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INSIGHT

# Cabotage reform in Australia - the 2012 “reforms” and the need for further reform

February 16, 2015 | Written by Maurice Thompson, Christopher Keane and Joel Cockerell

On 1 July 2012 the previous Australian Labour Party (ALP) government of Prime Minister Julia Gillard enacted the Coastal Trading (Revitalising Australian Shipping) Act (CTA) and related legislation - the most comprehensive changes to the regulation of coastal trading since the original Navigation Act was enacted in 1912. The stated objective of the 2012 reforms was to revitalise the Australian shipping industry and enhance efficiency and competition. However, almost 3 years after their enactment, the 2012 reforms have failed to revitalise the Australian shipping industry and have come under strong attack from just about every industry stakeholder for subjecting carriers and shippers to a system that is inefficient, anti-competitive and cumbersome.

Since taking office in September 2013, the Liberal - National Party government of Prime Minister Tony Abbott (**Abbott Government**) has repeatedly confirmed its pre-election commitment to abolish many of the 2012 reforms and introduce much greater flexibility for the carriage of cargo around the Australian coast. The Abbott Government is yet to provide details of the precise extent to which it proposes to wind back the 2012 reforms. Regrettably, it is becoming increasingly apparent that any attempt to reverse the 2012 reforms is likely to be blocked by the opposition parties in the Australian Senate.

## Coastal shipping in Australia before the 2012 reforms

To fully appreciate the significance of the 2012 reforms, it is important to consider the cabotage regime in Australia prior to the enactment of the 2012 reforms.

The original *Navigation Act* governed coastal shipping in Australia for almost a century and created two regulatory categories:

- Australian-flagged ships operating under *licence* - a permanent and unrestricted licence to carry cargo and passengers, subject to a range of conditions, including labour law requirements; and
- foreign ships operating under a *single voyage permit* (**SVP**) or a *continuing voyage permit* (**CVP**) - a temporary permit to carry nominated cargo, but subject to a lesser range of conditions than ships operating under licence.

The *Navigation Act* operated in conjunction with labour laws which facilitated a significant role for foreign carriers

in Australia's coastal trade. Foreign seafarers working on board ships operating under permit were generally exempt from Australian industrial relations requirements.

As recently as the 1970s more than 50% of Australia's domestic freight task was being moved by coastal shipping. In 2009 coastal shipping's share of the domestic freight task was still around 20%, despite extensive development of Australia's road and rail networks in the intervening years.

In Australia the main commodities transported by coastal shipping are:

- dry bulk freight, such as sugar, cement, fertiliser, alumina, iron ore, bauxite and steel;
- liquid bulk freight such as refined petroleum; and
- containerised and other cargo.

Since 2000 approximately 75% of Australia's coastal shipping freight has comprised dry bulk freight. Liquid bulk freight is the next largest freight, while containers and other cargo make up only a very small share of coastal freight.

## Precursor to the 2012 reforms - the *Fair Work Act*

The distinction between foreign seafarers and Australian seafarers engaged in coastal shipping ended in 2009 when the ALP government of Prime Minister Kevin Rudd enacted the *Fair Work Act*. Under this legislation, all carriers operating in the Australian coastal trade were required to pay crew wages at Australian award rates.

The difference between foreign wages and Australian award rates was (and remains) substantial. By way of example, in 2008 a major shipper in the resources sector estimated that the cost of crewing a dry bulk carrier on the coastal trade with international seafarers was 26% of the cost of crewing it with Australian seafarers.

Within months of its enactment, the *Fair Work Act* was having a deleterious impact with many of the international carriers either withdrawing from, or dramatically scaling back their role in, Australia's coastal trade. This in turn increased costs and inflexibility for shippers who had relied upon an affordable and efficient coastal trade.

## Introduction of the *Coastal Trading Act*

The CTA replaced the relatively simple system of licences and permits under the *Navigation Act* with a three-tier licensing regime comprising *general licences, temporary licences* and *emergency licences*.

A ***general licence*** ***(GL)*** is available to Australian flagged ships registered on the Australian General Shipping Register and foreign registered ships intending to transition to Australian registration within 5 years. Ships holding this licence are obliged to:

- employ Australian residents;
- pay crew wages at Australian award rates;
- comply with annual mandatory reporting requirements (concerning matters such as the type of cargo carried and the ports at which cargo is loaded and unloaded),

but otherwise have unrestricted access to coastal trades for a period of up to 5 years.

A ***temporary licence*** ***(TL)*** is available to foreign-flagged ships and to ships entered on the Australian International Shipping Register. Ships holding this licence are:

- restricted to a nominated coastal trade (passengers or cargo) for a specified number of authorised voyages over a 12 month period;
- able to hire foreign crew, subject to complying with some Australian employment conditions.

Applicants for a TL can only make one application in any 12-month period and are subject to a number of other very onerous requirements, including:

- specification of loading dates, cargo types, volumes, and ports of loading and unloading at the time the application is made;
- mandatory publication of the abovementioned information on the website of the Department of Infrastructure and Transport (**DIT**) to allow GL holders the opportunity to nominate to carry the cargo instead (in line with the requirements of the shipper); and
- an obligation to negotiate with any GL holder who might nominate to carry some or all of the cargo identified on the DIT website, to determine who carries what.

In the event that the TL holder and GL holder are unable to reach agreement in their mandatory negotiations, the Minister of Transport will determine whether a TL is to be granted and, if so, the scope of the TL.

