

AUSTRALIAN COASTAL SHIPPING: NAVIGATING REGULATORY REFORM

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1 Background

On 18 June 2012, the Federal Labour Government passed the *Stronger Shipping for a Stronger Economy* legislative package, with the aim of revitalising Australia's ailing shipping industry.¹ The legislative package overhauled the regulation of coastal shipping in Australia, changing vessel registration arrangements,² introducing a licensing regime to regulate vessels engaged in domestic shipping trade and strengthening cabotage provisions.³ It also introduced a raft of tax incentives,⁴ designed to 'encourage and sustain growth and productivity in our shipping industry'.⁵ This regime came atop 2010 amendments to the *Fair Work Regulations 2009* (Cth) which extended the application of the *Fair Work Act 2009* (Cth) to foreign flagged vessels operating in Australian waters and engaged in coastal trading.

In April 2014, the Australian Government released an Options Paper: *Approaches to regulating coastal shipping in Australia* ('Options Paper'), and sought stakeholder input regarding the impact of the current regulatory regime on the shipping industry. The Options Paper records Government's 'unambiguous aim' to 'reduce the regulatory burden in the shipping industry to provide Australia with access to efficient and competitive shipping services'.⁶

This paper will analyse the legal, economic and practical implications of the 2012 regulatory changes and undertake a review of the industry's response to the Options Paper. This will inform an analysis of the key issues affecting the coastal shipping industry, and facilitate the identification of matters to be considered and resolved in any future legislative reform.

2 Implications of the 2012 Legislative Package

The *Coastal Trading (Revitalising Australian Shipping) Act 2012* (Cth) ('*Coastal Trading Act*') established a three tier licensing system which replaced the permit system prescribed by the *Navigation Act 1912* (Cth). Under the *Coastal Trading Act*, vessels on the Australian General Register may obtain a General Licence which affords the holder unrestricted access to the coastal trade for a period of five years.⁷

A Temporary Licence can be granted to a vessel registered on the Australian International Shipping Register, or a foreign flagged vessel, to undertake nominated coastal trading voyages over a 12 month period.⁸ An application for a Temporary Licence must include a minimum of five voyages and specify loading dates, cargo or passenger details, unloading dates and vessel details.⁹ Vessels with a General Licence are afforded the right to lodge a notice in response to applications for Temporary Licences by foreign flagged vessels, where the General Licence holder could undertake the voyage contemplated in the application.¹⁰ Following a period of consultation, the Minister can determine whether or not to grant the Temporary Licence. Once granted, a Temporary Licence can be varied, and is required to be varied, if dates or cargo details change prior to the voyage outside accepted tolerance limits.¹¹

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¹ Anthony Albanese MP, 'A Strong and Prosperous Maritime Future' (Media Release, June 18 2012) <<http://anthonyalbanese.com.au/a-strong-and-prosperous-maritime-future>>.

² *Shipping Registration Amendment (Australian International Shipping Register) Act 2012* (Cth).

³ *Coastal Trading (Revitalising Australian Shipping) Act 2012* (Cth) Pt 4.

⁴ *Shipping Reform (Tax Incentives) Act 2012* (Cth); *Tax Laws Amendment (Shipping Reform) Act 2012* (Cth).

⁵ Albanese, above n 1.

⁶ Australian Government Department of Infrastructure and Transport, 'Approaches to regulating coastal shipping in Australia' (Options Paper, Department of Infrastructure and Transport, 8 April 2014)

<https://www.infrastructure.gov.au/maritime/business/coastal_trading/review/index.aspx>.

⁷ *Coastal Trading (Revitalising Australian Shipping) Act 2012* (Cth) ss 13, 16.

⁸ *Ibid* ss 28, 40.

⁹ *Ibid* s 28.

¹⁰ *Ibid* s 31.

¹¹ *Ibid* ss 43-49.

The *Coastal Trading Act* also provides for the granting of Emergency Licences which allow access to coastal trade for a period of no longer than 30 days, in certain limited circumstances.¹²

The *Stronger Shipping for a Stronger Economy* legislative package also altered the vessel registration arrangements in Australia, renaming the existing register the Australian General Register, and establishing an Australian International Shipping Register ('AISR'). Australian-owned or operated vessels which are engaged predominantly in international trade, can register on the AISR, and take advantage of less stringent labour requirements, and associated lower costs, when engaged on international voyages.¹³ To date, no vessels have registered on the AISR.¹⁴

The 2012 legislative package also introduced tax reforms designed to encourage Australian-based shipping operations and investment in the Australian fleet and workforce.¹⁵

2.1 Effect on Shipping and Industry

Whilst the new regulatory regime has been in place for a relatively short period of time, there has been no evidence of "revitalisation" of the Australian shipping industry, and industry reports suggest the reform has not achieved its stated aims.

