

SHIPPING REGISTRATION IN AUSTRALIA

BY

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Background

1. Until the *Shipping Registration Act 1981* ("the SR Act ") came into force on Australia Day 1982, there was no such thing as an "Australian ship". Ships were registered in Australia under Part I of the United Kingdom Merchant Shipping Act 1894 as "British ships".
2. The concept of "British ships" really began with the Navigation Act of 1660. The Act stipulated that trade with England's colonies must be in "Such ships as do truly and without fraud belong only to the people of England or Ireland, Dominion of Wales or Town of Berwick upon Tweed, or are of the built of and belonging to any of the said Lands, Islands, Plantations or Territories, as the Proprietors and right Owners thereof, and whereof the Master and Three Fourths of the Mariners at least are English". The Act required that an owner of a foreign-built ship to declare that he was not an alien and that the vessel was purchased for valuable consideration. He then received a Certificate from officials at the port deeming the vessel to belong to that port
3. In 1696, a statute prohibited the renaming of a ship without re-registration and introduced registration of shares in a ship. Later statutes (notably in 1786 and 1823) greatly expanded the rules for ship registration, including the introduction of ships' mortgages, and culminated in the 1894 Act.
4. By 1978, Australia was the only major independent member of the British Commonwealth to have continued with registration under the Merchant Shipping Act. In his Second Reading Speech, the then Minister for Transport said that "...the stage has now been reached where it is essential that we legislate to put an end to this anachronism". He further said that the Bill "...is an important step forward in the development of Australia's status as an independent nation. One of the attributes of national sovereignty is the right of a country to determine the conditions for the grant of its nationality to ships."
5. The SR Act entirely repealed Part I of the Merchant Shipping Act in its application to Australia. Although there have been minor amendments to the SR Act since 1982, the only development of any significance was the introduction of caveats in 1984.

Reviewing the SR Act

6. In April 1995, the Council of Australian Governments accepted a package of reforms that would substantially implement the recommendations of the Report of the National Competition Policy Review Committee (Hilmer Committee).
7. One element of the package was the adoption of a Competition Principles Agreement which included regulation review. Under the Agreement, the Commonwealth, State and Territory governments will review all existing legislation that may restrict competition. The guiding principle of the reviews is that legislation should not restrict competition unless it can be demonstrated that the benefits of the restriction outweigh

the costs and that the objectives of the legislation can only be achieved by restricting competition.

8. The review was conducted by a team of seconded officials from the Maritime Division of the Department of Workplace Relations and Small Business, the Bureau of Transport and Communications Economics and the Australian Maritime Safety Authority (AMSA).
9. The conduct of the review was under the oversight of a Steering Committee consisting of Mr John Bowdler, Deputy Secretary, Department of Transport and Regional Development and Mr Paul McGrath, Chief Executive of AMSA. There was also an Independent Reference Committee (Ms Philippa Lynch, Director of Research, Administrative Review Council and Mr Stuart Hicks, Consultant and former Director-General of Transport in Western Australia) which was established to scrutinise the review to ensure probity of process and full consideration of all relevant issues.
10. An Issues Paper was prepared which contained relevant background information on the SR Act and which set out the main issues to be covered by the review. The review team consulted widely with interested parties such as industry associations, shipping lines, yachting and fishing industry organisations, trade unions, financiers and law firms. Over 100 letters were written to representatives of these organisations sending them the Terms of Reference and the Issues Paper. Twenty four submissions were received from industry associations, financiers, lawyers and individuals.
11. The Terms of Reference for the review are set out in Attachment 1 to this paper. The recommendations of the Review are summarised in Attachment 2.

