (1), Cyprus (2).

<sup>216</sup> Interview with Marine Pilot (Fremantle, 14 August 2015).

<sup>217</sup> Interview with Manager – Ship Safety (Fremantle, 4 August 2015).

<sup>218</sup> MOU organisations are made up of participating maritime Administrations. Their objective is to eliminate the operation of sub-standard ships through harmonized port state control.

<sup>219</sup> Paris Memorandum of Understanding, White List (1 July 2016)

<<https://www.parismou.org/system/files/2015%20White%2C%20Grey%20and%20Black%20Flags%20List.PDF>>.

<sup>220</sup> Above n 167.

<sup>221</sup> Ibid, 657.

<sup>222</sup> MLC, 2006, standard A5.2.1.

<sup>223</sup> Bauer, above n 141, 657.

<sup>224</sup> Ibid.

<sup>225</sup> See, International Labour Organization, *Tripartite Meeting on the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), in relation to the right to strike and the modalities and practices of strike action at national level* (23-25 February 2015, Geneva).

The interviewees all shared the view that it is unnecessary to include the right to strike in the MLC, 2006. One view is that you cannot create ‘a convention that fits absolutely everything because it cannot address different cultures and attitudes... it is better to leave it silent on that matter.’<sup>226</sup> Another view is that, for a seafarer, it is not feasible to use strike action to assert their rights. The ship is not only their workplace but also their home. Therefore, if they strike at sea, they are only ‘hurting themselves’. Rather it is better to use port state control and the ITF in order to protect seafarers’ rights.<sup>227</sup>

### 2.3.9 Increased Costs

Bauer suggests that compliance with the MLC, 2006 will make shipping more costly due to the medical care and accommodation requirements.<sup>228</sup> However, the interviewees did not agree with this view for a number of reasons. Firstly, as the MLC, 2006 is tripartite, the shipowners had input so there should not be any surprises.<sup>229</sup> Secondly, the good operators already had these types of provisions in place.<sup>230</sup> Thirdly, two interviewees flagged the potential benefits of the MLC, 2006 to shipowners. They pointed out that if the crew are happy they will be more enthusiastic, work harder, be more careful, and do more maintenance.<sup>231</sup>

However, the ship’s master commented he had requested that more crew members be employed by the shipowner in order to comply with the Minimum Hours of Rest requirement. He explained that this was necessary because, when sailing between close ports in Europe that require fast turnarounds due to the volume of traffic, they are unable to ‘give proper rest time for every officer performing duties’.<sup>232</sup>

It will be useful to follow up in the future to see if any operators have conducted a cost-benefit analysis on the MLC, 2006 and if so, what they conclude.

## 3 Work in Fishing Convention (WIFC, 2007)

The MLC, 2006 expressly excludes ‘[s]hips engaged in fishing or in similar pursuits’.<sup>233</sup> The explanatory notes further explain that the exclusion of fishing vessels (and consequently fishers) from the MLC, 2006 reflects the view of the Governing Body of the International Labour Office.<sup>234</sup> Their opinion was that this convention should not try to address the very diverse needs and concerns of the fisheries sector. Instead, a convention specifically tailored to meet the needs of the fishing sector was more appropriate.<sup>235</sup> This is the *2007 Work in Fishing Convention* (WIFC, 2007)<sup>236</sup> which, despite opening for signature in 2007, and sitting alongside the MLC, 2006 was not welcomed in the same way and only received the required ratifications to enter into force on 16 November 2016.<sup>237</sup>

The WIFC, 2007 shares many of the features of the MLC, 2006. First, it is intended as a framework to cover all aspects of fishers’ living and working conditions.<sup>238</sup> Second, it requires certification for vessels that are over 24 metres in length and normally navigate more than 200 nautical miles from the flag state,<sup>239</sup> echoing the MLC, 2006’s maritime labour certificate.<sup>240</sup> Third, it adopts port state control as a method of enforcement and includes the ‘no more favourable treatment’ principle found in the MLC, 2006.<sup>241</sup> Fourth, the WIFC, 2007 has a simplified amendment procedure much like the MLC, 2006.<sup>242</sup>

<sup>226</sup> Interview with Marine Consultant (Murdoch University, 21 July 2015).

<sup>227</sup> Interview with Manager – Ship Safety (Fremantle, 4 August 2015).

<sup>228</sup> Bauer, above n 141, 657.

<sup>229</sup> Interview with Marine Consultant (Murdoch University, 21 July 2015).

