

SUBMISSION TO THE SENATE SELECT COMMITTEE ON RED TAPE ON THE EFFECT OF RED TAPE ON CABOTAGE

Shane Bosma, Counsel, Ashurst¹

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1. INTRODUCTION

Thank you for the opportunity to provide submissions to the Senate Select Committee on Red Tape (**Committee**) as part of its inquiry into the effect of red tape on cabotage (**Inquiry**) and the Committee's extension of time to provide submissions.

The following submissions respond, in particular, to the following paragraphs of the Inquiry's terms of reference:

- (b) any specific areas of red tape that are particularly burdensome, complex, redundant or duplicated across jurisdictions;
- (e) alternative institutional arrangements to reduce red tape, including providing subsidies or tax concessions to businesses to achieve outcomes currently achieved through regulation;
- (f) how different jurisdictions in Australia and internationally have attempted to reduce red tape; and
- (g) any related matters.

In this submission, the terms "cabotage" and "coastal trading" are used interchangeably.

2. EXECUTIVE SUMMARY

2.1 Summary of submissions

- (a) The *Coastal Trading (Revitalising Australian Shipping) Act 2012* (Cth) (**Coastal Trading Act**) requires that:
 - (i) in order to be granted a general licence to engage in unrestricted coastal trading, the crew that works on the vessel whilst it is engaged in coastal trading either being Australian citizens or holding a visa (this is also an ongoing condition of the licence); and
 - (ii) in order to be granted a temporary licence to engaged in restricted coastal trading, a vessel must either be a foreign vessel, or a vessel registered on the Australian International Shipping Register. In order to be registered on the Australian International Shipping Register, the *Shipping Registration Act 1981* (Cth) (**Shipping Registration Act**) requires that a collective agreement be in force in respect of the crew on board the vessel when it is used to engage in international trading.

¹ The views set out in this submission are those of Shane Bosma and do not necessarily reflect the views of Ashurst Australia or any member of the Ashurst Group. Further details about Ashurst can be found at www.ashurst.com.

- (b) The Coastal Trading Act is not the appropriate legislative vehicle in which to provide for migration or employment requirements relating to seafarers. In particular, such requirements are more appropriately addressed:
 - (i) in respect of migration matters, in the *Migration Act 1958* (Cth) (**Migration Act**) and the *Migration Regulations 1994* (Cth) (**Migration Regulations**); and
 - (ii) in respect of seafarer employment matters, in the *Fair Work Act 2009* (Cth) (**Fair Work Act**), the *Navigation Act 2012* (Cth) (**Navigation Act**) and *Marine Order 11 (Living and working conditions on vessels) 2015* (Cth) (**MO11**), being an instrument made under the Navigation Act.
- (c) Conditioning the grant of general and temporary coastal trading licences on the migration and employment requirements noted above:
 - (i) acts as a substantial deterrent to industry participants making an application for such licences; and
 - (ii) as a result, acts as a deterrent to the promotion of a viable, growing and competitive Australian coastal shipping industry as a whole.

Accordingly, all migration and employment requirements should be removed from the Coastal Trading Act.
- (d) To the extent that the Committee and the Parliament believe that the maintenance of migration and employment requirements for vessels engaged in coastal trading is in the national interest, that policy objective is best served by amendments to, relevantly, the Migration Act and Migration Regulations, or the Fair Work Act.

2.2 Summary of recommendations

(a) Recommendation One – removal of citizenship and visa requirements

The Committee should recommend that the Parliament:

- (i) remove the citizenship and visa requirements from the conditions imposed on general licenses by omitting sections 13(2)(b) and 21(b) of the Coastal Trading Act; and
- (ii) ensure that the Migration Act and Migration Regulations remain the principal source of regulation of visa requirements for foreign workers engaged in coastal trading (including the extent to which, if any, foreign workers should be permitted to work on such vessels).

