

# Public consultation on the National Action Plan to combat modern slavery 2020-24

PRESS GANGS AND GALLEY SLAVES – MARITIME HISTORY OR HIDDEN SHAME?

MODERN SLAVERY AND THE SHIPPING INDUSTRY

Submission by:

Glenn Kolomeitz:

Principal Maritime Lawyer, Cardinal Legal  
Marine Surveyor & Casualty Investigator, Cardinal Strategic

## Contents

Executive summary and recommendations .....	3
The particular vulnerability of seafarers .....	4
The concurrent vulnerabilities of seafarers and Australia’s maritime resilience ..	5
Australian companies in the maritime supply chain .....	6
Investigating foreign-flagged ships .....	7
Proposed goals of the 2020-24 Plan .....	7
Consultation Questions .....	8

## Executive summary and recommendations

When considered against the various classes of people subject to the risk of slavery-like practices, seafarers are among the most vulnerable and susceptible to exploitation. This particular vulnerability arises from the geographical and physical isolation of service onboard ships – the ‘hidden’ nature of the problem – as well as regulatory and enforcement weaknesses resulting from ‘flag of convenience’ registration of ships and the personal circumstances of many target crews in the sector.

As a coastal maritime nation with both commercial and strategic dependence on maritime traffic, addressing modern slavery in the shipping industry serves to honour our obligations under, and commitment to, the various conventions to which the Act gives effect<sup>ii</sup> whilst concurrently protecting our maritime resilience domestically. It is thus in the interests of Australian business to address modern slavery in its shipping supply chain in tangible ways including processes of restitution of seafarer wages and entitlements.

In order to properly identify cases of slavery and slavery-like practices in the shipping industry as it relates to Australia, it is necessary to empower and enable authorities to better investigate complaints or allegations. This will require education and liaison with seafarer welfare organisations which are often at the coalface of seafarer support in times of crisis. To properly enable authorities and welfare organisations and mandate liaison, an expressed focus on slavery in the shipping industry should be included in the Plan and subsequently enacted in legislation.

The key recommendations of this submission are as follows:

1. The National Action Plan should recognise the significance and prevalence of modern slavery in the shipping sector and include specific references to modern slavery in that sector and related wider supply chains.
2. The Government should introduce discrete provisions to the legislation and/or policy instruments regarding modern slavery in the shipping sector and related wider supply chains.
3. The Government should ensure consultation and engagement occurs with organisations operating in the seafarers’ welfare sector including, but not limited to, the Maritime Union of Australia and the various Missions to Seafarers with a view to identifying instances of modern slavery of relevance to Australia.
4. The Government should empower and enable the Australian Federal Police elements tasked with investigating slavery and servitude offences to better liaise with seafarer welfare and industrial organisations with a view to identifying slavery and slavery-like practices<sup>iii</sup> onboard vessels subject to Australian Port State control or in Australian territorial waters.

5. The Government should empower and enable the Australian Maritime Safety Authority to better liaise with seafarer welfare and industrial organisations with a view to identifying modern slavery practices onboard vessels subject to Australian Port State control in the course of Port State inspections.<sup>iv</sup>
6. The Government and businesses subject of the requirements of the *Modern Slavery Act* should establish a restorative process of the restitution of wages and entitlements of seafarers by Australian entities in the maritime supply chain where slavery-like practices have resulted in wage exploitation.
7. The Plan should amend Goal 5 to include the training of welfare and labour organisations in conjunction with frontline officials in the identification and investigation of modern slavery.
8. The following additional goals should be included in the Plan:
  - (i) Identify sectors at high risk of modern slavery or pose elevated risk to victims and direct defined rates of effort to targeting these sectors; and
  - (ii) Enhance our response and rate of effort to combat modern slavery in the shipping industry.

### The particular vulnerability of seafarers

History has shown seafarers to be in a class of workers at particular risk of labour exploitation and increased susceptibility to the threat of modern slavery, including forced labour and deceptive recruiting, in light of the inherent conditions and nature of sea service. Historical caselaw is replete with judicial statements attesting to such vulnerability and a resultant need for protection. In the 1823 case of *Harden v Gordon*, the court described the particular vulnerability of seafarers, in *obiter*, as:

Every court should watch with jealousy an encroachment upon the rights of seamen [sic], because they are unprotected and need counsel; because they are thoughtless and require indulgence; because they are credulous and complying; and are easily overreached.<sup>v</sup>

Putting aside the dated and largely offensive stereotypes by today's standards, the emphasis on the lack of protection afforded seafarers in the workplace in that era carries weight in the present day in terms of the risks of exploitation.

