



SEMAPHORE

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Australian Coastal Shipping Reform – Navigating the Course Ahead

On 26 February 2014 the Full Court of the Federal Court of Australia delivered Judgment in an important case on the operation of the Australian Coastal Trading legislation.

The question for the Minister administering the Coastal Trading legislation was whether to grant a variation to a Temporary Licence permitting a shipper to use a foreign flagged vessel to carry coastal cargo, or whether the effect of the legislation was that the Minister should have refused the application with the result that the cargo would be carried by an available Australian registered General Licenced vessel?

All three Appeal Judges were unanimous in holding that the Minister's Delegate had fallen into error by viewing commercial matters such as freight rates and a proposed liquidated damages clause as relevant to the mandatory considerations in the legislation.

The Coastal Trading (Revitalising Australian Shipping) Act 2012 (the "**Coastal Trading Act**"), which became law on 1 July 2012, regulates the granting of Temporary Licences in Australia.

As to the regulatory process, Chief Justice Allsop noted that:

"This Act was part of a suite of legislation to revitalise Australian shipping. It was not a piece of legislation to ensure the lowest possible freight rates set by foreign-flagged vessels to shipper interests in Australia and thereby make the development of Australian-owned or registered vessels very difficult. The balance of competing considerations is one for the decision-maker armed with contemporaneous and up-to-date information and chosen government policy."

The Coastal Trading Act does not dictate precisely how the Minister's Delegate must determine any application for a Temporary Licence or a variation to a Temporary Licence – instead it provides the Minister with certain criteria, or a framework, that the Delegate must consider. That determination process must however accord with the provisions of the Coastal Trading Act itself and the general law – for example the Delegate must, throughout the determination process, afford affected parties procedural fairness.

In this case, after receiving detailed submissions both from the applicant for the Temporary Licence and the General Licence holder which had vessels available and suitable to perform the coastal voyages, the Minister's Delegate granted the variation application on the basis of asserted freight rate differentials and the requirement of a proposed liquidated damages clause.

The General Licence holder's first instance application to a single Judge of the Federal Court to overturn the Minister's decision succeeded on procedural fairness grounds but not on issues of statutory construction, such as whether commercial matters are relevant to the mandatory considerations under s 34(3) of the Coastal Trading Act.

The General Licence holder's appeal to the Full Court was successful primarily because of the finding that the Minister's Delegate was wrong to take into account freight rates and liquidated damages (commercial matters) when assessing the mandatory considerations. The mandatory considerations include the suitability and availability of a General Licenced vessel in s 34(3)(b) and (c), the reasonable requirements of a shipper in s 34(3)(d), and the statutory negotiation process in s 32.

All three Appeal Judges held that the mandatory considerations to which the Delegate must first have regard are limited to the suitability of the ship, the timeliness of carriage and the reasonable requirements of a shipper of the kind of cargo specified in the application. Commercial considerations such as freight rates and a proposed liquidated damages clause are not reasonable requirements of a shipper of the kind of cargo specified in the application (as distinct from the reasonable requirements of the shipper of the cargo) and are not relevant to the assessment of the mandatory considerations.

This point was addressed directly by Justice Rares:

"... the reasonable requirements referred to in s 34(3)(d) that the Minister must consider are those specified in ss 32(3) and 34(3)(b) and (c), and do not extend to commercial issues such as freight rates or contractual terms or the economic position of a shipper ..."

The Court noted that the Coastal Trading Act permits the Minister to have regard to other discretionary (ie non-mandatory) considerations. These can include commercial matters provided the consideration is within the object of the legislation, which includes for example promoting a viable shipping industry that contributes to the broader Australian economy.

It has been suggested that the effect of the Full Court Judgment is that the Temporary Licence decision making process will remain flexible. It will, as the Act intended, within the framework and the limits of the Act, which Justice Rares described in the following way:

"Thus, the purpose of power to grant a temporary licence is not available to be used as a means for an applicant to circumvent the purpose of the general licence provisions or the object of the Act."

Justice Rares went further noting that:

"If the Minister considers that, under s 34(3), a general licensee's vessel is ready and able to perform the carriage of cargo that is the subject of a temporary licence application, the central elements in the statutory deliberative process will have been determined adversely to the applicant."

As to how that weighing is to be applied by the Minister, Justice Rares noted that in the hierarchy of the decision making process discretionary considerations will:

"...not [be assessed] in such a way that the purpose of the unrestricted access of the general licensee to perform the carriage or the object of the Act is circumvented."

Industry should welcome the Full Court Judgment as it clarifies the process for consideration of future applications, which is of interest for both Temporary Licence applicants and General Licence holders, and it should also translate to quicker determinations and greater certainty as to the likely outcome.

Contact

Robert Wilson
Email: robert.wilson@nortonwhite.com
Telephone: 02 9230 9475

Nathan Cecil
Email: nathan.cecil@nortonwhite.com
Telephone: 02 9230 9450

Charles Street
Email: charles.street@nortonwhite.com
Telephone: 02 9230 9444

Timothy Rout
Email: timothy.rout@nortonwhite.com
Telephone: 02 9230 9460

