



## Maritime Union of Australia (MUA)

### Submission to Department of Infrastructure, Transport, Regional Development, Communications and the Arts

#### Response to Discussion Paper

#### Review of Section 11 of *Carriage of Goods by Sea Act 1991*

1 November 2022

The MUA responds to each of the three consultations issues as follows:

#### **Concern 1: Definition of a 'sea carriage document'**

We do not consider that it is necessary to include an explicit definition for 'sea carriage documents' in the *Carriage of Goods by Sea Act 1991* (**COGSA**). The concern raised in the discussion paper as to whether a charter party or a voyage charter party are "sea carriage documents" for the purposes of the COGSA has been resolved by the Full Court in *Dampskibsselskabet Norden A/S v Gladstone Civil Pty Ltd* [2013] FCAFC 107.

This decision reversed the decision of *Dampskibsselskabet Norden A/S v Beach Building and Civil Group Pty Ltd* [2012] FCA 696 and did not follow the decision in *Jebsens International (Australia) Pty Ltd v interfere Australia* (2011) 112 SASR 297. The Full Court held that they were not 'sea carriage documents.'

We note that Full Court decision in *Dampskibsselskabet* was applied in *Carmichael Rail Network Pty Ltd v BBC Chartering Carriers GmbH & Co KG* [2022] FCAFC 171. In *Carmichael* the Court held (at [75]):

Section 11(1) is a mandatory choice of law provision for outbound shipments from Australia. It provides that all parties to a sea carriage document (and a non-negotiable document as described in s 10(1)(b)(iii)) relating to the carriage of goods *from any place in Australia to any place outside Australia* are taken to have intended to contract according to the laws at the place of shipment. In such circumstances, the law of the place,

including the Australian Rules, will apply to the contract of carriage: *Dampskibsselskabet; Hi-fert Pty Ltd v Kiukiang Maritime Carriers Inc (No 5)* [1998] FCA 1485; 90 FCR 1.

As the discussion paper records, the Australian rule include Article 1(1)(g) that defines a 'sea carriage document' to mean:

- (i) a bill of lading; or
- (ii) a negotiable document of title that is similar to a bill of lading and that contains or evidences a contract of carriage of goods by sea; or
- (iii) a bill of lading that, by law, is not negotiable; or
- (iv) a non-negotiable document (including a consignment note and a document of the kind known as a sea waybill or the kind known as a ship's delivery order) that either contains or evidences a contract of carriage of goods by sea.

If there had to be a fallback position we would recommend that it would be to adopt this definition.

### **Concern 2: Interstate voyages**

We support the inclusion of interstate voyages in an amended s 11 of the COGSA. Indeed we note that the Court in *Carmichael* held (at [103]) that:

However regrettable or absurd the apparent overlooking of inter-State contracts for carriage of goods by sea is in s 11 of COGSA 91, the will of the Parliament as expressed in that law does not allow the Court to stretch that legislative expression far beyond the text of the Act.

The amendments to s 11 should ensure that the inclusion of interstate voyages applies to all 'sea carriage documents' not just bills of lading. We note that even with this amendment intrastate voyages will not be captured and that the scheme of the legislation is to leave intra-State shipments to State legislatures. (see s 10(2)).

### **Concern 3: Seat of Arbitration**

We support an amendment to s 11 to ensure that the seat and location of an arbitration must be in Australia.