Inquiry into the Extent, Nature and Consequence of Insecure Work in the ACT

Submission by the Maritime Union of Australia

April 2017

Submitted to:

The Standing Committee on Education, Employment and Youth Affairs
Legislative Assembly Building
London Circuit
CANBERRA ACT 2601
By email only: committees@parliament.act.gov.au

Submitted by:

Ian Bray
Assistant National Secretary
Maritime Union of Australia
Level 2, 365 Sussex Street
SYDNEY NSW 2000
Telephone: (02) 9265 8410
Facsimile: (02) 9261 3481
Email: ian.bray@mua.org.au
Website: www.mua.org.au

Contact:

Nicola Maher-Boyle
Executive Legal Advisor
Maritime Union of Australia
Level 2, 365 Sussex Street
SYDNEY NSW 2000
Telephone: (02) 9265 8114
Facsimile: (02) 9261 3481
Email: nicola.maher@mua.org.au

1. **Overview**

1.1. By way of background, the MUA was formed in 1993 with merger of the Seamen's Union of Australia and the Waterside Workers Federation of Australia, which trace their formation to 1872. The MUA represents approximately 16,000 Australian seafarers, stevedores and other maritime workers, and covers more than 90% of Australian maritime workers. The MUA is also a proud affiliate of the 4.5 million members International Transport Federation.

1.2. We note this Parliamentary inquiry aims to explore the nature and consequences of insecure work in the ACT. This submission seeks to address the terms of reference outlined below, by firstly highlighting their applicability to the insertion of partnership agreements in the maritime industry. We will then provide recommendations with regards to closing loopholes in legislation to prevent this, specific to the ACT.

1.3. The MUA would also like to formally request the opportunity to provide verbal evidence at a public hearing with respect to this submission, which we understand are currently scheduled to take place between May and August 2017.

2. **Partnership Agreements in the Maritime Industry**

2.1. We seek to address Terms of Reference 1 (i) and (ii), outlined below:

The extent, nature and consequence of insecure work in the ACT, including but not limited to:

(i) the use of group training, labour hire and sham contracting in particular industries and in the supply chains of particular sectors; and

(ii) allegations that labour hire and sham contracting arrangements are being used to avoid workplace laws and other statutory obligations, such as underpayment of wages and entitlements and avoidance of payroll and income tax.

2.2. The example we draw your attention to is a contractual arrangement increasingly used in the maritime industry, which heightens the insecurity of workers by removing them from the *Fair Work Act 2009* (Cth) ("FWA") and regulating the work under State based partnership legislation. Partners are not 'national system employees' within the meaning of the FWA and are therefore not covered by the Act.

2.3. Partnership agreements have been harnessed by towage companies within the maritime industry, in circumstances where such companies have historically employed workers under enterprise agreements. Instead of workers being employed by these companies, they are instead offered to form a partnership with other workers, and then engaged by the company via a contract for service. By becoming a partner in a partnership as opposed to a worker under a contract of employment, workers fall under the coverage of the relevant State or Territory partnership Act and not the FWA. We submit that this arrangement is a misrepresentation of a contract for service, when in reality, it maintains the features associated with a traditional employee/employer relationship.

2.4. Traditionally, partnerships have been associations of persons who have agreed to pursue a joint business venture for their mutual benefit. They provide an avenue for two

or more persons to operate a business and share the profits, responsibilities and risks of the business. Since their inception, partnership agreements have traditionally been harnessed by white collar professionals such as lawyers, doctors and accountants. We acknowledge the success and suitability of partnerships in such industries, but assert that they have no place in the maritime industry or blue collar industries more broadly. Workers who enter into partnership agreements (at the request of the principal) will lose hard won entitlements such as:

2.4.1. National Employment Standards (ss 59-131 of the FWA);
2.4.2. Modern awards (ss 132-168L of the FWA);
2.4.3. Equal remuneration (ss 300-306 of the FWA);
2.4.4. Adverse action (s 342 of the FWA);
2.4.5. The ability to engage in protected industrial action (ss 406-416A);
2.4.6. Annual leave (ss 86-94 of the FWA);
2.4.7. Personal leave (ss 95-107 of the FWA);
2.4.8. Parental leave (ss 67-69 of the FWA);
2.4.9. Long service leave (ss 113-113A of the FWA);
2.4.10. Notice of termination (ss 117-123);
2.4.11. Right of entry (ss 478-480);
2.4.12. Unfair dismissal (ss 379-405);
2.4.13. The ability to enter into an enterprise agreement (s 172 of the FWA); and
2.4.14. Recourse through the Fair Work Commission.

This list is by no means exhaustive and is by way of example only.

