Maritime Union of Australia (MUA)

Submission to the Joint Standing Committee on Trade and Investment Growth

Inquiry into the Australian Government's approach to negotiating trade and investment agreements

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About the Maritime Union of Australia (MUA)

The Maritime Union of Australia (MUA) is a division of the 120,000-member Construction, Forestry, Maritime, Mining and Energy Union (CFMMEU), an affiliate of the 2-million member Australian Council of Trade Unions (ACTU) and an affiliate of the 20-million-member International Transport Workers' Federation (ITF).

The MUA represents approximately 14,000 workers in the shipping, stevedoring, offshore oil and gas, port services and commercial diving sectors of the Australian maritime industry. The MUA is also part of an Offshore Alliance with the Australian Workers Union (AWU) that jointly organises workers across the Australian offshore oil and gas industry.

The ITF represents workers involved in the shipping, ports, rail, road, airline and logistics components of global supply chains.

Introduction

The MUA is pleased for the opportunity to make a submission to this inquiry.

We have two primary concerns about recent free trade agreements (FTAs):

- Firstly, that they are either eroding human rights and labour standards (and this is particularly the case in the maritime sector), or not placing sufficient weight on the obligations that Australia and its partners in FTAs have to uphold and advance human rights and labour standards; and
- Secondly that the International Maritime Services Annexes that are emerging in recent FTAs are undermining national maritime cabotage, notwithstanding the express commitment in FTAs to respect national maritime cabotage. This is particularly the case in Australia with its weak and ineffectual cabotage law (the *Coastal Trading (Revitalising Australian Shipping) Act 2012*) that has contributed to the decline of the Australian shipping industry.

In relation to our first concern, we support the submissions of the Australian Council of Trade Unions (ACTU) and the Australian Fair Trade and Investment Network (AFTINET), and therefore will not be making specific submissions on terms of reference (a), (b), (d), (g), (h), (i), or (j).

What follows addresses our second concern, which broadly relates to terms of reference (c), (d) and (f).

The MUA submission

Term of Reference (c): The consultation process undertaken with interested parties, including representatives of industry and workers throughout the process

Neither the MUA, nor any maritime labour union in Australia, nor the relevant industry association representing Australian shipowners, ship operators and ship charterers, Maritime Industry Australia Ltd (MIAL) are consulted before or during FTA negotiations, unless we independently obtain information of concern, usually through the media or our international networks, and make representations to the Government or the Department of Foreign Affairs and Trade (DFAT) about our concerns.

Even when we raise issues or concerns, we are invariably doing so without the benefit of seeing the text of what is proposed or agreed in-principle.

Furthermore, by the time we have an opportunity to raise issues, it is usually after in-principle agreement is reached on text and in such circumstances DFAT trade negotiators are loathe to even

suggest changes or amendments. We are invariably given long explanations that our concerns are unfounded, and there is no cause for concern.

Because, as a labour union, we are usually raising issues of a human rights or labour rights character derived from the rights in ILO Labour Conventions, we believe the current consultation practice is contrary to Australia's obligations under the ILO, which is founded on tripartism. It is a clear breach of the ILO guiding principles and the principles contained in ILO Conventions that DFAT, as the representative of the Government, is only consulting one of the tripartite partners, the relevant Department (government) and not the labour union or employer interests which are the other two legs of tripartism.

This has been a serious problem in the maritime sector where the Department of Infrastructure, Transport, Regional Development, Communications and the Arts (DITRDCA), whom DFAT has relied on for expert advice on maritime matters, is the perhaps the most voracious advocate of foreign shipping interests, and labour exploitation, and has, by its administration of the Coastal Trading Act, all but destroyed Australian cabotage.

Not a single Australian ship has been protected from being undermined by foreign ships in Australian coastal trade in over a decade of operation of the Coastal Trading Act, to the extent there are only 13 large trading ships remaining on the Australian General Shipping Register (AGSR), and it is likely that two more of those will withdraw from the AGSR in 2024. That is despite Australia being the fourth largest user of ships on the globe, where the purchase of foreign shipping services is costing the nation over $23 billion annually[1] and wage theft, modern slavery practices and exploitation of seafarers on those foreign ships is effectively the preferred business model of foreign ship owners servicing Australia, where regulatory oversight is failing to prevent those practices.[2]

DFAT appears to have not taken any of those circumstances into account when it negotiated the International Maritime Services Annex in the Australia-United Kingdom Free Trade Agreement and recommended it to the Government for approval, and appears to be repeating the errors of judgement in negotiating the Australia-European Union Free Trade Agreement. We have been advised by DFAT, but provided with no documentation, that the Australia-EU FTA will contain a near identical International Maritime Services Annex as in the Australia-UK FTA. It is our assessment that DFAT has been poorly advised by the DITRDCA, which failed in any way to seek to protect Australia's national interest in its advice to DFAT.

