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10 May 2013

Mr Graham Perrett MP
Chair
House of Representatives Standing Committee
on Social Policy and Legal Affairs

Dear Mr Perrett

Imposition of conditions on port access for cruise ships: requirements regarding crimes at sea

1. Thank you for your letter on behalf of the House of Representatives Standing Committee on Social Policy and Legal Affairs (**the Committee**) requesting advice on Australia's rights under international law in relation to the investigation of incidents on cruise ships that call at Australian ports.

BACKGROUND

2. The Committee is currently conducting an inquiry into the arrangements surrounding crimes committed at sea, and has sought confidential legal advice from the Australian Government Solicitor to inform the inquiry. In particular, the Committee has asked for advice on Australia's right to legislate on mandatory measures to improve passenger safety on board passenger ships and its jurisdiction over the reporting and investigation of criminal acts on board ship.

3. As mentioned in your request for advice, s 112 of the *Navigation Act 2012* (**Navigation Act**) confers power to make regulations concerning passenger vessels. Such regulations may apply to both regulated Australian vessels and foreign vessels. However, their application to foreign vessels is limited by s 9 of the Navigation Act, which provides that the master or owner of a foreign vessel does not commit an offence or contravene a civil penalty provision, in relation to the vessel, unless, at the time when the conduct constituting the alleged offence or contravention occurs, the vessel is:

   (c) in an Australian port; or

   (d) entering or leaving an Australian port; or

   (e) in the internal waters of Australia; or

(f) in the territorial sea of Australia, other than in the course of innocent passage.

4. Related to this, and with reference to the provisions of the *United Nations Convention on the Law of the Sea*[1] (**UNCLOS**), the Committee is seeking advice as to whether:

- Australia would be within its rights under international law to require certain reporting and standards as a condition for entry to port, namely to regulate the activities of those ships visiting Australian shores and embarking and disembarking passengers for reward?
- Australia's jurisdiction would cover matters such as on board CCTV monitoring systems, management by the ship personnel of a reported crime, and reporting of serious crimes on board to Australian authorities?

SUMMARY OF ADVICE

5. The rules of international law on this subject are far from clear. Our conclusions in this advice are based on the application of certain basic principles of international law in a way that in our view is both logical and reasonable.

6. In our view there is probably scope for Australia to impose some conditions for entry by cruise ships to Australian ports, that relate to the way in which offences at sea are handled. In our view, conditions could probably be imposed consistently with international law if they are not excessively onerous, and are related to matters in relation to which Australia has jurisdiction and do not interfere with the jurisdiction of the flag State or other States with concurrent jurisdiction. (For example, we think that it could be a condition of entry to Australian ports that cruise ships provide information to Australian authorities about any offences on board the ship, anywhere in the world, alleged to have been committed by Australian nationals.)

7. However, we think that there is a substantial risk that the imposition of conditions, and denial of port access for failure to comply with them, would be considered to breach international law if they appear to be aimed at asserting Australian jurisdiction in circumstances where such jurisdiction is not recognised according to the general principles of international law, or at overriding the concurrent jurisdiction of other States (particularly the flag State). (These might be, for example, conditions that would prevent the flag State from investigating offences on board the ship, or that would impose requirements in relation to the investigation of incidents outside Australia that do not involve Australian nationals.)

8. The imposition of conditions requiring ships to have particular equipment or structural features (eg CCTV, peepholes in cabin doors) or to carry crew with particular training are also likely to be regarded as going beyond what Australia is entitled to require as a condition of port access.

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1 Montego Bay, 10 December 1982, [1994] ATS 31.

9. If the IMO adopts guidelines on dealing with crimes on ships with broad support of the States members, and particularly if the relevant flag States support their adoption, then there would probably be good arguments that it is reasonable for Australia to make it a condition of entry to Australian ports that the owners/operators of a cruise ship have adopted those guidelines as part of the normal practice for the operation of the vessel, at least for incidents over which Australia has concurrent jurisdiction.

10. Before imposing conditions of entry to Australian ports, it would be necessary to consider whether doing so is consistent with Australia's obligations under international trade law, and under treaties containing provisions on port access, such as the *Convention on the International Regime of Maritime Ports* (**1923 Convention**)[2]and bilateral friendship, commerce and navigation treaties.

