Shipping Legislation Amendment Bill 2015

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Contents

The Bills Digest at a glance ................................................................. 4
Purpose of the Bill ........................................................................ 5
Background .................................................................................... 5
International context ..................................................................... 5
2012 reforms to coastal shipping in Australia ........................... 5
Government policy commitment .................................................. 7
Options paper and consultation process ...................................... 8
Harper review recommendations ................................................ 8
Committee consideration .............................................................. 9
  Senate Rural and Regional Affairs and Transport Legislation
  Committee .................................................................................. 9
  Senate Standing Committee for the Scrutiny of Bills ................... 9
Parliamentary Joint Committee on Human Rights ..................... 10
Policy position of non-government parties/independents ...... 11
Position of major interest groups .................................................. 11
  Industry participants and industry representative bodies ....... 11
  Training providers .................................................................. 12
  Trade unions .......................................................................... 12
Financial implications ................................................................. 13
Statement of Compatibility with Human Rights ...................... 13
Key issues and provisions: Schedule 1 ...................................... 13
  Title of the Act ....................................................................... 13
  Object of the Act .................................................................... 13
  Expanding the range of vessels and activities regulated ......... 14

Date introduced: 25 June 2015

House: House of Representatives

Portfolio: Infrastructure and Regional Development

Commencement: A day to be fixed by Proclamation, or six months after Royal Assent.

Links: The links to the Bill, its Explanatory Memorandum and second reading speech can be found on the Bill’s home page, or through the Australian Parliament website. When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the ComLaw website.
Extension to transportation of liquid fuel products from offshore facilities.................................................. 14
Extension to certain activities ........................................... 14
Extension to cruise ships .................................................. 14
  Proposed permit period inappropriate for the cruise industry ................................................................. 14
  Dry dock arrangements.................................................. 15
  Smaller ‘adventure’ cruise ships .................................. 15
Background to the proposed new coastal shipping permit system ........................................................... 15
Navigation Act 1912 regime ............................................. 15
The *Fair Work Act* 2009 ................................................ 16
Current regime .................................................................. 16
  General licences ......................................................... 16
  Temporary licences ...................................................... 16
  Emergency licence ...................................................... 17
The notice in response process ....................................... 17
Summary of the previous, current and proposed coastal shipping regimes ........................................... 17
The arguments for opening up coastal trading to foreign flagged vessels ........................................... 20
Provisions that will allow foreign flagged vessels to engage in coastal trading ........................................... 20
  Who can apply for a permit or apply to transfer a permit? .... 20
Application requirements and obligation for foreign vessels to lodge a term declaration ...................... 21
  183 day rule and foreign vessels .................................... 22
Abolition of the notice and response system .................. 22
Factors the Minister must consider in deciding whether to grant a coastal shipping permit .................... 23
  When applications in relation to certain foreign vessels must automatically be refused ....................... 23
  Circumstances in which applications must be automatically granted .................................................. 24
Mandated post application determination actions ............ 24
  Information to be included in a permit.............................. 24
  Information about permits that must be published does not include term declaration details ................ 24
  Information to be included when an application is refused .................................................................... 24
Review of permit application and transfer decisions ........ 25
Imposing conditions on permits ....................................... 25
  Mandatory conditions .................................................. 25
  Optional conditions ..................................................... 25
The parity condition and when Australian wages must be paid to foreign seafarers .............................. 25
Cost savings to businesses ............................................. 26
Consequences for breaching permit conditions ................. 27
Consequences for failing to pay Australian wages when required ........................................................................... 27
Standing to seek payment of unpaid Australian wages ....... 27
Minimum Australian crewing requirements .................... 27
Consequences for failing to meet minimum Australian crew requirements .......................................................... 28
Reporting Requirements .................................................. 29
Contents of the reports .................................................... 29
Consequences for failing to lodge reports ......................... 30
Publication of the reports .................................................. 30
Enforcement of penalties .................................................. 30
Infringement notice regime ............................................. 30
Cancellation of permits .................................................... 30
Other provisions ............................................................ 31
Transitional provisions ..................................................... 31
Transition period ............................................................. 31
Modified continued operation of existing licences .......... 31
Application and modification of the Award ..................... 31
Does the Fair Work Act apply to the vessel? .................... 32
Amendments to the Shipping Registration Act 1981 ........ 33
Reduction in time vessel must be engaged in international trading ................................................................. 33
Removal of requirement to have a collective agreement ... 33
Mandatory refusal to register a vessel onto the AISR ......... 34
Changes related to minimum Australian crew requirements ............................................................................. 34
New power to cancel registration in certain circumstances ... 35
Continued application of Australian work health and safety laws to certain vessels ........................................... 35
Concluding comments ..................................................... 35
Appendix A: international comparison of selected jurisdictions ............................................................................. 37
Canada ............................................................................. 37
European Union .............................................................. 37
Individual European states ............................................. 38
United States .................................................................. 38
New Zealand ................................................................. 39
Japan .............................................................................. 40
China .............................................................................. 40
The Bills Digest at a glance

What the Bill does

This Bill will:

• open the Australian coastal shipping market to increased foreign competition
• increase flexibility in the coastal shipping sector
• seek to reduce the cost of coastal shipping
• extend regulation to cruise ships, transhipment vessels supporting the operation of offshore facilities (and those transporting liquid fuel products from them to Australia) and certain other activities and
• provide a limited form of protection to domestic shippers against foreign competition in the form of a degree of competitive neutrality (at least in regards to wage costs).

How the Bill works

To achieve the above the Bill:

• replaces the existing three-tiered licensing system with a single permit regime open to both foreign and domestic vessels
• removes the minimum five-voyage requirement currently imposed on foreign vessels seeking to engage in coastal shipping in Australian waters
• abolishes the ‘notice and response’ system
• allows both foreign vessels and those on the Australian International Shipping Register to more readily engage in coastal shipping between international voyages and
• provides that Australian wages must only be paid to foreign seafarers on vessels engaged in coastal shipping for more than 183 days each year. Currently most foreign vessels are required to pay Australian wages for the entire time they are engaged in coastal shipping.

Why the Bill has been introduced

• The Bill has been introduced to give effect to the policy intention of increasing the competiveness of the broader Australian economy by reducing coastal shipping costs through increased foreign competition. This was indirectly flagged in a number of policy documents produced by the Coalition prior to the last election.
• The Government argues that Bill builds on submissions received during the options paper and consultation process conducted by the Department of Infrastructure and Transport.
Purpose of the Bill

The purpose of the Shipping Legislation Amendment Bill 2015 (the Bill) is to amend the Coastal Trading (Revitalising Australian Shipping) Act 2012 (the Act)\(^1\) and other legislation relating to shipping to:

- replace the existing system of three levels of licences for coastal shipping with a single permit
- allow vessels to be registered on the Australian International Shipping Register (AISR) if they undertake 90 days international trading a year (instead of the current requirement to be ‘predominantly engaged’ in international trade) and allow these vessels to engage in coastal shipping and
- alter the workplace relations environment so that:
  - only seafarers on vessels engaged in coastal shipping for six months or more are covered by the Fair Work Act 2009 (the FWA) and
  - making a collective agreement with workers is no longer a condition for being registered on the AISR.

Background

International context

At a general level, it could be said that three basic ‘models’ of coastal shipping exist around the world: closed, partially open and fully open. A ‘closed’ coastal shipping regime is one that is either entirely or predominately closed to foreign ships. A partially open system (such as Australia’s previous and current systems) is open to foreign shipping, to a degree, but protections or incentives for domestic ships exist. A fully open system is one where both domestic and foreign ships have equal (or nearly equal) access to coastal shipping and are regulated in an identical (or nearly identical) way. The table below summarises the coastal shipping policies of a number of other countries.\(^2\)

### Table 1: cabotage arrangements of selected jurisdictions

<table>
<thead>
<tr>
<th>Country</th>
<th>Type of regime</th>
<th>Policy measures</th>
<th>Policy objective</th>
</tr>
</thead>
<tbody>
<tr>
<td>Canada(^3)</td>
<td>Closed</td>
<td>Access to coastal trade and short sea shipping restricted to Canadian ships unless none are available, in which case foreign ships may be used under waiver.</td>
<td>Provide a protected environment in which Canadian short sea shipping can prosper without being exposed to full force of international competition.</td>
</tr>
<tr>
<td>European Union(^4)</td>
<td>Partially open</td>
<td>Maritime transport services within a member state (that is, purely national connections) can be offered by companies of other member states. Some member states restrict access to flags of EU members while others don’t.</td>
<td>Liberalisation between EU members while supporting the policies of EU member states to support their own shipping industries. Increase opportunity to access EU cargo while maintaining some restrictions to EU flags.</td>
</tr>
<tr>
<td>United States(^5)</td>
<td>Closed</td>
<td>Highly restrictive. Coastal trade restricted to US built, US owned, US</td>
<td>Promotion and maintenance of the US merchant marine industry to</td>
</tr>
</tbody>
</table>

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2. Much of the information for this table was taken from: Australian Shipowners Association, Submission to Department of Infrastructure and Regional Development (DIRD), Approaches to regulating coastal shipping in Australia: options paper, June 2014, p. 15, accessed 30 September 2015.
<table>
<thead>
<tr>
<th>Country</th>
<th>Access Type</th>
<th>Description</th>
<th>Reason</th>
</tr>
</thead>
<tbody>
<tr>
<td>New Zealand</td>
<td>Partially open</td>
<td>Access to coastal trade restricted to NZ ships and foreign ships that pass NZ as part of an international voyage. Minister may authorise another ship on terms the minister thinks appropriate.</td>
<td>Part of a move toward liberalisation of a range of public policy areas in the 1990’s. There were calls to reintroduce tighter regulation after the Rena oil-spill incident to ensure appropriate safety and environmental protection.</td>
</tr>
<tr>
<td>Japan</td>
<td>Partially open</td>
<td>Access to coastal shipping of cargo or passengers restricted to Japanese ships, with the exception of vessels from a limited number of other countries which have been granted access pursuant to treaties or which have obtained a permit.</td>
<td>National security, the reliable transport of everyday goods for local residents and the secure employment of domestic crew members.</td>
</tr>
<tr>
<td>China</td>
<td>Closed</td>
<td>Foreign vessels not permitted to engage in coastal shipping.</td>
<td>Protecting China’s economic interests and ensuring its sovereignty and safety.</td>
</tr>
</tbody>
</table>

Source: as per sources cited in the footnotes in the table above.

The countries listed in the table above are examined in detail in

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Appendix A: international comparison of selected jurisdictions. However, the key point to emerge from the table above is that many of our major trading partners and other countries have either closed or partially open coastal shipping regimes in place. If the Bill is passed, Australia’s coastal shipping regime would either be classified as partially open, or fully open, depending on the actual impact of the 183 day rule on the degree of foreign competition entering the Australian coastal shipping market. With the above comparisons in mind, the reforms made in 2012 to Australia’s coastal shipping regime are examined, to give further context to the changes proposed by the Bill.

2012 reforms to coastal shipping in Australia

The current Bill, like previous reforms, is purportedly aimed at developing a competitive Australian shipping industry. In doing so, it is necessary to balance the interests of shipowners, the maritime workforce, and the shippers who depend on them. Shipping is both an important industry in itself and an input to many other industries.

Despite the introduction of the Act, the number of Australian flagged trading vessels, the proportion of Australia’s international trade carried on Australian flagged vessels, and the number of persons employed in coastal shipping have fallen in recent years. In addition, the average age of the Australian trading fleet is considerably greater than the global average. These falls occurred whilst globally sea freight was expanding.

The previous Labor Government passed a package of legislation in 2012 designed to respond to the long term decline in the number of Australian flagged trading vessels by providing various tax incentives and introducing measures (such as the ‘notice in response’ system, discussed below). Those measures were designed to increase the competitiveness of Australian ships and to provide them, in effect, with comparative advantages over foreign ships (at least in terms of operational and scheduling flexibility). Using the classification system noted above, Australia’s coastal shipping regime would be classified as partially open, tending towards closed (depending on how significant a barrier to foreign competition the ‘notice in response’ system represents). Useful background to the changes is in the Bills digests for the Bills in the 2012 package. However, briefly, the key reforms introduced by the Act included tax measures to remove barriers to investment in Australian shipping and to foster the global competitiveness of the shipping industry such as the Seafarers offset (in effect, a wage subsidy via the tax system for ships employing Australian crews; a provision to abolish that offset is in a Bill which is before the Senate) and other initiatives such as:

- the establishment of a new shipping Registrar (the AISR) to encourage Australian companies to participate in the international shipping trade
- a new regulatory framework including a three-level licensing regime for coastal trading (outlined below) and
- the establishment of a Maritime Workforce Development Forum to progress key maritime skills and training priorities.

In his second reading speech on the 2012 package, the then Minister for Infrastructure and Transport, Mr Albanese, confirmed that seafarers working on vessels engaged in coastal shipping would continue to be covered by the FWA.

10. Senator C Back (Senator for Western Australia, Liberal Party), Question in Senate Rural and Regional Affairs and Transport Legislation Committee, Inquiry into the Shipping Legislation Amendment Bill 2013 [Provisions], Senate, 7 September 2015, p. 5, accessed 5 November 2015. ‘Over the first two years of the current legislation there has been a 63 per cent decline in the carrying capacity of the major Australian coastal trading fleet.’ Senate Rural and Regional Affairs and Transport Legislation Committee, Shipping Legislation Amendment Bill 2015 [Provisions], The Senate, Canberra, 12 October 2015, paras 3.8–3.9, pp. 12–13, accessed 12 October 2015.
13. L Nielson and M Brennan, Shipping Reform, Bills digest, op. cit., p. 3.
At that time the Coalition expressed concern that the tax incentives would encourage other industries to seek government assistance and subsidies and would lessen competitive pressures towards efficiency and that the licensing regime for foreign vessels would reduce competition and increase shipping costs. The main provisions of the Act took effect from 1 July 2012.

**Government policy commitment**

Whilst not directly addressed in its 2013 election campaign materials, the Coalition indirectly flagged an intention to increase foreign competition in Australian coastal shipping in a number of policy documents. For example, the Nationals indicated they would:

- allow Australian shipping to compete effectively against other transport modes and internationally
- review Labor’s recent shipping reforms with a view to revising or reversing measures that hinder the competitiveness of Australia’s shipping services and
- repeal the five voyage minimum for voyage permits (discussed below).