DFAT has clearly relied heavily on DITRDCA advice on cabotage law and practice in settling the terms of International Maritime Services Annexes. While that is entirely reasonable, unfortunately DITRDCA relies on an incorrect understanding of cabotage, and appears not to understand its own policy or Australia's cabotage law.

National maritime cabotage is the system of reserving a nation's domestic (port to port) maritime commerce for its own businesses and citizens for reasons of national security and economic security and to ensure the retention of skilled workers and decent jobs for the future of the industry.

This was acknowledged in the Department's submission to an Inquiry into the effect of restrictions and prohibitions on business (red tape) on the economy and community in 2017, where it submitted "*In the maritime context, Australian flagged vessels operated by Australian seafarers are given*

[1] Department of Foreign Affairs and Trade, *Australia's Top 25 Imports, Goods & Services 2021-22*, www.dfat.gov.au/sites/default/files/australias-goods-services-by-top-25-imports-2021-22.pdf
[2] See Australia Institute/Centre for Future Work, *Robbed at Sea: Endemic Wage Theft from Seafarers in Australian Waters*, September 2022 https://australiainstitute.org.au/report/robbed-at-sea/

priority access to domestic shipping in Australia, although foreign shippers can partake in the domestic shipping market subject to the licensing requirements laid out in the Coastal Trading (Revitalising Australian Shipping) Act 2012 (the Coastal Trading Act)".[3]

It is also acknowledged in section 3 of the Coastal Trading Act (Object of Act) which says 'The object of this Act is to provide a regulatory framework for coastal trading in Australia that includes the following sub-Objects:

- (b) facilitates the long-term growth of the Australian shipping industry; and
- (d) maximises the use of vessels registered in the Australian General Shipping Register in coastal trading.'

Additionally, in Part VI of the now repealed *Navigation Act 1912*, which the Coastal Trading Act replaced, the legislation clearly reserved coastal trade i.e. cabotage trade, to Australian registered ships or ships with Australian crew because s286(1) dealing with Permits to unlicensed ships provided that "*Where it can be shown to the satisfaction of the Minister, in regard to the coasting trade with any port or between any ports in the Commonwealth or in the Territories: (a) that no licensed ship is available for the service; or (b) that the service as carried out by a licensed ship or ships is inadequate to the needs of such port or ports; and the Minister is satisfied that it is desirable in the public interest that unlicensed ships be allowed to engage in that trade, the Minister may grant permits to unlicensed ships to do so, either unconditionally or subject to such conditions as he or she thinks fit to impose"* while s286(2) provided that "*The carriage, by the ship named in a permit issued under this section, of passengers or cargo to or from any port, or between any ports, specified in the permit* ***shall not be deemed engaging in the coasting trade***." *(MUA emphasis)*. Therefore by statute, coastal trade was 'reserved' for licenced ships which were Australian ships or ships employing Australian crew.

On the other hand, the Australia-UK FTA contains a provision in Annex II which says: "*Australia reserves the right to adopt or maintain any measure with respect to maritime cabotage services*" where "cabotage" is defined as "*the transportation of passengers or goods between a port located in Australia and another port located in Australia and traffic originating and terminating in the same port located in Australia.*"

That is not Australia's policy or definition of cabotage, because it makes no reference to 'priority access' or 'reservation' of that trade to Australian ships and ships engaging Australian crew.'

DITRDC has clearly adopted the FTA definition, contrary to Australia's and the Department's own policy position, appearing to draw its interpretation of cabotage from the global cabotage deregulation agenda of the United Nations Conference on Trade and Development (UNCTAD) which now describes cabotage as a market to be deregulated, and has conveniently dropped the national 'reservation' or 'priority access' aspect of cabotage.

Regrettably, DFAT appears to accept that flawed position.

Had it been more willing to consult at an early stage, listen to all perspectives and accommodate the range of views held by the social partners, it surely would not have agreed to the UK position that undermines Australian cabotage it agreed to in the FTA negotiations.

[3] Department of Infrastructure and Regional Development, Select Committee on Red Tape, *Submission to the inquiry into the effect of red tape on cabotage*, April 2017

There is no benefit to Australia whatsoever from accepting the UK position, but there is potential detriment.

Term of reference (e): How the economic, social and environmental impacts of an agreement are considered and acted upon?

