

FEDERAL COURT OF AUSTRALIA RULES ON CHALLENGE TO COASTAL TRADE “TEMPORARY LICENCE” GRANTED TO AUSTRALIAN CHARTERER



In *CSL Australia Pty Ltd v Minister for Infrastructure and Transport and Anor*, (unrep. Hon Robertson J 16 November 2012) the Federal Court of Australia has considered for the first time a challenge by the holder of a “general licence” against the variation or issue of a “temporary licence” granted by the Minister for Infrastructure & Transport (or their delegate) under the *Coastal Trading (Revitalising Australian Shipping) Act 2012* (Act). In ruling on a challenge made by CSL Australia Pty Ltd (CSL), Robertson J has provided a comprehensive overview of the Minister’s discretionary powers under the Act, in particular the permissible considerations that may be taken account of by the Minister in deciding an application for a temporary licence, which is a very helpful guide to both users and providers of freight services in Australian cabotage shipping trades.

Background

The Act, which came into force on 1 July 2012, introduced a regime to regulate the coastal shipping trades between Australian

States (excluding intrastate voyages), thereby replacing the licence and permit system that had operated under the *Navigation Act 1912* (Cth). In order to engage lawfully in coastal trade, it is now mandatory for a vessel to operate under one of three kinds of licence, being either a general licence, temporary licence or an emergency licence.

A general licence is available only if the relevant vessel is registered on the Australian General Shipping Register (AGSR); in broad terms, in order for a vessel to be registered on the AGSR it 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”. A general licence 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 and enables voyages in respect of which it has been granted to be performed by foreign flagged/crewed vessels.



The Act provides that general licence holders must be given notice of any temporary licence application (including a variation application in respect of a temporary licence) and afforded the opportunity to negotiate terms for one or more voyages that are the subject of the application. In the event that the period allowed for the negotiation elapses without agreement being reached, the Minister or a delegate of the Minister will decide whether to grant or refuse the application for the temporary licence or the variation as the case may be.

The proceeding

In the CSL Australia case, negotiations between CSL Australia and the applicant for the variation of a temporary licence (Rio Tinto Shipping), concerning CSL Australia performing four voyages that were the subject of the application, were unsuccessful. After consideration of the material presented by CSL Australia and Rio Tinto Shipping in accordance with the procedure set out in the Act, an authorised delegate of the Minister granted the variation to the temporary licence. CSL Australia responded by immediately applying for an interlocutory injunction to restrain Rio Tinto Shipping from taking any steps to perform the four voyages under the temporary licence. That application was refused in favour of Rio Tinto Shipping.

CSL Australia also proceeded with an application for declaratory relief claiming several grounds of judicial review of the delegate's decision to grant the temporary licence. In his judgment on CSL Australia's application for judicial review, of

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general interest are Robertson J's findings rejecting CSL Australia's submissions that in granting the temporary licence the delegate had failed to take account of the objects of the Act as required under 34(2)(f), alternatively had misconstrued the objects of the Act.

In essence, his Honour rejected the submissions on behalf of CSL Australia 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”¹ [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”². His Honour also made the significant finding that the object of the Act of “Promoting a viable Australian shipping industry is not the only or dominant object of the Act [emphasis added] so as to make other considerations legally impermissible”³; such as the promotion of competition in coastal trading⁴. In other words, contrary to the position put on behalf of CSL Australia, 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.”⁵

General implications of the decision

Robertson J's findings that (i) the pricing of freight services offered by the general licence holder and (ii) 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 in the determination of an application for the issue or variation of a temporary licence, together with his Honour's finding that promoting a viable Australian shipping industry is neither the only nor dominant object of the Act, provide all stakeholders in Australia's coastal trades with much needed direction regarding the operation of the temporary licence scheme under the Act. These findings are consistent with other objects of the Act, including the promotion of competition in coastal trading and ensuring the efficient movement of passengers between Australian ports. Accordingly, it is hoped that this important judgment will operate to streamline the process for reviewing applications for temporary licences and thereby

1. Para 94.
2. Para 135.
3. Para 137.
4. See s 3(1)(e).

5. Para 135.



facilitate a reduction of the time currently being required for a decision.

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