REASONS

General principles relating to jurisdiction

11. The questions you have asked raise issues concerning the jurisdiction of States under international law. There are two issues to consider, in relation to a State's jurisdiction under international law: a State's right to impose rules in relation to conduct (**prescriptive jurisdiction**); and a State's right to enforce its law in the event of a breach of such rules (**enforcement jurisdiction**).[3] A State that has the power to legislate in relation to particular conduct does not necessarily have a power of enforcement with respect to that conduct. This advice focuses principally on prescriptive jurisdiction. As necessary background to our answer to your specific questions, the general principles relating to jurisdiction under international law are described, very briefly, below.

Territorial jurisdiction

12. Under international law, territoriality is the primary basis for jurisdiction. Within its territory, a State may apply and enforce its law in relation to both its own nationals and non-nationals. In general terms, a State has territorial jurisdiction over its internal waters and, subject to an important exception for innocent passage of foreign ships, over its territorial sea. Maritime zones beyond its territorial sea (contiguous zone, exclusive economic zone (**EEZ**), continental shelf, high seas) are not part of its territory.[4]

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2 Geneva, 9 December 1923 [1926] ATS 14.

3 Enforcement jurisdiction can also be divided into the competence to arrest (arrest jurisdiction) and the competence of courts to deal with alleged breaches of the law (judicial jurisdiction).

4 The coastal state has certain sovereign rights in relation to the EEZ and continental shelf, in relation particularly to natural resources and protection of the marine environment. It also has rights in the contiguous zone, with regard to preventing and punishing infringements in its territory or territorial sea of customs, fiscal, immigration and sanitary laws.

Nationality jurisdiction

13. International law also recognises other secondary bases of jurisdiction, apart from territoriality. The most generally accepted is nationality. A State has prescriptive jurisdiction over its nationals when they are abroad, but does not have enforcement jurisdiction in another State's territory. Prescriptive jurisdiction on the basis of nationality is concurrent with the primary jurisdiction of the territorial State. Therefore, China, for example, may impose laws that apply to the conduct of Chinese nationals while they are in Australia, but cannot enforce those laws against its nationals while they are in Australian territory. Australian law will also apply to the conduct in question, concurrently with Chinese law.

Jurisdiction other than territorial and nationality jurisdiction

14. Generally, a State does not have prescriptive jurisdiction over persons who are not its nationals and who are not within its territory. However, there are some circumstances where such jurisdiction is recognised.[5] Arguable grounds for jurisdiction include the 'protective security' principle (jurisdiction over extra-territorial acts of non-nationals to protect the State's vital security interests, territorial integrity or political independence[6]); the 'passive personality' principle (jurisdiction over a non-national in relation to acts taking place outside the State if those acts harm a national of the State[7]); and cases of 'universal jurisdiction' in relation to a limited number of crimes such as piracy.[8] However, the scope of most of these further bases for jurisdiction remains uncertain.

15. This advice does not deal with the extent to which Australia can or should assert extraterritorial jurisdiction on any of these bases. We point out that any decision to do so needs to take account of the government's view of the current state of international law on the issue, and a broad range of related considerations. These include that Australia's assertion of a particular basis of jurisdiction in one context may make it difficult for Australia to object to other States asserting similar jurisdiction over Australian nationals on Australian vessels or in Australian territory in a similar or different context. We note that the *Crimes at Sea Act 2000*[9] and the *Criminal Code*[10] require the Attorney-General's consent to prosecutions of foreign nationals for extra-territorial offences, which provides a means of avoiding an exercise of jurisdiction that may be excessive in the particular circumstances.

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5 Jennings and Watts, *Oppenheim's International Law* (9th ed, 1992), vol 1 (**'Oppenheim'**), p 457-8.

6 See *Oppenheim*, p 470-471.

7 See *Oppenheim*, p 471-472. See also *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* ICJ Reports 2002 (*Arrest Warrant Case*) (Separate Opinion of Judges Higgins, Kooijmans and Buergenthal at [47]-[48]).

8 See *Arrest Warrant Case*, Separate Opinion of Judges Higgins, Kooijmans and Buergenthal; *Polyukhovich v Commonwealth* (1991) 172 CLR 501.

9 Schedule 1, item 7.

10 See for example ss 16.1, 70.5, 71.20, 72.7, 73.5

Law of the sea and questions of jurisdiction

16. In addition to the general principles of international law relating to jurisdiction, described above, the international law of the sea has rules relating to jurisdiction of States over vessels and conduct on board vessels. Many of these rules are set out in UNCLOS, to which Australia and most other States are parties. However, many of the provisions of UNCLOS reflect customary international law which is binding also on non-parties.

