

2010-2011-2012

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

COASTAL TRADING (REVITALISING AUSTRALIAN SHIPPING) BILL 2012

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Infrastructure and Transport,
the Honourable Anthony Albanese, MP)

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POLICY CONTEXT

In September 2011, the Government released its *Stronger Shipping for a Stronger Economy* package to revitalise the Australian shipping industry. Australia is heavily dependant on shipping, with 99 per cent of international trade volumes transported by ship and Australian ports managing 10 per cent of the world's sea trade. A viable shipping industry is recognised by a wide range of OECD and developing countries as critical to national economic prosperity.

A vibrant domestic maritime sector is also required to maintain the supply of maritime skills to fill specialist shore-based roles. Australia's maritime safety and environmental regulators, as well as port authorities, draw their skills from the sea-based labour pool. Significant seagoing experience is required to attain the high levels of technical expertise required.

The shipping task through Australian waters is forecast to double by 2029-30, which will substantially increase demand for these technical skills. Relying on immigration to fill these positions is not sustainable, as a global shortage increases competition for these skills. A domestic shipping industry provides the foundation to build a sustainable workforce.

The Need for Action

The Australian shipping industry has been in decline over an extended period. The number of Australian registered ships in the major trading fleet has dropped from 55 in 1995-96 to 22 in 2010-11. Without action, there are unlikely to be any Australian registered vessels operating in the major trades within the next five years. This decline stems from the failure of Australian shipping policy to keep pace with global changes in the industry, as well as the regulatory and competitive settings faced by the domestic industry.

Australia's coastal trading framework is one of the most liberal in the world. Foreign flagged and crewed vessels can operate in the domestic economy under 'permit', which allows these vessels to be exempted from certain Australian regulatory requirements. Coastal shipping is the only sector in the Australian domestic transport industry where lower paid foreign workers are employed. While the Fair Work Regulations 2009 extended award coverage to a number of permit vessels, foreign flagged vessels continue to enjoy favourable cost structures when compared to Australian licensed vessels.

Since the early 1990s, many developed countries have implemented fiscal and policy measures to support their domestic industry. Access to beneficial taxation and other arrangements further entrenches operating cost differentials. The inability of Australian vessels to compete on a level playing field with international operators has led to the current decline. Indicative of this in 2010-11 approximately 417 ships operated on the Australia coast under permit, compared to 22 Australian-registered and licensed vessels.

Previous policy development processes and consultation

A number of major reviews have been undertaken into the shipping industry since the mid-1990s, notably the Report of the Shipping Reform Group (1997) and the Independent Review of Australian Shipping (2003). These reviews found that without Government action the Australian shipping fleet would continue to decline. None of the recommendations of these reviews were implemented.

In 2008, the House Representatives Committee on Infrastructure, Transport, Regional Development and Local Government undertook an inquiry into coastal shipping policy and regulation (*Rebuilding Australia's Coastal Shipping Industry*). The key themes arising from the inquiry included:

- Shipping is legally able to acquire a national character that is independent of its owner and operate internationally to take advantage of key tax incentives offered by the country of registration. This has created an intensely competitive global fiscal environment in a bid to attract shipping tonnage.
- Australian shipping companies are subject to the standard corporate tax arrangement, which puts them at a competitive disadvantage with ships registered in countries like Singapore, Hong Kong and Canada that offer zero tax or very low rates for shipping businesses.
- Traditional maritime nations, mainly from Europe, have for some time now successfully introduced differential corporate tax arrangements and created new international registers to retain national tonnage.
- Australian ships face severe disadvantage in competing with foreign ships. Stakeholders expressed concern regarding costs related to wages and maintenance.
- There exist differences amongst stakeholders on productivity and efficiency gains but there is general agreement on the range of fiscal and regulatory measures required, including an optional tonnage tax, withdrawal of royal withholding tax, accelerated depreciation, seafarer taxation and changes to the cabotage regime with a view to an increased Australian presence in the coastal trade.

The Committee considered the benefits of a competitive and sustainable coastal trading sector and through its 14 recommendations articulated a comprehensive policy framework aimed at revitalising the industry.

Given the broad ranging nature of the Committee's recommendations, a Shipping Policy Advisory Group, comprising industry and unions was established in 2009. This Group advised the Government on how best to implement the Committee's recommendations. The outcomes of these deliberations were incorporated into *Reforming Australia's Shipping – A Discussion Paper for Stakeholder Consultation* that was released in December 2010.

The Discussion Paper outlined the Government’s shipping policy framework and sought industry and public comment on the proposals. Three industry reference groups met from February – May 2011 and advised on implementation issues relating to the key areas of the reform package.

Exposure Draft Legislation

On 19 December 2012, the Government released Exposure Drafts of the Coastal Trading Bill 2012 and the Coastal Trading (Consequential Amendments and Transitional Provisions) Bill 2012. Over 20 submissions were received in response.

On 20 February 2012, the Government released the following Exposure Draft bills:

- Coastal Trading (Revitalising Australian Shipping) Bill 2012
- Coastal Trading (Revitalising Australian Shipping) (Consequential Amendments and Transitional Provisions) Bill 2012
- Shipping Registration Amendment (Australian International Shipping Register) Bill 2012
- Shipping Reform (Tax Incentives) Bill 2012
- Tax Laws Amendment (Shipping Reform) Bill 2012

An industry Roundtable was held on 28 February to provide industry with the opportunity to provide feedback on major policy issues arising from the Bill ahead of the close of public consultation on 5 March. Over 60 industry representatives attended, and 27 written submissions were received.

Stronger Shipping for a Stronger Economy Legislative Package

The shipping reforms are an integrated policy framework consisting of three legislative packages:

Coastal Trading	<ul style="list-style-type: none"> • Coastal Trading (Revitalising Australian Shipping) Bill 2012 • Coastal Trading (Revitalising Australian Shipping) (Consequential Amendments and Transitional Provisions) Bill 2012
Australian International Shipping Register	<ul style="list-style-type: none"> • Shipping Registration Amendment (Australian International Shipping Register) Bill 2012
Taxation Incentives	<ul style="list-style-type: none"> • Shipping Reform (Tax Incentives) Bill 2012 • Tax Laws Amendment (Shipping Reform) Bill 2012

The reforms are seeking to create a stable regulatory environment and provide internationally competitive fiscal incentives to encourage the revitalisation of the Australian shipping industry.

While the Committee's Terms of Reference did not extend to include consideration of establishing an international shipping registration, the consultation process identified that there was widespread support for this initiative. Further, increasing Australian shipping's participation in international trade (currently there are only four Australian registered vessels undertaking only international trade operations), is considered a necessary catalyst for reinvigoration of the domestic industry.

OUTLINE

The Coastal Trading (Revitalising Australian Shipping) Bill 2012 (the Bill) provides for the regulatory framework for access by vessels to coastal trading in Australia. It replaces the regulatory arrangements set out in Part VI of the *Navigation Act 1912* (Navigation Act). Part VI of the Navigation Act will be repealed by the Coastal Trading (Revitalising Australian Shipping) (Consequential Amendments and Transitional Provisions) Bill 2012.

The Bill aims to address the regulatory uncertainty that exists under the current arrangements. In particular, concerns regarding ambiguity in the wording of the Navigation Act and the reliance on Ministerial Guidelines, which are open to broad interpretation, have been considered in developing the Bill's provisions.

The Bill makes it clear that no vessel may engage in coastal trading unless it has the appropriate licence issued under the *Coastal Trading (Revitalising Australian Shipping) Act 2012*. The key contents of the Bill are as follows:

- The object of the Act is to provide a regulatory framework for coastal trading in Australia that promotes a viable shipping industry which contributes to the broader Australian economy; facilitates long-term growth of the Australian shipping industry; enhances the efficiency and reliability of Australian shipping; and maximises the use of Australian vessels registered under the Australian General Shipping Register.
- It establishes three types of licences (general licences, temporary licences and emergency licences) which would authorise vessels to carry passengers or cargo between ports in Australia.
- It deals with the application process for a licence, the decision-making process including criteria in making such decision, conditions of licences, cancellations of licences, Ministerial exemptions from the Act, appointment and enforcement of the requirements of the Act.
- It also provides for review of certain decisions by the Administrative Appeals Tribunal and the delegation of the functions and powers by the Minister and the Secretary.

FINANCIAL IMPACT STATEMENT

There will be no impact on Commonwealth expenditure.

REGULATORY IMPACT STATEMENT

A Regulatory Impact Statement was prepared on the shipping reform package. This can be accessed at

http://www.infrastructure.gov.au/maritime/shipping_reform/files/RIS_post_OBPR_20110816_formatted.pdf

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Coastal Trading (Revitalising Australian Shipping) Bill 2012

This Bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*

Overview of the Bill

The Coastal Trading (Revitalising Australian Shipping) Bill 2012 (the Bill) provides for the regulatory framework for coastal trading in Australia. It replaces the regulatory arrangements set out in Part VI of the *Navigation Act 1912* (Navigation Act). Part VI of the *Navigation Act 1912* will be repealed by the Coastal Trading (Consequential Amendments and Transitional Provisions) Bill 2012.

The key contents of the Bill are as follows:

- The Act provides a regulatory framework for coastal trading in Australia that promotes a viable shipping industry which contributes to the broader Australian economy; facilitates long-term growth of the Australian shipping industry; enhances the efficiency and reliability of Australian shipping; and maximises the use of Australian-registered vessels.
- It establishes three types of licences (general licences, temporary licences and emergency licences) which would authorise vessels to engage in trade on Australian coastal waters.
- It deals with the application process for a licence, the decision-making process including criteria in making such decision, conditions of licences, cancellations of licences, Ministerial exemptions from the Act, appointment and investigative powers of authorised persons, and enforcement of the requirements of the Act.
- It also provides for review of certain decisions by the Administrative Appeals Tribunal and the delegation of the functions and powers by the Minister and the Secretary.

The proposed legislation provides for unrestricted carriage of domestic cargo and passengers to General Licence holders and restricted carriage to Temporary Licence and Emergency Licence operators.

The restrictions on Temporary Licence holders relate to the voyages that are applied for by the applicant. All Temporary Licence applications are subject to negotiation for carriage by a General Licence holder ability to nominate for the trade. The proposed legislation mirrors

the current practice under Part VI of the *Navigation Act 1912*, which provides operators of foreign registered vessels the ability to apply for a permit to carry Australian domestic cargo and passengers on the basis that there is no licensed vessel available, adequate and that it is in the public interest.

However, the Bill will strengthen the merits review process for all operators by including an Administrative Appeals Tribunal review of decisions for the following:

- Refusal to exempt a particular vessel or a particular person from this Act (section 11);
- Grant an exemption subject to conditions (section 11);
- Refusal to make a declaration in relation to a vessel (section 12);
- Cancellation of a general licence (subsection 25(3)); and
- Cancellation of a temporary licence (subsection 44(3)).

This Bill does not make substantial changes to the current regulatory arrangements for coastal shipping and is consistent with international maritime practices under World Trade Organisation and Free Trade Agreement provisions which provide States with the ability to reserve its coastal trade and cabotage provisions.

Human rights implications

This Bill does not engage any of the applicable rights or freedoms.

Conclusion

This Bill is compatible with human rights as it does not raise any human rights issues.

Minister for Infrastructure and Transport, The Hon Anthony Albanese MP

NOTES ON CLAUSES

Clause 1 – Short title

Clause 1 is a formal provision specifying the short title of the Act.

Clause 2 – Commencement

This clause provides that the Act commences on 1 July 2012.

Clause 3 – Object of the Act

This clause sets out the object of the Act which is to provide a regulatory framework for coastal trading in Australia that:

- (a) promotes a viable shipping industry that contributes to the broader Australian economy;
- (b) facilitates the long term growth of the Australian shipping industry;
- (c) enhances the efficiency and reliability of Australian shipping as part of the national transport system; and
- (d) maximises the use of vessels registered in the Australian General Shipping Register (under the *Shipping Registration Act 1981*).

