27th January 2009

Committee Secretary
Senate Education, Employment and Workplace Relations Committee
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Parliament House
Canberra ACT 2600

By email:ewer.sern@aph.gov.au

Dear Secretary

Senate Standing Committee on Education, Employment and Workplace Relations
Inquiry into Fair Work Bill 2008

Inco Ships Pty Ltd appreciates the opportunity to provide a submission to the Senate Standing Committee on Education, Employment and Workplace Relations ("**Committee**") in relation to its inquiry into the Fair Work Bill 2008 ("**Inquiry**").

Inco Ships Pty Ltd ("**Inco**") is an Australian owned and operated company that specialises in the management of ships. Inco provides an entire ship management service including the employment and management of crew. It currently manages a fleet of eleven ships that comprise a mix of Australian flagged, foreign flagged that operate under both licenses and permits granted pursuant to the *Navigation Act 1912 (Cth).* Inco additionally operates vessel's that purely export cargo from Australia to foreign ports.

The *Workplace Relations Act 1996 (Cth)* ("**WRA**") and *Workplace Relations Regulations 2006* ("**WRR**") currently excludes from its application foreign corporations employing non-citizen crew members on vessels operating pursuant to permits granted under s.286 of the *Navigation Act 1912 (Cth).*

Permits granted under the *Navigation Act 1912 (Cth)* are either a single voyage permit ("**SVP**") or continuing voyage permit ("**CVP**"). Inco submits that the current provision in the WRA and WRR excluding foreign employers employing non-citizen crews on ships operating under these permits ("**exclusion**") should continue. Set out below are the factors that Inco considers should be taken into account in considering the ongoing operation of this exclusion provision.

Policy

Inco submits that the scope of the Inquiry is not able to fully address the relevance of the application of the exclusion. The impact of regulation in relation to the maritime industry generally is subject to the *Navigation Act 1912 (Cth)* that makes provision for terms and conditions of employment and other matters applicable to seafarers. The scope and range of application of provisions under that Act are determined according to a ship's registration, license or permit. The exclusion has the effect of remitting determination of the terms and

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conditions of non-citizen crew employed on foreign flagged permit ships to the *Navigation Act 1912*. The extent to which that is appropriate and meets Australia's transport and other policy requirements should be determined taking into account broader trade, economic and transport considerations than whether the exclusion should be maintained.

It should be noted that the exclusion was introduced at the time of amendments to the *WRA* that may otherwise have extended the scope and operation of the WRA beyond its traditional application. Over a period of several years prior to the introduction of amendments to the WRA that applied from 26th March 2006, applications had been made to the Australian Industrial Relations Commission ("**Commission**") for the application of awards of that Commission to non-citizen crew on foreign flagged ships operating under permits pursuant to s.286 of the *Navigation Act 1912*.

These were not at large applications to "rope in" all such vessels but were applications made with respect to several (three) ships. If the applications had been granted they would have resulted in an extension of the application of awards of the Commission with respect to the maritime industry beyond their traditional scope. In effect the Commission would have made a decision having policy implications on a selective basis were the applications to have been successful. The exclusion barred further proceedings at the time.

The effect of a recommendation to remove the exclusion will be to effect a significant change in policy in the absence of a review being undertaken into whether and any extent to which Australian laws should apply to non-citizen crew on foreign flagged vessels operating under the permit system.

Inco submits that the policy considerations applicable to the scope and extent to which Australian laws can or should apply to non-citizen crew on foreign flagged ships are matters that fall more properly within a review of the maritime industry pursuant to the *Navigation Act 1912(Cth)* that is structured to take into account considerations under the WRA (or *Fair Work Bill 2008* ("**Bill**") and the *Migration Act 1975 (Cth)* among other things. It is noted that during 2000 the *Review of the Navigation Act 1912 Final Report* ("Report") was published. The Report was the result of a comprehensive review of the *Navigation Act 1912 (Cth)*. At the time it concluded that:

> *"On a tonne-distance basis, Australia has the fifth largest shipping task in the world, representing about 13% of the world seaborne trade task. This requirement gives Australia a significant impact on world shipping as a purchaser of shipping services, although the Australian fleet as a supplier of shipping services traditionally is quite small. Australian ships traditionally have carried a very small proportion of our trade, and for various reasons the proportion has declined steadily over the past five years. In import trades, Australian ships' participation has declined from 6% of value and 2% of volume in 1994-95 to around 3% of both value and volume in 1998-99. In exports, Australian shipping has maintained a steady 2% of export tonnage carried over the period, but this has declined in value from 6% to 3% between 1994-95 and 1998-99"*[1]

The implications of removing the exclusion to create capacity for and to extend application of Australian industrial laws to non-Australian ships (approximately 97% of Australian trade based on the figures from the Report) where those laws have never previously applied are significant including but not limited to issues relevant to compliance and enforcement. In Inco's submission the considerations applicable to such a recommendation have not been nor are appropriate to be considered in the current Inquiry.

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[1] *Navigation Act 1912 Final Report para 2.7 p.9*

The following observations from the Report demonstrate the difficulties that can apply if capacity exists under the WRA to regulate areas that are currently subject to the *Navigation Act 1912* without full consideration of the implications for the maritime industry[2]:

> *"3. Employment conditions for crews aboard Australian ships*
> *The current legislation prescribes a range of matters regulating the employment of seafarers, in some instances reflecting the nature of industry wide industrial agreements, as well as international convention requirements. Prescription of such matters on an industry-wide basis reduces the ability of individual enterprises to negotiate employment arrangements that would more appropriately suit individual operating circumstances and market sectors. Regulations may also limit the ability of ship owners and operators to acquire alternative, more internationally competitive equipment, such as new ships, which do not comply with Australian employment-related regulations."*
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> ....
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> *5.12 The Navigation Act 1912 also regulates coastal trade for the purposes of ensuring licensed vessels meet prescribed conditions, whilst allowing for unlicensed vessels to operate when no suitable licensed ship is available and it is considered to be in the public interest. These arrangements, commonly called cabotage, were introduced to protect Australian coastal shipping from unfair competition from foreign ships, to ensure a supply of trained seamen and ships in time of war and to secure communications and trade. A further claimed purpose of regulation of coastal trade was to protect the wages and conditions of Australian seafarers by limiting access to the trade. There has been considerable confusion in the past about the interaction of coastal trading regulation in Part VI and the employment provisions of Part II of the Act.*
>
> *5.13 The economic regulation of the coasting trade currently covered by Part VI of the Act serves a distinctly different policy objective from other Parts of the Act and does not easily fit with its core purposes. There is a strong preference in industry submissions that economic regulation of the coastal trade should be separated from the Navigation Act 1912 to provide for a clear indication of the Government's policies for shipping safety and environment protection on the one hand and economic regulation on the other."*

Inco submits that there is no demonstrable imperative that requires a selective approach to addressing an issue that has greater policy implications under other Government portfolios such as Department of Immigration And Citizenship and Department of Infrastructure, Transport, Regional Development and Local Government.

There are also difficulties with the current taxation regime and wages structure applicable in Australia militates against any significant changes to the award resulting in terms and conditions that compare favourably in some cases with existing international standards. The interaction of proposed changes to Australian laws as they affect non-citizen crew on foreign flagged vessels is a further matter that Inco submits should be considered before recommendations are made with respect to the exclusion.

History of applications prior to the exclusion

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[2] *Navigation Act 1912 Final Report see* http://www.infrastructure.gov.au/maritime/publications/index.aspx Review of the Navigation Act 1912 Final Report

Inco submits that it is of assistance to review the case history of applications made by the maritime unions prior to the exclusion coming into effect which were made to extend the scope of the *Maritime Industry Seagoing Award 1999* to two vessels operating under permits issued pursuant to s.286 of the *Navigation Act 1912 (Cth).*

Applications with respect to the two vessels (MV Hakula and MV Ikuna) were made by the maritime unions during 2004 to apply to vessels registered in Tonga and crewed by predominantly Tongan crew although senior officers and engineers on board were generally other foreign nationals. These vessels carry export cargo and interstate cargo on the Australian coast under Single Voyage Permits ("SVP") issued pursuant to s.286 of the *Navigation Act 1912* pursuant to the relevant Government Minister's discretion. SVPs are issued when there is no suitable Australian registered or licensed vessel available to undertake the work.