<sup>230</sup> Interview with Manager – Ship Safety (Fremantle, 4 August 2015).

<sup>231</sup> Ibid. Second Officer (Fremantle 30 July 2015).

<sup>232</sup> Interview with Ship’s Captain (Fremantle 30 July 2015).

<sup>233</sup> MLC, 2006 Article II

<sup>234</sup> Preparatory Technical Maritime Conference, Consolidated Maritime Labour Convention: Commentary to the Recommended Draft, ILO Doc PTMC/04/2 (13-24 September 2004) 9.

<sup>235</sup> Ibid.

<sup>236</sup> *Work in Fishing Convention*, opened for signature 14 June 2007, C188 (hereinafter WIFC, 2007).

<sup>237</sup> At the time of writing 10 countries have ratified the WIFC, 2007, namely: Angola, Argentina, Bosnia and Herzegovina, Congo, Estonia, France, Lithuania, Morocco, Norway and South Africa. It will come into force on 16 Nov 2017

<[www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO:11300:P11300\\_INSTRUMENT\\_ID:312333:NO](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO:11300:P11300_INSTRUMENT_ID:312333:NO)>.

<sup>238</sup> George P Politakis, ‘From Tankers to Trawlers: The International Labour Organization’s New Work in Fishing Convention’ (2008) 39 *Ocean Development and International Law* 119, 120.

<sup>239</sup> WIFC, 2007 art 41.

<sup>240</sup> Although unlike the Maritime Labour Certificate, the WIFC, 2007 document is not taken as prima facie evidence of compliance. See Politakis, above n 238, 121.

<sup>241</sup> WIFC, 2007 arts 43-44.

<sup>242</sup> Ibid art 45.



A member state will be responsible for ensuring that vessels that fly its flag are compliant with the WIFC, 2007 by establishing a system of inspection, reporting, monitoring and procedures for handling complaints coupled with appropriate penalties and corrective measures.<sup>243</sup> States that ratify the WIFC, 2007, may also inspect foreign fishing vessels visiting their ports and detain them if their conditions are clearly hazardous to safety or health.

This is the first time that port state control has been introduced into a fishing Convention.<sup>244</sup> Port state control can be an extremely effective mechanism for ensuring compliance with international standards and helps to ensure uniformity of the application of international conventions. However, as discussed above, in relation to the MLC, 2006, port state control varies from country to country. In addition, it is possible for fishing vessels to simply avoid entering ports where they are subject to rigorous inspection by transshipping the catch at sea, bunkering at sea,<sup>245</sup> or landing the catch at a 'port of convenience'.<sup>246</sup>

### 3.1 Jurisdiction and fishing regulation

Article 56 of the *United Nations Convention on the Law of the Sea* ('UNCLOS') gives a state 'sovereign rights for the purpose of exploring and exploiting conserving and managing the natural resources ... of the waters superjacent to the seabed'<sup>247</sup> in its Exclusive Economic Zone ('EEZ'), which is 24-200 nautical miles from the coast. Thus the coastal state has the legal authority to permit, or refuse, the harvesting of fish in this area. It is illegal for a foreign vessel to engage in fishing in another country's EEZ without a licence.

The development of the EEZ in the 1980s under UNCLOS largely benefited developed states with long coastlines such as Australia, the United States, New Zealand, Norway and Russia. Conversely countries with smaller coastlines, such as Thailand, South Korea and Taiwan, who had fished under the previous 'open seas regime' were disadvantaged by being confined to their own EEZs and limited areas of the high seas.<sup>248</sup>

Fishing on much of the high seas<sup>249</sup> is managed by regional fisheries management organisations ('RFMOs'). These bodies are established by the Food and Agriculture Organization of the United Nations ('FAO'). FAO's role is to monitor fish stocks and facilitate inter-governmental co-operation in fisheries management.<sup>250</sup> However, these bodies rely upon flag states implementing the rules of the RFMO. As pointed out by Couper et al, this is not an issue where the flag state is compliant with, or a party to, UNCLOS and the relevant RFMO convention.<sup>251</sup> However if fishing vessels are registered in open registry (flag of convenience) states that have no capability, or interest in, enforcing the RFMO rules, their 'distant-water fishing' will effectively go unregulated.<sup>252</sup> This has indeed encouraged major fishing enterprises to flag their vessels out to those open registries.<sup>253</sup>

Some states with long coastlines sold licences to fish in their EEZ to foreign companies.<sup>254</sup> Article 92 of UNCLOS provides that the flag state has 'exclusive jurisdiction' on board.<sup>255</sup> If a crime is committed while a vessel is in a state's territorial sea, Article 27 of UNCLOS permits the coastal state to intervene in limited circumstances.<sup>256</sup> However, the territorial sea only extends 12 nm from the coast, so if a vessel is beyond the territorial waters UNCLOS does not extend any jurisdiction to what occurs on-board the vessel to the coastal state.<sup>257</sup> This means

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<sup>243</sup> Ibid art 40.

