MARITIME UNION OF AUSTRALIA (MUA)

RESPONSE TO QUESTIONS RAISED BY PARLIAMENTARY COMMITTEE

INQUIRY INTO AUSTRALIAN COASTAL SHIPPING POLICY AND REGULATION

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Preamble

The MUA submits its response to each of the questions raised in the following sections.

We have included for background reference two extracts (at **Attachments A and B**) from our primary submission which also addresses some of the questions, and provides an overall picture of the changes which we believe are required.

Ships in receipt of subsidies (s 287 of the Navigation Act)

1.4 It is an offence for vessels operating under license to receive, directly or indirectly, any subsidy or bonus from the Government of a country other than Australia. There is no definition of "subsidy" or "bonus".

1.4 (i) How should it be defined?

The fact that thios provision creates an offence can be interpreted as meaning that section 287 is intended to prevent ships from engaging in the coastal trade as a result of financial benefits that are received either directly or indirectly by the ship from a foreign government/s.

It is our submission that behind that intent is the desire by Government to maintain a level commercial playing field, so that ships are not the beneficiaries of financial benefits that act as inducements for them to become licenced and participate in the coasting trade to the detriment of ships that are not the subject of subsidies or bonuses.

We say that consistent with the principle of statutory interpretation that it is not necessary to define the terms subsidy or bonus, and that they should be given their ordinary meaning. A party who may allege that a subsidy or bonus is applying would need to have that allegation investigated on its merits, to asses whether, in the case of a possible subsidy, there is in fact a grant or contribution of money being paid, or in the case of a possible bonus, whether a payment over and above that what is due is or has been paid (in the preceding 12 months).

Of the sorts of benefits that a ship might be eligible for in international shipping such as capital grants, various forms of tonnage tax, various forms of depreciation allowances, roll over relief, reductions or exemptions in income tax for crew, reductions in social contributions, seafarer repatriation subsidies, national security funding, partnership and financing schemes such as the German KG scheme some are undoubtedly either subsidies.

However, as can be seen by the range of benefits identified, and they are by no means exhaustive, the financial benefits that are available in respect to ships

operating in the coasting trade extend beyond subsidies and bonuses and incorporate tax concessions or benefits, including tax free payments top owners, operators and crews of those ships.

We submit that all financial benefits which are not available to the owner, operators or crew of an Australian registered ships which is granted a licence to operate in the coasting trade should be prohibited by the section.

We note also that the liability that flows from conduct which breaches the section falls upon the master, owner and agent of the ship. The operator of ships is frequently not the owner but a person who operates the ship under charter or a person who manages the ship on behalf of the owner or charter operator. Any person who operates a ship and engages in the conduct should in our view be held accountable under the section.

Australian wages (s288 (3)(a))

1.5 *"the seamen employed on the [licensed] ship shall be paid wages in accordance with this Part"; (s289 (1)) "Every seaman employed on a ship engaged in any part of the coasting trade shall...be paid, for the period during which the ship is so engaged, wages at the current rates ruling in Australia for seamen employed in that part of the coasting trade"; and (s292) An Australian Pay and Classification Scale (or APCS) or a transitional award within the meaning of the Workplace Relations Act 1996 which is binding on or applicable to seamen employed in any part of the coasting trade is prima facie evidence of the rates of wages in Australia for those seamen."*

1.5 (i) *Should this be restricted to pay in hand or include other entitlements such as leave loading?*

The MUA submits that the expression "*wages at the current rates ruling*" can only mean the rates actually payable in the relevant coasting trade as distinct from some minimum rate fixed by some industrial instrument.

This view is supported by the pre-WorkChoices provision in section 292 where reference was made to either the Award rates or certification by the Industrial Register that rates of wages ruling in Australia for seamen employed in any part of the coasting trade is evidence of those wage rates. Clearly the intention was that current and up to date rates applying in agreements are the rates that should be applied.

The Award or Registrar's certificate were *prima facie* evidence of rates of wages ruling. The relevant award in respect to the coasting trade was the Maritime Industry Modern Ships Award 1989 which prescribed paid rates. That award became irrelevant for the purpose of sec 292 in 1999 when the award was converted to a "minimum rates award" in accordance with the then current wage fixing principles.