Shipowner association, Shipping Australia Limited, reports that the Australian blue water shipping industry has continued to contract. It is aware that a number of international shipping companies have withdrawn from offering coastal shipping services due to increased cost and administrative burdens, resulting in reduced competition and increased cost to shippers.¹⁶ This is consistent with the Australian Competition and Consumer Commission's ('ACCC') observations that the number of Australian vessels registered to carry coastal trade has fallen from 22 in 2010-11 to 16 as at December 2013.¹⁷ The ACCC notes that restrictions on foreign lines operating is leading to higher costs for Australian businesses and particularly as foreign vessels are being discouraged from carrying coastal trade incidental to an international service.¹⁸

A report published by the Institute of Public Affairs found that as 'a result of the 2012 changes alone, the net present value of the coastal shipping industry's net economic benefit to the Australian economy is between \$76 million and \$150 million less than it would be in the absence of these changes'.¹⁹

The 2012 amendments are by no means the sole cause of the decline in Australian shipping, which has been on a downward trend for some time. The extension of the *Fair Work Act* to foreign flagged vessels is seen as a major contributing factor in the reduction in coastal trade.²⁰

As a result of the recent regulatory change, shippers, including manufacturers and primary producers, are experiencing increased shipping costs. Industry groups are reporting that their members are experiencing significant freight increases, which in trade-exposed industries threatens Australian industry survival in a global marketplace. The Minerals Council of Australia reports that members have experienced increased tonnage rates of up to 63%, and freight rates have increased by over \$3 000 per day along the east coast of Australia.²¹ The Australian Aluminium Council reports that members have experienced an increase in shipping costs of as much

¹² Ibid ss 64-74.

¹³ Australian Government Department of Infrastructure and Transport, above n 6.

¹⁴ Australian Maritime Safety Authority, *List of Registered Ships* (2014) <<http://www.amsa.gov.au/vessels/shipping-registration/list-of-registered-ships/index.aspx>>.

¹⁵ Australian Government Department of Infrastructure and Transport, above n 6.

¹⁶ Shipping Australia Limited, Submission No 63 to Department of Infrastructure and Transport, *Approaches to regulating coastal shipping in Australia*, 2014, <http://www.infrastructure.gov.au/maritime/business/coastal_trading/review/submissions.aspx>.

¹⁷ Australian Competition and Consumer Commission, Submission No 23 to Department of Infrastructure and Transport, *Approaches to regulating coastal shipping in Australia*, (2014) <http://www.infrastructure.gov.au/maritime/business/coastal_trading/review/submissions.aspx>.

¹⁸ Ibid.

¹⁹ Chris Berg, Aaron Lane, *Coastal Shipping Reform: Industry Saviour or Regulatory Nightmare?* (2013) Institute of Public Affairs <http://www.ipa.org.au/portal/uploads/Coastal_Shipping_Report-Institute_of_Public_Affairs-Dec_13.pdf>..

²⁰ Shipping Australia Limited, above n 16; National Farmers' Federation, Submission No 34 to Department of Infrastructure and Transport, *Approaches to regulating coastal shipping in Australia*, 2014, <http://www.infrastructure.gov.au/maritime/business/coastal_trading/review/submissions.aspx>.

²¹ Minerals Council of Australia, Submission No 50 to Department of Infrastructure and Transport, *Approaches to regulating coastal shipping in Australia*, 2014, <http://www.infrastructure.gov.au/maritime/business/coastal_trading/review/submissions.aspx>.

as 100%. In respect of some bulk commodity producers, products can be shipped between ports in Australia for prices comparable to shipment from Australia to Asia.²²

The Business Council of Australia submits that the 'cabotage restrictions, are locking in uncompetitive shipping rates and imposing excessively high regulatory costs on businesses'.²³

A further indication of the failure of the 2012 regulatory regime to achieve its aims is the zero rate of uptake on registration on the AISR.

The continued decline in coastal shipping trade means that end users are resorting to transporting products interstate by road and rail, with associated environmental and infrastructure costs. Or, alternatively, substituting Australian inputs for overseas imports.

2.2 Legal Uncertainty Regarding Objects of the Coastal Trading Act

The application of the *Coastal Trading Act*, and in particular the interpretation of the matters which the Minister can take into account when deciding whether to grant a Temporary Licence, has caused confusion and uncertainty for stakeholders. This confusion stems from the inherent inconsistencies between the objects of the *Coastal Trading Act*. Section 3(1) provides that the object of the Coastal Trading Act is to provide a regulatory framework for coastal trading in Australia that:

- (a) promotes a viable shipping industry that contributes to the broader Australian economy; and
- (b) facilitates the long term growth of the Australian shipping industry; and
- (c) enhances the efficiency and reliability of Australian shipping as part of the national transport system; and
- (d) maximises the use of vessels registered in the Australian General Shipping Register in coastal trading; and
- (e) promotes competition in coastal trading; and
- (f) ensures efficient movement of passengers and cargo between Australian ports.

