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**Australian Government**

**Department of Infrastructure and Regional Development**

**Secretary**

File Reference: 2015/4445  
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Dear Mr Watling

**Inquiry into the increasing use of so-called Flag of Convenience shipping in Australia**

Thank you for your letter dated 24 July 2015, inviting the Department to make a submission to the Senate Rural and Regional Affairs and Transport References Committee's inquiry into the *Increasing use of so-called Flag of Convenience shipping in Australia*.

Attached is the Department's submission to the inquiry.

Yours sincerely

Mike Mrdak

16 September 2015

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Senate Standing Committees Rural and Regional Affairs and Transport  
References Committee

# Inquiry into the increasing use of so-called Flag of Convenience shipping in Australia

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*Submission by the Department of Infrastructure and  
Regional Development*

*September 2015*

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## U N C L A S S I F I E D

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## Introduction

1. This submission is provided by the Department of Infrastructure and Regional Development (the Department). The Australian Maritime Safety Authority (AMSA), an independent agency within the Infrastructure and Regional Development portfolio, will be providing a separate submission to the Inquiry. The submissions by the Department and AMSA can be read in conjunction with each other.
2. This submission incorporates input from the Australian Transport Safety Bureau (ATSB). The ATSB is an independent Commonwealth Government Statutory agency within the Infrastructure and Regional Development portfolio. The ATSB's function is to improve safety and public confidence in the three modes of transport: aviation, rail and maritime.
3. The submission also incorporates input from the International Legal Branch (ILB) of the Department of Foreign Affairs and Trade, which will not be providing a separate submission. ILB is jointly responsible for providing advice on international law under the *Legal Services Directions 2005*.
4. In addressing the Committee's terms of reference the submission focuses on the following matters:
  - the international frameworks for shipping registration and maritime safety, environmental protection and security;
  - Australia's regulatory frameworks for maritime security and the protection of the marine environment; and
  - key domestic and international developments since the 1992 House of Representatives Standing Committee on Transport, Communications and Infrastructure report *Ships of shame: inquiry into ship safety*.
5. In so doing, the submission is structured into three parts. **Part A** provides the Committee with context relating to the legal framework that applies to the global shipping industry and the use of open registers. **Part B** responds to specific matters relevant to the Department's responsibilities arising from the Inquiry's Terms of Reference. **Part C** discusses progress since the original 'Ships of Shame' inquiries.
6. The submission by AMSA provides detailed information on the terms of reference related to shipping standards and vessel inspection systems.

## Part A – Ship Registration and the role of the flag State

### Law of the Sea

7. The United Nations Convention on the Law of the Seas (UNCLOS)<sup>1</sup> provides a comprehensive framework addressing all matters relating to the law of the sea.
8. Under UNCLOS, States involved in maritime activities fall into three, non-mutually exclusive categories — flag States, port States, and coastal States, all of which encompass different rights and responsibilities in ensuring the maintenance of international standards at sea.

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<sup>1</sup> United Nations Convention on the Law of the Sea of December 1982,  
[http://www.un.org/Depts/los/convention\\_agreements/texts/unclos/unclos\\_e.pdf](http://www.un.org/Depts/los/convention_agreements/texts/unclos/unclos_e.pdf) (entered into force Nov. 16, 1994)



9. Of particular importance to this submission are flag States and port States. Flag State refers to a State that has authority and responsibility over a ship and, amongst other things, its compliance with international standards. Port State refers to the State that a ship is travelling to. Port States have certain powers under international law to investigate and institute proceedings against ships that breach international environmental and safety standards. Coastal State refers to a State that has territorial sea. This is of less relevance to this submission. Further details on the obligations of each type of State are outlined at Attachment A.

### Ship Registration

10. The category of a flag State is particularly important to the international ship registration system. Ascribing nationality to ships is one of the key means to maintain order in the international shipping system. Nationality is ascribed through the registration of the ship to a particular State pursuant to Article 91 of UNCLOS, authorising the ship to fly the State's flag. Nationality indicates the rights and obligations that a ship is subject to, that is, a ship is bound by the laws of the State that it is registered with. Nationality also indicates which State is responsible for the ship under international law.
11. A flag State is required to have a 'genuine link' with a ship to register that ship and authorise it to fly its flag, again, in accordance with Article 91 of UNCLOS. In addition, the 1958 Convention on the High Seas also articulates that a genuine link must exist between the ship and the flag State. However, there is not a definitive understanding of what constitutes a genuine link under the convention<sup>2</sup>. This has seen the requirement for a genuine link not being widely observed, giving rise to two broad types of ship registries:
- *Traditional or closed registries*, which generally put a focus on establishing a genuine link between the State and the ship in order to register that ship; and
  - *Open registries*, which permit foreign ship owners to register with that State, with little to no focus on the concept of genuine link.

### Open registers

12. Registering a ship on an open register can potentially offer considerable economic benefit to shipowners when compared to registering in their State of origin, including:
- Lower fees;
  - Lower taxation; and
  - Lower crew costs (resulting from low wages)<sup>3</sup>.
13. Open Registers can also bring significant benefits to a flag State, including:
- Tonnage taxes and registration fees;
  - Franchise and/or royalty fees; and
  - Reduced government expense due to outsourcing<sup>4</sup>.
14. The combination of these benefits to flag State and shipowner has seen the growth of open registries in modern times. Liberia became the first open registry in the mid-1900s, originally as

<sup>2</sup> Churchill and Lowe *Melland Schill Studies in International Law: The Law of the Sea*, 3<sup>rd</sup> Edition, Juris Publishing: Manchester, 1999, p.258.

<sup>3</sup> The International Transport Workers' Federation (ITF), *Flags of convenience*, <http://www.itfglobal.org/en/transport-sectors/seafarers/in-focus/flags-of-convenience-campaign> The ITF was founded in 1896 and represents the interests of transport workers' unions in bodies such as the ILO, the IMO and the International Civil Aviation Organization.