The amount of cargo carried by these vessels was insignificant in terms of its proportion of the overall cargo tonnage moved by non-Australian flagged vessels around the Australian coast.

The three maritime unions having historical coverage of Australian crews (the Australian Institute of Marine and Power Engineers ("AIMPE"), the Maritime Union of Australia ("MUA") and the Australian Maritime Officers Union ('AMOU") sought to have these vessels brought within the jurisdiction of the Commission and made subject to awards of that Commission. Despite the fact that these vessels were of little significance in terms of the tonnage that they shift compared to the entire non-Australian vessels contingent operating on the Australian coast, these applications were limited to these two vessels. Other contemporaneous applications were similarly limited to one or two vessels. In total the number of vessels sought to be covered by the applications was three.

There was not demonstration of any intention to engage other vessels trading in similar circumstances or to obtain an award of general application to non-Australian registered vessels operating under a permit system.

Traditionally, the Commission has been interventionist in its approach to expanding the scope and operation of its awards. Rarely was an Australian employer exempted from coverage by a federal award once the unions serve a log of claims and identify it as an employer within the scope of their rules and the award.

With respect to maritime matters however the history is different. The effect of cabotage being in effect on the Australian coast for many years meant that there was a large Australian registered fleet and Australian crews. When cabotage became less rigidly enforced, through the granting of more SVP's, the Australian registered fleet became progressively more vulnerable to commercial challenge with respect to freight rates. A result of this has been the demise of the Australian registered commercial fleet which is now predominantly comprised of companies managing their own cargo with their own vessels.

An initial application was made to extend award coverage that resulted in the decision of the High Court of Australia in *Re Maritime Union of Australia ([2003] HCA 43)* in which the High Court concluded that the Commission had jurisdiction at the time. The applications with respect to the *MV Hakula* and *MV Ikuna* were then made by the three maritime unions. This dilemma has been brought to the attention of the Commission.

Proceedings history

On 7 August 2003 the High Court held that the Commission had jurisdiction to determine whether or not to make an award (which does not inevitably lead to a finding that an award is appropriate or necessary). It did this on the basis that:

1. CSL Pacific Shipping Inc was incorporated in Barbados and part of a group of companies including CSL Australia Pty Ltd that were ultimately owned in whole or in part by a Canadian corporation;

2. That a vessel previously registered in Australia as the *MV River Torrens* was sold by CSL Australia to CSL Pacific and registered in the Bahamas ultimately returning to trade in Australia after a 15 month absence and operating on the coast under Continuous Voyage Permits (CVPs);

3. The provisions of the *Workplace Relations Act 1996* (then) provided that it applied to industrial issues with respect to the relationship between employers and maritime employees so far as the matters related to trade or commerce between Australia and a place outside Australia, between the States of Australia or between a Territory of Australia and the States;

4. The Commission is entrusted with determining whether an award or variation to an award should occur so as to affect the "internal economy" of a vessel such as the *CSL Pacific.*

5. Section 111(1)(g) (iii) of the *Workplace Relations Act 1996* (then) empowered the Commission to dismiss an application in whole or in part or to refrain from further hearing or determining the industrial issue if it appears to the Commission that further proceedings are not necessary or desirable in the public interest. Considerations respect the significance of the "internal economy" rule on the one hand and the economic interests of Australia on the other are matters for consideration by the Commission in due course.

Following the decision of the High Court, the application involving the *CSL Pacific* was remitted to the Commission for determination. The application was dismissed at first instance by the Commission as were the applications with respect to the *Hakula* and *Ikuna*[3].

