Case Notes

Re Maritime Union of Australia; Ex parte CSL Pacific Shipping Inc (2003) 200 ALR 39; (2003) 77 ALJR 1497; (2003) 121 IR 103; [2003] HCA 43

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This case involved a challenge to the jurisdiction of the Australian Industrial Relations Commission ('the Commission') to hear and determine matters relating to the working conditions of a crew onboard a foreign flagged vessel operating in Australian waters.

Background

The *River Torrens* was a vessel operated on the Australian coast by the Australian National Line ('ANL') for the purpose of carrying dry bulk cargos. It was flagged in Australia with an Australian crew that was covered by the *Maritime Industry Seagoing Award 1999* (Cth) ('the Award').[1] The vessel was licensed under section 288 of the *Navigation Act 1912* (Cth) ('the Navigation Act') to operate in the coasting trade. One of the conditions of such a license was that the seaman employed onboard a licensed vessel must be paid at 'the current rates ruling in Australia'.[2]

Following the break-up of ANL in 1999 the *River Torrens* was sold to an Australian subsidiary of the Canadian CSL Group Inc ('CSL').[3] The vessel was renamed the *CSL Pacific* and sailed to Shanghai where the Australian crew were replaced by Ukrainian nationals with rates of pay and conditions of employment fixed under an agreement with the International Transport Federation. The vessel was registered in the Bahamas and took the Bahamian flag. It then returned to work on the Australian coast where it was issued a permit to operate in the coasting trade under section 286 of the Navigation Act. This permit allowed the vessel to avoid having to obtain a licence or comply with normal license conditions, including the requirement to pay Australian award wages.

The Maritime Union of Australia ('the MUA') lodged an application with the Commission seeking a variation to the Award to include the new crew of the *CSL Pacific*. CSL disputed the jurisdiction of the tribunal to hear the matter under the provisions of the *Workplace Relations Act 1996* (Cth) ('the Act'). After preliminary hearings before a single commissioner the matter was referred to a Full Bench on the application of the solicitors representing the MUA.[4]

The Full Bench concluded that the matter constituted an 'industrial issue' that the Commission had jurisdiction to hear and determine.[5] It was held that the conventions

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[1] This Award replaced the *Maritime Industry Seagoing Interim Award 1998* (Cth) on 27 August 1999.

[2] *Navigation Act 1912* (Cth) s 289(1).

[3] The precise identity of the CSL subsidiary with actual ownership of the vessel changed over time as CSL restructured its Australian operations but nothing substantive turned on these changes.

[4] Section 107 of the *Workplace Relations Act 1996* (Cth) provides that any party to a proceeding before the Commission may apply for the matter to be heard by a Full Bench because the subject matter of the proceeding is of such importance it would be in the public interest to do so. The decision whether or not to grant such an application is left to the President of the Commission.

[5] *Re Maritime Industry Seagoing Award 1999* (2002) 118 IR 294, [104] (Munro J, Harrison SDP, Raffaelli C).

relating to the law of the sea and the recognition of sovereignty by foreign shipping might be relevant to the merits of the application to vary the award but did not operate to curtail the Commission's jurisdiction to hear such applications.[6] Further, the Full Bench indicated that its provisional view was that CSL should be added to the Award and gave the parties fifteen working days to show cause why that variation should not take place.

High Court Proceedings

CSL applied to the High Court for a stay of the Full Bench's decision as well as an order nisi for certiorari and prohibition aimed at correcting what was alleged to be an erroneous assumption by the Commission about the extent of its jurisdiction. Gaudron J granted the orders nisi but refused the application for a stay.[7] The application to make the orders nisi absolute was heard by a Full Court comprising Gleeson CJ, McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ. The Court delivered a unanimous joint judgment.

CSL put a number of submissions to the Court. The first concerned the limits of the Commonwealth's law making power under the Constitution. Under subsection 5(2) of the Act the jurisdiction of the Commission is extended to 'industrial issues'. Matters pertaining to the relationship between employers and maritime employees relating to trade or commerce within Australia or between Australia and a place outside Australia are specifically designated an 'industrial issue' by subsection 5(3)(b) of the Act. CSL submitted that this provision was beyond the power possessed by the Commonwealth under section 51(i) of the Constitution to make laws with respect to "[t]rade and commerce with other countries, and among the States". The Court rejected this submission and held that a vessel such as the *CSL Pacific* journeying for reward is in commerce, those involved in that journeying (i.e. the crew) are in commerce and the conditions of their employment are therefore related to commerce as well.[8]