<sup>4</sup> Food and Agriculture Organization of the United Nations, *Rationale for the Operation of Open Registers*, <http://www.fao.org/docrep/005/y3824e/y3824e06.htm>

a means to provide development funds to the nation. By 2014 almost 73 per cent of the world fleet was flagged in a country other than its owner<sup>5</sup>.

15. However the growth of open registries has been accompanied by concerns about the implications for vessel safety and environmental standards, and the conditions for, and quality of, seafarers on open register ships<sup>6</sup>.

#### What are 'Flags of Convenience'?

16. The International Transport Workers Federation (ITF), the global federation of transport workers' trade unions, identifies a number of open registers as 'flags of convenience'. 'Flags of convenience' is a contested term, with a number of meanings depending on context. The term can be used to describe individual ships flying a flag of an open register, the open registries themselves, and a business practice by ship owners. The ITF categorisation relates to individual flag States, with the implication that ships flying the flag of that State do so as a business convenience. This is the most practical definition for the purpose of responding to the terms of reference.

17. The ITF identifies 34 flag States as offering a 'Flag of Convenience'. Table 1 lists these below.

**Table 1 – Countries declared as 'Flag of Convenience' by the ITF's fair practices committee<sup>7</sup>**

Nation	International Maritime Organization (IMO) Member?
Antigua and Barbuda	Yes
Bahamas	Yes (and IMO council member)
Barbados	Yes
Belize	Yes
Bermuda (UK)	Yes*
Bolivia	Yes
Burma	No
Cambodia	Yes
Cayman Islands	No
Comoros	Yes
Cyprus	Yes (and IMO council member)
Equatorial Guinea	Yes
Faroe Islands	Associate Member
France (international register)	Yes
Germany (international register)	Yes
Georgia	Yes
Gibraltar (UK)	Yes*
Honduras	Yes
Jamaica	Yes (and IMO council member)
Lebanon	Yes
Liberia	Yes (and IMO council member)
Malta	Yes (and IMO council member)
Marshall Islands	Yes
Mauritius	Yes
Moldova	No
Mongolia	Yes
Netherlands Antilles	Yes*
North Korea	No

<sup>5</sup> United Nations Conference on Trade and Development, *Review of Maritime Transport 2014*, [http://unctad.org/en/PublicationsLibrary/rmt2014\\_en.pdf](http://unctad.org/en/PublicationsLibrary/rmt2014_en.pdf)

<sup>6</sup> Rothwell and Stephens (2010) *The International Law of the Sea*, Hart Publishing: Oregon, p.159

<sup>7</sup> The ITF, *Flags of convenience*, <http://www.itfglobal.org/en/transport-sectors/seafarers/in-focus/flags-of-convenience-campaign>

Panama	Yes (and IMO council member)
Sao Tome and Príncipe	Yes
St Vincent	Yes
Sri Lanka	Yes
Tonga	Yes
Vanuatu	Yes

(\* refers to IMO membership of primary register)

18. As shown in Table 1, most countries classified as Flags of Convenience by the ITF are IMO Member States. Four of them - Bahamas, Panama, Liberia, and the Marshall Islands - are amongst the top ten financial contributors in terms of the IMO's annual assessments. In addition to being IMO Member States, Bahamas, Cyprus, Jamaica, Liberia, Malta and Panama are IMO Council Members.
19. Three of the five largest global fleets as of 1 January 2014 are categorised by the ITF as Flags of Convenience: Panama (21.21 per cent of the world fleet), followed by Liberia (12.24 per cent), and the Marshall Islands (9.08 per cent). Hong Kong (China) (8.24 per cent) and Singapore (6.17 per cent)<sup>8</sup> make up the top five.

### International legal obligations of flag States

20. In addition to the obligations of flag States under UNCLOS discussed above, States must ensure that vessels registered under their flag satisfy their obligations arising under relevant Conventions.
21. Four Maritime Conventions are characterised as the four pillars of the international regulatory regime for quality shipping. Australia is a Party to all four Conventions:
- International Convention for the Safety of Life at Sea (SOLAS), 1974, as amended;
  - International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 relating thereto and by the Protocol of 1997 (MARPOL);
  - International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW) as amended, including the 1995 and 2010 Manila Amendments; and
  - Maritime Labour Convention (MLC), 2006, as amended.
22. The first three Conventions are administered by the IMO, a specialised agency of the United Nations established in 1948 as the first international body devoted exclusively to maritime matters. The IMO first met in 1959 and since then has developed over 50 Conventions and Protocols relating to ship safety and marine environment protection. Australia has been a member of the IMO since its establishment in 1959 and a member of the IMO Council for the past 40 years.
23. The first pillar, SOLAS, requires ships flagged by State parties to comply with the minimum safety standards concerning construction, equipment and operation. The first SOLAS Convention was adopted on 20 January 1914 and entered into force in July 1915, following the sinking of the *Titanic*, on 14 April 1912.
24. The second pillar, STCW, entered into force in April 1984 and establishes basic international requirements on seafarer training, certification and watchkeeping. The Convention prescribes minimum standards relating to training, certification and watchkeeping for seafarers which countries are obliged to meet or exceed.