The Full Court of the Federal Court of Australia had opportunity to consider the competing nature of the objects of the *Coastal Trading Act* in *CSL Australia v Minister for Infrastructure and Transport*.²⁴ This case concerned the validity of a decision to vary a temporary licence, and the matters which the decision-maker could take into account in making the decision.

The matters which the Minister may have regard to in deciding whether to grant a temporary licence include in s 34(2)(f) of the Coastal Trading Act, 'the object of this Act'. Allsop CJ determined that it was clear from a review the Parliamentary debate that the *Coastal Trading Act* was concerned to 'revitalise an important industry by the introduction of features that were seen as likely to stimulate an Australian shipping industry: an appropriate regulatory framework, labour market reforms, a new international shipping register and taxation reform and incentives'.²⁵

In regard to the competing objectives set out in s 3(1) of the *Coastal Trading Act*, Allsop CJ noted that the 'multifactorial aims of the regulatory framework may, to a degree, have some tension among them' and was of the view that the framework was 'one in which a significant degree of latitude is given to the government of the day to administer any coastal trading regime'.²⁶ The uncertainty in this case arose as to whether commercial considerations are within the bounds of the matters which the decision-maker ought to have regard in reaching a decision whether or not to grant a Temporary Licence. This manifests in practice where shippers can be forced to use a General Licence vessel in circumstances where a Temporary Licence vessel is offering better commercial terms for the same voyage.

²² Ibid.

²³ Business Council of Australia, Submission No 59 to Department of Infrastructure and Transport, *Approaches to regulating coastal shipping in Australia*, 2014, <http://www.infrastructure.gov.au/maritime/business/coastal_trading/review/submissions.aspx>.

²⁴ [2014] FCAFC 10 (26 February 2014).

²⁵ Ibid [28].

²⁶ Ibid [31]-[32].

2.3 Balancing Competing Economic Considerations

The competing nature of the objects of the *Coastal Trading Act* highlights a broader policy issue; the conflict between encouraging an Australian coastal shipping fleet in circumstances where foreign registered vessels can provide lower cost services to Australian commodity producers.

In analysing coastal shipping regulatory reform, one must ask whether encouraging expansion of the Australian domestic shipping fleet is the right approach, or should government aim to lower shipping costs by encouraging foreign flagged vessels to operate in Australia? The latter approach would support the broader manufacturing, mining and agricultural industries that use shipping for transport, and help to stem the flow of manufacturers taking their operations offshore, when faced with rising Australian operational costs.

The Business Council of Australia notes that the current regime contains two inconsistent objectives.²⁷ On the one hand, the regime aims to enhance efficiency and competition while also maximising the use of Australian vessels, whilst, on the other hand higher-cost Australian ships are given preferential rights over lower-cost foreign vessels.

It has been said that the 'measure of economic success should not be the market share of Australian flagged vessels within the coastal shipping industry'.²⁸ Rather, the focus should be on increasing the competitiveness and efficiency of coastal shipping so that Australian products can compete in global markets. A strong manufacturing and mining industry would, in turn, require and foster a strong shipping industry.

The proponents of encouraging an Australian domestic shipping fleet through cabotage recognise the political and national defence objective and importance of maintaining a fleet of Australian flagged vessels, a well-trained seafaring workforce, and fostering development of onshore maritime skills. However, there is an evident conflict between these policy objectives and the economic outcomes of the policy, in circumstances where Australian flagged vessels incur higher operating (especially labour) costs compared to their foreign flagged counterparts and are passing these costs on to end users.²⁹

The nature of cabotage regulation was considered in the recent Report of the Commission of Audit, which characterised cabotage regulation as 'effectively industry assistance' which increased costs and reduced competition, and recommended the cabotage policy be abolished.³⁰ If industry support is to be provided by government, it should be done so through separate and considered policy.³¹

Cabotage regulation can be supported on the basis that the protection of the Australian shipping industry is necessary to preserve maritime skills and encourage training and investment in the Australian maritime industry. The Maritime Union of Australia ('MUA') submits that the availability of Australian flagged ships is an essential part of the nation's economic independence, its defence and border security and that without a domestic trading fleet there will be major implications for the supply of the nation's maritime skills.³² However, if the current cabotage regime is having the unintended impact of reducing the coastal fleet, and reducing the amount of tonnage shipped, then it is unlikely to have any benefits to maritime skills and training.

A further consideration is whether Australia can instead take advantage of the global shipping industry to maintain its maritime workforce. It is arguable that Australia could still maintain port and maritime skills through operating in the international marketplace, particularly if this is carried out in conjunction with the training offered by the Royal Australian Navy.³³

²⁷ Business Council of Australia, above n 23.

²⁸ Berg and Lane, above n 19.

