FEDERAL COURT OF AUSTRALIA

CSL Australia Pty Ltd v Minister for Infrastructure and Transport (No 3) [2012] FCA 1261

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| Citation: | | CSL Australia Pty Ltd v Minister for Infrastructure and Transport (No 3) [2012] FCA 1261 |
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| Parties: | | **CSL AUSTRALIA PTY LTD ACN 080 378 614 v MINISTER FOR INFRASTRUCTURE AND TRANSPORT and RIO TINTO SHIPPING PTY LIMITED ACN 007 261 430** |
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| File number: | |  |
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| Judge: | |  |
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| Date of judgment: | | 16 November 2012 |
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| Catchwords: | | **ADMINISTRATIVE LAW** – temporary shipping licences issued under *Coastal Trading (Revitalising Australian Shipping) Act 2012* (Cth) – judicial review of decision to issue varied temporary licence – decision by delegate of the Minister – scope of considerations where power vested in the Minister – whether failure to take into account relevant considerations – whether taking into account irrelevant considerations – procedural fairness – content of procedural fairness in the context of the Act – whether failure to give an opportunity to consider and make submissions – whether failure to disclose material – irrationality or illogicality – whether delegate misconstrued objects of the Act  **STATUTORY INTERPRETATION** – objects of Act – objects as an aid to interpretation – where objects are conflicting  **ADMINISTRATIVE LAW** – discretion to grant relief – whether relief futile – whether conduct disentitled applicant to any relief – whether applicant had any legal interest in challenging a decision – whether merits review should have been sought in the Administrative Appeals Tribunal |
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| Legislation: | | *Administrative Decisions (Judicial Review) Act 1977* (Cth) ss 10(2)(b)(ii), 13  *Coastal Trading (Revitalising Australian Shipping) Act 2012* (Cth) ss 3, 5, 7, 13, 30, 31, 32, 33, 34, 37, 50, 51, 52, 53, 54, 55, 56, 57, 77, 83, 107  *Coastal Trading (Revitalising Australian Shipping) (Consequential Amendments and Transitional Provisions) Act 2012* (Cth) Sch 2, Part 3, cl 16  *Judiciary Act 1903 (Cth)* s 39B |
|  | |  |
| Cases cited: | | *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 applied  *Applicant VEAL of 2002 v Minister* *for Immigration and Multicultural and Indigenous Affairs*(2005) 225 CLR 88 applied  *Corio Bay & District Private Hospital NH Pty Ltd v Minister for Family Services* (1998) 87 FCR 37 distinguished  *Kamha v Australian Prudential Regulation Authority* (2005) 146 FCR 24 cited  *Kamha v Australian Prudential Regulation Authority* (2005) 147 FCR 516 cited  *Kamha v Australian Prudential Regulation Authority* (2007) 98 ALD 49 cited  *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 cited  *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57 applied  *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 applied  *Minister for Urban Affairs & Planning v Rosemount Estates Pty Ltd* (1996) 91 LGERA 31 applied  *Murphyores Inc Pty Ltd v Commonwealth* (1976) 136 CLR 1 applied  *NAUV v Minister for Immigration & Multicultural & Indigenous Affairs* (2003) 79 ALD 149 considered  *Peko-Wallsend Ltd v Minister for Aboriginal Affairs* (1985) 5 FCR 532 considered  *Pharmacy Restructuring Authority v Martin* (1994) 53 FCR 589 distinguished  *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 cited  *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152 applied |
|  |  | |
| Date of hearing: | 1 and 2 November 2012 | |
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| Place: |  | |
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| Division: |  | |
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| Category: | Catchwords | |
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| Number of paragraphs: | 156 | |
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| Counsel for the Applicant: | Mr AW Street SC with Mr JS Emmett | |
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| Solicitor for the Applicant: | Norton White | |
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| Counsel for the First Respondent: | Mr RJ Bromwich SC | |
|  |  | |
| Solicitor for the First Respondent: | Clayton Utz | |
|  |  | |
| Counsel for the Second Respondent: | Dr JG Renwick SC with Mr AM Stewart | |
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| Solicitor for the Second Respondent: | Holman Fenwick Willan | |

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| in admiralty |  |
| NEW SOUTH WALES DISTRICT REGISTRY |  |
| GENERAL DIVISION | NSD 1543 of 2012 |

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| BETWEEN: | CSL AUSTRALIA PTY LTD ACN 080 378 614  Applicant |
| AND: | MINISTER FOR INFRASTRUCTURE AND TRANSPORT  First Respondent  RIO TINTO SHIPPING PTY LIMITED ACN 007 261 430  Second Respondent |

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| JUDGE: | ROBERTSON J |
| DATE OF ORDER: | 16 NOVEMBER 2012 |
| WHERE MADE: | SYDNEY |

THE COURT ORDERS THAT:

1. The parties bring in short minutes to give effect to the reasons for judgment. If those orders, and appropriate costs orders, cannot be agreed, liberty is granted to any party to relist the matter for short oral submissions within the next seven days.

Note: Entry of orders is dealt with in Rule 39.32 of the Federal Court Rules 2011.

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| IN ADMIRALTY |  |
| DISTRICT REGISTRY |  |
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| BETWEEN: | CSL AUSTRALIA PTY LTD ACN 080 378 614  Applicant |
| AND: | MINISTER FOR INFRASTRUCTURE AND TRANSPORT  First Respondent  RIO TINTO SHIPPING PTY LIMITED ACN 007 261 430  Second Respondent |

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| : |  |
| DATE: | 16 NOVEMBER 2012 |
| PLACE: |  |

**REASONS FOR JUDGMENT**

## Introduction

1. On 9 October 2012 the General Manager, Maritime Policy Reform, Department of Infrastructure and Transport, as delegate of the Minister for Infrastructure and Transport (the delegate), issued a varied temporary licence to Rio Tinto Shipping Pty Ltd (Rio Tinto), the second respondent. The decision was made under s 53, read with s 34, of the *Coastal Trading (Revitalising Australian Shipping) Act 2012* (Cth) (the Act). It is the validity of this decision, in relation to four voyages, which is challenged in these proceedings for judicial review.
2. The applicant has, relevantly, two vessels, *CSL Melbourne* and *CSL Brisbane*, for each of which a transitional general licence was issued on 8 August 2012. Each of those licences commenced on 8 August 2012 and remains in force until 7 August 2017. It was common ground that for present purposes the Act applied in relation to those transitional general licences as if they were general licences: seeSch 2, Part 3, cl 16 of the *Coastal Trading (Revitalising Australian Shipping) (Consequential Amendments and Transitional Provisions) Act 2012* (Cth).
3. The challenge relates to four voyage numbers, those numbers being 1207006003 (loading date 11 October 2012), 1207006005 (loading date 4 December 2012), 1207006006 (loading date 4 January 2013) and 1207006012 (loading date 1 February 2013), referred to as 1207006007.
4. On 12 October 2012 I refused an application for an interlocutory injunction: *CSL Australia Pty Ltd v Minister for Infrastructure and Transport* [2012] FCA 1110. That application was for an order restraining Rio Tinto from taking any steps to perform the voyages numbers 120700603, 120700605, 120700606 and 120700607 under any purported variation to its temporary licence (referred to in the further amended application as the “Variation”). An application for declaratory relief is maintained by the applicant in respect of the earliest and now past voyage number 1207006003.
5. In the further amended originating application there are some 10 grounds of judicial review in relation to the earliest voyage, number 1207006003, and five of those grounds, numbered 1 to 5 below, are pursued in relation to the other three voyages considered as a group. The application was brought under s 39B of the *Judiciary Act 1903* (Cth) and under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (*ADJR Act*).

## Grounds

1. The 10 grounds are, in summary, that the delegate:

1. failed to take into account the considerations required by ss 34(3)(b), 34(3)(c) and 34(3)(d) of the Act, being the fact that CSL’s vessels were equipped to carry the cargo specified in the application, that those vessels could carry the cargo on the expected loading dates, and that those vessels met the reasonable requirements for a shipper of alumina, being the kind of cargo specified in the application;

2. failed to take into account a relevant consideration under s 34(2)(f), being the objects of the Act stated in ss 3(1)(a), (b), (c), (d), (e) and 3(2)(a) and/or misconstrued the said objects by taking into account the economic interests, profitability and costs of the shipper/receiver of the cargo;

3. took into account irrelevant considerations, being;

i. the effect of the Variation on the aluminium industry or on aluminium operations at Bell Bay separate from its effect in promoting a viable Australian shipping industry;

ii. the assertion by Pacific Aluminium that increased freight costs would threaten the viability of aluminium operations at Bell Bay; and/or

iii. the freight rates Rio Tinto proposed for the voyages, as compared to the freight rates offered by CSL for equivalent voyages;

4. denied procedural fairness to CSL by failing to give CSL an opportunity to consider and make submissions about:

i. the information received by the delegate from Rio Tinto as to the viability of aluminium operations at Bell Bay;

ii. the information received by the delegate from Pacific Aluminium as to the viability of aluminium operations at Bell Bay;

iii. the freight rates of other “international” shipowners provided by Rio Tinto to the delegate; and/or

iv. Rio Tinto’s response to CSL’s explanation that CSL’s freight rates in 2010 and 2011 were lower than CSL’s current proposed freight rates because the 2010 and 2011 voyages were trial voyages.

5. made a decision that was illogical or irrational having regard to:

i. the objects of the Act;

ii. the availability of CSL’s vessels to perform the voyages;

iii. the suitability of CSL’s vessels for the reasonable requirements of a shipper of alumina, being the kind of cargo specified in Rio Tinto’s application;

iv. the absence or insufficiency of probative evidence about the impact of CSL’s proposed freight rates on the viability of aluminium operations in Bell Bay;

v. CSL’s explanation as to why its freight rates in 2010 and 2011 were lower than the applicant’s current proposed freight rates;

vi. the absence of evidence about competition between general licence holders or transitional general licence holders;

vii. the significantly higher operating expenses of vessels that are the subject of a general licence or a transitional general licence under the Act.

6. took into account an irrelevant consideration, being the fact that the applicant’s vessel (the *CSL Melbourne*) was longer than the proposed berth in Bell Bay Terminal 1, in circumstances where the same vessel had attended the same berth in August 2010;

7. took into account an irrelevant consideration, being asserted safety concerns as to length in relation to the *CSL Melbourne* berthing in Bell Bay Terminal 1;

8. failed to take into account relevant considerations as to the *CSL Melbourne* being equipped to carry the cargo and as to the vessel meeting the reasonable requirements of a shipper of the kind of cargo specified in the application, being the following matters:

i. the *CSL Melbourne* had attended the same berth in August 2010;

ii. fifteen vessels, which were identified and set out in the further amended originating application, had been approved by Rio Tinto for a voyage to Bell Bay despite being longer than 172 metres, in some cases with the notation that cargo must be in holds 2, 3 and 4;

iii. Rio Tinto’s checklist for Bell Bay identified the length overall of the *CSL Melbourne* as “Too long” but had no similar note in relation to each of 11 of the 15 ships already referred to;

iv. the *Alltrans* performed Bell Bay alumina voyages for 25 years prior to 2008, despite being 2 metres longer than the *CSL Melbourne*;

v. Rio Tinto’s internal material recorded the *CSL Melbourne* as satisfying Rio Tinto’s LOA criteria with the qualification that cargo for Bell Bay must be in holds 2, 3 and 4;

vi. the Bell Bay wharf has a fixed hopper, and all multi-hold vessels must warp up and down the wharf in front of the fixed hopper to discharge cargo;

1. the advice received from the Australian Maritime Safety Authority about safety was hypothetical as to oversized vessels and involved nothing that related specifically to the *CSL Melbourne*;
2. the Australian Maritime Safety Authority provided advice to the delegate about safety without having received the applicant’s detailed response in relation to safety concerns dated 25 July 2012; and
3. Rio Tinto had already fixed a non-General Licence vessel for the proposed voyage at a substantially reduced freight rate, indicating that the second respondent's real objection was based on freight rates and not on safety concerns;

9. denied procedural fairness by:

i. failing to provide all relevant safety information to the Australian Maritime Safety Authority in the course of seeking its advice and in particular failing to provide CSL’s detailed response in relation to safety concerns dated 25 July 2012 (including its attachments); and/or

ii. failing to disclose to CSL the material that had been provided to the Australian Maritime Safety Authority so that CSL could make submissions about that material and submissions about what other material should be put before the Authority; and/or

iii. misstating the substance of the advice from the Australian Maritime Safety Authority to CSL.

1. made a decision that was illogical or irrational, having regard to:

i. the objects of the Act;

ii. the considerations set out under paragraph 8 above.

Grounds 2 and 7 were also each pleaded as an error of law, being said to be alternative bases for review under the *ADJR Act*, the essential grounds being the same as other grounds earlier raised.

**Statutory provisions**

1. The relevant provisions of the Act are as follows.

**3 Object of Act**

(1) The object of this Act 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; and

(b) facilitates the long term growth of the Australian shipping industry; and

(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 in coastal trading; and

(e) promotes competition in coastal trading; and

(f) ensures efficient movement of passengers and cargo between Australian ports.

(2) This Act aims to achieve its object by the following means:

(a) ensuring that a vessel that is used to engage in coastal trading under a general licence has unrestricted access to Australian waters;

(b) ensuring that a vessel that is used to engage in coastal trading has access to Australian waters under a temporary licence that is limited in time and to voyages authorised by the licence;

(c) ensuring that a vessel that is used to engage in coastal trading under an emergency licence has the access to Australian waters required to deal with the emergency to which the licence relates.