(b) Recommendation Two – removal of collective agreement requirements

The Committee should recommend that the Parliament:

- (i) remove the collective agreement provisions from the Shipping Registration Act, which apply to vessels engaged in coastal trading under a temporary licence if those vessels are registered on the Australian International Shipping Register, by omitting sections 11A and 15F(3)(b) of the Shipping Registration Act; and

- (ii) ensure that the Fair Work Act (and subordinate legislation), Navigation Act and MO11 remain the principles sources of regulation of the conditions of employment of seafarers working on vessels engaged in coastal trading.

3. **ABOUT SHANE BOSMA**

Shane Bosma leads Ashurst's trade and transport group and is an experienced international trade & transport / maritime lawyer, specialising in offshore oil and gas spanning Australia, the European North Sea, the Middle East, and SE Asia.

Shane is familiar with all shipping and maritime aspects of international resources projects, including international trade finance and the financing of vessels, and his clients include major resources companies (including BHP Billiton, Woodside, INPEX, Shell, Rio Tinto, and BP), and major banking and finance companies (including ANZ Bank and Westpac Bank). Shane has specific experience in relation to the relevance and impact of cabotage having advised several major Australian resources companies on the coastal trading regulatory requirements, assisting with the attempted transfer of a vessel from the Australian General Shipping Register to the Australian International Shipping Register (the vessel was subsequently deregistered from the Australian General Shipping Register and instead registered on a foreign register), and advising and assisting with the recent demobilisation of a number of vessels engaged in Australian coastal trading.

4. **REMOVE THE CITIZENSHIP AND VISA REQUIREMENTS FROM THE CONDITIONS IMPOSED ON GENERAL LICENCES**

4.1 **Legislative background**

Section 21 of the Coastal Trading Act provides, relevantly:

A general licence is subject to the following conditions:

...

- (b) when the vessel is used to engage in coastal trading, each seafarer working on the vessel must:
 - (i) be an Australian citizen; or
 - (ii) hold a permanent visa; or
 - (iii) hold a temporary visa that does not prohibit the seafarer from performing the work he or she performs on the vessel;

In relation to applications for a general licence, section 13(2) of the Coastal Trading Act provides, relevantly:

The application must be in writing and be accompanied by the following:

...

- (b) a statement that each seafarer working on the vessel, when the vessel is used to engage in coastal trading:
 - (i) is or will be an Australian citizen; or
 - (ii) is or will hold a permanent visa; or

- (iii) is or will hold a temporary visa that does not prohibit the seafarer from performing the work he or she performs on the vessel;

4.2 **Effect of the current legislative framework and proper legislative remit**

A general licence issued under the Coastal Trading Act permits a vessel to be used to engage in unrestricted coastal trading for a period of up to five years. That vessel must also be registered on the Australian General Shipping Register (which is maintained under the Shipping Registration Act) in order to be entitled to be granted a general licence.²

Clearly, the effect of the sections 13(2)(b) and 21(b) of the Coastal Trading Act is to impart nationality and visa requirements on the seafarers working on vessels engaged in coastal trading as a condition to the grant of a general licence.

However, the entitlement of foreign workers to enter, work and remain in Australia is properly the remit of the Migration Act (and subordinate legislation), and including such requirements in the Coastal Trading Act imposes an additional redtape burden on applicants. It is unnecessary to:

- (a) include such requirements in the Coastal Trading Act, being an Act that effectively governs commerce between the States and Territories by means of sea transport and which is otherwise wholly unrelated to migration matters; and
- (b) accordingly, condition the ability of a vessel to engage in unrestricted coastal trading on the citizenship and visa status of the seafarers working on board.

Rather, any requirements relating to the visa status of seafarers working on board vessels engaged in unrestricted coastal trading are properly (and conveniently) located in the Migration Act and subordinate legislation such as the Migration Regulations (which contain significant detail relating to visa subclasses).

It is submitted that nationality and visa requirements should be removed from the Coastal Trading Act.

