Shipping

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TROUBLED WATERS AHEAD?

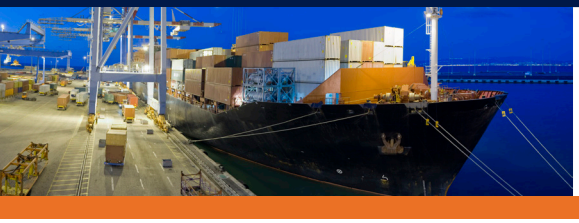
AUSTRALIA TO OPEN UP COASTAL TRADES TO INTERNATIONAL SHIPPING

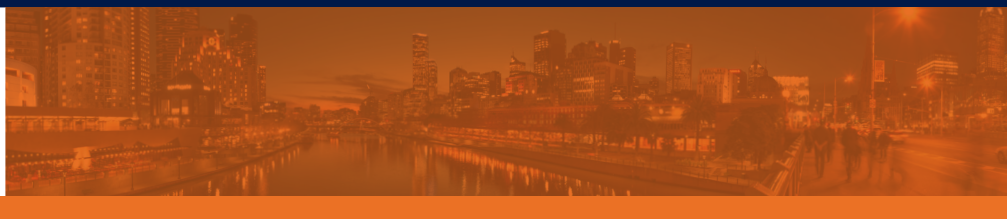
In his election victory speech in September 2013, Prime Minister Abbott declared *"Australia is under new management and is once more open for business".*

The high cost of shipping on Australian coastal trades that are regulated by federal cabotage legislation has been a constant thorn in the side of Australian business. On 8 April 2014, the Deputy Prime Minister and Minister for Infrastructure and Regional Development, the Hon Warren Truss MP, announced the release of an options paper on approaches to regulating coastal shipping in Australia directed at addressing the lack of competitiveness of Australian shipping. Last month press reports appeared on a roundtable meeting in Canberra on 2 February 2015 between Minister Truss and shipper interests to discuss "options" in relation to the reform of Australia's cabotage regime. Subsequent reports have suggested that the Federal Government is proposing to introduce legislation designed to streamline the current regulatory system that was introduced by the previous Labour Government with reference being made to replacing the existing multi-tiered licence system with a single permit for all ships (Australian and foreign) which operates to grant unrestricted access to coastal shipping. Among other things, the proposed reforms will be directed at achieving equal treatment of Australian and foreign ships for the carriage of Australian coastal cargo.

The rationale reportedly provided by the Government for the proposed reform is that, since it came into force in 2012, the cabotage regime (as revised under the *Coastal Trading (Revitalising Australian Shipping) Act* (CTA) has acted as a barrier to competition and market entry by foreign ships resulting in a substantial increase in the cost of coastal shipping services which, in turn, has impacted negatively on Australian business and led to a high level of uncertainty and red-tape without achieving any of the objects of the CTA. The cost differential between freight rates for Australian and foreign flagged vessels was considered in the decision of the Federal Court of Australia last year in *CSL Australia Pty Limited v Minister*[1] *for Infrastructure and Transport* in which reference was made to evidence of the freight

1 *CSL Australia Pty Limited v Minister for Infrastructure and Transport* [2014] FCAFC 10





The proposed opening up of the Australian coast to international shipping will be welcomed by business and generate increased cargo movements through our ports and on Australian coastal trades. However, there are already rumblings emanating from the maritime unions which suggest there will be strong resistance to reform.

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rate offered by CSL Australia in respect of its Australian flagged tonnage being more than US$12 more per MT than a comparative quote provided in respect of foreign flagged tonnage – this differential generated an annualised differential to the charterer of at least AUS$4 million for the trade in question.

However, as the Government does not have control of the Senate it remains to be seen whether any amending legislation will be blocked by the Labour opposition in conjunction with minor parties with whom they can form a majority in the Upper House.