1. The term “coastal trading” is defined in s 7 as follows:

**7 Meaning of coastal trading**

(1) For the purposes of this Act, and subject to subsection (2), a vessel is used to engage in ***coastal trading*** if, for or in connection with a commercial activity:

(a) the vessel:

(i) takes on board passengers or cargo at a port in a State or Territory; and

(ii) 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; or

(b) the vessel:

(i) takes on board passengers or cargo at a port in a State or Territory; and

(ii) carries the passengers or cargo to a port in the same State or Territory where some passengers disembark or some cargo is unloaded; and

(iii) 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; or

(c) the vessel:

(i) takes on board passengers or cargo at a port in a State or Territory; and

(ii) 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

(iii) is one in relation to which a declaration under subsection 12(2) is in force.

(2) Subsection (1) does not apply in respect of the following:

(a) a passenger who:

(i) holds a through ticket to or from a port outside Australia; and

(ii) disembarks at a port in Australia for transit purposes only;

(b) cargo that:

(i) is consigned on a through bill of lading to or from a port

outside Australia; and

(ii) is unloaded at a port in Australia for transshipment only;

(c) passengers, or cargo, of a kind prescribed by the regulations for the purposes of this paragraph.

1. By s 83 of the Act engaging in coastal trading without a licence exposes the persons there listed to a civil penalty:

**83 Engaging in coastal trading without licence**

A person contravenes this section if:

(a) the person is:

(i) the owner, charterer, master or agent of a vessel; or

(ii) a shipper in relation to a vessel; and

(b) the vessel is used to engage in coastal trading; and

(c) the vessel is not authorised by a licence to be used to engage in coastal trading; and

(d) neither of the following apply:

(i) the vessel is not subject to an exemption under section 11;

(ii) the person is not subject to an exemption under section 11.

Civil penalty:

(a) for an individual—300 penalty units; and

(b) for a body corporate—1,500 penalty units.

1. According to the simplified outline in s 5 of the Act, the Act regulates coastal trading by providing for licences to be granted that authorise vessels to carry, relevantly, cargo between ports in Australia. Part 4 of the Act sets out the three kinds of licences that may be granted (general licences, temporary licences and emergency licences) and the application process for each.
2. General licences are provided for by Division 1 of Part 4 of the Act. By s 13, to be eligible to apply for a general licence, authorising a vessel to be used to engage in coastal trading, the vessel must be registered in the Australian General Shipping Register, that is, in broad terms the vessel must be an Australian-owned ship. Further, each seafarer working on the vessel when the vessel is used to engage in coastal trading must be an Australian citizen or the holder of a permanent visa or the holder of a temporary visa that does not prohibit the seafarer from the work he or she performs on the vessel.
3. Temporary licences are provided for by Division 2 of Part 4 of the Act. Such a licence enables a vessel to be used to engage in coastal trading over a 12 month period. The application must specify the number of voyages, five or more, to be authorised by the licence; the expected loading date; relevantly, the kinds and volume of cargo expected to be carried; the type and size, or type and capacity, of the vessel to be used to carry the cargo (if known); the name of the vessel (if known); the ports at which the cargo is expected to be taken on board; and the ports at which the cargo is expected to be unloaded.
4. Subdivision D of the Act deals with the variation of temporary licences to include new matters. It contains the following relevant provisions:

**50 Application of Subdivision**

This Subdivision applies if a holder of a temporary licence proposes to vary the licence to include a matter not already authorised by the licence.

**51 Application to vary temporary licence**

(1) A holder of a temporary licence may apply to the Minister for a variation of the licence.

(2) The application must be in writing and specify the following:

(a) the number of voyages, which must be 5 or more, to be authorised by the licence;

(b) the expected loading dates;

(c) the number of passengers expected to be carried;

(d) the kinds and volume of cargo expected to be carried (if any);

(e) the type and size, or type and capacity, of the vessel to be used to carry the passengers or cargo (if known);

(f) the ports at which the passengers or cargo are expected to be taken on board;

(g) the ports at which the passengers are expected to disembark or the cargo is expected to be unloaded;

(h) such other information as is prescribed by the regulations.

(3) The application must be accompanied by the application fee prescribed by the regulations.

**53 Process for deciding application**

Sections 30 to 34 apply in relation to an application made under subsection 51(1), except that, in deciding the application, the Minister may also have regard to whether the applicant has previously applied for a variation of a temporary licence (whether under this Subdivision or Subdivision C of this Division).

**54 Time for deciding application**

(1) The Minister must decide an application for variation of a temporary licence within 7 business days after the day the application is made.

(2) A day is not to be counted as a business day for the purposes of subsection (1) if it is:

(a) on or after the day the Minister receives a notice in response

in respect of the application; and

(b) on or before:

(i) the day the applicant notifies the Minister under paragraph 32(2)(b); or

(ii) if the applicant fails to notify the Minister under that paragraph—the last day of the period within which the applicant was required to notify the Minister under that paragraph.

Note: The period within which an application is to be decided may also be affected by section 77.

**55 Grant of variation to temporary licence**

If the Minister grants an application for the variation of a temporary licence, the Minister must cause the details of the variation to be published on the Department’s website.

**56 Application taken to be granted in certain circumstances**

If the Minister has not decided an application by the end of the period within which a decision is required under section 54, then, at the end of the last day of that period, the Minister is taken to have varied the licence in accordance with the application.

**57 Issue of varied temporary licence**

(1) If the Minister decides to grant an application, he or she must, as soon as practicable, give the applicant a varied temporary licence.

(2) The licence must specify the matters set out in subsection 37(2).

(3) If the Minister grants an application for which he or she received one or more notices in response, the Minister must, as soon as practicable, give written notice of the decision to each holder of a general licence who gave a notice in response.

1. The provisions referred to in s 53 are as follows:

**30 Publication and notification of application**

Within 2 business days after the day the Minister receives an application under section 28, the Minister must:

(a) cause to be published on the Department’s website a copy of the application, but must delete from the copy information that the Minister is satisfied:

(i) is commercial in confidence; or

(ii) consists of personal details of an individual; and

(b) cause the following persons to be notified of the application:

(i) every holder of a general licence;

(ii) a body or organisation that the Minister considers would be directly affected, or whose members would be directly affected, if the application were granted.

**31 Holder of general licence may give notice in response**

The holder of a general licence may, within 2 business days after the day an application is published under section 30, give the Minister a written notice (a ***notice in response***):

(a) stating that:

(i) all of the passengers specified in the application could be carried under the holder’s general licence; or

(ii) all of a particular kind of cargo specified in the application could be carried under the holder’s general licence; or

(iii) all of the passengers and all of a particular kind of cargo specified in the application could be carried under the holder’s general licence; or

(iv) all of the passengers and all of the cargo specified in the

application could be carried under the holder’s general licence; or

(v) one or more voyages specified in the application could be undertaken under the holder’s general licence; and

(b) if subparagraph (a)(i), (ii) or (iii) applies—identifying which passengers or cargo could be so carried; and

(c) if subparagraph (a)(v) applies—identifying which voyage or voyages could be so undertaken.

Note: The period within which the Minister must decide an application does not run if the Minister receives a notice in response in relation to the application, see subsection 34(5).

**32 Process if notice in response received**

*Minister to give copy of notice in response to applicant*

(1) If the Minister receives one or more notices in response in relation to an application, the Minister must, as soon as practicable after the end of the 2 business day period mentioned in section 31, give a copy of each notice in response to the applicant.

*Negotiation between applicant and holder of general licence*

(2) Within 2 business days after the day the applicant receives a copy of each notice in response, the applicant must:

(a) undertake negotiations in accordance with subsection (3); and

(b) notify the Minister, in writing, of the outcome of the negotiations.

(3) For the purposes of paragraph (2)(a), the applicant must negotiate, with each holder of a general licence who gave a notice in response, in respect of the following matters:

(a) whether, and to what extent, the vessel authorised by the holder’s general licence is equipped to carry the passengers or cargo specified in the application;

(b) whether those passengers or cargo can be carried in a timely manner.

(4) If an application relates to the carriage of cargo, negotiations under subsection (3) in relation to the application must have regard to the requirements of the shipper of the cargo.

**33 Comments by third parties**

Within 2 business days after the day an application is published under section 30, written comments on the application may be given to the Minister by:

(a) a person (other than the holder of a general licence) who would be directly affected if the application were, or were not, granted; or

(b) a body or organisation that would be directly affected, or

whose members would be directly affected, if the application were, or were not, granted.

**34 Minister to decide applications**

(1) The Minister decides an application by:

(a) granting the application; or

(b) refusing the application.

(2) In deciding an application, the Minister may have regard to the following (whether or not the Minister receives a notice in response in relation to the application):

(a) whether the applicant has previously held, or applied for, a temporary licence;

(b) whether the applicant has previously held a licence that was cancelled;

(ba) if the application relates to cargo and a vessel registered in the Australian International Shipping Register—both:

(i) whether the applicant owns the cargo and the vessel; and

(ii) whether the cargo is to be carried on the vessel;

(c) whether the applicant has been issued with an infringement notice under this Act;

(d) any written comments received by the Minister in relation to the application;

(e) any report given to the Department by the applicant under section 62;

(f) the object of this Act;

(g) any other matters the Minister thinks relevant.

(3) If the Minister receives one or more notices in response in relation to an application, the Minister must have regard to the following in deciding the application:

(a) the outcome of negotiations, as notified by the applicant under paragraph 32(2)(b);

(b) whether, and to what extent, the vessel authorised by the holder’s general licence is equipped to carry the passengers or cargo specified in the application;

(c) whether those passengers or cargo can be carried on the expected loading dates or within 5 days before or after the relevant date;

(d) if the application relates to the carriage of cargo—the reasonable requirements of a shipper of the kind of cargo specified in the application.

(4) The Minister must decide an application for a temporary licence within 15 business days after the day the application is made.

(5) A day is not to be counted as a business day for the purposes of subsection (4) if it is:

(a) on or after the day the Minister receives a notice in response in respect of the application; and

(b) on or before:

(i) the day the applicant notifies the Minister under paragraph 32(2)(b); or

(ii) if the applicant fails to notify the Minister under that paragraph—the last day of the period within which the applicant was required to notify the Minister under that paragraph.

Note: The period within which an application is to be decided may also be affected by section 77.

1. Despite the terms of s 53 there seems no doubt that the time limit in s 54 overrides the time limit in s 34(4) in the case of applications to vary a temporary licence.
2. Not only must every holder of a general licence be given notice of an application for a temporary licence (s 30(b)), every holder of a general licence must also be given notice of any application to vary the temporary licence for a variation of a matter authorised by a temporary licence (other than an application relating to an energy security situation as defined in s 6(1A)) (s 45(1)(a)); and every holder of a general licence must also be given notice of an application to vary a temporary licence to include a matter not already authorised by the licence (s 53, picking up s 30(b)).
3. The holder of a general licence may give a notice in response, which in the case of a temporary licence or a temporary licence to include a new matter, gives the general licence holder a right to undertake negotiations with the applicant in respect of the matters specified in s 32(3) and, if the application relates to the carriage of cargo, the matter specified in s 32(4).
4. If the Minister grants an application for a temporary licence for which he or she received one or more notices in response, the Minister must, as soon as practicable, give written notice of the decision to each holder of a general licence who gave a notice in response: s 37(3).
5. The express information gathering power was also the subject of submissions, particularly in relation to the suspension of time limits. It provides:

**77 Requests for further information—temporary licence applications**

(1) If the Minister needs further information to decide an application made under section 28 or 51, the Minister may, by written notice, ask one or more 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.

(2) A request under subsection (1) in relation to an application must not be made before:

(a) if one or more notices in response have been given in relation to the application—either:

(i) the day the applicant notifies the Minister under paragraph 32(2)(b); or

(ii) in a case where the applicant fails to notify the Minister under that paragraph—the end of the period within which the applicant was required to notify the Minister under that paragraph; or

(b) otherwise—the end of the 2 business day period mentioned in section 31.

(3) 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.

(4) A day is not to be counted as a business day for the purposes of subsection 34(4) or 54(1) if it is:

(a) on or after the day the Minister asks a person for further information under subsection (1); and

(b) on or before the day the Minister notifies the person that the further information provided satisfies the Minister’s request.

1. Lastly I set out the relevant provisions for merits review:

**107 Review by the Administrative Appeals Tribunal**

…

(3) A person who applied for a variation of a temporary licence under section 51 may apply to the Administrative Appeals Tribunal for review of a decision by the Minister to refuse the application under section 58.

…

(5) The holder of a general licence who gave the Minister a notice in response to an application for a variation of a temporary licence under section 51 may apply to the Administrative Appeals Tribunal for review of:

(a) a decision by the Minister to grant the application under section 55; or

(b) a decision by the Minister to have taken to have granted the application under section 56.

Note: The decision under review continues to operate during the review process, see section 41 of the *Administrative Appeals Tribunal Act* *1975*.

(6) An application for review mentioned in subsection … (3) must be made within 20 business days after the day the person is notified of the decision.

(7) An application for review mentioned in subsection … (5) must be made within 20 business days after the day of the holder of the general licence is notified of the decision.

Note: Other applications for review must be made within the time prescribed for the purposes of paragraph 29(1)(d) of the *Administrative Appeals Tribunal Act 1975*.

