



International Transport Workers Federation (ITF)

Submission to Productivity Commission

Response to Draft Report of 9 September 2022

Lifting productivity at Australia's container ports: between water, wharf and warehouse

Inquiry into the Long-term productivity of Australia's maritime logistics system

28 October 2022

About the Australian ITF Inspectorate

This submission is made on behalf of the International Transport Workers' Federation (ITF). The ITF is an international federation of around 700 transport workers' trade unions representing over 18 million transport workers from some 150 countries. It is one of several Global Union Federations and works closely with the International Trade Union Confederation (ITUC).

In Australia, the ITF has a team of five people that are employed full-time to inspect international ships and assist international seafarers in Australian ports. These inspectors board approximately 500 ships per year, in addition to assisting multiple seafarers that contact them by text, email, social media, seafarers centres or waterfront workers. The Australian ITF Inspectorate has been active since the 1980s.

Overview of the ITF submission

This submission responds to issues raised, observations, findings, recommendations and calls for information in the following Chapters:

- 3. Container port performance
- 6. Market power in other markets
- 8. Workforce arrangements: background and framework
- 9. Workforce arrangements: issues
- 10. Skills and labour supply
- 12. Australia's national shipping concerns.

Introductory comments

The ITF supports the submission of the Maritime Union of Australia (MUA).

The ITF submission focusses on the operation of international liner shipping and in particular the relationship between the human and labour rights of international seafarers that crew those container line ships and port performance.

We are concerned that due to the particular perspectives, which we regard as narrow, from which the Commission has responded to the terms of reference for this inquiry, there has not been due regard given in its draft report to social factors which we submit should have more weight when examining economic concepts such as efficiency and productivity in supply chains.

Both ships and ports, the two most strategic elements of international freight supply chains, viewed both separately and as an inter-connected interface for moving containers from ship to shore, are complex eco-systems, involving a constrained workspace using an extraordinary array of technologies where capital and labour come together to sustain the heartbeat of international trade and hence human needs and prosperity.

Yet severe exploitation of that labour, particularly on international ships, continues to flourish, while port workers and the unions that represent them are pilloried and shown disrespect, including by government agencies that should be required to provide objective and evidence based advice to government and industry, aimed at creating a better functioning, more equitable, fair and civil Australian society.

We hope the matters raised in this submission are helpful to the Commission in preparing its final report on this inquiry.

The core of our submission is that the Commission should have stronger regard to human rights norms and instruments when framing its responses, be they findings or recommendations, to the matters under investigation.

It is our submission that in order to improve efficiency and productivity in the complex eco-systems of ships and ports we refer to, where the interface between labour and capital is so critical to that improvement, it is fundamental that the rights and aspirations of workers are properly considered so that labour and their contribution is valued and their rights respected.

Unfortunately, in our view, this is not evident in the Commission's draft report. To the contrary, the draft report appears to further undermine the rights of the port workforce and propose a raft of discriminatory recommendations that may negatively impact port workers for years to come and place the union that represents them on the offensive in seeking to defend their rights. It will be no surprise to the Commission that the ITF will fully support the response of its affiliate, the MUA, in that endeavour.

Furthermore, the Commission has, due to its methodological approach, appeared to ignore and/or overlook the exploitation of seafarers derived from the almost totally deregulated system in which international shipping operates, in reaching the conclusion that international liner shipping is operating efficiently and just as could be expected in a perfect laissez-faire market.

The implications for the human rights of seafarers from an inadequate international shipping regulatory framework

It appears to the ITF that the Commission has not had due regard to the United Nations Guiding Principles on Business and Human Rights (UNGPs) when making its findings and recommendations.

The ITF actively protects the human rights of seafarers including fundamental labour rights in accordance with the ILO Maritime Labour Convention 2006 (ILO MLC), as amended. In September 2022 the Australian ITF Inspectorate released a report it commissioned, prepared by the Australia Institute/Centre for Future Work, entitled *Robbed at Sea: Endemic Wage Theft from Seafarers in Australian Waters*.¹ The report documents the extent of wage theft from seafarers on international ships trading through Australian waters and visiting Australian ports.

The report makes ten recommendations aimed at eliminating wage theft (or at the very least, mitigating wage theft) from seafarers, some of which propose improvement to the regulatory framework for international shipping. We submit that those recommendations, if implemented, would contribute to the valuing of seafarers, thereby improving their contribution to the productivity of ships in the marineside (vessel operations) described in Figure 2.1 in the draft report. Those recommendations to Government are to:

1. Close the loophole in the Fair Work Regulations 2009.
2. Strengthen the *Fair Work Act 2009* to regulate the conditions of employment of seafarers in relation to all vessels engaged in trade and commerce with Australia.
3. Amend the Seagoing Industry Award 2020 to level the playing field for all seafarers in coastal trading.
4. Make wage theft unviable.
5. Amend the licence application process under the *Coastal Trading (Revitalising Australian Shipping) Act 2012* to require applicants to lodge a bond when applying for a temporary licence.
6. Expand and enforce Modern Slavery commitments.
7. Advocate to national governments and the ILO for the establishment of a network of regional shipping industry labour tribunals to address seafarer labour grievances.
8. Include shipping industry labour standards in trade agreements.
9. Advocate that the ACCC fulfil the object of the *Competition and Consumer Act 2010* to require that Australian flag shipping is not hindered from commercial participation in liner cargo shipping.
10. Enhance information sharing and coordination among compliance bodies.

The ITF has been working in an unprecedented way to identify common ground with organisations such as the World Health Organisation (WHO), the ILO, the International Maritime Organisation (IMO), the International Chamber of Shipping (ICS – the global shipowners) and the International Maritime Employers' Council (IMEC) along with other shipping industry groups including Intertanko, BIMCO and Intermanager, to develop and implement practical solutions to the significant challenges to supply chains revealed during the COVID-19 pandemic and which continue. See Figure 1 for the continuum of challenges identified by the ICS, which are endorsed by the ITF.

