

**Maritime Labour Regulation –
What's So Special about Maritime?**

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Maritime Labour Regulation – What’s so special about maritime?

A Brief History

No other labour market has been as internationalised as that for seafarers. Ships can be registered in one country, beneficially owned in another and operated by an entity in another. The seafarers manning the ship may well be from a range of countries, possibly employed through an agency in another country, and holding a certificate of competency issued in yet another country.

It has been recognised for a long time that seafarers have a risky work environment. Even during the working horrors of the industrial revolution, seafarer working conditions won them a champion in the form of Samuel Plimsoll who wrote his “Our Seamen – An Appeal” in 1873 and as we all know eventually succeeded in his attempts to introduce the Load Line.

The International Labour Organisation (the “ILO”) (the specialised agency of the United Nations tasked with promoting “decent work for all”) has had a major concern with the working and living conditions of seafarers ever since its creation in 1919. One of the first legal instruments that the ILO adopted was the National Seamen’s Codes Recommendation, 1920 (No. 9), which called for the establishment of an international seafarers’ code, which would clearly set out the rights and obligations relevant to this sector. Between 1920 and 2006 the ILO adopted 41 conventions and related recommendations dealing with almost every issue in the sector.

In 1976 the ILO adopted the Merchant Shipping (Minimum Standards) Convention (No.147), which was an “umbrella” convention intended to bring together a number of the key maritime labour conventions. This Convention established the concept of inspecting and, possibly, detaining foreign ships coming into port (“port State control”) as employed to good effect under the International Maritime Organisation safety and environment conventions.

From an Australian perspective, ratification of these ILO maritime sector conventions has not been comprehensive. Reference to the Australian Treaties Library on the

Department of Foreign Affairs and Trade website shows that Australia is currently a party to ILO Conventions related to crew accommodation (No's 92 & 133), medical examination of seafarers (No.73), minimum age for employment at sea (No.58) , repatriation of seafarers (No.166), seamen's articles of agreement (No.22) and certification of ship's cooks (No.69).

The 1992 report of the Australian Government House of Representatives inquiry into ship safety, "Ships of Shame", prompted by growing concerns in Australia and worldwide about substandard shipping, recommended that Australian ports deny entry to ships that did not meet the standards called up by ILO Convention No.147. Despite that recommendation, Australia never ratified ILO No.147 due to various policy issues surrounding the raft of conventions that ILO No.147 called up. Instead effect was given to the port State control aspects surrounding crew living conditions through amendments to the Australian *Navigation Act 1912*, and delegated legislation under the Act, "Marine Orders Part 11 – Substandard Ships". These amendments allowed for detention of ships that were otherwise seaworthy in terms of the International Maritime Organisation safety conventions, but which posed an unacceptable threat to crew safety. In practical terms, substandard living conditions have been found generally to coexist with unseaworthy conditions so use of these powers of intervention on their own has been very rare.

ILO Convention No 147 never entered into force internationally for various reasons and in 2001 the ILO took action to address this through starting the development of a new instrument, which would address the issues that had stopped ILO No.147 coming into force and consolidate nearly all the existing maritime sector instruments while also updating them to reflect the current industry. Following several preparatory meetings and working groups, the 94th International Labour Conference of the ILO in February 2006 adopted the Maritime Labour Convention by a record vote of 314 in favour, 0 against and 2 abstaining. Australia voted for adoption, as did New Zealand.

The Maritime Labour Convention 2006

The Maritime Labour Convention (MLC) was described by the Director General of the ILO as "historic" and "a way forward" and was referred to by the Secretary

General of the International Maritime Organisation as the “fourth pillar” of maritime regulation (the others being the International Convention for the Safety of Life at Sea (SOLAS), International Convention of the Standards for the Training and Certification for Watchkeeping Seafarers (STCW) and the International Convention for the Prevention of Marine Pollution (MARPOL)), and indeed, it is an impressive document. It is also a complex and highly technical document. The MLC is structured similarly to STCW Convention with Articles and Regulations, which cover 5 Titles and are supported by a Code to provide detailed implementation requirements. The Code is divided into Standards (mandatory in Part A) and Guidelines (non-mandatory in Part B).