The award was renamed Maritime Industry Seagoing Award 1999 ("MISA"). WorkChoices had the effect of removing the prescription of minimum wages from awards and transferring their prescription to the newly created Australian Pay and Classification Scale or APCS as the scale is referred to. This reform caused sec 292 to be amended to its president form. The APCS prescribes a "safety net" of minimum rates and not the current rate of wages ruling. The APCS means pre-reform award

rates ("preserved APCS") and rates determined by the Australian Fair Pay Commission ("new APCS"). The APCS for the coasting trade reflect the wage rates formerly fixed by MISA expressed as an hourly rate and varied by the Australian Fair Pay Commission on two occasions. Unfortunately the rates fixed by the Commission are not yet published and do not reflect the "current wage rates ruling".

As *prima facie* evidence of actual ruling wages the APCS is inappropriate and section 292 should be repealed. It only causes confusion.

We should emphasise that "wages" are defined in s.6 of the *Navigation Act 1912* as "includes emoluments". The word emolument has been held to have a wider meaning than "remuneration" and to include such matters as a war bonus, employer and employee contributions to a pension fund, damages for breach of contract, national insurance contributions which a ship owner had agreed to pay an employee, full pay during sick leave and employee contributions for social insurance, repatriation expenses and bonuses promised to be paid. [1]The word includes payments due in respect to annual and other forms of leave.

The width of the meaning of the word "wages" in sec 289 should be expressed in the section itself. In the maritime industry there is a close connection between the quantum of salary and the quantum of paid leave. In particular, historically increases in salary were traded for greater amounts of leave. If a level playing field is to be established between ships operated by Australian interests and those operated by foreign operators competing for trade in the coasting trade, leave payments should be expressly included in section 289 so as to exclude any possibility of confusion by foreign operators.

In summary two steps should be taken. They are:

(i) Repeal section 292;

(ii) Amending section 289 so that it reads:

289 Payment of Australian rates of wages

(1) Every seafarer employed on a ship engaged in any part of the coasting trade shall, subject to any lawful deductions, be entitled to and shall be paid, for the period during which the ship is so engaged, wages, salary, allowances, loadings, leave entitlements, emoluments and other payments due in respect to the seaman's employment at the current rates ruling in Australia for seafarers employed in that part of the coasting trade, and may sue for and recover those wages.

(2) In the case of ships trading to places beyond Australia, the payments to which a seafarer is entitled under this section shall be paid before the departure of the ship from Australia, and the master of such a ship shall produce to the officer of Customs to whom application is made for a clearance under the Customs

[1] *R v Postmaster – General [1876] QBD 658 at 665; Shelford v Mosey* [1917] KB 154 at 159; *Halcyon Skies [1977] 1QB 14 (Administration of Justice Act 1956;* Justitia [1887] 12PD 145; *The Gee-Whiz* [1951] 1 Lloyd's report 145; *The Gee-Whiz* [1951] 1 Lloyd's report 145; *The Arosa Star* [1959] 2 Lloyd's reports 396; *The Westport* (No.4) [1968] 2 Lloyd's reports 559 and *The Elmville (No.2)* [1994] PD 402

Act for an international voyage from a port in Australia evidence to the satisfaction of that officer of such payment, and the officer of Customs may refuse to grant the clearance, and the ship may be detained, until such evidence is produced to him or her.

Availability (s286(1)(a))

1.6 "that no licensed ship is available for the service" - which is a criteria for granting permits

In responding to each of the points below addressing both availability and adequacy, the MUA submits that the guiding principle should be the reasonableness test i.e. what is reasonable given that: (a) the rationale behind Part VI of the *Navigation Act 1912* requires the decision maker to always err in favour of the licenced vessel; (b) the fact that the Statutory and Guideline provisions ought to be always interpreted in a way which seeks to promote and grow the Australian shipping industry; and (c) the practical and commercial environment under which the coasting trade provisions of the Act are being applied.

1.6 (i) How many days on either side of a shippers designated loading date should a licenced vessel be considered to be available?

The MUA submits that this provision, and others of similar character that form in total the availability tests should be applied in a wider context based on a shipper onus of responsibility to declare and notify the long term trade and contractual characteristics of the cargo. We submit that the forward business plan of the shipper must be made available to the market for the permit system to work efficiently and in accordance with its underlying rationale and objectives. Further, we submit that there must be a responsibility to declare as soon as the cargo requirements are known to the shipper i.e. not just the next cargo, but the short, medium and long term requirements for cargo movement, and that this information should be made available to the market.

Only this degree of transparency can allow the market to operate efficiently and at the same time provide the decision maker with a context for decision making.

