Red Tape Committee (Cabotage)
Department of the Senate
PO Box 6100
Canberra ACT 2600

By Email: redtape.sen@aph.gov.au

Date: 5 April 2017

Dear Cabotage Red Tape Committee,

Re: Cabotage Red Tape

I am grateful for the opportunity to make a submission on the effect of Cabotage Red Tape. My interest in the Red Tape on Cabotage inquiry stems from a career as an Australian ship's officer, who also has obtained experience in:

- Maritime safety regulatory roles and regulatory policy development and implementation;
- Provision of maritime legal advice in relation to coastal shipping and other maritime legislation to a broad range of maritime industry participants including:
    a) Individual mariners;
    b) Maritime Industry Associations;
    c) Australian and foreign corporations engaged in domestic and international trade (ie dry-bulk, container, project and hydrocarbon and chemical trades); and
    d) International marine insurers (both P&I and Hull & Machinery).

In the 28 years I have been involved in the maritime industry, I am of the opinion that governmental policy decisions have been driven by ulterior motives and have damaged the maritime industry and because the policy decisions have not been in the best interests of Australia or its citizens.

Accordingly, I provide the following attached personal comments for the inquiry's consideration. I emphasize that my comments are not necessarily the views of any of my past or current legal clients or associations that I am a member.

Yours Sincerely

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RED TAPE COMMITTEE - CABOTAGE SUBMISSION

1. ***The effects on compliance costs (in hours and money), economic output, employment and government revenue****;*

- All organizations in Australia along the supply chain for goods incur business expense/costs related to compliance with coastal shipping legislation as a cost of engaging in or using coastal shipping.

  These costs are business-operating expenses that ultimately (depending on the companies structure) end up as taxation deductions in the taxation affairs of theses companies.

  Accordingly, other than the efficient use of capital to perform compliance tasks by these companies, compliance costs ultimately reduce government revenue.

  I am not aware of any reliable estimate of the amount of these compliance costs to the economy of the Australian Commonwealth.

- Compliance costs vary for each organization engaged in or using Australian coastal shipping. The costs also depending on whether organizations utilize legitimate commercial strategic approaches to processes available under the current coastal trading licensing scheme for commercial advantage. For example:

  - General License holders are able to utilize the current coastal trading licensing scheme to manipulate the Australian shipping transport and domestic trade markets to their favour because the licensing scheme effective creates a market monopoly for General License holders.

    Observations of this can be seen particularly where General License holders utilize provision of the coastal trading legislation to strategically delay Temporary License applications of cargo interests, or alternatively, to make the Temporary License holder processes more expensive in addition to imposing delays by legitimate legislative processes.

    Such a strategy drives up commercial pressures related to movement of cargos and can infer unreliability of Temporary Licensed vessel supply for cargo movement.

  - Some associations representing their members are also able to similarly use the provisions of the coastal trading licensing legislation to similarly apply commercial pressure to both General and Temporary License holders, and additionally to Australian cargo interests, for the purposes of commercial negotiation positions and/or Fair Work Act awards negotiations.

Accordingly, it is suggested that the coastal trading current licensing scheme ought to be amended so that:

a) All Australian registered vessels are not required to hold a General License.

   The right to operate in the Australian coastal trade should be an automatic right of being an Australian registered vessel.

   The ability for the Department of Infrastructure and Regional Development to obtain and record coastal trade cargo voyages, quantity and cargo types on Australian registered ships can be achieved my making it mandatory for all Australian registered ships engaged in coastal trade to

submit a voyage report to the department through a provision in to the *Shipping Registration Act 1981 (Cmth)*. Such information should also be able to be submitted electronically.

b) The statutory scheme requiring notification of Temporary License applications under section 30, and consultation of variations under section 45 of the *Coastal Trading (Revitalising Australian Shipping) Act 2012* ("Act") ought to be repealed upon legislation of a suitable scheme which balances the liberty made available by the repeal of the provisions and the imbalance of costs between foreign and Australian registered vessels engaged in coastal trade.

