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**Our Reference:** JP / Comments on MSA Draft  
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Dear Mr. Mphahlele and Mr. Phungo

## COMMENTS ON THE DRAFT MERCHANT SHIPPING AMENDMENT BILL, 2013

We refer to General Notice 349 of 2013 published by the Department of Transport in Government Gazette no: 36329 of 3 April 2013 in which will the Draft Merchant Shipping Amendment Bill, 2013 has been published for comments.

You may be aware that, at present, the Bowman Gilfillan has been retained by the Department of Transport (specifically the Chief Directorate: Maritime) to provide advice and assistance in connection with a raft of South African maritime legislation including the Merchant Shipping Act. Whilst the matters canvassed in the Draft for comment do not for specifically fall within our Terms of the Reference from the Department of Transport, there is a measure of overlap in respect of the work which we have been doing and, for this reason, we consider it appropriate to the furnish you with our comments on the Draft which we hope will be of assistance.

Please note that references herein to "the Draft" means the Draft Merchant Shipping Amendment Bill, 2013, and references to "the principal Act" means the Merchant Shipping Act, 1951, as amended.

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1. **The replacement of the word “seafarer” for “seaman” in the definitions section of the principal Act:** If the amendment is to be made, then it follows that all references to “seaman” or “seamen” in the principal Act ought to change accordingly. It is noted that there have been selective changes made to a handful of references; the majority of references to “seaman” in the principal Act are not subject to amendment in the Draft. This is a serious shortcoming, because if the current definition is replaced it will leave a lacuna as regards the definition of seamen where the term remains in the principal Act.
  2. **Proposed amendments to section 91 and 92:** It is noted that the intention of this amendment is to broaden the scope of application from a “*South African ship*” (as already defined in the principal Act) to a ship that is “*registered or licensed in the Republic*”. If one reads this change in the context of Chapter IV of the principal Act as a whole, then the proposed amendment is inconsistent, in that there is repeated use of the term “*South African ship*” throughout this Chapter. There do not appear to be any compelling reasons why the proposed sections 91 and 92 should be inconsistent with the balance of the Chapter. Indeed, the intended change could lead to anomalies and unintended consequences in the treatment of the seafarers to whom the provisions apply in practice. It is therefore submitted that the proposed changes to sections 91 and 92, inasmuch as they deal with the application to ships, ought to be applied consistently across Chapter IV as a whole or not at all.
  3. **Proposed amendment to section 102 (1):** There is a typographical error in the penultimate line of the Draft. The word “*the*” before the word [seamen] should be the definite article “*a*”.
  4. **Proposed amendment to paragraph (f) of section 102(3):**
    - 4.1. It is noted that this provision introduces the term “*fishing vessel*”. This is not a defined term in the principal Act (although it is noted that the term “*fishing boat*” is defined). It is submitted that the drafters ought to consider introducing an appropriate definition for “*fishing vessel*” or cross-referencing the definition to other appropriate legislation such as the Marine Living Resources Act, no. 18 of 1998.
    - 4.2. It is also submitted that the language of the amendment would benefit from being redrafted in the following form:

"(f) the wages which each [seamen] seafarer is to receive, [;] including particulars of the basic wages to be paid, payments to be made for overtime, bonuses, allowances paid, paid leave or any other additional payments, or in the case of a fishing vessel, the basic daily rate and commission scales;"

5. **Proposed amendments to paragraph (i) of section 102(3) as read with proposed subsection 111A(2):** It is submitted that there is a measure of duplication in the proposed provisions which may lead to uncertainty in interpretation and it is submitted that this uncertainty may be removed by consolidating the provisions into 102(3)(i) (thus deleting proposed 111A(2)) and amending the language as follows:

"(i) the amount of a seafarer's entitlement to annual leave or, where applicable, the formula used to calculate annual leave and the remuneration payable during that period of leave;"

6. **Proposed amendments to paragraphs (j) and (m) of section 102(3):** it is noted that the intended paragraphs introduce the term "*shipowner*". This term is not defined in the principal Act and is likely to lead to uncertainty in interpretation should it be introduced without a definition. It is submitted that the term "**owner**" should be used instead of "*shipowner*" as this term is already defined in the principal Act and is used extensively in connection with references to ship owners.