<sup>8</sup> United Nations Conference on Trade and Development, *Review of Maritime Transport 2014*, [http://unctad.org/en/PublicationsLibrary/rmt2014\\_en.pdf](http://unctad.org/en/PublicationsLibrary/rmt2014_en.pdf)

25. The third pillar, MARPOL, entered into force on October 1983 and covers the prevention of pollution of the marine environment by ships from operational or accidental causes. MARPOL is discussed in further detail under Part B.
26. The fourth pillar, MLC, was adopted by the 'the 94th International Labour Conference' in 2006 with the aim to provide international standards for the world's first genuinely global industry, ensuring decent work for seafarers around the world. The MLC 2006 is the result of a tripartite negotiation by representatives of government, employers and workers. The Convention establishes comprehensive rights and protections at work for the world's seafarers and aims to achieve decent work arrangements for seafarers, and secure economic interests in fair competition for quality shipowners.
27. Australia is a Party to the MLC 2006, which came into force in August 2013. To date, sixty-four International Labour Organization (ILO) Member States representing more than 80 per cent of the world's global shipping tonnage have ratified the Convention. The MLC provides an international safety net of standards regulating seafarer employment relationships for the world's 1.5 million seafarers and creates a level playing field for shipowners and operators. The regulations and guidelines of the MLC set out the minimum standards for employment, accommodation, health protection, medical care, welfare and social security protection of seafarers. They clearly define the role of flag States that register ships in ensuring that adequate security exists to mitigate against the financial, legal and human cost of abandonment, and death and long-term disability due to occupational hazards. AMSA is responsible for enforcing the MLC in Australia.
28. The main open registers, Liberia, Panama, the Marshall Islands and the Bahamas, have ratified these Conventions and are bound by their provisions regarding maritime safety and environmental protection, although they have not ratified all subsequent amendments<sup>9</sup>.

## **Part B – Specific matters relevant to the Department's responsibilities**

### **Term of Reference (a) - Maritime security**

29. Australia's approach to maritime transport security is robust and compliant with international maritime security obligations. In Australia, government agencies and industry work together to ensure a layered approach to maritime security with no agency being solely responsible for security outcomes. While no system is infallible, a layered approach means that should one security layer be compromised, there is a strong likelihood that another layer will be effective.
30. Australia's layered approach to maritime security begins with intelligence, ends with physical security measures at ports and on board ships, and includes many layers in between. The layers are all different, comprising technology, training, practices, processes and physical measures.
31. To date, the Australian Government's approach, in collaboration with the maritime industry, has successfully prevented an attack occurring in Australia. The Australian Government's intelligence agencies work closely with the Department and industry to provide accurate information about maritime threats to determine if security settings are fit for purpose or

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<sup>9</sup> The International Maritime Organization, *Status of Conventions*, <http://www.imo.org/en/About/Conventions/StatusOfConventions/Pages/Default.aspx> & International Labour Organization, *Ratification and implementation information for the Maritime Labour Convention, 2006*, <http://www.ilo.org/global/standards/maritime-labour-convention/database-ratification-implementation/lang-en/index.htm>

whether there are gaps that need to be filled. Currently, there is no information to indicate there is a specific terrorist threat to Australia's maritime transport system.

32. The ongoing monitoring and review of Australia's maritime transport security system is informed by intelligence, exercises and minor incidents and decisions of the international maritime community. The Department actively considers what the Australian Government knows about terrorist intent, capability and tactics to ensure policy settings and practices for the maritime transport security system are fit for purpose and adaptable to any change in threat.

### **The international basis for Australia's maritime transport security system**

33. Following the events of 11 September 2001, members of the IMO determined a need to enhance global maritime transport security standards. Members agreed to amend the SOLAS Convention, and to develop the International Ship and Port Facility Security (ISPS) Code.
34. SOLAS and the ISPS Code establish an international framework between contracting governments and the maritime industry to detect security threats and deter acts which threaten the security of ships and port facilities used in international trade. The framework has 162 contracting governments, including Australia, and represents 98.6% of international maritime freight tonnage<sup>10</sup>.
35. The framework requires passenger ships, cargo ships (above 500 gross tonnage) and mobile offshore drilling units operating on international voyages to have an approved security plan with security measures informed by a security assessment. Contracting governments will issue an International Ship Security Certificate (ISSC) to the ship operator to confirm these requirements have been appropriately met.
36. When a foreign-flagged ship enters the territorial water of another State, the contracting government confirms that the ship has appropriate security measures in place by requesting the ship's valid ISSC and security plan. If the ship does not have these items, the contracting government under the ISPS Code is able to control the movement of the ship. Types of control measures that can be used include ship inspections, restricting operations and ship expulsions.

### **Regulation of maritime transport security in Australia**

37. An efficient, safe and secure maritime transport system is integral to Australia's social and economic wellbeing. Government and industry work together to provide a robust maritime transport security system.
38. The Department administers the *Maritime Transport and Offshore Facilities Security Act 2003* (MTOFSA) which establishes a regulatory framework for preventative maritime transport security and fulfils Australia's international obligations under SOLAS and the ISPS Code. MTOFSA sets security requirements for Australian-flagged ships and foreign-flagged ships in Australian waters, as well as the ports and port facilities which interface with these ships. As at 15 July 2015, 69 ports, 201 port facilities and 53 Australian-flagged ships were security regulated under MTOFSA.
39. Australia's approach to maritime transport security regulation is consistent with likeminded countries such as Canada, the United Kingdom and the United States. As with these countries,

<sup>10</sup> The International Maritime Organization, *Status of Conventions*,  
<http://www.imo.org/en/About/Conventions/StatusOfConventions/Pages/Default.aspx>



Australia extends its SOLAS and the ISPS Code obligations to include the wider port area in addition to the port facilities which interface with ships on international voyages. The United States Coast Guard (USCG) regularly inspects maritime security arrangements globally, including in Australia, to assess compliance with the ISPS Code standards. The USCG have assessed Australia's maritime security framework as appropriate.