While these two provisions are arguably the most contentious on both sides of the argument for and against foreign shipping access to the coastal trade. It is recommend that the repeal or replacement of the above two provisions of the Act must occur only after all four of the following are applied:

i) A provision be incorporated into the Act that mandates that all contracts related to any vessel that is subject to, used, or intended to be used in relation to a Temporary License, or carriage of coastal trade covered by a Temporary License is deemed to include the application of Australian arbitration and laws and is subject to Australian jurisdiction of the courts of Australia and the States and Territories with Maritime and Admiralty Jurisdiction.

The concept of this is similar to the deeming provision applied by section 11 of the *Carriage of Gods by Sea Act 1991* (Cmth) as applied to sea carriage contracts such as Bills of Lading and other sea carriage agreements.

However, the concept ought to be broad enough to encompass all commercial contracts related to the vessel covered by the temporary license. This would include:

a) All Charterparty contracts and other commercial contract such as vessel pooling agreements, consortium agreements, etc for the vessel which the Temporary Licensed activity relates; and
b) All other vessel related contracts such as vessel management, technical, operational, crewing, bunkering etc related to the foreign vessel covered by a Temporary License.

The purpose of this is to ensure that all commercial contracts of any foreign vessel under a Temporary License are subject to Australian law and jurisdiction and legal process.

In addition, should there be legal disputes, Australian companies and coastal trade vessel users who have a legal dispute are able to resolve their disputes in Australian jurisdiction instead of having to incur higher legal costs by having to commence proceeding in Non-Australian jurisdictions in which costs are increased and exposed to currency exchange rate risk.

ii) If a foreign vessel is used in Australian coastal trade for more than three (3) months (or some other period) in any financial year, that foreign vessel ought to be deemed to be Australian entity for GST and/or Australian taxation purposes while that vessel is engaged in voyages under a Temporary License.

The obligation to pay the GST or other taxation may need to be withheld by an Australian entity that is a Temporary License holder or the vessel's charterer (or alternative they ought to be obliged to pay these amounts directly to Australian tax office) so that the foreign entities owning or chartering the vessel do not have to submit a tax return.

The basis for this is that under various treaties which Australian has with foreign countries, there is a non discrimination/parity element - That is the foreign countries citizens and

business, should be treated the same as Australian citizens and businesses. Accordingly, commercial contracts where a foreign vessel performs services under cover of a Temporary License should also be subject to GST while engaged in Australian coastal trade.

Accordingly, all charterparty hire or freight payments and other contract arrangements of a foreign registered, whether contracted with an Australian company or between foreign entities ought not be able to utilize the GST foreign purchase exclusion when they are engaged in coastal trade under a Temporary License.

iii) There should be a provision for a mandated percentage of coastal trade to be carried on Australian registered ships and an independently managed scheme for establishing a skills fund and subsidies system for Australian registered coastal trading vessels. Such a scheme should mandate that each Temporary License holder is to:

a. Have a 5th (or some other higher amount) of their coast trade carried on an Australian registered ship in any financial year; or

b. They pay a maritime levy equivalent to the carriage cost savings by using a foreign registered vessel under Temporary License. This levy being paid specifically to an independent fund for the purpose of Australian Maritime skills development, and Australian port costs subsidies for Australian registered ships engaged in coastal trade.

The purpose of this is again to resolve the treaty non-discrimination/disparity in costs between Australian and foreign registered vessels used in coastal trade and to guarantee a percentage of cargo for Australian registered ships.

The port costs subside concept being because most Australian port fees are calculated based on a scale which rewards vessels that use the ports with larger economies of scale (ie import export trading vessels).

These port cost (ie port fees, pilotage, tugs and line men, etc) benefit import and export vessels that use these ports because of their port fee scaled pricing structures. These very pricing structure are also an impairment to Australian coastal shipping development and do not provide an incentive for ports (particularly leased ports) to provide incentives to encourage coastal vessels to use their ports.

iv) Applications for Temporary License ought to be subject to usual Australian Judicial Review/Administrative law review processes.