It is our submission that there is no watertight barrier to encroachment in Australian coastal trade by UK and possibly in the future, by EU ships, by inclusion of the Annex II provision that says "*Australia reserves the right to adopt or maintain any measure with respect to maritime cabotage services*" because:

- Firstly, there is a potential loophole in the Coastal Trading Act that could be exploited by a UK or EU shipowner to gain access to Australian coastal 'feeder services' as defined in the International Maritime Transport Services Annex (8B) of the UK FTA. At present, we are advised by the DITRDCA that the main feeder services in Australia, the Bass Strait trade between Tasmania and Melbourne, invariably comprises a mix of cargo (i) consigned under 'through bills of lading' (international cargo) and cargo (ii) not so consigned (domestic or cabotage cargo), and in those circumstances the Department treats those mixed cargo shipments as all 'cabotage' cargo, which under the FTA is carved out from the operation of Annex 8B. However, should DITRDCA take a different view in future e.g. a different Ministerial Delegate appointed under s111 of the Coastal Trading Act who determines that mixed cargo is a 'feeder service' or international cargo because it is predominantly consigned under a 'through bill of lading', meaning it is not cabotage cargo, that transhipment trade would no longer be protected by the cabotage carve out in the FTA, and UK and EU ships would have 'equivalence' with Australian ships in such trade.
- Secondly, a future Parliament could amend the Coastal Trading Act to redefine 'coastal trading' or cabotage, and expose domestic 'feeder services' to the Annex 8B provisions, which would have the effect of UK and EU ships being equivalent to Australian ships:
  - Given that UK ships have lower labour costs than Australian ships, that would present an attractive option for cargo owners to seek to utilise the lower cost UK ships in Australian feeder services, in circumstances where the Minister's delegate under the Coastal Trading Act, has a history of taking into account lower freight costs i.e. lower ship operational costs, in deciding to grant Temporary Licences to foreign registered ships to the detriment of Australian registered ships.

Given that Bass Strait trade comprises six Australian registered ships employing Australian seafarers, more than half the Australian large trading fleet, any encroachment on that trade by foreign registered ships would have a major and devastating impact on the commercial or Australian merchant shipping fleet and on seafarer employment.

That would have negative consequences for:

- Australian investment in Australian ships;
- Australian seafarer employment;
- The availability of suitable ships on which mandatory sea service is required for completion of STCW[4] seafarer qualifications and occupational licences;
- Australian tax collections from Australian shipowners and from seafarers; and
- Ships to support the Defence sealift capability which relies on Australian ships and crews.

[4] The International Convention on *Standards of Training, Certification and Watchkeeping for Seafarers* (STCW), 1978.

None of those factors were analysed and costed in any form of economic or social cost benefit analysis by DITRDCA in provision of advice to DFAT, and DFAT did not undertake its own independent analysis or seek advice from the social partners.

It is our submission therefore that economic, social and environmental impacts were not assessed in this example, which has led to acceptance of an International Maritime Services Annex which is contrary to Australia's national interest.

It is our submission, that the Australian Government adopt a new approach when negotiating trade and investment agreements with trading partners that:

- Firstly, not just embeds consultation with the social partners and civil society groups in its modus operandi, in addition to the relevant government agency or agencies, but involves the social partners throughout the negotiation process;
- Secondly, requires an economic and social cost benefit analysis to be undertaken on impacts of key provisions under negotiation, that examines:
  - ❖ The impact on Australian businesses, including service provider businesses such as supply chain businesses – not just the producers of goods that seek to benefit from a trade agreement;
  - ❖ The impact on investment in affected segments of the supply chain – in this case investment in Australian ships and related maritime infrastructure;
  - ❖ The impacts on Australian employment, including seafarer employment, noting that onboard seafarers are a source of supply to onshore maritime skills required across the supply chain; and
  - ❖ The impact on human rights and labour standards, having regard to rights under all ILO Conventions to which Australia is a signatory; and
- Thirdly, Government policy:
  - ➢ We note that in relation to International Maritime Services Annexes, they are being negotiated at the very time Australian Government policy is to revitalise Australian shipping and seafarer employment. The two policy approaches are diametrically opposed.

Term of Reference (f): The steps taken to ensure agreements protect and advance Australia's national interests, including the ability to regulate in the public interest;

It is our submission that the International Maritime Services Annex to recent FTAs are contrary to Australia's national interest.

Neither DFAT, nor DITRDCA have been able to explain how Australia benefits from agreeing to the International Maritime Services Annexes, and have claimed in all responses to the MUA that it simply maintains the status quo.

