

## Chapter 2

### The Current Law and the Provisions of the Bill

#### **The Coastal Trading (Revitalising Australian Shipping) Act 2012**

2.1 Coastal shipping in Australia is currently regulated under the *Coastal Trading (Revitalising Australian Shipping) Act 2012* (the CTA), which commenced on 1 July 2012. The objects of the CTA include: the promotion of, and facilitating the long term growth of, a viable shipping industry that contributes to the broader Australian economy; enhancing the efficiency and reliability of Australian shipping; maximising the use of Australian flagged vessels; promoting competition in coastal trading; and ensuring the efficient movement of passengers and cargo between Australian ports.<sup>1</sup>

2.2 The Committee was told that it was not clear whether the Act was attempting to benefit Australian ships or Australian industry, and that this lack of clarity had led to a significant amount of litigation by a number of companies in relation to the CTA.<sup>2</sup>

2.3 The CTA seeks to reconcile these 'somewhat inconsistent'<sup>3</sup> objects by creating a tiered licensing system which provides an advantage to Australian ships by allowing them unrestricted access to coastal trade, along with the opportunity to compete for voyages proposed to be conducted by foreign ships.

#### ***The CTA licensing system***

2.4 Four types of licence are available under the CTA framework: general licences, transitional general licences, temporary licences and emergency licences.

2.5 General licences are available to vessels on the Australian General Shipping Register, and provide unrestricted access to engage in coastal trading in Australian waters for five years. Each seafarer working on a general licence vessel must be an Australian citizen or permanent resident or hold a visa with appropriate work rights.

2.6 Transitional general licences are intended to assist ships operating under the former arrangements under Part VI of the *Navigation Act 1912* to transition to Australian registration. They are issued for a period of five years and afford the ship to which they are issued the same rights as a general licence. They are intended to expire in 2017.

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1 *Coastal Trading (Revitalising Australian Shipping) Act 2012*, section 3.

2 Ms Judi Zielke, Department of Infrastructure and Regional Development, *Committee Hansard*, 7 September 2015, p. 63.

3 Australian Institute of Marine and Power Engineers, *Submission 2*, p. 9.

2.7 Temporary licences may be granted to a shipper, or the owner, charterer, master or agent of Australian or foreign-registered vessels. They provide restricted access to engage in a minimum of five specific coastal trading voyages over a 12 month period, with a licence being required for each end-to-end cargo movement conducted by the ship. A total of 677 temporary licences have so far been granted over a two-year period.<sup>4</sup>

2.8 Temporary Licences can be varied after they are issued, to either add additional voyages (in minimum groups of five) or to amend the details of already authorised voyages (eg, to vary departure or arrival dates).<sup>5</sup>

2.9 Information about each application for a temporary licence is provided to all general licence holders, who are permitted to provide a 'notice in response' that a general licensed vessel is available to conduct any or all of the notified voyages. A 'notice in response' triggers a mandatory consultation process between the shipper and all interested general licence holders which may be arbitrated by the Department. Third parties who would be directly affected if an application were granted must also be notified, and may give the Minister written comments on each temporary licence application.<sup>6</sup> A decision is made by the Minister (or a delegate) and, if issued, a temporary licence must specify a number of things.<sup>7</sup>

2.10 Emergency licences may be granted, for a period of no more than 30 days, to a shipper, or the owner, charterer, master or agent of a vessel, to respond to significant national emergencies. The licence allows an applicant to respond to a specific emergency of a kind identified in the regulations. The regulations specify various types of natural disaster (eg cyclones, earthquakes, floods, thunderstorms, tsunamis and wildfires) which endanger, or threaten to endanger, life, property or the environment, and which require a significant and coordinated response.<sup>8</sup>

2.11 An applicant must provide details of each aspect of the intended voyages including the reasons why the voyages cannot be undertaken by a vessel authorised under a general licence.

2.12 In summary, the CTA does not seek to exclude the involvement of foreign-flagged ships from domestic coastal shipping, but sets up 'a form of mediated

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4 Dr Alison Morehead, Department of Employment, *Committee Hansard*, 7 September 2015, p. 62.

5 *Coastal Trading (Revitalising Australian Shipping) Act 2012*, section 28.

6 *Coastal Trading (Revitalising Australian Shipping) Act 2012*, section 33.