An ***emergency licence*** permits the licence holder to engage in coastal trading for no more than 30 days and is intended to respond to national emergencies such as cyclones, earthquakes and bushfires. Ships holding this licence are:

- able to hire foreign crew, subject to complying with some of Australia's labour laws;
- subject to mandatory reporting requirements at the end of any voyage undertaken during the period of the licence.

## The impact of the 2012 reforms on coastal shipping in Australia

The introduction of TLs and GLs under the 2012 reforms has adversely impacted upon the ability of foreign-flagged ships to participate in the Australian coastal trading sector. Prior to the 2012 reforms, foreign-flagged ships were able to participate in coastal trading under the relatively straightforward system of SVPs and CVPs. Under the current regime, however, the operators of foreign-flagged ships must deal with a set of procedures that are cumbersome, bureaucratic, impractical, uncertain and heavily stacked in favour of Australian operators.

It would be wrong to assume that the only interests to have been adversely affected by the 2012 reforms are foreign-flagged ships. On the contrary, the 2012 reforms presented, and will continue to present, a major problem for anyone seeking to ship cargo on Australia's coastal trade. In that regard, it is well to note that:

- the participation of foreign-flagged ships in the coastal trade has decreased dramatically, meaning less competition for Australian operators;
- the lack of competition has caused a substantial escalation in shipping costs to the point where Australian shippers are paying up to double the freight rates that could be offered by foreign-flagged ships in a deregulated coastal trade;
- high-volume shippers are being deprived of the flexibility required to meet unplanned or urgent coastal shipping requirements due to unforeseen changes to operations or external factors;
- a number of foreign-flagged operators engaged in coastal trading provide specialised services that cannot be provided efficiently (or at all) by the Australian operators - this is of particular significance to shippers of heavy

and break-bulk cargo.

The negative impact of the 2012 reforms is highlighted by the following examples:

- it has become cheaper for Australian manufacturers to import commodities such as bauxite, gypsum, cement clinker, fertiliser and soda ash which, until very recently, were almost exclusively purchased from Australian producers and shipped around the continent by coastal trade;
- Caltex stopped refining in New South Wales and withdrew their tankers from Australia's coastal trade - they now import their product from Asia;
- sugar is now imported from South East Asia and South Africa while the Australian sugar industry contemplates exporting 100% of its product due to the cost of coastal trading.

## Temporary licences considered by the Federal Court of Australia

In *CSL Australia Limited -v- Minister for Infrastructure and Transport* [2014] FCAFC 10 the Full Court of the Federal Court of Australia clarified the law regarding the matters to be taken into consideration by the Minister in applications for the grant or variation of TLs under the CTA.

The majority expressly rejected the proposition that decisions by the Minister's delegate concerning the granting and variation of TLs should adopt an assumed bias towards the holders of GLs. However, this decision provides little comfort for foreign-flagged operators and those parts of the Australian economy dependent upon an efficient and reliable coastal trading service, having regard to the following matters noted by the majority of the Court:

- although it is "impossible" to exclude freight rates and their impact on Australian industry in the decision-making process, the question of how much weight is to be put on freight rates in any particular case will generally be a matter for the decision maker;
- the CTA was not introduced to ensure that shippers are able to obtain the lowest possible freight rates and, as such, the relevant decision maker will need to weigh up a number of "competing considerations".

The majority decision is arguably most notable for confirming the degree of uncertainty in the decision-making framework associated with the granting and variation of temporary licences and the potential of the CTA to undermine an efficient and reliable coastal trading service.

The High Court recently refused a special leave application in relation to this case.

## Reform of the 2012 reforms?

By attempting to simultaneously promote an efficient shipping market and revitalise the Australian shipping industry, the 2012 reforms sought to achieve inconsistent objectives. As the last 2 years have demonstrated, these objectives clearly come into conflict when a higher-cost Australian ship is given preferential rights over a lower-cost foreign ship. By raising the costs of coastal shipping, the current regime puts the long-term viability of coastal shipping - and many shippers - at risk. Higher costs have made coastal shipping less competitive with road and rail, and creates incentives for industry to import product rather than ship materials around the coast for local manufacture.

Since the enactment of the 2012 reforms, Australia has had a change of government. The Abbott Government, elected to office in September 2013, has repeatedly emphasised its commitment to streamline the cabotage regime in the CTA.

In May 2014 the National Commission of Audit, an independent body established by the Abbott Government, recommended the abolition of cabotage policy in its entirety, removing all regulation of access to coastal trading. Since its publication, this recommendation has been enthusiastically embraced by almost every key stakeholder, with the notable exception of the powerful Maritime Union of Australia. The Abbott Government is yet to provide details of the precise nature and extent of the proposed rollback.

Recent parliamentary debate suggests that the opposition parties (comprising the ALP and several minor parties who control the balance of power in the Australian Senate) are likely to oppose any rollback of the 2012 reforms. It follows that there is no guarantee that the reforms foreshadowed by the Abbott Government will become law, despite the utterly unsatisfactory nature of the present cabotage regime.

## How Clyde & Co can help

Clyde & Co's Australian maritime practice possesses extensive experience assisting the shipping and offshore sectors with all aspects of Australia's coastal trading regulations, including:

- the obtaining and renewal of licences to engage in coastal trade;
- representations to, and negotiations with, the Department of Infrastructure and Transport regarding coastal trade;
- the application of Australia's labour laws to coastal trade; and
- the impact of these laws upon charterparties and other contracts of affreightment.

We will continue to closely monitor developments regarding possible changes to the regulation of coastal trading in Australia and provide further updates in due course.

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