<sup>244</sup> Politakis, above n 238, 125.

<sup>245</sup> Food and Agriculture Organization of the United Nations, Report of the Expert Consultation on Fishing Vessels Operating under Open Registries and their Impact on Illegal, Unreported and Regulated Fishing, FIP/R722 (En) (23-25 September 2003) 3 [14].

<sup>246</sup> Couper et al, above n 13, 98 provides an example of vessels engaged in illegal fishing off the coast of West Africa. The vessels tranship to reefer vessels which in turn land the combined catch in Gran Canaria which is under Spanish jurisdiction. The catch is then packaged suggesting that the fish was legally caught and complies with EU hygiene standards.

<sup>247</sup> *United Nations Convention on the Law of the Sea*, opened for signature 16 December 1982, UNTS 1833 (entered into force 16 November 1994) art 56.

<sup>248</sup> Ibid 47.

<sup>249</sup> For a useful map showing the geographical areas managed by RFMOs see European Commission – Fisheries, Regional fisheries management organisations (RFMOs), <[https://ec.europa.eu/fisheries/cfp/international/rfmo\\_en](https://ec.europa.eu/fisheries/cfp/international/rfmo_en)>.

<sup>250</sup> For example Asia Pacific Fisheries Commission <<http://www.apfic.org/>>.

<sup>251</sup> For example *Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas*, opened for signature 24 November 1993 (entered into force 24 April 2003).

<sup>252</sup> Judith Swan, *Fishing Vessels Operating under Open Registers and the Exercise of Flag State Responsibilities - Information and Options*, FAO Fisheries Circular No. 980 FIPP/C980 (2002) <<http://www.fao.org/docrep/005/y3824e/y3824e06.htm#m06.3>>.

<sup>253</sup> Couper, above n 13, 47.

<sup>254</sup> Ibid 78.

<sup>255</sup> Kate Lewins and Nick Gaskell, 'Jurisdiction over criminal acts on cruise ships: Perhaps, perhaps, perhaps' (2013) 37 *Criminal Law Journal* 221, 223.

<sup>256</sup> Ibid 224.

<sup>257</sup> Ibid 227.

that a fisher may be a victim of a crime on a foreign flagged vessel while fishing in the coastal state's EEZ, but the jurisdiction for prosecuting that crime rests with the flag state.<sup>258</sup>

### 3.2 Labour abuse of fishers - a salutary tale from New Zealand

Until May 2016,<sup>259</sup> foreign crew working on foreign-owned fishing boats were permitted to fish in New Zealand's EEZ.<sup>260</sup> New Zealand operates an individual transferable quota system to control the amount of fish taken from its waters.<sup>261</sup> Some of the larger quota holders chartered foreign owned and operated vessels ('FCVs') to supplement their own fleet. The smaller quota holders, who lack resources to exploit their allocated fish stocks, chartered foreign vessels to come and fish on their behalf.<sup>262</sup> As the boats were not in New Zealand's territorial waters, the law of the flag state applied on board those vessels.<sup>263</sup> The use of 'mother ships' for refuelling and transshipping meant that fishing vessels could operate in such a way that they rarely needed to come to port; they were invisible to port state control.

Following the sinking of one of these South Korean-flagged vessels and the escape of crew members from others, Stringer et al from the University of Auckland<sup>264</sup> conducted over 140 interviews with Indonesian crews from FCVs. The crews reported not only underpayment and non-payment of wages but verbal, psychological, physical and sexual abuse.<sup>265</sup> The interviews uncovered systematic human rights and labour abuses on board these vessels including 'substandard and inhumane working conditions'.<sup>266</sup> The below deck accommodation on one vessel had no heating and was damp with no ventilation. Cockroaches and bedbugs were common. Some workers had to bathe in salt water. Crew were fed rotten fish bait and their unboiled drinking water had a 'rusty colour'. At the same time, the officers were served nutritious food and bottled water.<sup>267</sup>