4.3 **Objectives of the Coastal Trading Act do not support maintaining this condition**

None of the objectives set out in section 3 of the Coastal Trading Act, including the promotion of a viable shipping industry, inherently require that each seafarer on a vessel be an Australian citizen, or hold a permanent visa or specific class of temporary visa as a condition to the grant of a general licence.

In my experience, the current nationality and visa requirements in sections 13(2) and 21(b) act as a significant deterrent to industry participants making an application for a general licence and, accordingly, act as a deterrent to the promotion of a viable, growing and competitive Australian coastal shipping industry as a whole.

When introducing the *Coastal Trading (Revitalising Australian Shipping) Bill 2012* (Cth) into the House of Representatives, the then-Leader of the House and Minister for Infrastructure and Transport said that

[L]ike many industries, the maritime sector is also feeling the pressures of an ageing workforce. We must attract new recruits; but we must also have enough ships so that cadets

² Coastal Trading Act, section 13(1)(a).

can gain the required sea time to obtain their qualifications ... There are challenges of an ageing workforce, costly and complicated training systems and the consequent erosion of skills.

However, the current nationality and visa requirements do not relieve these pressures to the extent that they act as significant deterrents to proponents applying for a general licence because, relevantly:

- (a) the limited number of vessels currently holding a general licence (56 general licences have been issued without surrender)³ provide limited coastal-trading related employment opportunities for new seafarers; and
- (b) the restrictions imposed on coastal trading for vessels holding a temporary licence, and prohibitions on coastal trading for vessels that do not hold any licence issued under the Coastal Trading Act, means that there are limited other employment opportunities for Australians, within Australia, on other vessels for the same purpose.

4.4 **Reduced barriers to coastal trading have significant economic and social benefits**

Data from New Zealand indicates that coastal shipping is a cost-efficient and environmentally acceptable means of transporting freight. A 2012 study found that the comparative per-kilometre cost of shipping a 20ft container from Auckland to Dunedin showed that the sea, rail and road costs were NZ\$0.92, \$1.59 and \$2.73 respectively.⁴ In contrast to Australia, New Zealand's coastal shipping laws are relatively unrestricted, with foreign vessels permitted to undertake domestic coastal trading that is incidental to the carriage of international cargo.⁵

Of course, such benefits are best realised in an environment that encourages coastal trading by encouraging the entrance of new vessels and industry participants, rather than implementing artificially high barriers to entry to the coastal trades through the imposition of nationality and visa requirements (as a condition to the grant of a general licence) that are already properly regulated through the Migration Act.

In 2014 the National Committee of Audit (**NCOA**) found that although the volume of Australia's domestic freight has been growing steadily over the previous 40 years, the volume of freight carried by coastal shipping has remained largely static. The increased demand has been met by rail, and by Australia's increasingly congested road network. The costs of this inefficiency are not only borne financially by consumers, but increased heavy vehicle traffic in particular has consequential social and economic effects on the wider community.

The NCOA report found that current coastal trading rules are "effectively industry assistance, increasing costs and reducing competition" and, significantly, recommended that the current coastal trading policy be abolished entirely.⁶

³ Department of Infrastructure and Regional Development, *General Licences Granted*, accessed 19 April 2017, available at <https://infrastructure.gov.au/maritime/business/coastal_trading/licencing/granted/general/index.aspx>.

⁴ PD Cenek, RJ Kean and NK Jamieson, 'Freight transport efficiency: a comparative study of costal shipping, rail and road modes' (Research report, New Zealand Transport Agency, 2012) 50.

⁵ *Marine Transport Act 1994* (NZ), section 198(1).

⁶ National Committee of Audit, Parliament of Australia, *Towards Responsible Government – Phase Two* (2014) 28.