## Chronology

1. The relevant chronology of events is as follows.
2. In July 2012, Rio Tinto applied for a temporary licence.
3. On 6 July 2012, CSL submitted a notice in response to that temporary licence application. The voyage numbers were 11207006003, 11207006004, 11207006005 and 11207006006.
4. On 10 July 2012, by email Rio Tinto asked CSL for its freight indication for the cargoes CSL had challenged with the assumption of using *CSL Brisbane*. The email said: “As you know, MV CSL MELBOURNE is unsuitable for Bell Bay due to her LOA so we expect you to withdraw your challenge on the early October cargo (voyage number 11207006003).” This information was not considered by the delegate dealing with Rio Tinto's application to vary the temporary licence with which this application for judicial review is concerned.
5. By email later that day, 10 July 2012, CSL said that it would not be withdrawing its notice in response to the voyage number 11207006003 on the *CSL Melbourne*. “CSL acknowledge that there may be an issue with the length overall (LOA) of the vessel. However, as you know we have previously used this vessel for a Bell Bay discharge and dealt with safe access from the ship to the berth. We maintain that the *CSL Melbourne* can carry 25,000mt +/- 5% without loading in hold #1.” CSL then went on to indicate rates for both the *CSL Melbourne* and the *CSL Brisbane* voyages of $29.70pmt.This information was not considered by the delegate dealing with Rio Tinto’s application to vary the temporary licence with which this application for judicial review is concerned.
6. By email on 11 July 2012, CSL said it was not in a position to be able to revise its freight rate quoted the day before. It said the rate reflected the high costs of operating an Australian vessel on the Australian coast with Australian crews. The email continued:

We appreciate our good working relationship with Rio Tinto and we understand your concerns about the high cost of Australian shipping as compared to current foreign flag rates.

Our quoted freight rate is in accordance with the offer made to Pacific Aluminium for the carriage of Alumina from various Australian ports to Bell Bay from 2013 onwards.

We maintain our rates as quoted below. I would also like to confirm that this rate is for 4 cargoes, including the end December cargo.

The writer said she would forward a further response regarding the safety issue on the *CSL Melbourne* later that morning. This information was not considered by the delegate dealing with Rio Tinto’s application to vary the temporary licence with which this application for judicial review is concerned.

1. Pacific Aluminium on behalf of Bell Bay Aluminium (BBA) as an affected third party under s 33 of the Act wrote a letter dated 11 July 2012 to the Minister. It said that small changes in cost per tonne could have significant impact on total operating costs. The letter also referred to the reliability of alumina supply as a central concern. It said that BBA was concerned that CSL had only one vessel which was able to perform the charters then under consideration and noted that in the past the charter services provided by CSL had been unreliable. The letter said that BBA did not have the logistical infrastructure or operational flexibility to adapt to that unreliability due to its current financial position and distance from its alumina source.
2. Rio Tinto sent an email on 11 July 2012 to the then delegate putting a number of matters by reference to s 34 of the Act and stating, in summary, there were significant grounds referred to that were both relevant and more than simply reasonable requirements of a shipper, “rather they are commercial imperatives for PACAL to maintain its business operations.”
3. On 23 July 2012, Rio Tinto sent an email to the then delegate saying that the *CSL Melbourne* was considered by the terminal operators (Pacific Aluminium) to be far too big for the Bell Bay Terminal facility number one berth and stating in some detail the basis of that view. The letter attached plans providing a schematic of the berth in question, the mooring standard and associated guidelines and a checklist completed by BBA setting out the operational parameters governing a vessel’s acceptance. In addition there was attached the Mooring Guide to Masters.
4. On 24 July 2012, Rio Tinto’s email of 23 July 2012 and its attachments were forwarded to the Deputy CEO of the Australian Maritime Safety Authority (AMSA).
5. Also on 24 July 2012 the then delegate forwarded to CSL by email the material provided to her by Rio Tinto by email on 23 July 2012. The delegate said she was providing CSL with the opportunity to respond to this material.
6. By email dated 25 July 2012, CSL made a submission to the then delegate responding to the concerns of the shipper, Rio Tinto, on the basis that there were two issues in relation to the *CSL Melbourne*, vessel LOA and the subsequent safe access to the vessel.
7. As to the vessel LOA issue, CSL said that shippers had accepted vessels with an LOA of over 172 metres. A checklist for those vessels was attached which was said to show that each vessel was approved on the basis that hold number 1 would not be loaded. It was said the *CSL Melbourne* discharged 26,250mt of alumina at Bell Bay in August 2010 and cargo was not loaded in hold number 1. The vessel was rejected on the basis of RightShip, not LOA. The email attached a copy of the current RightShip rating. The email attached drawings showing the position of the *CSL Melbourne* on the wharf leaving either hold number 1 or hold number 5 empty. It was said that Rio Tinto guidelines showed the berth box to be 330 metres: the East dolphin was 109 metres from the edge of the berth, so the *CSL Melbourne* overhanging by a maximum of 59 metres should present no problems for safe mooring.
8. As to the second issue, safe access to the vessel, the email said that the *CSL Melbourne* had an aft gangway and if that gangway did not provide safe access to the wharf the vessel carried a ship’s brow that could be placed anywhere along the wharf/ship’s side to provide safe access to the vessel at all times.
9. This response was taken into account by the delegate considering Rio Tinto’s application to vary the temporary licence, to which this application for judicial review relates. Unlike Rio Tinto’s email to which it responded, it was not forwarded to the Deputy CEO of AMSA.
10. The temporary licence, number 0008TL0001, was issued to Rio Tinto and commenced on 30 July 2012.
11. On 6 August 2012, Rio Tinto made an application for variation under that temporary licence. The variation type was in respect of “new matters”. Five voyages were specified (see s 51(2)(a) of the Act).
12. In each case the category of trade was “dry bulk”; the cargo description “alumina”; the load port was Gladstone; the discharge port Bell Bay; the volume amount 25,000 metric tonnes; and the expected loading dates as I have set out at [3] above.
13. On 8 August 2012 the Department notified relevant persons of the application, pursuant to s 30 of the Act.
14. By email sent on 10 August 2012, CSL notified the Department that it wished to submit a notice in response to the temporary licence application.
15. In relation to voyage number 1207006003, CSL said it had a General Licence Vessel available to perform the voyage and formally objected to the issuance of the temporary licence to Rio Tinto with respect to that voyage. CSL advised that the *CSL Melbourne* could perform the voyage. The vessel was an Australian licensed ship. A Transitional General Licence application had been lodged for the *CSL Melbourne* dated 8 August 2012. The *CSL Melbourne* was able to load at the Port of Gladstone and able to discharge at the Port of Bell Bay. Pursuant to s 34(3)(b) of the Act, CSL confirmed that the General Licence Vessel was equipped to carry the cargo as specified in the temporary licence application. The vessel was classed to and able to carry alumina; classed to and able to carry dry bulk cargo and classed to and able to load, carry and discharge 25,000 metric tonnes of alumina. Pursuant to s 34(3)(c) of the Act, CSL confirmed that the cargo could be carried in a timely manner on the General Licence Vessel.
16. In relation to the other three voyages presently in dispute, CSL advised that the *CSL Brisbane* could perform those voyages. The *CSL Brisbane* was an Australian licensed ship and also the subject of an application for a Transitional General Licence dated 8 August 2012. The *CSL Brisbane* was able to load at the Port of Gladstone and able to discharge at the Port of Bell Bay. Pursuant to s 34(3)(b) of the Act, CSL confirmed that the General Licence Vessel was equipped to carry the cargo as specified in the temporary licence application. The vessel was classed to and able to carry alumina; classed to and able to carry dry bulk cargo and classed to and able to load carry and discharge 25,000 metric tonnes of alumina. Pursuant to s 34(3)(c) of the Act, CSL confirmed that the cargo could be carried in a timely manner on the General Licence Vessel. Pursuant to s 34(3)(d) the Act, CSL confirmed that the vessel met the requirements of the shipper.
17. By email dated 13 August 2012 the General Manager, Shipping Policy Reform, Department of Infrastructure and Transport (the General Manager) informed Rio Tinto under s 32 of the Act that a notice in response from CSL had been received in relation to five voyages, including the four the subject of the present application to the Court. That email forwarded to Rio Tinto most of the text of the notice in response by CSL. The email from the General Manager also said that under s 32 of the Act, Rio Tinto had two business days to undertake negotiations with CSL and notify the delegate of the outcome of the negotiations.
18. By email dated 14 August, Rio Tinto asked CSL for its freight indication for the cargoes it had challenged. The email stated: “we expect the same to be in line with the market.” The email also stated that the *CSL Melbourne* was unsuitable for Bell Bay due to her LOA and Rio Tinto expected CSL to withdraw its challenge on voyage number 11207006003.
19. On 15 August 2012, CSL responded to Rio Tinto’s email saying that at that stage the *CSL Melbourne* would not be in position to meet the dates of the October shipment. CSL provided freight rates for the *CSL Brisbane* voyages.
20. By email dated 16 August 2012 Rio Tinto informed the General Manager that it had concluded negotiations with CSL.
21. The relevant parts of this email were as follows, including the indication from CSL for 2012 for these cargoes of AUD 29.70/Mt (flat) + BAF (at $1.87/Mt as of today) total freight $31.57 with demurrage AUD 35,000/HD. This indication of rates compared to 2010 rates of AUD 17.30/Mt (demurrage AUD 24,500/HD) and 2011 rates of AUD 18.20/Mt (demurrage AUD 14,000/HD):

1) Of the 5 cargoes applied for under the application, CSL have maintained their challenge for the last 4… [1207006004, 1207006005, 1207006006 and 1207006007] proposing to use the MV CSL BRISBANE.

…

2) Their offer in challenge remains as per the previous challenge in relation to application: 11207006, which can be summarised as follows:

3) [here quoting CSL’s email of 15 August 2012 as to freight rates per the *CSL Brisbane* voyages]

4) This offer in challenge for the four cargoes listed below is unacceptable to the applicant.

5) It is unacceptable for the same reasons previously stated in relation to the challenge CSL made to the voyages listed in our application for variation to Temporary licence 008TL0001, which are repeated here for ease of reference and which should be read to apply to voyages 1207006004-7 under the current application.

…

6) In responding to the challenge from CSL and in asserting our request for a variation for new matters to be included in our temporary license we repeat the submissions we have made previously in relation to our application for variation to Temporary license 008TL0001. In particular in reference to the economic issues that arise in relation to CSL’s offer in challenge, we comment as follows:

This is a comparison between CSL’s initial offer in challenge (as per item 3 above) and “international” Owners’ offerings on Bell Bay fixtures over the last 3 years. This comparison only applies to specific cargoes (outlined below).

…

[Here in relation to 2010, 2011 and 2012 there were set out the rates fixed with or indicated by CSL compared to other offers/indications from Owners over a range which for 2010 was USD 17 to USD 20s+/Mt; for 2011 was USD 17 to USD 18.50/Mt; and for 2012 was USD 17.50/Mt and USD 16.35/Mt. Demurrage rates were also compared.]

7) What is significant here is the change or uplift in the challenger’s freight rate. Under the permit system its rates were almost competitive, under the [sic] this new license system as a GLO, it appears to believe that it holds a more dominant position. As can be seen from the previous offers CSL were more than capable of being market related with their pricing, yet this time under these challenges they have simply refused to move, even the second time around. These significantly higher rates are unacceptable to the applicant and are certainly not in the interests of the shipper and cannot be performed at that [sic] the quoted price for reasons that the shipper will make plain under submissions made pursuant to Sect 33 of the Act (see attached letter from PACAL dated 16 August 2012).

There was also reference to Rio Tinto seeking to insert a liquidated damages clause into any proposed charterparty with CSL. CSL refused to accept such a clause, leaving Rio Tinto exposed to an unacceptable risk that previously did not exist. The email continued:

9) A failure to find appropriately priced freight will compound the already difficult situation at Bell Bay, highlighted in the attached letter from PACAL, threatening its future viability. This would seem contrary to the purpose of the new legislation as it will not enhance in any way the encouragement to [sic] nor use of, GL vessels.

10) For ease of reference we have attached our submissions made in relation to the first application for a temporary license set out in our e-mail dated 11 July 2012, which we would ask you to read as applying to this response from CSL and our application for a temporary license for the 5 voyages above.

I interpolate that what is within s 32(2)(b) is the outcome of the negotiations. It is not clear which parts of the 16 August 2012 email are to be so described. I do not accept the applicant’s suggestion that the outcome should be described in one word, either “failed” or “succeeded”. In my view notifying the Minister of the outcome of the negotiations would extend to a report of why the negotiations succeeded or failed. On that approach paragraphs numbered 1 (including the table), 2, 3, 4 and possibly 5 of Rio Tinto’s email of 16 August 2012 would describe the outcome. The balance of the email seems to me, on the scant evidence limited to the terms of the document, to be submissions rather than a notification of the outcome of the negotiations. Thus I do not accept the more expansive approach of the respondents. The only possible relevance of the point is to the issues of procedural fairness. But I observe that the basic scheme of the Act is that the notification of the outcome of negotiations under s 32(2)(b) may enable a decision to be made within the principal time limits in s 34(4) or s 54(1): to the extent that material is submitted outside that notification, being material not limited to the outcome of negotiations, additional procedural fairness obligations are more likely to arise.