17. A fundamental concept is flag State jurisdiction. Flag State jurisdiction can be regarded as a form of nationality jurisdiction.[11] The flag of a ship establishes its nationality.[12] Article 92(1) of UNCLOS states that, on the high seas, where no State has territorial jurisdiction, the flag State has exclusive jurisdiction over the vessel. However, other States may have concurrent jurisdiction in relation to persons on board the vessel. In relation to the conduct of a national of one State who is on a ship flagged to another State, both States have prescriptive jurisdiction, but Churchill and Lowe note that 'the expectation is that in this case of concurrent jurisdiction it is the flag State whose jurisdiction has primacy (see, eg, [UNCLOS], art 94)'.[13]

18. In general terms, the flag State is responsible for the vessels flying its flag, and it is subject to a many obligations under international law in relation to those vessels. Article 94 of UNCLOS sets out 'duties of the flag State', including:

> 1. Every State shall effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag.
> 2. In particular every State shall:
>
> ...
>
> (b) assume jurisdiction under its internal law over each ship flying its flag and its master, officers and crew in respect of administrative, technical and social matters concerning the ship.
>
> 3. Every State shall take such measures for ships flying its flag as are necessary to ensure safety at sea with regard, inter alia, to:
>
> (a) the construction, equipment and seaworthiness of ships;
>
> (b) the manning of ships, labour conditions and the training of crews, taking into account the applicable international instruments;
>
> (c) the use of signals, the maintenance of communications and the prevention of collisions.
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> ....
>
> 6. A State which has clear grounds to believe that proper jurisdiction and control with respect to a ship have not been exercised may report the

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11 *Oppenheim*, p 734; Churchill and Lowe, *The law of the sea*, 3rd ed, (**'Churchill and Lowe'**), p 257.

12 UNCLOS, art 91.

13 Churchill and Lowe, p 209.

> facts to the flag State. Upon receiving such a report, the flag State shall investigate the matter and, if appropriate, take any action necessary to remedy the situation.
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> ...

Territorial sea

19. As already mentioned, a coastal State has sovereignty over its territorial sea[14], and can therefore apply its laws to foreign vessels in the territorial sea, with one major limitation. That limitation is that it must respect the right of innocent passage of foreign vessels.[15] Generally speaking, the right of innocent passage entitles foreign vessels to navigate through the coastal State's territorial sea, for the purpose of proceeding to or from its internal waters (eg a port), or traversing the sea without entering internal waters. Passage is 'innocent' so long as it is not prejudicial to the peace, good order or security of the coastal State. Article 19(2) of UNCLOS lists certain activities which render passage non-innocent, but these do not appear relevant to this advice. The coastal State may 'take the necessary steps in its territorial sea to prevent passage which is not innocent'.[16]

20. Where a foreign ship is engaged in innocent passage, under art 21(1) of UNCLOS the coastal State has rights to regulate that passage in respect of various matters, such as the safety of navigation and the regulation of maritime traffic, protection of the environment of the coastal State, and prevention of infringement of fisheries laws, and customs, fiscal, immigration or sanitary laws,[17] provided the laws are non-discriminatory and do not have the practical effect of denying or impairing the right of innocent passage.[18] (Failure to comply with an applicable law of the coastal State does not necessarily render passage non-innocent.) However, art 21(2) provides:

> 2. Such laws and regulations shall not apply to the design, construction, manning or equipment of foreign ships unless they are giving effect to generally accepted international rules or standards.

21. Of particular relevance to your question is the rule set out in art 25(2) of UNCLOS that, in the case of ships proceeding to a port or other internal waters, the coastal State has the right to take in the territorial sea the necessary steps to prevent any breach of the conditions to which their entry is subject. Therefore, the coastal State can, for example, take steps in the territorial sea to prevent a foreign vessel from entering port if it does not comply with conditions for entry.

22. With regard to offences committed by a person who is on board a foreign vessel in the territorial sea, art 27 of UNCLOS sets out the general principle that the criminal

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14 UNCLOS, art 2.