These risks are aggravated by the complex regulatory and enforcement regimes invoked as a result of flag state registration of vessels, the so-called 'flags of convenience'. The regulation of seafarers' wages and conditions, which should arise from the "genuine link" between flag state and ship as required under the United Nations Convention on the Law of the Sea (UNCLOS)<sup>vi</sup>, appears to be missing in most cases<sup>vii</sup> due, largely, to a lack of definition of the

term in the Convention and a lack of stipulation as to consequences that follow where no such genuine link exists.<sup>viii</sup>

The prevalence of the threat of modern slavery in the maritime sector is demonstrated by the caseloads of seafarer welfare organisations such as Stella Maris, the mandates of which include supporting seafarers in cases of non-payment of wages, refusal of shore leave, labour exploitation and modern slavery. In its 2019 Report, appropriately entitled, “Life at Sea Report 2019: the tip of the iceberg”, Stella Maris stated:

For every ship’s crew in crisis supported by Stella Maris last year, we believe there were up to 20 crews who needed our help. Perhaps they were too scared to escalate a problem, or maybe they weren’t aware of the support our chaplains provide.<sup>ix</sup>

With reference to a specific case involving sea-going fishing vessel crews, Stella Maris, in its 2019 Report, stated, ‘[w]ithout our intervention, these frightened and unpaid fishermen could still be working in slave-like conditions’.<sup>x</sup>

For the purposes of this submission and, indeed, the evolution of the National Action Plan, the extent of the problem identified by Stella Maris warrants expressed attention in the Plan as it goes forward. This need for greater specific attention to the shipping sector arises from, *inter alia*, fear on the part of seafarers of reporting adverse conditions and/or a lack of awareness of reporting mechanisms or the non-availability of such reporting mechanisms. It is submitted that organisations at the coalface of seafarer welfare are best placed to identify sub-optimal conditions of service onboard vessels due to their non-governmental welfare-centric function and the fact they are likely to be the first ‘port of call’ for seafarers in distress. In that light, relationships need to be established between Australian authorities tasked with investigating conditions of service onboard merchant vessels specifically or investigating slavery and servitude more broadly and seafarer welfare organisations. Such relationships should properly include direct liaison and reporting lines as well as targeted and collaborative training.

## The concurrent vulnerabilities of seafarers and Australia’s maritime resilience

The Commonwealth has recognised certain particularities of seafarer employment by devoting legislation expressly to their wellbeing<sup>xi</sup> - the *Seafarer Rehabilitation and Compensation Act 1992* (Cth). Australia has long been dependent on maritime trade for sustainment and export earnings and the rise of globalisation and decline of local manufacturing has seen this dependence grow markedly.<sup>xii</sup> These facts confirm a need for greater strategic resilience in the maritime space. They further confirm critical vulnerabilities in Australia’s supply chains arising from a continual decline in Australian-flagged shipping and a concomitant reliance on foreign-owned shipping – facts which have both been tacitly accepted by government.<sup>xiii</sup>

These parallel vulnerabilities can only be of concern to both government and business. Supply chain disruption as a result of issues in the shipping industry, including the arrest of ships for

labour breaches and crew insecurity leading to vessel abandonment, poses significant economic and industrial viability risk, not to mention the adverse impacts of diminished fuel security on Australia's sovereign interests. The Federal Opposition has made some policy announcements regarding the revitalisation of Australian shipping for reasons of national security and there is little doubt these reasons have validity.<sup>xiv</sup>

It is this threat to the supply chain which, from a commercial perspective, goes to the heart of Australian industry's need to ensure seafarers are protected and available to crew ships serving Australia's sea commerce. It is also the resilience of the supply chain which, from a moral and ethical perspective, encourages Australian business to ensure seafarers are protected. The latter point is, of course, now enshrined in the legislation subject of this consultative process and these submissions pertaining thereto.

### Australian companies in the maritime supply chain

A cursory review of the Australian companies, and entities based or operating in Australia, with shipping as part of their respective supply chains evidences a commitment to the aims and objects of the *Modern Slavery Act*.<sup>xv</sup> Exploitative labour practices in the nature of slavery in the shipping industry, including forced labour, debt bondage and wage exploitation, are undoubtedly hidden upstream in the supply chain. It is the hidden nature of ship-borne slavery which is a common element of this modern slavery vector and other categories of prevalence in Australia.<sup>xvi</sup> It is submitted the greater difficulty in identifying, investigating and actioning slavery practices in the shipping industry is what distinguishes slavery in the maritime supply chain from the other categories and aggravates the offending. This is where slavery in shipping diverges from the 2017 report of the Parliament's inquiry into establishing the Act, entitled, '*Hidden in Plain Sight*' – slavery in shipping is certainly hidden but it is far from in plain sight. The Explanatory Memorandum to the Bill identified the fact that the risk of exposure to modern slavery 'may be heightened for large companies and other entities with extensive, complex and/or global supply chains'.<sup>xvii</sup> This is the very definition of shipping in the supply chain.

