Shortcomings of Federal Maritime Legislation

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MAJOR SHORTCOMINGS OF AUSTRALIAN MARITIME LEGISLATION

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INTRODUCTION

This paper deals with three major areas of Commonwealth legislation that impact on the Australian maritime industry and that have major shortcomings. Those are the Navigation Act, the Migration Act and the Income Tax Assessment Act.

When taken together these pieces of legislation, regulations made pursuant to them and the interpretations applied by the Courts, tilt the playing field well and truly against the Australian shipping industry and Australian seafarers. This applies both in the international trades and in relation to the coastal trade or the domestic shipping industry. By contrast other OECD nations have recognised the unfair competition and taken action to counter it.

The net effect of the legislation is that the Australian shipping industry and Australian seafarers have to meet a set of standards that do not apply to non-Australian shipping and non-Australian seafarers. This has created an unfair situation that makes it very difficult if not impossible for the Australian players to compete. In turn, this has led to a significant contraction of the Australian shipping industry in recent years. Guest workers are taking over Australian coastal shipping.

If the decline of the Australian shipping industry continues the nation risks losing a strategic transport capability of quite fundamental importance – the ability to transport commodities and processed goods in and out of (and even around) our island nation. Indeed during the recent East Timor conflict, foreign flag vessels had to be chartered in by our Navy because there were insufficient Australian flag vessels available to carry out the task.

Unless there is a change in policy leading to legislative change by the Federal Government Australian flag shipping will continue to stagnate and decline.

NAVIGATION ACT 1912

The Navigation Act is an omnibus law that has developed over the best part of a century to deal with a variety of matters maritime.

It was originally a product of the UK Merchant Shipping Acts of the 19th Century. The Navigation Act is the main vehicle for the implementation of Australia's obligations under a number of IMO Conventions.

On its face the legislation appears to be responsive to the needs of the players in the maritime industry or to events and circumstances of the times. It has been much amended and recently reviewed.

The major shortcoming of the Navigation Act is that it does not promote an Australian shipping industry.

The Navigation Act does not require that foreign vessels participating in the Coasting Trade must comply will all of the requirements that apply to Australian flag vessels that are licensed for the Coasting Trade (see Appendix 1). There is a double standard here. The Australian law works to the disadvantage of the Australian operators and Australian seafarers.

In relation to the international trades, there are simply no mechanisms in the Navigation Act or anywhere else to encourage Australian participation in the task of transporting Australia's exports or imports. In a globalizing world, Australia is missing out on participation in the key service for trade of most real goods i.e. shipping.

Globalization has been a buzzword of the last decade but the maritime industry has been a truly global one for many decades, if not centuries. The IMO Conventions have been a primary method for dealing with global maritime issues during the 20th Century. Compliance with IMO Conventions and the national laws that implement them has been patchy. The Ships of Shame Report highlighted many of these problems in the early 1990s after a period of numerous bulk shipping disasters. The more recent ICONS report, Ships, Slaves and Competition, demonstrated that 'the more things change, the more they stay the same'. Peter Morris' address to the MLAANZ Conference last year detailed the problems of enforcement of international standards.

Port State Control (PSC) in Australia and many other nations has arguable raised the physical standard of ships visiting Australia (and the other complying nations). As the recent groundings of the *Doric Chariot*, *Hanjin Dampier*, and *Bunga Teratai Satu* demonstrate however the operation of ships in Australian waters is still a hazardous one. And because of our PSC inspection reputation, we are not seeing the worst ships in our waters.

What has happened during the latter part of the 20th Century is that the economics of shipping have altered fundamentally. Cost minimization has driven the separation of ship ownership, ship registration, ship management and ship operation. The term Flag of Convenience (FOC) covers the concept of a country which has no physical connection with a vessel but is prepared to register the vessel at cut-price rates and without being rigorous about the implementation of IMO standards (or in some cases any standards).

Large elements of the global maritime industry are structured to minimize taxation and exposure to risk through exploitation of the FOC concept.

Corporations are established to take advantage of the most lenient laws that can be found and the countries most desperate for foreign exchange are engaged in a constant downward spiral in an effort to retain their meagre benefits from the registration of vessels.

The current dispute over the Coasting Trade provisions of the Australian Navigation Act is an exercise in determining how far Australia is prepared to allow this corrupt international process to penetrate into the national polity.

The Single Voyage Permit and Continuing Voyage Permit system has become a mechanism for the Minister for Transport to waive virtually all Australian laws and standards in domestic shipping.