40. The Australian Border Force (ABF) collects pre-arrival information from foreign-flagged ships on behalf of the Australian Government, to confirm the safety and security status of the ship and who is travelling on it (crew and passengers). The pre-arrival information collected in support of MTOFSA includes details of the ship's ISSC, the security level which the ship has been operating at, and its last ten ports of call. The Department provides this information to Australian ports and port facilities to inform security arrangements. Of the approximately 52,000 ships arriving in Australia between 2013 and 2014<sup>11</sup>, all were operating at maritime security level 1 – indicating no ship posed an identifiable heightened risk of a security incident occurring. Pre-arrival information collected by the ABF also confirms the visa status of foreign crew (by confirming they hold a valid maritime crew visa) and passengers (if any).
41. The Department also has a memorandum of understanding with AMSA that supports the implementation of MTOFSA. Through their PSC activities, AMSA inspects foreign-flagged ships to confirm compliance with the ISPS Code. Between 2012 and 2014, over 10,000 foreign-flagged ships were inspected by AMSA, with zero deficiencies identified for non-compliance with the ISPS Code.
42. If a foreign-flagged ship is non-compliant with MTOFSA, has a heightened security risk, or if there is probable or imminent threat, MTOFSA allows the Secretary to direct them to implement additional security measures. This can be done through the issuing of security directions which are used to manage specific risk or vulnerability; or control directions which address non-compliance issues. The last control direction was issued on 21 November 2008 and required a foreign-flagged ship operating as an offshore facility in Australian waters to obtain a valid ISSC.
43. Foreign-flagged ships must comply with the port and port facility operator's security requirements. Ports and port facilities must have a security assessment and security plan approved by the Secretary of the Department (the Secretary). The security plan includes a range of security measures informed by a security assessment, to protect both the facility and the visiting ship by setting out how they will interact. Examples of security measures include maritime security zones, access and escorting arrangements for crew, and CCTV monitoring.
44. Maritime security zones are established under MTOFSA by the Secretary to control the movement of goods or people around ships and to protect critical infrastructure. A maritime security zone is a security measure which foreign-flagged ships and their crew must comply with. Unmonitored access in maritime security zones is limited to holders of Maritime Security Identification Cards (MSICs). An MSIC identifies a person who has been the subject of a background check and has met the minimum security requirements to work unmonitored in a maritime security zone. MSICs are limited to Australian citizens, work visa holders or foreign seafarers on ships in the Australian International Shipping Register. Persons without an MSIC,

<sup>11</sup> The Australian Maritime Safety Authority (AMSA), 'Port State Control 2014 Report: Australia', <https://www.amsa.gov.au/forms-and-publications/International/publications/Ship-Safety/PSC-Annual-Reports/PSCReport2014.pdf>

or those ineligible to be issued an MSIC (such as foreign seafarers on foreign-flagged ships) must be monitored or escorted in maritime security zones by an MSIC holder at all times.

45. To ensure Australia's maritime transport security framework is working effectively, the Department hosts the Maritime Industry Security Consultative Forum (MISCF) twice a year. Through MISCF, the government and industry share intelligence and information on threats, risks and incidents, and discuss operational issues and regulatory settings.

## **Conclusion**

46. The Australian maritime transport security framework, and its underpinning international obligations, ensures all ships (including foreign-flagged ships) in Australian waters have appropriate security arrangements in place. In the event of non-compliance or a change in threat, MTOFSA has the appropriate mechanisms in place to allow for increased security measures to be applied to foreign-flagged ships.
47. The Department takes a proactive and forward looking approach to security regulation, constantly reflecting on what the Government knows about terrorist threats to ensure that Australia's maritime transport security system is fit for purpose and security measures are targeted towards the areas of highest risk.
48. To respond to future challenges, the Department works closely with the international maritime community, other government agencies and the maritime industry to ensure Australia's maritime transport security system is responsive to new and emerging threats and can also cope with expected future growth in trade.

## **Term of Reference (a) - Marine environment protection**

### **Legislative framework**

#### **Preventative requirements**

49. Australia has a vast coastline, some of which is particularly vulnerable to pollution from ships. Being an island continent, Australia is economically dependent on its sea lanes and port operations – resulting in a continual risk of pollution to the marine environment.
50. As described in Attachment A, under the law of the sea, ships have the right of 'innocent passage' when transiting the territorial and international sea of a coastal State, and a right of freedom of navigation on the high seas. UNCLOS states that passage is innocent as long as it is not prejudicial to the peace, good order or security of the coastal State. Consistent with these rights, a system of global regulation has been implemented to ensure ships are subject to uniform pollution standards whether they are on the high seas, in territorial waters or in port.
51. The Marine Environment Protection Committee (MEPC) is IMO's senior technical body on marine pollution related matters. It is aided in its work by a number of IMO's Sub-Committees, in particular the Sub-Committee on Pollution Prevention and Response (PPR). MEPC was established on November 1973 and was chaired by Australia from 1997 to 2002.
52. Australia is a Party to a number of IMO conventions that deal specifically with ship related marine pollution matters:
  - International Convention on the Control of Harmful Anti-Fouling Systems on Ships 2001;
  - International Convention on Civil Liability for Bunker Oil Pollution Damage 2001;

- International Convention on Civil Liability for Oil Pollution Damage 1992;
- International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1992;
- Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties 1969;
- International Convention for the Prevention of Pollution from Ships;
- Protocol on Preparedness, Response and Co-operation to Pollution Incidents by Hazardous and Noxious Substances 2000;
- International Convention on Oil Pollution Preparedness, Response and Cooperation 1990; and,
- Protocol to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1992.