The Coalition’s policy document ‘Discussion Paper on Building a Strong, Prosperous Tasmania’, whilst focusing on shipping costs to and from Tasmania, noted that ‘fundamental, downward pressure on the cost of doing business in Tasmania will occur if greater competition occurs in the shipping and transport sectors’. Arguably this could be said to be an indication of a broader commitment to introduce greater (foreign) competition into coastal shipping around Australia, including Tasmania.

**Options paper and consultation process**

In line with the above policy commitment to review the reforms to coastal shipping introduced by the Act, in April 2014 the Government released an options paper on regulating coastal shipping. The paper conceded that there was no data available for the period since the reforms took effect. It declared that:

> ... the current regulatory regime comes at a cost to shippers, and, ultimately, their customers. Industry specific assistance imposes costs on taxpayers ... Regulation dulls the incentive for firms to improve productivity, cease unsuccessful investments early and diversify into other ventures.

Through the options paper process the Government sought the views of stakeholders about the ‘current operation of the Australian shipping industry’ and in particular, the operation of the Act. As part of this consultation process, the Department of Infrastructure and Regional Development (Department) sought submissions ‘from as broad a range of stakeholders as possible’. However, the consultation paper also noted that:

> The Government will consider the outcomes of this consultation together with the Productivity Commission’s recommendations from its inquiry into Tasmanian Shipping and Freight and the Government’s ‘Root and Branch’ review of competition policy.

The relevant outcomes of the Productivity Commission’s review of competition laws (the Harper review) are briefly discussed below. In terms of models for reform, the options paper canvassed three options. However, the measures included in the Bill reflect a fourth option, which, according to the Regulatory Impact Statement (contained in the Explanatory Memorandum to the Bill):

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21. Ibid., p. 3.
22. Ibid.
23. Ibid., p. 4.
24. Ibid.
...was developed in light of the outcomes of the consultative process and better reflected industry views about the advantages of an option that captured most of the benefits of full deregulation but with additional protections for wages and conditions for workers onboard ships trading in Australia for most of the year... The additional option (option 4) is similar to the controlled deregulation option but would require the employment of people with Australian work rights in some circumstances, and the application of the Fair Work Act to foreign ships engaged predominantly in coastal trade.25

Harper review recommendations

The Harper review made two key recommendations in relation to coastal shipping:

• that Part X of the Competition and Consumer Act 2010 (the CCA),26 which allows certain types of shipping operators to enter cartel agreements among themselves in relation to the freight rates, the quantity and kinds of cargo to be carried on particular trade routes, be removed and

• other restrictions on coastal shipping should be removed, unless ‘it can be demonstrated that the benefits of the restrictions to the community as a whole outweigh the costs, and the objectives of the government policy can only be achieved by restricting competition’.27

The Bill only deals with the second recommendation noted above, namely whether the removal of restrictions on foreign vessels engaging in coastal shipping will, on balance, benefit the community and Australian economy as a whole. The Government argues that the proposed changes will do so.28 It does not propose to make any of the recommended changes to the CCA noted above.

Committee consideration

Senate Rural and Regional Affairs and Transport Legislation Committee

The Bill was referred to the Senate Rural and Regional Affairs and Transport Legislation Committee (Transport Committee) for inquiry and report. Details of the inquiry are at the inquiry’s web page.29 The Transport Committee received 40 submissions. The views of stakeholders are addressed under the heading ‘Position of major interest groups’, whilst the views of non-government parties and independents are addressed under the heading ‘Policy position of non-government parties/independents’ below. Briefly however, the main issues identified by the Transport Committee included:

• the ‘somewhat inconsistent’ objectives of the current Act
• the need for competition in Australian coastal shipping and the role to be played by foreign vessels
• the application of Australian wages to foreign seafarers
• loss of employment and employment related skills in Australia and
• the application of the Bill to cruise ships

The majority report of the Transport Committee noted that the Act represented a ‘clearly inadequate’ attempt to revitalise coastal shipping.30 The majority of the Transport Committee recommended that the Bill be passed, but that the Government give consideration to:

• the desirability of providing a mechanism for emergency permit applications and

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28. W Truss, ‘Second reading speech: Shipping Legislation Amendment Bill 2015’, House of Representatives, Debates, op. cit.: ‘The current arrangements are self-defeating for the shipping industry, let alone our industries and manufacturers reliant on coastal shipping services. The extra cost for Australian businesses using an Australian vessel is unsustainable at some $5 million a year more than using a foreign vessel. More affordable freight means more freight, more efficient services and more competition, all of which will make Australian products more competitive internationally and domestically, helping local industries, which employ thousands of Australians, and providing the opportunity for economic growth and expansion.’
• clarifying the effect of the Bill on cruise ship operators.\(^{31}\)

Both the ALP and Greens members of the Transport Committee issued dissenting reports, opposing the Bill in its entirety.\(^{32}\)

**Senate Standing Committee for the Scrutiny of Bills**

The Senate Standing Committee for the Scrutiny of Bills had no comment on the Bill.\(^{33}\)

**Parliamentary Joint Committee on Human Rights**

The Parliamentary Joint Committee on Human Rights (PJCHR) reported on the Bill in September 2015.\(^{34}\) The PJCHR noted that the 183 day rule measure (discussed below under the heading ‘183 day rule and foreign vessels’) engaged and ‘may limit the right to just and favourable conditions at work’ under the International Covenant on Economic, Social and Cultural Rights (ICESCR).\(^{35}\) This is because the 183 day rule ‘may permit individuals to be paid less than Australian award wages whilst working in Australian coastal waters’.\(^{36}\)

The PJCHR noted that under article 2(1) of the ICESCR, Australia has obligations in relation to the right to work including:

- the immediate obligation to satisfy certain minimum aspects of the right
- the obligation not to unjustifiably take any backwards steps (retrogressive measures) that might affect the right
- the obligation to ensure the right is made available in a non-discriminatory way and
- the obligation to take reasonable measures within its available resources to progressively secure broader enjoyment of the right.\(^{37}\)

Whilst the rights provided by the ICESCR are not absolute, the PJCHR noted that the right to work may only be subject to limitations that are determined by law, compatible with the nature of the right and solely for the purpose of promoting the general welfare in a democratic society.\(^{38}\) The PJCHR noted:

> The statement of compatibility states that Australia is not required to set wages and conditions for seafarers on foreign vessels under the ICESCR. **This appears to misunderstand the nature of Australia's obligations under international law. Australia is obligated to apply international human rights law to everyone subject to its jurisdiction. This includes people in Australian coastal waters that form part of Australia's territory.** As part of Australia's sovereignty, Australia applies a number of domestic laws to foreign flagged vessels in its coastal waters including the Navigation Act 2012.

Accordingly, to the extent that the Bill may expand the number of individuals working in Australian coastal waters on below Australian award wages, the Bill may limit the right to just and favourable conditions of work.\(^{39}\) (emphasis added).

The PJCHR concluded that the 183 day rule ‘raises questions as to whether the measure limits the right, and if so, whether that limitation is justifiable’.\(^{40}\) It therefore concluded that ‘the measure engages and may limit the right to just and favourable conditions at work as the Bill may permit individuals to be paid less than Australian award wages whilst working in Australian coastal waters’.

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31. Ibid., p. 32.
35. Ibid., paras 1.73–1.74, pp. 16–17.
36. Ibid., para 1.73, p. 16.
37. Ibid., para 1.76, p. 17.
38. Ibid., para 1.77, p. 17.
39. Ibid., paras 1.79–1.80, pp. 17–18.
40. PJCHR, Twenty-seventh report of the 44th Parliament, op. cit., para 1.8, p. 18.
award wages whilst working in Australian coastal waters’ and stated that ‘the statement of compatibility does not sufficiently justify that limitation for the purposes of international human rights law’. As a result, the PJCHR requested advice from the Minister regarding whether:

- there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective
- there is a rational connection between the limitation and that objective and
- the limitation is a reasonable and proportionate measure for the achievement of that objective.

In relation to whether the 183 day rule (argued to limit the right to just and favourable conditions at work) is designed solely for the purpose of promoting the general welfare in a democratic society, one possible argument is that the measure in question will, on balance, benefit the community and Australian economy as a whole, and therefore is a compatible limitation on the right.

Policy position of non-government parties/independents

The Shadow Minister for Infrastructure and Transport, Mr Albanese, speaking on a separate motion about the claimed ‘detrimental effects’ of the 2012 package in December 2014, noted that the 2012 policy package had been developed in consultation with industry. He referred to the Government’s proposed provision that the FWA and the Seagoing Industry Award 2010 (Award) would only apply to vessels which spend six months in Australian waters as ‘Work Choices on water’. In addition to his comment in Parliament, Mr Albanese has also noted that major incidents around the coast have mostly involved foreign vessels, and questioned the security implications of allowing the Australian flagged fleet to disappear. Further, Mr Albanese has also described allowing foreign vessels access to the coastal trade as ‘unilateral economic disarmament’ and pointed out that most countries have some form of cabotage. He has also said that the legislation:

... would destroy the Australian shipping industry by removing current provisions that require people moving freight between Australian ports to first seek out an Australian vessel or where one is not available, engage a foreign-flagged vessel on the condition they pay the crew Australian-level wages.

Independent member Mr Andrew Wilkie described the projected measures as an attack on workers and a distraction from the real issue for Tasmania, which was the cost of getting Tasmanian goods to Melbourne.

Position of major interest groups

Eighty-seven submissions were made in response to the 2014 options paper, and they are available on the Department’s web page. The Transport Committee received 40 submissions. What follows is an attempt to summarise the range of views expressed by stakeholders in both the options paper consultation process and the Transport Committee’s Inquiry.

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41. Ibid., para 1.83, p. 18.
42. Ibid., para 1.83, pp. 18–19.
43. W Truss, ‘Second reading speech: Shipping Legislation Amendment Bill 2015’, House of Representatives, Debates, op. cit.: ‘More affordable freight means more freight, more efficient services and more competition, all of which will make Australian products more competitive internationally and domestically, helping local industries, which employ thousands of Australians, and providing the opportunity for economic growth and expansion.’
44. A Albanese, ‘Private Members’ Business: Coastal Shipping’, Federation Chamber, House of Representatives, Debates, 1 December 2014, p. 13797, accessed 15 July 2015. One meaning of cabotage is restricting the operation of transport services within a particular country to that country’s own transport services. As a result, the reference to ‘some form of cabotage’ is a reference to some form of restriction on foreign competition in coastal shipping.
45. Fair Work Commission (FWC), Seagoing Industry Award 2010 [MA0000122], FWC, 18 June 2015.
47. Ibid.
Industry participants and industry representative bodies

The Australian Peak Shippers Association submitted that the system of permits had resulted in a deterioration in services available and an increase in costs. It suggested that this could drive manufacturing offshore. This was echoed by several individual companies, and by the National Farmers’ Federation. The Australian Food and Grocery Council and the Minerals Council of Australia favoured complete deregulation of access to coastal trading.

The Danish Maersk Line argued that the regulatory regime was preventing it from offering a viable service. It specified the extra cost involved in paying Australian wages, and the administrative burden: it estimated that it required ‘one full head count’ to manage compliance, and said that the system did not allow for one-off voyages. CSL Australia, which describes itself as a key player in the coastal market with long term arrangements with Australian shippers, did not believe that costs were increased by the 2012 package, except for the requirement to pay Australian wages. CSL Australia argued that dedicated Australian-flagged coastal vessels could not compete with foreign vessels entering and leaving Australian waters after engaging in coastal shipping. CSL Australia recommended that ‘a change is required to the new Bill to achieve a level playing field’, and nominated increasing the number of days a foreign vessel must engage in coastal shipping in Australian water prior to being required to pay Australian wages ‘be increased from 183 to 295 days’.

The Freight and Logistics Council of WA recommended a more flexible temporary licence, which would require only that the crew were paid ‘internationally acceptable’ wages (as defined by the International Transport Federation) and would not require a particular frequency or presence, as well as the general licence.

North Star Cruises, an Australian passenger cruise company, complained that it was undercut by foreign operators, who did not have to pay Australian wages. Meanwhile the tax incentives were not available to it because it did not operate internationally. It supported the current regulations, with further restrictions. This was also the response of Coral Princess Cruises, while the industry association, the Australian Expedition Cruise Shipping Association, argued that all foreign cruise vessels should be required to be on the General Register. On the other hand the South Australian Tourism Commission favoured broadening the exemptions for foreign cruise ships to increase the amount of tourism activity along the coast.

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52. Australian Peak Shippers Association (APSA), Submission to DIRD, Approaches to regulating coastal shipping in Australia: options paper, 8 May 2014, accessed 16 July 2015.
Minerals Council of Australia (MCA), Submission to Senate Rural and Regional Affairs and Transport Legislation Committee, Inquiry into the Shipping Legislation Amendment Bill 2015 [Provisions], Senate, Canberra, 21 August 2015, p. 7. The MCA submitted that removing ‘...all regulation of access to Coastal Trading and enacting legislation to deal with the effects of other Australian laws’ was ‘most likely to enhance business productivity and economic growth’.
57. CSL Australia, Submission to Senate Rural and Regional Affairs and Transport Legislation Committee, Inquiry into the Shipping Legislation Amendment Bill 2015 [Provisions], Senate, Canberra, August 2015, p. 2.
Training providers
The Australian Maritime College expressed concern that the options paper had not considered the training needs of the industry, for both seafaring and shore-based roles, which were essential for the industry to survive.63

Trade unions
The Maritime Union of Australia (MUA), Australian Maritime Officers Union (AMOU) and the Australian Institute of Marine and Power Engineers (AIMPE) all oppose the Bill.64

The MUA opposed the Bill on the grounds that it would ‘destroy the Australian shipping industry’ by removing ‘all preferential treatment for Australian ships, which has been at the heart of maritime and shipping policy in Australia for over a century’.65 The AMOU opposed the Bill on the ground that it would ‘lead to the loss of jobs for Australian deck officers’.66 The AIMPE opposed the Bill on a number of grounds, including that:

- the impact of the Bill would be adverse for the few remaining Australian companies engaged in the shipping sector
- the Bill would reduce employment opportunities for Australian Marine Engineer Officers, Deck Officers and other Australian seafarers
- as foreign shipping operators are ‘effectively free from the payment of corporate income tax’, allowing foreign competition in the coastal shipping sector would disadvantage Australian shippers and
- the ‘Australian’ crew requirements could be easily avoided.67

Financial implications
According to the Explanatory Memorandum, the Bill has no financial implications for the Commonwealth.68

Statement of Compatibility with Human Rights
As required under Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011 (Cth), the Government has assessed the Bill’s compatibility with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of that Act. The Government considers that the Bill is compatible.69

However, as noted earlier, the PJCHR has raised concerns about the 183 day rule and its compatibility with the right to just and favourable conditions at work.