This provision outlines the types of licences available to engage in coastal trading and what access each licence gives to engage in coastal trading. The object of the Act will be achieved by ensuring that:

- a general licence (for Australian General Shipping Register vessels) provides unrestricted access to engage in coastal trading in Australian waters;
- a temporary licence provides access to engage in coastal trading in Australian waters which is limited in time and is also limited to the voyages authorised by the licence;
- an emergency licence provides access to engage in coastal trading in Australian waters which is also time limited and is to deal with the identified emergency situation.

Clause 4 – Constitutional basis for Act

Subclause 4(1) identifies the constitutional heads of power enabling the Commonwealth to legislate in relation to the matters covered by the Act.

Subclause 4(2) explains that an ‘activity of a vessel’ or a ‘matter that relates to a vessel’ as provided in subsection (1) includes, but is not limited to, an activity done by the:

- owner of the vessel; or
- seafarer working on the vessel.

Subclause 4(3) defines what is meant by ‘external to Australia’ for purposes of subsection (1). This Act applies to activities and other matters relating to a vessel external to Australia. This means the Act applies to a vessel that is operating:

- beyond the baseline from which the breadth of the territorial sea is measured under section 7 of the *Seas and Submerged Lands Act 1973*; or
- any waters on the landward side of the territorial sea that are not within the limits of a

State or internal Territory.

Clause 5 – Simplified outline

This clause provides a simplified outline of the Act.

This Act deals with the regulatory requirements to authorise vessels to carry passengers and / or cargo, for or in connection with a commercial activity, between ports in Australia.

Part 1 deals with the preliminary provisions which include the commencement date, the object of the Act and the constitutional basis for the Act.

Part 2 contains definitions for the Act including the definition of coastal trading in section 7.

Part 3 deals with the application of the Act to various vessels, lists the vessels to which the Act does not apply, provides for the power to exempt certain vessels or persons from the application of the Act, and provides for the power to declare vessels on intrastate voyages to be covered by the Act.

Part 4 establishes the three categories of licences that may be granted and the application process for each. The three types of licences are general licences, temporary licences and emergency licences. Part 4 also deals with matters such as conditions of licences, cancellations and other penalties, and reporting requirements.

Part 5 deals with enforcement of the Act and provides for civil penalty provisions and infringement notice scheme.

Part 6 deals with miscellaneous matters such as merits review, appointment of authorised persons, delegation of the Minister's and Secretary's powers and the regulation-making power.

Clause 6 – Definitions

A definition of '*acceptable tolerance limits*' is provided. The inclusion in the Bill of 'acceptable tolerance limits' was the outcome of industry comments provided during consultation on this Bill.

In relation to a cargo, the acceptable tolerance limit is plus or minus 20% of the volume of cargo authorised to be carried on a vessel under a temporary licence. In relation to passengers, the acceptable tolerance limit is plus or minus 20% of the passengers authorised to be carried on a vessel under a temporary licence.

In relation to a loading date, the acceptable tolerance limit is five days before or after the loading date authorised under a temporary licence. While current arrangements provide for a tolerance in regard to the sailing date, this Bill uses the loading date. This is consistent with industry advice that the loading date may in certain circumstances be more critical to the ongoing management of operations (clearing a stockpile/empty storage tanks etc), including upstream production.

Australia, when used in a geographical sense, includes the external Territories. It should be noted that the Act applies to external Territories.

Australian General Shipping Register has the same meaning as in the *Shipping Registration Act 1981*.

Australian International Shipping Register has the same meaning as in the *Shipping Registration Act 1981*.

Australian nationality means a vessel registered on the *Shipping Registration Act 1981*.

authorised person means a person appointed as such under section ^108.

business day means a day that is not:

- (a) a Saturday; or
- (b) a Sunday; or
- (c) a public holiday in the Australian Capital Territory; or
- (d) 27, 28, 29, 30 or 31 December.

The definition of business day is relevant in determining the statutory period for making a decision on the application for a licence.

cargo means any personal property:

- (a) that is carried on board a vessel; and
- (b) for which a bill of lading, or a receipt of a similar kind, is issued.

civil penalty order has the meaning given by section ^86.

civil penalty provision means a provision which provides for a civil penalty and one or more amounts in penalty units. A contravention of a civil penalty provision may be subject to an infringement notice.

coastal trading has the meaning provided under section ^7.

Commonwealth agency means:

- (a) an agency within the meaning of the *Financial Management and Accountability Act 1997*; or
- (b) a body corporate established for a public purpose under a law of the Commonwealth.

Commonwealth vessel means a vessel that is owned by, or in the possession or control of, the Commonwealth or a Commonwealth authority.

emergency licence means a licence granted under Division 3 of Part 4.

evidential burden, in relation to a matter, means the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist.

executive officer of a body corporate means a person, by whatever name called and whether or not a director of the body, who is concerned in, or takes part in, the management of the body.

Federal Court means the Federal Court of Australia.

fish includes turtles, dugong, crustacea, molluscs and any other living resources of the sea or of the seabed.

fishing fleet support vessel means a vessel (other than a Commonwealth vessel or an inland waterways vessel) that is used wholly or primarily in activities in support of the fishing operations of a fishing vessel. The Act does not apply to activities of, or matters relating to, a fishing fleet support vessel.

fishing operations means:

- (a) the taking, catching or capturing of fish for trading or manufacturing purposes; and
- (b) the processing or carrying of the fish that are taken, caught or captured.

fishing vessel means a vessel (other than a Commonwealth vessel or an inland waterways vessel) that is used wholly or primarily for fishing operations. The Act does not apply to activities of, or matters relating to, a fishing vessel.

general licence means a licence granted to an Australian vessel registered under the Australian General Shipping Register under Division 1 of Part 4.

harbour means a harbour properly so called, whether natural or artificial, and includes an estuary, navigable river, creek, channel, haven, roadstead, dock, pier, jetty or other place in or at which vessels can obtain shelter or load and unload goods or embark and disembark passengers. This definition does not include an ‘offshore terminal’. This is consistent with the intended policy that this Act does not apply to activities on offshore terminals, offshore industry vessels or activities or matters relating to the offshore industry.

inland waterways vessel means a vessel (other than a Commonwealth vessel) that is used wholly in waters other than waters of the sea. The Act does not apply to activities of, or matters relating to, an inland waterways vessel.

internal waters of Australia has the same meaning as in the *Seas and Submerged Lands Act 1973*

international agreement means a treaty or agreement whose parties are:

- (a) Australia and a foreign country; or
- (b) Australia and 2 or more foreign countries.

licence means a general licence, a temporary licence or an emergency licence.

loading date means the date passengers or cargo are expected to be loaded on board a vessel.

master of a vessel means a person who has command or charge of the vessel, but does not include a pilot of the vessel.

notice in response is the response given to the Minister or delegate by a holder of a general licence in relation to a temporary licence application, as provided for under section 31.

offshore industry vessel means a vessel that is used wholly or primarily in, or in any operations or activities associated with or incidental to, exploring or exploiting the mineral and other non-living resources of the seabed and its subsoil. This Act does not apply to activities on offshore terminals, offshore industry vessels or activities or matters relating to the offshore industry.

owner of a vessel includes:

- (a) a person who has a legal or beneficial interest in the vessel, other than as a mortgagor; and
- (b) a person with overall general control and management of the vessel.

For this purpose, a person is not taken to have overall general control and management of a vessel merely because he or she is the master of the vessel. For purposes of the Act, ‘owner’ includes an operator who has overall general control and management of the vessel.

passenger means a person who is carried on board a vessel with the knowledge or consent of the owner, charterer, master or operator of the vessel, if consideration (whether monetary or otherwise) is required to be, or has been, paid for the person to be so carried.

permanent visa has the same meaning as in the *Migration Act 1958*.

port is broadly defined. It includes a harbour which is also defined broadly and includes a place in, or at, which vessels can obtain shelter or load and unload goods or embark and disembark passengers.

recreational vessel means a vessel (other than a Commonwealth vessel or an inland waterways vessel) that is used wholly for recreational or sporting activities (whether or not let, or intended to be let, for hire or reward or consideration of any kind). The Act does not apply to activities of, or matters relating to, a recreational vessel.

salvage operation means any act or activity undertaken to assist a vessel or any other property not permanently and intentionally attached to the shoreline (including freight at risk) in danger in navigable waters or in any other waters.

salvage vessel means a vessel that is used wholly or primarily for salvage operations. The Act does not apply to activities of, or matters relating to, a salvage vessel.

sea includes any waters within the ebb and flow of the tide.

seafarer means any person who is employed or engaged or works in any capacity on board a vessel on the business of the vessel, other than the following:

- (a) a pilot (which is taken to have its ordinary meaning);
- (b) an owner of the vessel or a person representing the owner;
- (c) law enforcement personnel;
- (d) special personnel (within the meaning of section 283 of the *Navigation Act 1912*);
- (e) a person temporarily employed on the vessel in port;
- (f) a person prescribed by the regulations.

temporary licence means a licence granted under Division 2 of Part 4 to operators of either a foreign-registered vessel or an Australian International Shipping Register vessel and includes such a licence as varied under that Division.

temporary visa has the same meaning as in the *Migration Act 1958*.

vessel means any kind of vessel used in navigation by water, however propelled or moved.

voyage means the movement of a vessel from one port to another port in a way that would satisfy paragraph 7(1)(a), (b) or (c). This is a departure from the notion that a voyage is ‘empty ship to empty ship’ and that various legs or segments form part of the whole movement. Having regard to industry comments, the definition of voyage adopted is a

movement of a vessel from one port to another port where the movement constitutes coastal trading within the meaning of that term in section 7. For example:

- a movement of cargo or passengers from Newcastle to Melbourne is one voyage [as per paragraph 7(1)(a)];
- a movement of cargo or passengers from Newcastle to Sydney then to Melbourne is one voyage [as per paragraph 7(1)(b)]; however, if there is a declaration under subsection 12(2), the movement from Newcastle to Sydney constitutes one voyage and the movement to Melbourne will be another voyage.

Subclause 6(2) lists the activities *in support of the fishing operations* of a fishing vessel to include:

- (a) the storage and transport of fish taken, caught or captured by the fishing vessel; and
- (b) the provision of food, fuel and other supplies to the fishing vessel while it is engaged in fishing operations; and
- (c) the transport of crew to and from the fishing vessel while it is engaged in fishing operations.