Fatigue is a major danger in the fishing industry.<sup>268</sup> Crews reported accidents as a result of being 'sleepy'.<sup>269</sup> Injuries included frostbite, fingers being crushed; and chest injuries from falls. The injuries were not reported to Maritime New Zealand<sup>270</sup> or recorded in logs. Sometimes the crew members were refused treatment or 'amputations at sea were suggested'.<sup>271</sup>

Furthermore, crews were subjected to serious verbal, physical and sexual abuse.<sup>272</sup> When asked why they did not seek help from the New Zealand authorities a crew member explained that they believed they were on 'Korean soil' so nothing could be done. They also feared the consequences as it had been known for a complainant to have been 'taken to a private cabin and beaten'.<sup>273</sup>

The crews on the FCVs held New Zealand work visas and were entitled to be paid at least the New Zealand minimum wage of NZ\$15.00 per hour.<sup>274</sup> However, an audit of three vessels discovered that the crew were paid the minimum wage for 42 hours per week regardless of the number of hours they actually worked. It also appeared that the crew had signed two different employment contracts; one for the Indonesian manning agent and one for the New Zealand charter company. The pay under the Indonesian contracts was substantially lower at between US\$200-US\$500 per month<sup>275</sup> and contained a clause subjecting the crew members to fines of up to \$10,000 if

<sup>258</sup> For a detailed discussion on criminal jurisdiction for crimes at sea, see Lewins and Gaskell above n 255.

<sup>259</sup> In response to the reports of labour abuse on the foreign charter vessels, the New Zealand government introduced the *Fisheries (Foreign Charter Vessels and Other Matters) Amendment Act 2014* (NZ) to require that all vessels engaged in fishing in New Zealand's EEZ must be flagged in New Zealand. The amendments came into force in May 2016.

<sup>260</sup> This is no longer the case, in May 2016 New Zealand amended its laws to close the regulatory loopholes that allowed the abuse of foreign crews. *Fisheries (Foreign Charter Vessels and Other Matters) Amendment Act 2014* (NZ).

<sup>261</sup> Jennifer Devlin, 'Modern Day Slavery: Employment Conditions for Foreign Fishing Crews in New Zealand Waters' (2009) 23 *Australia and New Zealand Maritime Law Journal* 82, 83.

<sup>262</sup> *Ibid.*

<sup>263</sup> *United Nations Convention on the Law of the Sea*, opened for signature 16 December 1982, UNTS 1833 (entered into force 16 November 1994) art 56. Although a country has fishing rights in EEZ it does not mean their domestic law applies in that zone.

<sup>264</sup> Christina Stringer, Glenn Simmons, David Coulston and D Hugh Whittaker, 'Not in New Zealand's waters, surely?' Linking labour issues to GPNs' (2014) 14 *Journal of Economic Geography* 739.

<sup>265</sup> *Ibid.*

<sup>266</sup> *Ibid* 745.

<sup>267</sup> *Ibid* 747.

<sup>268</sup> Australian Transport Safety Bureau, 'Fatigue and Fishing Crews' (Safety Bulletin No 04, 1 January 2004), 2.

<sup>269</sup> Stringer et al, above n 264, 747.

<sup>270</sup> New Zealand's maritime safety authority.

<sup>271</sup> Stringer et al, above n 264, 747.

<sup>272</sup> *Ibid* 748.

<sup>273</sup> *Ibid* citing the Report to Minister of Labour, Employment Conditions in the Fishing Industry: Final Report on Foreign Crew on New Zealand Fishing Vessels and Annex 1 Summary of Investigation Findings (2 December 2004).

<sup>274</sup> *Ibid* 744.

<sup>275</sup> *Ibid* 749.

they broke the contract.<sup>276</sup> In addition, the Indonesian manning agents required applicants to pay the first three months' salary to them as a fee for their services<sup>277</sup> plus collateral in the form of titles to property to ensure they 'behaved' at sea.<sup>278</sup>

If the WIFC, 2007 was in operation worldwide, there is no doubt those fishers would have had better rights; assuming that shipowners would readily comply. Compliance with the WIFC, 2007, would have better protected the fishers as follows:

- by preventing duplicity of contracts. A fisher is required to have a work agreement with a copy kept on board (Article 16).
- by prohibiting recruitment agencies from charging fees to the fisher. (Article 22) However this activity is already prohibited by Article 7 of the *Private Employment Agencies Convention*<sup>279</sup> but the practice continues.
- by entitling fishers to hours of rest (Article 14).
- by entitling fishers to decent accommodation (Article 26)
- by entitling fishers to quality food and drinking water (Article 27).
- by making the reporting of accidents and provision of proper medical treatment to the injured mandatory. (Articles 29 and 31).
- by entitling fishers to be paid regularly (Article 23).