Key issues and provisions: Schedule 1

Title of the Act
Items 1 and 2 of Schedule 1 of the Bill will amend the title of the Act to the ‘Coastal Shipping Act 2015’.70

64. Maritime Union of Australia (MUA), Submission to Senate Rural and Regional Affairs and Transport Legislation Committee, Inquiry into the Shipping Legislation Amendment Bill 2015 [Provisions], Senate, Canberra, August 2015, p. 2; Australian Maritime Officers Union (AMOU), Submission to Senate Rural and Regional Affairs and Transport Legislation Committee, Inquiry into the Shipping Legislation Amendment Bill 2015 [Provisions], Senate, Canberra, August 2015, p. 2; Australian Institute of Marine and Power Engineers (AIMPE), Submission to Senate Rural and Regional Affairs and Transport Legislation Committee, Inquiry into the Shipping Legislation Amendment Bill 2015 [Provisions], Senate, Canberra, August 2015, p. 3, all accessed 6 November 2015.
67. AIMPE, Submission to Senate Rural and Regional Affairs and Transport Legislation Committee, Inquiry into the Shipping Legislation Amendment Bill 2015 [Provisions], op. cit., p. 3
69. The Statement of Compatibility with Human Rights can be found at pp. 3–6 of the Explanatory Memorandum to the Bill.
Object of the Act

The Transport Committee noted that ‘it was not clear whether the Act was attempting to benefit Australian ships or Australian industry’ and further noted that this ‘lack of clarity had led to a significant amount of litigation by a number of companies’.[71] An example of the litigation referred to by the Transport Committee is CSL Australia Pty Limited v Minister for Infrastructure and Transport (the CSL Case, discussed below), which highlighted the important role that the interpretation of an Act’s object clause can play in determining disputes over the issuing (or refusing to issue) licences or permits under the Act.[72] The Bill makes some improvements in this regard. Proposed section 3 seeks to significantly simplify the objects section of the Act in a manner that appears to address what the Transport Committee called the ‘somewhat inconsistent’ objectives of benefiting both Australian ships and Australian industry more broadly by emphasising the needs of industries that rely on coastal shipping over the needs of the shippers.[73] Proposed section 3 provides that the object of the Act is to provide a regulatory framework for coastal shipping in Australia that:

- fosters a competitive coastal shipping services industry that supports the Australian economy and
- maximises the use of available shipping capacity on the Australian coast. (emphasis added)

Expanding the range of vessels and activities regulated

The Bill proposes to expand the range of vessels and activities regulated by the Act. Currently section 7 of the Act, subject to certain exceptions, defines coastal trading as where a vessel (in connection with a commercial activity):

- takes on board passengers or cargo at a port in a state or territory
- carries those passengers or that cargo to a port in a different state or territory[74] and
- where some or all of the passengers disembark or some or all of the cargo is then unloaded.[75]

The Act applies to vessels that engage in ‘coastal trading’ in Australian waters.[76] The Bill will replace the concept of coastal trading with ‘coastal shipping’.[77] The practical effect of the proposed changes is that the range of activities captured by Australia’s coastal shipping regime would be expanded to include cruise ships, transhipment vessels supporting the operation of offshore facilities (and those transporting liquid fuel products from them to Australia) and certain other activities, as discussed below.

Extension to transportation of liquid fuel products from offshore facilities

Proposed paragraph 7(1)(d) will extend the scope of coastal shipping beyond the activities currently covered in the definition of coastal trading noted above to include the transportation of liquid fuel products from offshore facilities to a port in a state or territory.

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73.  Senate Rural and Regional Affairs and Transport Legislation Committee, op. cit., para 2.3, p. 3.
74.  A vessel that offloads passengers or cargo in the same state or territory in which they were loaded will only be considered to be involved in ‘coastal trading’ if the Minister declares that the Act applies to that vessel – see subsection 12(2) of the Act.
75.  The exceptions are provided in subsection 7(2) of the Coastal Trading (Revitalising Australian Shipping) Act 2012 and include where a passenger who holds a through ticket to or from a port outside Australia disembarks at a port in Australia for transit purposes only, or to cargo that is consigned on a through bill of lading to or from a port outside Australia and is unloaded at a port in Australia for transshipment purposes only or kinds of passengers (or cargo) prescribed by the regulations.
76.  Coastal Trading (Revitalising Australian Shipping) Act 2012, see subsections 3(1), (2), 6(1) and sections 5, 7, 8, 10 and 12. The effect of these provisions is that where a person engages in the activity of ‘coastal trading’, they are captured by the Act, regardless of whether the relevant voyage was commenced inside or outside of Australia’s territorial waters, Exclusive Economic Zone (EEZ), the Australian continental shelf or Australia’s external territories.
77.  Shipping Legislation Amendment Bill 2015, Items 7, 8 and 23–25.
Extension to certain activities

Proposed paragraph 7(1)(e) and proposed section 7A (at item 27 of Schedule 1 to the Bill) will extend the application of the Act to periods of time that a vessel is loading or unloading cargo (even if it does not move from port to port) and days that the vessel is docked for service.78

Extension to cruise ships

The Bill will also bring cruise ships into the coastal shipping regulatory system and hence such vessels will require a coastal shipping permit. This is a significant change, as currently most cruise ships are exempt from the Act’s licensing regime.79 This change attracted some criticism.80

Proposed permit period inappropriate for the cruise industry

For example, it was suggested that the proposed 12 month permit period was inappropriate for the cruise industry, given that cruise programs are generally published and available for purchase two years in advance.81 As a result, it was suggested that cruise ship operators be able either to obtain a longer term permit or, alternatively, that they be issued with a rolling permit that remained valid until it was breached.82

Dry dock arrangements

The proposed dry dock arrangements were also criticised. The Transport committee noted that the cruise ship industry proposed that the Customs Act 1901 should be amended to ensure that cruise ships entering dry dock in Australia are not deemed to be imported, and hence remove the need for dry docking and importation to be part of the permit system. It was argued that this would allow cruise ship operators to maximise their coastal shipping activity within the 183 day threshold, instead of having the days a vessel is in dry dock (and hence not engaged in normal operations) counted towards the days it was engaged in coastal shipping.83

Smaller ‘adventure’ cruise ships

The Transport Committee noted that ‘expedition’ cruise ships generally fell below the exemption threshold that currently applies to larger cruise ships, and that some submissions had argued that the benefit of the exemption (i.e., vessels of a certain size would not require a permit) should be extended to smaller cruise ships.84

Background to the proposed new coastal shipping permit system

The central feature of the Bill is the proposed permit system that will allow foreign vessels to engage in coastal shipping in Australian waters for up to 12 months (with no minimum number of voyages) and the abolition of the ‘notice in response’ system. To give context to the proposed changes, the previous regulatory regimes are briefly summarised below, and comparisons to major trading partners are considered.

Navigation Act 1912 regime

Under the previous regulatory regime created by Part VI of the Navigation Act 1912, which operated in various reiterations for almost a century, vessels were required to hold either a licence, single voyage permit or a continuing voyage permit to engage in coastal trading. The Navigation Act created two regulatory categories:

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78. Item 9 will amend subsection 6(1) of the Coastal Trading (Revitalising Australian Shipping) Act 2012 to provide that a vessel is ‘docked for service’ when it is in dry dock or docked for maintenance, repairs, cleaning or painting and not engaged on a voyage.
79. Section 11 of the Coastal Trading (Revitalising Australian Shipping) Act 2012 allows the Minister to exempt certain vessels from the operation of that Act. The Coastal Trading (Revitalising Australian Shipping) Act 2012 - Section 11 exemption for cruise vessels (a legislative instrument made under section 11 of that Act) currently exempts vessels in excess of 5,000 gross tonnes which are: (a) capable of a speed of at least 15 knots, (b) capable of carrying at least 100 passengers and (c) utilised wholly or primarily for the carriage of passengers between any ports in the Commonwealth or in the Territories, except between Victoria and Tasmania. As such, it exempts most cruise ships from the licensing regime created by that Act. Section 11 will be repealed by Item 28 of Schedule 1 to the Bill.
81. Ibid., para 3.66, p. 29.
84. Ibid., paras 3.72–3.73, p. 30.
• Australian-flagged ships could operate under a permanent and unrestricted licence to carry cargo and passengers (subject to various conditions including labour law requirements) and

• foreign ships which could operate (when the Minister was satisfied that no adequate Australian ship was available) under either:
  – a single voyage permit (SVP): as the name suggests, this allowed a single voyage between specified ports carrying a specified type of cargo or passengers to be carried out or
  – a continuing voyage permit (CVP): a temporary permit to carry specified cargo for a period of time determined by the Minister between specified ports.

The framework created by the Navigation Act provided that ships issued with an unrestricted licence were required to pay Australian wages. However, in circumstances where no licensed ship was available (or was not adequate for a specific task) the Navigation Act provided that the Minister could (if satisfied that it was in the public interest) issue one of the two types of permits noted above to a non-licensed ship (generally foreign owned and crewed). The Navigation Act provided that ships operating under either type of permit were not engaged in coastal trading, and hence not required to pay Australian wages to the crew. As a result, the Navigation Act (and labour laws in force at that time) had the combined effect of facilitating a significant, but not dominant, role for foreign flagged ships in Australia’s coastal shipping market, due (in part) to lower wage costs (crew wage cost and its impact on competitiveness is a key issue discussed elsewhere in this digest), whilst the restrictions on foreign vessels provided a degree of protection to the Australian shipping industry.

The Fair Work Act 2009

The commencement of the FWA ended the different wage treatment between foreign seafarers and Australian seafarers engaged in coastal trading. Under the FWA and the Fair Work Regulations 2009, all vessels engaged in coastal trading in Australia were required to pay Australian award rate wages to their crew. However, subsequent amendments to the FWA Regulations partially wound back that change.

Current regime

The Act introduced the current regime. It replaced the relatively simple system of licences and permits available under the Navigation Act with a new three-tier licensing regime that required coastal trading vessels to hold either:

• general licence

• temporary licence or

• an emergency licence.

These are discussed below.

General licences

Currently, a general licence is available to Australian flagged vessels that are registered on the Australian General Shipping Register (AGSR). Certain foreign registered vessels that intend to transition onto the AGSR

85. Navigation Act 1912 as amended, taking into account amendments up to Act No. 144 of 2008, subsection 286(3): ‘A permit issued under this section may be for a single voyage only, or may be a continuing permit’.
86. Navigation Act 1912, subsection 288(3) and section 289.
87. Ibid., section 286.
88. Ibid., subsection 286(2): ‘The carriage, by the ship named in a permit issued under this section, of passengers or cargo to or from any port, or between any ports, specified in the permit shall not be deemed engaging in the coasting trade.’ (emphasis added); subsection 289(1): ‘Every seaman employed on a ship engaged in any part of the coasting trade shall... be paid, for the period during which the ship is so engaged, wages at the current rates ruling in Australia...’ (emphasis added).
89. See: Fair Work Act 2009, subsections 33(1) and 33(3); Fair Work Regulations 2009 (as amended, taking into account amendments up to SLI 2009 No. 164); Regulation 1.15D (Regulation 1.15E commenced on 1 January 2010). As noted in the Explanatory Statement for the Fair Work Legislation Amendment Regulations 2009 (No. 2) the effect of regulation 1.15E was to extend the application of the FWA to all ‘vessels, whether or not crew members and their employers are Australian’; Explanatory Statement, Fair Work Legislation Amendment Regulations 2009 (No. 2), p. 7, accessed 27 August 2015.
90. Fair Work Regulations 2009 (as amended by the Fair Work Legislation Amendment Regulations 2009 (No. 2)), regulations 1.15D and 1.15E.
91. The reforms also created a transitional general licence (which was only applicable to foreign ships registered under the previous system and featured a statutorily-imposed expiration date), but this is not examined in this digest.
92. Coastal Trading (Revitalising Australian Shipping) Act 2012, section 13
are eligible for a transitional general licence, which affords the vessel the same rights as a general licence. A general licence provides unrestricted access to coastal trading for a period of up to five years.  

**Temporary licences**

Currently, temporary licences are available to foreign-flagged vessels as well as those on the Australian International Shipping Register (AISR). Vessels with a temporary licence are able to engage in coastal trading, subject to time, cargo, passenger or other voyage conditions for up to 12 months. Vessels with a temporary licence can use foreign crew, but must comply with certain Australian employment conditions (for example, paying crew wages at the rates specified in Part B of the Award). However, obtaining a temporary licence requires nominating specific information (such as loading dates, cargo types, volumes, and ports of loading and unloading) at the time an application for a temporary licence is made. Further, as part of this process a temporary licence applicant must participate in the ‘notice in response process’ (discussed below under the heading ‘The notice in response process’). This involves the publication of the information mentioned above on the Department’s website, to allow general licence holders the opportunity to nominate to carry the cargo instead (in line with the requirements of the shipper). The Act imposes an obligation on temporary licence applicants to negotiate with any general licence holder who might nominate to carry some or all of the cargo published on the Department’s website, to determine who carries what. Where a temporary licence holder and general licence holder do not reach an agreement, the Minister determines whether a temporary licence is to be granted, its scope and any other conditions.  

**Emergency licence**

An emergency licence allows a vessel to engage in coastal trading for no more than 30 days. It can be issued to vessels on the AGSR, AISR and foreign vessels. Emergency licences are intended to respond to national emergencies such as cyclones, earthquakes and bushfires. Vessels with an emergency licence:  

- can hire foreign crew, but must comply with certain Australian employment conditions and  
- are subject to mandatory reporting requirements before and at the end of any voyage undertaken during the licence period.  

