

Carriage of Goods by Sea Regulations 1998 1998 No. 174

EXPLANATORY STATEMENT

STATUTORY RULES 1998 NO. 174

Issued by the Authority of the Minister for Workplace Relations and Small Business

Carriage of Goods by Sea Act 1991

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OUTLINE

The *Carriage of Goods by Sea Act 1991* ("the COGSA") gives effect in Australia to the amended Hague Rules, an international convention relating to carrier liability for loss or damage to marine cargoes, the text of which forms Schedule 1 to the Act.

The COGSA was amended in 1997 to partially implement a package of measures developed by an industry/government working group to improve Australia's marine cargo liability regime by extending the scope of carrier liability. As well, the 1997 amendments introduced a regulation-making power to enable the balance of the package to be implemented.

The Carriage of Goods by Sea Regulations 1998 are made with the authority of Sections 22 and 7 of the *Carriage of Goods by Sea Act 1991*. The Regulations will modify the operation in Australia of the amended Hague Rules. The changes are, in summary:

- ensuring coverage by the COGSA of a wide range of contracts of carriage, including electronic documents (rather than just bills of lading);
- covering cargo carried on deck, in most circumstances;
- extending COGSA coverage from the current "hook-to-hook" coverage to provide "terminal-to-terminal coverage";
- providing limited recompense for shippers' losses due to delays, except where the delays are "excusable delays"; and
- extending coverage to importers in limited circumstances.

These modifications to the COGSA will form Schedule 1A to the Act.

Background

The *Carriage of Goods By Sea Act 1991* received Royal Assent on 31 October 1991. The main object of the Act is to introduce a regime of marine cargo liability that is equitable and efficient and is compatible with arrangements existing in Australia's major trading partners.

The COGSA provides for two separate international agreements on carriage of goods by sea. The first is comprised by the amended Hague Rules which are Articles 1 to 10 of the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading 1924 (the Brussels Convention), as set out in sections 4 and 7. Section 8 of the COGSA provides that, subject to section 10, the amended Hague Rules have the force of law in Australia.

The second international agreement provided for in the COGSA is comprised by the Hamburg Rules which are Articles 1 to 26 of the United Nations Convention on the Carriage of Goods by Sea, which is Annex 1 of the Final Act of the United Nations Conference on the Carriage of Goods by Sea 1978, as well as Annex 11 of that Final Act (sections 4 and 12).

At present, general international practice is based on the Hague Rules. Australia's major trading partners currently operate under regimes based on the Hague Rules rather than the Hamburg Rules, which place greater liabilities on carriers than currently exist under the Hague Rules.

Prior to 1 November 1994, when the so-called "Hamburg Rules trigger" (then in the COGSA) was due to bring the Hamburg Rules into force for Australia, there was a vigorous debate in Australia between shipper interests arguing for their implementation and carrier interests opposing this. The view emerged that while the existing arrangements had deficiencies, there were drawbacks to the Hamburg Rules, both in terms of the drafting of the Rules, and because Australia's major trading partners have not adopted them.

The Marine Cargo Liability Working Group was set up in 1995 to examine the issues involved in this debate and make recommendations to improve the cargo liability regime for Australian shippers. The Group included representatives of shippers, carriers, shipowners, marine insurers and maritime law groups. In October 1995, the *Report of the Marine Cargo Liability Working Group* was presented to a forum of leading representatives of the industry interests concerned, which endorsed a package of measures.

The COGSA was amended in 1997, when a regulation-making power was introduced to enable implementation of the parts of the package which were not implemented by the *Carriage of Goods By Sea Amendment Act 1997*.

The latter requires that relevant industry interests be consulted before regulations are made. In order to satisfy this requirement, and because the subject matter is highly technical, drafts of the regulations have been circulated to industry interests for comment and subsequent modification. Representatives of these interests, encompassing shippers, carriers, marine insurers and maritime law groups, were involved in the development of the industry package. Responses received from these industry interests indicate that there is general agreement that the text of the final draft is appropriate.