However, this assumes that the vessels would comply with the WIFC, 2007. The evidence suggests that the operators of these fishing vessels were not accidentally non-compliant with labour law. The abuse of the fishers was deliberate. The non-payment and under-payment of wages was deliberately concealed from the New Zealand authorities. The dual contracts were issued to deceive both the authorities and the crews. The poor quality of food and drinking water provided to the crews was to save money. The accidents went unreported and untreated to avoid taking the crews to port. Denying the crews adequate rest ensured that the vessels' catch was maximised.

As discussed above, the MLC, 2006 is effective mainly thanks to PSC. The WIFC, 2007 is weaker in this regard. Article 43 only permits a port state to detain a vessel if the conditions on board are 'clearly hazardous to safety or health'.<sup>280</sup> This position contrasts with the MLC, 2006 which additionally allows for a vessel to be detained for a breach of seafarer rights.<sup>281</sup> While arguably the conditions on board were hazardous to health and Maritime New Zealand would have been entitled to detain the vessels, the non-payment of wages would not have justified detention under the WIFC, 2007.

The WIFC, 2007 is a 'sister convention'<sup>282</sup> that complements the MLC, 2006 but, despite this, the WIFC, 2007 fails to be embraced in the same way. As discussed above, the impetus for a consolidation of ILO maritime labour conventions came from the shipowners desiring a uniform compliance regime to effectively 'level the playing field' for ship operators.<sup>283</sup> In the preparatory meetings to the WIFC, 2007, the employer group participated in, rather than drove the discussions. The employer's group requested a 'progressive implementation approach' for nations that did not have the necessary infrastructure<sup>284</sup> to implement the WIFC, 2007 thereby indicating a lack of urgency on the part of employers for the WIFC, 2007 to be adopted in practice.

This would imply that the employer group in the WIFC, 2007 discussions did not share the same drive as the shipowner group in the MLC, 2006 discussions to achieve uniformity in standards and costs. In other words, whereas the shipowners required the MLC, 2006 to better protect their economic interests, the fishing industry is quite different. The WIFC, 2007 was imposed rather than desired. The sector is also much more diverse and less organized (or unionized) internationally.

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<sup>276</sup> Ibid 750.

<sup>277</sup> Christina Stringer and Glenn Simmons, 'Forced into Slavery' (2013) (65) *Samudra Report* <[www.icsf.net/en/samudra/article/EN/65-3893-Forced-into-Sla.html](http://www.icsf.net/en/samudra/article/EN/65-3893-Forced-into-Sla.html)>.

<sup>278</sup> Christina Stringer, Daren Coulston and Thomas Harre, *Human Trafficking for Forced Labour in New Zealand's Foreign Charter Sector Human Rights at Sea* <<https://www.humanrightsatsea.org/case-studies/>>.

<sup>279</sup> *Private Employment Agencies Convention*, opened for signature 19 June 1997, C181 (entered into force 10 May 2000) art 7.

<sup>280</sup> WIFC, 2007 art 43.

<sup>281</sup> MLC, 2006 reg 5.2.1.

<sup>282</sup> Politakis, above n 238, 126.

<sup>283</sup> Blanck Jr above n 60, 39.

<sup>284</sup> Ibid 122.

A further explanation for the lack of support for the WIFC, 2007 is that many of the countries most involved in fishing have not ratified the WIFC, 2007. For example, China, Norway and Thailand are the three biggest exporters of fish in the world,<sup>285</sup> yet only Norway has ratified the WIFC, 2007.

#### **4 IUU Fishing and Human Trafficking**

A different problem again is apparent where the fishing is itself illegal. In this context, the rights of the fishers are disregarded to an even greater degree. Fishers are particularly vulnerable to human trafficking. Due to illegal, unreported and unregulated (IUU) fishing<sup>286</sup> and overfishing, fish stocks are in decline.<sup>287</sup> The decline in catches increases pressure on operators to reduce costs and at the same time leads to fishing vessels travelling further away and spending longer at sea. As running costs increase, the operators reduce wages and look to abuse oppressed, forced and migrant labour. There is no effective international inspection regime for the working and living conditions on fishing vessels and this creates the perfect environment for human trafficking.<sup>288</sup> In the IUU fishing trade, human trafficking and slavery is rife.

