Shipping

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AUSTRALIAN COASTAL TRADING MARKET UPDATE

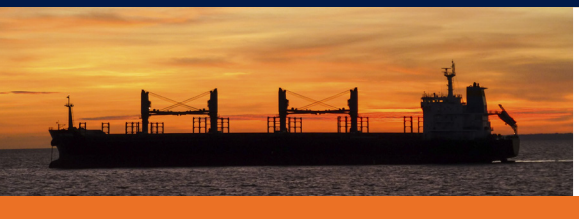
Since its introduction in 2012, the Coastal Trading (Revitalising Australian Shipping) Act 2012 (Cth) (the CTA) has been the subject of criticism by the shipping industry. In particular, the manner in which coastal trading is being regulated has caused difficulties for both foreign and Australian based shipowners and charterers seeking flexible and cost effective coastal trading services.

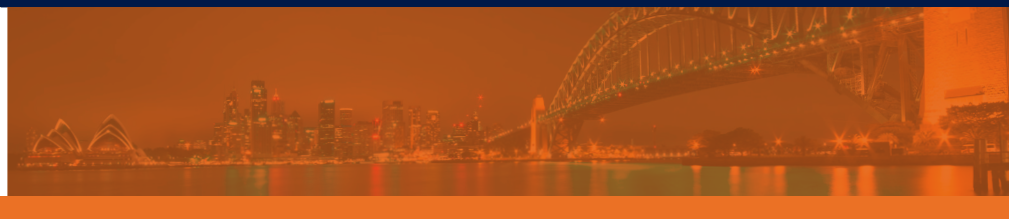
Variation of a temporary licence authorising a vessel to be used in coastal trading

The recent Federal Court of Australia decision, *CSL Australia Pty Ltd v Minister for Infrastructure and Transport*[1] highlights some of the challenges faced by industry stakeholders and indeed the Department of Infrastructure and Transport (the Department) in seeking to navigate the licensing requirements of the CTA. In this case, a broker applied for a temporary licence under the CTA as an agent of a vessel and the Department granted that licence. The broker sought to vary the specifications of a voyage authorised by the temporary licence in order to assist a shipper client who was not able to apply under the CTA for a temporary licence as the client only had one voyage to perform and not the required minimum of five voyages. Ultimately it was held, amongst other matters, that a broker is not a "person" entitled to apply for a temporary licence (in respect of unfixed vessels) under the CTA and can only make an application as an agent for a shipowner in very restricted circumstances.

In this case the Federal Court also set out new parameters for when holders of temporary licences must use the more onerous licence variation procedure in Subdivision D of the CTA, rather than the expedited variation procedure of Subdivision C. That Subdivision sets out a process for varying a matter *"authorised by a temporary licence"*. The Federal Court rejected the Department's submission that, through Subdivision C, a temporary licence holder could validly vary any changes to a voyage which had already been authorised provided that it did not seek to add further voyages to the temporary licence[2]. Instead, it was held that any changes to the temporary licence under Subdivision C would have to bear *"a reasonable relationship to*

1 [2014] FCA 1160
2 At [59]-[61]





the detail of matters specified" in the temporary licence[3]. Such an interpretation, His Honor Justice Rares opined, was consistent with the concept of applying "acceptable tolerance limits" to the criteria in the initial application for a temporary licence[4]. For example, if a person applied for a temporary licence for a certain volume of cargo and the volume of the cargo was to increase by more than 20% (which is the *"acceptable tolerance limit"* defined in the CTA) the temporary licence could be varied under Subdivision C. It is unclear, however, whether, if the cargo remained within acceptable tolerance limits but the dates changed such that the loading date was no longer within acceptable tolerance limits, the voyage would still *"bear a reasonable relationship to the detail of the matters specified"* in the temporary licence.