Findings

Need for the SR Act

12. The review looked at whether the SR Act is necessary at all.
13. A fundamental principle of the freedom of the seas is that the vessels of any nation, including land-locked ones, have access to all parts of the seas that are not included in the territorial sea or internal waters of another State. Jurisdiction over a vessel resides solely with the State to which the vessel belongs and all vessels using the high seas must have a national character. The right of a ship to sail on the open seas is dependent upon its right to fly the national colours of a recognised country.
14. Reflecting this reality, international law gives every country, including those which are land-locked, the right to register ships. Article 91 of the United Nations Convention on the Law of the Sea (UNCLOS) provides that "Every State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly." Article 92 of UNCLOS states, inter alia, that "ships sail under the flag of one State only and...shall be subject to its exclusive jurisdiction on the high seas".
15. The only way that Australia could dispense with having a ship register would be if a decision was taken not to allow any ships to fly the Australian flag, i.e. if a policy decision was made that Australia would not have its own register so that Australian shipowners would then be free to register their vessels in any country they choose. It is likely that such a policy

decision would contravene Article 91(1) of UNCLOS which requires that there be a genuine link between a ship and its flag State. For those ships currently on the Australia register, particularly recreational craft, it would be difficult to prove a genuine link if they were all to be flagged in other countries.

16. The review accepted that registration is a necessary prerequisite for ships to be able to legally navigate the high seas. It concluded that it is appropriate for Australia to have legislation which conveys nationality to Australian-owned vessels. However, the review found no reasons why, from a public policy perspective, the Australian ship registration regime should continue to compel the registration of ships. Registration is a facility which should simply be available to shipowners to use if they need it and therefore the legislation should be phrased in terms of ships being entitled, rather than required, to be registered.

Mortgages

17. The registration of ship mortgages was a feature of the Merchant Shipping Act and these provisions were included in the new Australian legislation. The Review concluded that it is not unreasonable that provisions dealing with mortgages over ships are required to be entered on a register maintained for the purposes of UNCLOS. This is because the powers of a mortgagee are such that in certain circumstances the mortgagee acquires the right to take possession of the ship and thereby be in the position of the legal owner. For example, the mortgagee becomes entitled to the unpaid freight of the ship and may use the ship as if it were the owner. The mortgagee may sell the ship and confer a good title on the purchaser in order to recover a debt.

18. A registration system which enabled the owner to be identified for the purpose of enforcing administrative, technical and social matters, but which did not provide for the identification of a mortgagee who might assume powers of ownership, would be incomplete. Accordingly, there is an argument that, in order for a State to exercise its jurisdiction and control over the ship effectively, its ship registration system must provide for the registration of mortgages.

19. The Review concluded that the registration of mortgages is so firmly tied to the concept of registration of ships that it is a necessary incident of any registration system.

Impact of the Act

20. A key part of the review was the analysis of the benefits and costs of the SR Act. Issues raised in submissions were of two types: those which concern the fundamental nature of the current ship registration regime and those which addressed the efficiency of particular aspects of the system. Analysis of the fundamental issues formed the basis of consideration for an alternative registration regime.

21. The review found that there are essentially three benefits arising from the SR Act. These are:

- the ability to sail overseas;
- gaining title as a proof of ownership; and
- facilitating the provision of finance.

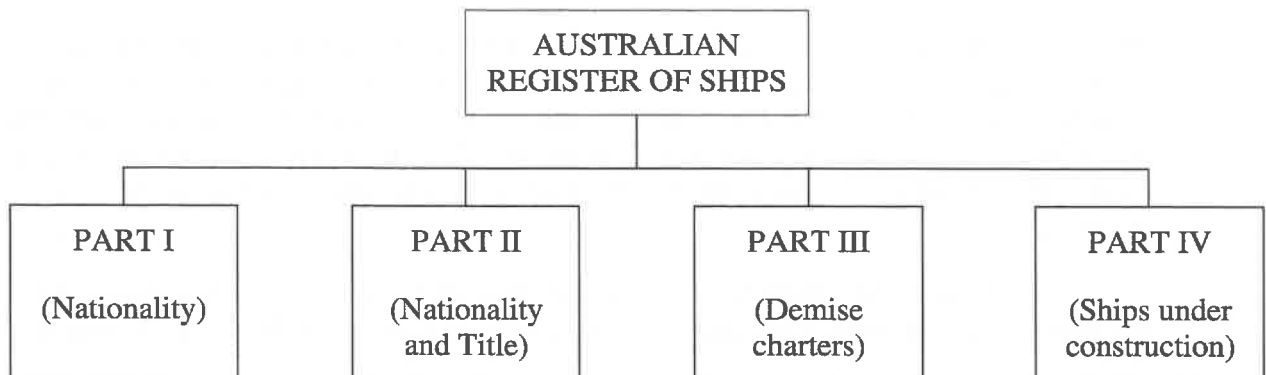
22. Three major strategic issues were raised in submissions that have implications for the fundamental nature of the registration regime:

- the need for simpler registration procedures for yachts;
- the registration system should convey indefeasible title to the vessel; and
- the need for a notice-based system of recording ownership (as distinct from title) and financial interests in a vessel rather than the current title register.