We submit that a failure to declare as outlined should constitute a breach of the Guidelines, bearing in mind that the reasonableness test should be allowed to operate in a commercial environment i.e. there will be circumstances that require short term variation to long term patterns of trade that enable the decision maker to confidently allow a permit to be issued.

Within the framework outlined above, the MUA submits that the current 3 day window as provided in Clause 36 of the Ministerial Guidelines for Granting Licences and Permits to Engage in Australia's Domestic Shipping (Permit Guidelines) may be too onerous (too restrictive) given: (a) the long distances between ports on the Australian coastline (which means it can take several days for a ship to position itself for a cargo); and (b) the nature of Australian coastal cargo carried (mainly non time sensitive). Given these factors we believe that a window of 5 days would be more appropriate.

However, if there was a Guideline requirement to declare as we outline, the licenced ship operator would be in a far better position to respond to the shippers more

specific uplift and discharge requirements, which would mean the window specification would decline in importance. It has only become critical because the shippers patterns and short, medium and long term requirements are no known sufficiently in advance (we say through deliberately withheld information) to enable the system to operate fairly and efficiently, and as intended.

1.6 (ii) Should the date specified be the commencement of loading or sailing?

In the context of the preamble to our specific response to Q1.6(i) above, the MUA submits that the date specified (subject to acceptance of a 5 day window) should be the date of sailing. We put this view because: (a) the shipper should know the loading capacity of the ship and the port and in setting the sailing date can discuss with the licenced ship operator the time required to get its vessel to the port and to load to meet the sailing date; and (b) the shipper can have reasonable certainty about arrival time at the port of discharge (this is important in booking berthing slots at the discharge port and in satisfying a customer about date of arrival of a cargo).

We submit that if the Ministerial Guidelines are based on a collaborative and commercial model, and not established as if it is an adversarial system, then the appropriate level of commercial negotiation and dialogue will occur to ensure the objects of each party is satisfied.

1.6 (iii) Is availability to mean a whole voyage or a particular segment of a voyage?

The MUA submits that availability means the whole voyage for that particular cargo. However, as this is a commercial environment, the licenced ship operator should be able to subcontract for upload and discharge of part of the cargo (including under permit) if that would be more operationally efficient for the licensed ship operator and such an arrangement met the shipper's discharge date requirements.

1.6 (iv) Should holders of CVPs be required to check with licenced operators at each time of loading to ensure a licenced vessel is not available?

The MUA submits that no CVP should be approved unless the shipper has lodged full details of the long term contractual requirements for the cargo, which provides a level of transparency to allow the market to operate efficiently, and to provide the environment for informed investment decisions to be made by current and prospective licenced operators.

Essentially, we submit that CVPs should only be permitted as a vehicle to facilitate an interim arrangement pending the sourcing of a licenced vessel. We say this because virtually all CVPs are issued for established and long term contracted cargo requirements. For example, the imminent decommissioning of the bulk carrier *Alltrans*, which carries alumina on a regular pattern of voyages, should in our view only lead to the granting of permits where there is lodgement of a plan (including a timeframe) for sourcing of a licenced vessel to replace the *Alltrans*. We say the shipper, Rio Tinto in this case, should have an obligation under the Guidelines to make public its plans to allow the market the opportunity to respond in a considered way based on the facts of the situation.

If such a system was in place, and again subject to there being a reasonableness test in place, we would generally not see the need for a CVP holder to be required to check the availability of a licensed operator at each time of loading.

However, in the absence of proper information being available to the market, we say that a shipper should be required to check for the availability of a licenced ship at each loading. We put this view because under such circumstances i.e. where the market is uninformed, such a validation process, aimed at always providing the opportunity for an Australian licenced vessel to carry the cargo, the integrity of the coasting trade provisions of the Act and Regulations could potentially be undermined.

In the absence of such a procedure, a licensed vessel, which may not have been available at the time of the application for a 3 month CVP, could well become available at an early period in the 3 month permit approval window, and if excluded from offering for the cargoes that the CVP vessel would carry, could damage an Australian shipping operator's business, contrary to the intent and spirit of the Act and Regulations.

As we put in our primary submission to the Inquiry (see Para 5.2.48), we submit that there should be a new category of CVP that would provide certainly for the CVP vessel over a period of time (we say up to 1 year) in circumstances where the shipper or the ship operating company it has a relationship with is seeking to secure a new market, or is in transition between operating one licenced vessel and its replacement by another. We say that a new category of CVP would need to be on application and considered on the merits of the business case advanced by the applicant and made available to the market. Disclosure is important.