1. The attached letter from Pacific Aluminium dated 16 August 2012 was in support of the submission by Rio Tinto acting as the agent for Pacific Aluminium. It said that BBA Aluminium, a wholly-owned subsidiary of Pacific Aluminium, was an affected third party under s 33 of the Act. The letter stated that in rejecting the offers put forward by CSL to date, and in addition to the logistical and safety issues raised in Pacific Aluminium’s letter of 11 July 2012, BBA had been considering a number of key impacts which, it said, on the basis of the offers put forward by CSL to date, would add at least AUD $4,000,000 to the annual cost of production on freight alone. It specified the percentage of BBA’s controllable costs represented by these additional costs together with $4,000,000 in additional costs already being absorbed by BBA since the loss of a direct international container service from the Bell Bay Port. The letter annexed two Figures dated July 2012, one being the cash costs of smelters in Australia and the other being the London Metal Exchange aluminium price history in Australian dollar terms.
2. By email dated 17 August 2012, the General Manager wrote to Rio Tinto asking for clarification of the freight rate being offered by CSL to Rio Tinto in regard to the four voyages 1207006004 to 120706007.
3. Rio Tinto replied by email on the same dayconfirming the rates offered by CSL set out in Rio Tinto’s notification of the outcome of the negotiations dated 16 August 2012, which I have set out above. The email had as an attachment an email from July 2010 dealing with the then rates offered and agreed. In turn that email included a number of attachments.
4. By email dated 22 August 2012, the General Manager wrote to CSL requesting further information from it. It asked about Rio Tinto’s advice that CSL had refused to insert a liquidated damages clause into the charter agreement for the carriage of the cargo for the four voyages specified. CSL responded by email dated 23 August 2012. It said that if, for whatever reason, there was an unexpected delay to a GL vessel and an alternative GL vessel could not arrive within the nominated laycan (laydays and cancelling), CSL would notify Rio Tinto and offer to source a foreign flag vessel and carry the cargo under the CSL Temporary Licence. This would be done at commercially acceptable terms to both parties, taking into account the use of a foreign flag vessel.
5. By email dated 22 August 2012 the General Manager wrote to Rio Tinto that it was her intention to seek advice from CSL on their proposed freight rate offer to Rio Tinto and the reasons for the 69 percent increase since the price offered in September 2011. The General Manager asked Rio Tinto to confirm that she could share the 2010, 2011 and 2012 prices with CSL.
6. Rio Tinto replied on 23 August 2012 agreeing to that course provided there was no obvious reference made to the identity of the shipowner/carrier. The email said it was a matter of public record which ships undertook those voyages. Rio Tinto would prefer that CSL obtain that information themselves as Rio Tinto were contractually obliged to be circumspect around sharing commercially sensitive information.
7. The General Manager in turn replied, by email a few minutes later, saying that it was her intention to remove all references to the international rates offered and by whom, and focus on why CSL had increased its own rate by 67 percent in one year.
8. By email also dated 23 August 2012, Rio Tinto said to the General Manager that it was surprised CSL had not already shared with the General Manager the rates they were prepared to offer and did in the end take when doing this business last time. The email continued:

If they weren’t going to give that information to you, I see no reason why we shouldn’t; indeed, it’s the foundation of our argument.

They were ‘relatively’ competitive under the old regime, we don’t understand why they still can’t be or what might have changed? The difference then was only $1 - $2 different on the freight rate, now it’s upward of $12.

The demurrage rate is also cause for concern.

1. By email dated 23 August 2012 the General Manager asked CSL to confirm that the CSL rates advised by Rio Tinto, as notified to the Department, were correct and, if they were correct what factors had caused the increase in CSL’s current offer over the rates agreed with Rio Tinto in 2010 and 2011.
2. By email dated 27 August 2012, CSL responded, making some corrections. In relation to the rates agreed with Rio Tinto in 2010 and 2011, CSL said that those cargoes were considered trial cargoes and therefore CSL had been willing to compromise on the freight rate and corresponding revenue return. However, the email continued, on the *CSL Brisbane* voyage CSL made a cash loss of A$300,000, not including capital return and depreciation on the vessel, and on the *CSL Melbourne* voyage CSL made a loss of A$200,000, including capital return and depreciation. CSL added that the freight and demurrage rates as offered to Rio Tinto during negotiations for the temporary licence cargoes were reflective of owning and operating General Licence Vessels on the Australian coast.
3. By email dated 3 September 2012 the General Manager wrote to CSL requesting further information about the status of the 2010 and 2011 voyages from Gladstone and Bunbury respectively, to Bell Bay referred to in CSL’s previous email. The General Manager asked whether Rio Tinto was made aware of the trial status of those voyages and that CSL was compromising on its freight rate. CSL responded by email dated 5 September 2012, relevantly as follows:

Both voyage negotiations were conducted on a spot basis relative to market. Whilst Rio Tinto understands the real costs of Australian shipping, they made it clear during the spot negotiations that they required CSL to be close to market rates in order to conclude negotiations. While CSL had the option at the time of objecting to an SVP application if negotiations failed, the internal decision was made to accept a close to market rate in order to prove the vessel capability of the CSL Melbourne and CSL Brisbane discharging at Bell Bay and ensure a good ongoing customer relationship with Rio Tinto.

The CSL Brisbane hybrid self unloading system was designed for the carriage of Alumina and the Bunbury-Bell Bay voyage was the first opportunity to trial this type of cargo. It is not unusual for a new self unloading vessel to meet market rates and therefore price below cost in order to prove the vessel’s capabilities on a new cargo/trade.

The decision to conclude both voyages on the CSL Melbourne and CSL Brisbane on freight rates that did not cover costs was an internal strategic decision on the part of CSL to enable the vessels to perform on a trade that CSL was struggling to gain access to. Whilst Rio Tinto was verbally advised that these freight rates were below the cost of Australian vessels, it was not an explicit condition of the voyages.

1. By email dated 7 September 2012, the General Manager wrote to Rio Tinto requesting further information. This email covered the topics of the liquidated damages clause and “the increase in the freight rates offered to Rio Tinto in 2010, 2011 and 2012.” The email asked whether Rio Tinto was satisfied with CSL’s offer to discuss the sourcing of a foreign flag vessel to carry cargo in the event that one of its GL vessels was unable to arrive within the nominated laycan; and whether Rio Tinto was aware of the trial nature of the 2010 and 2011 voyages undertaken by CSL and whether Rio Tinto was advised by CSL that due to the trial nature of those voyages the corresponding freight rates were below the cost of Australian vessels.
2. Rio Tinto responded to those queries by email dated 7 September 2012. As to the liquidated damages point Rio Tinto said it was not satisfied with CSL’s offer. Applications for variations would take too much time and would not adequately protect Rio Tinto without a liquidated damages clause as was proposed. It said that working through CSL to cover their own failure would be even less efficient and certainly more time-consuming, which was in neither party’s interests.
3. As to the rates question, Rio Tinto said it was aware of the trial nature of the 2010 and 2011 voyages to the extent that the trials related to the physical capabilities/compatibilities of the vessels proposed. It said, however, the parties did not want to consider further commitment until those capabilities/compatibilities were assessed. It said there was no logic or relevance to the argument that because these were trial voyages the rates were obviously/necessarily lower or more competitive. Rio Tinto added it was not made party to the internal strategic decisions of CSL: negotiations with CSL at the time included an insistence on the part of Rio Tinto for competitive freight rates. CSL may well have alluded to their high operating costs, however, at the time of fixing those voyages, there was no agreement that those rates were at once off levels, which were below the operating costs of Australian vessels. The trial nature related to the physical fit of the vessels to the trade, not the freight rates charged.
4. This email, or the substance of it, was not provided to CSL.
5. By email to the Department on 17 September 2012, Rio Tinto said that the first voyage in its application, voyage number 1207006003, had not been challenged by a general licence holder, as indicated in Rio Tinto’s email dated 16 August 2012, and asked for confirmation that Rio Tinto was authorised to perform that voyage under its temporary licence.
6. Rio Tinto sent a further email on 20 September 2012 to the General Manager asking for confirmation that it was authorised to perform voyage number 1207006003 under its temporary licence. On the same date there was a further email from Rio Tinto saying that it needed to secure the vessel in the shipper’s interests, absent any “contest” to that voyage. Rio Tinto said it would appreciate an update from the delegate at the first available opportunity.
7. By email dated 21 September 2012, the General Manager wrote again to CSL. The information requested was whether the *CSL Brisbane* was able to meet the loading dates, discharge dates, able to carry the full cargoes required by Rio Tinto and whether it was equipped to carry both raw sugar and alumina on the same voyage and, if so, whether that was satisfactory to both Sugar Australia and Rio Tinto. That email was responded to by CSL by email dated 25 September 2012. Amongst other things CSL said that the *CSL Brisbane* would not be carrying both sugar and alumina on the same voyage for any of the three voyages listed. The correspondence resulted in CSL withdrawing its notice in response for voyage number 1207006004.
8. By email dated 2 October 2012, the delegate asked CSL for confirmation that the advice the Department had received for voyage number 1207006003 was correct and that CSL had previously advised Rio Tinto that the *CSL Melbourne* would not be available to meet the dates of that particular voyage. However, by email of the same date, CSL maintained that the notice in response for 1207006003 for the *CSL Melbourne* was still valid. In response to that email, on the same day the delegate sent an email to CSL asking whether it had advised Rio Tinto that the *CSL Melbourne* had become available, since the initial negotiations, to perform voyage number 1207006003. If CSL had so advised Rio Tinto, the delegate asked for evidence to that effect, including advice provided to Rio Tinto relating to relevant freight rates, loading dates, etc for the voyage. In response, by email of the same date, CSL said that it did not formally advise Rio Tinto that the *CSL Melbourne* was still available because Rio Tinto knew that the *CSL Melbourne* was available for this cargo. CSL said it did not provide Rio Tinto with updated terms or freight rates for the *CSL Melbourne* as the freight rate and terms were the same as those offered for the *CSL Brisbane*. CSL said the offer put forward for both vessels during the July negotiations was repeated during the August negotiations: the offer was exactly the same in both negotiations, thus Rio Tinto was aware that the same rate was applicable, regardless of the vessel. CSL stated it was willing to negotiate freight terms with Rio Tinto for voyage number 1207006003. CSL said that it did not advise the Department of withdrawal of the notice in response and so CSL understood the notice in response was still valid.
9. By email dated 3 October 2012, Rio Tinto told the General Manager that the vessel secured to perform voyage number 1207006003 was currently on its way to the loading port of Gladstone. The email sought the Department’s earliest confirmation of the status of the voyage under Rio Tinto’s temporary licence.
10. By email dated 3 October 2012 the delegate requested further information from Rio Tinto, specifically whether Rio Tinto was satisfied with the timing of voyages numbered 1207006005 and 1207006006 that CSL was proposing and whether Rio Tinto was advised by CSL that the *CSL Melbourne* had become available to perform voyage number 1207006003.
11. Rio Tinto sent an email by way of interim response dated 4 October 2012. Rio Tinto reiterated that the *CSL Melbourne* was deemed unsuitable for the trade due to safety concerns (overlength). It said that this was discussed extensively with the Department in July. Rio Tinto attached an email sent on 23 July 2012 to the Department on that topic, together with the attachments to that email. By email dated 4 October 2012, Rio Tinto said that the *CSL Melbourne’s* unacceptability for the Bell Bay wharf had been discussed and explained to the Department previously. Nothing had changed that would make that vessel acceptable.
12. There were further email communications from Rio Tinto to the Department on 4 October and 5 October 2012 dealing with whether or not voyage numbered 1207006003 was or was not contested.
13. On 6 October 2012 the delegate spoke to the Deputy CEO of AMSA. She sought confirmation of the advice previously provided to the Department in response to the information provided by Rio Tinto on 23 July 2012 regarding the safety risks associated with an oversize vessel, such as the *CSL Melbourne*, berthing at Bell Bay Terminal Facility 1. The Deputy CEO of AMSA confirmed that he reviewed the material provided to him in July 2012 and also confirmed that operations involving an oversize vessel at that berth “can pose safety issues of the kind described by Rio Tinto. He advised that the manoeuvres required to move an oversize vessel up and down the berth to facilitate loading can put excessive load on lines, bollards and dolphins placing personnel, the vessel and the berth at risk.”
14. On 6 October 2012 the delegate sent an email to CSL. That email read, relevantly:

I am a delegate of the Minister for the purposes of making decisions under the Act, including decisions in relation to applications for variations of temporary licences. Having considered the information submitted by both Rio Tinto and CSL, I propose to grant the application for a variation to the TL to include new matters, being voyages 120700603, 120700604, 120700605, 120700606, and 120700607 [sic]. In reaching this preliminary view, I have considered a range of information provided by both the applicant and the general licence holder. The key factors I have taken into account in forming my present view as to a decision are as follows:

Voyage 120700603 [sic] - Gladstone to Bell Bay - Vessel proposed by CSL - *MV CSL* *Melbourne*

Information provided to me by the applicant indicates that the *MV CSL Melbourne* is considered by the terminal operators (Pacific Aluminium) to be too big for the berth (Bell Bay Terminal Facility No 1) for safety, berthing and operational reasons. This information indicates that MV CSL Melbourne is too large to berth safely at Bell Bay Terminal Facility No 1 and may be refused permission to unload at the berth. The information provided by the applicant in regard to this issue was forwarded to CSL for response on 24 July 2010 [sic]. The Australian Maritime Safety Authority (AMSA) have confirmed that berthing a vessel of the size of the CSL Melbourne at Bell Bay Terminal Facility No 1 would pose safety concerns of the kind described by the applicant. I consider that these safety considerations are significant, and that they suggest that the *MV CSL Melbourne* does not meet the reasonable requirements of the shipper.

There was then a paragraph dealing with CSL’s withdrawal of the notice in relation to voyage number 1207006004.