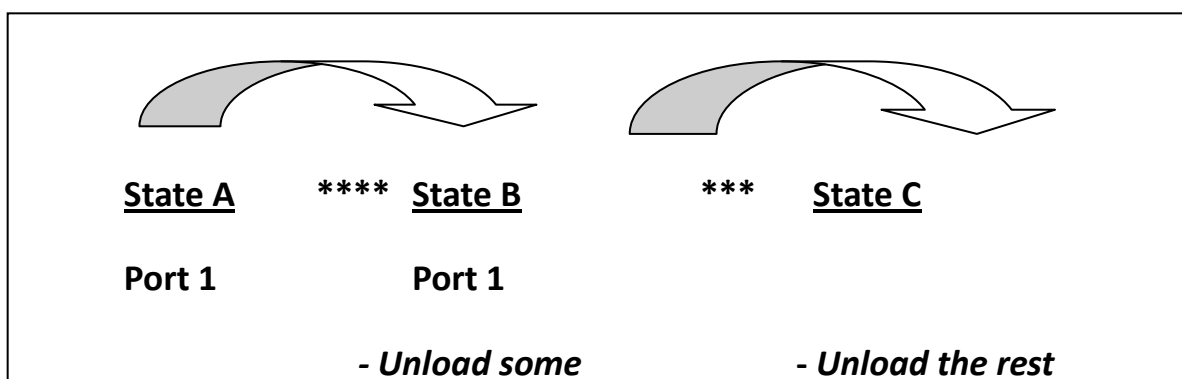
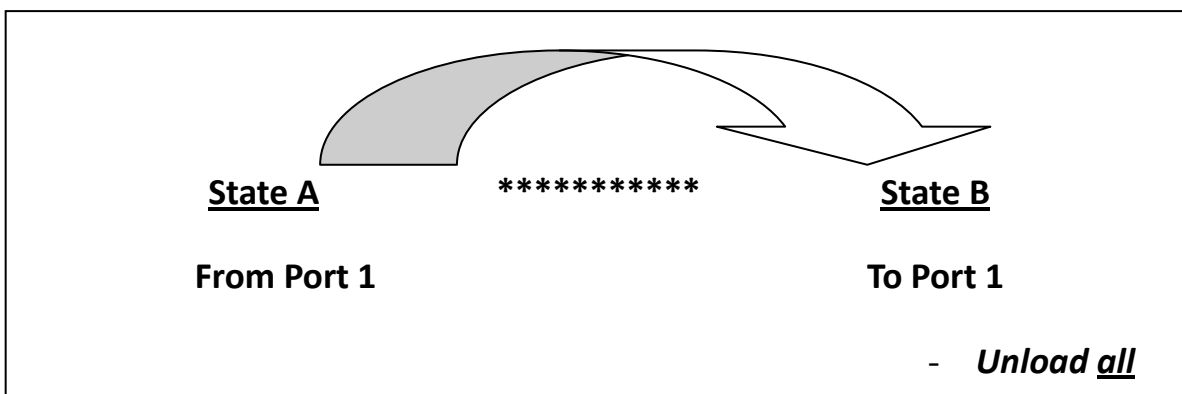
Clause 7 – Meaning of coastal trading

The intention of this Act is that a vessel engaged in coastal trading is required to operate under the appropriate licence issued under the Act.

A vessel is engaging in coastal trading if it operates under any of the following basic scenarios:

- (a) A vessel, for or in connection with a commercial activity, which takes on board passengers or cargo at a port in a State or Territory and carries the passengers or cargo to a port in another State or Territory where some or all of the passengers disembark or some or all of the cargo is unloaded.

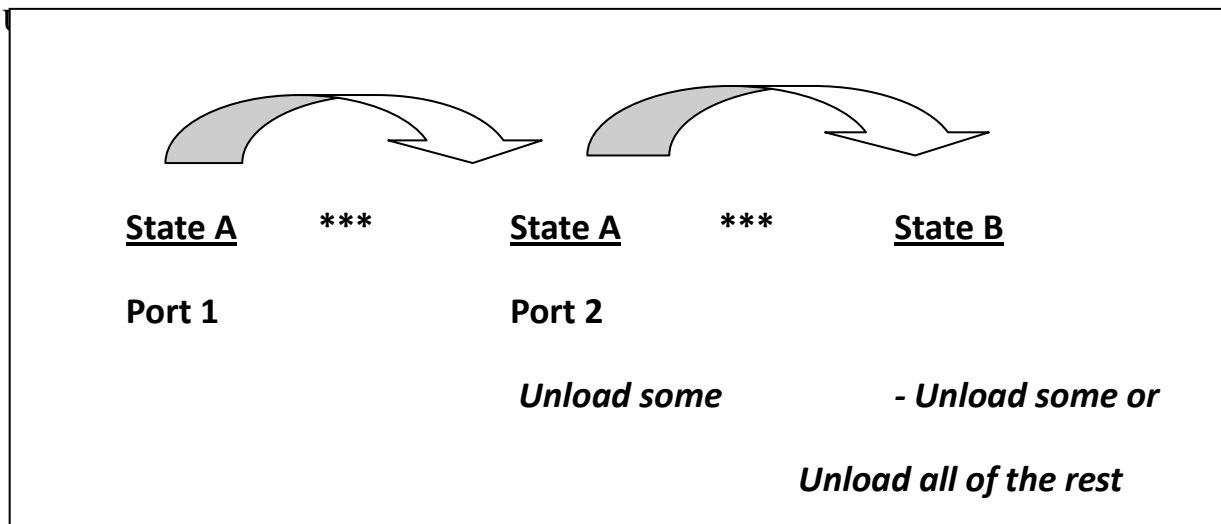
To illustrate:



- (b) A vessel takes on board passengers or cargo at a port in a State or Territory and carries the passengers or cargo to a port in the same State or Territory where some passengers disembark or some cargo is unloaded and carries passengers or cargo to a port in another State or Territory where some or all of the passengers disembark or some or all of the cargo is unloaded.

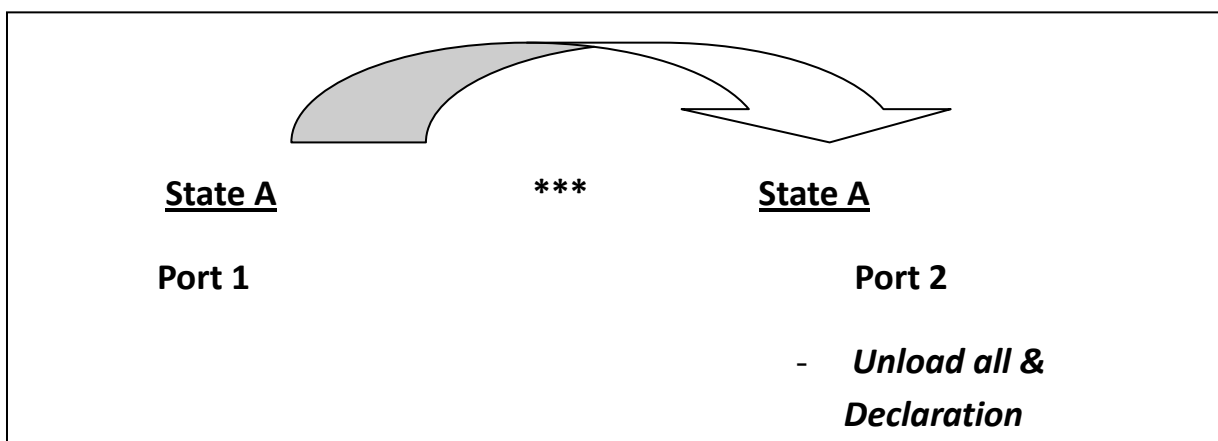
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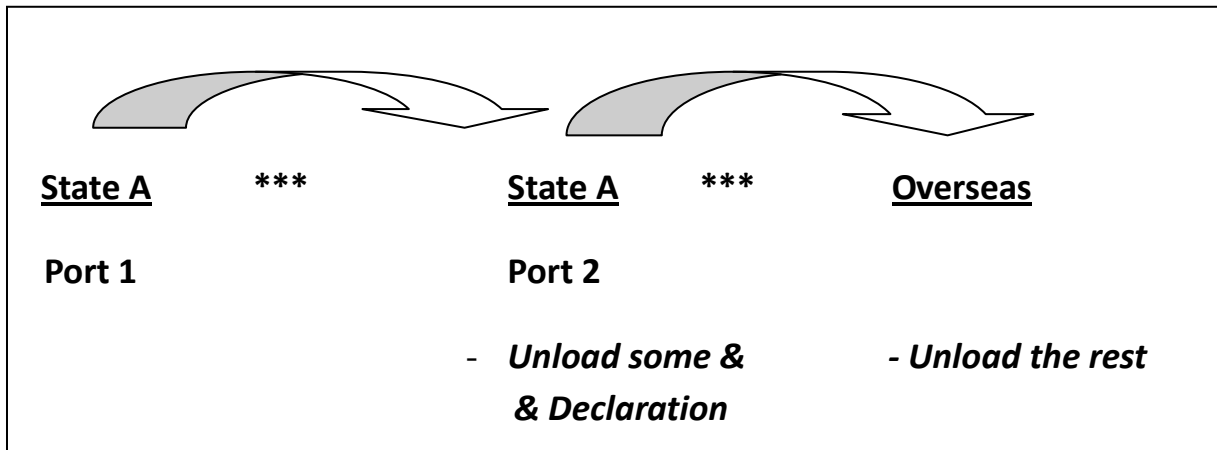
A vessel that loaded cargo from port 1 in State A unloads a part of that same cargo (loaded in port 1 of State A) in port 2 of State A and the vessel continues to transport part or all of the remaining cargo (loaded originally in port 1 of State A) to a port in another State is coastal trading under paragraph 7 (1)(b).



- (c) A vessel takes on board passengers or cargo at a port in a State or Territory and carries the passengers or cargo to a port in the same State or Territory where some or all of the passengers disembark or some or all of the cargo is unloaded and a declaration under subsection 12(2) is in force.

To illustrate:





Paragraph (c) contemplates a vessel on an intra-state voyage, where neither paragraph (a) nor paragraph (b) above applies, and a declaration under subsection 12 is in force.

Further example:

All of the cargo loaded in port 1 of State A is unloaded in port 2 of State A, and the same vessel loads a new cargo in port 2 of State A and transports the cargo taken from port 2 of State A in State B.

The voyage from port 1 to port 2 of State A is not coastal trading unless there is a declaration in force under section 12 of the Act applying to the vessel.

The voyage from port 2 of State A to another port in a port in State B is coastal trading for purposes of this Act under paragraph 7(1)(a).

Subsection 7(2) provides for exclusions from the definition of ‘coastal trading’. The following situations are not ‘coastal trading’ for purposes of the Act:

- (a) A vessel which carries passengers who hold through tickets to and from a port outside Australia. If such vessel disembarks the passengers at a port in Australia, the vessel is not exempt from the meaning of ‘coastal trading’ unless such disembarkation at a port in Australia is for transit purposes only.
- (b) A vessel which carries cargo that is consigned on a through bill of lading to or from a port outside Australia. If such vessel unloads the cargo at a port in Australia for transshipment purposes only, the vessel is not engaging in coastal trading (for purposes of this Act) if the cargo that is transhipped has an international bill of lading.

To illustrate:

A vessel (carrying cargo with an international bill of lading) which unloads the cargo at a port in Australia for transshipment and the cargo (with an international bill of lading) is transferred to another vessel which carries the cargo (with an international bill of lading) to its final destination is not engaging in coastal trading for purposes of the Act.

The second vessel which carries the cargo (with an international bill of lading) to its final destination is likewise not engaging in coastal trading for purposes of the Act.

This situation contemplates a vessel carrying cargo with international bill of lading only and does not fall under any of the situations under subsection 7(1).

(c) The regulations may prescribe other exclusions from the definition of coastal trading.

Part 3 – Provisions relating to the application of this Act

Clause 8 – Extension to Territories

This Act applies to all external Territories.

Clause 9 – Act to bind the Crown

The Act binds the Crown in each of its capacities.

Clause 10 – Act does not apply to certain vessels

This clause lists the kinds of vessels to which the Act does not apply and they are:

- (a) A vessel belonging to or operated by the Australian Defence Force or the naval, military or air forces of a foreign country.
- (b) A Commonwealth vessel used wholly or primarily for non-commercial activities. ‘Non-commercial activities’ of a Commonwealth vessel include marine or ocean research activities so long as the Commonwealth vessel is not undertaking the research as part of a commercial activity.
- (c) A fishing vessel or fishing fleet support vessel.
- (d) An inland waterways vessel.
- (e) An offshore industry vessel.
- (f) A recreational vessel.
- (g) A salvage boat
- (h) A tugboat. A tugboat, by its very nature, pulls another vessel or craft. The vessel or craft being pulled by a tugboat is not exempt unless it is of a kind listed in section 10.

Clause 11 – Minister may exempt certain vessels or persons

The Minister may issue a direction which exempts from the Act a vessel or class of vessels or a person or class of persons.

This provision maintains the power to exempt under section 421 of the *Navigation Act 1912*.

The Ministerial direction (to exempt) is a legislative instrument which means it will have to be registered in the Federal Register of Legislative Instruments (FRLI) and would be subject to Parliamentary scrutiny through the disallowance process.