As considered above, Australian companies have an interest in ensuring slavery and slavery-like practices are not occurring on ships forming part of their supply chains on a number of grounds. Commercial viability and resilience of supply, national security and the preservation of trade routes including fuel security, reputational protection and moral standing, and, relevantly, compliance with this legislative regime.

A key, yet potentially contentious, aspect of this submission and resultant recommendations is that companies subject of the Act, with shipping as part of their respective supply chains, are better able to contribute to the outcomes and intent of the Act if they are involved in restorative processes with crews rather than in punitive processes with Australian authorities. Where, for example, any wage exploitation complaints are brought to the attention of Australian companies using ships subject of such complaints, a process of restitution of wages and entitlements to the seafarers concerned by the Australian companies should be developed. Recovery from the

shipping companies is then open to the Australian companies. This proposal clearly requires greater fidelity and detail than is possible in this submissions but the key upshot is that restitution should displace prosecution or other sanction in order to achieve the human-centric outcomes sought by the legislation.

In facilitating such processes there is clearly a need for liaison between Australian companies and seafarer welfare organisations including the Maritime Union of Australia but such liaison and consultation is at the heart of the operative aspects of the modern slavery laws and policy.<sup>xviii</sup>

## Investigating foreign-flagged ships

The arrest and detention of foreign-flagged ships by Australian authorities for Maritime Labour Convention (MLC) breaches is not unheard of. In 2015 the Australian Maritime Safety Authority detained the Panama-flagged bulk carrier *MV Apellis* when a Port State Control inspection identified breaches of the MLC pertaining to wages and conditions of employment. This targeted inspection took place following a complaint to the Australian Maritime Safety Authority by the International Transport Workers Federation.<sup>xix</sup> The question begs asking as to whether Australian Port State Control authorities would be able or, indeed, inclined to identify labour breaches at the threshold of slavery-related practices in the absence of reporting from external bodies such as the International Transport Workers Federation / Maritime Union of Australia, Mission to Seafarers or other seafarer welfare organisations. In fairness, it is unlikely merchant crews subject of slavery-related conditions would feel comfortable to complain directly to government authorities in the course of such inspections. This contention does not, however, displace the obligation on Australian authorities, be it expressed or implied, to be alert to the prospect of slavery-related practices onboard vessels and be enabled to take appropriate action.

It follows that liaison and coordination between Australian authorities, including the Australian Federal Police and the Australian Maritime Safety Authority, and the seafarer industrial and welfare organisations is warranted in order to properly facilitate the reporting of complaints and their subsequent investigation. This is especially the case noting the likely reticence of seafarers from countries in which distrust of authorities is prevalent to be interviewed by investigators in the absence of non-governmental welfare support.

## Proposed goals of the 2020-24 Plan

1. Maintain and promote compliance with international standards on modern slavery.
2. Engage the Australian community to understand and combat modern slavery.

3. Promote an evidence-based response to modern slavery.
4. Maintain a robust and comprehensive legislative framework to combat modern slavery.
5. Train frontline officials to support the identification of victims and effective investigations of modern slavery.
6. Progress effective prosecutions to secure convictions against offenders.
7. Enhance our response to combat forced marriage.
8. Enhance our response to combating serious forms of labour exploitation, including forced labour and deceptive recruiting.
9. Promote transparency and accountability for combating modern slavery risks in global supply chains, including in Government procurement.
10. Provide adequate support, protections and remedies to empower victims of modern slavery.
11. Enhance our leadership and partnerships to promote regional and international cooperation on combating modern slavery.
12. Work collaboratively across government, along with non-government stakeholders, to combat modern slavery.

## Consultation Questions

### **1. Do the 12 goals capture key areas of focus for Australia over the next five years?**

Noting the focus of these submissions is on the shipping industry and, specifically, the risks posed to seafarers by the threat of modern slavery in all its incarnations, these goals, whilst broadly appropriate, should include a focus on this high-risk sector. The sector is deemed high-risk from both the perspective of the risk to individual seafarers and the risk to Australia as a maritime nation dependent on sea traffic for the vast majority of its commerce.

In that light it is submitted that additional goals are warranted which consider the identification of high-risk sectors and which, in this case, direct a rate of effort at combating modern slavery in the shipping industry. These points are expanded upon, below.

The existing goals are relevant and are not inconsistent with the proposed additional goals. It is, however, submitted that Goal 5 be expanded upon to include the training of welfare and labour organisations in conjunction with frontline officials in the identification and investigation



of modern slavery. This collaborative training approach is consistent with that adopted in multi-agency responses to other crimes in the nature of exploitation.<sup>xx</sup>

**2. Should there be additional goals to address other areas of focus, emerging issues or trends? If so, what should they be?**

The following two additional goals are recommended:

13. Identify sectors at high risk of modern slavery or pose elevated risk to victims and direct defined rates of effort to targeting these sectors.