23. It was the first of these that was the most important in terms of formulating an alternative registration regime. The problem experienced by owners of small craft is that, while most only need nationality in order to travel overseas, the Australian Register of Ships is a title register and they are forced into using a title registration system which is more complex than they need.

24. It was also submitted that, because non-mortgage security interests cannot be registered, the SR Act restricts financing options and raises costs.

25. The Review recommended that Australia's shipping registration regime would operate more efficiently if the register was divided into four parts, as shown below, with each part providing a specific service from which a shipowner could choose depending on circumstances.



26. A key feature of the proposed regime is that the States and Northern Territory would be able to participate in the administration of Part I if they wished. This would require amendments to the SR Act and it would also require administrative arrangements to be negotiated with the States and Northern Territory.

27. The principal advantage of the proposal is that Part I would enable recreational and fishing boat owners to gain nationality without establishing title. Registration under this part would be less complex and cheaper than at present.

Non-mortgage securities

28. The Review recognised that, while the restructured register would continue to provide for the registration, transfer and priority of ship mortgages, in an internationalised financial sector ship financing options are varied and complex. Many international trading vessels are financed under complex leasing arrangements with the security for the financier being that it owns the vessel.

29. The SR Act is a title register and, while a financier may be the legal owner of a vessel, it is unlikely that financiers are interested in becoming involved with ship registration. The shipping company as the operator will need to register the vessel for the purpose of gaining nationality. The Review considered it desirable that the SR Act recognise modern ship financing techniques by enabling the registration of ships acquired by leases. Forms of finance where a non-mortgage secured loan is advanced to the purchaser who then remains the registered owner could be notified by way of a caveat lodged with the registrar.

30. The Review recommended that consideration be given to ways in which the interests of holders of non-mortgage securities might be recognised by the SR Act, including:

- examining the feasibility of amending the Act so that a ship could be entitled to be registered if it is in the exclusive possession of a person or company under a financing agreement which provides for the acquisition of ownership at the completion of the agreement; and
- examining whether the caveat provisions of the Act currently allow the notification of non-mortgage interests and, if they do not, amending the Act to allow this.

Removing undischarged mortgages

31. An issue raised in submissions concerned the impact of a change in flag, arising from either the expiry of the charter of a foreign-owned ship to an Australia operator or the, sale of an Australian-owned ship to an overseas party, on the security of a mortgage.

32. While a ship can be moved between jurisdictions, by its owner, a mortgage does not automatically follow and the mortgagee becomes vulnerable to a loss of security if the mortgage becomes unregistered. The key issue would appear to be how the mortgage can cross jurisdictions so as to minimise any loss of security for the mortgagee and whether this could be made to occur automatically.

33. One submission recommended that there be an amendment to section 44 of the SR Act to allow a ship mortgage to be removed from the register without being released or discharged. While removing a mortgage from the Australian register is unlikely to assist a mortgagee, as a general point the registration of a mortgage is voluntary and therefore, from a regulatory policy perspective, there would not appear to be any reason why a financier should not be able to voluntarily remove or "deregister" a mortgage.

34. The Review therefore recommended that legal advice be sought as to whether there is currently power in the SR Act for a mortgagee to remove a ship mortgage from the register voluntarily and, if not, that the SR Act be amended to give a mortgagee such a power.

Closure of registration

35. Some submissions suggested that closure of registration should be made conditional on the giving of notice or the consent of mortgagees. The Review concluded that Australia cannot prevent a ship from being registered on a foreign register and, if it ceases to be Australian-owned, it is no longer eligible for registration. The aim of registration is to provide a genuine link between the nationality of a ship and the nationality of the owner and the Registrar must be able to close the registration of a ship immediately on receiving notice that it is no longer entitled to be registered.