²⁹ Port of Townsville Ltd, Submission No 47 to Department of Infrastructure and Transport, *Approaches to regulating coastal shipping in Australia*, 2014, <http://www.infrastructure.gov.au/maritime/business/coastal_trading/review/submissions.aspx>.

³⁰ National Commission of Audit, *Towards Responsible Government, The Report of the National Commission of Audit Phase Two* (2014) <http://www.ncoa.gov.au/report/index.html?utm_source=Liberal+Party+E-news&utm_campaign=f9646c25f4-Commission+of+Audit&utm_medium=email&utm_term=0_51af948dc8-f9646c25f4-57654429>.

³¹ Business Council of Australia, above n 23.

³² Maritime Union of Australia, Submission No 72 to Department of Infrastructure and Transport, *Approaches to regulating coastal shipping in Australia*, 2014, <http://www.infrastructure.gov.au/maritime/business/coastal_trading/review/submissions.aspx>.

³³ Shipping Australia Limited, above n 16.

3 Options Paper

The Options Paper proposed three broad policy options for consideration and comment.³⁴ Option 1 was to remove all regulation of access to coastal trading. This would involve repealing the *Coastal Trading Act* and related legislation. Without regulation, all vessels, regardless of flag, operating in the Australian coastal trade would be required to comply with all Australian laws, including the *Fair Work Act*, customs legislation, and occupational health and safety regulations. Foreign vessels would be considered 'imported' under the *Customs Act 1901* (Cth) ('*Customs Act*'), effectively making it impossible for foreign vessels to operate in the coastal trade.

Option 2 was to remove all regulation of access to Coastal Trading and enact legislation to deal with the effects of other Australian laws. This option proposed to deal with issues which would arise through repeal of the *Coastal Trading Act* such as importation, immigration and workplace relations with further legislation.

Option 3 was to continue to regulate coastal trade, but to make amendments to remove those aspects of the regime which place unnecessary burdens on industry participants. Proposed amendments under Option 3 included:

- (a) extending the geographical reach of the Coastal Trading Act to, for example, voyages between the mainland and places outside the coastal waters of a State or Territory, such as offshore installations, or floating production, storage and offloading ('FPSO') facilities;
- (b) changing the five voyage minimum for Temporary Licences;
- (c) amending the onerous requirements for applications to vary Temporary Licences; and
- (d) amending the tolerance provisions for Temporary Licence voyages.

4 Industry Response

Responses to the Options Paper were received from a broad cross-section of participants in the coastal shipping industry. This section will provide a high-level, industry-based review of the submissions received, highlighting key areas for consideration.

International shipping lines are, unsurprisingly, in unanimous agreement that Australian coastal shipping regulations ought to be less restrictive towards the presence of foreign-flagged vessels. They seek a reduction in the administrative burden imposed by the regulations, and, in particular, removal of the application of the *Fair Work Act* to foreign vessels on the coastal trade.³⁵

The oil and gas industry has a keen interest in the regulation of Australian coastal shipping, with public submissions from the peak body, the Australian Institute of Petroleum Ltd ('Institute'), and Caltex, alongside in-confidence submissions from Woodside, Shell Australia and BP Australia.³⁶ Within the oil and gas industry, there is a preference for Option 3 in order to minimise the restrictions, costs and regulatory burdens the *Coastal Trading Act* imposes on the industry (particularly on Australian oil refineries).

Of particular concern to the oil and gas industry are the customs consequences of vessels returning from offshore oil and gas facilities ('FPSO facilities') to Australian ports: such vessels are considered 'offshore industry vessels' which are not covered by the *Coastal Trading Act*. These vessels are therefore not exempt from the *Customs Act* and are considered imported for the purposes of the *Customs Act*.³⁷

³⁴ Australian Government Department of Infrastructure and Transport, above n 6.

³⁵ Nicolai Noes, Maersk Line Australia, Submission No 2 to Department of Infrastructure and Transport, *Approaches to regulating coastal shipping in Australia*, 2014, <http://www.infrastructure.gov.au/maritime/business/coastal_trading/review/submissions.aspx>; Teekay Corporation, Submission No 12 to Department of Infrastructure and Transport, *Approaches to regulating coastal shipping in Australia*, 2014, <http://www.infrastructure.gov.au/maritime/business/coastal_trading/review/submissions.aspx>; CSL Australia, Submission No 22 to Department of Infrastructure and Transport, *Approaches to regulating coastal shipping in Australia*, 2014, <http://www.infrastructure.gov.au/maritime/business/coastal_trading/review/submissions.aspx>.

³⁶ Though n.b., these companies are each a member of the Australian Institute of Petroleum Ltd and the Institute's submission notes that it is on behalf of the following 'core member' companies: BP Australia Pty Ltd; Caltex Australia Limited; Mobil Oil (Australia) Pty Ltd; and the Shell Company of Australia Ltd.