An exemption may be confined to one or both of the following:

- (a) one or more specified periods;
- (b) one or more specified voyages.

The Minister may attach a condition or conditions to an exemption. A breach of such a condition may be subject to a civil penalty under section 84 and 85.

The Ministerial exemption should not breach Australia's obligation under an international agreement. Furthermore, such exemption should not be given if it will jeopardise the safety of a vessel or persons on board a vessel.

The power of the Minister to issue a direction to exempt certain vessels or persons will not be capable of being delegated to other officers.

Clause 12 – Application to vessels on intrastate voyages

The Minister may issue a declaration applying the Act to a vessel operating on intra-state voyages. The owner of the vessel may apply for such Ministerial declaration. This provision maintains the ability of vessel owners to 'opt-in' to the coastal trading regime under section 8AA of the *Navigation Act 1912*.

The declaration will be in force until its expiry date or upon revocation.

If the owner of the vessel requests revocation of the declaration, the Minister must revoke it. The Minister on his/her own may revoke a declaration if the Minister is satisfied that:

- (a) the vessel no longer exists or has been lost; or
- (b) the name or any other details of the vessel have been changed since the making of the declaration; or
- (c) the vessel no longer operates in Australia.

A declaration under section 12 is not a legislative instrument within the meaning of section 5 of the *Legislative Instruments Act 2003*.

Part 4 – Licences

Division 1 – General Licences

Subdivision A – Application for, and grant of, general licences

Clause 13 – Application for general licence

The owner, charterer, master or agent of the vessel (or a person prescribed by the regulations) may apply to the Minister for a general licence, including renewal of a general licence, to engage in coastal trading using a vessel that is registered in the Australian General Shipping Register.

An application must be:

- accompanied by evidence of registration under the Australian General Shipping Register (such evidence may include the vessel’s International Maritime Organisation (IMO) identification number);
- accompanied by a statement that the vessel will be crewed by Australian citizens, permanent residents or persons with appropriate work visas;
- accompanied by the fee prescribed by the regulations or evidence of payment of such fee; and
- accompanied by any information required by the regulations.

For an application to be a valid and complete application, it must be one that has complied with all of the above requirements. The decision-making period will not start to run unless the application is complete.

A general licence only applies to one vessel and each general licence requires an application. A person who wants a general licence for two or more vessels should lodge a separate application for each vessel.

An application for renewal of a general licence is the same process as a first-time application for a general licence.

Clause 14 – Application may be varied or withdrawn

At any time before an application is decided by the Minister, the applicant may vary or withdraw the application. The variation or withdrawal of the application must be in writing.

If an application is withdrawn, any application fee paid is not refundable.

Clause 15 – Deciding applications

The Minister may grant or refuse the application. In deciding an application, the Minister may have regard to the following:

- (a) whether the applicant has previously held a licence that was cancelled (the term ‘licence’ refers to a general licence, temporary licence or emergency licence issued

- under this Act);
- (b) whether the applicant has been issued an infringement notice under this Act;
- (c) the object of this Act;
- (d) any other matters the Minister thinks relevant. For purposes of this paragraph, the Minister may consider whether the applicant has held a licence or a permit issued under Part VI of the *Navigation Act 1912*.

The Minister has 10 business days to decide an application after the application is made. If the application was varied, under section 14, the Minister has 10 business days to decide the application from the date the Minister received the written variation.

Clause 16 – Grant of general licence

If the Minister decides to grant the application, he or she must issue the general licence for a period not more than five years. Under current arrangements, licences are only granted for one year. Introduction of a five year licence period, reinforces the policy intent of providing greater certainty for industry and to encourage long term investment planning.

If an application for a general licence is granted, the Minister must cause the following information to be published on the Department's website:

- (a) general licence number;
- (b) holder of the licence (the person to whom the licence is issued);
- (c) holder's business name and business address;
- (d) the vessel to which the licence relates;
- (e) period of the licence;
- (f) any other information prescribed by the regulations.

Clause 17 – Application taken to be granted in certain circumstances

If the Minister has not made a decision within the 10-business day period, the licence is deemed to have been granted. In this situation, the Minister is taken to have determined that the licence is valid for five years.

Clause 18 – Issue of general licence

If the Minister grants the licence, or is deemed to have granted the licence, he or she must, as soon as practicable, give the applicant a general licence.

The licence must specify the following:

- (a) general licence number
- (b) holder of the licence (the person to whom the licence is issued)
- (c) holder's business name and business address
- (d) the vessel to which the licence relates
- (e) that the licence is subject to the conditions specified in section 21 (referring to section 21, without necessarily listing the conditions in the licence would be sufficient)
- (f) any additional conditions which the Minister may impose pursuant to section 22
- (g) the day the licence commences and the period of validity of the licence
- (h) other matters prescribed by the regulations.

Clause 19 – When general licence is in force

A general licence commences on the day specified in the licence and expires at the end of the period specified in the licence, unless the licence is cancelled or surrendered before that time.

Clause 20 – Refusal of application

If the Minister decides to refuse an application for a general licence, he or she must, as soon as practicable, notify the applicant, in writing of the decision and the reasons for the decision.

Subdivision B – Conditions of general licences

Clause 21 – Conditions imposed on all general licences

A general licence is subject to the following conditions:

- (a) the vessel authorised by the general licence must continue to be registered in the Australian General Shipping Register;
- (b) each seafarer working on the vessel (when it is used to engage in coastal trading) must be an Australian citizen, or hold a permanent visa, or hold a temporary visa with appropriate work rights;
- (c) a copy of the licence must be displayed in a conspicuous place on the vessel (when the vessel is used to engage in coastal trading);
- (d) the holder of the licence must comply with any other condition specified in the regulations.

Clause 22 – Additional conditions may be imposed by Minister

The Minister may, at any time, impose an additional condition on a general licence including after the licence has been granted. The Minister must notify in writing the holder of the general licence of any condition imposed.

The Minister, may at anytime, vary or remove such condition. The Minister must notify, in writing, the holder of the general licence of any variation or removal of such condition.

The Minister cannot impose a condition that is inconsistent with the conditions imposed by the Act under section 21.

Clause 23 – Breaching condition of general licence

A holder of a general licence contravenes section 23 if the holder breaches a condition imposed on the licence under section 21 or 22. The civil penalty for such breach would be 50 penalty units (for an individual) or 250 penalty units (for a corporation).

A breach of condition of a general licence may also lead to cancellation of the licence.

Subdivision C – Renewal, cancellation and surrender of general licences

Clause 24 – Renewal of general licence

The holder of a general licence may apply, before it expires, for a renewal of the general licence.

The process for deciding an application for renewal of the licence is the same as the application for a licence.

While an application for renewal of the licence is pending, the general licence continues to be valid and in force. This way, the movement of goods will not be impeded by reason only that the administrative process for renewal of the general licence has not been completed.

A general licence may be renewed more than once.

Clause 25 – Cancellation of general licence

A general licence cannot be cancelled unless the Minister has given a show cause notice.

If the Minister believes on reasonable grounds that a condition of a general licence has been contravened, the Minister may give a show cause notice to the holder of the licence.

The show cause notice must state the grounds on which the notice is given. It must also invite the holder of the licence to give the Minister, within 10 business days after the day the notice is given, a written statement why the licence should not be cancelled.

After considering the written response from the holder of the licence, the Minister is satisfied that a condition of the licence has been contravened, the Minister may cancel the licence.

A decision to cancel a general licence may be the subject of an application for review by the Administrative Appeals Tribunal.

If the Minister decides to cancel the licence, he or she must give a written notice to the holder of the licence setting out the following:

- (a) the day the cancellation takes effect;
- (b) the reasons for the cancellation; and
- (c) that fact that if the licence is not returned to the Minister within 10 business days after the day the cancellation takes effect, the holder is in breach of the Act. The civil penalty for such breach would be 50 penalty units (for an individual) or 250 penalty units (for a corporation).

A show cause notice issued by the Minister under subsection 25(1) is not a legislative instrument within the meaning of section 5 of the *Legislative Instruments Act 2003*.

Clause 26 – Surrender of general licence

The holder of a general licence may surrender at any time the licence by returning the licence

to the Minister and notifying the Minister in writing.

The general licence ceases to have force and effect on the day the notice (to surrender the licence) is received by the Minister or at a later date specified in the notice of surrender.

Subdivision D – Miscellaneous

Clause 27 – Reporting requirements for general licence

A holder of a general licence must give to the Department, no later than 30 business days after the end of each financial year during the period of validity of the licence, a report containing the following information:

- (a) if passengers were carried during the year:
 - the number of passengers carried; and
 - ports of loading and disembarkation of passengers

- (b) if cargo was carried during the year:
 - the kinds and volume of cargo carried; and
 - ports of loading and unloading of the cargo.

A breach of the reporting requirement may be subject to a civil penalty of 50 penalty units (for an individual) or 250 penalty units (for a corporation).

The Minister must cause the publication on the Department’s website a summary of the information contained in the report.

Division 2 – Temporary licences

Subdivision A – Application for, and grant of, temporary licences

As stated in clause 3, a temporary licence provides access to engage in coastal trading in Australian waters which is limited in time and is also limited to the voyages authorised by the licence.

A foreign-registered vessel or a vessel registered in the Australian International Shipping Register will need a temporary licence to engage in coastal trading in Australian waters.

A temporary licence is limited for a period of 12 months although it may be renewed (and the number of times it may be renewed is not limited depending on the satisfaction of criteria provided in the Act).

Unlike a general licence which enables a vessel to have unrestricted access to coastal trading, a temporary licence is restricted to the matters authorised in the licence—for example, the number of voyages, kinds and volume of cargo or number of passengers, ports of loading and disembarkation etc.

The application process for a temporary licence was the most contentious issue raised during stakeholder consultations on the Bill with a diverse range of views expressed by industry reflecting the range of businesses and industries operating and using shipping services. A number of models for the application and granting of a temporary licence were discussed

with industry. The provisions of the Bill are designed to balance the needs and priorities of these businesses and industries whilst providing ample opportunity for general licence holders to nominate to carry passengers or cargo that would otherwise be carried by either foreign-registered vessels or vessels registered on the Australian International Shipping Register.

The Bill provides that a temporary licence covers a period of 12 months. However, only those voyages where the required information is known (including expected loading dates, loading and discharge ports and cargo type and volumes) would be authorised.

An application for a temporary licence is subject to a minimum of five voyages. One exposure draft of the Bill released for public consultation proposed that the minimum number of voyages be set at ten voyages. There was broad consensus from industry that many operators could not provide sufficient detail for ten voyages and that five voyages was more practical.

The Bill provides that a general licence holder can nominate to carry passengers or cargo as stated in the temporary licence application (or a variation) and the minimum number of voyages underpins this process.

Clause 28 – Application for temporary licence

The owner, charterer, shipper, master or agent of the vessel may apply to the Minister for a temporary licence for one or more vessels to be used to engage in coastal trading.

The application should cover a period of 12 months. The application will have to be for a minimum of five voyages over a 12-month period.

The Act requires that the application should specify:

- the number of voyages which must be at least five;
- the expected loading dates;
- the number of passengers to be carried (if any);
- the kinds of and volume of cargo expected to be carried (if any);
- the type of the vessel;
- the size or capacity of the vessel (if known);
- the ports of loading and unloading of cargo (in the case of passengers, the ports of disembarkation);
- such other information prescribed by the regulations.

The temporary licence will authorise only those known voyages specified over a 12-month period. When new voyages are anticipated to be undertaken during the life of the temporary licence, the licence holder should seek a variation of the temporary licence to obtain authorisation for the new voyages. However, any application to increase the number of voyages must have a minimum of five voyages.

