

Carriage of Goods By Sea Regulations 1998 (No. 2) 1998 No. 324

EXPLANATORY STATEMENT

STATUTORY RULES 1998 NO. 324

Issued by the Authority of the Minister for Transport and Regional Services

Carriage of Goods by Sea Act 1991

Carriage of Goods By Sea Regulations 1998 (No. 2)

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OUTLINE

The Carriage of Goods by Sea Act 1991 ("the COGSA") gives effect in Australia to the amended Hague Rules, a modification for Australia of an international convention relating to carrier liability for loss or damage to marine cargoes, the text of which forms Schedule 1A 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, which came into force on 1 July 1998, completed the implementation of the package of measures. Those regulations were made with the authority of Sections 22 and 7 of the Carriage of Goods by Sea Act 1991.

The purpose of the Carriage of Goods by Sea Regulations 1998 (No. 2) is to correct two technical drafting errors, make one clarificatory amendment, and make a further amendment requested by industry, in the Carriage of Goods by Sea Regulations 1998 by:

- substituting revised words for subparagraph 111(2)(c)(i), which broaden the categories of shipping documents under which import shippers have access to Australian courts, in line with the intention that the Act should apply to all relevant shipping documents. This corrects an unintended effect of the Carriage of Goods by Sea Regulations 1998, which inadvertently restricted such access by referring to documents to which the amended Hague Rules apply;
- substituting revised words for subparagraph 11(1)(a), to make more clear that the same range of shipping documents is intended to be covered by the COGSA for outwards shipments as for inwards shipments.
- correcting a cross-referencing error relating to Schedule 1A, the amended Hague Rules, article 1, paragraph 1(e), changing the cross reference from "paragraph 2" to "paragraph 3".
- requiring the surrender by the shipper of any sea carriage document

for the goods concerned before the carrier will issue a "shipped" sea carriage document. At present this applies only to sea carriage documents that are documents of title, but subsequent industry advice is that non-surrender of other types of documents could cause problems for shippers in some circumstances.

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 Marine Cargo Liability Working Group was set up in 1995 to 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 Carriage of Goods By Sea Act 1991 requires that relevant industry interests be consulted before regulations are made. In order to satisfy this requirement, the Carriage of Goods by Sea Regulations 1998 (No. 2) have been circulated to industry interests for comment. 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 industry indicate 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 (No. 2)

Regulation 1: Short title

Regulation 1 provides that the Regulations may be cited as the Carriage of Goods by Sea Regulations 1998 (No. 2).

Regulation 2: Commencement

Regulation 2 provides for the Regulations to commence on gazettal.

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 Schedule 1 of these regulations. Such amendment is permitted by sub-section 7(3) of the Act.

SCHEDULE 1 AMENDMENTS of the CARRIAGE OF GOODS BY SEA

ACT 1991

Item 1: Paragraph 11(1)(a)

This substitution of words preserves the parallel effect of subsections 11 (1) and 11 (2) after the substantive change made to paragraph 11(2)(c)(i). Effectively, the change removes the words "to which, or relating to a contract of carriage to which, the amended Hague Rules apply," from the paragraph.

The change also clarifies the paragraph, to more make clear that shippers exporting goods from Australia using a sea carriage document (as defined in the regulations) are taken to have intended to contract according to Australian law.

In the original (1991) COGSA, this provision only applied to bills of lading or similar documents of title. The industry-endorsed package of measures implemented by the regulations that came into force on 1 July 1998 envisaged that the COGSA would apply to "all relevant shipping documents".

Item 2: Paragraph 11(2)(c)(i)

This substitution of words removes an unintended consequence of the regulations that came into force on 1 July 1998 of restricting access to Australian courts by Australian shippers and consignees.

Effectively, the change removes the words "to which, or relating to a contract of carriage to which, the amended Hague Rules apply," from the paragraph.

Had this change not been made, only *those* shippers and consignees whose sea carriage documents were subject to the Australian version of the amended Hague Rules would have been guaranteed access to Australian courts. Most inwards shipments would not be so subject.

In the original COGSA this provision applied to bills of lading or similar documents of title, no matter what regime applied to these documents. The industry-endorsed package of measures implemented by the regulations that came into force on 1 July 1998 envisaged that the COGSA would apply to "all relevant shipping documents".

Accordingly, this change now provides, as intended, that inwards shipments into Australia using a sea carriage document (as defined in the regulations) will be guaranteed such court access.

Item 3: Schedule 1A, the amended Hague Rules, Article 1, paragraph 1(e)

This item corrects a cross-referencing error in the definition of "Carriage of Goods by Sea", relating to the period in which the carrier is in charge of the goods concerned.

Item 4: Schedule 1A, the amended Hague Rules, Article 3, paragraph 7

This item modifies the operation of Article 3, paragraph 7 to require the surrender by the shipper of any sea carriage document for the goods concerned before the carrier will issue a "shipped" sea carriage document. At present this applies only to sea carriage documents that are documents of title, but subsequent industry advice is that non-surrender of other types of documents could cause problems for shippers in some circumstances.

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 an Australian modification to the amended Hague Rules (Schedule 1A to the COGSA), which set out the conditions under which, and the maximum extent to which, carriers are liable for loss or damage to Australian sea cargoes.

B: Objectives

The purpose of the proposed Carriage of Goods by Sea Regulations 1998 (No. 2) is to correct technical drafting errors in, and improve the operation of, the Carriage of Goods by Sea Regulations 1998, by:

- substituting revised words for subparagraph 11(2)(c)(!), which broaden the categories of shipping documents under which import shippers have access to Australian courts, in line with the intention that the Act should apply to all relevant shipping documents. This corrects the unintended effect of the *Carriage of Goods by Sea Regulations 1998*, which inadvertently restricted such access by referring to documents to which the amended Hague Rules apply;
- substituting revised words for paragraph 11(i)(a) to make clear that shippers exporting goods from Australia using any sea carriage document (as defined in the regulations) are taken to have intended to contract according to Australian law. In the original COGSA this provision only applied to bills of lading or similar documents of title. The industry-endorsed package of measures implemented by the regulations that came into force on 1 July 1998 envisaged that the COGSA would apply to "all relevant shipping documents".
- correcting a cross-referencing error relating to Schedule 1 A, the amended Hague Rules, article 1, paragraph 1(e), changing the crossreference from "paragraph 2" to "paragraph 3".
- requiring the surrender of any sea carriage document before the carrier will issue a "shipped" sea carriage document. At present this applies only to sea carriage documents that are documents of title, but subsequent industry advice is that nonsurrender of other types of documents could cause problems for shippers in some circumstances.

C. Options

To maintain the status quo would have the unintended consequence that many import shippers and consignees would lose their guaranteed right of access to Australian courts.

D. Impact analysis

Access to Australian courts by Australian importers and consignees will be provided, as intended, in relation to shipments made using all relevant shipping documents.

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, draft regulations have been circulated to industry interests for comment. 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 no objection to the corrective Carriage of Goods by Sea Regulations 1998 (No. 2).

F: Conclusion and recommended option

The amendments are necessary in order that:

- the right of access by Australian importers and consignees to Australian courts should not only be restored, but expanded, as intended, to cover shippers using all relevant shipping documents.
- the potential be removed for confusion from unclear wording and an incorrect crossreference.
- the potential be removed for problems arising in some circumstances from nonsurrender of a sea carriage document that is not a document of title before a "shipped" sea carriage document is issued by a carrier.

G: Implementation and Review

The COGSA must be reviewed prior to 15 September 2002, so that the Minister may decide whether the amended Hague Rules should be replaced by the Hamburg Rules as the regime in force for Australia.