If that was the case, how does DFAT explain the DFAT Regulation Impact Statement: Final Assessment (National Interest Analysis) which at Para 206. says "*States and territories were also consulted in the development of agreement text* ***which went beyond previous FTA practice, particularly an International Maritime Services Annex*** *(MUA emphasis), and higher ambition commitments on Domestic Regulation. The commitments are consistent with Australia's domestic system but the specific listing of them in the FTA went beyond current FTA practice*."[5]

[5] DFAT, *National Interest Analysis* [2022] ATNIA 3 - Free Trade Agreement between Australia and the United Kingdom of Great Britain and Northern Ireland (Adelaide, 17 December 2021 and London, 16 December 2021) [2022] ATNIF 3 https://www.dfat.gov.au/sites/default/files/tabling-uk-fta-agreement-australian-parliament-national-interest-analysis.pdf

Annex 8B in the Australia UK FTA is very specific. It requires that both Australia and the UK must accord to vessels supplying an international maritime transport service (such as transhipment) and flying the flag of the other Party, and international maritime transport services suppliers of the other Party, treatment no less favourable than it accords, in like circumstances, to its own vessels or international maritime transport services suppliers.

That is not consistent with Australia' cabotage policy which is intended to reserve cabotage trade to Australian ships employing Australian seafarers.

That clearly means that as a result of this FTA, Australia is no longer able to exclusively reserve to Australian registered ships i.e. registered under the *Shipping Registration Act 1981* (SRA, which defines what makes a ship uniquely Australian – see for example s8 [Australian-owned ships][6] - the carriage of cargo between Australian ports (if the carriage of that cargo is an international shipping service as defined in the FTA, such as a feeder service or a service to re-position owned or leased empty containers between ports of that Party) or to the ships of service suppliers, like towage, mooring and pilotage services that are supporting ship activities such as feeder services or repositioning of empty containers.

Furthermore, the FTA explicitly prohibits either Australia or the UK from adopting or maintaining a measure that requires all or part of any international cargo to be transported exclusively by vessels registered in that Party or owned or controlled by nationals of that Party.

Additionally, the FTA also explicitly prohibits either Australia or the UK from adopting or maintaining a cargo-sharing arrangement with a non-Party concerning maritime transport services[7], including dry and liquid bulk and liner trade.

This provision would appear to be contrary to required reform of Part X of the *Competition and Consumer Act 2010* (CCA) as has long been proposed by the Australian Competition and Consumer Commission (ACCC) and recommended by the Productivity Commission[8] and other stakeholders to the extent that where cargo sharing arrangements remain exempted from the CCA anti-cartel

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[6] Extract from the SRA -s8 Australian-owned ships (1) A reference in this Act to an Australian-owned ship shall be read as a reference to a ship that: (a) is owned by an Australian national or Australian nationals, and by no other person; (b) is owned (otherwise than as described in paragraph (c)) by 3 or more persons as joint owners, where the majority of those persons are Australian nationals; or (c) is owned by 2 or more persons as owners in common, where more than half of the shares in the ship are owned by an Australian national or Australian nationals. (2) For the purposes of paragraph (1)(c), where 2 or more persons are joint owners of a share or shares in a ship: (a) in the case of 2 or more particular shares that are owned by the same persons — the interest of each owner in the shares shall be ascertained by dividing the number of the shares by the number of the owners of the shares; and (b) in the case of a share to which paragraph (a) does not apply —the interest of each owner in the share shall be ascertained by dividing the number one by the number of the owners of the share; and, if the sum of the interests so ascertained in respect of all jointly-owned shares in the ship as being interests of an Australian national or Australian nationals is a whole number or a whole number and a fraction, such number of those shares as is equal to that whole number shall be deemed to be owned by an Australian national or Australian nationals. **This FTA renders that provision inoperable in relation to UK registered ships providing specified services.**

[7] 'Maritime transport services' is different to 'international maritime transport services', and is not defined in Annex 8B to the Australia-UK FTA.

[8] Productivity Commission *Inquiry into the Long-term productivity of Australia's maritime logistics system,* Final Report, January 2023 https://www.pc.gov.au/inquiries/completed/maritime-logistics/report/maritime-logistics.pdf

provisions, that would only apply to UK ships, and ships from other nations could not be exempted from the anti-cartel provisions of the CCA in relation to cargo sharing:

Those provisions are not in Australia's national interest.

We also draw the Committee's attention to an MUA submission of 1 September 2023 to the Australian International Trade Remedies Forum (ITRF) Sub-committee on Strengthening the Anti-Dumping System addressing the dumping of shipping services into Australia.

In that submission the MUA proposes that the Australian anti-dumping system requires reform to clarify that shipping services are within scope for consideration/investigation by the Anti-Dumping Commissioner and or by the Minister.

The MUA contention is that the 'price' of foreign registered ships engaged in trade with Australia i.e. the freight rate (the proxy for the price of the ship or shipping service) for Australian importers that involves a sea transportation component is lower than the price (the freight rate) that a domestic user of ships is required to pay in the domestic market of many exporting countries, particularly developed exporting nations, and as such falls within the definition of dumping as specified by the World Trade Organisation (WTO).

We ask that the Committee consider the implications of dumping of both goods and services when proposing improvements to the approach adopted by the Australian government when negotiating trade and investment agreements with trading partners.