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95. Ibid., subsection 16(1).  
96. Ibid., paragraph 40(a) and subsection 28(1).  
97. Ibid., paragraph 35(1)(a).  
98. [Fair Work Regulations 2009](https://www.fairwork.gov.au/), Regulation 1.15E(1): ‘For subsection 33(3) of the Act, the Act is extended to and in relation to each of the following ships in the exclusive economic zone or the waters above the continental shelf... a temporary licensed ship’.  
102. [Fair Work Regulations 2009](https://www.fairwork.gov.au/), Regulation 1.15E(1): ‘For subsection 33(3) of the Act, the Act is extended to and in relation to each of the following ships in the exclusive economic zone or the waters above the continental shelf... an emergency licensed ship’.  
The notice in response process

Under the current Act, in order for a foreign registered vessel to obtain a temporary licence, all vessels holding a general licence have the right to be notified of any ‘relevant voyage’ and to provide a ‘notice of availability’ in relation to that voyage.\textsuperscript{108}

The ‘notice in response’ process involves both the temporary licence applicant and interested general licence holders who are interested in carrying the cargo entering into negotiations. Where the mandated negotiations fail, all parties must provide detailed submissions that are considered by the Minister, who then determines whether to grant a temporary licence to the relevant applicant. The ‘notice in response’ process, the factors (and their weighting) that the Minister considered when making a decision to grant a temporary licence were central to the dispute in the CSL Case. The current system has been criticised for being inefficient and stifling competition in Australian coastal shipping.\textsuperscript{109}

Summary of the previous, current and proposed coastal shipping regimes

The table below provides a generalised summary of the coastal shipping regimes under the \textit{Navigation Act}, the Act and that proposed by the Bill.

\begin{table}[h!]
\centering
\begin{tabular}{|c|c|c|}
\hline
Regime & Previous & Current & Proposed \\
\hline
\textit{Navigation Act} & & & \\
\hline
\textit{Act} & & & \\
\hline
Bill & & & \\
\hline
\end{tabular}
\end{table}

\textsuperscript{108} Ibid., sections 30 and 31.

### Table 2: Summary of Australian coastal shipping regimes

<table>
<thead>
<tr>
<th>Licence or permit</th>
<th>Activities allowed</th>
<th>Crew /wage conditions</th>
<th>Flag</th>
<th>Owner or operator</th>
</tr>
</thead>
<tbody>
<tr>
<td>Permanent and unrestricted licence</td>
<td>Unrestricted ability to carry coastal cargoes and passengers</td>
<td>Australian(^\text{110})</td>
<td>Australian</td>
<td>Australia</td>
</tr>
<tr>
<td>Single voyage permit</td>
<td>A single voyage to carry pre-determined cargo or passengers</td>
<td>Foreign(^\text{111})</td>
<td>Foreign</td>
<td>Foreign</td>
</tr>
<tr>
<td>Continuing voyage permit</td>
<td>Carrying specified cargo for a period of up to three months between specified ports</td>
<td>Foreign(^\text{112})</td>
<td>Foreign</td>
<td>Foreign</td>
</tr>
</tbody>
</table>

### Current regime

<table>
<thead>
<tr>
<th>Licence or permit</th>
<th>Activities allowed</th>
<th>Crew /wage conditions</th>
<th>Flag</th>
<th>Owner or operator</th>
</tr>
</thead>
<tbody>
<tr>
<td>General licence</td>
<td>Unrestricted ability to carry coastal cargoes and passengers</td>
<td>Australian (Part A of the Award)(^\text{113})</td>
<td>Australian</td>
<td>Australian</td>
</tr>
<tr>
<td>Temporary licence</td>
<td>Time, trade and/or voyage limited</td>
<td>Australian (Part B of the Award)(^\text{114})</td>
<td>Australian (AISR registered) or Foreign (all other cases)</td>
<td>Australian (AISR registered) or Foreign (all other cases)</td>
</tr>
</tbody>
</table>

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111. Ibid., subsections 286(2) and 289(1).

112. Ibid.

113. *Coastal Trading (Revitalising Australian Shipping Act)* 2012, paragraph 13(2)(b); *Fair Work Regulations 2009*, regulation 1.15C, paragraphs 1.15D(b) and 1.15E(b); *Seagoing Industry Award 2010* (the Award), Part A: ‘The following provisions... apply to all vessels except those which have been granted a temporary licence under the Coastal Trading (Revitalising Australian Shipping) Act 2012 (Cth)’ (emphasis added).

114. Subsection 28(2) of the *Coastal Trading (Revitalising Australian Shipping Act)* 2012 provides that an application for a temporary licence must (amongst other things) specify ‘the number of voyages, which must be 5 or more, to be authorised by the licence’ (emphasis added). The combined effect of regulations 1.15B (definition of temporary licenced ship), 1.15D (modification of application of the *Fair Work Act 2009*) of the *Fair Work Regulations 2009* and Part B of the Award mean that, in the normal course of events, a ship issued with a temporary licence must pay the Australian wages specified in Part B of the Award. This is because to be issued with a temporary licence it must nominate at least five voyages, and the requirement to pay Australian wages is triggered once a third voyage is commenced within a 12 month period. Whilst it is theoretically possible that a ship could apply for a temporary licence and only undertake two voyages in a 12 month period (and hence not be required to pay Australian wages), this appears unlikely to occur on a regular basis.
### Proposed regime

<table>
<thead>
<tr>
<th>Licence or permit</th>
<th>Activities allowed</th>
<th>Crew /wage conditions</th>
<th>Flag</th>
<th>Owner or operator</th>
</tr>
</thead>
</table>
| Coastal shipping permit   | Unrestricted ability to carry coastal cargoes and passengers. | AGSR vessels: Australian (Part A of the Award)\(^{115}\) AISR vessels whilst operating in Australian waters: Australian (Part A of the Award) \textbf{and} minimum Australian crew requirements\(^{117}\) Foreign vessels if engaged in coastal shipping for: \begin{itemize} 
- less than 183 days: foreign wages\(^{118}\)
- more than 183 days: Australian (Part B of the Award) \textbf{and} minimum Australian crew requirements\(^{119}\)  
\end{itemize} | Australian or Foreign | Australian or Foreign |

Source: As per footnotes in the table above.

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\(^{115}\) As per sources cited above at fn 113.


\(^{117}\) \textit{Explanatory Memorandum}, \textit{Shipping Legislation Amendment Bill 2015}, p. 3.

\(^{118}\) Proposed subsections 22(2)–(4).

\(^{119}\) Proposed subsections 22(2)–(4); proposed section 38. See also: \textit{Explanatory Memorandum}, \textit{Shipping Legislation Amendment Bill 2015}, pp. 16–17 and 23.
The arguments for opening up coastal trading to foreign flagged vessels
As the table above demonstrates, neither the Act nor the previous system under the Navigation Act entirely excluded foreign-flagged ships from coastal shipping in Australian waters. Instead, the Act and previous system under the Navigation Act favoured Australian ships by providing them with a comparatively greater level of operational and scheduling flexibility compared to foreign ships. However, the changes made by the Act appear to have had a further effect of squeezing foreign-flagged ships out of the market by increasing the regulatory burden they face, at least compared to the previous regime under the Navigation Act.

It has been argued that the changes made by the Act have caused transport costs to rise (although this is disputed120), resulting in bulk commodities being sourced from cheaper overseas markets and negatively impacting Australian commodity producers.121 As a result, the Bill emphasises the needs of the Australian economy as a whole over the interest of Australian shippers by seeking to reduce the cost of coastal shipping by opening the coastal shipping industry to increased foreign competition.122

Provisions that will allow foreign flagged vessels to engage in coastal trading
As proposed section 12A (at item 38 of Schedule 1 to the Bill) prohibits vessels from engaging in coastal shipping without a coastal shipping permit, any vessel – Australian or foreign – must obtain a permit prior to engaging in coastal trading. From a practical perspective, the proposed changes retain the current position that foreign vessels engaged in international shipping (i.e. moving cargo or passengers to Australia from another country) cannot choose to engage in coastal shipping between international voyages without first obtaining a permit. However, the proposed changes will introduce a greater degree of flexibility. This is because the minimum five voyages currently imposed by paragraph 28(2)(a)—which requires a significant amount of pre-planning—is scrapped. Instead, under proposed section 16 (at item 30 of Schedule 1 to the Bill) once approved, a permit remains in force for 12 months, unless it is cancelled earlier. The inclusion of a fixed 12-month permit period has implications for foreign vessels, as discussed below. Clearly however, the introduction of a fixed permit period without any minimum voyage requirements simplifies the process of engaging in coastal shipping between international voyages and therefore introduces a degree of flexibility lacking from the current regime. This point was made during the Transport Committee Inquiry into the Bill:

The overall purpose of the policy is to create a more efficient and cost-effective industry at the same time as ensuring that we have a growth in onshore jobs and offshore jobs in the maritime industry. The intention of the policy for foreign flagged ships is to allow and encourage, in fact, foreign flagged ships to duck in and out of Australia to do some of these routes that Australian ships are not doing, to come in and do that. So when the previous Labor government made its changes, it did make it more cumbersome for foreign ships to duck in and out and do some trading on the Australian coast, for its various policy reasons.123 (emphasis added)

Who can apply for a permit or apply to transfer a permit?
Proposed Part 4, Division 1 of the Act (at item 30 of Schedule 1 to the Bill) deals with applying for, and granting coastal shipping permits (permits), whilst proposed Division 3 of Part 4, deals with applying to transfer permits. The provisions dealing with applying for and transferring a permit are very similar. To aid the reader only the provisions dealing with applying for a permit are examined below, with the equivalent provisions relating to transfer of permits noted in the footnotes (however any substantive differences are examined in the main text).

120. See: Maritime Industry Australia Ltd, Submission to Senate Rural and Regional Affairs and Transport Legislation Committee, Inquiry into the Shipping Legislation Amendment Bill 2015 [Provisions], Senate, Canberra, 21 August 2015, p. 10, accessed 12 October 2015: ‘The departure of Australian ships is linked to closures or changed nature of operations of shore based operations such as Alcoa’s Point Henry plant, Bluescope’s Westport operations, Caltex’s Kurnell refinery, and so on. It is overly simplistic and misleading to assert that regulation of access to coastal freight drives these changes (increased costs) in business structure when the shipping task is an ancillary element. Furthermore, the Coastal Trading Act has not caused a freight rate hike in the container sector, nor has it driven operators out of markets.’


122. W Truss, ‘Second reading speech: Shipping Legislation Amendment Bill 2015’, op. cit.: ‘The extra cost for Australian businesses using an Australian vessel is unsustainable at some $5 million a year more than using a foreign vessel. More affordable freight means more freight, more efficient services and more competition, all of which will make Australian products more competitive internationally and domestically, helping local industries... and providing the opportunity for economic growth and expansion.’

123. Dr A Morehead (Group Manager, Workplace Relations Policy Group, Department of Employment), Evidence to Senate Rural and Regional Affairs and Transport Legislation Committee, Inquiry into the Shipping Legislation Amendment Bill 2015 [Provisions], Senate, 7 September 2015, p. 54, accessed 5 November 2015.
Proposed subsection 13(1) provides that a person who has a legal or beneficial interest in a vessel (other than a mortgage) or who has day-to-day responsibility for the management a vessel may apply for a coastal shipping permit for a vessel, provided it is registered:

- on the AGSR
- on the AISR, or
- under the law of a foreign country.\(^{124}\)

The effect of proposed subsection 13(1) is to open up coastal shipping not only to Australian vessels, but also to foreign vessels to a much greater extent than previously possible under either the Act or the Navigation Act. In addition, amendments to the Shipping Registration Act 1981 (the Registration Act) will allow ships on the AISR to apply for coastal shipping permits and engage in coastal shipping to a much greater degree than possible under the Act. In turn, this would increase the uses to which vessels on the AISR can be put, and thus will enhance the flexibility of the Australian mercantile shipping fleet as a whole.\(^{125}\) However, it is worth noting that currently no ships are on the AISR.\(^{126}\)

The Bill does contain one unresolved issue in relation to who can apply for a coastal shipping permit. Currently the Act provides that ‘the owner, charterer, master or agent of the vessel’,\(^{127}\) a person of a kind prescribed by the regulations or ‘a shipper’ can apply for a general, temporary or emergency licence.\(^{128}\) In contrast, proposed subsection 13(1) provides that only a person with the requisite type of legal or beneficial interest or who ‘has day-to-day responsibility’ for the management a vessel may apply for a coastal shipping permit, and hence would appear to exclude charterers and their brokers (i.e. agents). As noted by one commentator:

> Charterers and their brokers appear not to be eligible to apply for a permit under the proposed system, although this remains to be clarified... there is no clear guidance in the Bill whether applications would be accepted when made by a local representative on behalf of a foreign vessel operator or manager. Obtaining necessary local law approvals for a voyage to proceed is often the charterer’s task, being the party with the relevant local knowledge.\(^ {129}\)

(emphasis added).

Whilst proposed subsection 13(1) as drafted appears to introduce some uncertainty in this regard, it would appear that proposed section 112A (at item 30 of Schedule 1 to the Bill) would allow the Minister to issue a legislative instrument to provide that charterers and brokers are, for the purpose of proposed subparagraph 13(1)(b)(ii), considered to have ‘day to day responsibility for the management of the vessel’,\(^ {130}\) at least in relation to the coastal permit application process.\(^ {131}\) However, until such time as a relevant legislative instrument clarifying the position in relation to charterers and brokers comes into effect, the uncertainty around who can apply for a coastal trading permit is likely to remain.

Proposed section 14 provides that applications for coastal shipping permits can be varied or withdrawn at any time before the Minister determines the application.\(^ {131}\)

Application requirements and obligation for foreign vessels to lodge a term declaration

Proposed subsection 13(2) imposes a number of requirements in relation to the application including that it must be in writing, must be accompanied by a copy of the vessel’s registration certificate, and other evidence of the relevant legal or beneficial interest or evidence that the applicant has day-to-day responsibility for the

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124. **Proposed subsection 13(1).** In relation to applications to transfer a permit see: **proposed subsection 25(1).**

125. See: Schedule 2, **proposed section 15F** of the Registration Act.

126. Senate Rural and Regional Affairs and Transport Legislation Committee, **Shipping Legislation Amendment Bill 2015 [Provisions]**, op. cit., para 2.15, p. 5, accessed 12 October 2015: ‘Despite what appear to be generous tax incentives, there are currently no ships registered on the AISR.’

127. **Coastal Trading (Revitalising Australian Shipping) Act 2012**, subparagraph 13(1)(b)(ii) (deals with general licence applications); paragraphs 28(1)(a) (deals with temporary licence applications) and 64(1)(a) (deals with emergency licence applications).