15 UNCLOS, art 17ff.

16 UNCLOS, art 25(1)

17 UNCLOS, art 21(1).

18 UNCLOS, art 24(1)(a).

jurisdiction of the coastal State should not be exercised on board a foreign ship, except in certain specified situations. Article 27 provides:

> 1. The criminal jurisdiction of the coastal State should not be exercised on board a foreign ship passing through the territorial sea to arrest any person or to conduct any investigation in connection with any crime committed on board the ship during its passage, save only in the following cases:
>
> (a) if the consequences of the crime extend to the coastal State;
>
> (b) if the crime is of a kind to disturb the peace of the country or the good order of the territorial sea;
>
> (c) if the assistance of the local authorities has been requested by the master of the ship or by a diplomatic agent or consular officer of the flag State; or
>
> (d) if such measures are necessary for the suppression of illicit traffic in narcotic drugs or psychotropic substances.
>
> 2. The above provisions do not affect the right of the coastal State to take any steps authorized by its laws for the purpose of an arrest or investigation on board a foreign ship passing through the territorial sea after leaving internal waters.
>
> 3. In the cases provided for in paragraphs 1 and 2, the coastal State shall, if the master so requests, notify a diplomatic agent or consular officer of the flag State before taking any steps, and shall facilitate contact between such agent or officer and the ship's crew. In cases of emergency this notification may be communicated while the measures are being taken.

Internal waters: ports

23. A State's internal waters, including its ports, are part of its territory, over which it has territorial jurisdiction, as it has over its land territory. It therefore has jurisdiction over vessels in its ports and persons on those vessels. However, the flag States of the vessels also have jurisdiction over them.

24. *Oppenheim* describes the situation of foreign flag ships in ports as follows:

> Private foreign vessels present in ports or any other internal waters are in principle subject to the local law and the jurisdiction of the local courts both in criminal and civil matters. Since, however, vessels all have nationality, there is also a concurrent jurisdiction by the flag State, which, at any rate in all matters concerning the internal discipline of the vessel, will normally be the convenient one to apply.[19]

19. Accordingly, matters relating solely to the 'internal economy' of a foreign flag ship in port tend to be left to the authority of the flag State. Churchill and Lowe summarise general international practice as follows:

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[19] p 622.

> By entering foreign ports and other internal waters, ships put themselves within the territorial jurisdiction of the coastal State. Accordingly, that State is entitled to enforce its laws against the ship and those on board, subject to the normal rules concerning sovereign and diplomatic immunities, which arise chiefly in the case of warships. But since ships are more or less self-contained units, having not only a comprehensive body of laws - that of the flag State - applicable to them while in foreign ports, but also a system for the enforcement of those flag State laws through the powers of the captain and the authority of the local consul, coastal States commonly enforce their laws only in cases where their interests are engaged. Matters relating solely to the 'internal economy' of the ship tend in practice to be left to the authorities of the flag State.
>
> ... Thus, local jurisdiction will be asserted when the offence affects the peace or good order of the port either literally (for example, customs or immigration offences), or in some constructive sense. ...
>
> ... Coastal States will, of course, exercise their jurisdiction in matters which do not concern solely the 'internal economy' of foreign ships. Pollution, pilotage and navigation laws are routinely enforced against such vessels and, as we have noted, ships may be arrested in the course of civil proceedings in the coastal State. But, with the exception of the categories described above, States do not exercise their jurisdiction in respect of the internal affairs of foreign ships in their ports even though, as a matter of strict law, they would be entitled to do so because of the voluntary entry of those ships within their territorial jurisdiction.[20]

20. The Anglo-American position (which as far as we are aware is shared by Australia) is that this non-exercise of jurisdiction over the internal economy of ships in port is a matter of the voluntary non-exercise of jurisdiction - a rule of comity, rather than a rule of international law.[21] However, some countries may take the view that, as a matter of international law, the port State has no jurisdiction over the purely internal affairs of foreign ships.[22] In any case, Churchill and Lowe note that the practice of refraining from exercising such jurisdiction is 'remarkably consistent'.[23]

Control over entry into ports

25. You have asked specifically for advice about the power to impose conditions for the entry of foreign cruise ships into Australian ports. Those conditions would relate to offences committed on board ship. It is our understanding that your question does not relate only to incidents occurring in situations which could be covered by regulations under s 112 of the Navigation Act, as restricted by s 9. That is, we understand that you would not intend conditions on port access to be restricted to incidents occurring on the ship in an Australian port, when the ship is entering or leaving an Australian port, or in other internal waters of Australia, or in the territorial sea of Australia other than in the course of innocent passage.

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20 *The law of the sea*, 3rd ed, pp 65-68.