2.5. Further, as partners are not 'employees', they are not eligible to be a member of a union. They are also ineligible to be covered by workers' compensation legislation, and instead must source their own personal accident and income protection insurance.

2.6. The use of partnership agreements in lieu of traditional employment relationship arrangements in in recent years, is of great concern to the MUA and our members. We submit that the use of partnership agreements in place of employment contracts is contrary to the legislative intent of the FWA, which intend to cover the field in respect of employee/employer relations between corporations and individuals in Australia. We submit these arrangements are being used to avoid the protections and entitlements contained in the FWA.

Example of Partnership Agreements in the Maritime Industry

2.7. Recently we have seen the use of partnership agreements in place of employment contracts in the Australian towage industry. Towage employer Teekay had historically employed employees under an enterprise agreement. In 2015, Teekay negotiated an enterprise agreement with said employees, but simultaneously BHP Billiton Mitsubishi Alliance engaged Rivtow Marine for the purpose of making partnership agreements to displace those employees, who were then terminated. The net result was that 229 permanent employees, with hundreds of years of collective experience, were removed overnight and replaced by persons engaged under partnership agreements.

January 2016 saw this model engaged by towage giant Svitzer, in the Pilbara region of Western Australia, on the Gorgon Project. Chevron contracted its towage work to

Svitzer, who subsequently engaged workers in partnerships to perform the work. The partnerships were initiated despite Svitzer entering into negotiations with the maritime unions for an enterprise agreement for the Gorgon Project.

Liabilities Incurred by Workers Under a Partnership Agreement

2.8. As mentioned above, partnership legislation is State based and differs slightly from State to State, however the overarching principles remain the same. Under section 6(1) of the *Partnership Act 1963* (ACT), a partnership is defined as the relation between people carrying on a business in common with a view of profit (including an incorporated limited partnership). Partners are unable to profit from any monetary success of partnership and are instead paid set remuneration (in the agreements we have seen so far). We argue that any partnership of this nature is not a true partnership within the definition set out in the Act, due to the inability to profit from the partnership within the true sense of the word. Further, the principal retains control over the hours and location of the work performed, in addition to owning the asset used to carry out the work of the partnership (i.e. the vessel), all of which are consistent with a relationship of employment.

2.9. By way of example, under 13(1) of the *Partnership Act 1963* (ACT), every partner in a firm (other than an incorporated limited partnership (ILP)) is liable jointly and severally with the other partners, for all debts and obligations of the firm incurred while the partner is a partner. Further, under section 13(2), if the partner is an individual (such as a worker), in the event of their death, their estate is also severally liable in respect of the administration of any debts. In practical terms, should a maritime worker die at sea, their estate will remain liable until the partnership's debts are discharged.

2.10. Under s 10(1) of the aforementioned Act, in the event of any wrongful act or omission of a partner in a firm (other than an ILP), in circumstances where they have acted in the ordinary course of the business of the firm or with authority, each partner will be liable for any loss or injury caused, or any penalty incurred to the same extent as the partner who committed the Act. For example, if loss is suffered due to time delays by a corporation who has contracted the services of the partnership, the partnership is liable for that loss. Similarly, a partnership will be liable for any fines or penalties incurred by the partnership for breaches of safety standards.

2.11. Whilst we are unaware of any specific examples of the *Partnership Act 1963* (ACT) being utilised as a means to exploit entitlements and protections under the FWA, we believe legislative change is required in the ACT, so that it does not follow suit of the respective State Acts which have been exploited in this way.

3. Recommendations

3.1. In circumstances where partnership agreements have the ability to heighten the insecurity of workers and allow for corporations to avoid paying income tax whilst essentially retaining the role of an employer, legislation needs to be amended so as to prohibit same. We recommend that such an amendment prohibit partnerships in circumstances where it can be demonstrated that an employee/employer relationship remains, despite there being a contract of service or a proposed contract of service

between a partnership and a principal. We would be pleased to work with the Committee and provide them with our draft legislative amendment should they wish to review same.

3.2. Given the severe consequences for workers engaged in such contractual agreements, the *Partnership Act 1963* (ACT) along with each State and Territory piece of partnership legislation, needs to be amended along the lines described above so as to prohibit the use of partnership agreements in industries in which they were not designed to operate.

3.3. We are aware that it is not within the ACT's jurisdiction to amend Commonwealth legislation, however, for the sake of completeness we advise that in addition to the above recommendations, it is our opinion that there also needs to be legislative change under the FWA in order to achieve our objective. We believe that there needs to be a provision inserted or an amendment made to an existing provision under Division 6, Part 3-1, of the FWA so as to prohibit partnership agreements in circumstances where they amount to sham contracts.