



# **POTENTIAL LEGISLATIVE AMENDMENT TO SUPPORT SHORE-BASED SEAFARERS' WELFARE IN AUSTRALIA**

**Human Rights at Sea  
International Maritime Levy Campaign  
Focus: Australia**



**HUMAN RIGHTS AT SEA**

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## Introduction

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*“insert: (c) the facilitation of, or support for, seafarer welfare services.”<sup>1</sup>*

Following a campaign by the New Zealand Seafarers’ Welfare Board (SWB) supported by the publishing of a commissioned independent report by Human Rights at Sea with attached Counsel’s opinion titled; ‘New Zealand: Under-Funding of Seafarers’ Welfare Services and Poor MLC Compliance’, the resultant actions by the New Zealand Government in subsequently amending the Maritime Transport Act 1994<sup>2</sup> to assure sustainable funding of welfare centres across its ten ports, set a new international precedent for the use of national levy funds for seafarers’ welfare needs.

The report issued on 16 April 2020 had five key recommendations:

1. Recommend that the New Zealand Government immediately review the funding mechanism, or lack thereof, for shore-based seafarers’ welfare facilities and services under the MLC throughout the State;
2. Recommend that the New Zealand Government draft and propose relevant amendments to national legislation to support seafarer’s welfare services, for example to the Maritime Transport Act 1994 in order to give effect to Regulation 4.4 of the MLC;
3. Recommend that the New Zealand Government introduce an updated compulsory port levy system in line with that advocated by the ITF, ICS and other maritime welfare organisations, which specifically focus on sustainably delivering seafarers’ welfare services;
4. In the alternative, it is recommended that the New Zealand Government ring-fence and allocate part of the current Maritime Levy currently in place to assure future funding and the protection of seafarer’s welfare facilities and services;
5. Recommend that the SWB raise a formal complaint with the ILO for non-compliance with a Convention obligation should the New Zealand Government fail to subsequently act.”

The Regulatory Systems (Transport) Amendment Act 2021 (30 March 2021) came into force with the key amendment to Section 191 amended (Maritime levies), which stated: “After section 191(2)(b), **insert: (c) the facilitation of, or support for, seafarer welfare services.**” This updated Part 14 General provisions relating to shipping.

**This New Zealand precedent reflects a simple but effective approach to meaningful legislative change which supports sustainable seafarer welfare service funding by states with maritime levy income.**

**As the next step in the International Maritime Levy Campaign, Human Rights at Sea issues Counsel’s advisory opinion in respect of the reasoning, evidence, and legislative route that the Australian Government should follow for securing long-term funding to support shore-based seafarer welfare services throughout the country.**

ENDS.

<sup>1</sup> <https://www.legislation.govt.nz/act/public/2021/0009/latest/LMS464121.html>

<sup>2</sup> <https://www.humanrightsatsea.org/2021/07/01/in-force-new-zealand-amends-legislation-to-provide-assured-seafarer-welfare-funding/>

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## ADVISORY OPINION

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# POTENTIAL LEGISLATIVE AMENDMENT TO SUPPORT SHORE-BASED SEAFARERS' WELFARE IN AUSTRALIA

### Executive Summary

1. The arrangements currently in place in Australia as regards the Commonwealth's Maritime Labour Convention (**MLC**) obligations for shore-based seafarer welfare are showing signs of strain. This, if left unchecked, may well leave the Commonwealth in breach of those obligations.
2. This short advisory opinion canvasses a modest amendment to the *Australian Maritime Safety Authority Act 1990 (Cth)*. That amendment would have the effect of requiring the Australian Maritime Safety Authority (**AMSA**) to ensure that the provision of shore-based seafarer welfare is sufficiently funded to ensure Australia's compliance with its obligations under the MLC.
3. That, by definition, would ensure compliance with those obligations, as well as - perhaps more importantly still - ensuring the proper provision of shore-based seafarer welfare.

### Introduction

4. For some time, Human Rights at Sea has been concerned about the lack of adequate and long-term sustainable funding to support shore-based seafarers' welfare (**SBSW**) facilities and services in a number of jurisdictions.
5. Human Rights at Sea has been working with various stakeholders to develop a sustainable model for SBSW - and to achieve necessary legislative reform.
6. Human Rights at Sea has achieved particular success in New Zealand supporting the Seafarers' Welfare Board, with the Parliament of New Zealand having amended the Maritime Transport Act 1994 (NZ) to ensure the funding of SBSW through maritime levies.
7. Human Rights at Sea is now seeking to achieve similar legislative reform in Australia.
8. We are instructed in support of Human Rights at Sea's work in Australia.