128. Ibid., subparagraph 13(1)(b)(ii); paragraphs, 28(1)(b) (deals with temporary licence applications) and 64(1)(b) (deals with emergency licence applications).


130. Ibid.

131. In relation to applications to transfer a permit see: **proposed section 26.**
management of the vessel. In relation to applications to transfer a permit, the application must also include certain types of information that proposed subsection 36(1) requires must be included in coastal shipping reports as well as information regarding whether the vessel was docked for service during the period the applicant held the permit that is sought to be transferred.

Importantly however, in relation to an application for a permit, if the vessel is a foreign vessel (that is, registered under the laws of a foreign country) the application must include a ‘term declaration’. A term declaration is defined in proposed subsection 13(3) as:

   .... a declaration stating whether or not it is the intention of the applicant for the permit that the vessel to which the permit relates will be used to engage in coastal shipping on more than 183 days during the normal period of the permit. (emphasis added)

The requirement to declare whether the vessel will engage in coastal trading for more than 183 days is a critical feature not only of the permit application process for foreign flagged vessels, but for the coastal trading permit system as a whole, for the reasons discussed below.

183 day rule and foreign vessels

The Bill will allow foreign vessels to engage in coastal shipping year-round. However, the 183 day rule will offer a limited form of protection to both Australian shipping from foreign competition, although arguably at the expense of economic efficiency. That limited protection is in the form of a degree of competitive neutrality, at least in regards to wage costs. This is because under the regime proposed by the Bill, foreign vessels that either intend to (or actually engage in) coastal shipping for more than 183 days will be subject to Australian wage and crewing requirements (discussed below under the headings ‘The parity condition’ and ‘Minimum Australian crewing requirements’). In contrast, foreign vessels that engage in coastal shipping for less than 183 days are not required to pay Australian wages or have a minimum number of Australian crew on board.

As a result, foreign ships that engage in year-round coastal trading (or at least for more than 183 days) will have their cost advantage over Australian shippers (lower wages costs) partly ameliorated. However, as foreign ships that engage in coastal trading for less than 183 days are not required to pay Australian wages, it is possible that foreign shipping companies will simply ‘cycle’ vessels of a similar size and purpose that they own, lease or charter for periods of less than 183 days each, thus ensuring year-round coverage for their clients without incurring Australian wage costs. This is because the permits attach to individual vessels, not the entities that own, lease or control them. In such circumstances, foreign vessels would appear to have a substantial competitive advantage over Australian shippers, at least in relation to wage costs.

Abolition of the notice and response system

A key feature of the Bill is the abolition of the ‘notice and response’ system. As noted earlier, this currently mandates that when a foreign registered vessel applies for a temporary licence all appropriately licenced Australian vessels have the right to be notified of the proposed voyages of that foreign vessel and to effectively negotiate or compete for that cargo, with the Minister determining whether or not to grant the licence where negotiations are unsuccessful. The ‘notice in response’ system was described by the Transport Committee as setting up ‘a form of mediated competition’ between Australian and foreign vessels.

The Bill will abolish the notice and response system, which the Government argues is a deregulatory measure that will lead to ‘savings in administration costs’ to both industry and government.

References

132. See: proposed paragraph 13(2)(c).
133. Proposed subsections 13(2)–(4).
135. See: proposed section 38, subsections 13(3), 15(3)–(4), and 22(1)–(3)—discussed later in this Digest.
136. Ibid.
Factors the Minister must consider in deciding whether to grant a coastal shipping permit

Proposed section 15 deals with the factors relevant to the Minister’s decision to grant or refuse a coastal shipping permit.\(^{140}\) A decision must be made within 10 business days (in the case of permit applications) or two days (in the case of transfers) after an application is made or varied.\(^{141}\) When determining an application, proposed subsection 15(2) provides that the Minister may have regard to:

- whether the applicant previously held a coastal shipping permit or licence under the Act that was cancelled
- whether the applicant had at any time been issued with an infringement notice under the Act (or relating to a civil penalty provision)
- whether a court had ordered the applicant to pay a pecuniary penalty (or for contravening a civil penalty provision) under the Act
- whether the Minister is satisfied that the applicant had previously breached a condition of a coastal shipping permit or other licence under the Act and
- any other relevant matters.\(^{142}\)

The above indicate that a key focus in deciding whether to grant a coastal trading permit is the previous conduct of the applicant. However, as the CSL Case makes clear, the inclusion of the ‘any other relevant matters’ gives the Minister a degree of flexibility in regards to what factors they will consider when deciding coastal shipping permit applications.\(^{143}\)

In addition however, proposed subsection 15(3) provides that where a foreign vessel applies for a permit, the Minister must have regard to whether:

- a term declaration for a permit previously held stated an intention that the vessel would not be used to engage in coastal shipping for more than 183 days during the 12 month permit period and
- the vessel was then used for more than 183 days during the 12 month permit period.\(^{144}\)

In contrast to the factors that the Minister may have regard to under proposed subsection 15(2), proposed paragraph 15(3)(b) requires that the Minister must have regard to the ‘object of this Act’ when considering an application in respect of a foreign vessel from an applicant who has previously held a permit for a foreign vessel.\(^{145}\) In summary, as currently drafted:

- proposed subsection 15(2) does not directly require the Minister to consider the broader objects of the Act and related relevant commercial factors when deciding applications for permits for Australian vessels (noting however that proposed paragraph 15(2)(e) nonetheless provides the Minister the discretion to consider such issues\(^{146}\)) but

- proposed subsection 15(3) requires the Minister, when deciding applications for coastal shipping permits by applicants who have previously held a coastal shipping permit for a foreign vessel, to consider the object of fostering a competitive coastal shipping industry and maximising the use of available shipping capacity on the Australia coast, and thus arguably related commercial issues.

When applications in relation to certain foreign vessels must automatically be refused

Proposed subsection 15(4) provides that the Minister must not grant a coastal shipping permit to a foreign vessel if the applicant has not complied with the parity condition (discussed below) of a coastal shipping permit previously.\(^{147}\) Importantly this requirement attaches to the applicant, rather than the vessel. As a result, where an applicant did not comply with the parity condition of a coastal shipping permit in relation to one vessel, but

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140. In relation to applications to transfer a permit see: proposed section 27.
141. Proposed subsection 15(5). In relation to applications to transfer a permit see: proposed subsection 27(5)
142. In relation to applications to transfer a permit see: proposed subsection 27(2).
144. Proposed paragraph 15(3)(a). In relation to applications to transfer a permit see: proposed paragraph 27(3)(a).
145. In relation to applications to transfer a permit see: proposed paragraph 27(3)(b).
146. In relation to applications to transfer a permit see: proposed paragraph 27(2)(e).
147. In relation to applications to transfer a permit see: proposed subsection 27(4).
then applies for a coastal shipping permit for a different vessel (or the same vessel) the Minister must refuse the application (this is because whilst a permit is granted to the applicant, it ‘attaches’ to a single vessel).\(^{148}\)

_Circumstances in which applications must be automatically granted_

Proposed section 19 provides that where the Minister has not decided an application for a coastal shipping permit within the 10 business day period mandated by proposed subsection 15(5), the application is automatically granted.\(^{149}\) However, if the granting of the permit would result in more than one permit being in force in relation to the vessel simultaneously, it is taken to have been automatically refused.\(^{150}\) As with other permits, those automatically granted under this provision remain in force for 12 months.\(^{151}\)

_Mandated post application determination actions_

Proposed sections 17, 20, 21, and 29–31 deal with information that must be provided to applicants after a permit or transfer application is determined, and also what information must be made publically available.

_Information to be included in a permit_

If an application is granted, proposed subsection 20(1) requires the Minister (as soon as is practicable) to give the permit to the applicant.\(^ {152}\) Proposed subsection 20(2) mandates that the following information must be specified in the permit:

- the permit number
- the holder of the permit and their business name and business address
- the vessel to which the permit relates (including its name and International Maritime Organisation (IMO) number)
- the conditions to which the permit is subject under proposed section 22 (discussed below)
- any additional conditions imposed on the permit under proposed section 23 (discussed below)
- the day the permit comes into force and the period for which the permit is in force and
- any other matters prescribed by the rules.

Importantly, where a permit relates to a foreign vessel, proposed paragraph 20(2)(f) provides that the permit must also specify whether the applicant intends to use the vessel for coastal shipping on more than 183 days during the normal period of the permit (12 months), that is, the term declaration.

_Information about permits that must be published does not include term declaration details_

Proposed section 17 provides that the Minister must publish the above information, other than any conditions imposed under proposed section 22 (discussed below). It is not immediately clear why proposed section 17 does not mandate the publication of conditions imposed by proposed section 22 such as the parity condition or the term declaration. It could be argued that disclosing whether the applicant intends to use the vessel for coastal shipping on more than 183 days during the permit period could assist in non-government parties monitoring compliance with any parity condition imposed on the vessel (discussed below). However, it may be possible to ascertain from the information published whether or not a foreign vessel intends to engage in coastal shipping on more than 183 days.

In relation to applications to transfer a permit, proposed section 31 provides that where an application is granted, the Minister must update the information about the permit published on the Department’s website.

_Information to be included when an application is refused_

Proposed section 21 provides that where an application is refused, the Minister must inform the applicant in writing of the decision and the reasons for it.\(^ {153}\) The Bill does not impose any requirement to publish information about refused applications.

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148. See proposed section 18, which provides that only one coastal shipping permit can be in force in relation to a vessel.
149. Proposed paragraph 19(1)(a). In relation to applications to transfer a permit see: proposed section 28.
150. Proposed paragraph 19(1)(b).
151. Proposed subsection 19(2). It is worth noting that transferred applications only remain in force for the balance of the permit period.
152. In relation to applications to transfer a permit see: proposed section 29.
Review of permit application and transfer decisions

Proposed section 107 (at item 31 of Schedule 1 to the Bill) provides that any decision by the Minister to refuse to grant a transfer or permit can be reviewed by the AAT.

Imposing conditions on permits

Proposed sections 22 and 23 deal with various mandatory conditions that all permit holders must comply with, as well as the power of the Minister to impose additional conditions at his or her discretion (discussed below).

Mandatory conditions

Proposed subsection 22(1) imposes a number of conditions on all coastal shipping permit holders including:

- the vessel must continue to be registered on either the AGSR, AISR or under the laws of a foreign country
- a copy of the permit must ‘be displayed on the vessel in a conspicuous place accessible to all persons on board at all times when the vessel is being used to engage in coastal shipping’
- compliance with the reporting requirements imposed by proposed sections 35 and 36 (for example, number of passengers carried, kind and volume of cargo carried and so forth) and
- any other conditions prescribed by the rules.

In addition to the above conditions, proposed subsection 22(2) provides that where the permit relates to a foreign vessel and:

- the term declaration stated an intention that the vessel engage in coastal shipping on more than 183 days during the permit period and
- it subsequently engages in coastal trading for more than 183 days during the permit period then
- the vessel will be subject to the parity condition imposed by proposed subsection 22(3), discussed below.

In addition to the imposition of the parity condition on foreign vessels that engage in coastal shipping for more than 183 days in the permit period, proposed paragraph 22(1)(d) provides that such foreign vessels must also comply with the mandatory minimum Australian crewing requirements imposed by proposed section 38 (discussed below).

Optional conditions

Proposed section 23 provides that the Minister may impose additional conditions on a coastal shipping permit, provided that any such conditions are not inconsistent with those imposed by proposed section 22. Whilst the Bill’s Explanatory Memorandum notes that ‘the ability for the Minister to impose additional conditions currently exists for general and temporary licences and it will allow the Minister to impose an additional condition on an individual permit if required’, no examples of the types of conditions that may be imposed are given.154

The parity condition and when Australian wages must be paid to foreign seafarers

Proposed subsections 22(2) to 22(4) deal with the imposition of the parity condition. The parity condition is part of the ‘key protections’ for foreign seafarers on vessels engaged predominantly in coastal shipping in Australian water.155 It provides that:

- if a seafarer is an employee on board the foreign vessel after the permit period commences but
- before the use of the vessel to engage in coastal shipping exceeds 183 days and
- the seafarer was not paid the notional award amount that the seafarer would have been paid if the FWA applied to the vessel because of the operation of proposed section 41 (at item 41 of Schedule 1 to the Bill) then

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153. In relation to applications to transfer a permit see: proposed section 30.
• the holder of the permit must pay the seafarer, or must ensure that the seafarer is paid an amount (the parity amount) equal to the difference (if any) between the notional award amount and the amount that the seafarer has already been paid in respect of that employment.

In effect this means that foreign vessels that engage in coastal shipping in Australian waters for less than 183 days are not required to pay Australian wages, resulting in a cost saving through lower wage overheads. This issue is discussed below under the heading ‘Cost savings to businesses’.

However, proposed subsections 22(2) to 22(4) also have the effect of ensuring that foreign seafarers on foreign vessels that engage in coastal trading for more than 183 days are provided payment at least at the rates specified in Part B of the Award. Proposed section 22(4) provides that the parity amount must be paid within the timeframe provided in the rules. Proposed subsection 15(4) provides that the Minister must not grant a coastal shipping permit to a foreign vessel if the applicant has not complied with the parity condition (discussed below) of a coastal shipping permit previously. As a result, where a permit is breached (for example, by failing to comply with the parity condition) the Minister will be required to refuse any future permit applications from that applicant, effectively locking them out of Australia’s coastal shipping industry. Whilst the same mandatory ‘lock out’ does not apply to domestic applicants who have previously breached a permit condition, when viewed as a whole the consequences of breaching the proposed civil penalty provisions would appear likely to operate as an effective deterrent against breaches of permit conditions, especially for foreign vessels.

Cost savings to businesses

One of the key aspects of the Bill is a partial return to the system in place under the Navigation Act, that is, providing that foreign vessels are generally not required to pay Australian wages to the crew whilst engaged in coastal shipping in Australian waters (noting the impact of the proposed 183 day rule and parity condition in this regard). The Government argues that:

...the cost of Australian domestic shipping services is uncompetitive on a global scale and the movement of manufacturing inputs and completed products on the Australian coast can be more expensive than importing inputs or finished products from other countries.