During industry consultations, it was proposed that an applicant for a temporary licence should be allowed to nominate multiple ports of discharge (referred to as a port range). The law will allow this and so an application may specify a range of ports where a particular kind of cargo is expected to be discharged.

There is no limit to the number of times a temporary licence may be varied. A holder of a general licence will be given the opportunity to nominate (or give a notice in response) for every application to vary a temporary licence.

A temporary licence may be applied for only in relation to a vessel that is registered under the Australian International Shipping Register or under a law of a foreign country. This means that a vessel registered under the Australian General Shipping Register cannot operate under a temporary licence. However, such vessel is open to operate under a general licence or an emergency licence.

Unless all requirements of section 28 are complied with, an application is not considered complete and therefore the assessment period will not commence.

An application fee prescribed in the regulations must be paid. A person whose application for temporary licence was refused may re-apply even if the 12-month period has not lapsed.

Clause 29 – Application may be withdrawn

At any time before the Minister decides an application, the applicant may withdraw the application by notifying the Minister in writing.

If the application is withdrawn, any application fee paid is not refundable.

Clause 30 – Publication and notification of application

Within two business days after the Minister receives an application under section 28, a copy of the application will be published on the Department's website. However, any information which the Minister considers commercial-in confidence or consists of personal details of an individual will not be published.

Also, within the same two-business-day period, the holder of a general licence and a body or organisation directly affected will be notified of the temporary licence application.

Clause 31 – Holder of general licence may give notice in response

Within two business days after the day an application is published, a holder of a general licence may give the Minister a written notice (a 'notice in response') stating that:

- all of the passengers specified in the application could be carried under the holder's general licence; or
- all of a particular kind of cargo could be carried under the holder's general licence; or
- all of the passengers and all of a particular kind of cargo could be carried under the holder's general licence; or
- all of the passengers and all of the cargo could be carried under the holder's general licence; or
- one or more voyages specified in the application could be undertaken under the holder's general licence.

It is not required that a holder of a general licence is able to carry all of the cargo specified in the application. A holder of a general licence may nominate to carry only one or more of the voyages for a particular kind of cargo specified in the application.

Clause 32 – Process if notice in response received

If the Minister receives one or more notices in response, the Minister must, as soon as practicable, give a copy of each notice in response to the temporary licence applicant.

Within two business days after the applicant receives a copy of each notice in response, the applicant must undertake negotiations with each general licence holder who gave a notice in response. Such negotiations must have regard to the requirements of the shipper of the cargo. Also within the two-business-day period, the temporary licence applicant must notify the Minister of the outcome of the negotiations.

Clause 33 – Comments by third parties

A third party (whether an individual, corporation, body or organisation) who would be directly affected if the application were granted, may give the Minister written comments on the temporary licence application. These comments should be given within two business days after the application is published on the Department's website.

Clause 34 – Minister to decide applications

The Minister decides an application by either granting or refusing to grant the application.

Matters the Minister may have regard to

If the Minister does not receive a notice in response in relation to the application, he or she may have regard to the following:

- whether the applicant has previously held, or applied for, a temporary licence;
- if the applicant has previously held a licence that was cancelled (be it a general licence or temporary licence or emergency licence);
- whether the applicant has been issued with an infringement notice;
- any written comments received from third parties;
- any report given by the applicant under section 62;
- the object of the Act;
- any other matters the Minister thinks relevant.

It is open for the Minister to refuse an application if the Minister has information indicating the applicant has inappropriately used a licence previously held.

If the applicant has previously held a licence or permit (issued under the old law) which has been cancelled, this may also be considered by the Minister as it would be a matter that the Minister may consider relevant to the application.

If the Minister receives one or more notices in response in relation to an application, in addition to the matters the Minister may have regard to as listed above; the Minister must have regard to the following:

- the outcome of the negotiations;
- whether, and to what extent, the vessel authorised under a general licence is equipped

- to carry the passengers or cargo;
- whether those passengers or cargo can be carried in a timely manner;
- the reasonable requirements of the shipper of the cargo if the application relates to the carriage of cargo.

The phrase ‘whether, and to what extent, the vessel authorised under a general licence is equipped to carry the passengers or cargo’ is intended to allow a holder of a general licence to be able to nominate to undertake a specific voyage (or voyages). The Act also allows for a holder of general licence to nominate to carry a particular kind of cargo in all the movements required for such cargo. It is not necessary for the holder of a general licence to be able to nominate for all the types of cargo or all voyages specified in the application.

To illustrate:

A temporary licence application may contain the following information:

Bulk wheat 100 tonnes	Expected loading date: 15 April 2013	Port of loading: Townsville	Ports of discharge: Newcastle, Melbourne, Adelaide	Type of vessel Bulk carrier Capacity
Sugar	Expected loading date: 25 April 2013	Port of loading: Townsville	Ports of discharge: Newcastle, Melbourne, Hobart	Type of vessel Bulk carrier Capacity
Animal feed	Expected loading date: 15 May 2013	Ports of loading: Brisbane Townsville	Ports of discharge: Sydney Newcastle, Melbourne,	Type of vessel Bulk carrier Capacity
Bulk wheat 100 tonnes	Expected loading date: 20 May 2013	Port of loading: Cairns	Ports of discharge: Melbourne Hobart	Type of vessel Bulk carrier Capacity
Bulk wheat 100 tonnes	Expected loading date: 20 June 2013	Port of loading: Cairns	Ports of discharge: Melbourne Hobart	Type of vessel Bulk carrier Capacity

A holder of a general licence may nominate to:

- carry all of the various kinds of cargo specified in the application (bulk wheat, sugar, animal feed, bulk wheat) allowing for the tolerances provided in this Act; or
- carry all the bulk wheat in April and June; or
- carry the bulk wheat in April but not in May; or
- carry the sugar in April from Townsville to Hobart; carry the wheat in June from Cairns to Hobart and so on.

Timeframe for making a decision

The Minister must decide an application for a temporary licence within 15 business days. The Act, however, allows for a shorter timeframe in case of variation of an existing temporary licence.

For purposes of counting the statutory decision-making period, the following days are not to be counted as ‘business days’:

- on or after the day the Minister receives a notice in response in respect of the application;
- on or before the day the applicant notifies the Minister under paragraph 32(2)(b) or if the applicant fails to notify the Minister, on or before the last day of the period within which the applicant was required to notify the Minister.

Clause 35 – Grant of temporary licence

If the Minister decides to grant a temporary licence, the Minister must also determine the number of voyages authorised.

If the Minister grants a temporary licence, the following information must be published on the Department’s website:

- (a) licence number
- (b) day the licence commences
- (c) number of voyages authorised by the licence
- (d) dates of loading
- (e) number of passengers (if any) authorised to be carried under the licence
- (f) kinds and volume of cargo (if any) authorised to be carried under the licence
- (g) ports at which passengers or cargo will be taken on board
- (h) ports of disembarkation or unloading
- (i) any other information prescribed by the regulations.

Clause 36 – Application taken to be granted in certain circumstances

If the Minister did not decide an application within the statutory timeframe required under section 34, then at the end of the last day of that period, the application is taken to be granted authorising the matters specified in the application.

Clause 37 – Issue of temporary licence

If the Minister decides to grant an application, the Minister must, as soon as practicable, give the applicant a temporary licence. If an application is deemed granted, the Minister must also, as soon as practicable, give the applicant a temporary licence.

The temporary licence must specify the following:

- (a) licence number
- (b) holder of the licence (the person to whom the licence is issued)
- (c) holder’s business name and business address
- (d) number of voyages authorised by the licence

- (e) dates of loading
- (f) that the loading dates are subject to acceptable tolerance limits of 5 days before and 5 days after the date of loading
- (g) number of passengers authorised to be carried (if relevant to a vessel)
- (h) if paragraph (g) is applicable, a tolerance of plus or minus 20% of the number of passengers authorised
- (i) kinds and volume of cargo authorised to be carried (if relevant to a vessel)
- (j) if paragraph (i) is applicable, a tolerance of plus or minus 20% of the volume of cargo authorised
- (k) ports at which passengers or cargo are authorised to be taken on board
- (l) ports at which passengers are authorised to disembark or the cargo is authorised to be unloaded
- (m) that the licence is subject to conditions under section 40 (referring to section 40, without necessarily listing the conditions in the licence would be sufficient)
- (n) any additional conditions imposed on the licence under section 41
- (o) the date of commencement of the licence
- (p) any other matters prescribed by the regulations.

If the Minister grants an application for temporary licence, the Minister, must, as soon as practicable, notify in writing, each holder of a general licence who gave a notice in response in relation to the application.

Clause 38 – When temporary licence is in force

A temporary licence starts to have force and effect on the day specified in the licence and expires at the end of the period specified in the licence unless it is cancelled or surrendered before its expiry date. The decision-maker determines the number of voyages and other matters authorised by the licence. The temporary licence is valid for 12 months (as provided under section 35).

Clause 39 – Refusal of application

If the Minister decides to refuse an application, the Minister must, as soon as practicable, notify the applicant, in writing, of the decision and reasons for the refusal.

The decision will be published on the Department's website.

Subdivision B – Conditions of temporary licences

Clause 40 – Conditions imposed on all temporary licences

A temporary licence is subject to the following conditions:

- (a) any vessel used to undertake a voyage under the licence must be registered either in the Australian International Shipping Register or under a law of a foreign country;
- (b) every time a vessel operates under the licence, a copy of the licence must be displayed on the vessel in a conspicuous place accessible to all persons on board;
- (c) the holder of the licence must comply with what is authorised by the licence, as specified in the licence, pursuant to section 37;
- (d) the holder of the licence must comply with the notification requirements under section 61;

- (e) the holder of the licence must comply with the reporting requirements under section 62;
- (f) the holder of the licence must comply with any other condition prescribed by the regulations.

Clause 41 – Additional conditions may be imposed by Minister

The Minister may, at any time, impose an additional condition on a temporary licence. Such condition must not be inconsistent with a condition imposed under section 40.

The Minister may, at any time, vary or cancel such condition. Any additional condition, variation or cancellation of such condition, must be in writing.

Clause 42 – Breaching condition of temporary licence

If a holder of a temporary licence breaches any condition imposed under section 40 or any additional condition imposed by the Minister pursuant to section 41, such person may be liable to a civil penalty. If the person is an individual, the maximum civil penalty is 50 penalty units and if it is a body corporate, 250 penalty units.

A breach of condition of a temporary licence may also lead to cancellation of the licence.

Subdivision C – Variation, cancellation and surrender of temporary licences

The variation process was the subject of substantial industry comment. The Bill seeks to maintain the policy integrity of the reforms, while ensuring there is sufficient flexibility in the system to meet the genuine operating requirements of many in the industry.

Accordingly, two types of variation have been provided for in relation to temporary licence:

- variation of matters already authorised by the temporary licence which is in force—for example, a temporary licence is authorised to undertake 8 voyages, 5 voyages have been undertaken but there will be changes in the port routes for the last two;
- variation of a temporary licence in force for matters not yet authorised—in the example above, if the holder of the temporary licence needs to increase the number of voyages, he or she applies for a variation for matters not yet authorised.

The assessment period for the first type of variation is two business days while for the second type, it is seven business days.

There is no limit on the number of variations made to a temporary licence. However, a variation cannot be made to extend the period of validity of the licence.

Clause 43 – Application to vary matters authorised by temporary licence

A holder of a temporary licence may apply to vary matters authorised by a temporary licence already in force.

Clause 44 – Application may be withdrawn

An application for variation of a temporary licence may be withdrawn before the Minister makes a decision by informing the Minister in writing.

Any application fee paid is non-refundable.

Clause 45 – Consultation on proposed variation

Upon receipt of an application for variation of matters already authorised under a temporary licence, the Minister must notify general licence holders and a body or organisation directly affected should the granting of such temporary licence occur.

A general licence holder who wishes to nominate to undertake the voyage proposed by the temporary licence holder must give a notice in response within 24 hours from the time he or she was notified of the application.