7 As listed in *CTA Coastal Trading (Revitalising Australian Shipping) Act 2012*, section 37.

8 *Coastal Trading (Revitalising Australian Shipping) Regulation 2012*, Select Legislative Instrument No 135 of 2012, paragraph 4.3.1.

competition between the remnant Australian flag fleet and the almost infinite pool of foreign flagged ships around the world.'<sup>9</sup>

### ***The Australian International Shipping Register***

2.13 The CTA package also included the *Shipping Registration Amendment (Australian International Shipping Register) Act 2012*, which established the Australian International Shipping Register (AISR) 'to provide a competitive registration alternative for Australian shipowners and operators who predominantly engage in international trades'.<sup>10</sup> Ships registered on the AISR are eligible for income tax exemption and other tax incentives.

2.14 One submitter told the Committee that the creation of the AISR was met with incredulity by many shipping practitioners, who saw it 'as a self-deluding aggrandisement by a Nation with one of the smallest National ship registries in the world'.<sup>11</sup>

2.15 Despite what appear to be generous tax incentives, there are currently no ships registered on the AISR. The Committee was given one reason for this apparent lack of interest in the AISR – that 'exposure to Australian crewing, in any number, has and remains a major detraction due to high cost penalty, and perceived unionised industrial reputation'.<sup>12</sup>

2.16 The National Farmers' Federation offered another related reason:

One feature of the AISR Act that has attracted little comment since its inception is the requirement for any ship seeking registration on the AISR to have a collective agreement with the 'seafarer's bargaining unit' comprised of relevant maritime unions. This is in lieu of the application of the *Fair Work Act 2009*. The requirement to bargain with all relevant maritime unions and the absence of any alternative (such as negotiating directly with the seafarers) is likely to have operated as a deterrent to registration.

The legislative framework requires the making of the 'bargain' for those who seek access to the AISR and in doing so, extinguishes the element of choice in relation to employers. This is because any perceived advantages flowing from the disapplication of the Fair Work Act are immediately offset by the position of veto held by the seafarers' bargaining unit; refusal to accede to the demands made on behalf of seafarers will mean the conditions for registration on the AISR cannot be met. In other words,

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9 Australian Institute of Marine and Power Engineers, *Submission 2*, p. 9.

10 National Farmers' Federation, *Submission 8*, p. 9.

11 Australian Shipping Consultants Pty Ltd, *Submission 17*, pp. 3-4.

12 Australian Shipping Consultants Pty Ltd, *Submission 17*, p. 4.

access to the AISR is available on a 'take it or leave it' basis with seafarer conditions set by maritime unions and paid for by those responsible for the costs of labour. This provision is highly unusual as a feature of the Australian federal law and should be repealed.<sup>13</sup>

2.17 The Australian Institute of Marine and Power Engineers told the Committee that one operator had applied to register a ship – *Pioneer* – on the AISR, but the application did not proceed because of a veto by the Maritime Union of Australia. The exercise of the veto resulted in the ship – which trades internationally, carrying Australian sugar to Asian ports, and coastally within Australia under temporary licences – being reflagged to the Hong Kong flag and operating with a mixed crew of senior Australian officers with the remaining crew being foreign.<sup>14</sup>

2.18 It was also put to the Committee that the AISR has been a failure because most, if not all Australian exports, including major commodity trades such as iron ore, coal and grains, are sold at the Australian wharf and the international transport task is in the hands of the foreign buyer.<sup>15</sup>

### ***The CTA and Australian wages***

2.19 Historically, foreign flagged ships operating domestically under permits issued under the previous *Navigation Act 1912* (Navigation Act) were generally not covered by Australian labour laws. In 2010, the *Fair Work Act 2009* was applied to certain foreign-flagged vessels operating in Australian waters and engaged in coastal trading. Following the introduction of the CTA, consequential amendments were made to the Fair Work Regulations 2009 to maintain the alignment of the Fair Work Act to crew on ships (both Australian and foreign flagged ships) engaged in coastal shipping if the ships are operating under a general, transitional general or emergency licence under the CTA, or are operating under a temporary licence and have made at least two other voyages under a temporary licence in the previous 12 months.

2.20 As CSL Australia Pty Ltd observed in its submission 'no other maritime nation requires foreign seafarers on foreign vessels operating within their coastal waters to be paid in accord with national labour agreements.'<sup>16</sup>

### ***Cruise ships***

2.21 Vessels which exceed 5000 gross tonnes, and which are capable of a speed of at least 15 knots, and which are capable of carrying at least 100 passengers, and which are utilised wholly or primarily for carrying passengers between any Australian ports,

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13 National Farmers' Federation, *Submission 8*, p. 9.