¹ Australia Institute/Centre for Future Work, *Robbed at Sea: Endemic Wage Theft from Seafarers in Australian Waters*, September 2022

Figure 1: Main Challenges: Seafarers and Shipping Companies during the Pandemic



Source: International Chamber of Shipping, *The perfect storm: The Impact of COVID-19 on Shipping, Seafarers and Maritime Labour Markets - Lessons learned and practical solutions for the future*, April 2022, https://www.ics-shipping.org/wp-content/uploads/2022/04/The-Perfect-Storm_HSBA-and-ICS.pdf

One of the key calls by the ITF and its partners is that countries formally designate seafarers and other marine personnel as ‘key workers’:

- To enable crew changes to take place in a safe and timely manner; and
- To ensure that seafarers are prioritised for COVID-19 vaccination.

The ITF also participated in the production of extensive on-board protocols and guidelines, later endorsed by ILO, IMO and WHO²; and has worked with the WHO on the digital ‘yellow cards’, a medical passport issued by WHO, to be used by transport workers as proof of vaccination for seafarers and other workers who need to cross borders for their jobs.

The ITF will continue to advocate for these measures, because if adopted they will:

- Ensure that seafarers are not forced to remain on board a vessel longer than provided by their employment contract (seafarer employment agreement [SEA]), which can be up to the legal maximum of 11 months (subject to any qualifications provided in the collective bargaining agreement (CBA) applicable to the seafarer, to help mitigate fatigue and other physical and mental health issues).
- Limit any unavoidable crew contract extensions to the next scheduled port where crew change is possible and/or diverting course to a port where repatriation can be arranged in line with the IMO and ILO requirements.
- Result in the development of “green lanes” to facilitate crew changes.
- Help create a framework for enhanced coordination between ports, within countries and internationally, to manage the crew change issue more effectively.
- Ensure that ships in supply chains enforce their right to enter a port to disembark and repatriate seafarers who have completed their employment contract or where seafarers are unable to continue to work due to fatigue/illness (including mental illness) causing such a safety risk to a ship (e.g. insufficient healthy crew to meet the crewing requirements under the minimum safe manning document (MSMD) issued by the registry where the ship is registered applying to a particular ship) under the innocent passage provisions of the United Nations Convention on the Law of the Sea (UNCLOS) (subject of course to compliance with national human biosecurity protocols).
- Provide processes for seafarers to access vaccination.

² See for example the IMO *Recommended Framework of Protocols for ensuring safe ship crew changes and travel during this COVID-19 pandemic*, MSC.1/Circ.1636/Rev.1, 22 April 2021 <https://wwwcdn.imo.org/localresources/en/MediaCentre/HotTopics/Documents/MS%201636%20protocolMSC.1-Circ.1636%20-%20Industry%20Recommended%20Framework%20Of%20Protocols%20For%20Ensuring%20Safe%20Ship%20Crew%20Changes%20And%20Travel.pdf>

- Support the timely provision of medical attention to seafarers, including those with, or suspected of infection with, COVID-19.
- Ensure compliance with collective bargaining agreements (CBAs) approved by the ITF.
- Ensure collaboration with the relevant regulatory authorities to enable humanitarian assistance to be provided to seafarers stranded at sea:
 - All the above actions will guard against forced labour, which is a central concept in modern slavery legislation.

The ITF has also advocated to ship owners, ship managers and ship charterers to have in place:

- An on-board procedure for seafarers to lodge complaints, including an internal reporting mechanism and the right to complain to external authorities as a grievance mechanism consistent with a commitment to adopt a risk-based approach to modern slavery due diligence that is guided by the Guiding Principles on Business and Human Rights (UNGPs)³ and OECD Guidelines for Multinational Enterprises⁴ and is consistent with the ILO MLC;
- A human rights due diligence framework based on the UN Agencies Due Diligence Maritime Human Rights Risks and *The Covid-19 Crew Change Crisis: A Tool To Support Human Rights Due Diligence* that the ITF helped produce⁵; and
- A contract with a reputable third party ship vetting partner such as RightShip Pty Ltd (RightShip has recently committed to adopt a seafarers' rights self-assessment questionnaire developed in collaboration with the Institute for Human Rights and Business (IHRB) and the Sustainable Shipping Initiative (SSI)⁶ for its vessel selection and inspection processes to verify that seafarers' statutory rights and welfare are being upheld).

Notwithstanding the approaches of the ITF to improve the functionality, sustainability and security of international supply chains, there remain significant gaps in international shipping regulation that creates risks from over reliance on international ships for Australia's sea freight task.

Gaps in the regulation of international shipping and consequences for workers

Non-compliance with the ILO MLC⁷ as given effect by Marine Order 11 made under the Navigation Act 2012

- Seafarer employment agreements (SEAs - that incorporate ITF approved CBAs): There remains significant non-compliance with SEAs as evidenced by the extent of wage theft in international shipping.
- Shore leave: There remains significant non-compliance in facilitating a seafarer's right to access shore leave. Marine Order 11 provides that:

³ UN *Guiding Principles on Business and Human Rights*, https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinessshr_en.pdf

⁴ OECD *Guidelines for Multinational Enterprises*, <https://www.oecd.org/daf/inv/mne/48004323.pdf>

⁵ UN Agencies *Due Diligence Maritime Human Rights Risks and The Covid-19 Crew Change Crisis A Tool To Support Human Rights Due Diligence*, 2021, <https://www.ohchr.org/sites/default/files/Documents/Issues/Business/maritime-risks-and-hrdd.pdf>

⁶ Sustainable Shipping Initiative (SSI), *Delivering on seafarers' rights: Self-assessment questionnaire*, October 2021 <https://www.sustainableshipping.org/wp-content/uploads/2021/10/Seafarers-rights-self-assessment-questionnaire.pdf>

⁷ ILO, Maritime Labour Convention (MLC), https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/normativeinstrument/wcms_763684.pdf

“Subject to the operational requirements of a seafarer’s work on board a vessel, the master of a vessel must ensure that when the vessel is in port each seafarer on board the vessel is, if requested by the seafarer, granted leave to go to shore.”⁸