It is suggested that the above-suggested scheme might need some refinement. However the concept in principle should be adopted before section 30 and section 45 of the *Coastal Trading (Revitalising Australian Shipping) Act 2012* are repealed.

2. Any specific areas of red tape that are particularly burdensome, complex, redundant or duplicated across jurisdictions;

- No specific submission is provided on this question – although the responses to item 1 may assist with reduction in areas of Taxation, Customs, Fair Work and other legislation.

3. The impact on health, safety and economic opportunity, particularly for the low-skilled and disadvantaged;

- No submission provided on this question -

4. The effectiveness of the Abbott, Turnbull and previous governments' efforts to reduce red tape;

In relation to coastal trading legislation - the previous *Shipping Legislation Bill 2015,* which was unsupported in the Senate, was a mistake.

If that Bill had limited amendments to minor corrections to the administration of the legislation without damaging Australian industry and jobs, it may have been successful. Trying to include Trojan horse provisions that ultimately, or inadvertently, are destructive to Australian maritime skills, Australian jobs and Australian citizens is not in my opinion in the interest of Australia.

In my opinion, a similar mistake occurred by the former government that adopted the *Coastal Trading (Revitalising Australian Shipping) Act 2012,* this legislation included Trojan horse provisions that also went too far and caused imbalances that remain the subject of government policy considerations.

As a result, the unbalanced effect for the coastal trade market is that it continues to swing with each legislation change or amendment to the detriment of Australia's economy and Australian citizens and workers.

5. Alternative institutional arrangements to reduce red tape, including providing subsidies or tax concessions to businesses to achieve outcomes currently achieved through regulation;

- No submission provided on this question -

6. How different jurisdictions in Australia and internationally have attempted to reduce red tape; and

- No submission provided on this question -

7. *Any related* matters.

7.1. *The inference of relevance of Coastal Shipping to an export economy*

It remains remarkable that, Coastal Shipping continues to be regularly said to be economically significant to the "export economy" of Australia.

- Australia's exports in 2015 are reported to be 19.8% of Australia's Gross Domestic Profit ("GDP").[1] Publicly available Commonwealth parliamentary documents indicate that the export component of the Australian economy is declining, with the peak export percentage of GDP being about 23 % in 2008.[2]

  Accordingly, approximately 80% of the GDP comes from consumption (ie household spending, etc), investment and government purchases - these are not export based activates of the Australian economy.

[1] The World Bank, 2015 Export of Goods and Services (% of GDP), see <http://data.worldbank.org/indicator/NE.EXP.GNFS.ZS >, viewed 21 March 2017.

[2] O'Brien G, Statistics and Mapping, "Australia's Trade in figures", (2016), See <http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/BriefingBook45p/AustraliaTrade >, viewed 21 March 2016.

Considering fundamental macroeconomic principles, the relevance of Australian coastal shipping (in an economic sense) is more significant to the domestic aspect of Australia's economy.

Any inference or attempt to redefine Australian coastal shipping in light of the export trade is flawed and fails to understand effect of Foreign Direct Investment ("FDI") and Net Foreign Investment ("NFI") and their contribution to the Australian economy, or alternatively seeks to associate Trade Surplus (or Trade deficits) with Australian domestic activities that contribute to the eventual exports even though these activities are measured in GDP by non-export related measures.

Accordingly, any attempt to frame any Australian coastal shipping discussion under an export light (because of the trade carried on the Australian coast) is inappropriate and arguably indicative of an attempt to skew the coastal shipping policy to influence market factors for commercial financial gains that are economically measured in Australia's GDP by components other than Net Exports.

Accordingly, government and all political parties ought to cease referring to Australian coastal shipping in a distorted economic export perspective. A failure to do so inadvertently misleads the debate and the public about the Australian economic value of Australian coastal shipping.

The question of how coastal shipping intersects with the economic export component, such as in a supply chain perspective is broader than just coastal shipping - it includes, port privatization, port competition, port profit strategies, multimodal transport hubs, government policy group modal imbalances, etc. These are broader than the scope of the Red Tape on Cabotage Committee's scope.