Further, the Government noted that many stakeholders have argued that the ‘primary driver’ of the higher cost of coastal shipping in Australia was ‘seen to be high Australian wage costs relative to foreign vessel wage costs’, but also noted that other costs ‘related to the high average age of Australian vessels, such as higher fuel consumption and insurance premiums’ were also factors. Similarly, the Transport Committee also noted that the high cost of Australian wages (compared to those paid to foreign seafarers generally) was perceived to be a contributor to the overall cost of coastal shipping in Australia, and therefore to its competitiveness in a global marketplace. The Transport Committee stated that it ‘heard considerable criticism of increases in shipping costs’ as a result of introduction of the Act, but also noting that the Act ‘had not increased costs in the containerised freight segment of the industry’.

The Transport Committee noted that the precise savings to businesses flowing from a reduction in wages paid to foreign seafarers engaged in coastal shipping in Australian water for less than 183 days ‘was the subject of considerable discussion’ and criticism. However, the Transport Committee noted that, based on estimated foreign seafarer wages, Australian crews effectively imposed ‘a 15–20 percent disadvantage against international ships in terms of operating costs’. It noted that the submissions to its inquiry into the Bill that supported the proposed changes argued that the Bill would reduce the cost of shipping, and ultimately

156. In relation to applications to transfer a permit see: proposed subsection 27(4).
159. Ibid., p. 80.
161. Ibid., p. 16.
163. Ibid., para 3.39, p. 22.
concluded that the measures in the Bill that would reduce the wage costs associated with coastal shipping in Australia, and therefore its overall cost, would ‘benefit the economy generally’. 164

**Consequences for breaching permit conditions**

**Proposed section 24** creates a civil penalty for breaching a condition of a permit. Specifically, it provides that where a person breaches a permit condition (either through an act or an omission) imposed by **proposed sections 22 or 23**, they are liable for a civil penalty:

- in the case of an individual: maximum of 50 penalty units ($9,000) or
- in the case of a body corporate: maximum of 250 penalty units ($45,000). 165

The framework for enforcing civil penalties via infringement notices and court proceedings, along with which persons have standing to do so, are examined under the heading ‘**Enforcement of penalties**’ below.

**Consequences for failing to pay Australian wages when required**

As discussed above the requirement to pay Australian wages to foreign seafarers on vessels engaged in coastal shipping in Australian waters for more than 183 days is imposed via the parity condition. 166 As a result, **proposed section 24** applies to any failure to pay Australian wages when required (that is, to pay the parity amount), with breaches attracting the fines discussed above.

**Standing to seek payment of unpaid Australian wages**

**Proposed section 93** (at item 39 of Schedule 1 to the Bill) deals with court actions to recover unpaid wages in circumstances where the parity condition was breached by a permit holder (that is, the parity amount had not been fully paid). **Proposed subsection 93(2)** provides that only the seafarer or a ‘person prescribed by the rules’ (with the written consent of the seafarer) may apply for a court order requiring payment of the amount not paid. 167

Neither the Bill’s Explanatory Memorandum nor the Second Reading Speech provide any detail as to which persons, other than the seafarer, are likely to be ‘prescribed by the rules’ and thus have standing to commence an action for unpaid wages (provided they have the seafarers consent to do so). Whilst it would appear likely that the Secretary of the Department (or their delegates) would be prescribed, another possibility may be officers of the Fair Work Ombudsman or officers of a relevant registered organisation (that is, a trade union) will be prescribed.

**Minimum Australian crewing requirements**

**Proposed section 38** provides that foreign vessels with a coastal shipping permit are required to adhere to minimum Australian crew requirements where:

- the term declaration lodged with the permit application stated an intention that the vessel would be used to engage in coastal shipping for more than 183 days during the permit period or
- during the period the permit is in force, the vessel engaged in coastal shipping for more than 183 days. 168

**Proposed subsection 38(2)** provides that the Australian crew requirements are that for the entire period in which the permit is in force that either:

- the master or the chief mate and
- the chief engineer or the first engineer

must be an Australian citizen, Australian resident or ‘a person who holds a visa prescribed by the rules’ that allows them to work in Australia as a master, chief mate, chief engineer or first engineer. Clearly, this means that persons who are not Australian citizens or residents can be employed in the roles listed above on a vessel. As a

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165. Section 4AA of the *Crimes Act 1914* (Cth) provides that currently a penalty unit is $180.
166. See **proposed subsection 22(2)** and (3).
167. **Proposed subsection 93(3).**
168. **Proposed subsection 38(1).**
result, the proposed ‘Australian’ crew requirements in proposed section 38 will potentially allow vessels to be crewed entirely by persons who are not Australian citizens or residents.

The Transport Committee noted that such persons ‘will be subject to domestic workplace relations arrangements’.\(^{169}\) The proposed minimum Australian crewing requirements have attracted both support and criticism. For example, the Business Council of Australia stated that, in its view, the Bill as a whole would ‘lift competition and significantly reduce costs on business’ and that the Australian crewing requirement was ‘designed to strengthen skills development and employment opportunities’.\(^{170}\)

In contrast, the National Maritime Training Partnership was critical of the proposed minimum Australian crew requirements, stating that they are not ‘robust enough in policy terms to ensure the right quality and quantity of maritime skills are retained by Australian nationals’ and also expressed the view that ‘if experience on board ships is denied to Australians, then these critical functions too will inevitably be assigned to the ‘international marketplace’’.\(^{171}\)

Another issue raised by proposed paragraph 38(2)(e) is the lack of clarity around precisely what types of visas allow a person to ‘work in Australia’ in the specified positions are appropriate, and will be specified in the rules. For example, Maritime Industry Australia Ltd stated:

> Arguably, a Maritime Crew Visa – which is supposed to be a transit visa – provides precisely that right. Quite clearly any type of temporary work visa holder (s457, 458) is eligible. The government should clearly state whether these visas are considered to be appropriate. Regardless, the proposed amendment would do nothing to secure the critical skills base as any temporary work visa could be used.\(^{172}\)

Likewise the Maritime Union of Australia stated that the Bill would ‘allow foreign seafarers to enter and work in Australia on an indefinite basis without requiring a work visa, through multiple port visits’.\(^{173}\) However, it is not immediately clear if the above views are correct. A Maritime Crew Visa (subclass 988) (MCV) is a temporary three-year visa designed to facilitate the temporary entry of foreign seafarers to work in line with ‘the usual operational requirements of their ship’.\(^{174}\) Hence whether it can be said to allow them to ‘work in Australia’ (which arguably implies being subject to Australian employment laws such as the FWA) is open to debate. Ultimately however, until such time as rules are made specifying the types of visa that allow a person to ‘work in Australia’ in the relevant positions specified by proposed paragraph 38(2)(e) is produced, the issue will remain unresolved.

**Consequences for failing to meet minimum Australian crew requirements**

**Proposed subsection 38(3)** creates a civil penalty for failing to meet the minimum Australian crew requirements. Where the Australian crew requirements are not met, the permit holder is liable for a civil penalty:

- in the case of an individual: maximum 50 penalty units ($9,000) or
- in the case of a body corporate: maximum 250 penalty units ($45,000).\(^{175}\)

The framework for enforcing civil penalties via infringement notices and court proceedings, along with which persons have standing to do so, are examined under the heading ‘Enforcement of penalties’ below.

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174. The definition of ‘non-military ship’ contained in the Migration Regulations 1994, regulation 1.03, encompasses foreign vessels engaged in commercial trade or the carriage of passengers for reward. See also: Department of Immigration and Border Protection (DIBP), ‘Maritime Crew visa (subclass 988)’, DIBP website, accessed 3 November 2015: ‘The Maritime Crew visa (subclass 988) is a temporary visa for crew who are employed on non-military ships on international voyages to Australia... You cannot use this visa to come to Australia and stay here. You cannot work in Australia except for work that meets the normal operational requirements of your ship.’ (emphasis added).
175. Section 4AA of the Crimes Act 1914 (Cth) provides that currently a penalty unit is $180.
**Reporting Requirements**

Currently the Act requires both pre-voyage notification (at least two days before the actual loading date) and post-voyage reporting (within 10 days after the end of a voyage). The Bill will simplify the reporting requirements for permit holders by eliminating the pre-voyage reporting obligation entirely, and replacing the post-voyage reporting requirements with a requirement to report on voyages undertaken at six-monthly intervals (or more frequently if directed by the Minister).

**Contents of the reports**

**Proposed section 36** specifies the information that must be included in reports produced by permit holders. It provides that all of the following information must be included in relation to each voyage undertaken during the reporting period by the vessel to which the report relates:

**Table 3: mandatory content of reports**

<table>
<thead>
<tr>
<th>What was carried</th>
<th>Specified information</th>
</tr>
</thead>
<tbody>
<tr>
<td>Passengers</td>
<td>• the number of passengers carried</td>
</tr>
<tr>
<td></td>
<td>• the port at which the passengers embarked</td>
</tr>
<tr>
<td></td>
<td>• the date that embarkation began</td>
</tr>
<tr>
<td></td>
<td>• the port at which the passengers disembarked and</td>
</tr>
<tr>
<td></td>
<td>• the date that disembarkation finished.</td>
</tr>
<tr>
<td>Cargo</td>
<td>• the kinds and volumes of cargo carried</td>
</tr>
<tr>
<td></td>
<td>• the port at which the cargo was taken on board</td>
</tr>
<tr>
<td></td>
<td>• the date that loading began</td>
</tr>
<tr>
<td></td>
<td>• the port at which the cargo was unloaded and</td>
</tr>
<tr>
<td></td>
<td>• the date that unloading finished.</td>
</tr>
<tr>
<td>Liquid fuel product</td>
<td>• each type, and the volume of each type, of liquid fuel product carried</td>
</tr>
<tr>
<td></td>
<td>• the port or offshore facility at which the liquid fuel product was taken on board</td>
</tr>
<tr>
<td></td>
<td>• the date that loading began</td>
</tr>
<tr>
<td></td>
<td>• the port at which the liquid fuel product was unloaded and</td>
</tr>
<tr>
<td></td>
<td>• the date that unloading finished.</td>
</tr>
</tbody>
</table>

Source: proposed section 36 of the Act.

In addition to the above, **proposed section 36** also provides that the following information must be included:

- any other information prescribed by the rules
- the total number of days during the reporting period on which the vessel was used to engage in coastal shipping and
- whether the vessel was docked for service during the reporting period for the permit, and, if so, the days that the vessel was docked for service.

**Proposed subsection 36(3)** provides that the reports must be given to the Minister within 15 business days after the end of the reporting period concerned, unless the report has been produced in response to a request from the Minister for an interim report under **proposed subsection 35(3)**, in which case the report must be lodged within 10 business days of the request being given.

176. *Coastal Trading (Revitalising Australian Shipping) Act 2012*, see sections 61 and 62 (in relation to temporary licences) and 74A and 75 (in relation to emergency licences).
177. **Proposed section 35**.
178. **Proposed paragraph 36(1)(d)**
179. **Proposed subsection 36(2)**.
Consequences for failing to lodge reports

Proposed subsection 36(4) creates a civil penalty for failing to lodge reports within the time required. Where a report is not lodged on time (or not at all), the permit holder is liable for a civil penalty:

- in the case of an individual: maximum 50 penalty units ($9,000)
- in the case of a body corporate: maximum 250 penalty units ($45,000).\(^{180}\)

The framework for enforcing civil penalties via infringement notices and court proceedings, along with which persons have standing to do so, are examined under the heading 'Enforcement of penalties' below.

Publication of the reports

Proposed section 37 provides that the Minister must cause a summary of the information contained in the reports that are given to the Minister during each financial year to be published on the Department’s website.

Enforcement of penalties

Proposed section 83 of the Act (at item 39 of Schedule 1 to the Bill) provides that the civil penalty provisions contained in the Bill will be enforceable under the Regulatory Powers (Standard Provisions) Act 2014 (Regulatory Powers Act).\(^{181}\) Proposed sections 86 and 91 provide that the enforcement framework extends to every external Territory. Background information on the framework created by the Regulatory Powers Act can be found in the Bills digest for that Act.\(^{182}\)

Infringement notice regime

For the purposes of the Regulatory Powers Act, the Bill provides that in relation to the civil penalty provisions the Secretary is the authorised applicant and the Federal Court and Federal Circuit Court are the relevant courts.\(^{183}\)

Proposed sections 87 to 92 create an infringement notice regime. A description of infringement notices is set out in the Explanatory Memorandum to the Regulatory Powers Act:

> An infringement notice is a notice of a pecuniary penalty imposed on a person by statute setting out particulars of an alleged contravention of a law … Infringement notices are administrative methods for dealing with certain breaches of the law and are typically used for low-level offences and where a high volume of uncontested contraventions is likely.\(^{184}\)

Section 103 of the Regulatory Powers Act provides for when an infringement notice may be given. In particular, subsection 103(1) provides that where an infringement officer has reasonable grounds to believe that a person has contravened (in the case of the Bill) a civil penalty provision subject to an infringement notice under Part 5 of Regulatory Powers Act (which proposed section 87 provides applies to the civil penalty provisions in the Bill), the infringement officer can issue an infringement notice.

Section 104 of the Regulatory Powers Act sets out a number of details that must be included in an infringement notice, including the person to whom the notice is directed, the time and method of payment and the consequences of non-compliance with the notice. Proposed section 92 provides that the penalty payable in respect of an infringement notice ‘must be equal to one-fifth of the maximum penalty that a court could impose’ for the contravention.

Cancellation of permits

As noted above, breaching a condition of a coastal shipping permit (including the reporting and Australian crew requirements) attracts a civil penalty.\(^{185}\) Proposed section 32 provides that the Minister may issue a ‘show cause notice’ if the Minister reasonably believes that a condition of a permit has been breached.
Proposed subsection 32(2) provides that a show cause notice must state the grounds on which it is given and invite the permit holder to give (within 10 business days from when the notice is issued) a written statement showing cause why the permit should not be cancelled. Proposed section 33 deals with the cancellation of permits. Briefly, after considering any written statement in response to a show cause notice, the Minister may cancel a permit if they are satisfied that a condition of the permit has been breached. If a decision is made to cancel a permit, proposed subsection 33(2) provides that the Minister must inform the permit holder of the decision in writing, the reasons for it and the effect of proposed subsection 33(3). Proposed subsection 33(3) provides that where a permit is cancelled and the holder does not return it to the Minister within 10 business days, the permit holder is liable for a civil penalty:

- in the case of an individual: maximum 50 penalty units ($9,000) or
- in the case of a body corporate: maximum 250 penalty units ($45,000).  