The advantage for the applicant in using the Subdivision C variation mechanism is that the publication, notification and negotiation requirements that apply to the initial temporary licence application do not have to be repeated in relation to the proposed variation. The effect is that, while general licence holders will be notified of the application to vary the temporary licence, they will not have an automatic right to negotiate with the temporary licence holder.

New guidelines published by the Department

Following the CSL decision, the Department's Shipping Business Unit (SBU) published an Industry Bulletin (Number 1 of 2015)[5] indicating that it would amend the application forms for temporary licences. In the meantime, we understand the Department has taken steps to clarify:

Ultimately it was held, amongst other matters, that a broker is not a "person" entitled to apply for a temporary licence (in respect of unfixed vessels) under the CTA and can only make an application as an agent for a shipowner in very restricted circumstances.

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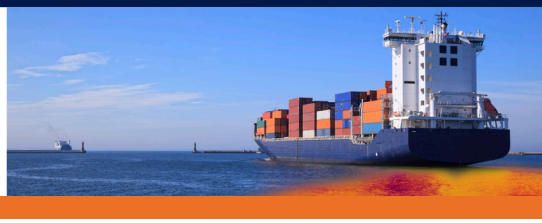
- Who is able to apply for a temporary licence.
- Under what circumstances a temporary licence holder can apply for a 'procedural', 'routine' or 'minor' variation to that licence under Subdivision C.
- Under what circumstances a temporary licence holder must submit a Subdivision D (new matters) application instead.

The SBU issued a further Industry Bulletin (Number 4 of 2015[6]) on 16 April 2015 stating that an application to add a single voyage under a temporary licence could be made by way of variation through Subdivision D. It seems that this new approach is aimed at addressing the situation where shipowners have an extra one or two new voyages and allows them to simply amend a pre-existing temporary licence, thereby, working around the *"5 or more"* voyages criteria in the CTA. The fact that such a process still falls within Subdivision D means the applicant is nonetheless required to submit to a review by general licence holders. Accordingly it will no longer be necessary for a temporary licence holder to wait until they have five or more new voyages to apply for a new temporary licence. This will no doubt also simplify matters from the Department's perspective as delegates will no longer be required to consider whether the proposed variation for a voyage has to be made under either Subdivision C or D.

However, the findings of the CSL decision which have prompted the Department to clarify the temporary licence application process may simply become academic if the Coalition Government proceeds with its plan to unwind parts of the Act.

3 At [97]
4 At [96]
5 The Bulletin can be accessed via this link: http://www.infrastructure.gov.au/maritime/business/coastal_trading/licencing/bulletins/sbu_industry_bulletin_001.aspx
6 The Bulletin can be accessed via this link: http://www.infrastructure.gov.au/maritime/business/coastal_trading/licencing/bulletins/sbu_industry_bulletin_004.aspx





Deregulation of coastal trading

The Deputy Prime Minister and Infrastructure Minister, Warren Truss, in a round table meeting in Canberra in early February 2015, set out the Coalition's proposal which purportedly seeks to ensure that Australian and foreign ships engaged in coastal trading are *"treated equally"*. The proposal includes:

- A single permit for all ships engaged in coastal trading.
- The abolition of general licence holders' right to object to a foreign ship being granted a permit.
- A requirement that foreign ships which remain on the Australian coast for a period of greater than six months employ a minimum number of Australian crew.
- Reduction of reporting and record keeping requirements.
- An exemption (even when in drydock) from the operation of certain sections of the Customs Act 1901 (Cth) which provide that ships remaining in Australian waters for more than 30 days will be deemed to have been imported.
- Amendments to the Australian International Shipping Register, including potentially removing the requirement for foreign shipowners/operators to reach a collective agreement with the seafarers bargaining unit.

