The CSL Yarra Decision: Reaction of Shipowners

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After completing a Commerce degree at the University of Melbourne in 1972, Mr. Payne was engaged in the road transport industry and the civil construction industry before moving to the shipping industry.

Lachlan Payne was appointed Chief Executive of the Australian National Maritime Association in 1987 and subsequently the Australian Shipowners Association in 1994.

Mr. Payne has over twenty years experience in industrial relations and shipping industry policy development and implementation, first as Chief Industrial Officer for the shipping industry employers' industrial organisation and subsequently as Chief Executive of the Australian National Maritime Association and subsequently with ASA.

Within Australia, Mr. Payne has been appointed by various Governments to various shipping fora including the Shipping Industry Reform Authority and the Shipping Reform Working Group. Mr. Payne sits on various advisory groups in the industry.

Mr. Payne is a member of the Board of the Australian Marine Environment Protection Association and the Australian Maritime Network and is a member of the National Seafarers Welfare Advisory Committee.

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"CSL Yarra Decision: The Reaction of Shipowners"

To make sense of the reaction of shipowners to the *CSL Yarra* decision it is necessary to understand where the settings in the industry were starting from.

So let me begin by explaining a little of the background to the circumstances of the Australian shipping industry as they stood just prior to the *CSL Yarra* decision.

Background

Up until the change of Government in 1996, there had been various forms of fiscal assistance in place in the Australian shipping industry. These were repealed in 1996.

In 1998 a report was commissioned by the Minister for Transport, John Anderson to look into the detailed issues surrounding fiscal assistance to the shipping industry.

In December 1999, the federal Government said there was to be no fiscal assistance reinstated for the shipping industry. In January 2000, we received a call from the Department of Transport in Canberra asking how Australian ship operators envisaged cabotage being wound-back.

In February 2000, members of the Australian Shipowners Association met to consider the issue of cabotage.

This was easier said than done because they have always chosen not to have a policy on cabotage, preferring instead to accept that cabotage suits some members and not others.

Some ASA members are shipper interests who operate ships as part of their internal supply chains. Others are independent ship operators. Still others are both ship users and suppliers of shipping services. Some use a combination of Australian and foreign vessels to meet their shipping needs.

When the ASA members met in February 200, they determined that the vessels they operate in the Australian interstate transport industry ought not be disadvantaged in comparison with foreign vessels operating in the interstate transport industry in Australia.

That understandable and apparently innocuous determination had the effect of altering forever the scenery of the Australian shipping industry. The reason it changed was that the focus of attention shifted to the question of what the causes are for the structure of the shipping industry being uncompetitive.

The thinking previously had been: "We know we're uncompetitive and we know by how much and we know what the factors are that contribute to our being uncompetitive", but the industry had not gone behind that to ask what causes the factors that we know make Australian shipping uncompetitive.

By October 2001 an analysis had been undertaken of the regulatory framework that caused certain impositions on Australians that foreign operators could escape. The principal finding was that certain aspects of the Customs Act, the Migration Act and the Navigation Act create a regulatory interplay which opens up a loophole large enough to sail a ship through.

An operator can escape Australian regulation

The most glaring beacon pointing to the navigable loophole was the fact that a vessel could trade in Australia without being imported under the Customs Act.

We established that the rationale applied by the responsible agencies in Canberra seemed, as far as we could see, to be more or less this:

1. If a vessel is in receipt of a Continuing Voyage Permit under the Navigation Act then it follows that, as the permit's name implies, the vessel is on a continuing voyage.

2. If a vessel undertakes a series of coastal legs carrying cargo interstate utilising a continuing voyage permit then those coastal legs are not separate events, they are a continuing voyage – the permit is called a continuing voyage permit so the voyage is deemed to be one that is continuous.

3. If the vessel undertakes the "continuing voyage" contiguously with the international voyage that brought the ship to Australia in the first place then the continuing voyage on the coast is a continuation of that international voyage.

