

CHALLENGING TIMES IN THE COASTAL TRADE

THE STORY SO FAR FOR “REVITALISING AUSTRALIAN SHIPPING”

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The year 2012 was a year of significant legislative reforms. In 2013 the outcomes of the Coastal Trading (Revitalising Australian Shipping) Act 2012 (Act) will be better understood by the shipping community.

Access to the Australian cabotage trades is at the centre of the “Revitalising Australian Shipping” reforms.

Proceedings issued by CSL Australia Pty Ltd (CSL) (Proceeding) centre on temporary licences to engage in coastal trading. In a judgment handed down on 16 November 2012 Robertson J has analysed the discretionary powers created by the Act, and factors to be taken into account when the Minister or delegate decides whether to grant an application for a temporary licence.

The courts’ interpretation of the Act will determine some key commercial outcomes of the new coastal trading regime. Current litigation also turns a spotlight on how efficiently the temporary licence process

is working. Australian manufacturing and processing industries are facing difficult operating conditions, aggravated by a high Australian dollar. In such conditions, the cost of freight can be a vital element for shipper and receiver interests who have a coastal sea freight requirement. On the other hand, the cost equation for owners and operators is not favoured by prevailing high bunker costs and regulatory uncertainty. For a range of stakeholders, the interpretation placed on discretionary factors built in to the temporary licence process under the Act will have important ramifications. Appeals to the Full Court are expected to be heard by May 2013.

Licences to engage in the coastal trade

The Act introduced a regime to regulate the coastal shipping trades between Australian states (excluding intrastate voyages), replacing the previous licence and permit system of the Navigation Act 1912 (Cth). To engage in coastal trade, a vessel must operate under one of three kinds of licence - a general licence, a



temporary licence or an emergency licence.

A general licence is available only if the vessel is registered on the Australian General Shipping Register; in broad terms, such a vessel must be an Australian-owned ship with each member of the crew being “an Australian citizen or the holder of a permanent visa or the holder of a temporary visa”. With a general licence, a vessel is allowed unrestricted access to Australia’s coastal trade.

A temporary licence may be granted for five or more coastal voyages at a time in a twelve month period. It enables those voyages to be performed by foreign flagged and crewed vessels.

The Act provides that general licence holders must be given notice of any temporary licence application (including a variation application) and afforded the opportunity to negotiate terms for one or more voyages that are the subject of the application.

In the event negotiations are not successful, the Minister or delegate will decide whether to grant or refuse the application.

The Act specifies factors which the Minister or delegate may take into account in reaching a decision, including at section 34(2)(f) the objects of the Act. Factors which the Minister or delegate must take into account include, at section 34(3) (d) the reasonable requirements of a shipper of the kind of cargo specified in the application. It appears that stakeholders have widely divergent expectations of how this aspect was intended to operate.

The Proceeding

Negotiations between CSL and the licence applicant Rio Tinto Shipping Pty Ltd (Rio Tinto) were unsuccessful in regard to CSL’s offer to fulfil four of the voyages in Rio Tinto’s application. After consideration, an authorised delegate of the Minister granted the variation application as requested by Rio Tinto.

CSL immediately applied for an interlocutory injunction to restrain Rio Tinto from taking any steps to perform the four voyages in question. That application was refused in favour of Rio Tinto Shipping.

CSL then applied for declaratory relief by judicial review of the delegate’s decision to grant the temporary licence.

The Judgment

The judgment of His Honour Robertson J on CSL’s application for judicial review has attracted general interest, in particular his honour’s reasons for rejecting CSL’s submissions that, in granting the temporary licence, the delegate had failed to take account of the objects of the Act, or had misconstrued the objects of the Act.

CSL had argued that the exercise of “... any discretion under the Act which resulted in the issue or variation of a temporary licence when a general licence vessel was available and suitable either established or was strongly suggestive of an error of law” [by the delegate], and that “the delegate misconstrued the object of the Act ... by taking account of the economic

interests, profitability and the costs of the shipper/receiver of the cargo”.

The Court disagreed with this proposition. Robertson J found that the object of the Act of “Promoting a viable Australian shipping industry is not the only or dominant object of the Act so as to make other considerations legally impermissible; such as the promotion of competition in coastal trading.”

The Court took note that the objects of the Act in section 3(1)(a) included providing a regular framework for coastal trading in Australia that promotes a viable shipping industry that contributes to the broader Australian economy. Robertson J found it significant that the word “Australian” did not appear in object 3(1)(a) in reference to “shipping industry”.

General implications of the decision - pricing

Robertson J held that pricing of freight offered by the general licence holder and the impact of the level of that pricing on the economic viability of a temporary licence applicant’s business operations, are not irrelevant considerations in the exercise of the Minister’s or delegate’s discretion. His Honour found that promoting a viable Australian shipping industry is neither the only nor the dominant object of the Act. The mere availability of general licence vessels which are suitable to perform voyages that are the subject of an application for the issue or variation of a temporary licence “... will not dictate the result of the exercise of the Minister’s or delegate’s discretion.”



CSL has appealed these findings, maintaining that the above findings are not consistent with the objects of the Act. Key issues for general licence holders are whether the Act permits the Minister or delegate to have regard to (a) the economic interests of the cargo parties and (b) the differential between the freight rates offered respectively by the general licence holder and by the temporary licence applicant.

Other implications – procedural fairness and time frames

A court decision can help streamline delegates' decisions by clarifying the legislative parameters, however the current situation could have the reverse effect. Robertson J found that the relevant decision maker had denied CSL procedural fairness when she consulted the Australian Maritime Safety Authority in regard to some but not all potentially available material concerning a safety issue affecting the vessel's suitability.

Delegates are caught between opposed and strong commercial interests in this context. At all times, numerous applications are tracking through the administrative process and mandatory time frames apply. Adding to the work load, a high incidence of variation applications has been experienced, as applicants strive to meet the exigencies of their operations under constraints of the fixed dates and voyages for which temporary licenses are granted. (Any variation application must also undergo the entire publication, challenge, negotiation and then decision process.) If the response of delegates is defensive concerning anticipated legal challenges, this could tend to slow matters down

while attention is directed to assurance of due process on all aspects of an application.

The time frames granted by the Act can be suspended while decision makers request additional information, and then assess whether the additional information is sufficient. In practice, the mandatory timeframes could be adding to the procedural burden without promoting speedier outcomes.

Other implications – uncertainty

The “Revitalising Australian Shipping” package of legislation aimed to incentivise investment in Australian ships. For any owner or operator weighing up the potential opportunity, the value of an income stream from cabotage trades is vital. While the availability and prospective value of cabotage freight trades are under a cloud of uncertainty, owners and operators will be unable to assess a business case to invest in Australian shipping.

Conclusion

Litigation currently before the Federal Court is significant across the spectrum of stakeholders. Ordinarily a period of uncertainty will follow the introduction of new and substantial reforming legislation. Testing the interpretation of new legislation through the courts is often the consequence. It is not surprising that access to coastal trading emerged as the front runner for a court challenge since it was the most difficult and contentious area of policy throughout the consultation stages of the reforms. The sooner some key points of interpretation are resolved, the clearer it will be to what extent the

objectives of the reforms have been achieved. Meanwhile, the hoped for flow-through benefits of a vibrant shipping “cluster” in the Australian economy remain elusive.

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