9. Within that context, we have been asked to:
  - (a) consider the seafarer welfare requirements imposed by the MLC;
  - (b) assess whether a similar amendment to that enacted in New Zealand could be implemented in Australian legislation;
  - (c) provide example texts(s) that could be inserted to any legislative update offering potential variations for due consideration;
  - (d) opine if there is a need for new standalone legislation to cover the use of the maritime levy for funding and sustaining seafarer's welfare facilities in Australia;
  - (e) opine if there are any legislative and/or policy matters that could prevent a change to the identified legislation; and
  - (f) identify any other pertinent considerations for the successful adoption of example text in updated legislation.
10. This document is an advisory opinion for the purpose of evaluating law reform proposals and should not be taken to constitute formal legal advice.

## **Obligations of Member States under the MLC**

11. The MLC establishes minimum living and working conditions for seafarers. The MLC entered into force internationally in August 2013 and currently has been ratified by 98 countries<sup>3</sup> representing the vast majority of global tonnage. Australia has ratified the MLC and all amendments to it currently in force.
12. The basic structure of the MLC is as follows:
  - (a) the Articles and Regulations set out the core rights and principles and the basic obligations of ratifying States.
  - (b) there is then a Code setting out how the Regulations should be implemented. Part A of the Code consists of mandatory Standards, but Part B comprises non-mandatory guidelines. Implementation of Part A is flexible, in that many provisions are drafted in general terms and States are entitled to give effect to the detailed requirements through "substantial equivalence" (see Article VI).
13. The primary focus of the MLC is on the responsibility of shipowners and Flag States and on standards onboard vessels. However, there are also provisions relating to shore-based welfare services. The relevant provisions are as follows:
  - (a) Article IV.4 states that every seafarer has the right to "welfare measures". Pursuant to Article IV.5 each Member shall "ensure" that such rights are "fully implemented".

<sup>3</sup> [https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO::P11300\\_INSTRUMENT\\_ID:312331](https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO::P11300_INSTRUMENT_ID:312331)

(b) Regulation 4.4.1 requires Member states to:

- “ensure” that shore-based welfare facilities “where they exist” are easily accessible. Standard A4.4 paragraph 1 makes clear that welfare facilities “where they exist” are available for the use of all seafarers without discrimination;<sup>3</sup> and
- promote the development of welfare facilities “in designated ports” to provide seafarers with access to “adequate” welfare facilities and services. Paragraph 2 of Standard A4.4.2 clarifies that development of welfare facilities should be promoted “in appropriate ports” and that Members are to determine, after consultation with shipowners’ and seafarers’ organisations, which ports are to be regarded as “appropriate”.

(c) Regulation 4.4.1 must be respected and “implemented in the manner set out in the corresponding provisions of Part A of the code” (MLC Article VI.2). However, if a Member is not in a position to implement in accordance with Part A then it can do so “through provisions in its laws and regulations or other measures which are substantially equivalent to the provisions of Part A” (MLC Article VI.3).

14. The MLC also contains guidance which recommends provision of adequate welfare centres. The relevant guidelines are as follows:

(a) Guideline B4.4.1 paragraph 1 requires Members to take measures to ensure that adequate welfare facilities and services are provided in designated ports of call.

(b) Guideline B4.4.2 provides:

- “1) Each Member should provide or ensure the provision of such welfare facilities and services as may be required, in appropriate ports of the country.*
- 2) Welfare Facilities and services should be provided, in accordance with national conditions and practice, by one or more of the following:*
  - (a) public authorities;*
  - (b) shipowners’ or seafarers’ organisations concerned under collective agreements or other agreed arrangements; and*
  - (c) voluntary organisations.*
- 3) Necessary welfare and recreational facilities should be established or developed in ports. These include:*
  - (a) meeting and recreation rooms as required;*
  - (b) facilities for sports and outdoor facilities, including competitions;*
  - (c) educational facilities; and*
  - (d) where appropriate, facilities for religious observances and for personal counselling.*

[...]

<sup>4</sup> Such shore-based welfare facilities are in existence in Australia.