36. Nevertheless, the position of mortgagees of ships which are bareboat chartered by Australian operators may be made clearer, and therefore strengthened, if Australian law specified the private law that was to operate with respect to the mortgage. For example the United Kingdom Merchant Shipping Act of 1995 provides that English private law provisions for registered ships do not apply to ships bareboat chartered-in by British operators.

37. It would be useful if Australian law also separated the responsibility for the exercise of public and private laws, at least with respect to mortgages, as currently there is no provision in the Australian law for recognising the priority of mortgages in a foreign register. The priority of these mortgages is determined by the ordinary rules relating to chattel mortgages.

38. The Review Team consequently recommended that consideration be given to amending the SR Act:

- to explicitly provide that, for ships bareboat chartered to Australian operators, the law applying to encumbrances such as mortgages will be the law of the State of underlying registration; and
- to enable the registration for an Australian-owned ship which is bareboat chartered-out to be suspended rather than closed and for a reference to be made in the proposed Part III of the register.

Ships under construction

39. The issue of the security over ships under construction was raised. The problem for both financiers and shipbuilders is the interplay between the SR Act and the Corporations Law, particularly for ships that are exported. Financiers take a charge over a ship under construction under the Corporations Law but once the ship floats it comes within the jurisdiction of the SR Act. If a temporary pass is issued under s.23 of the SR Act to facilitate the delivery of the ship, there is the problem that a mortgage cannot currently be registered against a temporary pass.

40. The Review considered that a charge over a ship under construction, which subsequently becomes a ship as defined in the SR Act and is issued with a temporary pass for the purpose of undertaking a delivery voyage, will not be removed from the Australian Register of Company Charges by virtue of the temporary pass. The security over the finance provided can be covered by the one legal regime, i.e. the Corporations Law.

41. Nevertheless, it is relevant that the Canada Shipping Act currently makes provision for ships under construction and the Review considered that the Australian SR Act could be improved if it was amended so that its scope was widened to allow the registration of ships under construction and mortgages against a ship under construction. This would provide a financier with an alternative security registration regime to a company charge registered under the Corporations Law. A separate part (Part IV) of the Register was recommended for ships under construction

Home ports

42. The concept of a "home port" originates in the practice of registering ships in the various ports of the British Empire. There are 32 "home ports" gazetted under the SR Act. Submissions were divided on the need for a home port. Some considered that the concept was

worthless and that Canberra should be the port of registry for all Australian flag ships while other submissions said that the concept was worthwhile.

43. The Review concluded that the one residual advantage of the concept of home port, apart from factors of pride, relates to the legal regime aboard a ship. All jurisdictions except Queensland have enacted complementary legislation to extend the operation of State and Territory criminal law to Australian ships. However, with respect to areas of civil law, which differ from jurisdiction to jurisdiction, the law applicable on board an Australian ship on the high seas is that of its home port.

44. The Review considered that, both for jurisdictional reasons and because it may be useful for an Australian registered ship in a foreign port to be able to display a home port, the concept of the home port should be retained. However, there is no reason to restrict the number of home ports to an approved list. The current list of gazetted ports is essentially a remnant of the former regime. Essentially, a shipowner should be able to select as home port any place which is defined as a port in either the *Customs Act 1901* or the *Navigation Act 1912*.

Marking

45. The SR Act requires that Australian registered ships be marked in accordance with the regulations. Submissions from yachting associations were generally critical of the marking requirements because they are considered to be too prescriptive and do not take account of changes in yacht design and construction methods. It was also suggested that it would be more efficient to issue the marking note and registration certificate concurrently.

46. The Review considered that there is a need to simplify the current marking requirements. It recommended that the issue be discussed with the shipping and yachting industries with a view to putting in place more cost-efficient requirements, including the possibility of the concurrent issue of the marking note and the registration certificate.

Tonnage certificate

47. It was submitted that current requirements for tonnage measurement are time consuming and expensive and that a tonnage certificate from a builder or a classification society should be accepted. The Review recommended that AMSA investigate the delegation of tonnage measurement to ship builders, in the case of a new ship being registered, or a classification society in the case of an existing ship being registered.

Access to the register

48. Submissions generally, but particularly from financiers and law firms, were unanimous in stating that electronic or on-line access to the Register is highly desirable. Being able to search the Register at any time would bring considerable efficiency gains and it was also felt that the cost of accessing the Register would be reduced.