For example, a company like CSR or Rio Tinto, with reasonably fixed scheduling of cargoes, may wish to, or need to, decommission or withdraw a licenced vessel prior to being able to secure another licenced vessel (as a newbuild or a new charter) and might for commercial reasons wish to contact with, or negotiate with, a foreign shipping company to carry that cargo for a transition period. Subject to the criteria for issuing such a permit requiring a guarantee that the applicant intended to introduce of reintroduce a licenced vessel at a specified point in the future (and there be a penalty for failing to conform with such an undertaking), we believe that the requirement to check the availability of a licensed ship at each loading, and the requirement to undertake an overseas voyage each 3 months, could be dispensed with under such a modified CVP.

Adequacy (s286(1)(b)

1.7 "that the service as carried out by a licensed ship or ships is inadequate to the needs of such port or ports" - which is also a criteria for granting permits

7.1 (i) Should price be a factor in determining adequacy?

The MUA submits that the Guidelines should be framed in a way which puts the primary onus on transport infrastructure policy makers, planners and funders (and on those that advise such functions, such as port planners, port regulators and stevedoring companies) to create a stronger synergy between the requirements of Australian shippers, licenced ship operators and ports so that licenced ships are not deemed unsuitable because their specifications do not match the specifications of a port.

In this way the Guidelines can in act be an instrument of policy that supports Australian licenced shipping. We do not believe that Australian licenced ships should

be penalised because of inadequate port infrastructure, and that the objects of the legislation, to support Australian shipping, should be promoted through all instruments available to the Government.

The establishment of *Infrastructure Australia*, and associated infrastructure planning frameworks constitutes a new macro planning framework that can begin to address these issues over time, and that instruments such as sector specific legislation like the Navigation Act, and Ministerial Guidelines, are micro instruments which can be used to support the macro planning frameworks.

In the meantime, we submit that the reasonableness test should be applied, such that where the shipper would incur additional costs based on the mis-match of licenced vessel to port, the additional cost may be a factor in determining adequacy.

In relation to freight costs however, the MUA submits that there is no basis whatsoever for using freight price as a factor in determining adequacy. We put this view because: (a) coastal cargo is a part of the domestic freight market, which is a highly competitive market, and in relation to a considerable proportion of the cargo traded on the coast, is a contestable market among competing modes; (b) government officials responsible for making a determination on a permit application (the decision maker) are not skilled or qualified in freight rate analysis or competitive shipping freight markets and could not possibly be in a position to determine whether a freight rate is competitive or otherwise; and (iii) an actual freight rate is only one of the considerations that is relevant to competitiveness and the efficient working of markets. We say that any attempt by a public official (a decision maker) to intervene in a market decision such as price would clearly lead to market distortion and furthermore, it could put the public official in a position of being manipulated.

We note that the decision by Departmental officials to use price as a criteria in determining adequacy of a licenced operator is a relatively recent interpretation of the Permit Guidelines, and arose from Departmental officials being placed under sustained pressure by parties representing international shipping interests.

We submit that the use of price in determining adequacy of an Australian licenced vessel is a form of dumping (social dumping), a practice that under WTO rules, allows a country to take remedial action. Under WTO rules, dumping means the country in question is exporting at a price below its domestic market price or below its production cost. We argue that favouring of foreign ships in the domestic freight market, through issue of a permit where price is used as a determinant factor, is in effect allowing the foreign operator to operate at less than the domestic market price at the expense of the domestic licensed ship operator. We say that consistent with the WTO rules, Australia should not allow a foreign permit vessel to be favoured over a licenced vessel on the basis of the freight rate the foreign vessel can offer.

Unless this view is adopted, it effectively means is that the lowest standard international ship, meeting the lowest safety, security and labour standards, and flagged in a registry that offers the lowest taxes, is to be favoured over a genuine Australian licenced vessel. The effect is that the Australian licensed vessel could never compete on price under those conditions, and should not be required to do so. No other domestic industry is forced to compete using developing nation wage rates as the benchmark of competitiveness.

There could be no stronger demonstration of the abuse of the intent of the permit system than to condone the use of freight price as a determinant in vessel adequacy.

7.1 (ii) Should a licensed vessel be considered adequate if it cannot carry the cargo in a single voyage?