14 Australian Institute of Marine and Power Engineers, *Submission 2*, p. 6.

15 Australian Institute of Marine and Power Engineers, *Submission 2*, p. 6.

16 CSL Australia Pty Ltd, *Submission 19*, p. 5.

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except between Victoria and Tasmania, are specifically exempted by legislative instrument from the operation of the CTA.<sup>17</sup>

### ***Practical difficulties with temporary licences***

2.22 Incitec Pivot Ltd (IPL) pointed out that the CTA contains an underlying assumption that the business conducted by a charterer is predictable and, accordingly, that vessel movements can be planned well in advance.<sup>18</sup> However, some users of coastal shipping services operate in a competitive environment with inherent demand variability. It provided the following example of the practical operation of temporary licences under the CTA.

2.23 In 2015 IPL chartered a ship to carry quantities of an ammonium sulphate fertiliser used in pasture, canola, cotton and vegetables from a manufacturing plant in Brisbane to distribution centres in Geelong and Adelaide, determined by IPL's demand planning process. The original temporary licences (a separate licence being required for each port-to-port trip) for this voyage stated that IPL would despatch 2000 tonnes at Geelong and 5000 tonnes at Adelaide.<sup>19</sup>

2.24 In the time that the licence was applied for and then approved, and the ship chartered, there was a change in the demand for the fertiliser – which was itself not unusual as weather plays a significant role in demand, and access to fertiliser to take advantage of preferential seasonal conditions is important. Geelong required an additional 2000 tonnes of fertiliser. Despite the ship being at the Geelong port, and despite the fertiliser being available on the ship, only an additional 400 tonnes was able to be unloaded due to the tolerance limits on the licence within the Act. There was no ability to make changes to the licences (more than one would need to be amended) as no amendments can be made on weekends or outside business hours. Additionally, given the time taken to have amendments approved, it was not practical or economical to have a ship wait for a licence to be applied for an approved.<sup>20</sup>

2.25 As a result the ship sailed from Geelong carrying the additional tonnes of fertiliser to Adelaide. Once it had arrived in Adelaide, the additional fertiliser that was still needed by customers and farmers in Geelong had to be loaded onto trucks to be taken back to Geelong. The cost of this was an additional \$75,000. It also placed an additional 40 B-Double trucks onto the road between Adelaide and Geelong.<sup>21</sup>

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17 See *Coastal Trading (Revitalising Australian Shipping) Act 2012* – section 11, Exemption for Cruise Vessels, as made on 5 December 2012.

18 Incitec Pivot Limited, *Submission 34*, p. 2.

19 Incitec Pivot Limited, *Submission 34*, p. 2.

20 Incitec Pivot Limited, *Submission 34*, p. 2.

21 Incitec Pivot Limited, *Submission 34*, p. 2.

2.26 The National Farmers' Federation also described some of the vagaries of the CTA:

Applicants for a temporary licence must specify, in some detail, at least five future voyages to be undertaken. Details provided about proposed voyages, including the number of voyages, the kinds and volume of cargo or number of passengers and ports of loading and disembarkation, effectively set the parameters of the licence to engage in the coastal trade and cannot change unless formally varied.

The same information is made publicly available and provided to holders of general licences, who then have the right to nominate to undertake the authorised voyages. This process means that a temporary licence applicant and its customers have no right to choose who they contract with to deliver the freight services they require. A third party can take over their contracted voyage, without any obligation to meet the agreed terms. For example, initial contracting parties might agree on a price of \$20 per tonne. A third party then nominates to undertake the voyage, ships the contracted goods at a price of \$25 per tonne, and leaves the initial parties to work out the difference. In this respect, the process is unique: it encourages unrelated third parties to impose their own commercial imperatives on the contractual arrangements of others. It acts as a disincentive to contract before permits are issued, results in delays in the grant of applications, and increases costs.<sup>22</sup>

2.27 Administrative delays were a major concern for the Australian Institute of Petroleum, which said that the CTA procedures involved delays of up to 15 days for an initial temporary licence, and a further seven to nine days for approvals of new voyages or variations to voyages, with additional delays for public holidays: 'these delays are unacceptable in a complex supply chain such as that for delivery of fuel to the Australian market, particularly when there are no Australian registered vessels available to 'contest' these voyages.'<sup>23</sup>

2.28 Even the Maritime Union of Australia (which does not support the bill) noted that the three years since the commencement of the CTA had shown 'a need for some streamlining and additional commerciality in its administration' and that the Act was 'not as effective as we would like.'<sup>24</sup>

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22 National Farmers' Federation, *Submission 8*, p. 8.