Clause 46 – Minister to decide application

The Minister in granting or refusing a temporary licence application for variation will consider whether the applicant has previously held, or applied for a temporary licence or variation of a temporary licence; including whether the applicant has acted in accordance with licence provisions where a licence has previously been granted. The Minister will also consider whether an infringement notice has been issued to the applicant or whether he or she has held a licence that was cancelled.

The Minister will also consider the object of the Act and any report provided previously by the person. The Minister may also consider any other matters which he or she thinks relevant.

In deciding the application for variation of a temporary licence, the Minister must have regard to a nomination by a holder of a general licence.

The Minister has two business days to decide on the application for variation, from the day the application was made.

Clause 47 – Grant of variation to temporary licence

The details of the variation to the temporary licence will be published on the Department's website.

Clause 48 – Issue of varied temporary licence

The Minister must issue a varied temporary licence detailing the licence number, the holder of the licence, the business name and address, the number of voyages authorised, the loading dates (within the tolerance limits), the number of passengers, the kinds and volume of cargo and ports the passengers and / or cargo are authorised to be taken on board and disembarked/unloaded.

The temporary licence holder is obliged to follow the conditions imposed (or any further conditions imposed by the Minister at any time) on the licence variation. Such conditions include that the vessel be registered in the Australian International Shipping Register or under a law of a foreign country; a copy of the licence be displayed on the vessel; comply with what is authorised in the licence; provide a voyage notification at least 2 business days before loading and provide a report to the Department 10 business days following completion of each voyage authorised.

The Minister is also obliged to inform the general licence holder, in circumstances where a notice in response is received, of the decision.

Clause 49 – Refusal of application

The Minister is obliged to inform in writing the applicant for variation of a temporary licence if the application is refused and the reasons for the refusal.

Subdivision D – Variation of temporary licences to include new matters

Clause 50 – Application of Subdivision

A variation for a temporary licence may be received in regard to new voyages by the temporary licence holder that have not been previously advised to the Department.

Clause 51 – Application to vary temporary licence

A temporary licence holder may seek authorisation for new voyages under a temporary licence through a variation to the licence.

The Act requires that the application should specify:

- the number of voyages which must be at least five;
- the expected loading dates;
- the number of passengers to be carried (if any);
- the kinds of and volume of cargo expected to be carried (if any);
- the type of the vessel;
- the size or capacity of the vessel (if known);
- the ports of loading and unloading of cargo (in the case of passengers, the ports of disembarkation);
- such other information prescribed by the regulations.

Clause 52 Application may be withdrawn

An application for variation of a temporary licence may be withdrawn before the Minister makes a decision by the applicant informing the Minister in writing that they wish to withdraw the application. Any application fee paid is non-refundable.

Clause 53 – Process for deciding application

The same process that applies to an application for temporary licence will apply for a variation of temporary licence.

Clause 54 – Time for deciding application

If a holder of a temporary licence applies to vary an existing temporary licence for new matters, the Minister must decide the application for variation within seven business days after the application is made.

For purposes of counting the statutory decision-making period, the following days are not to be counted as ‘business days’:

- on or after the day the Minister receives a notice in response in respect of the application;
- on or before the day the applicant notifies the Minister under paragraph 32(2)(b) or if the applicant fails to notify the Minister, on or before the last day of the period within which the applicant was required to notify the Minister.

Clause 55 – Grant of variation to temporary licence

If the Minister grants a variation to a temporary licence for new matters, the details of the variation will be published on the Department’s website as provided for under section 55.

Clause 56 – Application taken to be granted in certain circumstances

If the Minister did not decide a variation to a temporary licence for new matters within the statutory timeframe required under section 54, then at the end of the last day of that period, the temporary licence is taken to be varied in accordance with the application.

Clause 57 – Issue of varied temporary licence

If the Minister decides to grant an application for variance of a temporary licence, the Minister must, as soon as practicable, give the applicant a varied temporary licence.

The varied temporary licence must specify the following:

- licence number
- holder of the licence (the person to whom the licence is issued)
- holder’s business name and business address
- number of voyages authorised by the licence
- dates those voyages will be undertaken
- number of passengers authorised to be carried (if relevant to a vessel)
- kinds and volume of cargo authorised to be carried (if relevant to a vessel)
- ports at which passengers or cargo are authorised to be taken on board
- ports at which passengers are authorised to disembark or the cargo is authorised to be unloaded
- that the licence is subject to conditions under section 40 (referring to section 40, without necessarily listing the conditions in the licence would be sufficient)
- any additional conditions imposed on the licence under section 41
- the date of commencement of the licence and period of validity of the licence
- any other matters prescribed by the regulations.

If the Minister grants an application for varied temporary licence, the Minister, must, as soon as practicable, notify in writing, each holder of a general licence who gave a notice in response in relation to the application.

Clause 58 – Refusal of application

If the Minister decides to refuse an application for varied temporary licence, the Minister must, as soon as practicable, notify the applicant, in writing, of the decision and reasons for the refusal.

The decision will be published on the Department’s website.

Subdivision E – Cancellation and surrender of temporary licences

Clause 59 – Cancellation of temporary licence

If the Minister believes on reasonable grounds that a condition of a temporary licence has been contravened, the Minister may give the holder of the licence a ‘show cause notice’. The show cause notice must state the reasons for issuing the notice and invite the holder of the licence to respond in writing within 10 business days after the day the show cause notice is given.

After considering the written response provided by the holder of the licence, the Minister is satisfied that a condition of the licence has been contravened, the Minister may cancel the licence.

A decision to cancel a temporary licence may be appealed for review by the Administrative Appeals Tribunal.

If the Minister decides to cancel the licence, he or she must give a written notice to the holder of the licence setting out the following:

- (a) the day the cancellation takes effect;
- (b) the reasons for the cancellation; and
- (c) that fact that if the licence is not returned to the Minister within 10 business days after the day the cancellation takes effect, the holder is in breach of the Act. The civil penalty for such breach would be 50 penalty units (for an individual) or 250 penalty units (for a corporation).

A show cause notice issued by the Minister under subsection 63(1) is not a legislative instrument within the meaning of section 5 of the *Legislative Instruments Act 2003*.

Clause 60 – Surrender of temporary licence

The holder of a temporary licence may surrender at any time the licence by returning the licence to the Minister and notifying the Minister in writing.

The temporary licence ceases to have force and effect on the day the notice (to surrender the licence) is received by the Minister or at a later date specified in the notice of surrender.

Subdivision F – Miscellaneous

Clause 61 – Voyage notification requirements for temporary licences

At least two business days before the vessel is loaded to undertake a voyage authorised by the licence, the holder of the licence must notify the Minister, in writing, of the following:

- (a) the vessel to be used to undertake the voyage
- (b) number of passengers to be carried during the voyage (if any);
- (c) kinds and volume of cargo to be carried during the voyage (if any);
- (d) ports of loading of the passengers or cargo;
- (e) ports of disembarkation of passengers or unloading of cargo.

This notification requirement is a condition of the temporary licence as provided under section 40.

A contravention of this requirement may be subject to civil penalty. Such contravention may also lead to cancellation of the temporary licence.

Clause 62 – Reporting requirements for temporary licences

Improved transparency through stronger reporting and publishing requirements is a key policy aim of the new regulatory arrangements. This is consistent with the information policy that has been in place since 2008, with the details of single voyage permits issued (including vessel name, cargo type and volumes, dates of sailing and ports of loading and discharge) being published.

The Bill provides that within 10 business days after the completion of each voyage (authorised by the licence), the holder of the temporary licence must give a report to the Department containing the following information:

- (a) name of the vessel used;
- (b) if passengers were carried: the number of passengers carried; dates of voyages; and ports of loading and disembarkation of the passengers;
- (c) if cargo was carried: the kinds and volume of cargo carried, dates of voyages; and ports of loading and unloading; and
- (d) such other information prescribed by the regulations.

Failure to comply with the reporting requirement may be subject to a civil penalty. Such failure to report is a breach of a condition of licence which may also lead to cancellation of the licence.

Clause 63 – Inappropriate use of temporary licence

This clause provides that the Minister may issue a show cause notice to a holder of a temporary licence if, having considered the matters listed in subsection 63(1), in the Minister's view the holder of the temporary licence is circumventing the purpose of the general licence provisions or the object of this Act.

The purpose of the general licence provisions is to ensure that an Australian vessel operating

under a general licence is given the opportunity to maximise its trade. It is expected that the applicant of a temporary licence would disclose truthful and accurate information to enable the holder of a general licence to determine whether it is able to carry the trade and nominate to do the service.

Division 3 – Emergency licences

Subdivision A – Application for, and grant of, emergency licences

Clause 64 – Application for emergency licence

The owner, charterer, master or agent of the vessel or a shipper may apply to the Minister for an emergency licence for one or more vessels to be used to engage in coastal trading.

The application must be in writing and specify the following:

- details of the emergency (the regulations will prescribe the emergency situations for purposes of section 64; examples of an emergency would include flooding, bushfire or other natural disaster);
- number of voyages for which the applicant is seeking the licence (if known)
- number of passengers expected to be carried (if any)
- kinds and volume of cargo expected to be carried (if any) and the shipper of the cargo
- ports of loading of passengers or cargo (if known)
- ports of disembarkation or unloading (if known)
- set out the reasons why the voyages cannot be undertaken by a vessel operating under a general licence
- if the vessel is known at the time of application, evidence of registration in the Australian General Shipping Register, Australian International Shipping Register or in a foreign registry (if a vessel in the Australian General Shipping Register, which does not operate under a general licence, would be used to undertake voyages for genuine emergency situations, it needs to have an emergency licence)
- such other information prescribed by the regulations
- application fee prescribed by the regulations.

Clause 65 – Application may be varied or withdrawn

At any time before the application is decided, the applicant may vary or withdraw the application by written notice to the Minister. If the application is withdrawn, any application fee paid is not refundable.

Clause 66 – Deciding applications

The Minister must either grant or refuse to grant the emergency licence (subject to any conditions the Minister may impose).

In deciding the application, the Minister may have regard to the following:

- (a) whether the applicant has previously held a licence (issued under this Act) that was cancelled;
- (b) whether the applicant has been issued with an infringement notice under this Act;
- (c) any other matters the Minister thinks relevant—for example, whether the applicant

has held a previous licence or permit (issued under the *Navigation Act 1912*) that was cancelled.

Furthermore, the Minister must not grant the emergency licence unless he or she is satisfied that the emergency specified in the application exists.

The Minister has three business days to decide an application:

- after the date the application is made; or
- after the date the notice to vary the application is received by the Minister.

Clause 67 – Grant of emergency licence

If the Minister grants an application, the Minister must also determine the period of validity of the emergency licence which must not be more than 30 days.

When an emergency licence is granted, the following information will be published on the Department's website:

- (a) the holder of the licence (the person to whom the licence is issued)
- (b) the holder's name and business address
- (c) the period of the licence
- (d) any other information prescribed by the regulations.

Clause 68 – Application taken to be granted in certain circumstances

If the Minister has not decided an application by the end of the three-business day decision period (provided under section 66), the application is taken to have been granted. In this case, the emergency licence is deemed granted to be valid for 30 days.

Clause 69 – Issue of emergency licence

If the Minister decides to grant an application for an emergency licence, the Minister must, as soon as practicable, give the applicant an emergency licence.

Even if the Minister has not made an active decision on the application but the application was deemed approved under section 68, the Minister is required to give, as soon as practicable, the applicant an emergency licence.

The emergency licence must specify the following:

- (a) holder of the licence (the person to whom the licence is issued)
- (b) holder's business name and business address
- (c) number of passengers authorised (if any) to be carried under the licence
- (d) kinds and volume of cargo authorised (if any) to be carried under the licence
- (e) ports at which the passengers or cargo are authorised to be taken on board (if known)
- (f) ports at which the passengers are authorised to disembark or the cargo is authorised to be unloaded (if known)
- (g) that the licence is subject to the conditions under section 72
- (h) any additional conditions imposed on the licence under section 73
- (i) the day the licence commences to be in force and the period of validity of the licence
- (j) any other matters prescribed in the regulations.