Once again, the MUA submits that this question must be considered in the context of the shipper's business plan and contractual requirements, and that the shipper should be required to make a strategic declaration of its longer term shipping requirements, and that should be available transparently in the market. Once again, there should be an onus on disclosure. Only in this way can the licenced shipping operator know whether the cargo movement required is a genuine one-off, or part of a longer term need with a consistency or pattern of trade.

In relation to the specific question, we say there are two issues at play that need to be considered. First, in terms of ensuring the greatest degree of competitive neutrality between the conditions applying to licenced vessels and those applying to permit vessels, we say the rules must be applied equally. This means that if it is a requirement that the licensed vessel must carry the total cargo to be eligible, then the same condition must apply to both the licenced vessel and the permit vessel.

Second, we say the Government official who is the decision maker must have sufficient information to enable a fair, practical and commercially sensible decision to be made. If a case has been made that the stated cargo volume is absolutely critical to the client and must be carried as a single cargo, then it may be appropriate to rule a licenced ship that cannot carry the stated volume in a single cargo as being ineligible. However, if there is no such compelling case, then we say that discretion must on the balance, favour the licenced vessel. We say that the decision maker could only be in a position to make such an assessment if they had full information on the trade and full information on the shipper's requirements over a period of time. As stated, we say there must be a new requirement built into the Guidelines that [places this onus on the shipper.

7.1 (iii) Should a licensed ship offering to transport cargo on an open deck be considered adequate when a shipper would prefer that the cargo be shipped below deck (i.e. protected from the weather)?

The MUA submits that in relation to technical questions such as the one posed, the decision maker needs to be able to apply the reasonableness test. However, this assumes that the decision maker has sufficient technical knowledge to be able to apply a reasonableness test. Our experience suggests that the types of officer that are delegated as decision makers on behalf of the Minister do not hold such technical qualifications or skills.

Accordingly, we say that the decision maker needs to obtain technical advice and that sufficient time needs to be available for the decision maker to obtain technical advice. This reinforces our view above that early and timely declarations of future cargo requirements should be made. It may be that over time, Guidelines are enhanced based on experience that minimises the need to external technical advice to be sought on every occasion the situation arises.

Overall then, we submit that there should not be a fixed rule in relation to the stipulation of such conditions, and that each case be considered on its merits based

on securing of expert technical advice. Each case needs to be considered on its merits, and the decision maker should have regard to industry practice and advice from both parties, as well as independent expert advice.

Importantly, the shipper or applicant should not have the right to stipulate one condition for the licenced vessel and another for the permit vessel.

7.1(iv) Should a licensed ship offering lift on/lift capabilities only be considered adequate where a shipper stipulates RO/RO (roll on/roll off)? [Some shippers of vehicles prefer/stipulate RO/RO shipment to avoid potential damage.]

Our response to 7.1 (iii) applies.

7.1 (v) Should a licensed ship be considered adequate if the operator cannot supply equipment to the shipper?

We submit that the while a reasonableness test might be appropriate, it needs to be framed in the context of applying the Guidelines in a way which builds the capacity of the licenced operator and the range of associated services it might be able to offer to support its primary service of shipping cargo.

We say therefore that the decision maker should be asking how will the issue of a permit develop the equipment supply capacity of the licensed operator. The priory objective must be to take decisions which build the Australian operators capacity to provide the associated service demands and service standards required of the shipper, with the longer term capacity building as the objective.

Prima facie therefore, the MUA submits that there is no basis for determining a ship to be inadequate if the operator cannot supply equipment to the shipper. We put this view because equipment such as empty containers are always available, so whether the ship operators supplies the equipment or a third party supplies is immaterial (subject to cost issues – and again we say a reasonableness test may be applicable, subject to the decision maker having the information and capacity to make that judgment.

We submit that if licenced ships can get greater certainty of cargo, by getting access to shippers' cargoes under professional business relationships, then their willingness to serve that customers needs will grow, and the capacity of the licensed operator to be able to supply equipment will increase over time. This should be the underlying objective in applying the Guidelines on a merit basis.

7.1 (vi) Should a licensed slip be considered adequate if the foreign vessel offers freight free cargo shipment?

Again, consistent with our response to question 7.1 (i) above, such an offer would constitute an extreme form of social dumping, and must not be tolerated. A foreign ship headed for Australian waters with the opportunity for taking on a speculative cargo will of course always be in a position to offer that cargo at no cost or below cost, because its voyage has already been paid for by pre-arranged contracted cargo bookings.