### **International Convention for the Prevention of Pollution from Ships**

53. In 1973, the IMO adopted MARPOL, which has been amended by the Protocols of 1978 and 1997 and kept updated with relevant amendments. MARPOL addresses pollution from ships by oil; by noxious liquid substances carried in bulk; harmful substances carried by sea in packaged form; sewage; garbage; and the prevention of air pollution from ships. MARPOL applies to 99% of the world's merchant tonnage.
54. Regulations to prevent pollution from ships in Australian waters are implemented by both Commonwealth and State Governments. They are based on MARPOL. This Convention is in force in 152 countries and is the main international convention covering prevention of ship-sourced pollution in the marine environment.
55. The *Protection of the Sea (Prevention of Pollution from Ships) Act 1983* and *Navigation Act 2012* (Chapter 4) give effect to MARPOL. The States and Northern Territory have implemented complementary MARPOL legislation that implements certain parts of MARPOL. Where a State or the Northern Territory does not have complementary legislation for a specific Annex of the Convention, the Commonwealth legislation applies.
56. MARPOL deals with pollution that might result from accidents such as collisions or groundings, as well as all types of waste generated during the normal operation of ships, known as 'operational waste'. Ships are permitted to discharge small quantities of this operational waste, subject to very strict controls. A discharge is any release from a ship, whatever the cause.
57. MARPOL includes special protection measures for Australia's Great Barrier Reef.
58. Penalties under MARPOL legislation are up to \$A17 million for the shipowner and \$A3.4 million for the master of a ship discharging in contravention of the MARPOL regulations. The legislation provides wide powers for AMSA marine surveyors to board ships and obtain evidence such as oil samples, and enables ships to be detained while investigations are carried out.
59. While the focus of AMSA, the Great Barrier Reef Marine Park Authority and the various state/territory agencies involved in enforcing MARPOL will always be on preventing pollution incidents, enforcement action is becoming increasingly effective. Since 1988, there have been more than 200 successful prosecutions in Australian courts. Further successful prosecutions were also conducted in foreign courts following pollution incidents in Australian waters.



60. Maritime pollution legislation is subject to ongoing review, in the light of international and domestic developments. For example, following the grounding of the *Shen Neng 1* in the Great Barrier Reef in April 2010, the offence provisions regarding the discharge of oil from a ship were strengthened.
61. This amendment combined two separate offences (one requiring proof of recklessness or negligence, one strict liability) under the *Protection of the Seas (Prevention of Pollution from Ships) Act 1983* into one strict liability offence with a penalty of up to 20,000 penalty units<sup>12</sup>. Previously these offences were 2,000 penalty units for the reckless or negligent offence and 500 penalty units for the strict liability offence.
62. This no longer requires, to the same extent, the Commonwealth to prove which Party was responsible for a spill, as the offence applies to the master, owner, and charterer of the vessel, on conviction.
63. The new maximum fine of 20,000 penalty units is intended to ensure that a penalty can be imposed that is proportionate to the degree of harm as well as provide sufficient deterrent to avoid future harm. It will also bring the Commonwealth penalty in line with penalties under the *Queensland Transport Operations (Marine Pollution) Act 1995 (Qld)* and the *Marine Pollution Act 1987 (NSW)*.

#### **Recent initiatives— the North-East Shipping Management Plan (NESMP) and the Particularly Sensitive Sea Area (PSSA) extension**

64. The NESMP and the PSSA offer two recent examples of the Australian Government's commitment to protecting Australia's sensitive marine environments and enhancing ship safety. These initiatives apply to ships, regardless of their flag.

#### NESMP

65. Australia's north-east marine environment is recognised as one of the most sensitive and unique ecological regions in the world. The NESMP builds on existing world-class shipping management activities to proactively manage risks and further minimise potential environmental impacts. The plan was developed in close consultation with a range of government agencies and key stakeholders. The plan contains a suite of proposed measures that may be used to manage future increases in shipping traffic, ensure the safety of shipping and the prevention of ship sourced pollution and other environmental impacts in the Great Barrier Reef, Torres Strait and Coral Sea regions.

#### PSSA extension

66. On 15 May 2015, the IMO has agreed to the Australian Government's proposed extension of the Great Barrier Reef and Torres Strait PSSA to protect the South West Coral Sea. The new arrangements will protect an additional 565,000 square kilometres of the South-West Coral Sea adjacent to the existing Great Barrier Reef and Torres Strait PSSA – a 140% increase on the current 403,000 square kilometres.
67. Designation as a PSSA helps to protect seas where significant ecological, socio-economic or scientific attributes may be vulnerable to damage by international shipping. The Great Barrier Reef was declared the world's first PSSA in 1990. Three Associated Protective Measures will

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<sup>12</sup> As at July 2015, under the *Crimes Act 1914*, a penalty unit means the amount of \$180 (subject to indexation).

support the new PSSA, including a new 'Area to be avoided' and two supporting two-way routes. These measures will enhance ship safety by keeping traffic away from the many reefs, cays, islets, sandbars and shoal patches within the area. This reduces the risk of groundings and allows more time for intervention in developing situations, such as a ship suffering a mechanical breakdown.

## **Term of Reference (b) - Port State control and detentions**

68. A range of international Conventions, including the Conventions making up the four pillars of the international regulatory regime, provide for 'port State control' (PSC) which enables port States to inspect foreign-flagged ships in their ports. PSC inspection can verify that the condition of the ship and its equipment comply with the requirements of international regulations and that the ship is manned and operated in compliance with these rules.
69. The Australian Government is committed to the protection of life and property at sea and to the preservation of the marine environment. PSC is one of the key strategies used by AMSA to ensure that these objectives are achieved.
70. AMSA Marine Surveyors may board a ship at any time, regardless of flag, to inspect and detain unseaworthy or substandard ships under s.257 and s.248 of the *Navigation Act 2012* (Navigation Act)<sup>13</sup>. Detention of a ship is an effective compliance measure that ensures critical deficiencies are identified and rectified before the ship can depart. When a ship is detained/released, AMSA notifies the flag State and the relevant classification society. Details of all detentions are also forwarded to the IMO.
71. The separate submission from AMSA provides detailed information on its administration of the PSC framework.