³⁷ Caltex Australia, Submission No 33 to Department of Infrastructure and Transport, *Approaches to regulating coastal shipping in Australia*, 2014, <http://www.infrastructure.gov.au/maritime/business/coastal_trading/review/submissions.aspx>.

Although the Australian oil and gas industry has a declining need for coastal shipping (due to ongoing restructure and rationalisation of the refining industry and petroleum distribution), the oil and gas industry does take an interest in coastal shipping generally. This is a result of concerns over the competitiveness of Australian oil refineries, as the customs confusion and coastal shipping costs and delays associated with Temporary Licences results in less flexibility for oil shippers. The practical result is that foreign crude oil is being imported to Australian refineries and Australian crude oil is being exported rather than sold locally, lessening the choice for Australian refineries and thereby harming their competitiveness.

Another concern, which the oil and gas industry shares with other industry participants, is that the requirements on Temporary Licence holders to nominate voyages in advance, to allow General Licence holders to contest voyages, are redundant in circumstances where there are no General Licence oil tankers in Australia who could contest the voyages.³⁸ Caltex and the Institute each submit that the five voyage requirement should be repealed and the cumbersome provisions around variations to Temporary Licence applications should be amended. Caltex also suggests that the *Fair Work Act* should not apply to foreign-flagged vessels where there is no General Licence equivalent.³⁹

Primary producers submit that the key objective of coastal shipping policy should be to ensure the availability of competitive and reliable sea freight to meet the needs of rising consumer demand and logistical challenges specific to agricultural products.⁴⁰ Industry specific requirements include the nature of perishable agricultural goods and refined sugar and molasses which require specialised ships that are not currently on the General Register. Moreover, the National Farmers' Federation suggests that the application of the *Fair Work Regulations* to foreign-flagged Temporary Licence vessels is problematic, stifling competition and driving up costs.⁴¹

The Business Council of Australia argues for removal of cabotage restrictions that give Australian General Licence vessels the right to contest loads and seeks an open, competitive market, submitting that 'removing cabotage restrictions will reduce shipping costs and support investment and employment growth in manufacturing sectors'.⁴²

Overwhelmingly, shippers, be they manufacturers or shippers of raw materials or containerised goods, favour removal of cabotage restrictions as they are bearing the costs of increased freight rates. The Australian Peak Shippers Association submits that the legislation has had an adverse affect on the movement of containerised goods around the Australian coast, and its shippers are facing increased freight costs.⁴³ Bell Bay Aluminium submit that unless they can access internationally competitively priced shipping, then business will become uncompetitive and unsustainable.⁴⁴ This sentiment is echoed by the Australian Aluminium Council and the Cement Industry Federation.⁴⁵

Shippers question the practicality of the five voyage minimum requirement for Temporary Licences. The Minerals Council of Australia supports Option 2, and notes that it is extremely difficult for bulk shippers to provide accurate information about planned voyages a year in advance.⁴⁶ The Australian Aluminium Council submits that it is critical for a regime to provide shippers with the ability to contract for single voyages, and vary loading and discharge ports, and dates, to respond to operational changes.⁴⁷ Further, they require the ability to refuse bids from General Licence holders where the service offered is uncompetitive, unsafe or unsuitable.⁴⁸

Shipping Australia Limited ('SAL'), the peak ship-owner association, represents 37 member lines, who, with one exception, formed a general consensus position. SAL submit that the *Coastal Trading Act* and its interaction with the *Fair Work Act* are impeding international shipping lines from participating in coastal trade, and the

³⁸ Australian Institute of Petroleum, Submission No 66 to Department of Infrastructure and Transport, *Approaches to regulating coastal shipping in Australia*, 2014, <http://www.infrastructure.gov.au/maritime/business/coastal_trading/review/submissions.aspx>.

³⁹ Caltex Australia, above n 37.

⁴⁰ National Farmers' Federation, above n 20.

⁴¹ Ibid.

⁴² Business Council of Australia, above n 23.

⁴³ Australian Peak Shippers Association Inc, Submission No 3 to Department of Infrastructure and Transport, *Approaches to regulating coastal shipping in Australia*, 2014, <http://www.infrastructure.gov.au/maritime/business/coastal_trading/review/submissions.aspx>.

⁴⁴ Bell Bay Aluminium, Submission No 21 to Department of Infrastructure and Transport, *Approaches to regulating coastal shipping in Australia*, 2014, <http://www.infrastructure.gov.au/maritime/business/coastal_trading/review/submissions.aspx>.

⁴⁵ Australian Aluminium Council Ltd, Submission No 59 to Department of Infrastructure and Transport, *Approaches to regulating coastal shipping in Australia*, 2014, <http://www.infrastructure.gov.au/maritime/business/coastal_trading/review/submissions.aspx>.

⁴⁶ Minerals Council of Australia, above n 21.