Public interest (s286 (1))

1.8 "the Minister is satisfied that it is desirable in the public interest that unlicensed ships be allowed to engage in that trade" - which is also a criteria for granting permits. Currently this is confined to safety and security issues.

1.9 In respect of safety:

1.9 (i) Should a vessel that has been detained previously under a Port State Control (PSC) inspection not be considered for permits even though all the detention causing items have been fixed?

The MUA submits that the fact of a detention itself (if defects arising from that detention are remedied to the appropriate standard and in an appropriate timeframe) may not by itself be a factor that should automatically rule out a vessel from being eligible for the issue of a permit.

However, we say that the decision maker must have access to global Port State Control (PSC) data so that the decision maker can make a judgment (presumably after consulting AMSA and the ATSB) about: (a) the seriousness of the defects found the reasons for the detention; and (b) whether the vessel is a serial offender; (c) the age of the vessel; and (d) other criteria that could be developed to assist the decision making – all aimed at ensuring that only safe ships and compliant (to safety standards) ship operators are permitted to be granted a permit.

Where the decision maker has evidence, gained from consultation with expert regulators, that the vessel may be non conforming with a PSC defect notice/s, has a record of defects or detentions, is an aged ship then the Guidelines should require the decision maker to require the foreign vessel operator, to be eligible for a permit, to enter into a transparent agreement on its future safety risk management and associated governance arrangements as a condition of permit.

1.9 (ii) How long after a detention should a vessel not be considered for permits?

The MUA submits that if a vessel is considered to constitute a safety risk by the decision maker, and is ruled ineligible for the grant of a permit, then the vessel should not be eligible to apply for a permit for a further 6 months, and only then on the basis that here have been no further detentions or adverse PSC reports on the vessel.

1.9 (iii) Should tankers carry non-fuel products such as molasses and benign chemicals be subject to the same requirement for an OCIMF inspection report

It is the submission of the MUA that the Oil Companies International Marine Forum (OCIMF) standard is not suitable for application to chemical tankers carrying non chemical cargoes such as molasses. We suggest instead that the appropriate standard to be applied for carriage of such cargoes is the CDI standard (Chemical Data Institute standard) and use of its Guidelines.

We also submit that the Guidelines should include definitions of benign chemicals and other definitional issues to guide decision making.

1.10 In respect of security:

1.10 (i) How adequate are current background checks for foreign seafarers?

The MUA submits that implementation of the Maritime Crew Visa (MCV) does not adequately address the current security weakness that allows foreign seafarers to enter Australian waters and ports with security and background checks which do not match the standards applied to Australian seafarers and port workers. This is particularly so in relation to foreign seafarers employed on board ships to which a coastal trade permit has been issued.

We submit that the current background checks for foreign seafarers are inadequate. However, we recognise that Australia cannot unilaterally require all foreign seafarers entering Australia to have undergone backgrounds checks to the standards required of Australian seafarers who all hold Maritime Security Identification Cards (MSICs), and have therefore competed rigorous ASIO and Federal Police checks.

We do believe however, that seafarers who are working on vessels that are issued with a permit, and who are therefore engaged in the Australian coasting trade, and are therefore within the scope of Australian domestic law, should be required to meet additional security checks, to the standards required of as MSIC holder.

The MUA also submits that that a decision maker must refuse to grant a Permit in relation to an application that specifies the cargos as a High Consequence Dangerous Good (HCDG), and in particular Security Sensitive Ammonium Nitrate (SSAN). Such cargoes in our view must only be carried in the coasting trade by Australian flagged vessels.

Extract from MUA submission to Inquiry – Proposed changes to the licensing provisions in the Navigation Act 1912

Amend the licensing provisions in Part VI of the Navigation Act

5.2.62 Section 288(3) of the Navigation Act (Licensing of ships to engage in coasting trade) requires amending to provide new conditions for the granting of a license, these being:

- The ship must be registered under the *Shipping Registration Act 1981*;
- The ship must be crewed by Australian nationals i.e. be Australian residents, or persons authorized to work in Australia;
- The Australian seafarers must be engaged under the terms of an Australian collective enterprise agreement; and
- The employer of Australian seafarers must be in compliance with the *Seafarers Rehabilitation and Compensation Act 1992*.