Voyages 120700605, 120700606 and 120700607 [sic] - Gladstone to Bell Bay - Vessel proposed by CSL - *MV CSL Brisbane*

In deciding an application object [sic] of the Act (s 34 (2)(f)) is a relevant consideration. Section 3 (1) of the Act states that “the object of this Act 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”. I am presently of the view that, having regard to the freight rates offered by CSL for use of the MV CSL Brisbane to undertake the 3 voyages listed above, refusing to grant the variation of the TL to include these three voyages would not be consistent with the object of the Act. It is acknowledged that a direct comparison between the freight rates offered for a vessel under a general licence and those for a vessel operating under a temporary licence is not determinative because the underlying cost structures are different. Nevertheless, it is apparent from the information provided by the applicant and confirmed by CSL, that the freight rates proposed by CSL are significantly higher, not only than those offered by a vessel operating under a temporary licence, but also than those previously offered by CSL to Rio Tinto to undertake the same voyage. The applicant has provided probative information about the impact that rates of the magnitude of those offered by CSL for this voyage [sic] would have on the future viability of aluminium operations in Bell Bay. The aluminium industry in Australia is experiencing unprecedented challenges to its viability due to depressed aluminium prices and the continued strength of the Australian dollar. The cost of alumina and the associated freight costs are significant to all smelters but particularly to the operations at Bell Bay because of its location. Small changes in cost per tonne can have a significant impact on overall operating costs. I am presently of the view that refusing to grant the variation to the TL in respect of this voyage [sic] would be likely to contribute to the undermining of the future viability of operations of Bell Bay Aluminium and thus would not contribute to the broader Australian economy or the long-term viability of the Australian shipping industry.

1. By email dated 8 October 2012,CSL responded and stated that it strongly disagreed with the factors taken into account by the delegate in coming to her preliminary view.
2. As to voyage number 1207006003, CSL said AMSA had no jurisdiction in determining the suitability of a vessel to berth and operate in Bell Bay. CSL said it was unaware of any study of the *CSL Melbourne’s* suitability performed by AMSA and would appreciate a copy of their advice to the Department. CSL said the evidence supplied by Rio Tinto that the vessel was not able to moor in accordance with the guidelines was incorrect. CSL had supplied position diagrams to demonstrate that the vessel could be moored within the Rio Tinto guidelines but this appeared not to have been taken into account by the Department in its preliminary determination. CSL also stated that the *CSL Melbourne* had previously been accepted by the terminal operators under their own vetting criteria. CSL referred to other vessels being the *La Bamba*, the *Cetus Star* and the *Alltrans*. CSL said the *CSL Melbourne* should be accepted on the basis of these precedents. Also the *CSL Melbourne* discharged in August 2010 without incident with hold number 1 not being used. It was the intention of this voyage that the *CSL Melbourne* would not load its hold number 1. The terminal operator, Bell Bay Aluminium, was a related party to Rio Tinto and had a vested interest in ensuring the *CSL Melbourne* was rejected, even in contravention of their own guidelines.
3. As to voyage numbers 1207006005, 1207006006 and 1207006007, CSL said that granting the voyages in the temporary licence (TL) application would be in no sense promoting a viable shipping industry. CSL could only operate vessels on the Australian coast if they were fully utilised throughout the year. The loss to CSL was considerable if a vessel was not undertaking a voyage. Prolonged periods of time during which an Australian vessel was not undertaking a voyage would result in that vessel no longer being able to perform profitably on the Australian coast. Ultimately the vessel would be removed from the Australian coast and from the Australian Shipping Register. If the *CSL Brisbane* (or the *CSL Melbourne*) did not perform these voyages, they were likely to experience considerable idle time at a significant cost to CSL and the viability to remain on the Australian Shipping Register was severely compromised. CSL said that the aluminium industry was only a small part of the Australian economy, with the Bell Bay aluminium operations being an even smaller part of the aluminium industry. CSL disputed the claim that negative influences on those sectors of the economy were reflective of the broader Australian economy. CSL said the information from Rio Tinto regarding the impact of rates offered by CSL on the future viability of aluminium operations at Bell Bay had not been provided to CSL.
4. CSL said granting these TL applications would do the complete opposite to promoting a viable Australian shipping industry that contributed to the broader Australian economy in that such a decision in no way contributed to the broader Australian economy and denied access to Australian ships rather than promoting Australian shipping. CSL then referred to the freight rate and the reasons surrounding the freight rate differential between the present rates offered and the previously agreed freight rates. It said that it had made a $200,000 loss on the previous Gladstone-Bell Bay voyage. It said that to maintain a viable Australian shipping industry, the freight rate for coastal cargoes must be able to support operations of Australian vessels. CSL said that at no stage had Rio Tinto, on behalf of Pacific Aluminium, been willing to enter into freight rate negotiations with CSL for these Bell Bay cargoes. As no real negotiation took place, CSL was not aware of the upper limit that Rio Tinto would consider in terms of freight rate for an Australian vessel on the Gladstone-Bell Bay trade. CSL said that that day it had offered again to enter into freight rate negotiations with Rio Tinto, who again refused that offer and opted to wait for a decision on the TL application. Given that Rio Tinto had just agreed to a 3 year contract for Australian GL shipping for its Newcastle alumina requirements, after some negotiation, it seemed completely unreasonable to CSL that Rio Tinto would refuse to negotiate freight rates on their Bell Bay requirements.
5. CSL acknowledged that the aluminium industry in Australia was experiencing unprecedented challenges to its viability due to depressed prices and a high Australian dollar. CSL said that it too was experiencing unprecedented challenges to its viability. The same issues applied to the Australian steel industry and almost all manufacturers in Australia, yet those steel and other manufacturing industries still predominantly used Australian GL licensed vessels for their coastal trades.
6. CSL said that the freight rate information for the TL vessel had not been shared with CSL. CSL said that in previous correspondence it was made clear to CSL that the Department could not rely on any information provided by one party that was not shared or made available to the other party. CSL therefore requested that such information be supplied to it and CSL be given an opportunity to review and respond to that information prior to any decision being taken by the Department in respect of the TL applications.
7. By email dated 9 October 2012 the delegate notified Rio Tinto and CSL of the grant of Rio Tinto’s temporary licence application in respect of five voyages, including the four voyages in contention. The licence, as varied, remained valid for 12 months from the date of original issue, being 30 July 2012.
8. In the email to CSL, the delegate included the following:

In reaching this decision I have considered information provided by the applicant and by CSL in this and other correspondence with the Department. In relation to your email below [CSL’s email dated 8 October 2012], I provide the following information:

* AMSA has not made any ‘determination’ of the suitability of a vessel to berth in Bell Bay. AMSA, as the statutory maritime safety regulator, was consulted as an independent source of expert advice in relation to the advice provided to us by the applicant regarding safety concerns associated with berthing a vessel the size of the CSL Melbourne at the Bell Bay Terminal Facility No 1. The content of AMSA’s advice has been provided to you in my email of 6 October (below).
* The information provided by Rio Tinto concerning freight rates and their impact on the overall operating costs for aluminium operations at Bell Bay was, to the extent that it is not commercial-in-confidence, provided to CSL, including in summary in my email of 6 October 2012. Similarly all information relating to freight rates, to the extent that it was not commercial-in-confidence, was provided to CSL and CSL have been afforded the opportunity to respond (refer email from Pauline Sullivan to Emily Gross dated 23 August 2012).

1. I note also that Rio Tinto sought to read into evidence an affidavit sworn on 19 October 2012 by Denis Lecoge, senior charterer of Rio Tinto. I admitted that affidavit subject to relevance. In my opinion the contents of that affidavit could be relevant on the basis that it goes to the state of knowledge of CSL of the matters in relation to which it complains of the denial of procedural fairness. Since procedural fairness depends on process and since under the Act, in the present circumstances, the process necessarily involved both Rio Tinto and CSL then, in my view, what Rio Tinto told CSL could be relevant even if the delegate did not know of the communications or their terms. For completeness I set out the substance of that material although I have not taken it into account in reaching the conclusions I have reached in relation to the alleged denials of procedural fairness.
2. Mr Lecoge said that Rio Tinto had a meeting with CSL on 29 March 2012. The day before the meeting, on 28 March 2012, Mr Janholt, General Manager – Account Management Marine, Rio Tinto, sent an email attached which was a copy of a presentation to suppliers prepared by the chief procurement officer of Pacific Aluminium describing the difficult operating conditions and threat of smelter closures faced, relevantly, by Bell Bay operations of Pacific Aluminium. Pacific Aluminium is a division of Rio Tinto Aluminium Ltd which operates two aluminium smelters, one of which is at Bell Bay in Tasmania.
3. Mr Janholt’s main argument to renegotiate the rates offered by CSL was that transport cost is a significant cost element of the aluminium smelting operations at the two aluminium smelters.
4. The attachment to the email stated that Pacific Aluminium operated in a very difficult environment/set of circumstances and in order to continue business operations it must completely revise its operating model to lower costs so that it could become more resilient to the current and future headwinds. It said that three aluminium smelters operating within Australia, including Bell Bay, were under threat of closure.
5. Following the meeting on 29 March 2012, CSL wrote to Mr Janholt on 16 April 2012 saying, relevantly:

In March 2012 Rio Tinto, on behalf of Pacific Aluminium approached CSLA to assist in reducing costs associated with the manufacture of aluminium in Australia, including the transport costs. A number of factors including high USD/AUD exchange rates, the current international and domestic economic environment and the current regulatory environment were cited as contributors to the increased costs of the aluminium manufacturing sector. Rio Tinto requested CSLA to provide a proposal that could decrease the costs to Pacific Aluminium in the short term whilst being mutually beneficial to both parties in the longer term.

1. Mr Lecoge also deposed to discussions he had had with officers of CSL when CSL first challenged Rio Tinto’s original application for the temporary licence in July 2012. Mr Lecoge said that in those discussions he reminded those officers of the earlier discussions with Mr Janholt and of the need to reduce freight costs due to the precarious circumstances for Pacific Aluminium using words to the following effect:

You know the costs pressures on PACAL. We explained those to you previously. PACAL cannot afford to pay freight at the levels that you are requiring.

1. Mr Lecoge also deposed to a conversation in which he tried to persuade the relevant officer of CSL that CSL’s rates were way above the market rate and unacceptable for Bell Bay because they were not sustainable for Bell Bay. Mr Lecoge said that by “not sustainable” he meant that the extra cost pressure of such a high rate was not possible for Bell Bay in the present market. The officer of CSL listened to what he had to say. Her response was to talk about the high cost of operating Australian vessels.

## Findings

1. On this material, excluding the affidavit of Mr Lecoge, I make the following findings as to the basis of the delegate’s decision. I do so in the circumstances that, there having been no formal statement of reasons sought or given, whether under s 13 of the *ADJR Act* or otherwise, there is no other reasoning available. In so saying I do not suggest that the delegate ignored CSL’s response to the delegate’s indication of her “present view”: I find that the delegate read that material, as evidenced by her email to CSL of 9 October 2012, but was unpersuaded by those submissions.
2. In relation to voyage number 1207006003 only, the delegate found that the vessel did not meet the reasonable requirements of the shipper, on the basis of safety. I find further that the delegate did not take into account in relation to this voyage issues of freight rates and consequential economic considerations because she did not refer to them in her preliminary findings and there was nothing to suggest that she thereafter took those matters into account in relation to this voyage. The structure of, and reasoning in, the 6 October 2012 email deals separately and distinctively with the first voyage and the later three voyages as a group. My conclusion in relation to freight rates is also supported by the consideration that the rates for this voyage were subject to negotiation but no such negotiation had occurred: see in particular the email response by CSL to the delegate dated 3 October 2012 which I have referred to above.
3. I also find the Deputy CEO of AMSA did not have CSL’s email dated 25 July 2012, with attachments, but that he did have Rio Tinto’s email dated 23 July 2012, with attachments. I find that the delegate had and considered both these sets of material.
4. In relation to the remaining three voyages in contention, I find that the delegate granted the application for variation on the basis that to refuse it would be inconsistent with the object of the Act to provide a regulatory framework for coastal trading in Australia that promotes a viable shipping industry that contributes to the broader Australian economy. This was on the basis that, from the information provided by Rio Tinto and confirmed by CSL, the freight rates proposed by CSL for these voyages were significantly higher than those previously offered by CSL to Rio Tinto to undertake the same voyage. The delegate’s reasoning was that those higher rates in comparison to the rates otherwise offered to Rio Tinto would be likely to contribute to the undermining of the future viability of operations of Bell Bay Aluminium and thus would not contribute to the broader Australian economy or the long-term viability of the Australian shipping industry.
5. In relation to these three voyages I also find that the delegate, or anyone in the Department, did not communicate to CSL the “international rates offered and by whom” in relation to the freight rates which Rio Tinto had identified as available for the voyages but that she did in her email of 6 October 2012 refer to CSL’s rates as being significantly higher than those offered by a vessel under a temporary licence. I also find that the delegate, or anyone in the Department, did not provide to CSL, Rio Tinto’s email of 7 September 2012 which was Rio Tinto’s response to CSL’s email concerning the basis for CSL’s 2010 and 2011 agreed freight rates. Neither did the delegate, or anyone in the Department, provide to CSL the detail of the material she considered relating to the viability of aluminium operations at Bell Bay.
6. Before turning to consider the applicant’s grounds of judicial review and submissions, I would observe that those grounds and submissions in relation to the alleged failure to take into account relevant considerations in relation to the first voyage and the allegations of illogicality or irrationality in relation to all the voyages contained a substantial element of an appeal to the merits. This approach is not permissible on judicial review.