Trafficked people are more commonly used on vessels involved in these types of activity for the following reasons. First, these vessels are engaged in criminal activity. The operators are therefore solely focussed on profit seeking and exhibit a fundamental lack of moral judgement.<sup>289</sup> Second, because they run the risk of forfeiture if caught, the vessels used for IUU fishing are generally old and unsafe. Therefore, it is difficult to find qualified fishing crew who will work on them.<sup>290</sup> Third, as reports of illegal fishing often come from the crews themselves, victims of trafficking are unlikely to report the operator.<sup>291</sup> Finally, the vessels are often flagged in states that are unable or unwilling to exercise criminal jurisdiction.<sup>292</sup>

In addition to inhumane living and working conditions, the abuse meted out to fishers who have been trafficked is bloodcurdling. In 2009 the United Nations Inter-Agency Project on Human Trafficking (UNIAP) interviewed 49 Cambodian trafficked workers about the conditions on board 'slave ships'.<sup>293</sup> 18% were under the age of 18 and had been children when recruited. 59% had witnessed a captain murder a crew member. One reported seeing a captain decapitate a crew member.<sup>294</sup>

IUU vessels will often operate outside territorial waters and the EEZ of a coastal state which means that 'maritime law enforcement capability' is poor.<sup>295</sup> On the 'high seas' there are very limited grounds upon which a national government (navy or coastguard) ship can board a foreign ship. Article 110 of UNCLOS does not permit naval crew from a warship<sup>296</sup> to board a foreign vessel unless there are reasonable grounds to suspect the ship is engaged in piracy, the slave trade or unauthorised broadcasting, is without nationality, or is in fact the same nationality of the warship despite flying a different flag.<sup>297</sup>

Illegal fishing does not fall into these definitions, which leaves law enforcement agencies very little authority to investigate IUU vessels. Currently, law enforcement agencies have to approach the flag state of the vessel and request permission to board outlining the purpose and justification for boarding.<sup>298</sup> This removes the law

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<sup>285</sup> Asian Center for Migration 'Employment practices and working conditions in Thailand's fishing sector' (International Labour Organization 2013) ix.

<sup>286</sup> Food and Agriculture Organisation, International Plan Of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (2001) <<http://www.fao.org/docrep/003/y1224e/y1224e00.htm>>.

<sup>287</sup> Environmental Justice Foundation, 'Slavery at Sea. The Continued Plight of Trafficked Migrants in Thailand's Fishing Industry' (Report, 2014) 10.

<sup>288</sup> Ibid.

<sup>289</sup> United Nations Office on Drugs and Crime, 'Transnational Organised Crime in the Fishing Industry. Focus on: Trafficking in Persons, Smuggling of Migrant, Illicit Drugs Trafficking' (2011) 54.

<sup>290</sup> Ibid.

<sup>291</sup> Ibid.

<sup>292</sup> Ibid.

<sup>293</sup> Environmental Justice Foundation, 'All at Sea. The Abuse of Human Rights Aboard Illegal Fishing Vessels' (Report, 2010) 11.

<sup>294</sup> Ibid.

<sup>295</sup> Joe McNulty, 'Maritime Law Enforcement and High Sea Challenges' (Speech delivered at Admiralty and Maritime Law Seminar, Federal Court of Australia, 23 April 2015) 3.

<sup>296</sup> Warship is defined as 'a ship belonging to the armed forces of a State bearing the external marks distinguishing such ships of its nationality, under the command of an officer duly commissioned by the government of the State and whose name appears in the appropriate service list or its equivalent, and manned by a crew which is under regular armed forces discipline. *United Nations Convention on the Law of the Sea*, opened for signature 16 December 1982, UNTS 1833 (entered into force 16 November 1994) art 29.

<sup>297</sup> Ibid art 110.