Accordingly, debate on Australian coastal shipping ought to focus on improving the beneficial contribution of Australian coastal shipping to the Australian domestic economy and its place in the national interest of the Commonwealth of Australia.

7.2. Absence of Maritime Transport mode from government transport and infrastructure development policy

There is a clear omission of maritime transportation policy by government in current polices related to Transport, Infrastructure, Trade (Domestic), Defence and Emergency Response. This need to be addressed – the use of Australian coastal shipping in the domestic transport network is an under utilized capacity which has scope to significantly add to the Australian economy and Australian jobs.

Looking at various transport white papers, discussion papers, COAG council meeting releases and the COAG Transport and Infrastructure Council work programme it is clear that government transport policy has been blinkered by road transport.

The recent Queensland cyclone Debbie damage and flooding across a large portion of Australia's east coast in two States again highlights inadequacies in basing the primarily focus of Australian transport and infrastructure policies (and funded development projects) primarily on land based transport modes.

7.3. Cabotage or something else?

Cabotage is defined as:

> *"The right to operate sea, air, or other transport services within a particular territory.*
>
> *Restriction of the operation of sea, air, or other transport services within or into a particular country to that country's own transport services."*[3]

[3] See Oxford Dictionary

Australia's so-called Cabotage has its origins from recommendations from the Royal Commission on the Navigation Bill,[4] which became the *Navigation Act 1912(Cmth)*.

This Bill adopted English protectionism concepts that were first applied in about the year 1382, during the reign of King Richard II.[5] That legislation, Act 6 of Richard II, Chapter 3 stated:

> *"That for increasing the shipping of England, of late much diminished, none of the King's subjects shall hereafter ship any kind of merchandise either outward or homeward but only in the ships of the King's subjects, on forfeiture of ships and merchandise; in which also the greater part of the crews shall be the King's subjects.*"[6]

With the establishment of the Commonwealth of Australia, this English concept (although originally limiting importation and exportation) was modified to apply protection to Australian (and British commonwealth) ship-owners that operating on the Australian coast, from foreign ship-owners.

Cabotage for Australian coastal shipping at its inception was not unique – many countries adopted similar protectionist policies or limited opening their coastal trade to treaty arrangements only.[7]

The *Coastal Trading (Revitalising Australian Shipping) Act 2012* is the current legislative scheme that enables the Commonwealth Government to license (under section 51 constitutional powers) Australian and foreign vessels to engage in Australian coastal trade.

Significantly, the commonwealth's powers to manage who is engaged in Australian coastal trading is constrained - The Commonwealth Government of Australia is restricted in its ability to directly legislate on who can engage in Australian coastal trade due to section 92 of the Australian Constitution, which states:

> *"92 Trade within the Commonwealth to be free*
>
> *On the imposition of uniform duties of customs,* ***trade***, ***commerce***, *and* ***intercourse among the States***, ***whether by means of*** *internal carriage or* ***ocean navigation***, ***shall be absolutely free.***
>
> *But notwithstanding anything in this Constitution, goods imported before the imposition of uniform duties of customs into any State, or into any Colony which, whilst the goods remain therein, becomes a State, shall, on thence passing into another State within two years after the imposition of such duties, be liable to any duty chargeable on the importation of such goods into the Commonwealth, less any duty paid in respect of the goods on their importation." (Emphasis Added)*

Accordingly, the current coastal licensing scheme does not regulate coastal trade - it regulates the vessels that can be used in coastal trade in accordance with other commonwealth constitutional powers that are not constrained by the section 92.

[4] See "*Report of the Royal Commission on the Navigation Bill together with Appendices and minutes of evidence",* printed 15 June 1906
[5] Commonwealth of Australian, Parliamentary Debates*, "Official Senate Hansard No 37, Friday 13 September 1907"* at 3236
[6] Commonwealth of Australian, Parliamentary Debates*, "Official Senate Hansard No 37, Friday 13 September 1907"* at 3236
[7] See "*Report of the Royal Commission on the Navigation Bill together with Appendices and minutes of evidence",* printed 15 June 1906, at page xxxix.