⁴⁷ Australian Aluminium Council Ltd, above n 45.

⁴⁸ Ibid.

Australian shipping industry continues to contract. SAL supports Option 2 to increase competition, reduce regulatory burden and reduce costs to shippers and customers.⁴⁹

In contrast, the Maritime Union of Australia strongly supports Option 3 submitting that it is 'in the national interest to retain and grow the coastal shipping industry', and argues that 'the existence of a coastal shipping fleet improves competition and dampens freight rates, and that if General Register ships were to be removed, current low freight rates cannot be guaranteed'.⁵⁰

In addition to the above industry participants, who each engage in the shipping of cargo around the Australian coast, numerous submissions were received from passenger cruise ships and tourism entities. Small expedition cruises (up to 5 000 tonnes) are not exempt from the application of the *Coastal Trading Act*. A divide can be seen in the submissions. On the one hand, small Australian expedition cruise operators say foreign flagged vessels are undercutting their profits by utilising lower cost labour structures. These entities support maintaining the current system, with additional restrictions placed on foreign flagged vessels.⁵¹ In contrast, submissions received from Tourism Commissions and foreign cruise ship operators, support broadening the exemption so that foreign flagged expedition cruise ships can operate more freely in Australian waters.⁵² The overarching message of the passenger cruise industry submissions is that the nature of the industry is so different from the bulk cargo shipping trade, that separate consideration must be given to their regulation.

5 Analysis of Key Issues

5.1 Fair Work Act

From 1 January 2010, the application of the *Fair Work Act* was extended to cover all crews on certain vessels operating in Australian waters, with Part B of the *Seagoing Industry Award 2010* applying to foreign vessels. Under the current regime, the *Fair Work Act* applies to crews on ships operating under a Temporary Licence which have made at least two other voyages under a Temporary Licence in the prior 12 months.⁵³

Shipping Australia Limited members report that the extension of the application of the *Fair Work Act* has been 'the single most damaging factor to participation and competition in coastal trade'.⁵⁴ The extension of the *Fair Work Act* to vessels operating in the domestic coastal trade has increased the cost of coastal shipping. In conjunction with the *Coastal Trading Act*, the legislative package privileges Australian vessels with higher crew remuneration rates which in turn increases the cost of shipping for Australian businesses and consumers.⁵⁵

The MUA provides an example of one of very few submissions in support of the continued (and increased) application of the *Fair Work Act* to foreign flagged vessels, suggesting that a 'construction weakness' combined with 'weak compliance and enforcement' has resulted in the *Fair Work Act* not applying to 'most ships carrying [Temporary Licence] cargos'.⁵⁶

A number of factors militate against the extended application of the *Fair Work Act* to foreign vessels. Firstly, foreign seafarers do not spend their wages in the Australian economy or pay tax in Australia, so the increased shipping costs are not being returned to our economy. Secondly, foreign seafarers are subject to varied home

⁴⁹ Shipping Australia Limited, above n 16.

⁵⁰ Maritime Union of Australia, Submission No 72 to Department of Infrastructure and Transport, *Approaches to regulating coastal shipping in Australia*, 2014, <http://www.infrastructure.gov.au/maritime/business/coastal_trading/review/submissions.aspx>.

⁵¹ North Star Cruises Australia Pty Ltd, Submission No 5 to Department of Infrastructure and Transport, *Approaches to regulating coastal shipping in Australia*, 2014, <http://www.infrastructure.gov.au/maritime/business/coastal_trading/review/submissions.aspx>; Coral Princess Cruises, Submission No 10 to Department of Infrastructure and Transport, *Approaches to regulating coastal shipping in Australia*, 2014, <http://www.infrastructure.gov.au/maritime/business/coastal_trading/review/submissions.aspx>; Australian Expedition Cruise Shipping Association, Submission No 11 to Department of Infrastructure and Transport, *Approaches to regulating coastal shipping in Australia*, 2014, <http://www.infrastructure.gov.au/maritime/business/coastal_trading/review/submissions.aspx>.

⁵² South Australian Tourism Commission, Submission No 9 to Department of Infrastructure and Transport, *Approaches to regulating coastal shipping in Australia*, 2014, <http://www.infrastructure.gov.au/maritime/business/coastal_trading/review/submissions.aspx>; Tourism and Transport Forum Australia, Submission No 62 to Department of Infrastructure and Transport, *Approaches to regulating coastal shipping in Australia*, 2014, <http://www.infrastructure.gov.au/maritime/business/coastal_trading/review/submissions.aspx>; Cruise Lines International Association, Submission No 67 to Department of Infrastructure and Transport, *Approaches to regulating coastal shipping in Australia*, 2014, <http://www.infrastructure.gov.au/maritime/business/coastal_trading/review/submissions.aspx>.

⁵³ *Fair Work Regulations 2009* (Cth).

⁵⁴ Shipping Australia Limited, above n 16.