23 Australian Institute of Petroleum Ltd, *Submission 5*, p. 4.

24 Maritime Union of Australia, *Submission No 31*, p. 9 and Mr Rod Pickette, Maritime Union of Australia, *Committee Hansard*, 7 September 2015, p 6.

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## Main provisions of the Shipping Legislation Amendment Bill 2015

2.29 The Shipping Legislation Amendment Bill (the bill) seeks to overcome many of the above administrative procedures under the CTA, which have been characterised as 'cumbersome, bureaucratic, impractical, uncertain, costly and heavily weighted in favour of local ships'.<sup>25</sup>

2.30 In summary, the bill:

- redefines, simplifies and redirects the focus of the objects of the legislation which are: to provide a framework for coastal shipping that fosters a competitive coastal shipping services industry that supports the Australian economy and maximises the use of available shipping capacity on the Australian coast;<sup>26</sup>
- repeals the CTA's tiered licence system, replacing it with a single 'coastal shipping permit' that will be available to both Australian and foreign-registered ships.<sup>27</sup> Ships operating under a permit will be permitted to engage in unlimited transport of passengers and goods on the Australian coast for a 12 month permit period;
- provides that applications and variations must be decided within 10 business days;<sup>28</sup>
- grants permits in respect of a vessel rather than a voyage;<sup>29</sup>
- provides that a coastal shipping permit will also protect vessels from being deemed to have been imported under the Customs Act;<sup>30</sup>
- proposes to cover ships engaged in the carriage of petroleum products from offshore facilities to the mainland and ships engaged in dry docking;<sup>31</sup>
- provides that ships engaged predominantly in coastal shipping (ie for more than 183 days in a 12 month period) will be required to adhere to minimum Australian crew numbers, mirroring those for ships registered on the Australian International Shipping Register (ie they will be required to employ a Master or Chief Mate and a Chief Engineer or First Engineer who is an Australian citizen, Australian resident, or holds an appropriate visa, prescribed

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25 Cristal Mining Australia Ltd, *Submission No 6*, p. 2.

26 Shipping Legislation Amendment Bill 2015, Clause 3.

27 Shipping Legislation Amendment Bill 2015, Part 4.

28 Shipping Legislation Amendment Bill 2015, Subclause 15(5).

29 Shipping Legislation Amendment Bill 2015, Subclause 13(4).

30 *Coastal Trading (Revitalising Australian Shipping) Act 2012*, proposed new section 12B.

31 Shipping Legislation Amendment Bill 2015, Paragraphs 7(1)(d) and (e).

in the rules, and will be subject to domestic workplace relations arrangements;<sup>32</sup>

- provides that ships engaged predominantly in international trading (ie undertake less than 183 days of Australian coastal trading in a 12 month period) will be subject to their existing workplace arrangements;<sup>33</sup>
- provides that, if a foreign ship declares an intention not to trade predominantly on the coast, but then trades predominantly on the coast, it will be required to pay Australian wages for the entire permit period<sup>34</sup>; and
- greatly simplifies reporting requirements for permit holders – a permit holder would be required to report on voyages undertaken at six-monthly intervals, or more frequently if directed by the Minister, replacing the existing system of pre-voyage notification at least two days before the actual loading date and post-voyage reporting within 10 days after the end of a voyage.<sup>35</sup>

2.31 In his Second Reading Speech, the Minister stated that the bill 'recognises that shipping operates in a global context, and the framework it contains seeks to ensure that Australian businesses and industries can take maximum advantage of the opportunities created by global connectivity.'

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32 Shipping Legislation Amendment Bill 2015, Clause 38.

33 Shipping Legislation Amendment Bill 2015, Subclauses 22(2) and (3).

34 Shipping Legislation Amendment Bill 2015, Subclause 22(3).

35 Shipping Legislation Amendment Bill 2015, Clauses 35 and 36.