The Titles are:

1. Minimum requirements for seafarers to work on a ship
2. Conditions of employment
3. Accommodation, recreational facilities, food and catering
4. Health protection, medical care, welfare and social security protection
5. Compliance and enforcement

The level of detail in the Guidelines is considerable and for those not used to maritime conventions may be somewhat surprising. As an example, the guidelines on recreational facilities recommend that “where practicable” consideration should be given to making the following facilities available to seafarers on board ships:

- “a smoking room” (at the top of the list!)
- “showing of films, the stock of which should be adequate for the duration of the voyage”
- “a library containing vocational and other books, the stock of which...etc”
- “facilities for recreational handicrafts”
- “reasonable access to ship to shore telephone communications, and email and internet facilities, where available, with any charges for the use of these services being reasonable in amount”, etc.

As would be expected, the implementation of a new and complex technical instrument such as the MLC does pose several challenges to government and industry, and these are discussed below. These challenges will need to be dealt with soon as one of the entry into force provision in article VIII of the MLC has already been met with the ratification of the convention by Liberia, Panama, Bahamas, Marshall Islands and Norway, bringing the combined tonnage to 44% of the world fleet, well over the 33% required. The final requirement for entry into force is ratification by 30 countries. I understand that the European Union countries are preparing to ratify the MLC in 2010-2011, which should fulfil this requirement. The MLC will enter into force 12 months later.

Application and flexibility

The application of the MLC poses the first challenge in implementation. Article II of the MLC provides the convention applies to all seafarers except as expressly provided otherwise (article II.2). The MLC applies to all vessels engaged in commercial activities (except for fishing vessels) and the people employed on board such vessels except those operating exclusively in inland or sheltered waters or port areas (article II paragraphs 1(i) and 4). This is a much broader application than that of the International Maritime Organisation safety conventions and covers vessels on domestic voyages of all sizes while SOLAS, for example, covers vessels over 500 gross tons on international voyages (with exceptions). For Australia, with its federal system of government, such a wide application cuts across jurisdictions as many vessels that will be covered currently operate under State jurisdiction.

There is little flexibility allowed in Article II of the MLC in applying the Convention. In the ILO spirit of “tripartism”, what discretion there is can only be used after consulting the “social partners”. In this case those partners are the shipowners and seafarer organisations.

The flexibility is limited to cases where there is “doubt” about whether persons or a category of persons are “seafarers” (article II.3), when the competent authority is allowed to make a determination to resolve this. Similarly, the same applies if there is “doubt” about whether something is a “ship” (article II.5). The definition of what

constitutes a “seafarer”, like that of a “ship”, is broad and is intended to include entertainers on cruise ships, for example. The application to scientists who may be on a ship to undertake research is not clear.

Article II.6 also allows for some aspects of the MLC not to apply to vessels under 200 gross tons that not on international voyages if such application is not “reasonable or practicable” and the matters are dealt with by other national laws [rhetorical question: Why would you then need to not apply the Convention?), and again, the social partners must be consulted. Any determinations made under the above provisions must be reported to the Director General of the ILO who will let all the other ILO members know so clearly any member making such determinations must be prepared to show the strength of their convictions.

Further flexibility in the implementation of the MLC is built in to Article VI which allows for the concept of “substantial equivalence” in giving effect to the requirements of the mandatory Standards. However, in deciding that an implementing measure is “substantially equivalent”, the member State must satisfy itself and the social partners that the measure “gives effect to the provision of the Code”, which would appear to make substantial equivalence moot.

A New Certification and Compliance Regime

While Titles 1 to 4 largely give effect to existing ILO maritime labour instruments (which may or may not be in force), Title 5 introduces a new inspection and certification regime, similar to those used by the IMO safety and environmental conventions to provide evidence of compliance with the Convention. The application of this new certification regime only applies to vessels over 500 gross tons on international voyages and will provide evidence of compliance with the MLC in port States. The certification system is somewhat more complex than that used by the IMO and the Maritime Labour Certificate will be required to be accompanied by a Declaration of Labour Compliance Parts I and II and may be a sizeable document. In order to issue a Maritime Labour Certificate, the member State (or its “recognised organisation”) must verify that the vessel complies with the requirements of the Convention (Appendix A5-1) for:

- Minimum age
- Medical certification
- Qualifications of seafarers
- Seafarers' employment agreements
- Use of licensed or certified private recruitment or placement services
- Hours of work or rest
- Manning levels
- Accommodation
- On-board recreational facilities
- Food and catering
- Health and safety and accident prevention
- On-board complaint procedures
- Payment of wages

The Declaration of Labour Compliance Part I is intended to be completed by the member State and to state what national laws are to be complied with in meeting the MLC requirements and Part II is intended to be completed by the ship operators and to clearly explain what procedures they have in place to ensure compliance is maintained in between inspections.