## **Part C - Progress since Ships of Shame: inquiry into ship safety (1992)**

72. Term of Reference (e) seeks information about the progress made in this area since the 1992 House of Representatives Standing Committee on Transport, Communications and Infrastructure report: *Ships of shame: inquiry into ship safety*. The 1992 Ships of Shame Inquiry, along with subsequent progress (1994) and sequel (1995) reports, highlighted issues associated with the global shipping industry, and made a number of recommendations ([Attachment B](#)) for Australia to improve shipping standards and safety. Many of the recommendations touched on critical issues such as:
  - how investigations into maritime casualties are conducted;
  - the effectiveness of the PSC regime;
  - the availability of information regarding the inspection and detention of ships, and
  - the effectiveness of the IMO and enforcement of international Conventions.
73. This section discusses the progress on these key issues. Considerable progress has been made on improving safety, environmental, investigation and workforce outcomes since these

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<sup>13</sup> The Navigation Act is Commonwealth legislation containing the substantive powers for Australia to regulate both domestic and international ship and seafarer safety, shipping aspects of protecting the marine environment and the actions of seafarers in Australian waters. It also gives effect to the relevant international conventions relating to maritime issues to which Australia is a Party. The Navigation Act also has subordinate legislation contained in Regulations and Marine Orders.

inquiries. Since the Ships of Shame reports, the international maritime industry, through the IMO, has continued to improve safety, employee training, and environmental controls.

74. This robust international maritime regulatory environment has continued to improve the maritime industry's global safety record. For example, total shipping losses have declined by 50% since 2005 and in 2014 there were 75 total losses of ships greater than 100 gross tonnes reported worldwide, the lowest number in 10 years. This is a decline of 32% compared with 2013, and is a significant improvement on the 10 year average of 127 total losses per year<sup>14</sup>. The IMO is currently undertaking a major review of its strategic planning processes, including a reassessment of the trends, developments and challenges that will impact on the safety, environmental, security and economic outcomes of shipping over the medium-long term.

#### **Marine Safety Investigation: ATSB Procedures**

75. The ATSB, as Australia's national transport safety investigator, maintains an operational capability for the investigation of incidents, accidents and safety occurrences involving Australian registered ships anywhere in the world, foreign flag ships within Australian waters, or where evidence relating to an accident involving ships is found in Australia.
76. The ATSB's operational remit extends to international commercial shipping, international passenger transport (cruise ships) and heavy interstate passenger transport (ferry services). The ATSB is not presently resourced to undertake the investigation of occurrences involving domestic commercial vessels, private vessels or recreational watercraft.
77. ATSB investigations are undertaken in accordance with the *Transport Safety Investigation Act 2003*, which recognises and reflects the SOLAS Convention and the Code of International Standards and Recommended Practices for a Safety Investigation into a Marine Casualty or Marine Incident (Casualty Investigation Code). As such, the ATSB's protocols align with established international best practice.
78. Both the Ships of Shame report and the sequel report in 1995 made a number of recommendations concerning the conduct of maritime incident investigations, particularly that coastal States should be able to lead investigations, and that there should be transparency around such investigations, bringing them into line with the Bureau of Air Safety Investigation (BASI).
79. In 1999 the Australian Government formed the ATSB, with the then Marine Incident Investigation Unit (MIIU) amalgamating with the BASI and the non-regulatory elements of the Federal Office of Road Safety. Significantly, this allowed the adoption of an approach to maritime safety investigation that mirrored and reflected the practices of the BASI; addressing the intent of recommendation 14 of the Ships of Shame Inquiry. In a continuing vein, the 2003 introduction of the *Transport Safety Investigation Act* provided the legislative underpinnings for Australia's international obligations under the SOLAS Convention. Since 2010, compliance with the Casualty Investigation Code has been mandatory for parties to the SOLAS Convention.
80. Part 3 of the *Transport Safety Investigation Regulations 2003* defines *Immediately-Reportable Matters*; these being investigable matters relating to marine operations and typically being events that would seriously endanger, or had the potential to seriously endanger the safety of a ship, its occupants or any other person.

<sup>14</sup> *Allianz Safety and Shipping Review 2015*, citing Lloyds List Intelligence Casualty Statistics, <http://www.agcs.allianz.com/insights/white-papers-and-case-studies/safety-and-shipping-review-2015>

81. The country where a ship is registered has no bearing on the ATSB's considerations when deciding whether to undertake an investigation into any investigable matter. Accordingly, and reflecting the proportion of such shipping into and from Australian ports, the very significant majority of the ATSB's investigations have involved ships under foreign flags, including the so-called 'flags of convenience'.
82. To-date, the ATSB's investigations have not had grounds to identify any safety issues that could be held as more prevalent on (or associated with) 'flags of convenience' ships, when compared against other international or Australian flag ships. However it should be noted that the ATSB's investigative engagement levels are very small when compared to the routine PSC activities undertaken by AMSA.

### **Port State Control**

83. Compliance with international obligations by flag States was a major issue raised in the Ships of Shame reports, particularly the failures of some flag States to implement their obligations. Noting that, while responsibility of an individual vessel still lies with ship owners and flag States, as described earlier in this submission PSC inspections have become a critical element of Australia's strategy to ensure the safety of ships in Australian waters, protect the marine environment and ensure the safety and welfare of seafarers.
84. In Australia AMSA carries out PSC inspections on foreign ships within Australian jurisdiction to verify compliance with the requirements of international maritime Conventions. Please refer to AMSA's submission which reports on developments in the number and nature of deficiencies identified on ships since the 1990s.
85. In addition to Australia's individual PSC actions, Australia is involved in regional cooperation. In 1991 the IMO Assembly Resolution A.682 (17) 'Regional Cooperation in the Control of Ships and Discharges' recognised the effectiveness gained from regional cooperation in PSC rather than by States acting in isolation. The key to such regional cooperation is ensuring that substandard ships do not have access to ports where they can call with impunity. Regional cooperation also allows member States to share information on inspection results and ensure follow-up of deficiencies found during inspections that may not be able to be rectified in the initial inspection port.
86. A number of Regional Agreements or Memorandums of Understanding (MOUs) on PSC have been signed since 1991. Since the 1992 Ships of Shame report, Australia has become a signatory to and an active member of both the Asia Pacific Memorandum of Understanding on PSC (Tokyo MOU) in 1994 and Indian Ocean Memorandum of Understanding on PSC (IOMOU) in 1999.