4.5 **Policy objectives can be alternatively implemented through the Migration Act**

If the Committee and the Parliament consider that the maintenance of citizenship and visa requirements for vessels engaged in unrestricted coastal trading is in the national interest, such arrangements should be provided by:

- (a) amendments to the conditions of existing visa subclasses (eg maritime crew (subclass 988) visas) to prohibit visa holders from working on vessels engaged in coastal trading unless the vessel holds a general licence; or
 - (b) the introduction of a new visa subclass to provide for the same,
- by the Minister by way of amendments to the Migration Regulations; or
- (c) other appropriate amendments to the Migration Act by the Parliament.

This policy objective need not remain a condition to the grant of a general licence, and a condition of general licences that are granted.

The entitlement to and conditions of Australian citizens working on vessels engaged in coastal trading is already properly governed by other employment laws such as the Fair Work Act.

4.6 **Recommendation One – removal of citizenship and visa requirements**

In light of the above, the Committee should recommend that the Parliament:

- (a) remove the citizenship and visa requirements from the conditions imposed on general licences by omitting sections 13(2)(b) and 21(b) of the Coastal Trading Act; and
- (b) ensure that the Migration Act and Migration Regulations remain the principal source of regulation of visa requirements for foreign workers engaged in coastal trading (including the extent to which, if any, foreign workers should be permitted to work on such vessels).

5. **REMOVE THE COLLECTIVE AGREEMENT REQUIREMENTS FROM THE CONDITIONS IMPOSED ON THE GRANT OF TEMPORARY LICENCES**

5.1 **Legislative background**

Section 40 of the Coastal Trading Act provides, relevantly:

A temporary licence is subject to the following conditions:

- (a) any vessel used to undertake a voyage authorised by the licence must be registered in the Australian International Shipping Register or under a law of a foreign country;

In relation to the registration of a vessel on the Australian International Shipping Register, section 15F(3) of the Shipping Registration Act provides, relevantly:

The Registrar must refuse to register the ship in the International Register if the Registrar is satisfied that:

...

- (b) a collective agreement has not been made between the owner of the ship and the ship's seafarers' bargaining unit under section 11A.

Section 11A of the Shipping Registration Act provides:

- (1) The owner of a ship may make an agreement (a collective agreement) with the seafarers' bargaining unit for the ship about the terms and conditions of employment or engagement of all the seafarers working on board the ship when it is used to engage in international trading.

Note: Before a ship can be registered in the International Register, the owner of the ship must make a collective agreement under subsection (1): see paragraph 15F(3)(b).

- (2) The **seafarers' bargaining unit** for a ship is a body consisting of a representative from each employee organisation that:
 - (a) has, as a member, one or more seafarers who will work on the ship when it is used to engage in international trading; and
 - (b) is entitled to represent the industrial interests of those seafarers in relation to that work; and
 - (c) has given written notice to the owner of the ship that it wishes to be a member of the body and has not withdrawn that notice.
- (3) The regulations may prescribe requirements in relation to the making of a collective agreement under this section.
- (4) The *Fair Work Act 2009* does not apply in relation to the making of a collective agreement under this section, and a collective agreement under this section is not an enterprise agreement for the purposes of that Act.

5.2 Effect of the current legislative framework and proper legislative remit

A temporary licence issued under the Coastal Trading Act permits vessels registered on the Australian International Shipping Register, or under the law of a foreign country (ie foreign-flagged vessels) to engage in coastal trading for a fixed number of voyages over a 12 month period.

Similar to the position in respect of general licences, the effect of section 40 of the Coastal Trading Act and sections 11A and 15F(3) of the Shipping Registration Act is to effectively require that applicants for registration on the Australian International Shipping register who may also potentially engage in coastal trading via a temporary licence to enter into collective agreements with the seafarers' bargaining unit as a condition to the grant of that temporary licence.