The second submission put by CSL was that the laws of Australia should not apply to this foreign-flagged vessel. The argument relied upon subsection 21(1)(b) of the *Acts Interpretation Act 1901* (Cth), which provides that unless the contrary intention appears general references to, amongst other things, jurisdiction shall be construed as reference to things in and of the Commonwealth. The Court pointed out that the provision was not applicable because subsection 5(3)(b) of the Act specifically extended jurisdiction to the very type of matter in which CSL was involved.[9]

CSL also submitted that the employment conditions of persons onboard a ship were part of the 'internal economy' of a vessel that is the preserve of the law of the vessel's flag state. This rule has been recognised by leading academic commentators[10] and by

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[6] *Re Maritime Industry Seagoing Award 1999* (2002) 118 IR 294, [105] (Munro J, Harrison SDP, Raffaelli C).

[7] The transcript of this hearing is recorded as *CSL Pacific Shipping Inc, Ex parte - Re Members of the AIRC & Maritime Union of Aus & Ors* S391/2002 (18 November 2002) and is available online via the website of the Australian Legal Information Institute (AUSTLII) at <http://www.austlii.edu.au/au/other/hca/transcripts/2002/S391/1.html> at 19 May 2004.

[8] See (2003) 200 ALR 39, [36].The High Court also made it clear that it was irrelevant whether the crew's employer had a substantial 'presence' in Australia or whether the crew had no other connection with Australia in terms of either residence, employment or union membership.

[9] See (2003) 200 ALR 39, [43]. The Court also referred to cases such as *Lauritzen v Larsen* 345 US 571 (1953) and *Hellenic Lines v Rhoditis* 398 US 306 (1970) where the United States Supreme Court had been concerned with reading territorial limitations into the wider terms of the *Jones Act*.

[10] See e.g. Robin Churchill and Vaughn Lowe, *The Law of the Sea* (3rd ed, 1999) 66.

courts in a number of other common law jurisdictions.[11] In the absence of clear words to the contrary in the Act, CSL submitted that it should be interpreted consistently with customary international law as leaving crew employment conditions to be regulated by the law of the Bahamas, the flag state of the *CSL Pacific*.

The Court accepted that the 'internal economy' rule was a valid tenet of international law and valid law for Australia but held the rule did not operate to displace the explicit jurisdiction granted to the Commission under subsection 5(3)(b) of the Act. Rather, the Court held that the internal economy rule was something to be considered by the Commission in determining the merits of the application to vary the Award after weighing the significance of the rule against the economic interests of Australia.[12] An argument based on 'innocent passage' also failed when it could not be shown how the vessel's passage through Australian waters was interfered with.[13] The result was that CSL's orders nisi were discharged. The case was remitted to the Commission.

Postscript

The matter came on for hearing again before Commissioner Raffaelli. It was held that the 'internal economy rule' was not strictly applicable because it was designed to operate in situations where a vessel would otherwise be forced to deal with the different laws of a number of different coastal states not where only the laws of one coastal state applied.[14] The Commissioner still upheld CSL's application that it should not be added to the Award on other grounds. CSL was able to produce unchallenged evidence to show that extension of the Award would have the effect of offending the objectives of the Act by discouraging productivity and producing a situation unsuited to the efficient performance of work. The Commissioner regarded this evidence as decisive.[15] The application to add CSL to the Award was terminated while the dispute between CSL and the MUA was set down for further hearing to determine whether a new award should be made.[16]

[11] The United States Supreme Court has recognised the rule in a number of cases including *McCulloch v. Sociedad Nacional* 372 U.S. 10 (1963) and *International Longshoremen's Ass'n v. Allied Int'l* 456 U.S. 212 (1982). The Federal Court of Canada has applied the rule in cases including *Fernandez v. The "Mercury Bell"* [1986] 3 F.C. 454 and *Metaxas v The "Galaxias"* [1990] 2 F.C. 400. The rule has been codified in Canada by section 274 of the *Canada Shipping Act 1970*.

[12] See (2003) 200 ALR 39, [53].

[13] See (2003) 200 ALR 39, [48].

[14] *CSL Pacific Shipping Inc v Maritime Union of Australia* (2003) 127 IR 22, [93]-[94] (Raffaelli C).

[15] *CSL Pacific Shipping Inc v Maritime Union of Australia* (2003) 127 IR 22, [119]-[124] (Raffaelli C).

[16] *CSL Pacific Shipping Inc v Maritime Union of Australia* (2003) 127 IR 22, [136]-[139] (Raffaelli C).