Clearly, this requirement makes the Declaration of Labour Compliance Part II a key document for the ongoing effective implementation with the MLC. The role of “recognised organisations” is also a key to the implementation of the convention. Recognised organisations (Classification Societies) play a key role in the implementation of the IMO conventions through their work in approving, certifying and surveying ships and their equipment; most administrations would not have the technical resources to undertake this work if these organisations were not available to do so. It is expected that they will fulfil a similar role under the MLC. While it is understood that the Classification Societies are preparing to take on this new role, policy decisions remain to be made by flag States whether these organisations will have the capabilities to effectively do so; should a flag State delegate to a recognised organisation the role of checking on the payment of wages for seafarers on their ships, for example? The Convention also has requirements and guidelines for flag States to follow before recognising any organisations, intended to ensure that such

organisations do have the necessary capabilities. Decisions about any such authorisations in Australia are yet to be made and would probably have to be given effect under several pieces of legislation.

The port State responsibilities of Title 5 are of particular interest to Australia. This section of the MLC draws once again on the success of the IMO conventions' port State control provisions and endeavours to set up similar port State control mechanisms for the MLC. From an Australian perspective, these mechanisms will provide the means to ensure that seafarer living and working conditions on the vast bulk of ships calling in our ports meet an accepted international standard, which is generally acceptable to Australians. Further, Article V of the Convention includes a "no more favourable treatment" clause so that non-parties do not operate under lesser standards. A practical example of what this means is that Australia will be able to ensure that seafarers in Australian ports have the right to a safe workplace, rights that Australian workers have been entitled to for years.

Seafarers Placement

The other new area of regulation for Australia under the MLC is that for seafarers; recruitment and placement services contained in Title 1. This is a detailed requirement requiring, among other things, that any private agencies primarily engaged in recruiting or placing seafarers do so at no charge to the seafarers and that such organisations operate "only in conformity with a standardised system of licensing or certification..." and that "undue proliferation" of such organisations is not encouraged (see StandardA1.4.2). There is no requirement to have any such private organisations from a regulatory point of view. Perhaps it would be best to have none? Similar requirements apply to any such services provided by seafarer organisations. Again, policy on how to approach this requirement is yet to be decided in Australia.

Conclusions

There is no doubt that the uniform implementation of the MLC worldwide will do much for the living and working conditions of seafarers. It will also generate more work for these seafarers, flag States, port States and any recognised organisations if it is to be implemented properly. It will require new legislation and regulation, inspection resources and certification arrangements in many countries including

Australia. The Convention, Regulations and Code were written to deal with the situation in many flag States and seafarer supplying countries where labour is not regulated or given any protections, as it had to be. This does however cause problems for countries where labour is provided with universal welfare protection and labour regulation, workers are generally not exploited and seafarers are not a significant part of the workforce requiring special regulatory treatment; such as Australia.

In Australia the *Fair Work Act 2009* was recently put in place, the second major change to labour regulation in recent years. It remains to be seen if there will be specific changes required to this Act to accommodate the MLC. The Commonwealth government has commenced the consultation process required to ratify the MLC however and it is my personal hope that Australia will be positioned to ratify the Convention in time for its entry into force internationally.

As a final word, the Australian government statement made following Australia's vote to adopt the Convention in 2006 is still relevant today in the issues we face in implementing the MLC:

“The Australian Government welcomes the consolidation of international maritime labour standards, as part of an integrated approach to modernizing ILO standards and related supervisory activities.

The Australian Government considers that the ILO's labour standards must be principles-based, non-prescriptive, contemporary and have universal relevance. They must also be widely ratified and ratifiable if they are to command respect from the global community and continue to meet the ILO's core objectives.

However, despite the innovative approach taken in the development of this Convention, the Australian Government considers that the Convention and its associated Code are still somewhat prescriptive and inflexible, and seek to place obligations on member States without due consideration to their national circumstances.

Nonetheless, the vote of the Australian Government reflects its support for the consolidation of the international labour code.”