### **Ship information database**

87. The Ships of Shame report also found that Australia's PSC efforts could be improved through the public availability of information relating to deficiencies found. Since the report, data collection and the availability of ship information has been greatly enhanced in both the Australian and international context.
88. AMSA publishes on a monthly basis, details of vessels detained following inspection by its ship safety surveyors. AMSA also publishes an annual publication of the number of foreign ships inspected; number of foreign ships detained; number of Australian ships inspected; number of Australian ships detained; and the number of deficiencies found across the inspections.

89. The release of this data is in line with the recommendations 5 and 12 of the Ships of Shame report.
90. Through the Tokyo MOU and IOMOU, data sharing via the Asia Pacific Computerized Information System and the Indian Ocean Computerised Information System have enhanced regional access to detailed information about a ship's inspection history.

#### **Mandatory audit scheme**

91. The IMO has a key objective of improving Member State compliance with the Organization's legal instruments. At the IMO's 28th session of Assembly on 4 December 2013 the Instruments Implementation Code (the III Code) was adopted. The III Code provides a global standard to enable States to meet their obligations as flag, port and/or coastal States. Amendments to a number of key safety and environment Conventions were subsequently adopted that will make the III Code mandatory for contracting Parties. The purpose of making mandatory the III Code is to ensure that Parties to the relevant IMO Conventions facilitate, and be subject to, periodic audits by the IMO to ensure compliance with the respective treaty requirements.
92. A mandatory audit scheme is a key tool for assessing Member States' performance in meeting their obligations and responsibilities as a flag, port or coastal State under IMO Conventions. In making the III Code mandatory, the intention is not only to ensure Member States are adhering to mandatory requirements, but also to give opportunity to identify capacity building needs and offer technical assistance to Member States where required.
93. Australia is a long-standing supporter of the IMO audit scheme and sees the value of this scheme for all Parties to IMO Conventions. Australia participated in a voluntary IMO audit during 2008. Mandatory auditing under the III Code is expected to commence in 2016. The separate submission from AMSA provides further information on the 2008 audit.



## **ATTACHMENT A – Flag States, Port States and Coastal States**

### The Flag State

The State in which a ship is registered and authorised to fly its flag (the flag State) has authority over and responsibility in respect to its ship under international law, and generally has exclusive jurisdiction over its ships on the high seas. Under Article 94 of UNCLOS, flag States are obligated to perform the following duties:

- a. Assumption and effective exercise of jurisdiction over administrative, technical and social matters aboard its ships both at sea and through regular inspections;
- b. Maintenance of a ship register;
- c. Conformity with international regulations;
- d. Investigation of all reports of lack of proper jurisdiction and control by that flag State;
- e. Inquiries into all casualties and incidents on the high seas involving one of its ships and cooperation with inquiries held by other States regarding such incidents.

Article 217 of UNCLOS requires flag States to ensure their vessels only sail when in compliance with international rules and standards.

### The Port State

Article 218 of UNCLOS allows a State to which a ship travels (known as a port State) to conduct investigations and institute proceedings regarding 'discharges' in violation of international rules and standards outside of that State's internal waters, territorial sea (the band of ocean adjacent to the coastline, the outer limit of which does not exceed 12 nautical miles from the territorial sea baseline) or exclusive economic zone (EEZ) (the band of ocean extending up to 200 nautical miles from the territorial sea baseline). Article 219 of UNCLOS outlines permissible port State measures relating to seaworthiness of vessels to avoid pollution.

### The Coastal State

A coastal State has sovereignty over its territorial sea but must allow foreign flagged ships the right of innocent passage within its territorial sea. UNCLOS also gives a coastal State the right to prevent violations of its customs, fiscal, immigration, and sanitary laws and regulations within its territory or territorial sea (or to punish such violations) within an additional 12 nautical mile buffer zone beyond the territorial sea, named the contiguous zone. In the EEZ, the coastal State has sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil pursuant to Article 56 of UNCLOS. The coastal State also has jurisdiction with regard to the establishment and use of artificial islands, installations and structures, marine scientific research, and the protection and preservation of the marine environment. The high seas are open to all States. The freedoms of the high seas include freedom of navigation for vessels flagged to all States.

UNCLOS also defines a comprehensive range of maritime zones and provides for the rights and jurisdiction that coastal States may exercise within those zones. Generally speaking, the degree to which a coastal State can exercise jurisdiction in its maritime zones varies between each zone, becoming progressively smaller as the zones move away from the shore.

## ATTACHMENT B – Ships of Shame Recommendations

### *SHIPS OF SHAME INQUIRY INTO SHIP SAFETY REPORT RECOMMENDATIONS – DECEMBER 1992*

1. (a) Australia's representation at the IMO be strengthened by the inclusion of industry and trade delegates with relevant experience.
1. (b) AMSA meet the cost of the increased industry and trade union representation.
1. (c) AMSA consult with, industry on the merit of appointing a permanent delegate to the IMO.

2. The Secretary General of the IMO be authorised to initiate action in relation to matters of significance which arise between Council meetings at the request of a member State.

3. (a) That the Maritime Safety Committee (MSC) urgently complete its inquiry into flag State compliance.
3. (b) That appropriate operating criteria for classification societies be devised and that only certificates from classification societies, including when a classification society acts as an agent for a flag State, which comply with those criteria be recognised as valid internationally.
3. (c) That IMO approve a 'seal of approval' to those classification societies meeting its set criteria.
3. (d) That an IMO representative participate in the International Association of Classification Societies Quality System Certification Scheme audit team.