- Repatriation: The inability of seafarers to be repatriated at the end of their SEA contract term remains as a serious problem. In 2021 the Australian ITF Inspectorate (comprising just four inspectors to cover all Australian international trading ports) was successful in ensuring 338 seafarers on international ships visiting Australian ports were repatriated, based on lodgement of complaints by seafarers in accordance with the grievance procedures under the ILO MLC. That arose from complaints from approximately 1,000 seafarers in 2021. The ITF also lodges complaints with AMSA for compliance action.
- Fatigue, leading to marine accidents: The World Maritime University report on the current maritime regulatory framework on rest and work hours of 2020⁹ identified three significant shortcomings in international shipping regulation:
 - First, that insufficient crewing levels facilitate non-compliance with rest hours requirements. Subsequently, the adequacy of the current legal framework and associated practices may need to be reviewed to balance workload with crewing, safe operations and safety culture on board, including accurate record-keeping;
 - Second, that the ISM Code¹⁰ faces challenges in achieving some of its fundamental objectives, such as full compliance with regulations and effective feedback mechanisms; and
 - Third, the study considers the negative impact of chronic mistrust between shore and ships combined with the job insecurity characteristic of numerous seafarers’ working contracts, as triggers of a culture of adjustments to, in particular, records of work/rest hours. Maritime administrations should prevent such a culture by putting in place protection mechanisms that secure seafarers’ employment and to promote the concept of just culture:
 - ❖ The relationship between fatigue and marine accidents is well documented and has been a causal factor in several of Australia’s major marine incidents e.g. the grounding of the Chinese registered bulk carrier *Shen Neng 1* at Douglas Shoal, Qld in April 2010.¹¹

Other gaps

- Mental health: Australia’s principal seafarer mental health service, Hunterlink¹², has reported as follows in its quarterly reports over 2021-22:
 - Due to the COVID-19 situation Hunterlink has received an increase in contact from seafarers seeking return to home and desire to be repatriated due to long times at sea and expired contracts.
 - Hunterlink has also noticed an increase in internal conflicts on vessels and issues escalating to physical threats along with non-desirable conditions of vessels.
 - An increase in on-board loss of life of seafarers is contributing to grief and loss.

⁸ Ibid, Clause 30 Shore leave

⁹ World Maritime University, *A culture of adjustment : evaluating the implementation of the current maritime regulatory framework on rest and work hours*, 2020 (EVREST). - <https://www.wmu.se/news/systemic-failures-revealed-in-implementation-of-the-regulatory-regime-for-seafarers-hours-of-work-and-rest>

¹⁰ International Maritime Organisation (IMO), *The International Safety Management (ISM) Code*, <https://www.imo.org/en/OurWork/HumanElement/Pages/ISMCode.aspx>

¹¹ ATSB, Marine safety investigations report, *Independent investigation into the grounding of the Chinese registered bulk carrier Shen Neng 1 at Douglas Shoal, Queensland on 3 April 2010*, Final Report, April 2011, https://www.atsb.gov.au/publications/investigation_reports/2010/mair/274-mo-2010-003/

¹² Hunterlink, <https://hunterlink.org.au/>

- An increase in the non-desirable conditions of vessels include limited food and water.
- Bullying and harassment is an issue that is preventing seafarers reaching out, and the inability for shore leave is having a known detrimental effect on seafarers mental health.
- The main mental health issues that seafarers are presenting with involve: Struggling to leave ship on contract expiry; grief/loss; relationship issues; stress and anxiety; isolation, drugs/alcohol problems; workplace internal conflicts and psychosis/PTSD.
- Work health and safety (WHS): There remains widespread non-compliance with WHS law on board international ships visiting Australia, to the extent that there is no firm evidence that international ships are safe workplaces as could be expected for a land based workplace. This has been amply demonstrated during the COVID-19 pandemic, with frequent infection outbreaks on international ships. Non-compliance is exacerbated by uncertainty over which WHS law applies to ships when in the Australian Territorial Sea and when on the high seas, and the difficulty in monitoring WHS practice and undertaking compliance inspections and enforcement action by regulators. Advice provided to the MUA in 2020 by Holding Redlich Lawyers at the time of the NSW Commission of Inquiry into the *Ruby Princess* confirmed that when in the Territorial Sea, and most definitely when within state waters, international ships are covered by the relevant state WHS Act and Regulations, and most likely also by the WHS law applying in the nation of registration of the ship. We are not aware of any systematic inspection of international ships by State Government WHS regulators nor by the Australian Maritime Safety Authority (AMSA) notwithstanding that Marine Order 11 provides that in relation to foreign registered ships, they are required to comply with “*the requirements of the competent authority that give effect to the Maritime Labour Convention.*”¹³ The WHS arrangements on board international ships operating from ship registries over which there is little or no international regulatory oversight of WHS standards nor a compliance and enforcement mechanism, is manifestly inadequate. The international system of port state control (PSC) i.e. regulation of ships operating under the flag of another nation, by national maritime regulators like AMSA is ineffective and not interconnected.

The ITF advocates a two pronged approach to achieving greater supervision of the shipping element of supply chains.

Firstly, by increasing the level of Australian content in shipping. This can be achieved by incentivising investment in Australian ships in coastal trading, and by supporting and incentivising Australian shippers (cargo owners) to register the ships they own, involved in international trading, on the Australian General Shipping Register (AGSR) or Australian International Shipping Register (AISR). We address this in more detail later in our submission.

Secondly by using State/NT government powers in marine safety laws to complement national regulation of international shipping, particularly around labour standards and WHS practice.

We urge the Commission in its final report to acknowledge that workers, who are a key input to port operations, have rights, and are entitled to access and enjoy those rights, including the right to organise and collective bargaining, the right to safe work (which the Commission has already acknowledged) and the right to a grievance mechanism to address worker grievances. Likewise corporations, employers and

¹³ AMSA, *Marine Order 11, (Living and working conditions on vessels) 2015*, Clause 13, Foreign vessel ≥500 GT registered in country where MLC in force, <https://www.legislation.gov.au/Details/F2021C00485/Download>

managers of capital, have an obligation to confer those rights on workers, and identify aspects of their operations and business decisions which impact on those human rights, and to mitigate them.