## Consideration

1. The applicant devoted considerable attention to the second reading speech of the Minister made on 22 March 2012. The theme of the submission on behalf of CSL seemed to be that any discretion under the Act which resulted in the issue or variation of a temporary licence when a general licence vessel was available and suitable either established or was strongly suggestive of an error of law. The applicant sought to put the six express objects of the Act, which I have set out above, to the same use. However I found the second reading speech to be of less than the usual limited assistance provided by such extrinsic material for the reason that two of the express objects of the Act were added later in the life of the bill, after the second reading speech was made, as CSL accepted. The express objects that were added were in the provision of a regulatory framework that (e) promotes competition in coastal trading; and (f) ensures efficient movement of passengers and cargo between Australian ports. In my view it is not possible to discern from the six express objects of the Act a single or primary purpose to the achievement of which every exercise of a discretion under the Act must bend.
2. Another consideration is that s 3(2) of the Act sets out the express means by which the Act aims to achieve its object, that is, to provide a regulatory framework for coastal trading in Australia in the respects listed in paragraphs (a) to (f) of the object in s 3(1). Leaving aside emergency licences, the specified means are ensuring that a vessel that is used to engage in coastal trading under a general licence has unrestricted access to Australian waters while a vessel used to engage in coastal trading under a temporary licence has access to Australian waters that is limited in time and to voyages authorised by the licence.
3. Looking at the language of s 3(1) in more detail, I note in particular the reference to “coastal trading” in Australia in the opening words of the provision. As I have set out at [8] above, that expression is defined in s 7 of the Act. The definition does not discriminate between Australian shipping and other shipping. I also note the different language used in paragraph (a) which refers to promoting a viable shipping industry, in contrast to paragraph (b) which speaks of facilitating the long-term growth of the Australian shipping industry and paragraph (c) which speaks of enhancing the efficiency and reliability of Australian shipping. In my view the omission of “Australian” in paragraph (a) has significance.
4. I note also that there was a dispute between the parties as to whether the expression in paragraph (d), “vessels registered in the Australian General Shipping Register” in coastal trading, included the *CSL Melbourne* and the *CSL Brisbane*, the subject of transitional general licences. The evidence established that each of those vessels was subject to a request to be registered but as at 11 October 2012 the registration process was not yet complete and registration had not yet been granted. In my view paragraph (d) is not directly applicable as there does not appear to be any relevant deeming provision to effect that result.
5. I also note that the defined expression “coastal trading” is used in what I consider to be its defined sense in paragraph (e) and in paragraph (d) of s 3(1).
6. In short, it is difficult to see how the express statutory object or any of its paragraphs could be used in the manner contended for by the applicant: see, by analogy, the approach of the New South Wales Court of Appeal in *Minister for Urban Affairs & Planning v Rosemount Estates Pty Ltd* (1996) 91 LGERA 31 at 34, 38 per Handley JA; 41 per Sheller JA; 74 and 78 per Cole JA. In that context, Handley JA said, at 34, there was no basis on which that Court could conclude that only one planning regime for particular land or for a particular purpose could be consistent with the objects of the Act: the working out of conflicting objects in a given policy, plan or decision would inevitably present to a decision-maker a range of choices within the scope of any power. Sheller JA said, at 41, a reading of the objects section as a whole showed that the legislature contemplated that choices would have to be made between what may be competing and opposing objects. The legislature reposed in the Minister the responsibility of making those choices. Cole JA said, at 78, the objects clause did not control clear statutory language, or command a particular outcome of exercise of discretionary power. Even at the level of permissible considerations, the object is only one of eight considerations enumerated in s 34(2) of the Act.
7. Next, in my view it is relevant both that the power to issue or vary a temporary licence is vested by the Act in the Minister, albeit s 111 of the Act gives to the Minister an express power to delegate all or any of his or her functions and powers under the Act, other than the power of exemption in s 11, to an SES employee or acting SES employee in the Department. The vesting of the power in the Minister is related to the express permissible consideration in s 34(2)(g) that in deciding an application the Minister may have regard to “any other matters the Minister thinks relevant.” In my view these two features of the Act support or require a broader rather than a narrower approach to construction in relation to permissible considerations: see *Murphyores Inc Pty Ltd v Commonwealth* (1976) 136 CLR 1 at 12-13 and 24-25, cited by Mason J in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 42. It was not submitted before me that a narrower approach to construction should be taken where, as here, the power was in fact exercised by a delegate of the Minister.
8. Another general preliminary observation I make is that the effect of the grant of a licence is that it lifts a prohibition: the grant of a licence does not determine which vessel will in fact perform any voyage. Rather, the temporary licence permits, relevantly, a shipper in relation to a vessel to use the vessel to engage in coastal trading. In the present case, a temporary licence would permit Rio Tinto to perform each voyage but would not as a matter of law compel that result nor as a matter of law preclude CSL from being contracted by the shipper to perform any of the voyages.
9. The final preliminary matter is to consider the submissions on behalf of the delegate relying, by analogy, on the decisions in *Pharmacy Restructuring Authority v Martin* (1994) 53 FCR 589 and *Corio Bay & District Private Hospital NH Pty Ltd v Minister for Family Services* (1998) 87 FCR 37 (*Corio Bay*) in relation to procedural fairness.
10. In the former case, the statutory regime under the *National Health Act 1953* (Cth) involved mandatory guidelines determined by the Minister. The Full Court held that where certain pharmacists sought to relocate to premises two doors from the pharmacy operated by the first respondents, the statutory authority charged with the duty of considering the application to relocate, the Pharmacy Restructuring Authority, did not have any obligation to notify or hear the first respondents, non-parties to the application for approval, merely because an approval might commercially damage them. The relevant provisions were held not to be concerned with minimising competition in the pharmaceutical industry but with reducing the Commonwealth’s financial burden in providing pharmaceutical benefits while maintaining an acceptable level of community service. Further and in any event, the Court held the Authority had no discretion and there would be no purpose in the Authority affording the first respondents a hearing.
11. The second case, *Corio Bay*, concerned the *Aged Care Act 1997* (Cth). The applicant owned certain premises at East Geelong at which a private nursing home was conducted. A company called Silkcourt was the lessee of the premises and was an approved provider of aged care under the *Aged Care Act* in respect of 30 places allocated to it under that Act in respect of the East Geelong premises. The places entitled Silkcourt to provide Commonwealth subsidised aged care at the East Geelong premises for 30 persons. Silkcourt made application under the Act for the transfer of the 30 places to another entity so as to enable that other entity to increase to 60 places its allocation of places under the Act at its nursing home at Whittingham. A decision was made by a delegate of the Minister to approve the transfer of the 30 places. That decision was made without the owner of the East Geelong premises being afforded any opportunity to be heard in relation to that decision. The Court held that the owner of the premises in respect of which places were allocated had no right or interest in those places and had no interest recognised or which was required to be considered under the Act. Absent any right or interest of a proprietary nature of the owner and absent anything in the statutory scheme or in the conduct of any of the parties that engendered a legitimate expectation on the part of the owner that it would have some entitlement to be heard, any entitlement to be heard had to be founded upon the decision destroying, defeating or prejudicing a financial interest of the owner. The ‘interest” of the owner was, at best, an economic interest which was only indirectly and consequentially affected by the decision under challenge.
12. In my view these cases are to be immediately distinguished on the basis that the present applicant had a statutory right to be notified of the application, a statutory right to give a notice in response and a statutory right to undertake negotiations, with the Minister to be notified of the outcome of the negotiations. Further, I would not construe those provisions as exhaustively stating the content of the obligation to afford procedural fairness: see *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57.
13. Turning then to voyage number 1207006003, in light of my findings as to the basis of the delegate’s decision, a number of the grounds fall away or can be dealt with shortly.
14. As to ground 1, in my opinion the delegate did not fail to take into account the mandatory relevant considerations in s 34(3)(b), (c) or (d) of the Act. I have set out the terms of these provisions at [14] above. As to the first of those two mandatory relevant considerations, it was not in issue that the *CSL Melbourne*, authorised by CSL’s general licence, was equipped to carry the cargo specified in the application. Neither was it in contention that the cargo could be carried on the expected loading dates or within five days before or after the relevant date. As to paragraph (d), the delegate expressly based her decision on the reasonable requirements of the shipper of a specified kind of cargo. I reject the first ground in relation to this voyage. No point was taken in this context between “the shipper”, referred to in s 32(4), and “a shipper”, referred to in s 34(3)(d).
15. Ground 2 is that the delegate erred in law by failing to take into account a relevant consideration under s 34(2)(f). As framed this part of the ground must fail because the matters in s 34(2) are not mandatory relevant considerations. This is made clear by the contrast in language between s 34(2) on the one hand, listing matters the Minister *may* have regard to, as against s 34(3) listing matters the Minister *must* have regard to. This ground also alleges an error in taking into account the economic interests, profitability and costs of the shipper/receiver of the cargo. In my view, this ground fails because the delegate did not so proceed in relation to this voyage. If I am wrong in my conclusion as to the delegate’s reasons in relation to this first voyage, then my reasoning and conclusions on this ground in relation to the challenge to the variation for the balance of the voyages apply.
16. Insofar as it is submitted that the delegate’s real consideration in respect of this voyage was the freight rate being sought by CSL, I do not draw that inference and I reject that submission. This conclusion is supported by the fact that no freight rates were the subject of the statutory negotiation procedure since, at the time of that procedure, CSL had indicated that the *CSL Melbourne* was not available for this voyage and by the consideration I refer to at [66] above that, as at 2 October 2012, CSL stated it was willing to negotiate freight terms with Rio Tinto for voyage number 1207006003. I reject ground 2 in relation to this voyage. If I am wrong in my conclusion as to the delegate’s reasons in relation to this first voyage, then my reasoning and conclusions on this ground in relation to the challenge to the variation for the balance of the voyages apply.
17. Ground 3 is that the delegate took into account irrelevant considerations being the effect of the Variation on the aluminium industry or on the aluminium operations at Bell Bay separate from its effect in promoting a viable Australian shipping industry; the assertion by Pacific Aluminium that increased freight rates would threaten the viability of aluminium operations at Bell Bay; and the freight rates that Rio Tinto proposed for the voyages. In my view, the delegate did not take these matters into account in relation to the first voyage. I put to one side in relation to this voyage the question of whether those matters are irrelevant considerations under the Act. I reject ground 3 in relation to this voyage. Again, if I am wrong in my conclusion as to the delegate’s reasons in relation to this first voyage, then my reasoning and conclusions on this ground in relation to the challenge to the variation for the balance of the voyages apply.
18. Ground 4 alleges denial of procedural fairness in terms of the applicant CSL not being given an opportunity to be heard in relation to the information received by the delegate from Rio Tinto and Pacific Aluminium as to the viability of aluminium operations at Bell Bay; in relation to freight rates of international shipowners provided by Rio Tinto to the delegate; and Rio Tinto's response to CSL’s explanation as to its 2010 and 2011 freight rates. Since, in my view, the delegate did not take these matters into account in relation to the first voyage the procedural fairness point falls away. I reject ground 4 in relation to this voyage. Once again, if I am wrong in my conclusion as to the delegate’s reasons in relation to this first voyage, then my reasoning and conclusions on this ground in relation to the challenge to the variation for the balance of the voyages apply.
19. Ground 5 alleges that the decision in respect of the first voyage was illogical or irrational having regard to: (i) the objects of the Act; (ii) the availability of CSL’s vessels to perform the voyage; (iii) the suitability of CSL’s vessels; (iv) the evidence about freight rates and the impact of those freight rates on the viability of aluminium operations and Bell Bay; (v) the absence of evidence about competition between general licence holders or transitional general licence holders; and (vi) the significantly higher operating expenses of vessels that are the subject of a general licence or a transitional general licence under the Act. In light of my reasons at [94]-[101] above, none of these matters dictated the rejection of the application to vary in relation to the first voyage so as to make the decision to vary illogical or irrational. This ground is an impermissible appeal to the merits. I reject ground 5 in relation to this voyage. The subject of paragraph (iv) did not affect the delegate’s consideration of the first voyage. If I am wrong in that conclusion as to what the delegate’s reasons were in relation to this first voyage, then my reasoning and conclusions on this ground in relation to the challenge to the variation for the balance of the voyages apply.
20. Ground 6 in relation to the first voyage is that the delegate took into account an irrelevant consideration, the fact that the *CSL Melbourne* was longer than the proposed berth in Bell Bay Terminal 1, in circumstances where the same vessel had attended the same berth in August 2010. As framed this is a merits point. The delegate was entitled or obliged to take into account up to date information. I would not infer that she failed to evaluate the material. I reject ground 6 in relation to this voyage. I refer also to my consideration below of grounds 8 and 10 in relation to the first voyage.
21. Ground 7 in relation to the first voyage is that the asserted safety concerns as to length, in relation to the *CSL Melbourne* berthing in Bell Bay Terminal 1, was an irrelevant consideration. In my view it was open to the delegate to conclude that because the safety considerations were significant, the *CSL Melbourne* did not meet the reasonable requirements of the shipper. In my view it was not an irrelevant consideration to take that matter into account. I would not conclude that a matter of safety going to the reasonable requirements of the shipper were prohibited considerations under the Act; that is, that such a matter was one which the decision maker lawfully may not think to be relevant in terms of s 34(2)(g). The requirements of the shipper is also a mandatory relevant consideration under s 34(3)(a) when read with s 33(4) and the reasonable requirements of a shipper of the kind of cargo specified in the application is a mandatory relevant consideration under s 34(3)(d). For these reasons I reject ground 7 in relation to the first voyage. It follows that I also reject the submission that treating the asserted safety concerns about the LOA of the *CSL Melbourne* as the reasonable requirements of a shipper of the kind of cargo specified in the application to vary the temporary licence involves an error of law.
22. To the extent that a separate ground of review is that the decision as to this voyage involved an error of law by treating the asserted safety concerns about the LOA of the vessel as the reasonable requirements of a shipper of the kind of cargo specified in the application, within the meaning of s 34(3)(d) of the Act, I do not accept the applicant’s emphasis on the words “the kind of cargo” as a relevant limitation on the reasonable requirements of a shipper. Put differently, those words do not limit the requirements of a shipper to matters specific to the cargo in question. I reject that ground. If there is a difference between the content of the expression “other requirements of the shipper of the cargo” in s 32(4) and the content of the expression “the reasonable requirements of a shipper of the kind of cargo” in s 34(3)(d) it is that a more objective element is injected by the latter provision. In the present case it seems to me to make no difference as the requirements of Rio Tinto were not said to be idiosyncratic.
23. Ground 8 in relation to the first voyage contended, on the basis of nine subparagraphs, that the delegate failed to take into account relevant considerations as to the *CSL Melbourne* being equipped to carry the cargo and as to the vessel meeting the reasonable requirements of a shipper of the kind of cargo specified in the application. In my view this ground, with its nine subparagraphs, is a barely disguised appeal to the merits. The level of generality in relation to the pleaded mandatory relevant considerations is fixed by the Act, in particular s 34(3): see *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at [9]. Further, in my view, there is a disconnect between the nine subparagraphs and the mandatory relevant considerations identified in the Act. I reject ground 8 in relation to the first voyage. I return to related questions in my consideration of ground 10 in relation to the first voyage, below.
24. Ground 9 in relation to the first voyage contends that the applicant CSL was denied procedural fairness in that the delegate:
25. failed to provide all relevant safety information to AMSA in the course of seeking its advice and in particular failed to provide CSL’s detailed response in relation to safety concerns dated 25 July 2012 (including its attachments);
26. failed to disclose to CSL the material that had been provided to AMSA so that CSL could make submissions about that material and submissions about what other material should be put before AMSA;
27. misstated to CSL the substance of the advice from AMSA.