Predictably, the proposed winding back of the CTA is opposed by the Maritime Union of Australia (MUA). In a press release issued last week, MUA National Secretary Paddy Crumlin said that *"the MUA strongly urges the Abbott government to retain and improve the Coastal Trading Act,"* going on to comment *"the (planned) changes could impact around 2,000 direct jobs and up to 8,000 associated jobs".* Given the potential impact on jobs referred to by Mr Crumlin, it is reasonable to expect that Australia could be in for a period of industrial volatility in the marine sector. In this context, it is relevant to note that the MUA has been prosecuted successfully by Australia's federal competition regulator (Australian Competition and Consumer Commission – ACCC) and fined for unlawful boycott conduct under Australia's competition legislation[2], which is capable of being a strong deterrent against boycott activity, such as unlawfully hindering or preventing, or attempting to hinder and prevent, vessels from sailing unless the ship owner/charterer agreed to use MUA labour to clean the vessel's holds or otherwise engaging in unlawful action to stop vessels from sailing such as pickets, threats of pickets, action to delay, demands for payment in lieu of cleaning etc.

The secondary boycott provisions are contained in the *Competition and Consumer Act 2010* (Cth) (CCA), and have been subject to many amendments since they were introduced in 1977. In its Draft Report on its review of competition law and policy published on 22 September 2014, the Harper Committee expressed the view that secondary boycotts are harmful to trading freedom and therefore harmful to competition. The Committee suggested that the ACCC should focus on enforcing the relevant prohibitions in the CCA in a timely way to counter the perception that there is insufficient public enforcement of the prohibitions and to ensure they operate as an effective deterrent.

What is a secondary boycott?

Generally, a secondary boycott involves two or more persons, in concert with each other, engaging in conduct to hinder or prevent a third party from:

- Supplying goods or services to a fourth person;

2 *See ACCC v MUA* (2001) 187 ALR 487 *and ACCC v MUA* (2001) 187 ALR 1807



- Acquiring goods or services from a fourth person;

...where the conduct is for the purpose, and would be likely to have the effect of:

- Causing substantial loss or damage to the business of the fourth person.
- Causing a substantial lessening of competition in a market in which the fourth person trades.
- Preventing or substantially hindering a third person from engaging in trade or commerce involving the movement of goods between Australia and places outside Australia.

The last prohibition is particularly relevant to potential responses to any changes to the cabotage regime.

The prohibition specifically excludes the situation where the third or fourth person is the employer of any of the persons engaging in the conduct.

The secondary boycott prohibitions apply to employees who are members of a union. There is also a rebuttable presumption that a union is engaging in conduct if two or more of the persons engaging in the conduct are members or officers of a union.

Defences

There are two exclusions from the prohibition which apply where the dominant purpose of a boycott substantially relates to:

- Remuneration, conditions of employment, working hours or working conditions of employees engaged in the conduct.
- Environmental protection or consumer protection and the conduct is not industrial action.

Preventing or hindering

The term "hindering" means *"in any way affecting to an appreciable extent the ease of the usual way of supply of goods or services"*[3]. Conduct must be assessed in the context of all the circumstances and the mere act of picketing may not necessarily constitute an act of hindering or preventing supply or acquisition if it is undertaken in a peaceful and non-threatening way[4].

However, the conduct of preventing or substantially hindering supply or acquisition can be engaged in by threat and verbal intimidation as well as physical interference with the actual activities[5].

Acting in concert for prohibited purpose

The relevant provisions of the CCA require that all of the relevant persons engage in conduct in concert with the relevant purpose. There must be evidence of communication between the parties as to their proposed course of action and the acceptance of the obligations to undertake that conduct by at least one party[6].

Without evidence of specific communication between a union and a member of a union in relation to enforcing a picket line on a particular site, evidence that a union member acted in accordance with a long-standing policy of his union not to cross a picket-line was not sufficient to establish the member acted in concert with the union[7]. On the other hand, members of a union were found to have acted in concert with their union in circumstances where bans were imposed by the union against independent contractors at separate industrial sites. The court relied on the close temporal connection between the imposition of the bans at the separate sites and the fact that the decision by the union to impose the bans had been communicated to members in the union's official magazine[8].