Australia is a nation that is a signatory to a number of Conventions from UN bodies such as the ILO that confer rights on citizens and workers, derived from the ILO Declaration on Fundamental Principles and Rights at Work, adopted in 1998 and amended in 2022, which is an expression of commitment by governments, employers' and workers' organisations to uphold basic human values - values that are vital to our social and economic lives, and which affirms the obligations and commitments contained in Conventions of the ILO, including:

- Freedom of association and the effective recognition of the right to collective bargaining;
- The elimination of discrimination in respect of employment and occupation; and
- A safe and healthy working environment.

We do not believe it is the role of the ACCC or the Commission to reinterpret those fundamental labour rights or UN guidelines, and to propose discriminatory erosion of those rights through unworkable solutions on which the employers and unions have not been consulted and for which there is at this point no consensus. If there is to be improved labour relations processes and outcomes in Australian ports, they need to be advocated and managed by the relevant Minister and the labour relations agencies of Government.

Responding to these gaps in international shipping regulation, including through adoption of the recommendations in the *Robbed at Sea* report would in our view begin the process of ensuring seafarers can enjoy their human rights, which would have the effect of ensuring those seafarers fully exercise their contribution to making ships more efficient and more productive.

Container port performance

Productivity

Consistent with the MUA submission, we also believe there could be merit in the container flow/time metrics approach advocated by the Commission in designing an Australian 'index of port performance' that measures the productivity of a port as outlined diagrammatically in Figures 2.1 (The chain links imports and export across three fields of operations) and 3.1 (The anatomy of a port call).

We note that in the section on how productive are Australian container ports¹⁴, the Commission reported that:

- In relation to the marine operations aspect of port performance, reducing anchorage time is a key way to improve performance, whereas steam-in and steam-out times are likely more difficult to reduce because they should only reflect the sailing of ships within a port:
 - Seafarers have important roles to perform in anchorage operations and in vessel berthing, where their roles are integrated with port towage and mooring operators:
 - ❖ We note and endorse a point made in the MUA submission that invariably it is the maintenance of the ship (unsafe hazards) that extends the time taken by lashing gangs to unlash and lash;

¹⁴ Productivity Commission, *Lifting productivity at Australia's container ports: between water, wharf and warehouse*, Draft Report, 9 September 2022, P113

- That berth hours, which encompass start up time and finish up time (as described in Figure 2.1) account for almost 80 per cent of port hours on average, so improving performance in these time components could help to turn ships around faster:
 - One of the key roles of seafarers is to help repair and maintain on board equipment such as lashing bars, lashing bar securing points etc, and safety equipment like guard rails as well as making passageways safe, so critical for safe work of port workers who board ships to undertake lashing functions in port:
 - ❖ We note that under AMSAs 2022-23 National Compliance Plan the focus areas for Port State Control, Flag State Control and MLC compliance are: (a) Planned maintenance; (b) Fire safety; (c) Watertight/weather tight integrity; (d) Cargo Securing on ships; (e) Grain Inspections in NSW; (f) Container Verified Gross Mass audits (Victoria); (g) MLC Compliant Follow Up; (h) RPAS (Drone) trial for Sulphur analysis of Ship air pollution. Of those eight focus areas, three are directly related to container handling. AMSA reports that there were 3,631 arrivals of container vessels in Australian ports in 2021/22 and that it conducted 235 detailed cargo securing inspections. The outcome of these detailed inspections resulted in container vessels having a detention rate (7.6%), which is above the national average (5.6%). This detention rate was the third highest of any class of vessel to visit Australia. AMSA is also continuing to monitor the average age of vessels visiting Australian ports. It notes that the average age across all vessel types is 11 years, whilst the container fleet average is 14.9 years, which has been increasing each year since 2015/16:
 - ✓ Seafarers make every effort to ensure on-board equipment is safe but ultimately ship maintenance programs are matters for ship owners and ship managers/operators and the resources allocated for such programs. The AMSA evidence showing the age of container ships visiting Australian ports, along with the strong focus of its inspection program on container ships, which is a reflection of the level of its concern, should also be acknowledged by the Commission, because these are factors that impact on the time taken for marineside functions such as lashing and readying a ship for crane operations and readying a ship for departure. Seafarers and dock worker productivity is often a factor linked to the age and maintenance of the ship and containers, over which seafarers and dockworkers have no control.

We endorse the submission of the MUA that a key point to make is that across all segments of the movement of a container from ship to terminal gate, the terminal operator workforce has only minimalist influence on efficiency and productivity. The overwhelming influence derives from capital – its allocation, efficiency and productivity - and the quality of management which controls that capital.

Having regard to the factors we raise above, we also submit that it is extraordinary that of the 14 recommendations in the Commission’s draft report 10 are focussed on constraining the workforce, and not a single recommendation seeks to constrain management or managerial prerogative, or to improve management performance and practice. That appears unbalanced in our view.