14. Enhance our response and rate of effort to combat modern slavery in the shipping industry.

**3. The Government is committed to ensuring victims of modern slavery are supported, protected and empowered. Are there ways in which the Government can better reflect the voices of victims and their lived experiences in the 2020-24 Plan and Australia's response to modern slavery?**

Noting the focus of this submission is on slavery in the shipping industry, the very 'hidden' nature of slavery in that sector demands a greater voice on the part of victims. Having said that, the dangers posed to these foreign national seafarers at home and at sea tend to preclude the recording of individual and identified voices. It is in that respect that seafarer welfare organisations must be the collective and (de-identified) individual voice of victims.

The more these stories are told by organisations such as Stella Maris,<sup>xxi</sup> the less other victims will be 'all at sea' and apparently alone. Importantly, getting the message to consumers of products in the supply chains downstream of the shipping companies is likely to have an impact on Australian companies using the shipping companies to sustain their commercial activities.

**4. The Government is committed to ensuring that we can measure the impacts of the 2020-24 Plan. Are there evaluation methods, data sources or metrics the Government should consider in developing an evaluation framework?**

Again, noting the focus of this submission, the investigation and analysis of slavery-like practices in the shipping industry is likely to be highly intelligence-led. In that regard, existing criminal intelligence methodologies could readily be transposed to an evaluation framework for use in, and limitation to, that discrete area.

- 
- <sup>i</sup> MBA(AIB), MDefStud(NSW), MJus(Intelligence)(QUT), MIntLaw(Syd), MFFC(CSU), GDipMilLaw(ANU), GDipInvstMgmt(CSU), LLB(UNE), DipPol(CSU), DipIntAnalysis(CIT).
- <sup>ii</sup> *Modern Slavery Act 2018* (Cth) s7(2).
- <sup>iii</sup> Explanatory Memorandum, Modern Slavery Bill 2018 (Cth) 46.
- <sup>iv</sup> See, eg, *Procedures for Port State Control 2017 (2018 Edition)*, IMO Res A.1119(30) (adopted 6 December 2017) para 1.2.6.
- <sup>v</sup> 11 F Cas 480, 485 (1823).
- <sup>vi</sup> *Convention on the Law of the Sea*, opened for signature 10 December 1982, 1833 UNTS 397 (entered into force 16 November 1994), art 91(1).
- <sup>vii</sup> Michael White, *Australian Maritime Law* (3<sup>rd</sup> ed, 2014) 389.
- <sup>viii</sup> Robin Churchill, 'The meaning of the "genuine link" requirement in relation to the nationality of ships' (Study prepared for the International Transport Workers' Federation, University of Cardiff, 2000) 4.
- <sup>ix</sup> Stella Maris. (2019). *Life at Sea report 2019: the tip of the iceberg*, p. 03. Retrieved from <<https://www.apostleshipofthesea.org.uk>>.
- <sup>x</sup> *Ibid*, p. 09.
- <sup>xi</sup> White, above no. vii, at 393.
- <sup>xii</sup> Australian Naval Institute, 'Protecting Australian Maritime Trade' (Report of the Goldrick Seminar, Canberra, 18 September 2019) 3.
- <sup>xiii</sup> Maritime Union of Australia, 'Leaked Defence report highlights Australia's supply chain vulnerability and need for urgent solutions' (Press Release, 04 May 2020).
- <sup>xiv</sup> Sam Bateman, 'Does Australia need a merchant fleet?' (4 March 2019) *The Strategist*. Australian Strategic Policy Institute.
- <sup>xv</sup> Australian Border Force, *Online Register for Modern Slavery Statements* (2020) <<https://modernslaveryregister.gov.au>>.
- <sup>xvi</sup> See, Joint Standing Committee on Foreign Affairs, Defence and Trade, Parliament of the Commonwealth of Australia, *Hidden in Plain Sight: an inquiry into establishing a Modern Slavery Act in Australia* (2017).
- <sup>xvii</sup> Explanatory Memorandum, Modern Slavery Bill 2018 (Cth) 2.
- <sup>xviii</sup> Australian Border Force, *Commonwealth Modern slavery Act 2018: Guidance for Reporting Entities* (2018) 57, 73, 87.
- <sup>xix</sup> See, Australian Maritime Safety Authority, *AMSA detains ship for Maritime Labour Convention breaches* (10 September 2015) <<https://www.amsa.gov.au>>.
- <sup>xx</sup> See, Joint Child Protection Response (JCPR) Program, NSW Department of Communities & Justice (last updated 18 October 2019) <<https://www.facs.nsw.gov.au>>.
- <sup>xxi</sup> See, Stella Maris, above no, ix.