21 See *Re Maritime Union; ex p CSL Pacific* (2003) 214 CLR 397, 417-418.

22 See Churchill and Lowe, p 66; *Oppenheim*, pp 622-624. This was traditionally the French view.

23 Churchill and Lowe, p 66.

Whether foreign ships have a right of access to ports

26. Whether foreign ships have a general right under customary international law to enter a State's ports (other than in cases of distress) has been the subject of some controversy.[24] The arbitral tribunal in the *Aramco arbitration*[25] in 1958 stated that 'according to a great principle of public international law, the ports of every State must be open to foreign vessels and can only be closed when the vital interests of the State so require'. However, Churchill and Lowe state that there is no other support for the existence of such a general principle at customary international law, and take the view that tribunal's statement was incorrect.[26] A study of treaties and State practice by UNCTAD in 1975 also concluded that the question of the right of foreign merchant vessels to port access remained under debate and that insufficient evidence existed for such a right to be recognised as a custom in international law.[27]

27. In support of their view, Churchill and Lowe note that:

> While it is undoubtedly true that the international ports of a State are presumed to be open to international merchant traffic..., this presumption has not quite the status of a *right* in customary law. Moreover, any such right would be subject to substantial restrictions.

28. They point out that there is a long-standing rule that States have the right to nominate which of their ports are open to international trade, and that 'it is generally admitted that a State may close even its international ports to protect its vital interests without thereby violating customary international law, and it would be difficult to establish that any interests invoked by a State were inadequate to justify closure'. They add:

> Furthermore, States have a wide right to prescribe conditions for access to their ports.[28]

29. The International Court of Justice appears to have recognised such a right in the *Nicaragua case* when it noted that:

> It is also by virtue of its sovereignty [over its internal waters] that the coastal State may regulate access to its ports.[29]

30. Although UNCLOS does not specifically provide that a coastal State has the right to impose conditions on entry into its ports, some of its provisions assume that this is the case. In particular, as we have mentioned, art 25(2) allows the coastal State to take measures in the territorial sea in relation to ships proceeding to its internal waters to 'prevent any breach of the conditions to which admission of those ships to

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24 Churchill and Lowe, p 61-62.

25 *Aramco v Saudi Arabia*, 27 ILR 167 at 212.

26 See Churchill and Lowe, p 61.

27 *Economic co-operation in merchant shipping-treatment of foreign merchant vessels in ports*, UNCTAD/TD/B/C.4/136, 9 September 1975.

28 Churchill and Lowe, p 62.

29 *Nicaragua* v *USA* [1986] ICJ Rep. 14 at 111.

internal waters ... is subject'. In addition, art 211 requires States which establish requirements for the prevention, reduction and control of pollution of the marine environment 'as a condition for the entry of foreign vessels into their ports or internal waters' to give due publicity to those requirements and communicate them to the competent international organisation.

31. In our view, foreign ships do not have a right under customary international law or UNCLOS to enter a State's ports, except where the ship is in distress.[30] It seems clear that, as a matter of general principle, a State can impose conditions for entry into its ports.[31] However, there is little guidance, either in treaties or in the academic literature, about the sorts of conditions of access which would be permitted.

32. Rothwell and Stephens in *The international law of the sea*,[32] state:

> [UNCLOS] is silent as to whether foreign ships have a right of access to port. However there is both treaty law and case law in support of the general principle that a state does not have an unlimited power to prohibit access to its ports.[33]

33. This would also suggest that they consider that the right of a coastal State to impose conditions on access to a port is also limited. However, they note examples of States having, on a non-discriminatory basis, barred port access to certain types of vessels, notably Australia's prohibition on access by foreign whaling vessels in the absence of written permission,[34] and New Zealand's ban on nuclear powered ships.

34. Churchill and Lowe, while taking the view that conditions can be imposed, state that:

> It is, however, possible that closures or conditions of access which are patently unreasonable or discriminatory might be held to amount to an *abus de droit*, for which the coastal State might be internationally responsible even if there were no right of entry to the port.[35]

35. The existence and scope of the principle of a*bus de droit* (abuse of right) in international law is not clear. *Oppenheim* describes it as follows:

> A further restraint on the freedom of action which a state in general enjoys by virtue of its independence, and territorial and personal supremacy, is to be found in the prohibition of the abuse by a state of a right enjoyed by it by virtue of international law. Such an abuse of rights occurs when a state avails itself of its right in an arbitrary manner in such a way as to inflict upon another State an injury which cannot be justified by a legitimate consideration of its own advantage.... The Permanent Court of

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30 This is the view expressed in Churchill and Lowe, p 61-62.

31 This right is subject to any contrary international law obligations, and in particular treaty obligations, that the state may have. We discuss some of these later in this advice.

32 2010, p 55.

33 Original footnote: O'Connell, *The international law of the sea*, (n6) 848; Colombos, *The international law of the sea* (n 15) 176-177.

34 *Environment Protection and Biodiversity Conservation Act 1999*, s 236.