49. The Review agreed that, with the communications technology available such as the Internet, and with commerce making increasing use of electronic data transfer, it is becoming increasingly inefficient for the Register to not be available on-line.

Consular services

50. The Department of Foreign Affairs and Trade (DFAT) performs a wide range of services overseas, known as notarial services, for Government Departments as part of its consular responsibilities. These services, which are performed by a "proper officer" include the issue of new or provisional registration certificates.

51. DFAT has been reviewing how it delivers notarial services and is identifying ways in which they can be performed by locally engaged staff. The Review considered that the functions performed by "proper officers" under the SR Act are commercial in nature and are unlikely to involve issues of national security. After all, the Register can be searched by any individual and any details of a ship on the Register can be obtained for a fee. The degree of risk, in terms of breaches of national security, involved in using locally engaged staff to perform notarial services in connection with the SR Act would be low.

52. The Review therefore recommended that appropriate amendments be made to the definition of "proper officer" to allow locally engaged embassy staff to undertake functions required by the SR Act.

Next steps

53. The Government has accepted the Review recommendations and the SR Act will be amended accordingly. Drafting instructions are being prepared by AMSA.

54. To assist in that process, AMSA is obtaining the legal advice suggested in the recommendations dealing with registration of financial interests other than mortgages, removal of a mortgage from the Register, mortgages relating to a ship on demise charter and the registration of ships under construction.

55. The review also recommended that further consultation take place with interested parties on non-mortgage securities and the marking of ships; AMSA is seeking the participation of interested groups in that process.

56. The Department of Transport and Regional Services is to undertake formal discussions with States and Northern Territory on their participation in the administration of the restructured register.

REVIEW OF THE SHIPPING REGISTRATION ACT 1981**TERMS OF REFERENCE**

The *Shipping Registration Act 1981* (SR Act) came into effect on 26 January 1982 and provides for the registration of ships in Australia. The SR Act is "an Act for the registration of ships in Australia, and for related matters" and replaced the previous system of ship registration under which Australian owned ships were registered as British ships under the United Kingdom Merchant Shipping Act 1894 (MSA). The SR Act adopted the MSA approach which specifically addressed the needs of large commercial vessels.

A review of the SR Act will be undertaken in accordance with the requirements of the, national competition policy agreed between the Commonwealth and State and Territory Governments. The purpose of the review is to assess the performance of the Act in meeting its objectives, focussing particularly on any restriction on competition, and also to report on appropriate arrangements for national registration of ships in the future.

A Task Force of seconded officials from the Department of Transport and Regional Development, the Australian Maritime Safety Authority (AMSA), and the Bureau of Transport and Communications Economics will undertake the review. A Steering Committee, comprised of a senior executive from both the Department and AMSA, has been established to oversight the review. An Independent Reference Committee has also been established to act as an external referee of the conduct of the review.

1. The Task Force is to:
 - (a) identify the objectives of the *Shipping Registration Act 1981* and assess the appropriateness of these objectives;
 - (b) assess the effectiveness of the *Shipping Registration Act 1981* against the objectives identified in (a); and
 - (c) assess the efficiency of the *Shipping Registration Act 1981*.
2. In assessing the matters in (1), the Task Force is to have regard to:
 - (a) Australia's rights and duties as a flag State under the United Nations, Convention on the Law of the Sea; and
 - (b) the effects on the environment (including the link between ship registration, safety certification and environmental protection), welfare and equity, occupational health and safety, economic and regional development, consumer interests, the competitiveness of business including small business, and efficient resource allocation.
3. In the light of findings under (1) and (2) above, investigate and report on appropriate future arrangements for national registration of ships taking into account
 - (a) the benefits and costs to the community of current arrangements, including compliance costs and the paper work burden on business, particularly small business;