The proposed amendments to the CTA have elicited an angry response from the Maritime Union Australia (MUA) which has argued, amongst other things, that opening up a deregulated coastal trading system to foreign shipping with limited visa checks for international seafarers poses a security risk for Australia. MUA National Secretary Paddy Crumlin criticised Mr Truss' proposal as being at odds with a Memorandum of Understanding signed by the United States Coast Guard and Australian Federal Police on 20 February 2015 to increase collaboration in coastal security and border protection matters[7]. It remains to be seen how the MUA intends to protest these changes (assuming the Government is able to get them through the Senate) while not exposing itself to secondary boycott actions under the Competition and Consumer Act 2010 (CCA). See our briefing on the Australian Competition and Consumer Commission's actions against the MUA for secondary boycotts in the coastal trading space for more detail[8].

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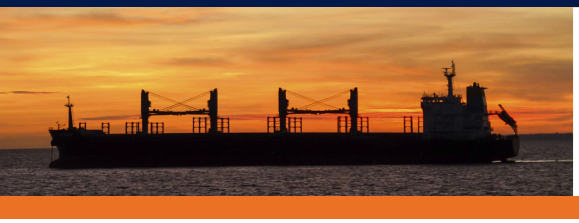
Competition Policy Review Final Report

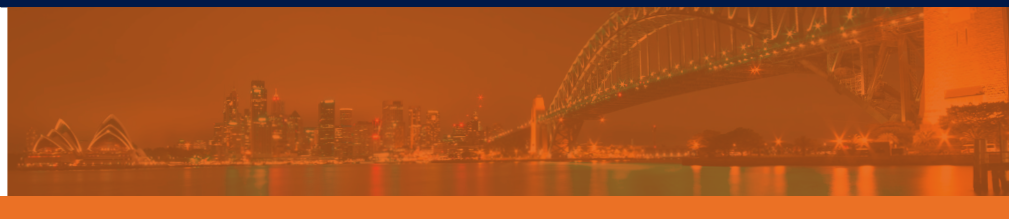
Also in the competition context, the 'Competition Policy Review Final Report' (the Harper Report) prepared by Professor Ian Harper, was released on 31 March 2015 recommending changes to a range of competition laws including the licensing restrictions of the coastal trading regime brought in by the CTA.

Whilst the Harper Report (and the earlier Draft Report released in September 2014 (Draft Report)) acknowledged that the coastal trading regime was under review, it nonetheless recommended that cabotage restrictions on coastal trading be removed *"unless it can be demonstrated that the benefit of the restrictions to the community as a whole outweigh the costs, and the objectives of the government policy can only be achieved by restricting competition"*[9].

The Harper Report also recommended the repeal of Part X of the CCA which granted exemptions to the liner shipping trade from the cartel provisions of the CCA. As with the coastal trading recommendations, the

7 http://www.mua.org.au/maritime_union_of_australia_says_abbott_has_twisted_priorities_on_maritime_security
8 http://www.hfw.com/Troubled-waters-ahead-March-2015
9 See Recommendation 5, page 40 of the Final Report available here: http://competitionpolicyreview.gov.au/files/2015/03/Competition-policy-review-report_online.pdf





recommendations relating to Part X were identical to those made in the Draft Report despite all stakeholders having been given a further opportunity to make submissions. Llew Russell AM (former CEO of Shipping Australia Ltd) commented in a recent article in Lloyd List Australia that the *"serious misstatements of facts in [the Harper Report] are regrettably a missed opportunity to highlight the competitive benefits of this light-handed regulatory regime which does so much to facilitate Australia's international container trade. The points made in the majority of submissions made to the review that mentioned Part X and supported its retention are simply not addressed"*[10]. For a more detailed discussion of the recommendations in relation to the Draft Report and adopted in the Harper Report refer to our Briefing 'Proposed Overhaul of Australian Competition Law in the Shipping Liner Trade'[11].

10 Lloyds List Australia, Issue No. 1075, dated 16 April 2015

11 Available here: http://www.hfw.com/Proposed-overhaul-of-Australian-competition-law-in-the-shipping-liner-trade-September-2014report_online.pdf

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