5.2.63 It is our view that the introduction of a more transparent Ministerial Guidelines, with strengthened availability, suitability and public interest tests, combined with the new category of permit we propose, will provide sufficient flexibility to meet shipper needs and shipping operator commercial requirements, whilst at the same time providing regulatory certainty and a foundation for investment in Australian shipping and to build reliability into the supply chain

Extract from MUA submission to Inquiry – Proposed changes to the Permit Guidelines

Reform of the Ministerial Guidelines for Granting Licences and Permits to Engage in Australia's Domestic Shipping

5.2.46 A new Preamble, to reflect the Government's commitment to enhance the competitiveness and sustainability of the Australian coastal shipping industry and to clarify the intent of Permits.

- Part of that policy statement would need to acknowledge the principle of Australian sovereignty over commercial shipping operations within Australian waters is adhered to, as upheld by the High Court in *Re Maritime Union of Australia; Ex parte CSL Pacific Shipping Inc* (2003) 200 ALR 39; (2003) 77 ALJR 1497; (2003) 121 IR 103; [2003] HCA 43.

- A second part of the policy statement must seek to establish the objective of competitive neutrality between licenced ships and permit ships

5.2.47 The preamble would also clarify the intent of the permit as being to:

- Fill a temporary incapacity in the Australian fleet so that shippers can meet customer contracted expectations;

- Meet specialised needs that cannot be fulfilled by Australian ships

- Facilitate the development of new trades; and

- Clarify that permits are the exception, not the rule.

5.2.48 However, we believe there needs to be a new category of Permit, or a new subcategory of the Continuing Voyage Permit that provides a Continuing Permit to operators in special circumstances, such as where an operator is awaiting delivery of a newbuild, or where the business case is such that a period of time is needed to establish a foothold in a market. It is our view that applicants for this category of permit should be required to lodge a business case submission and that each case be considered on its merits.

5.2.49 Improving transparency in the administration of the Guidelines, in two ways: (i) by providing stakeholders (whom we believe should be ASA, MUA, AIMPE, AMOU and possibly SA) or interested parties (unspecified) with the opportunity to comment on all applications for a permit within a specified timeframe aimed at assisting the Minister's delegate to make a decision on a permit application (under previous versions of the Ministerial Guidelines, the parties (which were specified) had 14 days to comment, and in addition, could trigger a conference of the parties if there was an issue of concern surrounding a permit application; and (ii) by providing a real time record of decisions as well as the reason for decision, and by providing regularly updated (no longer than quarterly) data/statistics on both SVPs and CVPs on the Department of Infrastructure website.

5.2.50 The cumulative statistical data should include, but not necessarily be limited to:

- Permit type
- Permit Number
- Date of Permit application
- Date of Permit approval
- Applicant name (company)
- Ship name
- Ship category
- Ship registration (country)
- Tonnes of cargo (MT) or TEUs (if containerised)
- Port of loading (POL)
- Port of discharge (POD)
- Estimated sailing date (ESD)

5.2.51 Strengthen the availability and suitability tests so that:

- The "reasonable commercial terms" provision are amended, or alternatively, define "reasonable commercial terms" so that (i) the offer of a freight rate by the Permit ship which uses international seafarer rates of pay and conditions of employment in determining the ships operational costs as a factor in the calculation of freight rates, is prohibited; and (ii) the Delegate is only able to assess the commercial terms relative to the going rate in the Australian domestic shipping freight market.

- In considering availability and adequacy, the Delegate be required to assess the patterns of applications by the Permit applicant, covering:

  - The previous applications made by the applicant;
  - The patterns of applications made by the applicant;
  - The frequency of applications made by the applicant; and
  - The timing of applications made by the applicant eg how close to the deadline for lodgement of applications are applications typically made.

5.2.52 Such information would enable the Delegate to determine if the information revealed a pattern of application that suggests the applicant is seeking to circumvent the spirit and intent of the Permit system. If a Department of Infrastructure and Transport officer in the course of assessing an application could ascertain from previous applications that a particular ship, or the ships of a particular operator or owner, are consistently showing up in applications for a particular cargo, or with a particular shipper, then the officer should reasonably question the bona fides of the application, and undertake additional investigation before determining an application.

5.2.53 Permit holders be required to uplift all available cargo, and not have the option to defer cargo to another voyage, so that the same conditions apply to both a licenced operator and a Permit holder. Alternatively, if the Permit holder cannot uplift the whole of a cargo, it should be deemed inadequate for the task and be ruled out of carrying any of the shipper's cargo.

5.2.54 Extend the public interest test by inclusion of a Labour Standards Clause, such that an applicant's adherence to minimum labour standards would form

part of the public interest test to be applied by the Ministers delegate in determining an application.