- (b) whether the objectives of the legislation cannot be achieved more efficiently or with greater net community benefits through other means, including non-legislative approaches;
 - (c) currently, or potentially, available means for registering an interest in vessels.
4. In making assessments in relation to the matters in (2), have regard to the analytical requirements for regulation assessment by the Commonwealth, including those set out in the Competition Principles Agreement. The report of the Task Force should
- (a) identify the nature and magnitude of the social and economic issues which the SR Act seeks to address;
 - (b) assess whether, in meeting its objectives, the SR Act restricts competition and, as far as practical, identify the nature, extent and effects of any such restrictions on business and on the community generally;
 - (c) detail any further effects of the SR Act on business beyond any restrictions on competition identified in (b);
 - (d) identify any appropriate alternative registration regimes to the current SR Act, including mutual recognition and other cooperative arrangements with State agencies, particularly for recreational vessels, and other non-legislative approaches;
 - (e) analyse and, as far as reasonably practical, quantify the benefits, costs and overall effects of the SR Act and alternatives identified in (d);
 - (f) determine a preferred option for regulation, if any, in light of objectives set out in (1) and (2);
 - (g) examine mechanisms for increasing overall efficiency, including minimising the compliance costs and paper burden on small business, of the SR Act and, if it differs, the preferred option.
5. In undertaking the review, advertise nationally the fact of the review, seek submissions, identify the interested parties likely to be affected by the SR Act and alternative approaches to ship registration, consult with key interest groups and affected parties and include in the report a list and outline of the views from this consultation and submission process.
6. Report by 30 September 1997 and ensure that within 2 weeks of the report being finalised, it is forwarded to the Minister for Transport and Regional Development with a recommendation that a copy be sent to the Treasurer.

REVIEW OF THE SHIPPING REGISTRATION ACT 1981**SUMMARY OF RECOMMENDATIONS**

1. The Review Team accepts that registration is a necessary prerequisite for ships to be able to legally navigate the high seas. It has concluded that it is appropriate for Australia to have legislation which conveys nationality to Australian-owned vessels.
2. The Review Team has concluded that the registration of mortgages is so firmly tied to the concept of registration of ships that it is a necessary incident of any registration system.
3. The Review Team recommends that:
 - (i) the Australian Register of Ships be restructured into four parts;
 - (ii) the Act be amended to give effect to the restructuring. This includes ss.12-14 (obligation to register and exemptions), s. 79 (nationality and the States) and s. 17 (foreign registered ships); and
 - (iii) discussions be commenced with the States and Northern Territory concerning their participation in the administration of Part I of the restructured Register.
4. The Review Team recommends that consideration be given to ways in which the interests of holders of non-mortgage securities might be recognised by the SR Act, including:
 - (i) examining the feasibility of amending the Act so that a ship could be entitled to be registered if it is in the exclusive possession of a person or company under a financing agreement which provides for the acquisition of ownership at the completion of the agreement; and
 - (ii) examining whether the caveat provisions of the Act currently allow the notification of non-mortgage interests and, if they do not, amending the Act to allow this.
5. The Review Team recommends that legal advice be sought as to whether there is power in the SR Act for a mortgagee to voluntarily remove a ship mortgage from the register. If the advice is that there is not, it is recommended that consideration be given to amending the SR Act to give a mortgagee such a power.
6. The Review Team recommends that, to give added protection to mortgagees of bareboat chartered ships, consideration be given to amending the SR Act:
 - (i) to explicitly provide that, for ships bareboat chartered to Australian operators, the law applying to encumbrances such as mortgages will be the law of the State of underlying registration; and
 - (ii) to enable the registration for an Australian-owned ship which is bareboat chartered-out to be suspended rather than closed and for a reference to be made in the proposed Part III of the register.

7. The Review Team recommends that consideration be given to amending the SR Act to provide for the registration of ships under construction. There would be a separate part (Part IV) of the Register for ships under construction.
8. The Review Team recommends that the concept of a home port should be retained but that the list of "approved" home ports should be abolished.
9. The Review Team considers that there is a need to simplify the current marking requirements. It recommends that the issue be discussed with the shipping and yachting industries with a view to putting in place more cost-efficient requirements, including the possibility of the concurrent issue of the marking note and the registration certificate.
10. The Review Team recommends that AMSA investigate the delegation of tonnage measurement to ship builders, in the case of a new ship being registered, or a classification society in the case of an existing ship being registered.
11. The Review Team recommends that AMSA investigate the feasibility of redeveloping the Register so that it can be available on-line to business.
12. The Review Team recommends that discussions be entered into with DFAT with a view to amending the definition of "proper officer" to allow locally engaged embassy staff to undertake functions required by the SR Act.