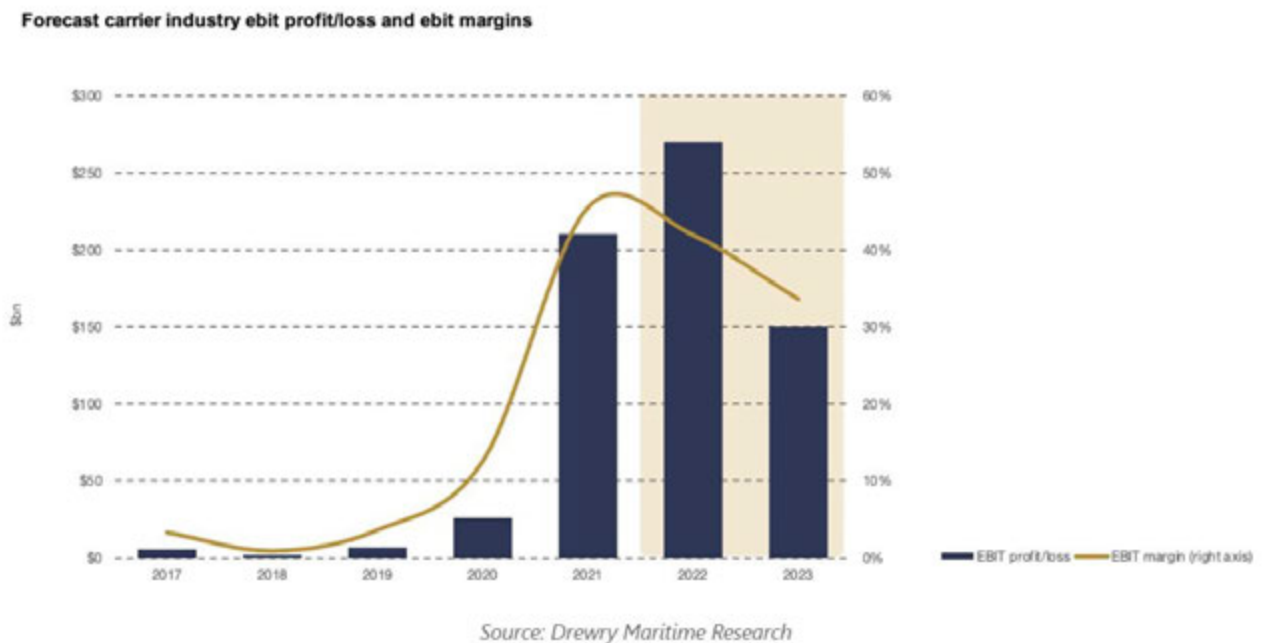
Market power in other markets

The market power of shipping lines

We agree with the MUA that the Commission has found that shipping lines can and do exercise market power, exemplified by:

- Shipping lines skipping port calls to the detriment of the cargo owner who has no recourse for remedy or compensation:
 - We ask the Commission to note that such practices not only impact on cargo owners and ports, but on seafarers, as it diminishes their opportunity to take shore leave, to access shore based seafarer welfare services and obtain medical assistance, all of which are rights conferred by the ILO MLC and Australia’s Marine Order 11.
- The ability of shipping lines to easily switch terminal operators.
- The unfettered ability of shipping lines to raise freight rates. We note the super profits which international shipping lines have extracted from price gouging strategies over the last two years in particular, and that shipping experts are expecting elevated profits to remain a feature of international container shipping well into the future – as shown in Figure 1. Maersk, the world’s second largest container line, revealed in August 2022 that it expects to register a record profit of \$31bn for the full year:
 - Regrettably this wealth is not being shared with the workforce, and is further contributing to global wealth inequality, and widening the ratio between CEO/Senior Executive pay and the median pay of shipping company workforces.

Figure 1: Forecast liner shipping EBIT profit 2017-2023



Source: Splash247.com, *Liner shipping on course to smash last year’s record profits*, August 10, 2022, <https://splash247.com/liner-shipping-on-course-to-smash-last-years-record-profits/>

- The unfettered ability of shipping lines to introduce larger ships into Australian ports without notice.
- The unfettered ability of shipping lines to fail to meet berthing windows without penalty.

- The increased bargaining power of the shipping lines which they are using to pay terminal operators lower charges and failing to pass on those lower costs to cargo owners. We address this in more detail later in this submission.
- The increased level of shipping line vertical integration in the freight and logistics supply chain.¹⁵
- Their lobbying power and veiled threats to disrupt the Australian supply chain, resulting in a continued exemption from key provisions of the C&C Act enabling the shipping lines to engage in behaviour that is normally regarded as anti-competitive conduct, not available to any other sector in the Australian economy.

We would add that the container shipping lines' market power is also exhibited by its ability to frequently disregard the obligations in the ILO MLC, and to engage in wage theft and other practices that exploit seafarers – again without fear of any regulatory action or penalty.

We also note that the Commission has clearly acknowledged the market power of shipping lines (and their ability to exercise that market power) because one of the rationales for its recommendation (6.2) that terminal access charges and other fixed fees for delivering or collecting a container from a terminal should be regulated so that they can only be charged to shipping lines and not to transport operators, is that *“if the fixed charges are unreasonable, the shipping lines are able to push back against these charges, unlike the transport operators.”*¹⁶

Notwithstanding those findings, the Commission concluded that current market competition is a sufficient constraint on international container shipping lines and no action is necessary to temper their market behaviour other than advocating the repeal of Part X of the CCA Act, and raising the question as to whether port authorities that manage the harbourmaster functions in a port could have some responsibility for any late arrivals or are in a position to charge fees to incentivise more timely arrivals.¹⁷

The ITF supports the Commission's recommendation 6.1 that the Australian Government should repeal Part X of the *Competition and Consumer Act 2010 (C'th)* (CCA), to be replaced by a limited form of class exemption.

We also propose that the CCA be simultaneously strengthened by requiring container shipping lines to adhere to specified service standards, as outlined in the MUA submission, which would include an obligation on shipping lines to inter alia:

- Ensure that seafarers on liner ships are covered by a current collective bargaining agreement approved by the International Transport Workers Federation (ITF);
- Comply with the International Labour Organisation (ILO) Maritime Labour Convention 2006, as amended to the standards required by the ITF; and
- Comply with the Neptune Declaration on Seafarer Wellbeing and Crew Change, International Maritime Organisation (IMO) Protocols for addressing seafarer crew changes and seafarer COVID-19 vaccination programs.