The Permit system does not permit the foreign shipping company to participate in the Australian Coasting Trade on the same terms as Licensed Australian shipping. Rather it permits the foreign shipping company to engage in coastal voyaging without needing to comply with all of the burdensome requirements imposed on Australian operators.

Why would any Parliament have agreed to such a gaping hole in the legislative framework? Simply because it was really only intended to be used sparingly and infrequently. It was meant to supplement Australian transport when there was not enough Australian shipping capacity to do the job. Now Australian shipping capacity is being re-flagged to ensure that there is no Australian shipping available to do the job.

There is no inherent competitive advantage held by Ukrainian seafarers over Australian seafarers despite what CSL has been quoted as saying. It is obvious that a crew of 27 will be able to do a great deal more maintenance on a vessel than a crew of 17.

The advantage that CSL gain from (ab)using the Permit system is avoidance of all Australian civil laws and regulations:
CSL does not pay any corporate income tax in Australia in relation to the earnings from the CSL Pacific or the Stadacona (former CSL Yarra);
CSL does not pay Australian minimum rates of pay to the seafarers it employs on the 2 vessels;
CSL does not pay any payroll tax in relation to the seafarers it employs on the 2 vessels;
CSL does not pay superannuation contributions for the seafarers it employs on the 2 vessels;
CSL does not provide Annual Holidays for the seafarers it employs on the 2 vessels;
CSL does not pay workers compensation premiums for the seafarers it employs on the 2 vessels;
CSL does not provide long service leave to the seafarers it employs on the 2 vessels;
The Ukrainian seafarers employed by CSL do not pay income tax on their wages;

Turning to the international trades, countries throughout the world have taken measures to ensure that they retain their shipping industries because they recognize the economic and strategic importance of shipping.

The European Commission in 1997 adopted a specific policy setting out what they call the Maritime State Aid Guidelines for member countries. The rationale was described as follows:

> *Many third countries have developed significant shipping registers, sometimes supported by an efficient international services infrastructure, attracting shipowners with a fiscal climate which is considerably milder than within EC Member States. The low tax environment has resulted in there being an incentive for companies not only to flag out their vessels but also to consider corporate relocation. It should be emphasised that there are no effective international rules at present to curb such tax competition and few administrative, legal or technical barriers to moving a ship's registration from a Member State's register. This leaves all Member States having significant fleets with a common problem: the creation of conditions which allow fair competition with flags of convenience seems the best way forward.*

The Guidelines went on to indicate the type of fiscal support that would be permitted within the EU:

> *In order to counter this tendency, many Member States have taken special measures to improve the fiscal climate for shipowning companies, including, for instance, accelerated depreciation on investment in ships or the right to reserve profits made on the sale of ships for a number of years on a taxfree basis, provided that these profits are reinvested in ships.*
>
> *These fiscal alleviation measures which apply in a special way to shipping are considered to be State aid. Equally, the system used in certain Member States and third countries of replacing the normal corporate tax system by a tonnage tax is a State aid. Tonnage tax means that the shipowner pays an amount of tax linked directly to the tonnage operated. The tonnage tax will be payable irrespective of the company's actual earnings, or profits or losses made.*
>
> *Such measures have been shown to safeguard high quality employment in the onshore maritime sector, such as management directly related to shipping and also in associated activities (insurance, brokerage and finance). In view of the importance of such activities to the economy of the Community and in support of the earlier stated objectives, these types of fiscal incentive can generally be endorsed.*

The Guidelines also set out the additional measures relating to labour costs which may be permitted among EU members:

> *However, maritime transport presents a special case, as the Commission accepted in adopting its guidelines on State aid in 1989 and the communication on reduction of labour costs. In particular, aid in the field of social security and seafarers' income taxation, tending to reduce the burden borne by shipping companies without reducing the level of social security for the seafarers and resulting from the operation of ships registered in the Community may be considered compatible with the common market.; The Commission considers that this approach remains valid.*

The Guidelines make it clear that the objective is not just to give corporate handouts:

Support measures for the maritime sector should, therefore, aim primarily at reducing fiscal and other costs and burdens borne by EC shipowners and EC seafarers (i.e. those liable to taxation and/or social security contributions in a Member State) towards levels in line with world norms. They should directly stimulate the development of the sector and employment, rather than provide general financial assistance.