5.2.55 The critical element of a Labour Standards Clause in our view is the minimum rates of pay and associated employment conditions applying to the crew. We propose that the definition of the minimum standard be an "ITF acceptable agreement". This is terminology that is used internationally and is recognised in for example, European and Scandinavian labor laws which provide a union right of boycott (for example, of a ship which does not apply an ITF acceptable agreement). It is also the terminology used in charter agreements globally, where the charterer requires the charter party to apply an ITF acceptable agreement to crew.

There are several ITF Agreements applying globally – the ITF Standard Collective Agreement 2006 (which applies when there is a major disputation of the parties), the ITF Uniform Total Crew Cost Collective Agreement 2006 (which is the most frequently applied agreement relevant to FOC ships) and the International Bargaining Forum Collective Agreement 2007 (which applies to ships owned by members of the Joint Negotiating Group (JNG), which is an employers' group made up of a number of ship management and ship owner associations in Asia and Europe which negotiates with the ITF in a body know as the International Bargaining Forum (IBF).

5.2.56 The secondary elements of the Labour Standards Clause would: (i) require the delegate to be satisfied that there is a 'genuine link' between the real owner of a vessel and the flag the vessel flies, in accordance with the United Nations Convention on the Law of the Sea (UNCLOS). Article 91 of UNCLOS (Nationality of ships) requires that:

"*Every State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly. There must exist a genuine link between the State and the ship*"

and (ii) require the delegate to be satisfied that the record of the Flag State where the vessel is registered is acceptable.

5.2.57 The main test of this record would be whether the Flag State has ratified the core ILO and IMO Conventions governing labour standards and ship safety standards. One source of such a record would be the ITFs Flag of Convenience list (which currently includes 32 States. Another source would be the Flag State Performance Table (available at http://www.marisec.org/flag-performance/FlagStatePerformanceTable07.pdf) produced by Maritime International Secretariat Services, a joint secretariat of all the major international shipping associations - BIMCO, NTERCARGO, International Chamber of Shipping, International Shipping Federation and INTERTANKO.

The following 32 countries have been declared FOCs (at April 2008) by the International Transport Workers Federation (ITF) Fair Practices Committee:

Antigua and Barbuda
Bahamas
Barbados
Belize

Bermuda (UK)
Bolivia
Burma
Cambodia
Cayman Islands
Comoros
Cyprus
Equatorial Guinea
French International Ship Register (FIS)
German International Ship Register (GIS)
Georgia
Gibraltar (UK)
Honduras
Jamaica
Lebanon
Liberia
Malta
Marshall Islands (USA)
Mauritius
Mongolia
Netherlands Antilles
North Korea
Panama
Sao Tome and Príncipe
St Vincent
Sri Lanka
Tonga
Vanuatu

5.2.58 The Flag State Performance Table currently identifies a list of 14 Flag States as having 12 or more negative performance indicators, these being: Albania, Bolivia, Cambodia, Costa Rica, Democratic People's Republic of Korea, Democratic Republic of the Congo, Honduras, Kenya, Madagascar, Mongolia, Sao Tome & Principe, Suriname, Syrian Arab Republic and Thailand. If this source was to be used as a guide, the industry would need to agree on which performance indicators would form the basis of ruling out an operator from being eligible for a permit. As far as ILO Standards are concerned, the minimums we believe are essential would comprise those codified by the ILO in its 1998 'Declaration on Fundamental Principles and Rights at Work'. The four principles established in the declaration were;

- freedom of association and the effective recognition of the right to collective bargaining;
- the elimination of all forms of forced and compulsory labour;
- the effective elimination of child labour; and
- the elimination of discrimination in respect of employment and occupation (ILO 1998a).

5.2.59 Also, extend the public interest test by ensuring that a permit vessel complies with Australian laws, including labour law, OHS law, workers' compensation law, taxation law, customs law, immigration law, environment law.

5.2.60 Add a new Clause specifying that a Delegate must refuse to grant a Permit in relation to an application that specifies the cargos as a High Consequence Dangerous Good (HCDG), and in particular Security Sensitive Ammonium Nitrate (SSAN). Such cargoes must only be carried in the coasting trade by Australian flagged or licenced vessels.

5.2.61 We also believe that there needs to be a proper compliance and penalty regime, so that abusers can be quickly penalised, and/or removed from participating in the system.