4. And since there is an expectation that the vessel will eventually depart Australia on an international voyage, all the voyaging that occurs between the vessel's arriving on an international voyage and departing on an international voyage is an international voyage.

5. Thus even after months of operating coastal voyages the vessel can be regarded as still being on an international voyage.

6. Since the vessel is on an international voyage there is no question of it being imported under the Customs Act. Customs looks to see whether the Department of Transport has issued a Permit. The Department of Transport has issued a permit which is administratively interpreted as determining that the vessel is still on an international voyage.

7. So long as the vessel has a permit it is taken to be on an international voyage and so long as it is on an international voyage it is not taken to be imported.

Whatever you and I think of the logic behind that line of reasoning does not matter because that seems to be the line of reasoning adopted by those who administer transport policy and they administer it, not us.

I have come to the view that the Government's administration of shipping really relies on semantics. Take the phrase "Continuing Voyage Permit".

For the international voyage that brought a ship to Australia in the first place to still be current after three or four months of continuous interstate trading, thereby allowing the vessel to escape importation, the Permit must be regarded as one applicable to a "Continuing Voyage".

Or, put simply, the words "continuing" and "voyage" would be notionally hyphenated.

But the reality is different. The Navigation Act in S 86 (3) says:

> "A permit issued under this section may be issued for a single voyage only, or may be a continuing permit".

So in fact the permit is the continuing thing, not the voyage. Somebody will hit on the significance of that one day, but in the meantime I will get back to the story.

How to track a permit vessel

In October 2001 we thought it would be a good idea to test the reasoning behind the Department of Transport's administration as well as the approach adopted by the Australian Customs Service to the importation of ships.

We started tracking vessels which we knew had permits. We knew they had permits because the permits appear in the Commonwealth Gazette and we are e-mailed them by a service to which we subscribe.

What we did was to open the LLDCN List section at the bit marked "Vessels Due in Port" and then we found the names of ships we knew had permits.

The List told us where and when the ships were due, where they came from and what their ETD's were. Then we turned over a couple of pages and checked the vessels against the list called "Vessels in Port" which provides other detail.

You can see it's not very sophisticated. But we took five minutes twice a week to do this for some months.

We found a vessel that was moving between Australian ports, back and forth, for months at a time. The vessel had a Continuing Voyage Permit and eventually we asked the Department of Transport how it could be that a ship could trade in Australia for months and months without being imported.

We also asked the Chief Executive of the Australian Customs Service about this and the tenor of the responses was such as to indicate that we had hit on the key issue.

Anyway we had quite good fun doing this tracking. It taught the industry a lot about how the system was being worked and I suspect for quite a while we had a better understanding than most of how the system worked and how the system can be exposed to suggestions of administrative expedience.

Concentration on process

I think we raised awareness of how administrative expedience can facilitate a process which strangles an industry.

Our focus was on how foreign ships come to be able to operate in the interstate transport industry on a completely different regulatory and cost basis from Australians with whom they compete in the same industry.

As it turned out a process had started. The unions soon began following the progress of vessels that were trading consistently on the coast.

Before long we found the maritime unions had instigated proceedings against CSL in the Federal Court as well as in the Australian Industrial Relations Commission.

It is now a matter of record that in the *CSL Yarra* decision the Federal Court did not accept the unions' contention that an offence had been committed under the Workplace Relations Act by reason of Australian workers being dismissed as a consequence of their being a party to an instrument under the Workplace Relations Act.

Since then there has been a series of actions concerning the conduct of employers in several circumstances. It is not necessary to go into those matters in detail because the reaction of employers to this spate of litigation can be bracketed together.

The *CSL Yarra* decision in the Federal Court has been seen by ship operators as creating a blue print with which a number of operators could align themselves if they wished to do so.

The message that came out of the *CSL Yarra* decision seemed to be that where action such as that taken by CSL is part of a global strategy to integrate an operator's Australian fleet within an international, flexible operation then it would not be said that Australian workers have been disadvantaged by reason of their being a party to an industrial instrument alone.

Now, there has been some discussion about whether the CSL decision would have survived an appeal but it was not appealed and the decision stands.