⁵⁵ Port of Townsville Ltd, above n 29.

⁵⁶ Maritime Union of Australia, above n 50.

country taxation regimes including some where income is taxed at lower rates than in Australia. As a result these seafarers could effectively receive higher wages than their Australian counterparts.

The industry responses to the Options Paper overwhelmingly favoured the need to exempt foreign flagged vessels employing foreign crews from the operation of the *Fair Work Act*. It is submitted that reform should remove the application of Part B of the *Seagoing Industry Award 2010* in order to reduce cost of foreign vessels trading on the coast. This would level the playing field between continuously trading foreign vessels, and vessels undertaking less than two coastal voyages. However, it would widen the gap between the costs of operation of foreign flagged and Australian flagged vessels.

5.2 Temporary Licences

The regime for applying for and varying Temporary Licences has been fraught with problems arising from the increased administrative burden and cost, and the inherent lack of flexibility.

The 'nature of the shipping industry is such that few voyages ever proceed absolutely as planned in terms of cargo volume and timeframe for loading and discharge'.⁵⁷ It is imperative that any licence system be flexible enough to deal with inevitable changes to schedules and cargo. The requirement to forecast, with precision, five voyages in advance, is simply incompatible with the nature of the shipping industry. In many cases, it is impractical for bulk shippers to provide accurate information about planned voyages a year in advance.⁵⁸ Shippers need flexibility around cargo sizes and loading dates and require the ability to take account of practical realities of shipping, including weather delay and port queues.

In a number of sectors, including container, pure car carrier and oil tanker, there are no General Licence vessels registered.⁵⁹ If there are no General Licence options for a particular cargo, then Temporary Licence applications will inevitably be uncontested. In such a case, the regulatory and administrative burden on applicants serves no practical purpose. Consideration ought to be given to removing this requirement for classes of vessels or cargos for which there is no registered General Licence alternative.

A final point to be made about the Temporary Licence application, is that shippers want the ability to refuse a bid from a General Licence holder where the terms offered are uncompetitive or unsuitable to their needs. Under the current regime, shippers can be forced to accept a General Licence vessel where the cost is substantially higher than that offered by the Temporary Licence applicant. The satisfaction of this valid request by shippers will need to be finely balanced with the underpinning policy of cabotage. A potential mechanism to bridge this gap is submitted by the MUA, which suggests that the ACCC could take responsibility for monitoring anti-competitive behaviour by General Licence holders.⁶⁰

5.3 Unintended Customs Consequences

The oil and gas industry are experiencing significant difficulty with the application of the *Coastal Trading Act* to FPSO facilities and the unintended importation of such vessels under the *Customs Act*.

Pursuant to s 112 of the *Coastal Trading Act*, a vessel is not imported into Australia for the purposes of the *Customs Act* only because it is used to carry passengers or cargo under a Temporary Licence or an Emergency Licence.

An offshore industry vessel is defined to mean a vessel that is used wholly or primarily in, or in any operations or activities associated with or incidental to, exploring or exploiting the mineral and other non-living resources of the seabed and its subsoil;⁶¹ this definition includes vessels moving cargo from a FPSO facility to an Australian port.

Pursuant to s 10 of the *Coastal Trading Act*, that Act does not apply to offshore industry vessels, meaning that such vessels cannot apply for a Temporary Licence, and are therefore not exempt from the importation provisions of the *Customs Act*.

⁵⁷ Australian Shipowners Association, Submission No 58 to Department of Infrastructure and Transport, *Approaches to regulating coastal shipping in Australia*, 2014, <http://www.infrastructure.gov.au/maritime/business/coastal_trading/review/submissions.aspx>.

⁵⁸ Minerals Council of Australia, above n 50.

⁵⁹ Shipping Australia Limited, above n 16; Caltex Australia, above n 37.

⁶⁰ Maritime Union of Australia, above n 50.

⁶¹ *Coastal Trading (Revitalising Australian Shipping) Act 2012* (Cth) s 6.

In order to reverse this unintended importation consequence, it is suggested that the definition of 'offshore industry vessel' be amended to exclude such vessels. In this way, foreign-flagged vessels carrying crude oil or condensate to an Australian port can apply for Temporary Licences, and would not be subject to unintended importation under the *Customs Act*.⁶²

5.4 Australian International Shipping Register

To date, no vessel has registered on the Australian International Shipping Register. This clearly suggests that the policy is not having the intended effect, and that shipowners see no advantage to the AISR over using foreign flagged vessels operating under Temporary Licences.

The AISR was intended to provide a lower operating cost option for vessels to register in Australia. The *Fair Work Act* does not apply to AISR vessels while engaged in international trade, but in order to undertake a domestic voyage, the vessel must apply for a Temporary Licence and becomes subject to Part B of the *Seagoing Industry Award 2010*.