<sup>298</sup> McNulty, above n 295, 4.

enforcement agency's tactical advantage and may release criminal intelligence to corrupt elements of the flag state.<sup>299</sup>

Fishing vessels can remain at sea for months at a time through the use of large refrigeration ships known as reefer vessels. The reefer replenishes the fishing vessel and the fishing vessel offloads their catch to the reefer which then distributes the frozen fish. This practice means that the fishing vessel can avoid port state measures and the crew are unable to leave without risking drowning or being marooned.<sup>300</sup>

Effectively, IUU vessels are operating in a deliberately lawless environment, and one that the WIFC, 2007 will struggle to penetrate. IUU fishing is an enormous worldwide problem that extends well beyond employment rights. It is a form of transnational organised crime<sup>301</sup> that impacts heavily on the environment by depleting fish stocks and reducing food security for developing nations<sup>302</sup> and has been linked to the increase in piracy, in particular off the coast of Somalia.<sup>303</sup>

## 5 Recommendations

The protection of the employment rights of fishers as part of the global seafaring work force needs both a top-down and bottom up approach. The following suggested solutions may help to address some of the issues facing fishers.

There is a compelling need for more countries to ratify the WIFC, 2007 as soon as possible in order to protect vulnerable workers in the fishing industry. In addition, PSC of requirement of the WIFC, 2007 ought to be expanded. As the MLC, 2006 has shown, PSC is one of the most effective means for ensuring compliance with international conventions. The WIFC, 2007 would better protect the labour rights of fishers if the authority given to port states to conduct inspections is increased to the same level of authority found in the MLC, 2006. This would allow for more rigorous inspection of crew lists, employment contracts and compliance with payment of wages. In any event, the regional PSC MOUs may wish to consider conducting CICs in relation to the WIFC, 2007 when it enters into force.

The use of reefer vessels should be strictly licensed. Flag of convenience states must be persuaded not to accept fishing vessels, including reefer vessels, on their registry unless they fulfil their obligations as a 'responsible flag state'.<sup>304</sup> Once fish is filleted and frozen on a reefer vessel it is impossible to identify where the fish came from and who caught it. Arguably, the use of reefer vessels should ultimately be prohibited.

The Environmental Justice Foundation has called for an international registry of fishing vessels in order to identify and prosecute labour and IUU breaches. This registry should include information on current and previous vessel names and flags, owners and country of ownership. The information should be made publicly available for international monitoring.<sup>305</sup> Nonetheless, it is likely that 'ghost ships', where up to five vessels have the same name and registration number, will continue to operate and remain invisible to authorities.<sup>306</sup>

The Tokyo and Paris PSC MOUs effectively co-ordinate Port State Control of ILO and IMO conventions. As the RFMOs are not mandated to ensure compliance with labour standards and safety at sea regulations, the inspection of fishing vessel for human trafficking offences could be extended to the MOUs.<sup>307</sup> This will help with information sharing on suspicious vessels and activity and build co-operation between states. There should be closer collaboration between the FAO, IMO, ILO and UNDOC<sup>308</sup> to address the plight of victims of human trafficking at sea.<sup>309</sup>

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<sup>299</sup> Ibid.

<sup>300</sup> Environmental Justice Foundation, 'All at Sea. The Abuse of Human Rights Aboard Illegal Fishing Vessels' (Report, 2010) 11.

<sup>301</sup> McNulty, above n 295, 1.

<sup>302</sup> Ibid.

<sup>303</sup> Erika J Techera, 'Piracy, Fishing and Human Trafficking: a 21<sup>st</sup> Century Challenge' (Paper presented at Maritime Law Association of Australia and New Zealand, 42<sup>nd</sup> Annual Conference, Perth, 16-18 September 2015).

<sup>304</sup> Environmental Justice Foundation, 'All at Sea. The Abuse of Human Rights Aboard Illegal Fishing Vessels' (Report, 2010) 21.

<sup>305</sup> Ibid.

<sup>306</sup> Ian Urbina, 'Sea Slaves': The Human Misery that Feeds Pets and Livestock (27 July 2015) <[www.nytimes.com/2015/07/27/world/outlaw-ocean-thailand-fishing-sea-slaves-pets.html?\\_r=0](http://www.nytimes.com/2015/07/27/world/outlaw-ocean-thailand-fishing-sea-slaves-pets.html?_r=0)>.

<sup>307</sup> International Labour Office, 'Caught at Sea. Forced Labour and Trafficking in Fisheries' (Report 2013) 51.

<sup>308</sup> Food and Agriculture Organisation; International Maritime Organisation; United Nations Office on Drugs and Crime.

<sup>309</sup> United Nations Office on Drugs and Crime, 'Transnational Organised Crime in the Fishing Industry. Focus on: Trafficking in Persons, Smuggling of Migrant, Illicit Drugs Trafficking' (2011) 139.