Clause 70 – When emergency licence is in force

An emergency licence commences operation on the day specified in the licence and expires at the end of the period specified in the licence.

Clause 71 – Refusal of application

If the Minister decides to refuse the application for emergency licence, the Minister, must as soon as practicable, notify the applicant, in writing, of the decision and reasons for the decision.

Subdivision B – Conditions of emergency licences

Clause 72 – Conditions imposed on all emergency licences

An emergency licence is subject to the following conditions:

- (a) any vessel used to undertake a voyage under the licence must be registered in the Australian General Shipping Register, the Australian International Shipping Register or under a law of a foreign country;
- (b) when a vessel undertakes a voyage under the licence, a copy of the licence must be displayed on the vessel in a conspicuous place accessible to all persons on board
- (c) the holder of the licence must comply with what is authorised by the licence
- (d) the holder of the licence must comply with the reporting requirements under section 75
- (e) the holder of the licence must comply with any other condition prescribed by the regulations.

Clause 73 – Additional conditions may be imposed by Minister

The Minister may, at any time, impose an additional condition on the emergency licence, vary or remove such condition by notifying the holder of the licence in writing. Any additional condition imposed, including a variation of the condition, should not be inconsistent with section 72.

Clause 74 – Breaching condition of emergency licence

A person who contravenes a condition imposed by the Act (under section 72) or by the Minister (under section 73) may be subject to a civil penalty of:

- 50 penalty units for an individual; and
- 250 penalty units for a corporation.

Clause 75 – Reporting requirements for emergency licences

The holder of an emergency licence must give to the Department a report containing the following information in respect of each voyage undertaken under the licence:

- (a) name of the vessel used
- (b) if passengers were carried: the number of passengers carried, dates these passengers were carried, and the ports of loading and disembarkation of the passengers;

- (c) if cargo was carried during the voyage: the kinds and volume of cargo carried, dates when the cargo was carried, and the ports of loading and unloading of the cargo;
- (d) such other information prescribed by the regulations.

The report must be given to the Department no later than 10 business days after the end of each voyage undertaken under the licence.

A person who fails to comply with the reporting requirement within the required timeframe may be liable for a civil penalty of:

- 50 penalty units for an individual; and
- 250 penalty units for a corporation.

A copy of each report submitted under subsection 75(1) will be published on the Department's website.

Division 4 – Miscellaneous

Clause 76 – Requests for further information – general and emergency licence applications

Under section 76, the Minister may, by written notice, seek further information in relation to general and emergency licence applications. The assessment period is stopped on the day the Minister seeks further information and resumes on the day after the Minister has notified the applicant that the information provided is satisfactory.

To illustrate:

If the Minister sought information on 3 March (assuming this is a business day), this day is not counted in the statutory assessment period. While the Minister awaits the response from the applicant, the statutory assessment period continues to be suspended. Once the Minister is satisfied with the information received, the Minister will notify the applicant that the information is satisfactory. In this example, if the Minister notified the applicant on 6 March that the information provided is satisfactory, the assessment period will resume on 7 March (assuming this is a business day).

Clause 77 – Requests for further information – temporary licence applications

If the Minister needs further information to decide an application made under section 28, the Minister may, by written notice, ask any or all of the following persons (as the Minister considers appropriate):

- (a) the applicant;
- (b) any holder of a general licence who has given a notice in response in relation to the application;

to provide the information to the Minister.

The Minister may not request further information in relation to an application during the two-business-day period within which a holder of a general licence may give a notice in response. If the two-business-day period has lapsed, and no notice in response is received, the Minister may seek further information if necessary.

Where the Minister receives a notice in response from a holder of a general licence, the Minister may not request for further information in relation to an application while the temporary licence applicant and the person who gave the notice in response are undertaking negotiations under section 32. If the temporary licence applicant failed to notify the Minister of the outcome of the negotiations under subsection 32(2) within the required timeframe, the Minister may seek further information after the lapse of the timeframe.

The Minister must, as soon as practicable after receiving the information, notify the person who provided the information, in writing, whether or not the information provided satisfies the Minister's request.

The assessment period is stopped on the day the Minister seeks further information and resumes on the day after the Minister has notified the applicant that the information provided is satisfactory.

Clause 78 – Basis on which licences granted

A licence granted under this Act is granted on the basis that:

- (a) conditions may be imposed on the licence, varied or removed under section 22, 41 or 73, respectively; and
- (b) the licence may be cancelled under section 25 or 59, as applicable; and
- (c) the licence may be cancelled, revoked, terminated or varied by or under later legislation; and
- (d) no compensation is payable if:
 - (i) conditions are imposed on the licence, varied or removed, as mentioned in paragraph (a); or
 - (ii) the licence is cancelled, revoked, terminated or varied as mentioned in any of the above paragraphs.

This explains that a licence is granted on the basis that conditions may be imposed, varied or removed in accordance with this Act, that the licence may be cancelled under the Act or later legislation, and that no compensation is payable in circumstances of this kind.

Part 5 – Enforcement

Inclusion of enforcement provisions in the Bill, addresses a long standing concern about the lack of regulatory powers to support enforcement and compliance activity.

Part 5 deals with the provisions to enforce the requirements of the Act. The enforcement powers are:

- the power of authorised persons to require a person to give information or produce

- a document or thing;
- the power of the Secretary to apply to the Federal Court or the Federal Magistrates Court for an order against a person alleged to have contravened a civil penalty provision;
- the power of authorised persons to investigate suspected contraventions of the legislation, seek information and require production of documents and to issue infringement notices.

Division 1 – Requiring people to give information and produce documents or things

Subdivision A – Notices to give information or produce documents or things

Clause 79 – Notice to give information or produce document or thing

The Bill enables the Secretary of the Department to appoint ‘authorised persons’ under section 108.

Sections 79 and 80 deal with the powers, functions and obligations of authorised persons. The powers of authorised persons in the Act are framed in accordance with the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*.

Under section 79, an authorised person is empowered to require a person to do any or all of the following:

- (a) give information, orally or in writing, specified in the written notice;
- (b) produce the documents or things specified in the written notice;
- (c) appear before the authorised person specified in the written notice to answer any questions put by the authorised person.

The authorised person may require that information provided under paragraph (a) is verified on oath and that answers provided under paragraph (c) is given on oath. The authorised person is empowered under this section to administer an oath.

Clause 80 – Department may retain documents and things

An authorised person may take possession of, and make copies of, any document or thing, or take extracts from the document which was produced to the authorised person under section 79.

The Department may retain possession of the document or thing for such period as necessary for purposes listed in section 80. While the Department retains possession of the document or thing, it must allow a person entitled to inspect the document or view the thing to do so at the times the person would ordinarily be able to do so, which is generally during business hours.

Subdivision B – Offence and related provisions

Clause 81 – Failure to comply with notice etc.

Section 81 provides for penalties for failure of a person to comply, within the required timeframe, with the requirements specified in a written notice issued by an authorised person under section 79.

A person who commits an offence under section 81 may be liable to the following penalty: 30 penalty units or imprisonment for 6 months, or both.

Clause 82 – Self-incrimination etc.

The right against self-incrimination is not an excuse for a person not to:

- (a) give information; or
- (b) produce a document or thing; or
- (c) answer a question asked by an authorised person

in relation to a notice under section 79.

However, in the case of an individual, none of the following:

- (a) the information or answer given;
- (b) the document or thing produced;
- (c) the giving of the information or the answer, or the producing of the document or thing;
- (d) any information, document or thing obtained as a direct or indirect consequence of giving the information or answer, or producing the document or thing is admissible in evidence against the individual in criminal proceedings (except the proceedings listed in section 82) or in civil proceedings for a contravention of a civil penalty provision.

Division 2 – Civil penalty provisions

Clause 83 – Engaging in coastal trading without licence

If a vessel is used to engage in coastal trading without the relevant licence, the owner, charterer, shipper, master and/ or agent of the vessel may be subject to a civil penalty of up to 300 penalty units (for an individual) or 1,500 penalty units (for a body corporate).

Clause 84 – Breaching condition of exemption – vessels

If a condition is attached to a vessel that is subject to an exemption under section 11 and such condition is breached, the owner and master of the vessel may be subject to civil penalty of up to 300 penalty units (for an individual) or 1,500 penalty units (for a body corporate).

Clause 85 – Breaching condition of exemption – persons

If a person who is subject to an exemption under section 11 breaches a condition of the exemption, that person may be subject to a civil penalty of up to 300 penalty units (for an individual) or 1,500 penalty units (for a body corporate).

Division 3 – Civil penalty proceedings

Subdivision A – Obtaining a civil penalty order

Clause 86 – Civil penalty orders

The civil penalty scheme allows the Secretary of the Department administering the legislation or a delegate to apply to the Federal Court for an order that a person must pay the Commonwealth a pecuniary penalty for contravening a civil penalty provision.

The Secretary must make the application within six years of the alleged contravention.

The civil penalty scheme is designed to encourage compliance with the legislative requirements without resorting to criminal prosecution. Contraventions of a civil penalty provision must be proved on the balance of probabilities in a court. If a court is satisfied that a person has contravened the civil penalty provision, the court may order the person to pay the Commonwealth such amount (pecuniary penalty) as the court determines to be appropriate.

Subsection 86(5) lists the matters which the court may take into account in determining the pecuniary penalty. This list is non-exhaustive.

Clause 87 – Civil enforcement of penalty

A pecuniary penalty, imposed by a court on a person for contravention of a requirement under the Act, is a debt payable to the Commonwealth. The Commonwealth may enforce a civil penalty order as if it were an order made in civil proceedings against a person to recover a debt. The debt arising from the order is taken to be a judgement debt.

Clause 88 – Conduct contravening more than one civil penalty provision

If a person contravenes two or more civil penalty provisions, proceedings may be instituted against that person in relation to one or more of those provisions. A person may be ordered to pay two or more pecuniary penalties – one for each contravention. However, a person may not be ordered to pay more than one pecuniary penalty for the same conduct.

Clause 89 – Multiple contraventions

A court may make a single penalty order against a person for multiple contraventions of a civil penalty provision if proceedings for the contraventions are founded on the same facts, or if the contraventions form, or are part of, a series of contraventions of the same or a similar character.

Clause 90 – Proceedings may be heard together

A court may direct that two or more proceedings relating to a contravention, or proposed contravention, of a civil penalty provisions be heard together.

Clause 91 – Civil evidence and procedure rules to apply

The rules of evidence and procedure for civil matters must be applied by the relevant court when hearing and determining an application for alleged contravention of a civil penalty provision.

Clause 92 – Contravening a civil penalty provision is not an offence

Contravening a civil penalty provision is not an offence. The burden of proof is not ‘proof beyond reasonable doubt’. The civil penalty is not a criminal punishment. It is a monetary penalty to compensate the Commonwealth for committing a breach of the law.

Subdivision B – Miscellaneous

Clause 93 – Ancillary contravention of civil penalty provisions

A person who does any of the following conduct in relation to a civil penalty provision is taken to have contravened the provision:

- (a) attempts to contravene a civil penalty provision;
- (b) aids, abets, counsels or procures a contravention of a civil penalty provision;
- (c) induces (by threats, promises or otherwise) a contravention of a civil penalty provision;
- (d) be in any way, directly or indirectly, knowingly concerned in, or party to, a contravention of a civil penalty provision; or
- (e) conspires with others to effect a contravention of a civil penalty provision.

A note in this section indicates that a person’s state of mind (as provided for in section 112) needs to be proven in proceedings relating to any of the above conduct.