FINANCIAL IMPACT STATEMENT

The Regulations have no effect on Commonwealth expenditure or revenue.

REGULATION IMPACT STATEMENT

A Regulation Impact Statement forms an attachment to this Explanatory Statement.

Carriage of Goods by Sea Regulations 1998

Regulation 1: Short title

Regulation 1 provides that the Regulations may be cited as the *Carriage of Goods by Sea Regulations 1998*.

Regulation 2: Commencement

Regulation 2 provides for the Regulations to commence on 1 July 1998.

Regulation 3: Amendment of the Act

Regulation 3 provides that the *Carriage of Goods by Sea Act 1991* ("the COGSA") is amended in accordance with these Regulations. Such amendment is permitted by sub-section 7(3) of the Act.

Regulation 4: New section 9A

Regulation 4 inserts a new section 9A to the *Carriage of Goods by Sea Act 1991*, which provides that a Ministerial determination of the limits of a port or wharf in Australia is a disallowable instrument. Such Ministerial determination may be required if the limits of a port or wharf as fixed by the Chief Executive Officer of Customs under the Customs Act 1901 produce an anomalous result when used to determine the period of the carrier's liability under the COGSA (see Article 1A, Rules 3 and 4 in Schedule 1A).

Regulation 5: Section 10 (Application of the amended Hague Rules)

Regulation 5 amends section 10 of the *Carriage of Goods by Sea Act 1991* to reflect the wider range of sea carriage documents to which the COGSA will apply. Previously the COGSA applied only to export and interstate bills of lading or similar documents of title. Now the COGSA is also to provide protection for Australian shippers whose contracts of carriage take other forms eg sea waybills, and consignment notes (other than those for purely coastal cargoes), including electronic versions of such documents (see Article 1 in Schedule 1A). In limited circumstances the COGSA will also apply to importers (see Article 10, Rule 2 in Schedule 1A).

Regulation 6: Section 11 (Construction and jurisdiction)

Regulation 6 amends subsection 11 (1) of the *Carriage of Goods by Sea Act 1991*, which provided for Australian law to apply to export bills of lading, to reflect the wider range of export sea carriage documents to which the COGSA will apply (and in limited circumstances to import documents and contracts of carriage).

Regulation 6 also amends subsection 11 (2) of the *Carriage of Goods by Sea Act 1991*, which preserves the jurisdiction of Australian courts, to apply to all relevant sea carriage documents. Note that, since the 1997 amendments, sub-section 11 (3) allows for the jurisdiction of Australian courts to be ousted by an arbitration agreement, if the agreement requires the arbitration to be conducted in Australia.

Regulation 7: New Schedule 1A

Pursuant to subsection 7(2) of the *Carriage of Goods by Sea Amendment Act 1997*, Regulation 7 inserts new Schedule 1A, which is the text of the

amended Hague Rules (see Schedule 1) as modified by the Regulations for operation in Australia.

SCHEDULE

SCHEDULE OF MODIFICATIONS TO BE INSERTED

Schedule 1A -Schedule of modifications

Item 1: Modifications

This Regulation sets out the scheme by which text omitted from the amended Hague Rules and text inserted into the amended Hague Rules to arrive at the modified text is shown, by *strikeout* and by *italics* respectively. References to "this Convention" are replaced by references to "these Rules" throughout.

Article 1

Article 1 is definitional and the modified text sets up the definitions which are required to expand the coverage of the COGSA from bills of lading (or similar documents of title) to sea carriage

documents generally (with the exception of certain consignment notes in the coastal trades - see Article 10, Rule 5).

Definitions additional to those in the amended Hague Rules are to be found in Rule 1, of: "*consignment note*" (Rule 1aa), "*data message*" (Rule 1ba), "*negotiable sea carriage document*" (Rule 1f), "*sea carriage document*" (Rule 1g) and "writing" (Rule 1h).