The international law on policing the high seas needs to be reviewed. An international framework for tackling organised crime at sea is required.<sup>310</sup> It is beyond the scope of this article to discuss the issue of organised crime at sea however there is potential for UNCLOS to be used as part of the framework. Article 110 of UNCLOS permits a navy to board a foreign ship suspected of being involved in the 'slave trade'. The *1926 Slavery Convention*<sup>311</sup> provides that:

- (1) Slavery is the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.
- (2) The slave trade includes all acts involved in the capture, acquisition or disposal of a person with intent to reduce him into slavery; all acts involved in the acquisition of a slave with a view to selling or exchanging him; all acts of disposal by sale or exchange of a slave acquired with a view to being sold or exchanged, and, in general, every act of trade or transport in slaves.

Potentially, this definition could be expansively interpreted to cover the use of slaves on fishing vessels, and police the operator that has 'acquired' them and any instances where they are being 'transported' on a fishing vessel. This would permit naval personnel to board and inspect foreign vessels suspected of using forced labour on the high seas.

Corporations must commit to ensuring and demonstrating that their supply chains are free from human trafficking and human rights violations.<sup>312</sup> Seafood retailers who sell farmed prawns should ensure that the fishmeal has not come from 'trash fish' caught with forced labour.<sup>313</sup> Finally, consumers must demand that retailers ensure 'net to plate traceability' for seafood products.

## **6 Conclusion**

Seafarers, have good, but not perfect, protection. Following the entry into force of the MLC, 2006 their living and working conditions have improved and coupled with regular visits to diligent port states they are reasonably protected. Fishers as part of the global seafaring body should enjoy the same protection.

The employment issues that face seafarers and fishers are similar in many respects. However, the fisher's plight is compounded by human trafficking and little to no legal protection. They are suffering serious human rights abuses because of the criminality that blights the industry. There is a culture of illegality in fishing that is not present in the broader commercial shipping industry. Even regulated fishing vessels are able to evade laws of well-meaning nations like New Zealand. In countries where the relevant laws are not enforced or fishing takes place under the radar, fishers are even more exposed. While fishing vessels continue to tranship their catch and avoid port state control, the fishers remain powerless.

It is vital that the international community addresses the legal protection of fishers and the lawlessness of the industry. The problem will not be solved by changing the law alone, but it may make it harder for the criminals and unscrupulous operators to continue to operate with impunity. There is increasing global awareness of the issue of human trafficking in the fishing industry. On 15 August 2015, three Californian law firms sought an injunction to stop the retail chain Costco from selling prawns unless they were labelled the produce of slavery. The class action lawsuit alleged that Costco knowingly sold prawns from a supply chain tainted by slavery.<sup>314</sup> At the time of writing it is not clear if the claim has merit. More recently, Cambodian villagers, recruited to work in the Thai fishing industry, filed a lawsuit in California against four companies that supply US supermarkets, claiming they were trafficked to work in slavery-like conditions.<sup>315</sup>

The MLC, 2006 is a welcome initiative that is making a real difference to the lives of seafarers, who are so important to our commercial trade and growing tourism cruise ship sector. The challenge is to bring awareness to

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<sup>310</sup> McNulty, above n 295, 11.

<sup>311</sup> *International Convention to Suppress the Slave Trade and Slavery*, opened for signature 25 September 1926 (entered into force 9 March 1927) art 1.

<sup>312</sup> Environmental Justice Foundation, 'Slavery at Sea. The Continued Plight of Trafficked Migrants in Thailand's Fishing Industry' (Report, 2014) 37.

<sup>313</sup> *Ibid.*

<sup>314</sup> Felicity Lawrence, 'Costco and CP Foods face lawsuit over alleged slavery in prawn supply chain', *The Guardian* (online), 20 August 2015 <[www.theguardian.com/global-development/2015/aug/19/costco-cp-foods-lawsuit-alleged-slavery-prawn-supply-chain](http://www.theguardian.com/global-development/2015/aug/19/costco-cp-foods-lawsuit-alleged-slavery-prawn-supply-chain)>.

<sup>315</sup> Kate Hodal, 'Cambodians sue US and Thai firms over trafficking and forced labour claims' *The Guardian* (online), 18 August 2016 <<https://www.theguardian.com/global-development/2016/aug/18/cambodian-villagers-sue-us-thai-firms-human-trafficking-forced-labour-claims-walmart-shrimp>>.

the international community of the issues that fishers face to ensure that their employment conditions are improved and their legal rights are protected to the same extent.