In line with the objective, therefore, the following action on employment costs should be allowed for EC shipping:

- reduced rates of contributions for the social protection of EC seafarers employed on board ships registered in a Member State,

- reduced rates of income tax for EC seafarers on board ships registered in a Member State.

For this type of aid, a maximum reduction of liabilities to zero may be permitted, allowing Member States to bring employment related costs to levels in line with world norms which often entail exemption from tax and social security liabilities for seafarers. However, no subsidy on net wages of EC seafarers may be granted, as this might lead to a distortion of competitive conditions between Member States. The alleviation of fiscal burdens would not remove the interest of the shipowner in negotiating an appropriate salary package with potential crew members and their labour representatives. Seafarers from Member States with lower wage levels would still, therefore, have a competitive advantage over those from other Member States with higher wage expectations. In any event, EC seafarers will continue to be more expensive than the cheapest available in the global market. Hence, there is no danger of overcompensation entailed in this measure.

Just in case any member country might be tempted to go over the top, the Guidelines set a maximum level of aid:

A reduction to zero of taxation and social charges for seafarers and of corporate taxation of shipping activities is the maximum level of aid which may be permitted.

Following the introduction of these guidelines most if not all EU countries have introduced extensive support measures for their shipping industry. These include the full range of measure identified in the Guidelines (see Appendix B for a summary).

Meanwhile the Australian Government has removed the support that did exist. The Ship Capital Grants Act 1987, s57AM of the Income Tax Assessment Act 1936 and the International Shipping (Australian Resident Seafarers) Grants Act 1995 provided some measure of assistance to the Australian shipping industry "towards levels in line with world norms". These measures were repealed by the Howard Government immediately upon election giving a clear signal about the Government's shipping policies.

MIGRATION ACT

The Migration Act 1958 regulates the arrival in Australia of non-citizens.

It could be regarded as gratuitous to comment about how the Migration Act has been used in 2001 and 2002 in conjunction with the "border security" issue to ensure that non-citizens are not allowed into this country.

By contrast, the Government and the Department of Immigration and Multicultural and Indigenous Affairs have been quite accommodating to non-citizens who are seafarers on foreign flag ships.

For many years the Migration Act has empowered the Minister to issue visas to people who wish to visit Australia.

There is a special type of visa for seafarers on foreign vessels engaged in international voyages. This is called the special purpose visa(s.33(2)(a), Migration Act). The Migration Regulations specify that the members of the crew of non-military ships are taken to have been granted special purpose visas(Regulation 2.40, Migration Regulation 1994).

In other words the special purpose visa is not issued it is taken to have been issued. It is effectively deemed to be issued.

There is however a proviso that the ship must be engaged in an international voyage. That is that the ship will depart Australia to a place outside Australia during the course of the voyage (Regulation 2.40(6)).

With the aplomb of Sir Humphrey Appleby, the First Assistant Secretary of the Department of Transport and Regional Services, Mr. G. Feeney advised the Senate Estimates Committee this year that foreign flag vessels which are granted Single Voyage Permits or Continuing Voyage Permits to trade between Australian ports are regarded as still being on international voyages.

In addition, the DIMIA also takes the view that a vessel operating under a Single Voyage Permit or a Continuing Voyage Permit is on an international voyage. DIMIA therefore regards the foreign seafarers on board these ships as being taken to have special purpose visas.

When the courts of Australia have considered the meaning of the term 'international voyage' for the purposes of the application or otherwise of the Excise Act, that have looked to the actuality of the voyages of the vessels concerned (BP Australia Ltd v Bissaker (1987) 163 CLR 106). Voyages between places in Australia are not to be regarded as international voyages. CSL claims that it pays the excise on fuel that its foreign flag CVP vessels use – effectively conceding it is operating on domestic not international voyages.

Examination of trading patterns shows that some of the foreign vessels trading between Australian ports using SVPs or CVPs are not actually engaged in international voyages. Some ships are using permits to replace former Australian flag vessels in dedicated trading patterns of repeated, regular voyages between Australian ports. They do not continue to foreign ports. The foreign seafarers on those vessels are therefore not entitled to be 'taken to be issued with special purpose visas'. On the face of it the seafarers are in the same legal position as the persons on

the so-called SIEVs (suspected illegal entry vessels), they are illegally in Australia. Minister Ruddock has not however taken the same heavy-handed approach as he has taken with the asylum seekers.

It goes without saying that these seafarers are not subject to all of the normal legislation that applies to other people working in Australia. Laws such as the Occupational Health and Safety Acts, