A proposal to reform the Subclass 988 Maritime Crew Visa (MCV) system

MUA Policy Briefing Paper

March 2021

Introduction

The current maritime crew visa (MCV – Subclass 988 visa) is no longer fit for purpose and requires an overhaul. The reasons why the MCV is no longer fit for purpose are:

- It is now being utilised for purposes for which it was not originally designed, noting its original intention and purpose was as a temporary visa for non-national seafarers on international ships calling temporarily at Australian ports for cargo loading and discharge as part of a continuing international voyage;
- It is now approved for use by non-national seafarers on foreign registered ships authorised to undertake interstate voyages under a Temporary Licence issued under the *Coastal Trading (Revitalising Australian Shipping) Act 2012* (CT Act), which by definition is a ship that has ceased an international voyage and is operating in domestic coastal trading and is competing in a domestic industry;
- It is the only temporary visa with a long duration (valid for up to 3 years) that applies to domestic non-national workers that does not include any of the labour market tests applicable to visas granting work rights in a domestic industry set out in the Migration (LIN 18/036: Period, manner and evidence of labour market testing) Instrument 2018;
- It is open to abuse by shipowners/operators and ship charterers operating ships in intrastate coastal trade that do not opt into the CT Act (under s12) and are therefore not permitted to access the Customs exemption provision provided by s112 of the CT Act, which should mean that non-national seafarers on such vessels, which are presumably declared to be imported and entered for home consumption under the *Customs Act 1901* (Customs Act), have 5 days to (i) transfer to another ship; or (ii) leave the country; or otherwise become an illegal non-citizen; and
- It does not require the same standards of background checking as is applied to Australian workers, including seafarers, required to hold a Maritime Security Identification Card (MSIC) under the *Maritime Transport and Offshore Facilities Security Act 2003* for work in or entry to a maritime security zone.

All these factors interact to undermine employment opportunities for Australian seafarers in Australian domestic shipping.

Furthermore, the MCV and its administration no longer meets international best practice, exemplified by the Canadian system given effect by the Canadian Special Measures Policy for the Maritime Sector (SMPMS). Under this policy the *Canadian Coasting Trade Act 1992* and Canada's Labour Market Impact Assessment (LMIA) requirements, which accompany its temporary visa system, work conjunctively to require applicants for a temporary licence to operate in Canadian coastal trade to undertake a labour market assessment to assess the availability of suitably qualified Canadian seafarers before a non-national seafarer is issued with a temporary work visa for employment on a foreign ship in Canadian coastal trade. Furthermore, the Canadian SMPMS obligates the Canadian visa issuing agency to obtain a Letter of Concurrence from the Canadian seafarers labour union attesting to the availability or otherwise of suitable national seafarers to undertake the work on the ship applying for a license, which is incorporated in the Labour Market Impact Assessment.

Summary of the proposed remedies

The MCV system

- Retain the existing MCV – Subclass 988 visa for seafarers on ships involved in a continuing international voyage undertaking short port calls within Australia, , enabling multiple entries over a period of up to three years
- However, it is proposed that the existing MCV be made more flexible so it also applies to foreign seafarers on foreign registered ships operating in the following circumstances within Australia, applicable for up to 60 days (with an extension allowed for up to 90 days in exceptional circumstances), once in any 3-year period:
    - Ships undertaking repairs, maintenance or dry docking in Australia.
    - Mother ships at anchorage in a roadstead in coastal waters awaiting barge loading.
    - Ships docked or at anchorage holding inventory such as refined petroleum product awaiting access to an onshore storage facility or oil awaiting refining.
    - Ships involved in production and processing e.g. marine products.
    - Ships held at an anchorage point or wharf for biosecurity reasons or if detained by the Australian Maritime Safety Authority.
- For all other circumstances non-national seafarers must hold a Temporary Skill Shortage (TSS) work visa (subclass 482) that includes a labour market test consistent with the Canadian system, provided seafarer occupations are on the Government's occupational skills shortage list.

Complementary amendments to the Customs Act and the CT Act

- Amend the Customs Act to ensure to ensure that the 60-day maxium duration of the Special Conditions MCV works in harmony with the ship importation and home consumption elements of the Customs Act; and
- Amend the CT Act to ensure that shipowners/operators/charterers issued with a TL under the CT Act cannot circumvent the new visa requirements through accessing the Customs Act exemption provision in s112 of the CT Act.

Overhauling the MCV system – the remedy to make the MCV system fit for purpose

The most appropriate remedy is that the Commonwealth modify the existing MCV by extending its application to a number of specified circumstances, in addition to its application to non-national seafarers on ships undertaking short port calls as part of a continuing international voyage. This would require an amendment to Regulation 2.01 (Classes of visas), Division 2.1 (Classes, criteria, conditions etc) s1 Table (Classes of visas provided for by the Act) of the Migration Regulations 1994 that derives from s38B of the *Migration Act 1958*.