So on the face of it the CSL decision opened a door that many had pondered but not previously attempted to open. And the *CSL Yarra* decision launched a new verb – "to do a CSL", into the Australian shipping lexicon.

Who is going to "do a CSL"?

The question would then seem to be whether Australian operators have subsequently got busy modifying their arrangements in such a way that they too can "do a CSL".

I do not think there is a desire on the part of most Australian ship operators to start "doing a CSL". But the reaction of Australian operators has been to determine that it is more a technical, rather than purely an industrial, question that will decide whether Australian-controlled ships will be operated and manned by Australians in the future.

The identification of at least ten items of legislation that impact adversely on Australian shipping was the first step. I don't know that anyone had ever done that before, but it started to de-industrialise the debate and instead concentrated on administrative and regulatory questions.

Now questions are being asked about when a ship is in domestic trades for the purposes of fuel excise but not in domestic trade for the purpose of immigration regulation. These inconsistencies are being discovered and the extent of their impact is being explored and defined.

The reaction of shipowners to the CSL decision has been to watch alternatives unfold as the edges of the navigable loophole that I mentioned before are better charted.

For example, how long can you engage in coastal trade and still be on an international voyage.

How long will foreign crews taken to hold visas intended for a different set of circumstances be allowed to work in Australian domestic transport,

How are different pieces of legislation which inter-react to render Australians uncompetitive allowing foreign interests to enjoy a competitive advantage in Australia reconciled with the Government's views on competition policy?

How many jobs will be lost in the rail industry as a consequence of cargo being carried interstate in foreign ships before someone in rural and regional Australia notices what is going on?

But these things are not the central issue.

The central issue – competitiveness:

I suppose the real question is whether the CSL decision has caused an irreversible change in attitudes on the part of stakeholders in the Australian shipping industry. If the coastal shipping industry was Humpty Dumpty then it is entirely possible that CSL has pushed Humpty off the wall and all the King's horses and all the King's men are not going to be able to turn the clock back and pretend the CSL precedent has not been set.

So much of the atmospheric impact of a situation like this has to do with perceptions. For example, ship operators see that the CSL precedent has changed the fundamental settings in the industry.

The unions are testing a number of issues associated with the legislative environment but the fact is that Humpty Dumpty cannot be put back together again: the industry cannot ever be taken back to how it was before.

The imperative is to take advantage of the impetus for change and test the possibilities that now present themselves. I think this is at the heart of ship operators' responses to the *CSL Yarra* decision.

The *CSL Yarra* decision changed the settings and the opportunity is now available to move with the changing circumstances of the industry. If the Australian shipping industry is ever to re-establish itself then it needs to reinvent itself.

This is very difficult to do. The unions can be expected to resist substantial change and the government has indicated it will not do anything substantive about shipping policy.

Before I conclude though, I should say that Minister Anderson continues to be sympathetic to the shipping industry's views in relation to the need to redress some flagrantly impractical aspects of the Shipping Registration Act and the Income Tax Assessment Act.

Conclusion:

It is ironic indeed that in November 1999 – three years ago, the Managing Director of CSL Australia wrote to the Minister for Transport and Regional Services, John Anderson and set out chapter and verse how the permit system is used to disadvantage Australian ship operators.

He also told the Minister that if the administration of the permit system was representative of the attitude of the Government to the future of Australian shipping then CSL would proceed to flag-out its two ships and operate within the permit process.

CSL obviously felt nothing changed from the Government's side and CSL did proceed to flag out its two Australian self-dischargers.

To say the rest is history would be trite. Konrad Adenauer is supposed to have said:

"History is the sum total of things that could have been avoided."

But it has also been said that every time history repeats itself the price goes up. So it is with the shipping industry in this country. The question now is whether the price has got so high that Government and/or the parties will seize the opportunity to do something about shipping before it is too late.

Even if the *CSL Yarra* decision did nothing else, it will have been useful if it makes the shipping industry do some serious lateral thinking.

Thankyou for your kind attention.