This ground was inserted by an amendment to the application, in respect of which I granted leave on 29 October 2012, subsequent to my decision refusing an interlocutory injunction on 12 October 2012.

1. In my view the evidence shows that the delegate did not provide to the Deputy CEO of AMSA, when seeking his advice on 6 October 2012, the material provided by CSL in July 2012 in answer to Rio Tinto’s material going to the safety of using the *CSL Melbourne* for voyages discharging at Bell Bay. In this respect I note that there is an email dated 24 July 2012 to the Deputy CEO forwarding the documents from Rio Tinto but there is no such forwarding of the CSL material sent to the Department under email dated 25 July 2012.
2. In my opinion, given the important use to which the delegate put the advice from the Deputy CEO of AMSA, it was a denial of procedural fairness not to provide that CSL material to AMSA in the particular circumstances. Although the CSL material was available to the delegate, it was not the subject of the expert consideration by the Deputy CEO of AMSA which was a factor in the delegate’s decision in relation to the first voyage. It is not to the point that AMSA had not made any “determination” of the suitability of a vessel to berth in Bell Bay: it is enough that AMSA was consulted as an independent source of expert advice but only in relation to the material provided by Rio Tinto. Telling CSL of the fact of AMSA’s expert advice in the delegate’s email of 6 October 2012 did not, in the circumstances, cure this procedural defect: by then time did not permit and no opportunity was given or taken for the CSL material to be the subject of the expert consideration by the Deputy CEO of AMSA.
3. It was also put on behalf of the respondents that the delegate was consulting the Deputy CEO of AMSA only for the purpose of ensuring that the Rio Tinto material was reasonable or whether or not in an abstract sense an overlength vessel was a source of a safety concern. Specifically, it was put that it appeared that what the delegate did for reassurance was to contact the Deputy CEO of AMSA and, in effect, say: “Rio are raising these issues about overlength vessels. Just confirm for me that the wool is not being pulled over my eyes”, with the Deputy CEO’s rather bland but confirmatory response being to confirm that overlength vessels at that berth can pose safety issues. In my view this submission fails on the evidence. The file note of 6 October 2012 does not support it and neither does the email expressing the delegate’s preliminary view in relation to this voyage. Further, the submission confirms the procedural problem rather than answering it since the delegate relied, in part, on the expert advice so expressed but, on the evidence, that advice being given without taking into account the CSL material relating specifically to the *CSL Melbourne* discharging at Bell Bay.
4. The respondents submitted that the CSL material was too slight to matter. This is not self-evident and it is not appropriate for the Court to attempt to put itself in the position of an expert and attempt to weigh or otherwise assess the cogency of that material. I reject that submission.
5. The respondents also relied on the structure of the Act and the strict time limits for determining an application to vary a temporary licence. I accept that, where a decision is made or an action taken under a statute, the content of procedural fairness must be considered in the context of the statute: see *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152 at [26]. But, contrary to the submissions on behalf of the delegate, I would not accept as a starting point that giving content to the obligations to afford procedural fairness would be introducing an additional layer of procedural fairness beyond that which is in the statute. Thus I accept that there is an express right in a general licence holder, amongst others, to be notified of an application; that a general licence holder may within two business days give a written notice in response; and that the applicant for the licence must undertake negotiations and notify the Minister in writing of the outcome of the negotiations; and that the outcome of those negotiations as notified is a mandatory relevant consideration under s 34(3)(a) of the Act. I also note that by s 54(1), subject to s 77, the Minister must decide an application for variation of a temporary licence within seven business days after the day the application is made. At a general level therefore that structure affects the content of procedural fairness but it does not state exhaustively, or dictate, the content of procedural fairness on the facts of a particular case: see my observations at [47] above. Further, it seems to me that the major relevance of the short standard time limit for dealing with variation applications is the assumption that it should be possible to deal with such an application promptly, in light of the earlier grant of a temporary licence. This did not happen in the present case. Strangely, the evidence shows, the present delegate did not consider all the material which must have been submitted to the earlier delegate in July 2012 for the temporary licence application by Rio Tinto.
6. It was contended on behalf of the delegate that s 77 of the Act, which I have set out at [19] above, was relevant to this issue. It was submitted that the scheme of the section was that there could be a delay to enable the delegate to get further information from, amongst others, the general licence holder who had given a notice in response under s 31. It was submitted that it would not be appropriate to delay the legislative imperative for a quick decision by using the s 77 request for a collateral purpose of furthering procedural fairness notifications and responses. The s 77 mechanism, it was submitted, was meant to be a stopwatch provision for gathering information for the decision-making process, rather than being designed to facilitate procedural fairness.
7. I see no such antithesis. If s 77 did not extend to the Minister or the delegate putting material to an interested party and thereby giving them an opportunity to be heard, there would be some force in the contention that the tight timeframe decision-making under the Act would strongly affect the content of procedural fairness, at least as to time. But procedural fairness obligations, whatever their ultimate source, do not stand outside the statute and constitute a collateral purpose. Unless, therefore, there is a basis in its language for concluding that s 77 is inapplicable, this limb of the submission must fail. Unless the word “information” has a limited meaning in this section, it follows that the language “the Minister needs further information to decide an application” are apposite to include discharging an obligation to afford procedural fairness. As to the word “information”, I see no basis for limiting its meaning to factual material as opposed to a party’s contentions about that factual material or a party’s contentions as to a proposed decision on an application to which s 77 applies. “Information” is not a defined term and its context does not suggest a meaning narrower than its ordinary meaning of knowledge concerning some fact or circumstance: see the *Macquarie Dictionary*. In so saying, I am not suggesting that the time limit in s 54 is not relevant to the fixing by the Minister of a time for the provision of information under s 77.
8. I note in passing that for none of the approximately nine s 77 requests made in relation to Rio Tinto’s application was there evidence that the Minister or the delegate or any other officer of the Department had notified either of the entities asked for further information that the further information provided satisfied the Minister’s or the delegate’s request. Thus the seven day time period prescribed by s 54(1) did not expire and s 56 did not operate to deem the Minister or the delegate to have varied the licence in accordance with the application. It seems likely that the clock was stopped by the issue of the first notice, on 17 August 2012, asking Rio Tinto to provide further information, but not restarted thereafter, given the absence of a notification that the further information provided satisfied the request.
9. The delegate also called in aid, as relevant to the content of procedural fairness, the numbers of temporary licences that were the subject of applications and thus the volume of decision-making. The evidence showed that there were 14 applications in July 2012, 15 applications in August 2012, 14 applications in September 2012 and 13 applications in October 2012 up to 30 October 2012. In my view, without more, those numbers are not relevant. This is not an application for *mandamus* based on a constructive failure to make a decision. Further, there is no evidence about the numbers of staff available to do the work. Even if there was such evidence, it is difficult to see how it would affect the requirements of procedural fairness. I reject the submission.
10. By ground 10 in relation to the first voyage, CSL contends that the delegate made a decision that was illogical or irrational having regard to the objects of the Act and the failure to take into account the mandatory relevant considerations contended for in relation to ground 8. I have already given my reasons for concluding that those matters are not mandatory relevant considerations.
11. CSL contended that “an overwhelming volume of material that was placed before the Minister’s delegate, which should have been taken into account … indicated the asserted safety concerns were not legitimate.” In my opinion, those are matters of the merits. I reject the submission that the fact-finding process, in concluding that there were safety concerns, was irrational or illogical and I also reject a related submission that the ultimate exercise of discretion was unreasonable. I also reject the submission that “the weight of this evidence means that it was impossible to treat the asserted safety concerns as the “reasonable requirements of a shipper of the kind of cargo specified in the application”, as contemplated by s 34(3)(d). In my opinion, that submission errs into the merits.
12. There was no expert evidence tendered before me to prove that the facts on which the delegate acted did not exist. Indeed, subject to the question of procedural fairness, the expert evidence which was before the delegate showed that the safety concerns were legitimate and, it follows, that the fact-finding process was not irrational or illogical or that the ultimate exercise of discretion was unreasonable. The same material necessitates the rejection of the contention that the weight of that material, for the purposes of judicial review, could not form the basis of a finding as to the reasonable requirements of a shipper or the shipper.
13. Quite apart from these matters, it is plain that the factual material, and the evaluation of it, was contestable and indeed contested, as the competing emails of July 2012 demonstrate. As I have said, it is not appropriate for the Court to go into the factual details, far less to attempt to evaluate them, but I observe that there were differing views on whether the attendance of the *CSL Melbourne* at the same berth in August 2010 constituted a precedent or a failure. I also observe that there was a basis for discounting or distinguishing the approval by Rio Tinto of the other sixteen vessels referred to by CSL in its application for judicial review. On the material before the delegate, most of those approvals had preceded the change of the LOA restriction from 225 metres to 172 metres in July 2012. The *CSL Melbourne* had an LOA of 187.5 metres. The material as to the remaining five vessels was equivocal and does not found a claim of unlawful decision-making. It is to be recalled that the immediate question was the safety of the *CSL Melbourne* using the Bell Bay berth and as to that CSL had said in its email of 25 July 2012 no more than that the *CSL Melbourne* overhanging by a maximum of 59 metres “should present no problems for safe mooring.”
14. Subject to the question of discretion, I would grant relief on the procedural fairness ground in relation to the first voyage.
15. I turn now to consider the five grounds in relation to the three remaining voyages, numbered 1207006005, 1207006006 and 1207006007, as a group.
16. As to ground 1 in relation to these three voyages, I repeat my reasoning at [107] above in relation to the first voyage and I reject this ground in relation to these three voyages also.
17. As to ground 2 in relation to these three voyages, I repeat my conclusion and reasoning at [108] above that s 34(2)(f) does not prescribe a mandatory relevant consideration. Neither does s 34(2)(f) set out the only permissible considerations: seven further permissible considerations are set out in s 34(2) and a further four mandatory relevant considerations are set out in s 34(3).
18. It is pleaded, in the alternative, that the delegate misconstrued the object of the Act in s 3(1) by taking into account the economic interests, profitability and costs of the shipper/receiver of the cargo. CSL’s submission is that those matters are legally prohibited considerations. I do not accept that submission on the facts of this case. I also reject the associated submission that the object of the regime is to allow general licence holders to nominate to carry particular trade if their vessels are able to meet the requirements for the proposed voyage. So to construe the Act would be to ignore s 34(2) and s 32(4), and to marginalise the prescribed negotiation process and the outcome of negotiations as notified, which is a mandatory relevant consideration by s 34(3)(a). It is true that one of the paragraphs set out in s 3(1) of the Act is to provide a regulatory framework for coastal trading in Australia that maximises the use of vessels registered in the Australian General Shipping Register, but even when the *CSL Melbourne* and the *CSL Brisbane* become so registered that object will not dictate the result of the exercise of the Minister’s or delegate’s discretion. I do not of course rule out that the exercise of that discretion may in a particular case have the result that an application for a temporary licence or for a variation of a temporary licence will be refused.
19. Ground 3 in relation to these three voyages is that the delegate took into account irrelevant considerations, being:
20. the effect of the Variation on the aluminium industry or on aluminium operations at Bell Bay separate from its effect in promoting a viable Australian shipping industry;
21. the assertion by Pacific Aluminium that increased freight costs would threaten the viability of aluminium operations at Bell Bay; and/or
22. the freight rates that Rio Tinto proposed for the voyages, as compared to the freight rates offered by CSL for equivalent voyages.
23. In my view these are not irrelevant considerations for the same reasons I have given in relation to ground 2 at [135] above. Promoting a viable Australian shipping industry is not the only or dominant object of the Act so as to make any other considerations legally impermissible. To the extent that this ground involved a contention that there was no, or insufficient, material to support the delegate’s finding because it was based on a mere assertion by Pacific Aluminium as to the threats to its viability rather than “real evidence”, I reject the contention as erring into the merits.
24. Ground 4 in relation to these three voyages is that the delegate denied procedural fairness to the applicant CSL by failing to give it an opportunity to consider and make submissions about four matters as follows:
25. the information received by the delegate from Rio Tinto as to the viability of aluminium operations at Bell Bay;
26. the information received by the delegate from Pacific Aluminium as to the viability of aluminium operations at Bell Bay;
27. the freight rates of other “international” shipowners provided by Rio Tinto to the delegate; and/or
28. Rio Tinto’s response to CSL’s explanation that CSL’s freight rates in 2010 and 2011 were lower than CSL’s current proposed freight rates because the 2010 and 2011 voyages were trial voyages.
29. In my view, the first and second of these matters do not establish a denial of procedural fairness. CSL was given an opportunity to be heard on the topic of its proposed freight rates for the voyages on the future viability of aluminium operations at Bell Bay. Further, the applicant CSL took advantage of that opportunity in its email to the delegate dated 8 October 2012 and said that it “acknowledges that the aluminium industry in Australia is experiencing unprecedented challenges to it’s [sic] viability due to depressed prices, and high Australian dollar.”The complaint here is as to the level of detail, in that CSL did not have an opportunity to test the veracity of the information. CSL made reference in submissions to it not having been given any detail of profitability or any analysis identifying why that profitability gave rise to a lack of viability. However, viability as such was not the issue but the undermining of viability. This was not an insolvency case. In my view, having regard to the statutory scheme, procedural fairness did not require CSL to be given that opportunity: CSL was given an opportunity to respond to the substance of the matter, and did so: *Applicant VEAL of 2002 v Minister* *for Immigration and Multicultural and Indigenous Affairs*(2005) 225 CLR 88 at [27].
30. As to the third of these matters, in my view, a fair reading of the material shows that the delegate did not decide the application by reference to the freight rates offered by vessels operating under a temporary licence or international rates. By email dated 23 August 2012 the General Manager said that her intention was to remove all references to the international rates offered and by whom. The delegate acted on the basis of the significantly higher freight rates proposed by CSL than those previously offered by CSL to Rio Tinto to undertake the same voyage. Put differently, the delegate took it as a given or constant that the freight rates proposed by CSL would be significantly higher than those offered by a vessel operating under a temporary licence and did not act on that factor. I refer to the email from the General Manager dated 22 August 2012, the email of 23 August 2012, the further email of 23 August 2012 from the General Manager to CSL asking what factors had caused the increase in CSL’s current offer over the rates agreed with Rio Tinto in 2010 and 2011, and the further emails on that topic of 3 September 2012 and 5 September 2012 between the General Manager and CSL. I also take into account the delegate’s reference to the different underlying cost structures for vessels operating under a general licence and vessels operating under a temporary licence in her email of 6 October 2012. I accept the submission on behalf of the delegate that she indicated that she would not have regard to the rates proposed by operators of non-general licence vessels and did not do so.
31. The fourth of these procedural fairness matters raised by ground 4 involves the material in Rio Tinto’s response dated 7 September 2012 to the delegate’s email of the same date: see [59]-[61] above. The issue of the significantly higher rates for these voyages compared to the rates previously offered by CSL to Rio Tinto to undertake the same voyage was at the centre of the delegate’s reasoning. I accept CSL’s submission that Rio Tinto’s response made detailed assertions about CSL’s rates on the earlier voyages and about the dealings between CSL and Rio Tinto. These assertions involved new matters that related directly to CSL’s individual position in the relevant trade. For example, there was a live issue as to the nature of the trial involved in the earlier voyages and whether the rates had been lower by reason of the nature of the trial, the issue being the cogency of the comparison between the 2010/2011 rates and the present rates and whether the two sets of rates were in truth comparable. The delegate did not indicate in her email of 6 October 2012 to CSL that she had put CSL’s material to Rio Tinto or that she had received a detailed response to that material from Rio Tinto.
32. On the state of the evidence, it must be assumed that the delegate took the matters in Rio Tinto’s response dated 7 September 2012 into account when making the finding which, as I have said, was at the centre of her reasoning. That finding involved an implicit rejection of CSL’s material. In my view the delegate, in her email of 6 October 2012 to CSL in which she outlined her present view in relation to these three voyages, should have, at least, indicated that Rio Tinto disagreed with CSL’s statements as to the nature of the 2010/2011 voyages and the consequent effect on rates and the basis of that disagreement, thus providing to CSL the substance, if not the text, of Rio Tinto’s response of 7 September 2012. The delegate did not do so and thereby denied procedural fairness to CSL.
33. To the extent that the respondents submitted that a denial of procedural fairness was not established because there was nothing CSL could have said on this issue or because CSL had not put on evidence setting out what it would have said if given the opportunity, I reject that submission. In my view, on this aspect of the case the denial of procedural fairness is not close to the borderline where a court may assume that the applicant for judicial review had nothing to say and where evidence as to what the applicant could or would have said is for that reason important or crucial.
34. Ground 5 in relation to these three voyages is that the delegate made a decision that was illogical or irrational having regard to: (i) the objects of the Act; (ii) the availability of CSL’s vessels to perform the voyages; (iii) the suitability of CSL’s vessels for the reasonable requirements of a shipper of alumina, being the kind of cargo specified in Rio Tinto’s application; (iv) the absence or insufficiency of probative evidence about the impact of CSL’s proposed freight rates on the viability of aluminium operations in Bell Bay; (v) CSL’s explanation as to why its freight rates in 2010 and 2011 were lower than its current proposed freight rates; (vi) the absence of evidence about competition between general licence holders or transitional general licence holders; and (vii) the significantly higher operating expenses of vessels that are the subject of a general licence or a transitional general licence under the Act. In my opinion, it follows from my rejection of the other grounds that this ground constitutes an impermissible appeal to the merits. The Court is engaged in judicial review not merits review, which is the province of the Administrative Appeals Tribunal under the Act. I reject this ground.
35. Subject to the question of discretion, I would grant relief to the applicant on the basis of the fourth of the procedural fairness particulars in ground 4 in relation to these three voyages.
36. I add that the oral submissions on behalf of CSL referred briefly to what was said to be an error by the delegate in construing paragraph (a) of s 3(1) which sets out the object of the Act. I would not grant relief on that ground as in my view it was neither pleaded nor developed in CSL’s written outline of submissions. I would however indicate that if regard is had only to paragraph (a) of s 3(1) it is difficult to see that the object of promoting a viable shipping industry that contributes to the broader Australian economy supports reasoning that high freight rates would undermine the future viability of operations of Bell Bay Aluminium and thus would not contribute to the broader Australian economy or the long term viability of the Australian shipping industry. I express that view tentatively, in the absence of argument.

