Submission by the Maritime Union of Australia (MUA)

Parliamentary Joint Standing Committee on Treaties

Inquiry into the Free Trade Agreement between Australia and the United Kingdom of Great Britain and Northern Ireland

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Introduction

This submission has been prepared by Maritime Union of Australia (MUA). The MUA is a Division of the 120,000-member Construction, Forestry, Maritime, Mining and Energy Union (CFMMEU) and an affiliate of the 20-million-member International Transport Workers' Federation (ITF).

The MUA represents approximately 14,000 workers in the shipping, offshore oil and gas, stevedoring, 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 that jointly organises workers across the Australian offshore oil and gas industry.

The MUA represent workers across various areas of maritime operations. These include:

- Onshore workers in ports who are required to interact with domestic and international ships docking at Australian ports and with landside workers involved in road and rail transportation to and from ports. International ships include both cargo ships and passenger ships, mainly large cruise ships. These workers include:
  - Container stevedoring workers (including dockworkers who board cargo ships to undertake lashing of containers);
  - Break bulk ship stevedoring workers (including dockworkers who board break bulk ships to assist with loading and unloading in ship's hatches);
  - Cruise ship baggage handlers, operators of gangplanks or passageways used for the embarkation and disembarkation of passengers and wharf workers that load stores;
  - Ship mooring workers;
  - Port security workers.
- On-water services workers servicing cargo and passenger ships i.e. workers involved in towage, mooring, pilotage, bunkering, waste removal.
- Harbour/river ferry workers.
- Shipboard workers (ship's crew) including (i) marine crew; and (ii) in the case of passenger ships non marine crew (collectively defined as seafarers).
- Offshore oil and gas industry seafarers servicing oil and gas platforms.

Overview

This submission addresses Annex 8B (International Maritime Transport Services), an Annex to Chapter 8, Cross Border Trade in Services.

We identify two major concerns about the specific provisions of Annex 8B. These concerns are:

- That for the first time in a Free Trade Agreement (FTA) signed by Australia, Australia will no longer be permitted to legislate for the exclusive access to certain maritime services covered the FTA, of Australian registered ships as defined in the *Shipping Registration Act 1981* (SRA), because the FTA requires UK registered ships to be given equivalent access to those specified maritime services:
  - That feature of this FTA directly undermines Australia's historic support for retention of maritime cabotage notwithstanding that Annex II provides that "*Australia reserves the right to adopt or maintain any measure with respect to maritime cabotage services and offshore transport services*":
    - We note however the unsatisfactory definition of cabotage in footnote 23 to the Annex II reference to maritime cabotage, which defines cabotage 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*" – it makes no reference to the core principle of cabotage which is the reservation for the ships and associated seafarers of the nation in

question in relation to the transportation of goods and services between domestic ports.

- That the states and NT appear, in the limited time available to them, to have not undertaken sufficient due diligence to assess the implications of the FTA on state/NT legislation given that this FTA removes the blanket exemption for all existing state government non-conforming measures or exceptions, instead requiring services exemptions at state government level to be listed separately:
  - In the case of Annex 8B, the states/NT have not separately listed state/NT marine laws and related laws which regulate the procurement of port service providers (such as towage, mooring, pilotage and bunkering services), which entitle the states/NT to establish conditions for the procurement of such services, including the nationality (nation of registration) of the ship to be precured for such a service.

The background to the MUA concerns

The MUA met with officials from the Department of Foreign Affairs and Trade (DFAT) and the Department of Infrastructure, Transport, Regional Development and Communications (DITRDC) on two occasions to try to gain a better appreciation of the provisions and implications of the FTA, Annex 8B in particular. We are grateful for the time of officials.

Departmental officials described Annex 8B as doing no more than 'codifying' existing Australian cabotage law and practice, and that this codification was done at the request of the UK Government, not because the UK necessarily has intentions for UK registered ships to operate in the Australian maritime services market, but because it establishes a precedent for future FTAs the UK may wish to enter into with other nations where it foreshadows opportunity for UK ships to enter the maritime services market of those nations.

When that explanation is combined with the statement in the DFAT Regulation Impact Statement: Final Assessment of 25 November 2021 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****, 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*." it is clear that Annex 8B provides a new obligation on Australian regulation of maritime cabotage and limits its ability to regulate for the exclusive access of Australian registered ships to certain maritime services.

DFAT have clearly relied heavily on DITRDC advice on cabotage law and practice in settling the terms of Annex 8B. While that is entirely reasonable, unfortunately DITRDC relies on an incorrect understanding of cabotage.

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.

DITRDC appears 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 reservation aspect of cabotage.[1]

[1] See for example, UNCTAD, Transport and Trade Facilitation, Series No 9: *Rethinking maritime cabotage for improved connectivity* 2017, https://unctad.org/system/files/official-document/dtltlb2017d1_en.pdf

DITRDCs interpretation and administration of the principal Act that regulates cabotage in Australia, the *Coastal Trading (Revitalising Australian Shipping) Act 2012* (CT Act), since about one year after it was introduced by Labor in 2012 and passed into law, has all but destroyed Australian cabotage to the point where there is now a growing realisation that it is not in Australia's security or economic interests to be totally reliant on foreign registered ships, and widespread support for rebuilding Australian national shipping has emerged. There has not been a single ship reserved for an Australian cabotage trade during the entire period of the Coalition Government since 2013. To the contrary, Australian registered ships have been encouraged by DITRDCs administration of the CT Act to leave the Australian ship registry.