However, the terms and conditions of a seafarer's employment and any requirement to enter into collective agreements is already properly the remit of the Fair Work Act (and associated employment legislation), and similar to the position in respect of migration, it is unnecessary to also:

- (a) include such requirements in the Coastal Trading Act and Shipping Registration Act, which are otherwise wholly unrelated to employment matters; and
- (b) accordingly, condition the ability of a vessel to engage in restricted coastal trading arrangements based on such employment requirements.

Rather, any employment requirements for seafarers working on board vessels engaged in restricted coastal trading are appropriately (and conveniently) already governed by the Fair Work Act and Navigation Act (see below).

It is submitted that these employment requirements, insofar as they relate to the coastal trading regime the subject of the Inquiry, should be removed from the Coastal Trading Act and Shipping Registration Act.

5.3 Satisfactory conditions of employment are adequately protected by the Fair Work Act

Section 34 of the Fair Work Act extends the operation of the Act to Australian ships generally.

Under the *Fair Work Regulations 2009* (Cth), the Fair Work Act also applies to temporary licenced foreign vessels engaging in coastal trading when, in effect, the vessel commences a third voyage. To be precise, the Fair Work Act will only apply to a vessel holding a temporary licence in respect of a voyage if the vessel has completed, within 12 months prior to commencing that voyage, two other voyages authorised by a temporary licence.

The Fair Work Act also applies to a licensed ship with a foreign crew and a foreign employer where it is in the exclusive economic zone or the waters above the continental shelf.

In practice, this makes applicable Part B of the Seagoing Industry Award 2010.

Part B of the Award covers minimum wages (at levels a little below the usual Australian minimum award rate), hours of work and overtime with a requirement for time and a quarter to be paid for all Saturday, Sunday and public holiday work or beyond eight hours on Mondays to Fridays, rest periods and leave/public holidays.

There are some other ways in which the Fair Work Act may apply depending on circumstances, for example, the National Employment Standards and statutory rights of entry for union officials.

5.4 Australia's implementation of the Maritime Labour Convention also protects conditions of seafarer employment

The internationally recognised standards for the terms and conditions of employment of seafarers set out in the *Maritime Labour Convention, 2004* (**MLC**) have also been implemented into Australian law through the Navigation Act and MO11, which is the principal subordinate instrument that implements the requirements of the MLC in Australia.

Relevantly, MO11 essentially requires that vessels flagged in countries in which the MLC is in force (including Australia) hold a valid Maritime Labour Certificate that certifies that the vessel complies with the laws of its flag state that implement the MLC.

Vessels arriving in Australia are subject to port-state control inspections conducted by the Australian Maritime Safety Authority, and those that do not comply with relevant international maritime conventions, including the MLC, are subject to detention until the relevant requirements are satisfied (including obligations to obtain a Maritime Labour Certificate).

In my experience, the mere threat or fact of detention is often sufficient to bring the vessel into prompt compliance, as the effect of any delay to a vessel's schedule and the financial implications for subsequent pre-arranged charters of the vessel will ordinarily far exceed the cost of compliance.

5.5 **Current framework has led to zero vessel registrations on the Australian International Shipping Register**

In my experience, the current employment requirements in sections 11A and 15(f) of the Shipping Registration Act act as a significant deterrent to:

- (a) vessels registering on the Australian International Shipping Register; and
- (b) industry participants considering registration on the Australian International Shipping Register as a potential basis for making an application for a temporary licence,

and for similar reasons as set out above, therefore act as a deterrent to the promotion of a viable, growing and competitive Australian coastal shipping industry as a whole.

In particular, these requirements have contributed to there being no vessels registered on the Australian International Shipping Register as of 29 March 2017.⁷ Accordingly, at present any application for a temporary licence could necessarily only be made by a foreign-flagged vessel.

When introducing the *Coastal Trading (Revitalising Australian Shipping) Bill 2012* (Cth) into the House of Representatives, the then-Leader of the House and Minister for Infrastructure and Transport said that

[u]nlike the United States, Canada or various European Union countries, Australia recognises that there is a legitimate role for foreign-flagged vessels in our domestic shipping industry. Under the provisions of this bill this will not change. Nothing in this package of bills closes our coast. However, we are making transparent the decision-making processes which determine a foreign vessel's participation in Australian domestic shipping.

The current legislative regime has led to a situation in which foreign-flagged vessels have become the sole users of temporary licences to engage in restricted coastal trading within Australia. This is not an optimal situation in which to achieve the Coastal Trading Act's objectives, which include:

- (a) facilitating the long term growth of the Australian shipping industry; or
- (b) promoting competition in coastal trading.

The reality is that the cost differential between expenses for vessels in open registry fleets are 12 to 27 per cent lower than those in traditional registers, and these costs are largely related to labour. While open registry fleets grew from 5% of the world shipping tonnage in 1950 to 48% in 2000, Australia's international fleet has effectively disappeared.⁸

⁷ Australian Maritime Safety Authority, *List of Registered Ships*, accessed 29 March 2017, available at <<http://www.amsa.gov.au/vessels/shipping-registration/list-of-registered-ships/>>.

⁸ World Bank, 'Transport Costs Specialization' (World Development Report, 2009) 176.

5.6 Policy objectives can be alternatively implemented through the Fair Work Act

If the Committee and the Parliament consider that the maintenance of collective agreement requirements for vessels engaged in restricted coastal trading is in the national interest, such arrangements should be provided by amendments to the Fair Work Act to prohibit employment on board vessels in respect of which a collective agreement is not in force. This policy objective need not remain a condition to the grant of a temporary licence.

5.7 Recommendation Two - removal of collective agreement requirements

In light of the above, the Committee should recommend that the Parliament:

- (a) remove the collective agreement provisions from the Shipping Registration Act, which apply to vessels engaged in coastal trading under a temporary licence if those vessels are registered on the Australian International Shipping Register, by omitting sections 11A and 15F(3)(b) of the Shipping Registration Act; and
- (b) ensure that the Fair Work Act (and subordinate legislation), Navigation Act and MO11 remain the principal sources of regulation of the conditions of employment of seafarers working on vessels engaged in coastal trading.

5.8 Other red tape associated with the temporary licencing regime

The current temporary licence regime is, in my experience, also a significant deterrent to participants engaging in temporary coastal trading arrangements and is subject to an overly bureaucratic process. However, for the reasons set out elsewhere in these submissions, Australia has not experienced a corresponding increase in the levels of shipping by Australian vessels under general licences as a result of the implementation of this scheme.

As temporary licences are only available for a fixed number of voyages over a 12 month period, the current scheme creates a lack of certainty in medium and long-term ventures that may otherwise utilise coastal shipping with a foreign vessel or vessel registered on the Australian International Shipping Register, and an associated lack of investment in the Australian coastal shipping industry.

An application for a temporary licence triggers a lengthy and complex notification and consultation process extensively bound by red tape. The applicant applies to the Minister who then invites all general licence holders to notify the Minister if they are able to complete the proposed shipment(s) instead.⁹ The applicant must then negotiate with the general licence holder as to whether the general licence holder is equipped to carry, and can carry in a timely manner, the passengers or cargo specified in the application for a general licence and advise the Minister of the outcome of those negotiations. Interested third parties also have the opportunity to comment on the application. Finally, the Minister must make a decision in respect of the grant of temporary licence having regard to a long list of relevant considerations.¹⁰

⁹ Coastal Trading Act, section 30.

¹⁰ Coastal Trading Act, section 34.

The Committee may wish to consider recommending that the Parliament streamline this process in order to further promote the growth of the Australian coastal trading industry by both Australian and foreign-flagged vessels.

6. **CONCLUSION**

I welcome the opportunity to discuss these submissions further with the Committee.

Please do contact me for further information, or to arrange a meeting to discuss these submissions.

Yours sincerely

Shane Bosma
Counsel
Ashurst Australia