35 Churchill and Lowe, p 63.

> International Justice expressed the view that, in certain circumstances, a state, while technically acting within the law, may nevertheless incur liability by abusing its rights.... Individual judges of the International Court of Justice have sometimes referred to it; possibly it is implied in the frequent judicial affirmation of the obligation of states to act in good faith.... However, the extent of the application of the still controversial doctrine of the prohibition of abuse of rights is not at all certain.[36]

36. Article 300 of UNCLOS arguably recognises the existence of such a doctrine as part of international law by providing:

> States Parties shall fulfil in good faith the obligations assumed under this Convention and shall exercise the rights, jurisdiction and freedoms recognized in this Convention in a manner which would not constitute an abuse of right.

37. Akehurst argues that the exercise of legislative jurisdiction 'can give rise to genuine examples of abuse of rights - the State has a right to legislate and acts illegally only because it abuses that right'.[37] One situation in which he suggested that abuse would occur was 'if legislation is aimed at advancing the interests of the legislating State illegitimately at the expense of other States'. Akehurst provided the following example:

> [D]uring the 1920s proposals were made in the United States Congress to alter United States law in order to give foreign seamen (serving on foreign ships) a contractual right to demand half their wages when the ship arrived in a United States port, even though the law of the flag State postponed the time for payment; in calculating the wages due to the seamen, advances paid in foreign countries were to be disregarded (i.e. the employer would have to pay again). Wages on United States ships were higher than wages on foreign ships, and the purpose of the proposed legislation (which was never passed) was to encourage foreign seamen to desert from foreign ships and to take up work on United States ships, thereby reducing labour costs and rectifying a shortage of labour on United States ships and increasing labour costs and causing general inconvenience on foreign ships. It is not surprising that foreign States protested that the proposed legislation was contrary to international law.[38]

38. Whether conditions imposed on port entry could potentially be considered to be an abuse of right, or a failure to act in good faith, or otherwise to go beyond what is permissible, would of course depend on the nature of the conditions in question. In our view, if conditions imposed by Australia appear to be aimed at supplanting the jurisdiction of the flag State in situations where the flag State has primary jurisdiction the flag State may consider the imposition of conditions to be an abuse of right or otherwise impermissible. This risk would be greater if the conditions imposed requirements in situations where Australia has no reasonable claim to even concurrent jurisdiction. We discuss this issue further later in this advice.

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36 *Oppenheim*, pp 407-408.

37 M Akehurst, 'Jurisdiction in International Law' (1972-1973) 46 *British Yearbook of International Law*, 145 at 189, referred to in M Byers, 'Abuse of Rights: An old principle, a new age', (2002) 47 *McGill Law Journal* 389, at 409.

38 At 189-190, quoted in Byers, at 409. (See note above.)

Treaty provisions requiring (equal) access to ports

39. In any case, the right of a coastal State to impose conditions on entry to its ports, and to deny entry to foreign vessels that do not comply with those conditions, is necessarily subject to any treaty obligations assumed by that State that would limit its rights in this regard. It is not possible in the context of this advice to provide a detailed analysis of all of the potentially relevant treaty obligations to which Australia is subject, but we note here some treaties which would need to be considered.

40. Australia is a party to the 1923 Convention and therefore, any restrictions imposed on a vessel flying the flag of another party to the 1923 Convention,[39] would have to be consistent with its obligations under that Convention. Churchill and Lowe refer to this Convention as providing 'for a reciprocal right of access to, and equality of treatment within, maritime ports'. However, at first sight, we think it can be argued that the relevant provision - art 2 of the Statute attached to the Convention - does not provide for a right of access, but only imposes an obligation of non-discrimination on the port State. It provides, in part:

> Subject to the principle of reciprocity and to the reservation set out in the first paragraph of Article 8, every Contracting State undertakes to grant the vessels of every other Contracting State equality of treatment with its own vessels, or those of any other State whatsoever, in the maritime ports situated under its sovereignty or authority, as regards freedom of access to the port, the use of the port, and the full enjoyment of the benefits as regards navigation and commercial operations which it affords to vessels, their cargoes and passengers.

41. (The reservation in art 8 is that if one party gives notice that it does not consider that another party is applying equality of treatment to the first party's vessels, cargo and passengers, the first party can suspend the benefit of equality of treatment in its own ports for any vessel of the second party.)

42. To provide a confident interpretation of the extent of the obligation under art 2 of the 1923 Convention it would be necessary to consider such matters as the circumstances of the conclusion of the Convention, and any subsequent agreement or subsequent practice regarding its interpretation and application.