Clause 94 – Continuing contraventions of civil penalty provisions

This is a standard provision in Commonwealth statutes relating to an act or thing being required to be done within a particular period or before a particular time. A person who contravenes a civil penalty provision that requires an act or thing to be done within a particular period or before a particular time commits a separate contravention of that provision in respect of each day during which the contravention occurs.

Clause 95 – Mistake of fact

Mistake of fact is a defence against an allegation of contravention of a civil penalty provision. The person who wishes to rely on mistake of fact as a defence bears the evidential burden of proof in relation to that matter. This means that the person has to adduce or point to evidence that suggests a reasonable possibility that the matter exists or does not exist.

Clause 96 – State of mind

In proceedings for alleged contravention of a civil penalty provision [other than subsection 109(1)], it is necessary to prove the state of mind of the person which may include the person's intention, knowledge, recklessness, or negligence.

This section, however, does not affect the operation of section 95 on mistake of fact.

Clause 97 – Civil penalty provisions contravened by employees, agents or officers

This provision concerns the liability of a body corporate for an action done by an employee, agent or officer of the body corporate acting within the actual or apparent scope of his/ her employment, or within his/ her actual or apparent authority.

Clause 98 – Civil penalty provisions contravened by executive officers

This provision imposes a civil penalty on an executive officer of a corporation who knew that the corporation would contravene a civil penalty provision and the officer, who was in a position to influence the conduct of the corporation, failed to take all reasonable steps to prevent the contravention.

Clause 99 – Establishing whether an executive officer took reasonable steps to prevent the contravention of a civil penalty provision

This section provides for the matters which a court is to have regard to in determining whether an executive officer of a corporation failed to take all reasonable steps to prevent the contravention of a civil penalty provision. The list in subsection 99(1) does not limit the generality of section 98.

Division 4 – Infringement notices

This Division establishes that an authorised person can give infringement notices when he or she has reasonable grounds to believe a person has contravened an 'enforceable provision'. Section 100 provides that a civil penalty provision is enforceable.

The infringement notice scheme is designed to encourage compliance with the legislative requirements, without resorting to civil penalty proceedings in a court. Failure to pay the amount specified in an infringement notice may lead to civil penalty proceedings.

The infringement notice scheme is drafted consistently with the requirements of Chapter 6 of *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Officers*.

Clause 100 – Enforceable provisions

A civil penalty provision is enforceable under this Division. This means that an authorised person may issue an infringement notice for a contravention of a civil penalty provision but not for an offence provision contained in Part 5.

Clause 101 – When an infringement notice may be given

If an authorised person has reasonable grounds to believe that a person has contravened a civil penalty provision, the authorised person may give the person an infringement notice for the alleged contravention.

If the person pays the penalty contained in the infringement notice, the person is immune from a potential court proceeding for the alleged contravention.

The infringement notice must be given within 12 months after the day the contravention is alleged to have taken place. The requirement that a notice must be issued within 12 months of the alleged contravention is a standard provision in most Commonwealth laws containing an infringement notice scheme.

Clause 102 – Matters to be included in an infringement notice

This clause sets out matters that must be included in an infringement notice. These matters include information that will help to identify the particular infringement notice, the relevant authorised officer, the person the infringement notice is issued to, and the circumstances of the alleged infringement. Other information that is required includes details about the recipient's rights in dealing with the infringement notice including how and when to pay, avenues to appeal the notice, and circumstances when the infringement notice might be withdrawn.

It is important to note that payment of the amount stated in the infringement notice is not an admission of guilt. The recipient of the infringement notice may write to the Secretary of the Department to seek withdrawal of the notice. If the recipient of the notice chooses not to pay the amount, proceedings seeking a penalty order may be brought in relation to the contravention.

Clause 103 – Extension of time to pay amount

This clause provides that the recipient of an infringement notice may apply to the Secretary of the relevant Department for an extension to pay an infringement notice penalty, and the Secretary may grant an extension at their discretion as many times as they see fit. If the Secretary does not grant the extension, the recipient will still have at least seven days to pay the penalty, following notice of the Secretary's decision.

A decision made by the Secretary under this clause is not reviewable by an external merits review, as the decision to issue an infringement notice itself is not subject to external merits review, and the Secretary's decision is not a final determination of rights.

Clause 104 – Withdrawal of an infringement notice

This clause provides that a person can make written representations requesting that the Secretary of the relevant Department withdraw an infringement notice.

The Secretary may withdraw an infringement notice at his or her discretion, whether or not the person has made written representations. In making that decision, the Secretary must take into account the applicant's written representations (if any), and may also consider other

factors including the circumstances of the alleged contravention, any prior contraventions and any other matter considered relevant.

The person must be advised in writing of any withdrawal. The withdrawal notice must include details which will identify the person and the infringement notice. The withdrawal notice must state that proceedings may be instituted against the person concerned. If a penalty has already been paid under the notice, it must be refunded to the person concerned.

A decision made by the Secretary under this clause is not reviewable by an external merits review, as the decision to issue an infringement notice itself is not subject to external merits review, and the Secretary's decision is not a final determination of rights.

Clause 105 – Effect of payment of amount

This clause provides that if a person pays the amount of an infringement notice penalty and the infringement notice is not withdrawn, then any liability for the contravention is discharged. No court proceedings may be brought against the person for the same conduct. Payment of the infringement notice penalty is not considered as admission of guilt by the concerned person.

However, if the infringement notice has been withdrawn, court proceedings seeking a civil penalty order may be brought against the concerned person for the alleged contravention.

Clause 106 – Effect of this Division

This clause clarifies the effect of the requirements under Division 4, Part 5 on infringement notices, in order to ensure compliance with Chapter 6 of *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*.

In particular, this clause provides that infringement notices are not required for any alleged contravention of a civil penalty provision, and are issued at the discretion of the authorised officer.

It also provides that the availability of infringement notices does not affect the liability of a person for an alleged contravention of a civil penalty provision, unless the recipient pays the infringement notice penalty (in which case, any liability of the person for the alleged contravention is discharged). In particular, if a person is not given an infringement notice, or if given a notice but he or she does not comply with it or the notice is subsequently withdrawn, the person's liability for an alleged contravention is not affected (which means court proceedings to seek a civil penalty order may be brought against the person).

The availability of infringement notices does not limit a court's discretion in setting penalty amounts if a person is found to have contravened a civil penalty provision.

The Division allows the giving of two or more infringement notices for an alleged contravention of a civil penalty provision.

In addition, no part of the infringement notice scheme limits the number of infringement notices that may be given to a person. An authorised officer may give a person two or more infringement notices in relation to a single contravention.

Part 6 – Miscellaneous

Division 1 – Review of decisions

Clause 107 – Review by the Administrative Appeals Tribunal

This clause provides that an application may be made to the Administrative Appeals Tribunal (AAT) for review of certain decisions under the Act. These decisions are reviewable by the AAT:

- a decision by the Minister refusing to exempt a particular vessel or person under section 11;
- a decision to grant an exemption subject to conditions, which is granted under section 11.

AAT review of the above decisions is consistent with previous arrangements as provided in section 377L of the *Navigation Act 1912*. A decision to grant an exemption, without conditions, is not subject to merits review.

Further, the following decisions may also be subject to AAT review:

- a decision under section 12 refusing to make a declaration in relation to a vessel;
- a decision to cancel a general licence;
- a decision to cancel a temporary licence.

For decisions listed in subsection 107(1), any affected person may seek review by the AAT within the period allowed under the *Administrative Appeals Tribunal Act 1975*.

The following decisions may also be brought to the AAT for merits review by the persons specified in the section:

- a decision to refuse an application for a temporary licence—only the person who made the application may seek review [subsection 107 (2)];
- a decision to refuse an application for a variation of a temporary licence under section 51—only the person who made the application may seek review [subsection 107 (3)];
- a decision to grant a temporary licence – the holder of a general licence who gave a notice in response in relation to the application may seek review [paragraph 107 (4)(a)];
- where no active decision was made and the application was deemed approved under section 36— the holder of a general licence who gave a notice in response in relation to the application may seek review [paragraph 107 (4)(b)];
- a decision to grant a variation of a temporary licence - the holder of a general licence who gave a notice in response in relation to the application may seek review [paragraph 107 (5)(a)];
- where no active decision was made and the application for variation was deemed approved under section 56— the holder of a general licence who gave a notice in

response in relation to the application may seek review [paragraph 107 (5)(b)].

For the matters listed in subsections 107 (2), (3), (4) and (5), the period for making an application is 20 business days after the relevant person was notified of the decision.

Transport of cargo or passengers made under a valid licence pending AAT review

A couple of ‘notes’ are inserted in section 107 to alert readers that a decision under review continues to operate during the review process by the AAT.

The legislative intent is to ensure that any application for review by the AAT does not disrupt the supply chain or the movement of goods and passengers pending decision by the AAT. This means that a valid temporary licence granted by the Minister, but has been made subject of an appeal to the AAT, may continue to be used to enable a vessel to carry cargo (or passengers) while the licence is still under review. In the event such temporary licence was invalidated by the AAT, the AAT decision does not invalidate the movement of the relevant cargo (or passengers) made under the temporary licence while it was still valid.

Division 2 – Appointment of authorised persons etc.

Clause 108 – Appointment of authorised persons

The Secretary of the Department may appoint any of the following as ‘authorised person’:

- (a) a person engaged under the *Public Service Act 1999*; or
- (b) a staff member of the Australian Maritime Safety Authority.

The Secretary has to be satisfied that the person to be appointed as an ‘authorised person’ has suitable qualifications and experience to properly exercise the powers of an authorised person.

The Secretary may issue directions to an authorised person and an authorised person is required to comply with the Secretary’s directions.

The Secretary’s direction (given to an authorised person) is not a legislative instrument within the meaning of section 5 of the *Legislative Instruments Act 2003*.

Clause 109 - Identity cards

The Secretary must issue an identity card to each authorised person appointed. The identity card must be in a form approved by the Secretary and contain a recent photograph of the authorised person.

A person who is no longer an authorised person must return his/ her identity card to the Secretary, as soon as practicable after ceasing to be an authorised person. A person commits an offence for failure to return the relevant identity card. However, no offence is committed if the identity card was lost or destroyed.

An authorised person is required to carry his/her identity card at all times when exercising the powers as an authorised person.

Division 3 – Disclosure of information

Clause 110 – Disclosure of information by the Secretary

This clause allows the Secretary of the Department to share information or document to the Minister or the head of a Commonwealth agency or a Commonwealth authority. This provision implements the Government's policy intention to ensure relevant Commonwealth agencies are able to share information to ensure the requirements of this Act are complied with or being enforced. For example, information may have to be shared with the Australian Customs and Border Protection Service (Customs), the Department Immigration and Citizenship (DIAC), and the Australian Maritime Safety Authority (AMSA). Customs and DIAC, under their respective legislation, are allowed to disclose relevant information to other government agencies. In relation to AMSA, a consequential amendment to the *Australian Maritime Safety Authority Act 1990* will be made to ensure that AMSA would be able to give to the Secretary of the Department information for the purpose of administering or enforcing the requirements of this Act.

Consistent with privacy principles and the right of companies to be protected from unnecessary disclosure of commercial-in-confidence information, this clause also ensures that the disclosure of information by the Secretary is subject to the conditions set out in subsection 110(2) and (3).

Division 4 – Miscellaneous

Clause 111 – Delegation

The Minister may delegate any of his/her powers or functions under this Act, except the power to provide an exemption under section 11, to an SES or acting SES employee of the Department.

The Secretary likewise may delegate any of his/her powers or functions under this Act to an SES or acting SES employee of the Department.

The delegation instrument must be in writing.

Clause 112 – Customs treatment of certain vessels

The intention is that vessels operating in Australian coastal waters under a temporary or an emergency licence are not imported into Australia for the purposes of the *Customs Act 1901* only because it is operating under a temporary licence or an emergency licence.

Clause 113 – Regulations

This clause provides for a general regulation-making power.