7. **The definition of "basic wages" in the proposed subsection 204(5)(a):** It is noted that the use of the term "pay" in the first line of the Draft is not consistent with the language of labour law legislation in the Republic (cf. Labour Relations Act, 66 of 1995 and the Basic Conditions of Employment Act, 75 of 1997). The use of the word "pay" is used primarily as a verb in labour legislation as opposed to its use in the Draft as compensation for employment service rendered. It is submitted that the appropriate language, in the context of this proposed provision, would be the term "**remuneration**" instead of "pay".

8. **Proposed subsection 102(5)(b):**

8.1. It is submitted that the first line in the Draft is ambiguous in that it is not clear as to whether this provision is intended to apply to (i) all ships including fishing vessels, or (ii) fishing vessels only. It is submitted that this issue ought to be clarified in the Draft.

8.2. It is noted that the proposed provision in the draft capitalises the words

"Bargaining" and "Statutory Council" without introducing a definition for these terms as would normally be adopted with legislative drafting. It is assumed that these terms are intended to cross-reference to the terms introduced by the Labour Relations Act which, themselves, are not capitalised. It is therefore submitted that the better approach to the drafting would be the following:

"if there is in place an agreement with the employer covering wages and conditions of employment agreed to under a registered bargaining council or statutory council in terms of the Labour Relations Act, 1995 (Act 66 of 1995), then the terms of such agreement shall apply to the employment of the seafarer concerned."

9. **Substitution for section 110:** It is noted that the Draft proposes to remove the words "*wholly engaged in plying between ports in the Republic*". Given that there are, in practice, non-SA registered or licensed ships of various descriptions plying ports in South Africa which employ South African citizens as crew, one must question the wisdom of deleting these words from the existing provision. Indeed, such a provision may provide a loophole for owners to register vessels offshore so as to employ South African crew of any age, which would defeat the purpose of the provision. It is therefore submitted that these words (or words to this effect) serve a useful purpose and should not be deleted but retained in the amended provision.
10. **Proposed amendments to subsection 111:** It is noted that the amended provisions seek to remove the reference to "*South Africa ship*", but subsection (7) appears to have been overlooked in that it still retains the term "*South African ship*". This is inconsistent with the proposed changes.
11. **Proposed section 111A(1):** It is submitted that the wording of this clause is unclear as regards its application to fishing vessels; firstly, in respect of clarity of drafting, and, secondly, in that the drafting implies an underlying assumption that all employees on fishing vessels are subject to a collective bargaining agreement. It is submitted that the necessary clarity and flexibility might be introduced by amending the proposed provision as follows:

"111A(1) Every seafarer employed or engaged on a ship that is registered or licensed in the Republic shall be entitled to leave accrued at the rate of at least 2.5 days per month of employment, except in the case of a seafarer employed on board a fishing vessel subject

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to an agreement concluded with a registered bargaining or statutory counsel in which case the terms of such agreement shall apply."

12. **The language of the proposed section 111A(3) may be improved as follows:**

"111A(3) Leave is deemed to commence when the seafarer arrives at his or her proper return port."

13. **The language of the proposed section 121 may be improved as follows:**

"(1) [When a seaman of a South African ship is discharged, the] The master or owner of [such] a ship that is registered or licensed in the Republic shall cause to be delivered to [such] a [seaman] seafarer a full and true account of his all her wages in a form approved by the Authority on a monthly basis or, in the case of a seafarer employed on board a fishing vessel, on the day of arrival in port after month end where the total period between delivery of the account and the preceding account shall not exceed forty five days."

14. **Proposed amendments to section 130:**

14.1 Given that the Draft intends making amendments to the section, it would be opportune to make a logical amendments to subsection (1) of section 130 in respect of the current reference to the National Welfare Act, 100 of 1978, which, in large part, has been repealed by the Advisory Board on Social Development Act, 3 of 2001, or assigned to the provinces by Proc R7 in GG16992 of 23 February 1996.

- 14.2 The language of the proposed to subsection (2) is not consistent with the section 130 as a whole and may be improved as follows:

"(2) Allotment notes may provide for payment of any portion or all of a seafarer's wages to any person designated by him or her to be the recipient of such wages or part thereof."