Proposed section 107 (at item 31 of Schedule 1 to the Bill) provides that any decision to cancel a permit can be reviewed by the AAT. Proposed section 40 provides that where a permit is cancelled, no compensation is payable.

Other provisions

Transitional provisions

The Bill contains a number of important transitional provisions that deal with the operation of a modified version of the existing licencing scheme during a yet-to-be-determined transition period.

Transition period

Items 44–46 of Schedule 1 of the Bill include a number of important transitional provisions. Item 44 creates a ‘transitional period’. The transitional period will commence no later than six months after the Bill receives Royal Assent and will end immediately before Part 2 of Schedule 1 of the Bill commences (no later than six months after the Bill receives Royal Assent).  

Modified continued operation of existing licences

Item 45 provides that the certain parts of the ‘old law’ related to licensing (defined as the Act and related legislation as in force immediately before the commencement of Part 1 of Schedule 1 of the Bill) will continue in operation during the transition period as if the various repeals and amendments made by the Bill had not happened, subject to the following modifications:

- all licences in force or issued during the transition period remain in force until the end of the transition period (unless cancelled) even if they are due to cease prior to the end of the transition period
- any person may apply to the Minister for a Temporary Licence (or to vary a temporary licence) during the transition period but the ‘notice and response’ process will no longer apply and
- licence holders must provide reports as required for all voyages (even after the transition period ends), thus ensuring that all reports they are obliged to lodge for voyages undertaken under a licence are provided.

The effect of the transitional arrangements noted above is to immediately remove the ‘notice and response’ system, whilst allowing for the continued operation of existing licences. This will provide a degree of business certainty to existing licence holders, whilst immediately reducing the regulatory burden imposed by the ‘notice and response’ processes on foreign vessels.

Application and modification of the Award

Proposed section 41 (at item 41 of Schedule 1 to the Bill) will ensure that Part B of the Award applies to foreign vessels with a permit, despite the Award referring to a type of licence that will be abolished. Proposed subsection 41(1) provides that Part B of the award will apply to seafarers employed on a foreign vessel where Part A of the Award does not apply to the vessel and:

186. Section 4AA of the Crimes Act 1914 (Cth) provides that currently a penalty unit is $180.
187. Proposed section 2, table item 2.
188. Explanatory Memorandum, Shipping Legislation Amendment Bill 2015, p. 31.
• the vessel is registered under the law of a foreign country
• the FWA applies to the vessel and
• a permit is in force in relation to the vessel.

This provision raises a number of issues, as noted below. However, it is worth noting that the drafting of both proposed section 41 and proposed section 61AKA of the Shipping Registration Act 1981 (at item 43 of Schedule 1 to the Bill) attracted criticism, with one submission to the Transport Committee’s Inquiry into the Bill stating that ‘we cannot discern the meaning of this provision’ and expressing concern at the confusion arising ‘as a result of regulations being used to override/amend the Award provisions’.189

**Does the Fair Work Act apply to the vessel?**

Normally an ‘Act is taken to have effect in, and in relation to, the coastal sea of Australia as if that coastal sea were part of Australia’.190 (In this context the Acts Interpretation Act 1901 defines ‘coastal sea’ as the territorial sea of Australia and the sea on the landward side of the territorial sea that is not within the limits of a state or territory).191 As a result, the normal position would be that the FWA would apply to vessels in Australia’s coastal seas. Currently the FWA applies to ‘Australian’ vessels (that is, those operated by an ‘Australian employer’ or are operated by ‘Australian employees’).192 The FWA also currently applies to most foreign vessels operating in Australia’s coastal waters, other than those transiting through Australia’s coastal water.193

In addition to having effect in relation to Australia’s coastal seas, subsection 33(1) of the FWA deals with application of that Act to vessels in Australia’s exclusive economic zone or in the water above the continental shelf.194 Importantly, this would normally not capture most foreign vessels unless the vessel:

• supplies or otherwise services a fixed platform within Australia’s exclusive economic zone or in the water above the continental shelf and operates to or from an Australian port or
• is operated or chartered by an Australian employer and uses Australia as a base.195

Subsection 33(3) allows regulations to be made to apply the FWA to activities taking place in Australia’s exclusive economic zone or in the water above the continental shelf.

In turn, the Fair Work Regulations does just that by extending the application of the FWA to ensure that seafarers who work ‘regularly in the Australian coastal trade have the benefit of Australian workplace relations laws and a legislative safety net of employment terms and conditions’.196 Put another way, the FWA currently applies to most foreign vessels engaged in activities in Australia’s coastal water, exclusive economic zone or in the water above the continental shelf, other than innocent passage or transit passage.

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190. Acts Interpretation Act 1901, subsection 158(1).
192. Section 15B of the Fair Work Act 2009 (FWA) provides that ‘A reference in an Act to Australia... is taken to include a reference to the coastal sea of Australia’ and ‘An Act is taken to have effect in, and in relation to, the coastal sea of Australia as if that coastal sea were part of Australia’. Section 35 of Fair Work Act 2009 (FWA) deals with application of the FWA to ‘Australian employers’ and ‘Australian employees’, and hence encompasses ‘Australian’ vessels (that is, those that are operated by an ‘Australian employer’ or are operated by ‘Australian employees’). In the case of foreign vessels, the FWA would not normally apply as the (foreign) owner or operator would not normally qualify as an ‘Australian employer’. Likewise, the crew of a foreign vessel operating in Australia’s coastal waters are unlikely to qualify as ‘Australian employees’ as their ‘primary place of work’ would usually not be Australia, if it were not for the operation of section 32 of the FWA and Regulation 1.15D of the Fair Work Regulations.
193. This is because section 32 of the Fair Work Act 2009 allows regulations to modify the application of that Act. Regulation 1.15D of the Fair Work Regulations does that, by providing that the Fair Work Act 2009 does not apply to vessels in Australia’s coastal waters other than those granted various types of licenses under the Coastal Trading (Revitalising Australian Shipping) Act 2012.
194. For an explanation of Australia’s maritime zones, including the exclusive economic zone and the continental shelf, see Geoscience Australia, ‘Maritime Boundary Definitions’, Geoscience Australia website, accessed 23 November 2015.
195. Fair Work Act 2009, paragraphs 33(1)(c) and (d).
The Government has indicated an intention that the FWA will continue to apply to foreign vessels that engage in coastal shipping for more than 183 days in Australian waters.\(^1\) However, as the FWA Regulations 2009 are expressed as applying to vessels granted various types of licenses under the Act that will cease to exist if the Bill is passed, they will not capture foreign vessels with permits and hence the FWA will not apply to such vessels until the FWA Regulations are amended to give effect to the Bill’s intention.

**Proposed subsection 41(2)** allows regulations to be made that amend the effect of the Award for the purpose of removing uncertainties, ambiguity or to correct errors, technical deficiencies or omissions (for example, references to a defunct licence category). However, as noted by the Australian Industry Group, the FWA Regulations must be amended ‘to ensure that they give effect to the Bill’s intention’.\(^2\) Put simply, until such time as the FWA Regulations are amended to refer to coastal shipping permits, the FWA will not apply to foreign vessels with a coastal shipping permit, and hence Part B of the Award (even if amended) would not apply to such vessels.

Similarly, **proposed section 61AKA** of the *Shipping Registration Act 1981* (at item 43 of Schedule 1 to the Bill) provides that Part B of the Award will apply in relation to seafarers employed on board a vessel registered on the AISR to which the FWA applies. It also allows regulations to be made that amend the Award for the purpose of removing uncertainties, ambiguity or to correct errors, technical deficiencies or omissions (for example, references to a defunct licence category). The Australian Industry Group noted that ‘this power would be used to amend the coverage of Part B of the Seagoing Award to reflect the new proposed licensing system’ and expressed the view that ‘this approach is sensible given that the coverage of the Seagoing Award is an essential element of the proposed changes.’\(^3\)

**Amendments to the Shipping Registration Act 1981**

In addition to **proposed section 61AKA** (discussed above), the Bill makes a number of other amendments to the *Shipping Registration Act*, discussed below.\(^4\)

**Reduction in time vessel must be engaged in international trading**

**Item 14** of Schedule 3 of the Bill will repeal the definition of ‘predominately used to engage in international trading’. This, along with introduction of the 90-day requirement proposed by **proposed subsection 15F(3)**, means that vessels will ‘only be required to engage in international trading for a period of 90 days before being eligible for registration’ on the AISR.\(^5\)

**Removal of requirement to have a collective agreement**

Currently paragraph 15(c) of the *Shipping Registration Act* requires that an application for registration of a vessel on the AISR requires ‘evidence that a collective agreement has been made under section 11A’ of that Act. Importantly however, subsection 11A(4) provides that the FWA does not apply in relation to the making of a collective agreement under that section, and that such a collective agreement is not an enterprise agreement for the purposes of the *FWA*.

**Item 6** of Schedule 2 of the Bill repeals paragraph 15(c) of the *Shipping Registration Act*, the effect of this proposed amendment is that whilst the ability to make a collective bargaining agreement under section 11A will remain, it will no longer be a mandatory requirement for registration on the AISR. The Transport Committee noted that ‘despite what appear to be generous tax incentives, there are currently no ships registered on the AISR’.\(^6\) The Transport Committee noted that possible explanations for the lack of interest in the AISR included:

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1. W Truss, *Second reading speech: Shipping Legislation Amendment Bill 2015*, House of Representatives, Debates, 25 June 2015, p. 7579, accessed 15 July 2015: ‘The bill ensures that if a foreign ship is predominantly operating in Australia—that is, for more than 183 days of Australian coastal trading in a 12-month permit period—it will be subject to domestic workplace relations arrangements. If a foreign ship engages predominantly in international trading—that is, for less than 183 days of Australian coastal trading in a 12-month permit period—their existing on-board workplace arrangements will apply.’


3. Ibid.


• perceived ‘unionised industrial reputation’ and

• ‘the requirement for any ship seeking registration on the AISR to have a collective agreement with the ‘seafarer’s bargaining unit’ comprised of relevant maritime unions (and the absence of any alternative such as negotiating directly with the seafarers) is likely to have operated as a deterrent to registration’.

It would appear that the removal of the requirement to have a collective agreement in place as a pre-condition to registration on the AISR proposed by item 6 of Schedule 2 of the Bill is designed to allow employers a greater degree of flexibility in regards to workplace relations on board vessels, including allowing negotiating directly with seafarers on an individual (instead of a collective) basis.

**Mandatory refusal to register a vessel onto the AISR**

**Proposed subsections 15F(3) – (3B) of the Shipping Registration Act** provides that the Registrar must refuse to register a ship in the AISR if satisfied that the ship will not be used to engage in at least 90 days of international trade in the following financial year, or pro-rata amount (when there is less than a full year remaining in the financial year at the time the application is made). This will ensure that a vessel joining the AISR part way through a financial year is not obligated to undertake the 90 days of trading in the remaining part of that financial year. **Proposed subsection 15F(3B) provides** that days on which passengers embark or disembark, or cargo is loaded or unloaded, will be counted as days in which the vessel is engaged in international trade.

**Changes related to minimum Australian crew requirements**

Currently section 33A of the Shipping Registration Act provides that it is a condition of registration on the AISR that the vessel must ensure that an Australian national or Australian resident:

- is the master or chief mate of the vessel and
- is the chief engineer or first engineer of the vessel.

Further to the above, subsection 33A(2) provides that it is a condition of registration of a vessel on the AISR that the owner or operator of the vessel (as the case may be) ‘must take reasonable steps to ensure that the positions of master and chief engineer are occupied by a person who is an Australian national or Australian resident’.

The Bill seeks to amend subsection 33A(1) of the Shipping Registration Act 1981 to expand the scope of those who hold senior crew positions on AISR vessels to include people who have Australian work rights without necessarily being Australian residents or nationals (that is, Australian citizens). **Items 8, 9 and 10 of Schedule 2 of the Bill do so by adding the words** ‘who holds a visa that allows the person to work in Australia’, thus allowing persons with an appropriate visa to qualify for the Australian crew requirements, even if those persons are not Australian citizens or residents. This provision attracted some criticism, with Maritime Industry Australia Ltd stating:

> These amendments provide for a person who holds a visa that allows the person to work in Australia in the specified roles to be included in addition to an Australian resident... a Maritime Crew Visa—which is supposed to be a transit visa—provides the right to enter Australia as a crew member on board foreign or AISR ships. Quite clearly any type of temporary work visa holder (±457, 400) is eligible. The Government should clearly state whether these visas are considered to be appropriate. Again, the proposed amendment would do nothing to secure the critical skills base as any temporary work visa could be used.

However, for the reasons noted above, it is not immediately clear if the view that the proposed amendments to subsection 33A(1) of the Shipping Registration Act 1981 would allow a holder of a Maritime Crew Visa to hold the relevant senior positions is correct. The amendments would, however, certainly facilitate certain other types

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204. Ibid.

205. Shipping Registration Act 1981, subsection 33A(1).

of visa holders holding the identified positions and thus potentially enable vessels to be registered on the AISR with a crew composed entirely of persons who are not Australian citizens or permanent residents. Ultimately however, until such time as rules are made specifying the types of visa that allow a person to ‘work in Australia’ in the relevant positions are produced, the issue will remain unresolved.

Importantly however, at least compared to the conditions currently imposed by the Act on general licence holders, this does not represent a substantial change. This is because currently paragraph 21(b) of the Act provides that when a vessel with a general licence is engaged in coastal shipping ‘each seafarer working on the vessel’ must be an Australian citizen, hold a permanent visa or ‘hold a temporary visa that does not prohibit the seafarer from performing the work he or she performs on the vessel’. In other words, currently the Act allows Australian vessels to employ foreign nationals who hold an appropriate class of visa. Theoretically at least, this allows a vessel with a general licence to be entirely foreign-crewed. The Bill would not change that.

New power to cancel registration in certain circumstances

Item 11 of Schedule 2 of Bill seeks to amend subsection 33B(1) of the Shipping Registration Act to provide the Registrar the power to cancel the registration of a ship on the AISR if satisfied that the ship will not, in the financial year the cancellation will take effect, be used to:

- engage in international trade for at least 90 days or
- if pro-rata number of days applies, for at least the pro-rata number of days.

The amendments will also provide the Registrar with the power to cancel the registration of a vessel on the AISR if satisfied that the ship was not, in a financial year preceding the financial year in which the cancellation will take effect, used to:

- engage in international trade for at least 90 days or
- if pro-rata number of days applies, for at least the pro-rata number of days.