- 8) *Measures should be taken to ensure that, as necessary, technically competent persons are employed full time in the operation of seafarers' welfare facilities and services, in addition to any voluntary workers."*
- (c) Guideline B4.4.4 states that financial support for port welfare facilities should be made available through one or more of:
- Grants from public funds;
  - Levies or other special dues from shipping sources;
  - Voluntary contributions from shipowners, seafarers, or their organisation; and
  - Voluntary contributions from other sources.
15. We note that the MLC gives ratifying states a great deal of flexibility as to implementation of their obligations thereunder:
- (a) Article IV.5 allows implementation of seafarers' right to "welfare measures" to be achieved through applicable collective bargaining agreements, other measures or "in practice", as well as through legislation.
- (b) Article V states that a state shall "implement and enforce laws or other regulations or other measures that it has adopted to fulfil its commitments under this Convention..." (emphasis added). This means that, if legislation is adopted, it must be implemented or enforced, but makes clear that measures other than legislation are allowed.
- (c) Again, Article VI.3 allows States to implement Part A of the Code through "laws and regulations or other measures" (emphasis added).
16. It should be appreciated that the MLC is not especially hard-edged in stipulating what member states must do in terms of SBSW. It also does not particularise how member states ought to go about achieving adequate SBSW.

## The Legal Regime in Australia

17. As noted above, Australia has signed and ratified the MLC.
18. The governmental body within Australia that is responsible for implementation of the MLC in Australia, including Regulation 4.4, is AMSA. The primary vehicle through which AMSA looks to meet its obligations in this regard is the ASWC.
19. However, there is no Australian statute or regulation that assigns any responsibility to AMSA (or any other body) for SBSW. The closest one gets is in the Explanatory Statement to the *Marine Navigation (Regulatory Functions) Levy Regulations 2018 (Cth)*, made under the *Marine Navigation (Regulatory Functions) Levy Act 1991 (Cth)*. The Explanatory Statement states that the levies collected under those acts are to be used "to deliver services consistent with Australia's obligations under international conventions such as the United Nations Convention on the Law of the Sea (UNCLOS), the International



Convention for the Safety of Life at Sea (SOLAS) and the Maritime Labour Convention (MLC).” Limited guidance can be derived from this high-level statement.

20. More widely, AMSA’s activities are funded (in whole or in part) by levies raised under various levy acts and regulations. In particular, the *Australian Maritime Safety Authority Act 1990 (Cth)* (**AMSA Act**) provides by s 48 that the levies received under the statutes and regulations listed below are to be paid to AMSA:

- (a) *Marine Navigation Levy Act 1989 (Cth)*
  - *Marine Navigation Levy Regulations 2018 (Cth)*
- (b) *Marine Navigation Levy Collection Act 1989 (Cth)*
  - *Marine Navigation Levy Collection Regulations 2018 (Cth)*
- (c) *Marine Navigation (Regulatory Functions) Levy Act 1991 (Cth)*
  - *Marine Navigation (Regulatory Functions) Levy Regulations 2018 (Cth)*
- (d) *Marine Navigation (Regulatory Functions) Levy Collection Act 1991 (Cth)*
  - *Marine Navigation (Regulatory Functions) Levy Collection Regulations 2018 (Cth)*
- (e) *Protection of the Sea (Shipping Levy) Act 1981 (Cth)*
  - *Protection of the Sea (Shipping Levy) Regulation 2014 (Cth)*
- (f) *Protection of the Sea (Shipping Levy Collection) Act 1981 (Cth)*
  - *Protection of the Sea (Shipping Levy Collection) Regulations 2014 (Cth)*
- (g) *Protection of the Sea (Imposition of Contributions to Oil Pollution Compensation Fund—Customs) Act 1993 (Cth)*
- (h) *Protection of the Sea (Imposition of Contributions to Oil Pollution Compensation Fund—Excise) Act 1993 (Cth)*
- (i) *Protection of the Sea (Imposition of Contributions to Oil Pollution Compensation Fund—General) Act 1993 (Cth)*

21. In practice, AMSA collects three types of levies from “non-exempted vessels”:

- (a) the Marine Navigation Levy (**MNL**) (pursuant to the *Marine Levy Regulations 2018 (Cth)*). The MNL is used to recover the cost of operating and maintaining marine aids to navigation systems and to ensure that Australia complies with its obligations under international conventions such as the *International Convention on Safety of Life at Sea* and the *Convention on the International Regulations for Preventing Collisions at Sea*.
- (b) the Protection of the Sea Levy (**PSL**). The PSL is used to fund a range of maritime safety regulation activities (e.g., ship inspections and surveys) to support and establish the seaworthiness of Australian vessels.