- 14.3 The language of the proposed subsection (6) maybe improved as follows:

"(6) The master, owner or authorized agent of the owner shall bear the costs incurred in affecting payment of the allotment of all or part of a seafarer's wages."

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15. **Proposed section 159A:**

15.1 At present there is no obligation imposed upon the master or owner of a ship to draw up a formalised complaints procedure. The Draft, in its current form, assumes the existence of such a documented procedure in circumstances where the same is not mandatory. In the premises, it is submitted that the new section ought to incorporate this obligation, first and foremost. Accordingly, it is submitted that subsection (1) ought to read as follows:

"(1) A master or owner of a ship that is registered or licensed in the Republic shall draw up and keep on board a complaints procedure and shall make such complaints procedure available to all seafarers."

15.2 It is noted that there is an attempt in subsection (2) to introduce the Maritime Labour Convention 2006 into the principal Act. In this regard, we submit as follows:

15.2.1 The reference in paragraph (a) to Consolidated Maritime Labour Convention is incorrect in that the word "*consolidated*" not part of the official title of the convention, but is used informally by the industry. Accordingly, any reference to "consolidated" ought to be deleted.

15.2.2 As is customary when referring to international conventions in the principal Act, there ought to be a full reference to the Maritime Labour Convention in the definitions section of the principal Act.

15.2.3 Furthermore, subparagraph (a) presupposes that the Convention has force of law in the Republic which does not appear to be the case (even if it were to be ratified by the Republic as contemplated). It is submitted that if the principal Act is to be the enabling legislation could there ought to be logical amendments to the principal Act which make it clear that the convention has force of law.

15.2.4 If the Convention is to have force of law in the Republic then there is bound to be repetition of subject matter and conflict between existing provisions in the principal Act and the Convention insofar as they deal with employment of

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crew and related matters. On the face of it, the Draft does not reconcile the potential conflict which will arise. Put differently, there has not been an attempt to harmonise the relative provisions of the principal Act and the Convention. This is likely to cause significant confusion and difficulties in application. It is submitted that this matter deserves serious attention and further consideration.

- 15.3 As regards subsection (3), it appears to be the intention of the drafters that the reference to a "complaints" refers to a complaint made in terms of subsection (2). It is submitted that, to avoid confusion, subsection (3) ought to refer specifically to a complaint made in terms of subsection (2), given that elsewhere in the principal Act there are provisions relating to complaints made in respect of other matters (such as the seaworthiness of a ship) which contain their own procedures for complaints.
- 15.4 As regards subsection (4), it is submitted that that is the language employed is vague and is likely to lead to confusion and litigation between conflicting parties as regards the meaning and effect of the provision. It is submitted that there ought to be a clearer mechanism for seafarers to escalate a complaint beyond the first stage complaint to the master as contemplated in subparagraph (3). For example:
- 15.4.1 the there no existing legislative framework within the principal Act or the SAMSA Act (SAMSA being the "Authority" referred to in the proposed subsection) dealing with the manner in which complaints by seafarers are to be addressed by SAMSA;
- 15.4.2 a framework would need to be created to allow SAMSA to establish, for example, a tribunal, which clearly sets out its jurisdiction and scope of authority etc;
- 15.4.3 moreover, there are difficulties in simply cross-referencing subsection (4) to the CCMA, given that its jurisdiction is limited in terms of (1) subject matter of disputes over which it may preside and (2) its jurisdictional reach; that is to say, the CCMA has no jurisdiction to hear extra-territorial matters;
- 15.4.4 finally, the reference to "*any legally recognised institution*" is so widely stated that it could be argued that it has no meaning at all and is therefore

unenforceable.

16. **Proposed amendment to section 162 (1):** It is noted that the drafters have reduced the number of complaints required to trigger the complaints mechanism created by this section from three to one. The proposed changes, however, overlook the need to make other consequential amendments to subsection (1) and subsection (3) (c) in that:
- 16.1 the other references to "*seaman*" therein needs to change to "*seafarer*";
  - 16.2 the reference to "*apprentice-officers*" needs to be deleted; and
  - 16.3 words expressed in the plural need to change to the singular, such as the word "*they*" in subsection (1).

We hold ourselves open to discuss any of the points raised in these comments with you.

With kind regards

Yours sincerely



**BOWMAN GILFILLAN**