This Briefing Paper proposes that there be five identifiable ship operations that would define the circumstances where a non-national seafarer could utilise the modified MCV, these being work on:

1. Foreign registered ships undertaking interstate coastal voyages authorised by a Temporary Licence issued under the CT Act.
2. Foreign registered ships undertaking repairs, maintenance or dry docking.
3. Foreign registered mother ships at anchorage in a roadstead in coastal waters awaiting barge loading.
4. Foreign registered ships held at an anchorage point or wharf for biosecurity reasons.
5. Foreign registered ships detained by the Australian Maritime Safety Authority under the *Navigation Act 2012*.

Under this proposal the modified MCV would permit non-national seafarers to work on foreign ships operating in one of the five defined circumstances for up to 60 days available to be accessed only once by a non-national seafarer in any three year period.

The modified MCV would operate as originally intended by permitting foreign seafarers' multiple entries for up to three years while holders are on a ship involved in a continuing international voyage undertaking short Australian port calls.

It is proposed however that the assessment requirements for obtaining an existing MCV (Maritime Crew visa (subclass 988)) be amended so that the security, character and identify checking is strengthened consistent with and equivalent to the security, character and identity checking required for the issue of a Maritime Security Identification Card (MSIC) under the *Maritime Transport and Offshore Facilities Security Act 2003*.

In all other circumstances, the MCV system must be altered so that in the absence of a suitable and available Australian seafarer that would need to be on a Government occupational skills shortage list, non-national seafarers must hold a Temporary Skill Shortage (TSS) work visa (subclass 482) if an employer sponsor wishes to recruit them for employment in Australia , supplemented with a Letter of Concurrence procedure as provided under the Canadian Special Measures Policy for the Maritime Sector.

To avoid any chance of abuse of the sponsored work visa system proposed, it will be necessary to remove the loopholes in current TSS visa sponsoring arrangements to eliminate the practice of employers sponsoring non-national maritime workers in permissible occupations (on the skills shortage lists) and then transferring those workers to maritime occupations that are not currently eligible for sponsorship e.g. Integrated Rating (those occupations specified in ASMA Marine Order 73).

Additionally, the role of ASMA in assessing the marine qualifications of workers sponsored by employers under a work visa for employment in maritime occupations, will need to be strengthened.

Complementary legislative reforms

In parallel with amendments to the Migration Regulations 1994 to create a modified MCV, the Customs Act and the CT Act require amendment to ensure the changes to the MCV system operate effectively and as intended.

These amendments will be necessary to ensure that the 60 day duration of the modifiedMCV works in harmony with the ship importation and home consumption elements of the Customs Act and that shipowners/operators/charterers issued with a TL under the CT Act cannot circumvent the new visa requirements through accessing the exemption provision in s112 of the CT Act.

Amendments to the *Customs Act 1901* (Customs Act)

To ensure that the 60-day duration of the modified MCV works in harmony with the ship importation and home consumption elements of the Customs Act, the Customs Act will require the following amendment:

- That s49A(1)(b) of the Customs Act (Ships and aircraft deemed to be imported) be amended by reducing the time period from the current 30 days that a ship can be deemed not to be imported, to 5 days, but accompany that amendment with a new S49A(1)(b)(i) specifying that an extension be permitted, on application, beyond 5 days (consistent with the general requirements in clause 988.512 of the Migration Regulations 1994), for up to 60 days requiring consequential amendment of clause 988.512 of the Migration Regulations 1994) for a specified purpose, being one of the following five purposes:

    1. Foreign registered ships undertaking repairs, maintenance or dry docking.
    2. Foreign registered mother ships at anchorage in a roadstead in coastal waters awaiting barge loading.
    3. Foreign registered ships involved in production and processing e.g. marine products.
    4. Foreign registered ships held at an anchorage point or wharf for biosecurity reasons.
    5. Foreign registered ships detained by the Australian Maritime Safety Authority under the Navigation Act 2012.

To ensure the ship importation and entering for home consumption decisions of Australian Border Force officers are transparent it is also proposed that s49A(4) of the Customs Act be amended, requiring, upon issuing a Notice that deems the ship to not be imported or to be imported, that a s49A(4) Notice to be published in real time on the Australian Border Force (ABF) website.

Amendment of the Australian Customs and Border Protection Notice No. 2014/61 (International Ships Undertaking Maintenance and Repair — Interim Process)

That this Notice be updated to reflect the 60 day duration and that the requirement for seafarers on ships undertaking maintenance and repair (Condition 2 above) to hold a Temporary Work (Short Stay Activity) visa (subclass 400) be altered to a requirement to hold the proposed modified MCV.