4. (a) AMSA have access to sufficient funds to increase the rate and effectiveness of port State Control inspections to the level where it ceases to be viable for substandard shipping to call at Australian ports.
4. (b) AMSA not be required to pay a dividend to Government and that these funds be used to improve the effectiveness of the port State control function.
4. (c) AMSA impose a penalty surcharge on substandard shipping to fund the increased level of operations generated by these vessels.

5. (a) AMSA publish each month the results of its port State control inspections in each port.
5. (b) This publication should include; the name of the ship on which defects are found, the nature of defects, the beneficial owner, the manager of the ship, classification society, flag State, the dates of the latest port State control and special survey inspections, type of charter, charterers and the relevant AMSA surveyor's name.
5. (c) AMSA ensure that information is made available promptly to parties as specified in existing Marine Orders.

6. (a) It be mandatory for dry bulk carriers entering Australian ports to carry a Survey History File consisting of all documents relating to a ship's structure which contains a history of port State inspections, structural inspections and repairs or alterations.
6. (b) The Survey History File should be available to both port State control and classification society surveyors.
6. (c) Full information on the commercial chain from the beneficial owner to cargo owner should be available to AMSA so that the responsibility for pollution damage can be readily determined.

7. (a) The IMO establish an international accreditation system for crew training and subsequent issuing of qualification certificates.

7. (b) AMSA obtain samples of crew certificates from each flag State to assist in determining the authenticity of documents sighted by AMSA surveyors.

8. AMSA in conjunction with the Australian Maritime College (AMC), establish training courses and assessment criteria which will improve the consistency of inspection outcomes by ship surveyors.

9. All international shipping organisations adopt IMO Resolution A647(16) as the base standard of operations for all members.

10. (a) The Federal Government examine means by which the level of Australian assistance to Asian and Pacific neighbours relating to crew training can be extended.

10. (b) The AMC explore opportunities to raise its profile as a maritime training institution to attract increased numbers of international students to the College and associated port based Technical and Further Education Colleges.

11. The Federal Government deny entry to ships which do not meet *International Labour Organisation Convention 147, Merchant Shipping (Minimum Standards) 1976* (ILO 147) standards in relation to crew employment conditions from trading in Australian waters.

12. (a) AMSA establish a comprehensive ship information base.

12. (b) The database be made available to any Party with a valid interest in ship safety.

12. (c) The IMO establish a comprehensive international ship information data base which is available to any Party with a valid interest in ship safety.

13. The Australian Government require proof of possession of adequate Protection and Indemnity insurance cover as a prior condition of entry of any foreign vessel into Australian ports.

14. (a) The Minister for Shipping and Aviation Support initiate an independent review of the structure and operating procedures of the MIIU with a view to improving the breadth of investigations.

14. (b) The conclusions of the MIIU investigators into marine incidents be more widely publicised throughout the shipping industry, including through industry and employee association publications similar to the practice followed by the Bureau of Air Safety Investigation.

#### *SHIPS OF SHAME REVIEW INQUIRY PROGRESS REPORT RECOMMENDATIONS NOVEMBER 1994*

1. (a) That the Australian Government propose at the IMO that the IMO be given the power to sanction member States that do not meet their international maritime Convention responsibilities.

1. (b) That this ability to sanction include the ability to suspend, expel or reinstate member States of a Convention.

2. That the Commonwealth Government take action to ratify *ILO 147* as soon as possible.

3. That AMSA produce a set of region based performance indicators for inclusion in its annual port State control report.



*SHIPS OF SHAME SEQUEL REPORT RECOMMENDATIONS DECEMBER 1995*

1. The IMO promote the mandatory use of IMO Maritime English in training schemes for both officers and ratings.
2. (a) AMSA review and strengthen the provisions of Marine Order Part 11 to bring them more closely into conformity with the requirements of ILO 147.
2. (b) The Australian Government ratify ILO 147 as soon as possible.

3. (a) AMSA ensure Masters and Agents of ships visiting Australian Ports are made aware of their obligations to report incidents of illness and injury.
3. (b) AMSA and the Department of Transport develop effective means to ensure Owners, Masters and Agents provide adequate medical care and rehabilitation for ill or injured crew members.

4. The Minister of Transport initiate an inquiry into the relationships, interfaces and interactions between Commonwealth and State Occupational Health and Safety legislation, the Navigation Act and its delegated legislation.

5. AMSA establish an effective crew competency test in accordance with the requirements of the revised STCW Convention for use in port State control inspections.

6. The Australian Commonwealth Department of Transport develop a detailed inspection system for all ships applying for Single Voyage or Continuous Voyage Permits, with such vessels to be inspected and approved prior to loading cargo.

7. AMSA regularly publish details of ships, companies and their flag States discovered during port State control inspection programs to have defective Safety Management Systems whilst holding Safety Management Certificates and Documents of Compliance.

8. The International Association of Classification Societies publish quarterly, details of ships (Name, IMO number, flag, former Class Society, new Class Society where available) which either transfer class out of International Association of Classification Societies member societies or withdraw from class with an unidentified future.

9. The IMO include, as part of the criteria for ship registration, a responsibility clause requiring ships to have:
  - (a) appropriate cover for any damage which may result from their operations,
  - (b) appropriate cover for seafarer's occupational disability and rehabilitation or death resulting from their operations.

10. (a) IMO develop a Convention on ship administration which defines the standards to be achieved by flag States for the registration of ships.
10. (b) the Convention contain mechanisms for flag States to demonstrate compliance and for IMO to audit and regularly publish lists of compliant flag States.
10. (c) the IMO:
  - (i) develop mechanisms for Coastal States to be the lead agencies in accident and incident investigations; and
  - (ii) publish the reports of such investigations.

11. The IMO establish the IMO Ship Information Database as originally proposed.