A number of factors can be said to be contributing to the lack of uptake on registration on the AISR. Firstly, the tax incentives which apply to the AISR are insufficient to lure vessels away from more generous international tax regimes. Secondly, there is no provision in the legislation for AISR vessels to be given priority over foreign flagged Temporary Licence vessels. An application for a Temporary Licence by an AISR vessel remains subject to challenge by a General Licence holder.

Thirdly, the strict eligibility requirements for registration, which require a vessel to be engaged 'predominantly' in international trading, may be inadvertently narrowing the field of potential registrants. Consideration could be given to relaxing or amending this requirement, if the AISR is to continue.

5.5 Application to Passenger Ships

Cruise ships are exempt from the coastal trading regime under s 11 of the *Coastal Trading Act*, where they are over 5 000 tonnes and capable of carrying at least 100 passengers. The exemption was granted because there are no Australian-flagged vessels of this size or capability.⁶³ The Tourism and Transport Forum reports that this exemption has 'facilitated the growth of this segment of the market'.⁶⁴

However, high end smaller vessels, referred to as expedition cruise ships, are not exempt from the application of the *Coastal Trading Act*. Foreign flagged vessels wishing to engage in coastal tours must apply for a Temporary Licence, and comply with Australian workplace relations laws when operating in Australian waters. This has been said to have deterred international expedition cruise ships from entering the Australian market.⁶⁵

An uneven playing field has effectively developed between the large cruise ships which are exempt, and the expedition cruise ships which must apply for a Temporary Licence and face higher wage costs operating in Australia.

There are a number of practical differences between cruise operators and cargo vessels which militate against a uniform application of regulation to the two industries. In both cases, the five voyage minimum may be impractical but for differing reasons. For cruise ships, the nomination of voyages in advance is nonsensical where voyages are planned and then marketed for sale. The requirement to nominate in advance serves no practical purpose. This can be contrasted to cargo vessels which nominate voyages in response to shipper requirements, which are apt to change due to operational requirements, making the inevitable variations cumbersome and costly.

The impact of the application of the *Fair Work Act* is amplified in the cruise ship industry, where labour costs are a significant expense, given the high ratio of crew to passengers required to operate a cruise ship.

⁶² This amendment is supported by: Caltex Australia, above n 37; Australian Shipowners Association, above n 57; and Australian Institute of Petroleum, above n 38.

⁶³ Australian Government Department of Infrastructure and Transport, above n 6.

⁶⁴ Tourism and Transport Forum Australia, above n 61.

⁶⁵ Cruise Lines International Association, above n 52.

The Tourism and Transport Forum recommends that the exemption be extended to include all cruise ships over 500 tonnes.⁶⁶ This would be consistent with the International Maritime Organisation definition of cruise ship, and would allay many of the concerns of international cruise liners wishing to operate in Australia. However, this is likely to be vigorously contested by Australian companies operating along the coast, who view foreign competition as having an unfair advantage. Foreign vessels, whilst currently required to pay Australian wages whilst operating in Australia, have the opportunity to spread those costs over a year with a resulting lower cost base.⁶⁷

This analysis suggests that the passenger cruise industry is of a significantly different nature to bulk cargo shipping, and subject to differing pressures and incentives, such that consideration ought to be given to separating regulation for these two contrasting industries.

6 Way Forward for Coastal Shipping Regulation

The current regulatory regime has significantly increased administrative burdens for shipowners, and increased costs for end users and shippers, without showing any signs of the 'revitalisation' it was intended to bring about. Policy and economic decisions need to address whether the Australian Government should persist with attempts to reinvigorate the ailing Australian coastal trading fleet through cabotage, or whether the reform ought to focus on increasing competition and encouraging foreign vessels to operate in Australia in support of Australian manufacturing, mining and exports. It is clear that to prioritise one industry at the expense of the other will be unsustainable.

Any investment in the shipping industry requires a long term view, and continued growth in the Australian shipping industry will only be seen if shipowners view the Australian industry as a stable and viable option in the global marketplace.

Option 2 received a significant amount of industry support, but the need for stability suggests a bipartisan policy approach is needed to ensure that any further reform is lasting, effective and sends positive signals to investors. Therefore, the retention of some form of cabotage policy along the lines of the proposal in Option 3 would be preferred, in order to obtain union endorsement and support from both sides of the political spectrum.

It is clear, however, that the current cabotage policy cannot be sustained. The increased administrative burdens and costs on users will not have the effect of revitalising an ailing industry. With expected increases in overall shipping tonnage in coming years, opportunity exists for Australia to develop a strong and prosperous maritime industry, and this opportunity to review and improve current regulation must be grasped.

⁶⁶ Tourism and Transport Forum Australia, above n 61.

⁶⁷ North Star Cruises Australia Pty Ltd, above n 51; Coral Princess Cruises, above n 51; Australian Expedition Cruise Shipping Association, above n 51.