Amendment to the *Coastal Trading (Revitalising Australian Shipping) Act 2012* (CT Act)

To ensure that shipowners/operators/charterers issued with a TL under the CT Act cannot circumvent the new visa requirements it will be necessary to repeal s112 in the CT Act. This will mean that foreign ships with foreign crew engaged in intrastate trade, whether or not they have been approved to opt in to the CT Act (under s12), and ships engaged in interstate trading voyages authorised by a Temporary Licence (TL) will require their foreign seafarers to hold a Temporary Skill Shortage (TSS) visa (subclass 482) that includes a labour market testing requirement, supplemented with a "Letter of Concurrence" procedure that verifies or otherwise the availability of national seafarers as provided under the Canadian Special Measures Policy for the Maritime Sector, but only in circumstances where seafaring occupations are on the Government's occupational skills shortage list.

Explanation of the proposed amendments to the Customs Act and CT Act

The intention of the proposed policy is:

- To provide for ships that are normally deemed imported and entered for home consumption by Customs (i.e. those that break an international voyage – to operate in coastal trading and in other circumstances) to be considered imported and entered for home consumption after 5 days, rather than for up to 30 days as is currently provided.
- That ships that conform with the five specified circumstances can apply to be deemed not imported for up to 60 days (similar to the continuous voyage permit requirement in the former Navigation Act 1912) thus allowing foreign national seafarers to work on those ships under the proposed modified MCV for up to 60 days:
    - » This would include seafarers on ships (cruise ships in particular with very large crews) where the ship wants to undertake ship maintenance, repair and dry-docking without the ship being declared imported by the Australian Border Force, thus avoiding the need for genuine work visas for crew at the expiry of 5 days, which is the limitation surrounding the conditions of the current Maritime Crew Visa held by crew on cruise ships temporarily entering Australia (though Australian Customs and Border Protection Notice No. 2014/61 (International Ships Undertaking Maintenance and Repair — Interim Process), provides for ships to be able to undertake repairs and maintenance during a (current) 30 day window during which time the crew may remain on a MCV and not be required to apply for a work visa).
- That no foreign seafarer can work in Australia for longer than 60 days on any form of MCV (in any 3-year period).

- That any foreign seafarer wanting to work in Australia for longer than 60 days must hold a Temporary Skill Shortage visa (Subclass 482), that replaced the 457 visa, subject to seafarers being on a Government skills shortage list:
    - » And that for those seafarers a labour market test apply, supplemented by the Canadian Letter of Concurrence procedure, so that even for such a visa, it only be issued if there are no suitably qualified Australian seafarers available for work.
    - » The opportunity for a foreign seafarer to work in Australia for over 60 days would be dependent on the sponsor of the 482 visa demonstrating that a labour market test revealed no suitable and available Australian seafarer.
- That the CT Act be amended so that there is no provision that overrides the Customs Act requirements (by repealing s112), thereby denying intrastate shipping operators the opportunity to take advantage of opting into the CT Act to simply allow them to employ foreign seafarers on an MCV for up to 3 years as is presently the case.

Explanation of how the new policy is designed to uphold the integrity of economic regulation for intrastate ships that a state government may wish to introduce

Some State Governments may consider a proposal to reintroduce a form of economic regulation of intrastate coastal trading ships (similar to the former Restricted Use Flag [RUF] provisions that applied in Qld prior to 2013), which if adopted would result in a requirement that intrastate trading ships be registered on the Australian General Shipping Register (and by definition, employ Australian seafarers).

If a form of economic regulation of intrastate coastal trading was adopted there is currently a mechanism by which intrastate shipowners/operators could legally bypass State economic regulation noting that at present, such owners/operators are regulation free i.e. the CT Act does not apply as it does not apply to intrastate trade.

The mechanism is that such operators could choose to apply to opt-in to the CT Act via s12 (Application to vessels on intrastate voyages). While this would require such operators to apply for a Temporary Licence (TL), apply for voyage authorisations and report under the CT Act etc, it would also allow those operators to utilise the benefit of s112 of the CT Act (Customs treatment of certain vessels) which specifies that a *"vessel is not imported into Australia for the purposes of the Customs Act 1901 only because it is used to carry passengers or cargo under a temporary licence or an emergency licence"*.

This means that because a TL ship, by virtue of s112 of the CT Act is not deemed to be imported under s49A of the Customs Act or entered for home consumption under s68 and s71A of the Customs Act, the migration arrangements allow the MCV to apply for up to 3 years, thereby enabling foreign seafarers to be engaged for up to a period of 3 years in coastal trade (for all voyages authorised under the TL – usually applied for multiple voyages over a 12 month period, which can be easily rolled over each 12 months).

As the Commonwealth CT Act would override state law (due to s109 of the Constitution - *Inconsistency of laws - When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid*) a State intent to economically regulate intrastate shipping could be thwarted.