We propose that additional service standards be included in a strengthened CCA, including a requirement on container shipping lines to:

¹⁵ Productivity Commission, *Lifting productivity at Australia's container ports: between water, wharf and warehouse, Draft Report*, 9 September 2022, P185

¹⁶ Ibid, P200

¹⁷ Ibid, P191

- Comply with modern slavery laws and other mandatory and voluntary human rights due diligence requirements;
- Comply with the joint SSI/IHRB/Rafto Foundation publication *Delivering on seafarers' rights Code of Conduct: A seafarers' rights and welfare Code of Conduct for shipowners, operators, charterers and cargo owners* of October 2021; and
- Incorporate the UN agencies *Maritime Human Rights Risks and the Covid-19 Crew Change Crisis: A Tool To Support Human Rights Due Diligence* of 2021 into their corporate sustainability practices.

In our view such obligations, which are not onerous for a well-managed corporation, will help build confidence that seafarers can enjoy their human rights, be treated with respect, enjoy a dignified working life, all pre-conditions to optimising the productivity of the seafaring workforce and therefore the efficient and productive operation of ships, and which we submit, would help ensure that container ship operations, to the extent it is within their control, reduce time in port.

We urge the Commission to recognise that critical linkage in its final report.

The market power of ports and terminal operators

As we mention earlier in the submission, and as emphasised by the Commission in its draft report, a well-functioning, efficient and productive port requires a high degree of cooperation and coordination between ships and ports (principally terminal operators), and by definition between the seafaring and port worker workforces.

That cooperation and coordination can be enhanced, with resultant improvements in efficiency and productivity, if the port the port workforce, and the terminal operator workforce in particular are respected and rewarded appropriately for their contribution to efficient port operations. That requires profitable terminal operators who have the capacity to share the extraction of labour value with the workforce in the form of improved pay, better working conditions and reduced hours or work.

The ITF is therefore concerned that on the basis of a misplaced view that terminal operators can exercise countervailing power over shipping lines, while at the other end of the port financialisation chain the landside operators cannot exercise countervailing power over terminal operators, it would be preferable if current terminal access charges (TACs) were charged to the shipping lines and not to transport operators.

We therefore do not agree with the Commissions finding that more active regulation of terminal access charges is required¹⁸, nor do we support the Commission's preferred option to prevent container terminal operators from charging terminal access charges to transport operators, and instead, transfer all fixed charges associated with container collection to the shipping lines.

That proposition would have disastrous consequences for port efficiency because shipping lines remain almost totally deregulated and would be provided with another avenue through which to exercise their excessive market power in their commercial relationship with container terminal operators.

¹⁸ Ibid, P17

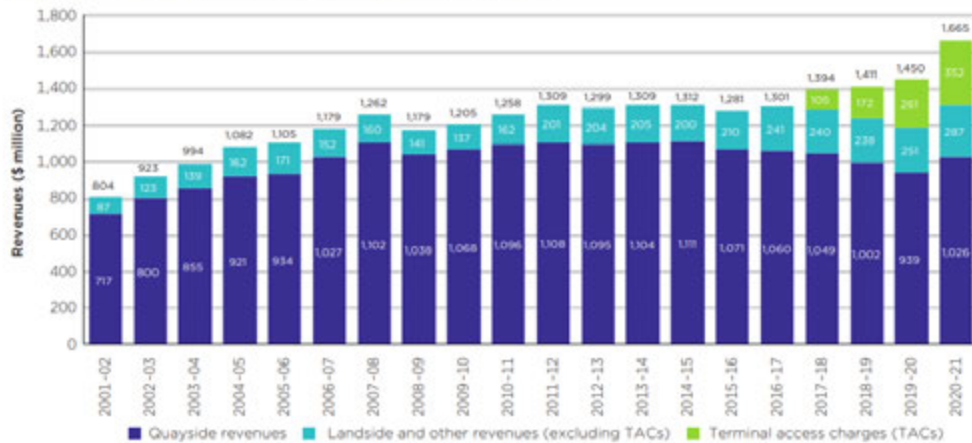
If terminal operators were required to collect TACs from shipping lines rather than from transport operators, the shipping lines would inevitably use their market power to recover those charges, so cargo owners, and ultimately consumers would be no better off.

But the more insidious outcome would be the impact on port efficiency and port productivity because shipping lines would use their market power to choose which terminal operator in a port they contract with, which would lead to regular contract switching as shipping lines seek to drive down the TACs by forcing the terminal operators to lower TACs to maintain their market share, which is relatively evenly balanced across ports at present.

Loss of contracts leading to loss of revenue, and or loss of revenue through lower TACs would impact on the return on capital already sunk by terminal operators in terms of terminal infrastructure (which is directly linked to port productivity). It would also impact on future infrastructure investment, including in other port infrastructure such as rail access and quay line extensions etc which is funded by a combination of government and port operator capital.

Shipping lines are already driving down the quayside revenues received by terminal operators as shown in Figure A2 in the ACCC *Container Stevedoring Monitoring Report 2020-21*.¹⁹ The Commission’s solution would result in a significant squeezing of terminal operator revenue and profitability, which could ultimately impact of their commercial sustainability. It would most definitely disrupt the investment plans of terminal operators. It would impact on the parameters of enterprise bargaining negotiations.

Figure A2: Total revenues in real terms: 2001-02 to 2020-21



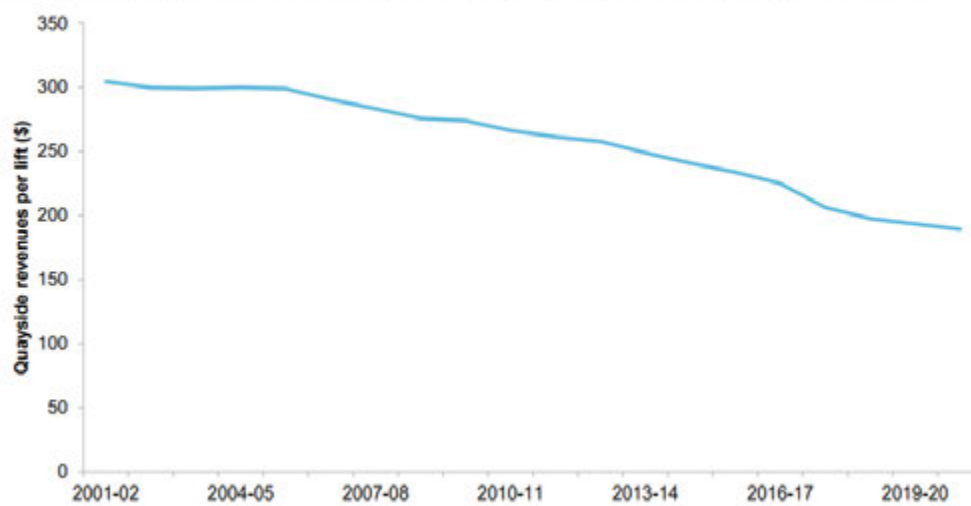
Source: ACCC analysis of information received from stevedores as part of the monitoring regime.