The subject matter of the application was described in the Commissioner's decision[4]:

> *"2. The subject matter of the industrial issue is whether terms and conditions of employment corresponding with some or all of the terms and conditions of employment applicable to maritime employees whose employment is covered by the Maritime Industry Seagoing Award 1999 [AW788080] should be accorded to maritime employees engaged on the ships Hakula and Ikuna in respect of any class of, or all voyages to or from a port in Australia."*

The Commission dismissed the applications and declined to make the awards or variations sought by the maritime unions to extend the coverage of the Maritime Industry Seagoing Award to these two vessels. Following the Commission's decision the Australian Institute of Marine and Power Engineers and Maritime Union of Australia filed appeals against the decision. The exclusion provision was incorporated into the WRA prior to the appeals being heard and they did not proceed as a consequence of the jurisdictional ground.

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[3] PR968570 Australian Industrial Relations Commission decisions - Application re the Maritime Industry Seagoing Award 1999 to apply it to the MV Hakula and Mv Ikuna

[4] PR968570 Australian Industrial Relation Commission decisions at [4]

Inco submits that it is necessary to determine as a matter of policy which Australian laws are to apply where;

1. Vessels are wholly owned and managed outside of Australia or are crewed by non-citizens on vessels that are foreign flagged and owned and there is no substantial connection between the vessels and Australia save as provided by the *Navigation Act 1912 (Cth)*. This is most significant in the context of the recent legislative amendments.

2. The policy benefits and arrangements for vessels such as the Ikuna and Hakula that are registered in Tonga where the register is not a FOC register and which has specific provisions dealing with the granting of preference to Tongans in employment on Tongan registered vessels. Inco notes that Tonga is a sovereign nation in relation to which is a nation identified in the Pacific Seasonal Worker Pilot Scheme that is currently limited to the horticultural industry. Inco notes that these two vessels have provided ongoing and sustainable employment to Tongan crew over a period of over ten years in a manner consistent with the stated objectives of the Australian Government to support and promote nations such as Tonga.

3. The vessels have always operated on single voyage permits.

The extent to which Australian determined terms and conditions of employment are to apply in the maritime industry to non-citizen crew of foreign flagged vessels is a policy matter that warrants separate and detailed consideration in the context of implications for areas such as trade, taxation, transport, maritime, immigration and labour requirements.

Summary

Inco submits that a comprehensive review across all relevant portfolios that provides a consistent and sustainable long term approach to employment on vessels operating on the Australian coast and subject to the *Navigation Act 1912(Cth)* is preferable to the Inquiry acting to make recommendations with respect to the Exclusion in isolation from the broader range of considerations that should legitimately and appropriately support a whole of Government approach that:

1. promotes an efficient and viable maritime industry;

2. supports industry and manufacturing in the transport of product in a timely and cost efficient manner;

3. is flexible and responsive to regional and economic considerations;

4. addresses ongoing taxation anomalies;

5. is consistent with migration and labour force objectives.

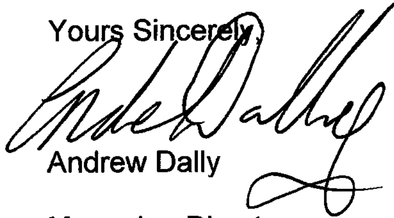
There is no imprimatur to remove the exclusion as its removal facilitates the introduction of an extension to the traditional scope and operation of awards of the Commission and workplace relations laws. Its removal is not restorative of a pre-existing circumstance or right but the creation of a new right that has previously been dismissed on its merits by the Commission and has not been the subject of informed policy debate or consideration.

Inco strongly submits that the current exclusion should remain until and unless informed policy debate and consideration has been applied to the question of whether it is appropriate

or desirable that non-citizen crew on foreign flagged vessels be subject to the WRA or the Bill or some other statutory requirements and if so, the extent and nature of such coverage.

We thank you for the opportunity to put this submission.

Yours Sincerely,



Andrew Dally

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