## Discretion

1. Four matters arise in relation to the Court’s discretion to withhold relief. The first, second and third matters relate only to the first voyage while the fourth matter relates to all four of the voyages.
2. The first matter is that it was submitted that there was no compelling reason to grant declaratory relief in relation to the first voyage where a declaration would reflect only the facts and circumstances of that particular variation application and because the time of that voyage had passed. I disagree. The utility of such relief is that in the future if an issue arises under the Act as to the suitability of the *CSL Melbourne* for Bell Bay Terminal 1, then procedural fairness will need to be afforded to CSL in respect of any safety issues arising or thought to arise from the LOA of that vessel. For the same reason, in my view the grant of declaratory relief stands outside the dictum in *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 (*Ainsworth*) at 582, relied on by the second respondent:

It is now accepted that superior courts have inherent power to grant declaratory relief. It is a discretionary power which “[i]t is neither possible nor desirable to fetter ... by laying down rules as to the manner of its exercise.’ However, it is confined by the considerations which mark out the boundaries of judicial power. Hence, declaratory relief must be directed to the determination of legal controversies and not to answering abstract or hypothetical questions. The person seeking relief must have “a real interest”and relief will not be granted if the question “is purely hypothetical”, if relief is “claimed in relation to circumstances that [have] not occurred and might never happen”or if “the Court’s declaration will produce no foreseeable consequences for the parties”. (footnotes omitted)

1. On the basis of the order in *Ainsworth* an appropriate form of declaration in relation to the first voyage would be that, in deciding to grant the application to vary the temporary licence in respect of voyage number 1207006003, the delegate failed to observe the requirements of procedural fairness.
2. The second matter is that it was submitted on behalf of Rio Tinto in relation to the first voyage that CSL’s conduct disentitled it to any relief. Reference was made to *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 and *NAUV v Minister for Immigration & Multicultural & Indigenous Affairs* (2003) 79 ALD 149 (*NAUV*). While such a discretion plainly exists, in the present case, in my view, the circumstances which would found the exercise of such a discretion are not established. It was submitted that there was on the part of CSL a lack of frankness, in the sense used by the Full Court in *Peko-Wallsend Ltd v Minister for Aboriginal Affairs* (1985) 5 FCR 532 at 543, 561 and 565. However, I am not persuaded that there was an awareness on the part of CSL of a mistake on the part of Rio Tinto or the delegate and a failure to correct that mistake in sufficient time. Although I accept that the question in the present case of whether the first voyage was within a subsisting notice in response was not conducive to the proper operation of the Act, a decision was in fact made. I also take into account that the only remedy is a declaration in respect of a past voyage. Different considerations may have applied if the voyage lay in the future and injunctive relief was sought.
3. Similarly, the third and factually related matter is a submission on behalf of Rio Tinto, adopted by the delegate, that CSL had no legal interest in challenging the decision in relation to the first voyage. This was put on the basis that the voyage in question could not “be undertaken under the holder’s general licence” within the meaning of s 31(a)(v), as the *CSL Melbourne* was not in a position at the stage of the statutory negotiations to meet the dates of the October shipment, and therefore no negotiations could be undertaken in relation to the voyage and the notice in response was, or had become, non-compliant with regard to that voyage.
4. In my opinion the short answer to this third matter is that the delegate in fact made a decision in relation to the first voyage. That being so, and if that decision be legally flawed, then CSL has a legal interest in challenging the decision in relation to that voyage. In my view the non-compliant process does not stand as an answer to the present denial of procedural fairness in circumstances where a decision was in fact made.
5. The fourth matter, which related to all voyages, was that it was submitted on behalf of the respondents that the provision for merits review in the Administrative Appeals Tribunal given by s 107 of the Act meant there was an adequate alternative remedy within the meaning of s 10(2)(b)(ii) of the *ADJR Act* and corresponding discretions in relation to the claim under the *Judiciary Act*. Reference was made in this context also to *NAUV*. It was put that the content of CSL’s application for review was more reflective of merits review than judicial review and it did not appear that there was much, if anything, that CSL sought to agitate that could not, in substance, have been dealt with by the Administrative Appeals Tribunal. The consequence was, it was submitted, that even if a ground of review was made out, the Court ought to refuse to grant CSL the relief it sought.
6. In my opinion a combination of circumstances has the result that I should not decline to grant relief on this discretionary ground. First, the originating process in this Court sought urgent interlocutory relief in relation to an imminent voyage. Second, the proceedings involved questions of law as to the construction of the Act where there has been no earlier judicial consideration of those questions. Third, the early final hearing made it impossible to identify separate questions of law appropriate for resolution in this Court while leaving other questions for determination by the Administrative Appeals Tribunal whether by reference to s 10(2)(b)(ii) of the *ADJR Act* or the general discretion in s 16 of that Act: compare the proceedings in *Kamha v Australian Prudential Regulation Authority* (2005) 146 FCR 24; *Kamha v Australian Prudential Regulation Authority* (2005) 147 FCR 516 and *Kamha v Australian Prudential Regulation Authority* (2007) 98 ALD 49. Indeed no such application for the determination of separate questions was made. I also take into account that in relation to the first voyage, which has passed, it is difficult to see what relief could now be granted by the Administrative Appeals Tribunal. It was not suggested that the first voyage should be dealt with by the Court and the balance of the voyages by the Administrative Appeals Tribunal.

## Severability

1. CSL did not maintain its stance, which it took at the interlocutory hearing, that the grant of a variation to the temporary licence in respect of the first voyage, if invalid, as a matter of legal consequence affected the validity of the variation in respect of the second, third and fourth voyages considered as a group and *vice versa* so that any invalidity of the variation in respect of the second, third and fourth voyages considered as a group as a matter of legal consequence affected the validity of the variation in respect of the first voyage. I therefore do not consider that issue further.

## Conclusion and orders

1. For these reasons I find that there was a denial of procedural fairness in relation to the first and past voyage, number 1207006003, and I also find there was a denial of procedural fairness in relation to the remaining three voyages considered as a group, being voyage numbers 1207006005, 1207006006 and 1207006012, referred to as 1207006007. I direct the parties to bring in short minutes to give effect to these reasons for judgment. If those orders, or appropriate costs orders, cannot be agreed I grant liberty to any party to relist the matter for short oral submissions within the next seven days. The parties have leave to contact my associate for that purpose.

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| I certify that the preceding one hundred and fifty-six (156) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Robertson. |

Associate:

Dated: 16 November 2012