43. Further, bilateral treaties of 'friendship, commerce and navigation' commonly deal with entry to ports. Australia succeeded to a large number of such treaties concluded by the United Kingdom. We have not examined all of these, either to interpret them or to establish whether they are still in force. However, on the basis of a very brief examination, it appears that most could be interpreted as providing, like the 1923 Convention, that ships of one party are to be treated no less favourably than ships of the other party in relation to access to that other party's ports, rather

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39 The parties include the UK and a number of European countries, but not the US or other major flag States such as Panama or Liberia (but note our comments below on the effect of a network of non-discrimination requirements). The parties to the 1923 Convention are listed at http://treaties.un.org/Pages/LONViewDetails.aspx?src=LON&id=558&lang=en .

than providing a positive right of access. Nonetheless, Australia's obligations under all of these treaties will need to be considered if it is proposed to impose conditions on entry into ports by foreign cruise ships.

Free trade agreements/GATS

44. Another issue that is beyond the scope of this advice, but which would need to be taken into account in any decision regarding the imposition of conditions on allowing cruise ships to enter Australian ports and embark and disembark passengers, is consistency with Australia's international trade law obligations. The imposition of such conditions would probably restrict international trade in services and denial of access to Australian ports would certainly do so. Negotiations relating to the application of the WTO General Agreement on Trade in Services to international maritime transport have been complex and difficult. We have not attempted, for the purposes of this advice, to ascertain the extent of Australia's relevant obligations - notably most favoured nation and national treatment obligations - in relation to allowing port access to cruise ships, but this would need to be done if a proposal to limit that access were developed.

45. In addition, a number of Australia's free trade agreements include provisions on trade in services. We have not sought to establish whether the imposition of conditions on port entry for passenger vessels would potentially breach any of these agreements - this is a complex issue, and the answer would probably depend on the particular conditions imposed - but it is a matter that would need to be considered before any such measure was adopted.

Potential effect of non-discrimination provisions

46. A central issue in relation to international trade obligations, if any, would probably be whether measures were discriminatory, as between service providers of different foreign States (contrary to most favoured nation requirements) or as between foreign providers and Australian providers (contrary to national treatment requirements). We have also noted earlier in this advice a number of treaties which provide, probably not for free access to Australian ports, but for non-discriminatory access. We point out that the general effect of multiple non-discrimination requirements is that the most favourable treatment that Australia must give to any one State is likely to be the treatment that must be given to all of the States with which Australia has relevant treaty relations.

47. We also note that it can not necessarily be assumed that, because the same conditions apply on their face to Australian ships[40] and to all foreign ships, there is no discrimination. Particularly in the context of international trade law, the practical effect of the requirements on service providers of different nationalities needs to be considered.

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40 We understand from information before the Committee this would be theoretical, because there are no Australian flagged cruise ships.

Conclusions with regard to Australia's right to impose conditions on port entry for cruise ships

48. As discussed above, we consider that Australia does have a general right to impose non-discriminatory conditions for entry to its ports on foreign cruise ships. However, that right is probably subject to some limitations. At least, it is probable that other States would take that view. As we have indicated, however, there is very little guidance as to what conditions are acceptable, and which are not.

49. We think that there is a substantial risk that the imposition of conditions, and denial of port access for failure to comply with them, would be considered to breach international law if the conditions appear to be aimed at asserting Australian jurisdiction in circumstances where such jurisdiction is not recognised according to the general principles of international law, or at overriding the concurrent jurisdiction of other States (particularly the flag State).

50. In our view, conditions that are not particularly onerous, that are related to matters in relation to which Australia has jurisdiction and do not interfere with other States' jurisdiction could probably be imposed consistently with international law. Such conditions would include, for example, that the master or shipowner undertakes to inform Australian authorities of alleged offences in relation to which Australia has jurisdiction. It may also be possible to impose some conditions relating to the preservation of evidence and the standard of investigation of offences in relation to which Australia has jurisdiction, provided these do not interfere with the concurrent jurisdiction of other States, and notably the jurisdiction of the flag State. Conditions that would impede the flag State in carrying out its own investigation according to its own laws would in our view also run a substantial risk of being considered contrary to international law.

51. A condition requiring Australian authorities to be notified of incidents on board in relation to which Australia has no claim to criminal jurisdiction, and which do not otherwise involve Australian nationals or Australian interests, would also run a significant risk of being considered contrary to international law, in our view.