In MUA discussions with Departmental officials, it was clear that DITRDC has adopted a narrow view of cabotage, and seems to have equated its interpretation of the CT Act as being the boundaries of what cabotage means. DITRDC do not take a wider conceptual view of cabotage, instead defining it as those Australian coastal trades (as defined in the CT Act) in which foreign registered ships with foreign crew are contesting for the trade, in reality or in theory, and hence, where Temporary Licences are applied for and granted/not granted. That results in a very narrow definition of cabotage.

It is clearly supporting the UK Government position (which understandably is acting in the UK national interest), which is not in Australia's national interest. Support for the UK position creates an additional hurdle for any future Australian government which may wish to strengthen cabotage in Australia.

In that context, DITRDC has given poor advice to DFAT who appear to believe that the FTA is consistent with the Annex II commitment that Australia reserves the right to adopt or maintain any measure with respect to maritime cabotage services. That is simply no longer the case if the FTA legally binds Australia, requiring UK registered ships to be treated equally with Australian ships which fundamentally undermines the ability of Australia to reserve for certain transport services, ships which are Australian registered. That is the essence of cabotage and this FTA erodes that principle in relation to the provision of 'international maritime transport services' as defined.

No other nation to our knowledge has committed to undermine its ability to regulate its cabotage trades in the terms permitted by this FTA, with the possible exception of the EU.

An explanation of the MUA concerns

Annex 8B requires that each Party shall:

- Accord to vessels supplying an international maritime transport service and flying the flag of the other Party, and international maritime transport services suppliers of the other Party, treatment no less favourable than that it accords, in like circumstances, to its own vessels or international maritime transport services suppliers, or to vessels or international maritime transport services suppliers of a non-Party, with regard to:
  - Access to ports;
  - The use of port infrastructure and services of ports, such as pilotage, towing and tug assistance, provisioning, fuelling and watering, garbage collecting and ballast waste disposal, port captain's services, navigation aids, emergency repair facilities, anchorage, berth, berthing and unberthing services and shore-based operational services essential to ship operations, including communications, water and electrical supplies;
  - The use of maritime auxiliary services;
  - Access to customs facilities; and
  - The assignment of berths and facilities for loading and unloading:
    including related fees and charges.

- Permit vessels supplying an international maritime transport service and flying the flag of the other Party, and international maritime transport services suppliers of the other Party, subject to the authorisation by the competent authority where applicable to re-position owned or leased empty containers, that are not being carried as cargo against payment, between ports of that Party; and
- Permit:
  - Vessels flying the flag of the other Party; and
  - International maritime transport services suppliers of the other Party,
    to provide feeder services between ports of that Party subject to the authorisation by the competent authority where applicable\

Furthermore, Annex 8B requires that neither Party shall:

- Adopt or maintain a cargo-sharing arrangement with a non-Party concerning maritime transport services, including dry and liquid bulk and liner trade; or
- Adopt or maintain 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.

The implications of this 'codification' are that, whether or not the current UK Government claim that it is not the intention of the UK to enter the Australian international maritime services market remains the case in practice, the precedent for UK ships to enter the Australian international maritime services market will now be in place if the Parliament waves the FTA through in its current form, and moreover, it sets a precedent for further FTAs, such as the Australia-EU FTA which is still being negotiated. Many European nations are large international ship service provider nations that already provide substantial shipping services to Australia e.g. in towage, and would jump at the opportunity to establish equivalency in maritime cabotage.

Annex 8B is very specific. It requires that both Australia and the UK must accord to vessels supplying an international maritime transport service 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 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 SRA (which defines what makes a ship uniquely Australian – see for example s8 [Australian-owned ships][2] - 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

[2] 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.**

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:
  - This would seem to prohibit Australia from legislating for a national strategic fleet comprising ships that are exclusively registered in Australia under the SRA, and would be required to treat UK registered ships as equivalent to Australian ships:
    - This would have the effect of preventing Australia from establishing a 'second register' as provided for under the Australian International Shipping Register (AISR) provisions of the SRA because by definition, the ships on the AISR must be Australian registered. Under the FTA UK registered ships could also comprise the Australian 'second register;' fleet thus completely undermining the object of the AISR (see s15A) which is to:

      (a) facilitate Australian participation in international trade; and
      (b) provide an internationally competitive register to facilitate the long term growth of the Australian shipping industry; and
      (c) promote the enhancement and viability of the Australian maritime skills base and the Australian shipping industry; and
- Adopting or maintaining a cargo-sharing arrangement with a non-Party concerning maritime transport services, 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* (C&C Act) as being proposed by the Australian Competition and Consumer Commission (ACCC) and other stakeholders to the extent that where cargo sharing arrangements remain exempted from the C&C Act's anti-cartel provisions, that would only apply to UK ships, and ships from other nations could not be exempted from the anti-cartel provisions of the C&C Act in relation to cargo sharing:

Note that 'maritime transport services' is different to 'international maritime transport services', and is not defined in Annex 8B.

Recommendations

1. That JSCOT recommend to the Government that it remove Annex 8B from the FTA and rely on the general provision that maritime cabotage is 'carved out' from the Chapter 8 services provisions in the FTA as provided in Annex II.

2. That JSCOT recommend to the Government the inclusion of a more complete definition of cabotage in footnote 23 in Annex II so that it reads as follows:

"*For the purposes of this entry, "cabotage" is defined as the reservation for Australian registered ships, crewed by Australian nationals, in 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*".

3. That JSCOT recommend to the Government that DFAT be required to confer again with the states/NT governments to ensure that state/NT marine or related law regulating the procurement of port services involving ships, be specially listed for exclusion from the operation of the FTA so that states/NT are permitted to set conditions for the procurement of such port service providers that could include the exclusive use of ships registered under the *Shipping Registration Act 1981*.