As noted in the Bill’s Explanatory Memorandum the proposed powers in relation to cancellation are ‘consistent with the international trading requirements required for initial registration’ on the AISR as provided for by proposed subsections 15F(3)–(3B).

Continued application of Australian work health and safety laws to certain vessels

Items 3 to 11 of Schedule 3 of the Bill operate to ensure that the obligations imposed on vessel licences under the current regime by the Occupational Health and Safety (Maritime Industry) Act 1993 and Seafarers Rehabilitation and Compensation Act 1992 will continue to apply to vessels (both Australian and foreign) with permits under the regime proposed by the Bill.

Concluding comments

The Bill, if passed, will greatly simplify the regulation of coastal shipping in Australia. By removing key restrictions on foreign vessels, it would also open up the Australian coastal shipping market to foreign competition to a much greater extent than under the current regime or under the Navigation Act 1912. This approach is clearly consistent with the policy basis of the Bill – emphasising and prioritising the needs of the Australian economy as a whole (and in particular, industries that rely on or could use coastal shipping) over the needs of the domestic coastal shipping industry.

The 183 day rule and parity condition may offer a limited protection against such competition, in the form of a degree of competitive neutrality, at least in regards to wage costs. However, the Bill would not prevent owners and operators of foreign vessels from ‘cycling’ vessels of a similar size and purpose for periods of less than 183 days each (thus ensuring year-round coverage for their clients without incurring Australian wage costs). In such circumstances, foreign operators would appear to have a substantial competitive advantage over Australian

207. Section 14 of the Shipping Registration Act 1981 deals with what ships may be registered in the General Register. Importantly, Australian-owned ships and ships on a demise character to Australian-based operators may be registered. No crewing requirements as a condition of registration are imposed on such vessels – they are only imposed on ‘small craft’.


shippers, at least in relation to wage costs, and hence it would appear likely that the 183 day rule and parity condition will provide little, if any protection to domestic shippers against foreign competition over the long-term.

As a result of the limited protection offered by the 183 day rule, it would appear that increased competition in the Australian coastal shipping market will drive down shipping costs. That said, until Part X of the *Competition and Consumer Act 2010* (which allows certain types of shipping operators to enter cartel agreements in relation to the freight rates), it is possible that freight rates (and other aspects of shipping) will remain at levels agreed to by both domestic and foreign shippers. However, it would appear that on balance, the reforms proposed by the Bill will most likely reduce coastal shipping costs over the long-term, with residual benefits to other sectors of the economy.

The Bill will introduce greater flexibility into the shipping industry as a whole. Foreign vessels will be more readily able to engage in coastal shipping between international voyages, and any vessels that are registered on the AISR will likewise be able to engage in both international and coastal shipping with relative ease.

Finally, the positive effects on the broader Australian economy as a result of the reforms proposed by the Bill will come at a cost. It would appear likely that domestic shipping will be faced with significant competition from foreign vessels. Given the wage disparity between foreign and Australian wages, it would also appear likely that the reforms would place significant downward pressure on wages in the domestic shipping industry. In addition, the so-called ‘Australian’ crew requirements, which allow non-Australian citizens or residents with a specified visa to qualify as ‘Australian’, undermine demand for Australian-trained crew over the longer-term.
Appendix A: international comparison of selected jurisdictions

Canada

Canada has pursued a virtual unbroken policy of protection in relation to coastal shipping since it inherited its coastal trade regime from Britain. The primary goal has been the provision of a protected environment in which Canadian shipping can prosper without being exposed to the full force of international competition.

Unfortunately, in the absence of sufficient domestic activity to sustain a viable industry, the protection barrier has proved to be as much an impediment to Canadian shipping seeking performance efficiencies as it has been a barrier constraining international access to domestic markets.210

Canada protects its coastal shipping activities under the Coasting Trade Act 1992 and the Customs Tariff Act 1997.211 Under these laws, the only ships that have unrestricted access to coastal shipping are those registered in Canada and either built in Canada or, if not built in Canada, on which all applicable duties have been paid. The Customs Tariff Act sets the import duty on imported ships at 25 per cent of the fair market value of the vessel for most types of ship. It should also be noted that any foreign built vessel seeking to be registered in Canada is often required to incur substantial additional expenditure to meet registration requirements as set out in the Canada Shipping Act 2001.212

Foreign-flag vessels may be used in Canadian coasting trade under waiver if no Canadian-flag vessels are available. In 2006, foreign flag vessels operating under waiver carried about 2.7 percent of all coasting-trade traffic.213

While Canada’s protectionist policy has changed little, a number of reviews have been conducted resulting in a substantial increase in the scope of activities included in the definition of cabotage, and in the geographic area to which it applies. In particular, Canada has chosen to:

- limit cabotage access to Canadian (as opposed to Commonwealth) registered ships on which all applicable duty has been paid
- extend the area of application to the outer limits of the Canadian continental shelf, or to 200 nautical miles, whichever is greater and
- expand the definition of ‘coasting trade’ to include a range of additional activities above and beyond transportation between two ports or places in Canada, including, for example, cruising activities and activities related to the exploration, exploitation and transportation of mineral or non-living natural resources.214

European Union

With the move toward a single European market in the late 1980s, more open access in maritime transport services was desired. The primary instrument for the liberalisation of Europe’s cabotage policy was EEC Regulation 3577/92, which came into force on 1 January 1992.215 The principal provision in this regulation was that:

... freedom to provide maritime transport services within a Member State (maritime cabotage) shall apply to Community shipowners who have their ships registered in, and flying the flag of, a Member State, provided that these ships comply with all conditions for carrying out cabotage in that Member State.216

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214. JRF Hodgson and M Brooks, op. cit., p. 11.
216. JRF Hodgson and M Brooks, op. cit., p. 51.
Also contained in this regulation were statements of policy intent, including the goal of ‘liberalisation of maritime cabotage’, ‘abolition of restriction on the provision of maritime transport’, as well as freedom for all members to provide marine transport services.\(^{217}\)

In Europe an EU-ship is therefore eligible to participate in the cabotage trades of any other EU state. Within Europe, each country can impose crew nationality requirements, vessel ownership requirements and fiscal requirements on owners. In addition, states that retain some restriction on access for foreign vessels usually maintain a waiver system based on the condition of non-availability or unsuitability of a national- or EU-flag ship.\(^{218}\) Cabotage policy differences of individual European states are discussed in more detail below.

**Individual European states**

EEC Regulation 3577/92—later extended to the European Free Trade Association, thereby applying it throughout the European Economic Area (EEA)—called for access to national cabotage for all member states as a minimum requirement. However, the question of whether or not cabotage trades should be further opened to foreign (non-EEA) ships has been left to the discretion of each state. In practice, Belgium, Denmark, Ireland, Netherlands, United Kingdom, Iceland and Norway have chosen not to place any restrictions on foreign flag access. Of these countries, only the UK and Norway have significant cabotage tonnage, both in cargo and passengers. In states where there are restrictions on foreign (non-EEA) vessels, the restrictions can take a variety of forms. For example, France, Germany and Greece prohibit the use of foreign-flag vessels except under a waiver system. Italy restricts cabotage to EEA-flag shipping and lays down ‘host state’ rules for EEA ship crews. Portugal also applies restrictions and sets ‘host state’ rules for island cabotage.\(^{219}\)

In terms of crew nationality requirements, most EEA states require the ship’s master to be of the nationality of that state, with some extending the requirement to certain other officers—for example, France, Italy, Spain and Portugal require the first officer to be a national as well. In certain circumstances there is a waiver system, but in Sweden and Greece (for example) there is no flexibility in this requirement regarding the ship’s master. For crews the normal requirement for first registers is that the crew be citizens of EEA states.\(^{220}\)

In terms of vessel ownership requirements, most states require that the ship be owned by an EEA citizen or by a company having its registered office in an EEA state. In Denmark, for example, there is also a requirement that the management of the ship be located in the host state.\(^{221}\)

The fiscal regime that is applicable to a ship engaged in European maritime cabotage is set by the state in which the ship is registered. The principal fiscal elements provided include corporate tax relief in various forms (but increasingly in the form of a low-rate tonnage tax) and a significant degree of tax relief for crews on income and social security benefits, normally related to the amount of time that a ship spends in international trading. To illustrate, in the UK ship operators may choose a ‘tonnage tax’ fiscal regime, and seafarers are exempt from income tax if they are engaged on a ship in international trades (and therefore not resident in the UK) for more than 183 days per year.\(^{222}\)

**United States**

The US domestic maritime industry is protected under section 27 of the *US Merchant Marine Act of 1920* (commonly referred to as the *Jones Act*).\(^{223}\) The *Jones Act* requires that cargo transported between two US ports be carried by vessels owned by citizens of the US, be built and registered in the US and be manned by a crew of US nationals. Foreign financial owners are permitted to fund *Jones Act* assets provided they derive the majority of their revenues from financing activities other than vessel operations.\(^{224}\) U.S. Customs and Border Protection

\(^{217}\) Ibid., p. 52.
\(^{218}\) M Brooks, op. cit., p. 10.
\(^{219}\) JRF Hodgson and M Brooks, op. cit., pp. 54–55.
\(^{220}\) Ibid., p. 55.
\(^{221}\) Ibid., p. 56.
\(^{222}\) Ibid.
has direct responsibility for enforcing the Jones Act and may grant waivers of the US-flag, US-build or US-ownership requirements, but only in the interest of national defence.\(^{225}\)

The argument made in support of cabotage in the US is one of strategic interest. The American Maritime Congress states that:

> The Jones Act and other cabotage laws, which include laws regarding passenger vessels, dredging and salvage, ensure that the United States has the vessels, seafarers and shipyards necessary to protect the national and economic security of the country.\(^{226}\)

If security is its strategic interest, however, then this is not reflected in the ocean-going US domestic fleet, which has been undergoing continuous decline over several years. Between 1996 and 2007, the number of ships engaged in ocean-going US origin to US destination trades has fallen from 291 to 100.\(^{227}\)

There is abundant evidence that the Jones Act harms business and the US economy by creating expensive barriers to trade. In 1995, a report from the US International Trade Commission found that the Jones Act costs the economy $2.8 billion annually and its removal would lower domestic shipping prices by 26 per cent. Particularly hard hit by the Jones Act are non-contiguous US territories and states, such as Hawaii, Puerto Rico and Guam. With few alternative means of transporting goods other than by sea, the impact on the cost of living and the cost of doing business in these areas can be significant.\(^{228}\)

The US cabotage regime is perhaps the most restrictive of any nation. While efforts have been made to reform or repeal the Jones Act, these have so far been unsuccessful.\(^{229}\)

**New Zealand**

New Zealand lies at the more liberalised end of the cabotage regime.\(^{230}\) The provisions governing maritime cabotage are laid out in section 198 of the *Maritime Transport Act 1994*.\(^{231}\) Coastal shipping is protected but only in the sense that no ship is permitted to carry coastal cargo unless it is a NZ-flag ship or a foreign ship that has either loaded or unloaded international cargo or passengers at a port in NZ, or will be doing so before departing from such a port. There is no ministerial discretion with this provision; however, the minister may authorise the carriage of coastal cargo by ‘any other ship’ under such conditions as the minister considers appropriate. Overall, coastal shipping control is not economically highly significant for NZ, and its administration is comparatively straightforward.\(^{232}\)

In 2000 the government implemented a review of the NZ shipping industry. The main finding of the review was that the NZ shipping industry was at a serious competitive disadvantage on coastal routes opened up to international operators by the implementation of section 198 of the *Maritime Transport Act 1994*. While one of the options for increasing NZ participation in shipping would be reintroduction of a cabotage regime, a report commissioned by the review found that such a move would increase domestic and international freight costs by an estimated NZ$13.1 million. The review strongly recommended that special tax incentives and/or a shipowner-friendly tonnage tax be implemented in NZ in order to create a ‘level ocean’ for local shipping operators.\(^{233}\)

The oil spill caused when the cargo ship *Rena* struck a reef off the coast of NZ in 2011 has prompted calls for the reintroduction of cabotage in NZ to ensure appropriate safety and environmental protection.\(^{234}\)


\(^{227}\) M Brooks, op. cit., p. 13.

\(^{228}\) M Blom Hill, *The sinking ship of cabotage: how the Jones Act lets unions and a few companies hold the economy hostage*, Capital Research Centre, April 2013, accessed 21 October 2015.

\(^{229}\) Ibid.

\(^{230}\) M Brooks, op. cit., p. 8.


\(^{234}\) Australian Shipowners Association, *Submission* to Department of Infrastructure and Regional Development (DIRD), *Approaches to regulating coastal shipping in Australia: options paper*, op. cit., p. 15.
**Japan**

Japan has a closed cabotage regime. Under relevant Japanese legislation, access to coastal shipping of cargo or passengers between ports in Japan is limited to Japanese vessels, with the exception of vessels from a limited number of countries which have been granted restricted access pursuant to treaties of friendship, commerce or navigation with Japan, or which have obtained a permit from the Ministry of Land, Infrastructure, Transport and Tourism. The reasons for these maritime restrictions are:

- To maintain national security. Because Japan is a maritime country its national security depends heavily on coastal shipping. If its shipping capacities were to decline or become severely limited, this would jeopardise the strength and security of the nation.
- To ensure the safe and reliable transport of everyday goods for local residents. Japanese waters are subject to extreme weather changes and the majority of navigation must be conducted within heavily trafficked sea lanes. If this were to be undertaken by foreign crews then Japanese coastal areas could become inordinately dangerous.
- To secure the employment of domestic crew members. If the transportation of goods were to become more dependent on foreign-flag ships and foreign crews, many local shipowners and transport operators would be forced to withdraw from the profession making it more difficult for Japan to pass on its marine technical tradition.

**China**

Foreign vessels are not permitted to engage in coastal shipping in China. In recent years some ports and shipping companies have made appeals to open coastal shipping to foreign vessels, claiming that restrictions impede the development of the port industry in China. The Chinese Ministry of Transport (MOT), however, has responded by saying that at present it is not appropriate to open the cabotage business to foreign vessels. MOT argues that maintaining strict controls on cabotage is necessary for the economic interest of the country, as well as the sovereignty and safety of the country. Relaxing restrictions would impact on the development of the domestic shipping industry and the status of Hong Kong as an international shipping centre. At the same time, it would adversely affect the development of small- and medium-sized ports in China.

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237. Ibid.