Note: TACs have been collected by container stevedores at some ports since 2011-12 and aggregated under landside and other revenues until 2016-17. Real values in 2020-21 dollars.

¹⁹ ACCC, *Container stevedoring monitoring report – 2020–21*, P74

Figure 6.3 – Quayside revenue has been decreasing

Aggregated quayside revenue per lift for Patrick, DP World and FACT, 2002–2021



Source: ACCC (2021a, fig. 5.2).

Additionally, shipping lines that did not like the TAC charges in a particular port could bypass that port altogether, or offer more limited services to that port, thus disrupting Australia’s supply chain logistics system. The shipping lines have already demonstrated they are willing to take that action (as evidenced in the Commission’s report), at great cost to cargo owners and ultimately consumers.

We therefore urge the ACCC to avoid adding its voice to supporting the Commission’s proposals.

If it is established that the trucking and rail companies are suffering a ‘capacity to pay’ crisis, as might be evidenced by bankruptcy, profitability or other such data and not just self-interest lobbying, adoption of a mechanism to assist those companies could be considered.

The mechanism we propose is establishment of an appropriate tribunal that would oversee and help settle contract rates that would be applied to cargo owners who engage trucking and rail companies. Fair contract rates set by a tribunal would not only ensure the sustainability of those transport operators and a fair return on their investment in trucks and trains and associated infrastructure (and help them transition to lower carbon emitting technologies), but would ensure that the trucking and rail workforce they employ are paid decent wages.²⁰ It is our view that cargo owners e.g. the importers such as

²⁰ The former Road Safety Remuneration Tribunal (RSRT) established by the Gillard Labor Government in 2012 to oversee the road transport industry in Australia, operating under the *Road Safety Remuneration Act 2012*, (Cth) is one such example. The RSRT was dismantled by the Abbot Coalition Government as part of its war on workers. We understand Labor is still considering the recommendations of an August 2021 Senate inquiry into the importance of a viable, safe, sustainable and efficient road transport industry which recommended establishment of an independent body that will, in consultation with industry, set universal and binding standards (including binding standards with respect to pay) which: (i) ensures the safe performance of work and eliminate unsafe economic and contracting practices; and (ii) apply to all road transport supply chain participants, including transport operators, online/on demand operations, and workers (regardless of their employment or work status), and throughout supply chains

retailers and exporters like manufacturers, who are the major users and beneficiaries of the products transported by containers and as the organisations which contract with the road and rail carriers to transport containers, should in our view bear the responsibility for ensuring that those transport companies have the ‘capacity to pay’, including for TACs charged by terminal operators. After all, it is the cargo owners and the transport companies they engage that are using the service provided by the terminal operator companies for pick-up and delivery of containers.

Such a supply chain responsibility approach is consistent with that applying to mandatory human rights and environmental due diligence, for example under Australia’s Safeguard Mechanism. This approach would provide the capacity that would enable the transport companies to more effectively manage TACs because it eliminates the ‘race to the bottom’ strategy adopted by companies under competitive pressure, thus eliminating the business model based on driving down labour costs and cutting corners on safety, that results in practices such as wage theft, use of platform workforce engagement technologies, higher rates of casualisation and insecure work, under-skilling, and higher injury and mortality rates, and which limits the capacity to invest for the future.

We believe the National voluntary guidelines for landside stevedore charges developed under the auspices of Infrastructure and Transport Ministers by the National Transport Commission, and approved by Ministers in March 2022 (and being commenced in each state according to that state’s timetable) should be given time to operate and be independently evaluated, say in three years from date of commencement.²¹

We note that the National voluntary guidelines for landside stevedore charges were based on the Victorian voluntary guidelines, which emerged after a Deloitte report for the Victorian Government found that container terminal operators are not using their market power unfairly to inflate prices and profits.²² The Commission also noted the ACCC finding that there is no evidence of excessive profitability for container terminal operators.²³

Australia’s national shipping concerns

Earlier in this submission we advocated a two pronged approach for nations to exercise a greater degree of control of the shipping element of supply chains as part of a strategy to improve the regulation of international shipping so it conforms with human rights norms and conventions, and helps meet nations’ trade and national security objectives.

One approach we proposed is to increase the level of Australian content in shipping. This can be achieved by incentivising investment in Australian ships in coastal trading, and by supporting and incentivising Australian shippers (cargo owners) to register the ships they own, involved in international trading, on the Australian General Shipping Register (AGSR) or on the Australian International Shipping

(https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Rural_and_Regional_Affairs_and_Transport/RoadTransportIndustry/Report).

²¹ National Transport Commission, *National voluntary guidelines for landside stevedore charges Version 1, 2022*, <https://www.ntc.gov.au/sites/default/files/assets/files/National%20voluntary%20guidelines%20for%20landside%20stevedore%20charges.pdf>

²² Deloitte Access Economics, *Port of Melbourne Pricing & Access Review, 2020*

²³ Productivity Commission, *Lifting productivity at Australia's container ports: between water, wharf and warehouse, Draft Report*, 9 September 2022, P201

Register (AISR). In fact we note that increasing Australian content is an objective of the AISR provisions in the *Shipping Registration Act 1981*.²⁴

The ITF advocates and campaigns for a lifting of domestic content in shipping by firstly, seeking to maintain or re-establish a link between the nation of beneficial ownership of a ship and the nation of registration of a ship. That is at the core of the ITFs Flag of Convenience (FOC) strategy. Secondly, the ITF supports the adoption and strengthening of national maritime cabotage. The loss of control and the loss of economic value from domestic shipowners flagging their ships in open registries is a matter of international concern in bodies such as the ILO and IMO.