In determining whether conduct has been engaged in for a particular purpose, the court considers the "operative subjective purpose" of those engaging in the conduct, that is, what was the real reason or object in the minds of those engaging in the conduct[9]. In cases where an individual's purpose is in question, best evidence of purpose will often be the oral testimony of that individual.

The purpose of causing substantial loss or damage need not be the only purpose of a secondary boycott for the prohibition to apply. The purpose of causing loss or damage may be established even where it is a means of achieving another primary purpose. In a case where the respondent union imposed bans on ships exporting the plaintiff company's coal by preventing another company from supplying tug services to the plaintiff, the union gave evidence that the ultimate goal of the ban was to crew the plaintiff company's ships with Australian seamen. The union argued that they did not have the proscribed harmful purpose; rather they wanted to protect their members' jobs. The union's defence was rejected on the basis that, while that may have been the union's ultimate purpose, the union failed to establish that there was no other prohibited purpose[10].

It follows that even if a potential consequence of the opening up of Australia's coastal routes to foreign

3 *ABLF (WA) v J-Corp Pty Ltd* (1993) 42 FCR 452 at 459
4 Ibid
5 *ABC v Parish* [1980] FCA 33
6 *AMIEU v Meat and Allied Trades Federation of Australia* [1991] ATPR 41-151 at 53,144
7 *Springdale Comfort Pty Ltd v Electrical Trades Union of Workers (WA Branch) Perth* [1986] ATPR 40-694
8 *Concrete Constructions Pty Ltd v Plumbers and Gasfitters Employers Union* [1987] ATPR 40-766
9 *Tillman's Butcheries Pty Ltd v Australasian Meat Industry Employees Union* (1979) 27 ALR 367 at 348
10 *Utah Development Co v Seaman's Union of Australia* [No 2] (1977) 17 ALR 15

There are some basic steps that owners and charterers of vessels can take in order to be best positioned to obtain expedited relief from secondary boycotts.

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shipping is the loss of employment for some MUA members, this will not protect prohibited secondary boycott activities from being sanctioned.

Injunctive relief to prevent secondary boycotts

Interim injunctions can be granted pursuant to the CCA to prevent secondary boycotts. The test for determining whether to grant interlocutory relief is, firstly, whether there is a serious question to be tried and, secondly, that the balance of convenience favours the granting of an injunction.

In order to obtain an interim injunction, there must be some evidence going to each of the above-mentioned elements making up a secondary boycott. An applicant bringing an action for breach of the secondary boycott prohibitions can face difficulty in adducing sufficient evidence that the respondents have acted "in concert" for a prohibited purpose.

However, a successful applicant may recover substantial damages as a result of boycott conduct.

In addition, if a remedy has been ordered against a union, failure to comply with the order may result in the union being fined for contempt of court.

Preparing to respond to boycott conduct

There are some basic steps that owners and charterers of vessels can take in order to be best positioned to obtain expedited relief from secondary boycotts. These include:

- Ensuring that all contractual arrangements relating to provision of services are in writing properly executed by the parties to the arrangements and that detailed documentation is available to show the parties' expectations with respect to the timing and scope of those arrangements.
- Keeping accurate and detailed records of all communications with union officials and representatives, in particular with respect to any threats or demands. In some cases, it may be appropriate to make audio recordings of face to face discussions. Otherwise, confirm the substance of any relevant discussions in writing as soon as possible after the discussion has occurred.

HFW's Australian offices have extensive experience dealing with secondary boycott conduct, including obtaining urgent injunctive relief to restrain the disruption of vessel operations.



For more information, please contact the authors of this Briefing, or your usual contact at HFW.

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