- (c) the Regulatory Functions Levy (**RFL**). The RFL is used by AMSA to ensure seafarer and ship safety in accordance with Australia's obligations under the MLC.
22. However, there is no express statement in the Australian legislation (other than in the clue given in the title to the various acts and regulations) as to what the particular levy is to be used for.
23. As an Australian government entity, however, AMSA is also subject to the *Public Governance, Performance and Accountability Act 2013 (Cth)* (**PGPA**). Under the framework established by the PGPA, AMSA is required to publish a "Cost Recovery Implementation Statement". Relevantly, this statement explains for what purposes AMSA uses the moneys raised under the various different levies. None of them looks to be related to SBSW and it seems a fair inference that it is not explicitly allocating expenditure to SBSW (if so, it is not a significant amount of expenditure).

## The Problem

24. Whilst there is no evidence that Australia is as yet in breach of its SBSW obligations under the MLC, we are instructed that there is evidence that the current system is not meeting need. In particular, the funding of SBSW is said to be faltering, in part because self-funding elements (such as the sale of top-up vouchers and SIM cards or souvenirs) are no longer generating funds, and in part because donations are decreasing.
25. Organisations such as the Mission to Seafarers and Stella Maris receive relatively little in the way of public money. They receive some donations from companies, organisations, charities and individuals, as well as support from the ASWC, but this is apparently now proving to be inadequate.
26. If this direction of travel continues, the situation may well be reached that the Commonwealth of Australia no longer complies with its obligations under the MLC to provide support to SBSW facilities and services.
27. Further, we are instructed that there is potential for improvement in the ASWC's SBSW operation.



## The Proposed Solution

28. One question that arises from the above is whether a change in the law will help the situation. It seems to us that the answer is that it may well and that it almost certainly cannot hurt to make express provision in law that one part of AMSA's responsibilities is to ensure the proper funding of SBSW using maritime levies. At the very least this would focus effort and provide AMSA with a firm basis for directing funding towards SBSW.
29. Of course, one likely consequence of such a provision may be additional bureaucracy, necessary to ensure that this increased flow of "public money" is appropriately spent. The cost of that bureaucracy will itself have to be defrayed from the resources generated by the levies. It is reasonable to infer, however, that AMSA already has systems in place for accounting for its use of moneys obtained through the imposition of the various levies: see paragraph 23 above. That being so, any additional bureaucracy would surely be minimal.
30. The legislative amendment that we propose is to amend the AMSA Act to add a new
- (a) subsection 48(3), giving the Minister the power to determine by regulation what AMSA is to spend levies money on; and
  - (b) subsection 48(4) to say that the existing arrangements are to continue until the s48(3) regulations come into force.
31. The regulations made under the new s48(3) would themselves state that the purpose of the levies includes the following: *"ensuring that shore-based seafarer welfare is sufficiently funded to ensure compliance with Australia's obligations under the MLC"*. The regulations would also list the other purposes for which the levies are to be used.
32. An alternative approach would be to amend the AMSA Act to include a new section, s 48A, which would expressly specify that AMSA may, without limiting the other purposes to which the moneys may be used, use moneys raised from the MNL or RFL for funding SBSW. This approach would avoid the need for specifying the other purposes for which the levies are to be used.
33. The advantage of both proposals is that neither would require amendment of the existing levy acts and regulations themselves, the scheme of which is that they do not expressly state the purposes for which the levies are to be used.

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2 February 2022

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# Who We Are

## BACKGROUND

Human Rights at Sea was established in April 2014. It was founded as an initiative to explore issues of maritime human rights development, review associated policies and legislation, and to undertake independent investigation of abuses at sea. It rapidly grew beyond all expectations and for reasons of governance it became a registered charity under the UK Charity Commission in 2015.

Today, the charity is an established, regulated and independent registered non-profit organisation based on the south coast of the United Kingdom. It undertakes **R**esearch, **A**dvocacy, **I**nvestigation and **L**obbying specifically for human rights issues in the maritime environment, including contributing to support for the human element that underpins the global maritime and fishing industries.

The charity works internationally with all individuals, commercial and maritime community organisations that have similar objectives as ourselves, including all the principal maritime welfare organisations.

## OUR MISSION

To explicitly raise awareness, implementation and accountability of human rights provisions throughout the maritime environment, especially where they are currently absent, ignored or being abused.



## STAY IN CONTACT



We welcome any questions, comments or suggestions. Please send your feedback to:  
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ISBN 978-1-913252-48-9

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