National maritime cabotage is acknowledged as a legitimate and effective policy option for nations to assist their domestic shipping industry. For example, national maritime cabotage is recognised in all Free Trade Agreements (FTAs) signed by Australia, even while maritime services annexes to FTAs are seeking to erode the core principle of maritime cabotage.²⁵

The ITF commissioned Seafarer Rights International (SRI) to produce a report on the status of global cabotage, resulting in publishing of *Cabotage Laws of the World* in 2018.²⁶ That report found that 91 United Nations member states, out of 140 investigated, have cabotage laws, representing 80 per cent of the world's coastal UN maritime states i.e. that nearly two-thirds of the maritime states of the United Nations, covering every geographic region of the world, provide some degree of governance assistance for their respective maritime cabotage trades that provides some level of preferential treatment to each nation's domestic ships.

Some of the key findings of the study include:

- Cabotage laws are diverse, with a range of approaches taken by different countries.
- There is great diversity in the interpretation, administration and enforcement of cabotage laws;
- The stated objectives of cabotage include, to: maintain national security; promote fair competition; develop human capacity; create jobs; enhance marine environmental protection; promote ship ownership; increase safety and security of ships in port; and preserve maritime knowledge and technology;
- Cabotage laws have endured for centuries, but continue to evolve;
- Cabotage is not subject to a single definition accepted as binding on all states under international law; and
- Regional and national definitions of cabotage vary widely.

For countries that depend on the sea for their trade, cabotage safeguards their own strategic interests as maritime nations, bringing added economic value while also protecting national security and the environment. Cabotage provides jobs for a country's seafarers and also safeguards foreign seafarers against exploitation posed by liberalisation of the global shipping industry, preventing a race to the bottom. Without strong cabotage rules, local seafarers are required to compete on an uneven playing

²⁴ Section 15A, *Objects of the International Register*, provides that: The objects of the International Register are to: (a) facilitate Australian participation in international trade; (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.

²⁵ One example is the Australia-UK FTA.

²⁶ Seafarers Rights International (SRI), *Cabotage Laws of the World*, 2018

field with much cheaper, exploited non-national labour, primarily on flag-of-convenience (FOC) vessels, the owners of which usually pay substandard wages, flout safety laws, and do not pay tax in the jurisdiction in which profits are earned.

We note that the Commission has restated its views on cabotage, as an industry protection measure, which makes the following points:

- Protecting an industry to preserve jobs is not justified; and
- Protecting an industry from competition not only harms consumers but also reduces the incentives of the protected industry to improve its efficiency and competitiveness. Over time, the protected industry falls further behind foreign competitors, requiring ever more protection and increasing the cost to consumers and the community in general.²⁷

The Commission seems to view industry assistance from a narrow perspective, that has little regard to wider national interest considerations. What would the Australian economy look like if all \$16.2 billion in annual industry assistance reported in the Commission's Trade and assistance review 2020-21²⁸ was removed, much of it targeted to assist Australian industry sectors, some sectors being far less strategically important than sea transportation, and to support domestic employment.

The Commission did not analyse the reasons why 91 of the 140 UN member countries has adopted forms of cabotage. We believe that level of global commitment to maritime cabotage suggests that the benefits of assisting their domestic shipping industry outweighs the cost of alleged competitive distortion.

We wish to re-emphasise a point made in the MUA submission that Australian coastal shipping is already disadvantaged relative to international shipping because international shipping is permitted unfettered access to coastal trading – there are no barriers to entry - but worse, international shipping is advantaged by Australian laws such as:

- Labour relations law – international shipping companies in domestic trade are not required to pay their crew Australian domestic wages nor conform with Australian working conditions as provided in enterprise bargaining agreements in coastal trading, unlike Australian owners of Australian registered ships:
 - We draw the Commission's attention to the analysis in the *Robbed at Sea* report which outlines why this anomaly is a key factor leading to wage theft in international shipping that participates in Australian cabotage trade.
- Visa requirements are much more favourable for international seafarers relative to visa requirements for other imported temporary skilled labour, including for ship deck and engineering officers, and the Maritime Crew Visa arrangements do not require the same level of security checking as a required of Australian port workers and seafarers:
 - We have long argued, in the context of the operation of the *Maritime Transport and Offshore Facilities Security Act 2003* (MTOFSA) that provides for a Maritime Security Identity Card (MSIC) as essentially a right to work card for workers needing to work in a maritime

²⁷ Productivity Commission, *Lifting productivity at Australia's container ports: between water, wharf and warehouse*, Draft Report, 9 September 2022, P385

²⁸ Productivity Commission 2022, *Trade and assistance review 2020-21*, Annual report series, Canberra

- security zone, that international seafarers entering Australian ports should face the same level of risk assessment as Australian residents, but that is not the case;
- Corporate taxation and customs duty laws are more favourable for owners of foreign registered ships relative to owners of Australian ships; and
 - Seafarer taxation laws are more favourable towards foreign seafarers than Australian seafarers.

The Commission appears to have disregarded those facts in its orthodox approach to competition and the Commission is factually wrong when it attributed part of the cost differential between operating an Australian registered ships V a foreign registered to “*higher crewing levels per vessel*”²⁹ on Australian ships. To the contrary, Australian crewing levels are the lowest in the world, and significantly lower than a typical international trading ship – 17 crew in Australia V around 21-22 on an international ship.

We hope our submission helps address the gaps we have identified and are willing and ready to answer any questions the Commission might have to our submission.

²⁹ Productivity Commission, *Lifting productivity at Australia's container ports: between water, wharf and warehouse*, Draft Report, 9 September 2022, P386