Rule 1 also contains revised definitions of: "*contract of carriage*", to reflect the wider range of documents to be covered by the COGSA (Rule 1b), "*goods*", as goods carried on deck are to be covered by the COGSA (Rule 1c), and "*carriage of goods by sea*", to reflect the expanded duration of carrier liability (Rule 1e).

New Rules 1A, 2, 3, 4 and 5 set out the limits of the carrier's expanded duration of liability. In general terms, the carrier's duration of liability changes from a "hook-tohook" basis to a "port-to-port" basis.

Under "hook-to-hook" liability, the carrier's liability began and ended at the ship's rail. Under the expanded duration of liability, the carrier's liability starts when it accepts delivery within the limits of a port or wharf (Rule 1A), and ends when it delivers the goods to the consignee, again within the limits of a port or wharf (Rule 2).

The limits of a port or wharf are to be, in Australia (Rule 3), ordinarily as defined in the Customs Act 1901 (but with provision in Rule 4 for the Minister to vary these limits to avoid an anomalous result), and overseas, as defined by local law (Rule 5).

Article 1A

This is a new Article, Rule 1of which extends COGSA coverage to cargoes for which the sea carriage document is in electronic form. Rule 2 defines when an electronic sea carriage document is issued and transferred.

Article 2

Article 2 of the amended Hague Rules (as found in Schedule 1) makes all contracts of carriage of goods by sea subject to the provisions of the amended Hague Rules, subject to an opt-out provision (Article 6) for cases where the character and condition of the goods warrants a special agreement.

Article 2 (as now modified) makes the amended Hague Rules apply to every contract of carriage by sea, except, by virtue of Article 6 and new Article 6A (regarding deck cargo, see below), where a special agreement is justified.

The modifications to Article 2 involve:

- * Adding Rule 2 which extends the definition of "goods" in the Hague Rules to include goods carried on or above deck (but not, by virtue of Article 1, Rule 1c, live animals). This means that the COGSA will, conditionally, cover goods carried on deck (subject to the limited opt-out provided by Article 6A).
- * Adding Rule 3 which requires the shipper to tell the carrier in writing of his stowage requirements for the goods referred to in Rule 2; and
- * Adding Rule 3 which removes the carrier's protection under the Rules (ie. the carrier's excuses and the limits on liability) if goods are carded on or above deck contrary to an express agreement with the shipper.

Article 3

Article 3 of the amended Hague Rules deals with the condition of the ship, the loading of cargo, marking of cargo, notice of loss, time bar for action etc.

The only modifications to this Article reflect the intended wider coverage of documents, with "bill of lading" being changed to "*sea carriage document*" or "*negotiable sea carriage document*" as appropriate, except where the provisions deal with special attributes of a bill of lading and this change is not appropriate.

Article 4

This Article of the amended Hague Rules sets out the circumstances in which the carrier is liable for loss or damage to sea cargoes, and the value limits to the carrier's liability.

The only modifications to Article 4 reflect the wider coverage of documents, with "bill of lading" being changed to "*sea carriage document*".

Article 4A

This is a new Article, which introduces limited carrier liability (Rules 1 and 6) for loss due to delay (including but not limited to pure economic loss, loss of markets and deterioration of the cargo) where the delay was inexcusable, using concepts from the Hamburg Rules. Where the delay (defined in Rule 2) was excusable, however, the carrier is not held liable.

A list of excusable delays (Rule 3) has been adapted from the *Marine Insurance Act 1909*, with some additional elaboration (Rules 4 and 5) in respect of delays due to industrial disputes to make clear that the carrier is to be held liable only when clearly at fault in the dispute.

Rule 6 sets the limits to the quantum of the carrier's liability, similarly to the limits in the Hamburg Rules. Rule 7 clarifies the relationship between Article 4 and Article 4A. A carrier may be liable under either or both Articles, but neither Article affects the exemptions provided in the other.

Article 4bis

There are no substantive changes to this Article of the amended Hague Rules as it is found in Schedule 1. It deals with the application of the carrier's defences and limits on liability, and with their extension to servants or agents of the carrier.

The only modifications to this Article are to replace references to "this Convention" with references to "*these Rules*", as is done throughout Schedule 1A.

Article 5

Article 5 of the amended Hague Rules provides that the carrier may increase the level of its liability above that set out elsewhere in the Rules.

The only modifications reflect the wider coverage of documents: "bill of lading" is changed to "*sea carriage document*" or "*negotiable sea carriage document*", as appropriate, except where the provisions deal with special attributes of a bill of lading and this change is not appropriate.

Article 6

This Article allows the shipper and the carrier a limited ability, not in respect of ordinary commercial shipments in the ordinary course of trade, to "opt out" of the amended Hague Rules where circumstances justify a special agreement.

The modifications reflect the wider coverage of documents to be covered by the COGSA. In the Article before modification there is a reference to no bill of lading having been issued, but only a non-negotiable receipt. The modifications express this condition in terms of no sea carriage document having been issued other than a non-negotiable receipt or consignment note.

Article 6A

This is a new Article, dealing with carriage on or above deck "at shipper's risk". A very narrow scope is intended for the use of this provision. Only where the goods must travel on or above deck, and the nature of cargo justifies a special agreement, may the shipper and carrier agree in writing that goods carried on deck not be covered by the COGSA (Rule 1). The word "must" means either that it is not lawful, or, for the carrier's vessel in question, not practicable, for the goods to be carried under deck. The opt out does not apply to containerised cargoes, but may apply to "over-dimensional" non-containerised breakbulk cargoes (Rule 2).

Rule 3 provides that an agreement for carriage on or above deck "at shipper's risk" must be recorded in the sea carriage document. Rule 4 is to make clear that this Article (unlike Article 6) may apply to ordinary commercial shipments.

With this (very limited) opt-out provision in place, the overall effect of the changes in relation to deck cargo is to increase the coverage of deck cargo, as required by the *Carriage of Goods by Sea Amendment Act 1997*.

Article 7

Article 7 allows the shipper and carrier to enter any agreement as to liability for loss or damage to the goods prior to loading and subsequent to discharge.

No change is being made to this Article. It is as found in Schedule 1.

Article 8

This Article provides that the amended Hague Rules do not override any limitation of liability which is set by statute. No change is being made from Schedule 1, except that "*These Rules*" replaces "The provisions of this Convention".

Article 9

Article 9 provides that the amended Hague Rules do not affect provisions regarding liability for nuclear damage in any international convention or national law. No change is being made from Schedule 1, except that "*These Rules*" replaces "This Convention".

Article 10

This Article of the amended Hague Rules sets out the basis of application of the amended Hague Rules. The modifications fundamentally reformulate this Article, which was predicated on the use of bills of lading only.

Rule 1 applies the amended Hague Rules (as modified) to all types of sea carriage documents for Australian export cargoes. Rule 2 applies the amended Hague Rules (as modified) to a limited category of import cargoes. Where an international convention listed in Rule 3, or a national modification of such a convention, does not apply, the COGSA will cover such cargo.

Rule 3 lists the international conventions referred to in Rule 2. In general terms these are the Hague Rules, the Hague Visby Rules or amended Hague Rules, and the Hamburg Rules.

Rule 4 applies the amended Hague Rules (as modified) to Australian interstate cargoes. Rule 5 exempts from the amended Hague Rules (as modified) Australian coastal cargo where the sea

carriage document is a consignment note, except where the cargo is international cargo being carried coastally.

Rule 6 exempt goods carried under a charterparty from the amended Hague Rules (as now modified), unless a sea carriage document, as defined in Article 1, is issued. Rule 7 applies the amended Hague Rules (as now modified) to a sea carriage document issued under a charterparty only if it is a negotiable sea carriage document (ie. a bill of lading or similar document).

ATTACHMENT

REGULATION IMPACT STATEMENT

A Problem

The Carriage of *Goods by Sea Act 1991* ("the COGSA"), governs the extent to which carriers are liable under statute law for loss or damage to seaborne cargo. The COGSA brings into force in Australia the amended Hague Rules (Schedule 1 to the COGSA), which set out the conditions under which, and the maximum extent to which, carriers are liable for loss or damage to cargo.

A second international agreement is also provided for in the COGSA. This is known as the Hamburg Rules, which place greater liabilities on carriers than currently exist under the amended Hague Rules. At present, general international practice is based on the Hague Rules, and Australia's major trading partners currently operate under regimes based on the Hague Rules.

The industry-agreed compromise which is the basis of these Regulations is based on industry's view that it is not appropriate that Australia adopt the Hamburg Rules (Schedule 2 to the COGSA) in place of the amended Hague Rules at this time, but that various amendments should be made to enhance the extent of the protection afforded to Australian shippers of marine cargoes.

B: Objectives

The objective of these Regulations is to complete the implementation of a package of measures, developed by industry in cooperation with government, to improve the protection provided to Australian shippers in the event of loss, damage or delay to their sea cargoes. Implementation, began with the passage of the Carriage of Goods *by Sea Amendment Act 1997*.

C: Options

A 1995 industry forum discussed options available for improving Australia's marine cargo liability regime. It was felt that, while there were shortcomings in the existing COGSA regime, it was not appropriate to introduce the Hamburg Rules at the time, primarily because the regimes of our major trading partners are based on the Hague Rules or the Hague-Visby Rules.

An industry working group was set up to examine the issues and explore whether it was possible to develop a regime that was broadly acceptable to all parties. The working group examined options for meeting industry concerns about the existing COGSA regime. The group developed a compromise solution in *which carriers* conceded significant extensions in the protection offered to shippers, in return for the removal of the automatic Hamburg Rules "trigger" from the COGSA, and its replacement with a review mechanism. This compromise was then adopted at a second industry forum, and the package of measures was subsequently approved by the Government.

Maintaining the status quo is not an appropriate option, as Australian shippers expect the passage of these measures in return for the removal of the so called "Hamburg Rules trigger" from the COGSA by the *Carriage of Goods by Sea Amendment Act 1997*. As well, industry has put considerable effort into developing the compromise package of measures, and into consultations on the development of these Regulations.

D : Impact analysis

The industry-agreed compromise will maintain the Hague Rules basis of the COGSA, thus maintaining compatibility with the regimes of our major trading partners, while broadening the protection the COGSA provides to Australian shippers, in some ways similarly to the intent of the Hamburg Rules.

The Regulations will increase the range of circumstances under which carriers will be made liable for loss or damage to marine cargoes, but not the maximum liability levels. Peak bodies representing carriers, the Australian Shipowners' Association (ASA) and the Australian Chamber of Shipping (ACOS), have agreed to the industryinitiated package.

The enhancement of carrier liability will increase the incentive for the mostly overseasowned shipping companies (represented by ACOS) to reduce loss, damage or delay to Australian cargoes. This should put downward pressure on the costs of marine cargo insurance cover for Australian shippers. While the carriers may experience some increase in costs from the enhancement of carrier liability, such cost increases would be greater if the Hamburg Rules were to be implemented.

E: Consultation

Subsection 7(4) of the COGSA requires that the Minister must consult relevant industry interests before regulations are made. In order to satisfy this requirement, and because the subject matter is highly technical, successive drafts of the regulations have been circulated to industry interests for comment and subsequent modification. Representatives of these interests, encompassing shippers/cargo owners, carriers, marine insurers and maritime law groups, were involved in the development of the industry package. Responses received from these industry interests indicate that there is general agreement with the final form of the Regulations.

F: Conclusion and recommended option

These Regulations will, as expected by industry, complete the implementation of a package of measures to improve the protection provided to Australian shippers in the event of loss, damage or delay to their sea cargoes.

G: Implementation and Review

The **COGSA provides** for regular Ministerial reviews of the question of whether the Hamburg Rules should replace the amended Hague Rules (as then in force in the COGSA following the 1997 amendments and these Regulations). In these reviews, the Minister must consult shippers, cargo owners, shipowners, carriers, marine insurers and maritime law associations.