52. Requiring ships to have on board and operate CCTV monitoring systems as a means of deterring crime and obtaining evidence throughout their voyage, in our view, is likely to be regarded as going beyond what Australia is entitled to require as a condition of port access. As we have mentioned, UNCLOS expressly provides that the coastal State cannot regulate ships in innocent passage in the territorial sea in relation to 'the design, construction, manning or equipment of foreign ships unless they are giving effect to generally accepted international rules or standards'. While this restriction relates to restrictions on innocent passage in the territorial sea, a condition of port entry that required ships to have a particular equipment - CCTV monitoring systems - while they were in the territorial sea heading to or from a port might be considered to be an attempt to overcome this limitation on the coastal State's rights by indirect means. This objection might be reduced if such a condition were limited to requiring the CCTV to be installed and in operation only while the

ship is in port. However, even such a requirement might well raise objections from other States. As we have discussed above, the normal international practice is for States to refrain from regulating the internal economy of foreign ships in their ports. Australia's view is that this is a matter of comity, rather than a legal requirement, but even so a departure from that practice may well raise objections from other States.

53. The same arguments as apply to requiring CCTV also probably apply to conditions relating to the manning of the ship, including that the ship carry crew with particular training, and requirements concerning the structure of the ship (such as high railings to deter suicide and reduce the risk of accident, and peepholes for cabin doors).

54. We think that there would be a significant risk in seeking to impose a condition that would require, as a condition of entry, that foreign ships adopt practices dictated by Australia in relation to the preservation of evidence and investigation of crimes on board wherever the ship is in the world, and whatever the nationality of the persons involved. This could be regarded as an attempt to supplant the jurisdiction of the flag State, which is recognised under customary international law, and by art 94 of UNCLOS.

55. However, the IMO currently has under consideration draft Guidelines on dealing with crimes on ships, which were approved by the Legal Committee at its 100th session, 15 to 19 April 2013. The draft guidelines, which focus on what can practically be carried out on board a ship to preserve and/or collect evidence and protect persons affected by serious crimes, until such time that the relevant law enforcement authorities commence an investigation, will be submitted to the IMO Assembly 28th session, in November 2013, along with an associated draft resolution, for consideration with a view to adoption.[41] (We note however that we have not seen the content of the draft guidelines.) If the guidelines are adopted by the IMO with broad support of the States members, and particularly if the relevant flag States support their adoption, then there would probably be good arguments that it is reasonable for Australia to make it a condition of entry to Australian ports that the owners/operators of a cruise ship have adopted those guidelines as part of the normal practice for the operation of the vessel. However, whether Australia could reasonably deny port access to a cruise ship on the basis that its crew had failed to follow the guidelines in a case in which Australia had no jurisdiction would be subject to doubt.

56. Generally, the adoption of draft guidelines in the IMO with broad support would increase the likelihood that any conditions reflecting those guidelines imposed by Australia would be regarded as reasonable, particularly by the States that had supported their adoption. Similarly other international practice, such as the adoption of requirements by a large number of other States for cruise liners operating in their ports or under their flag, would increase the likelihood that such requirements would be regarded as reasonable as conditions of port entry. Also, if the cruise industry

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41 Taken on 8 May 2013 from IMO media release at http://www.imo.org/MediaCentre/PressBriefings/Pages/11-LEG-100-outcome.aspx

generally adopts particular practices, conditions requiring the application of those practices are less likely to be objected to by other States, at least if Australia does not appear to be attempting to displace other States' jurisdiction.

57. We point out that there is a particular risk of other States regarding conditions of port access as unacceptable if those conditions would require the master or crew to breach the law of the flag State, which applies on board the ship. For example, requiring monitoring by CCTV and possibly other steps to secure evidence, and requirements to notify Australian authorities of incidents and the identity of persons involved, might breach applicable privacy laws or other laws such as protecting the identity of the alleged victims of sexual offences or the identity of alleged offenders.

58. As already mentioned, it would need to be considered whether any conditions are consistent with Australia's obligations under treaties dealing with port access and free trade.

Agreement of the flag State/owners and operators

59. We point out that objections on the basis of interference with other States' jurisdiction would be avoided if the States concerned agreed to the conditions in question. Also, voluntary arrangements with the owners or operators of cruise ships, assuming that they did not breach the law or otherwise deny the legitimate jurisdictional claims of other States, and assuming they did not result in discrimination between ships of different nationalities, would not appear to create difficulties under international law.

60. Mr Robert Orr QC, Chief General Counsel, has read and agrees with this advice.

61. Please let us know if we can be of further assistance.

Yours sincerely

Susan Reye
Senior General Counsel