



## **Australian Government**

Australian Government response to the  
Senate Rural and Regional Affairs and Transport  
References Committee report:

Increasing use of so-called Flag of Convenience shipping in  
Australia

## Introduction

On 19 July 2017, the Rural and Regional Affairs and Transport References Committee (the Committee) delivered its final report into the 'Increasing use of so-called Flag of Convenience shipping in Australia'. This Inquiry was to investigate the increasing use of so-called Flag of Convenience shipping in Australia with reference to:

- a) the effect on Australia's national security, fuel security, minimum employment law standards and our marine environment;
- b) the general standard of Flag of Convenience vessels trading to, from and around Australian ports, and methods of inspection of these vessels to ensure that they are seaworthy and meet required standards;
- c) the employment and possible exposure to exploitation and corruption of international seafarers on Flag of Convenience ships;
- d) discrepancies between legal remedies available to international seafarers in state and territory jurisdictions, opportunities for harmonisation, and the quality of shore-based welfare for seafarers working in Australian waters;
- e) progress made in this area since the 1992 House of Representatives Standing Committee on Transport, Communications and Infrastructure report *Ships of shame: inquiry into ship safety*; and
- f) any related matters.

## Australian Government response

### Recommendation 1

The Committee recommends that the Fair Work Ombudsman implement a program of inspection for ships with foreign seafarers, to verify that the wages paid on board accord with Australian legal requirements.

### Recommendation 2

The Committee recommends that the Australian Government provide adequate funding to the Fair Work Ombudsman to implement an inspection program of ships with foreign crews, to assess the payment of wages.

Recommendations 1 and 2 are concerned with a recommended program of inspection of ships with foreign crews to assess the payment of wages. The Australian Government **does not support these recommendations**.

The Government considers that the current arrangements for compliance in the maritime sector are sufficient and the Fair Work Ombudsman (FWO) is adequately funded to support these arrangements.

The FWO engages with the Australian Maritime Safety Authority (AMSA) and other government bodies involved in maritime regulation and compliance. The framework for identifying and investigating seafarers' wages is strengthened through collaboration between the FWO and AMSA, leveraging the powers available to both regulators.

This relationship is formalised in a Memorandum of Understanding (MoU) which provides for referrals between the two agencies and is available publicly at [www.amsa.gov.au](http://www.amsa.gov.au). AMSA is responsible for checking that foreign seafarers' working and living conditions are in accordance with the mandatory requirements of the Maritime Labour Convention 2006. Where AMSA becomes aware of potential breaches of the *Fair Work Act 2009* (FW Act) during inspections on foreign flagged ships to establish their compliance with the Maritime Labour Convention, these are referred to the FWO for further consideration.

Separate to this referral process, the FWO provides free advice and assistance to foreign seafarers through a variety of channels, including the Fair Work Infoline, Small Business Helpline, the online My Account portal and the online Anonymous Report tool. Foreign seafarers and their representatives can also make enquiries and raise concerns about maritime industry compliance by writing to the FWO's dedicated maritime inbox, which can be accessed via a specific webpage for maritime industry workplace rights and entitlements at [www.fairwork.gov.au](http://www.fairwork.gov.au).

When the FWO is alerted to a potential issue, the FWO considers information provided by employers, crew members, unions and others regarding compliance on board vessels in accordance with the FWO's Compliance and Enforcement Policy<sup>1</sup>. Where the FWO attends a

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<sup>1</sup> Fair Work Ombudsman, *Compliance and Enforcement Policy*, Fair Work Ombudsman, Canberra, 2017 <<https://www.fairwork.gov.au/ArticleDocuments/725/compliance-and-enforcement-policy.docx.aspx>>.

vessel for on-board educative and/or investigative activities, compliance is typically assessed by observing work practices, making inquiries of persons on board and requesting or requiring the production of employment records.

Between 1 July 2012 and 30 June 2017, the FWO recovered \$564,444 for seafarers covered by Part B of the *Seagoing Award 2010*. The FWO has also commenced legal proceedings against shipping companies/operators, most recently in the matter of *Fair Work Ombudsman v Transpetrol TM As*, in respect of an alleged underpayment of over \$255,042 to 61 foreign crew members working on board the *MT Turmoil*. In accordance with the FWO's Litigation Policy<sup>2</sup>, litigation is reserved for the most serious cases of non-compliance with the FW Act.

The Government recently increased the FWO's funding by \$20.1 million over 4 years (2016-17 to 2019-20) to allow the FWO to more effectively target employers who intentionally exploit workers, particularly migrant workers.

### Recommendation 3

The Committee recommends that the Australian Government implement clear guidelines and procedures to direct authorities on how to respond to deaths that occur on shipping vessels travelling in or to Australian waters, including how to engage with a vessel's flag state in a timely manner to progress appropriate investigations.

The Australian Government **notes this recommendation.**

The Australian Government confirms there are existing domestic and international guidelines and procedures that direct authorities as to how to respond to deaths on vessels travelling in or to Australian waters.

### Domestic Guidelines and Procedures

There are currently clear guidelines as to how all police jurisdictions should cooperate when responding to reports of crimes at sea, including to situations where a death occurs on vessels travelling in or to Australian waters.

These guidelines are contained in the *National Protocols for Reporting Crimes at Sea* (NPRCS), which were endorsed in 2010 and renewed in November 2016. The NPRCS apply to Commonwealth, state and territory police and set out procedures to ensure: an appropriate police response to crimes at sea; the rights and needs of victims and perpetrators are protected; evidence is obtained and secured at the earliest opportunity; police adopt a cooperative approach with the police jurisdiction receiving the report (including the flag state in certain cases) and, where appropriate, prosecutions are commenced in accordance with existing laws and protocols.

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<sup>2</sup> Fair Work Ombudsman, *Litigation Policy of the Office of the Fair Work Ombudsman*, Fair Work Ombudsman, Canberra, 2013 <<https://www.fairwork.gov.au/ArticleDocuments/725/gn-1-fwo-litigation-policy.docx.aspx>>.

The NPRCS reflect international best practice and include a provision stating that the Australian Federal Police, on behalf of the Australian Government and in cooperation with the states, will review the NCRPS every two years.

*The Australian Transport Safety Bureau's role in response to a death on board a ship.*

The Australian Transport Safety Bureau (ATSB) conducts 'no blame' marine safety investigations in accordance with the *Transport Safety Investigation Act 2003* (TSI Act). The ATSB does not investigate for the purpose of taking administrative, regulatory or criminal action. The aim of all ATSB investigations is to prevent accidents and incidents - not to assign blame or liability. The ATSB investigates fatal marine accidents where the death of a person occurred directly in connection with the operations of a ship. The ATSB does not normally investigate matters involving intentional deaths (suicide or criminal conduct) or deaths from natural causes.

Parallel investigations into deaths at sea may be run by the ATSB and the relevant state police force or Australian Federal Police (AFP). This means that in the event of a death at sea, there is not necessarily just one agency conducting an investigation. If a death turns out to be suspicious, the police will be the lead investigator.

Recommendation 4

The Committee recommends that the Australian Government consider any possible amendments to legislation governing federal investigative authorities, to provide clarity on jurisdictional responsibility for investigating deaths at sea, when they occur on shipping vessels travelling in Australian waters. The Australian Government should progress jurisdictional issues with the states and the Northern Territory at COAG to ensure satisfactory outcomes.

The Australian Government **notes this recommendation.**

The Australian Government confirms that Australian legislation already grants federal, state and territory investigative authorities broad jurisdictional reach, within the limitations imposed by Australia's obligations under international law, to investigate deaths at sea that occur on shipping vessels travelling within Australian waters.

Jurisdictional responsibility for investigating crimes at sea

Investigation of alleged crimes committed on vessels travelling in Australian waters is a matter for Australian policing authorities. When a crime is committed within Australia's waters, the arrangements under the *Crimes at Sea Act 2000* (CAS Act) effectively determine the Australian policing authority with jurisdictional responsibility for the matter.

Under the CAS Act, the substantive criminal law of the relevant state or the Northern Territory can be applied in the areas adjacent to the coast of Australia (either up to 200 nautical miles from the baseline of the relevant State or to the outer limit of the continental shelf, whichever is greater). These arrangements, for example, would ensure that New South Wales criminal law would apply to offences committed off the coast of New South Wales, and the New South Wales Police would be the relevant authority.

However, the scope of Australia's criminal jurisdiction with respect to a foreign ship is limited by its international obligations. For example, Article 27 of the United Nations'

Convention on the Law of the Sea (UNCLOS) provides that the criminal jurisdiction of a coastal state should not be exercised on board a foreign ship passing through its territorial sea, including conducting investigations or arrests in connection with any crime committed aboard the vessel during its passage unless: the consequences of the crime extend to that state; the crime disturbs the peace or good order of the territorial sea of the state; the vessel's master or a diplomatic agent of the flag state has requested assistance; the crime relates to drug offences.

Consistent with relevant international law obligations, the CAS Act provides that the Attorney-General's written consent is required before prosecution of an offence can proceed in relation to an act alleged to have been committed on a foreign ship in the adjacent areas. Before granting consent, the Attorney-General is required to take into account any views expressed by the government of the flag State. If consent is not given, a court must permanently stay any proceedings arising from a charge

#### Jurisdictional responsibility investigating transport safety concerns

The ATSB has broad jurisdiction under the TSI Act to conduct investigations into deaths at sea on Australian-flagged and foreign-flagged vessels within Australian territorial waters, or en route to Australia. The ATSB also has jurisdiction to investigate Australian-flagged vessels outside Australia's territorial waters, and foreign-flagged vessels outside Australia's territorial waters provided that Australia is a 'substantially interested State'. A substantially interested State means a State where, as a result of a marine casualty, nationals of that State lost their lives or received serious injuries.

The Government acknowledges the intent of the Committee in this recommendation and adds that it will continue to support existing legislation governing federal investigative authorities and efforts to provide clarity on jurisdictional responsibility for investigating deaths at sea.

#### Recommendation 5

The Committee recommends the re-establishment of the Maritime Workforce Development Forum, or a similar advisory body. The advisory group would comprise a variety of key maritime industry stakeholders and provide advice to government on new Australian shipping policies and workforce development and training opportunities.

The Australian Government **notes this recommendation.**

The Government undertook consultation on Australian shipping policy in 2015 and again in 2016 and 2017. That consultation has included all of the members of the former Maritime Workforce Development Forum (MWDF). The consultation engaged ship owners and operators, users of shipping services, maritime unions and employee representatives and other interested parties. That consultation has resulted in the Coastal Trading (Revitalising Australian Shipping) Amendment Bill 2017, which is currently before Parliament.

The Government, as part of its commitment to coastal trading reform, also canvassed opinions on multiple proposed training initiatives as part of the *Coastal Shipping Reforms: Discussion Paper* (Discussion Paper) process. Feedback from stakeholders on those reforms was mixed. In the absence of strong support, the Government will continue to consider the need for seafarer training initiatives.

A full list of stakeholders who made submissions in response to the Australian Government's discussion paper on coastal trading reform is available on the Department of Infrastructure and Regional Development's website.

The terms of reference for the MWDF were to provide advice on maritime skills and workforce development. As such, the Government does not consider that such a forum would be an appropriate body to provide advice on broader Australian shipping policy.

The Government notes that the Council of Australian Governments Industry and Skills Council established the Australian Industry and Skills Committee (AISC) in 2015 to give industry a formal role in policy direction and decision-making for the vocational education and training sector. The terms of reference for the AISC are available at [www.aisc.net.au](http://www.aisc.net.au).

Industry Reference Committees (IRC) advise the AISC about the currency of the competencies that underpin vocational qualifications, and oversee the development of these competencies to meet industry training needs. The current Maritime IRC is comprised of the following organisations:

- Maritime Industry Australia Limited
- Australian Maritime Officers Union
- Australian Institute of Marine and Power Engineers
- Maritime Union of Australia
- Australian Maritime Safety Authority
- Serco Asia Pacific
- Fremantle Ports
- Toll Shipping
- TT-Line Company (Spirit of Tasmania)
- WA Fishing Industry Council
- Association of Marine Park Tourism Operators Pty Ltd
- South Australian Oyster Growers Association

#### Recommendation 6

The Committee recommends that the Australian Government undertake a focussed and targeted review of the Australian maritime industry, with a view to growing and supporting the Australian maritime industry and developing policies that appropriately manage the operation of flag of convenience vessels in Australian waters.

The Australian Government **does not support this recommendation.**

The Government has already undertaken a number of reviews of the Australian maritime industry. Reviews that have been already conducted, or are being conducted, by the Government include (but are not limited to):

- *Northern Australia Transport Study* (Final report yet to be released).
- Review of the *Coastal Trading (Revitalising Australian Shipping Act) 2012* as informed by the *Coastal Shipping Reforms Discussion Paper* (released on 21 March 2017).
- *Regulation of Australian Agriculture*, Productivity Commission Inquiry Report, 15 November 2016.
- *Competition policy review* (Harper review), 31 March 2015.

- *Tasmanian Shipping and Freight*, Productivity Commission Inquiry Report, 7 March 2014.
- *Strengthening Economic Relations between Australia and New Zealand*, Joint Australia-New Zealand study, 13 December 2012.

The findings from these reviews continue to be pursued through amendments to the Tasmanian Freight Equalisation Scheme Ministerial Directions, amendments to the *Competition and Consumer Act 2010* and the Coastal Trading (Revitalising Australian Shipping) Amendment Bill 2017. The Government notes that this Inquiry in itself forms another review into the Australian maritime sector.

The Government has a robust set of policies in place to manage the operation of vessels in Australian waters covering vessel seaworthiness, workers' conditions and environmental impacts, regardless of the vessel's flag-state. International conventions give powers to states to ensure ships do not pose an unreasonable threat to safety of the ship's crew or the marine environment whilst in their waters.

Port State Control (PSC) inspections are the internationally accepted method used to ensure that foreign ships complying with international conventions when in the port of another State. In Australia, this regime is administered by AMSA, which inspects ships whilst in Australian waters.

AMSA uses a risk profiling system to assist in allocating inspection resources in the most effective manner. It inspected 3271 ships of 5502 eligible visiting ships in 2016.<sup>3</sup> Australia's PSC regime is internationally regarded as world leading.

#### Recommendation 7

The Committee recommends that the Australian Government undertake a comprehensive whole of government review into the potential economic, security and environmental risks presented by flag of convenience vessels and foreign crews.

The Australian Government **does not support this recommendation.**

As outlined in Recommendation 6 above, the Government has already undertaken a number of reviews of the Australian maritime industry in relation to potential economic and environmental risks in the maritime industry. Given the multitude of reviews of different aspects of the maritime sector that have already been conducted or are being currently progressed by the Government, as well as existing security and environmental protections in place, another review is not considered necessary.

Foreign flagged vessels are an important supporting element of Australia's economy. International trade (imports and exports), much of which is carried by foreign flagged vessels, comprises at least 40% of Australia's GDP. Foreign-flagged vessels will continue to be an essential element of Australia's prosperity and development for the foreseeable future.

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<sup>3</sup> AMSA's Port State Control Report is available online at [www.amsa.gov.au/vessels/ship-safety/port-state-control](http://www.amsa.gov.au/vessels/ship-safety/port-state-control).

The Australian Government has security arrangements in place to monitor all vessels and personnel entering Australia and a clear protective security regime for ports and ships, underpinned by legislation. Maritime security arrangements are regularly reviewed to ensure security settings are commensurate with the threat level. These arrangements form a core part of the Australian Border Force (ABF) and the Department of Immigration and Border Protection's (DIBP) work.

ABF was established in 2015, as the operational arm of DIBP. The establishment of the ABF represents a significant shift in the level of inter-connection between all border operations. It has brought together all immigration and customs operational border functions, deploying operational resources together with partner agencies, including border protection and enforcement activities on behalf of over 50 Commonwealth, State and territory agencies.

As the operational enforcement arm of DIBP, the responsibilities of the ABF extend to air and seaports as well as land and maritime domains.

#### *Maritime Crew Visa*

Australia has a universal visa requirement. All applicants must meet identity, character, security and other requirements relevant to the visa they are applying for. DIBP regularly assesses and reviews all visa products to improve security and maintain the smooth operation of visa policy.

The maritime crew visa (MCV) was introduced in 2007 with the following features incorporated into the visa to provide an appropriate visa for the maritime industry:

- automated processing of electronic applications, with paper applications also available;
- the ability for third parties, such as shipping and manning agents, to apply for an MCV on behalf of sea crew;
- allows multiple entry to Australia;
- three-year validity; and
- nil visa application charge.

In designing the MCV, DIBP sought to balance the need for security and information against the realities of the international shipping industry. There are very high levels of immigration compliance by the commercial maritime industry through the MCV program.

Strict qualifying criteria apply to all online applications to maintain the integrity of the DIBP's border management and enable DIBP to control volumes of applications. System checks are run automatically during the application processing, so that applications are assessed against DIBP's risk systems. These risk systems include both the Central Movement Alert List and the Safeguards system.

Foreign sea crew, supernumerary crew and any accompanying spouses and dependent children are able to apply for an MCV. There are approximately 260,000 MCVs granted per year.

## Dissenting Report by Government Senators O'Sullivan, Back and Bushby

### Dissenting Report

The dissenting report took into account that the current arrangements for Australia's transport security regime were robust.

The dissenting report found the ratification of the Maritime Labour Convention and its ongoing implementation through the *Navigation Act 2012* and other legislation showed that the governments 'supports a comprehensive framework for protecting rights of seafarers'.

In addition, the dissenting report recognised the development of a national freight and supply chain strategy and the current efforts to reform coastal shipping to reinvigorate the shipping industry.

The dissenting report found that there was no need to implement an inspection program by the Fair Work Ombudsman as appropriate arrangements were already in place.

The Australian Government **agrees with the dissenting report** as represented by Senators O'Sullivan, Back and Bushby.

As outlined in Recommendations 1 to 7 above, the Government considers Australia already has appropriate arrangements in place in the maritime sector, with regard to Australia's national security, fuel security, minimum employment law standards and marine environment.

The Government agrees that international shipping, including foreign flagged ships, plays an essential role in Australia's freight task and that Australia's shipping services must remain open and competitive.

The Government agrees that compelling evidence was presented in the course of this inquiry that Australia's transport security regime is robust. The Government agrees that the considerable increase in Maritime Crew Visa refusals in recent years demonstrates the strengthened integrity measures that form part of the visa assessment processes implemented in recent years.

The Government agrees that the implementation of the MLC through the *Navigation Act 2012*, as well as its ongoing enforcement, demonstrates a comprehensive framework exists in Australia for protecting the working rights of seafarers.

The Government agrees that the existing licensing scheme under the *Coastal Trading (Revitalising Australian Shipping) Act 2012* is burdensome and results in costly and unintended consequences. The Government also agrees that progressing development of a national freight and supply chain strategy, combined with coastal shipping reform, will contribute to ensuring safe and efficient shipping has an increasing and ongoing role in Australia's national freight network.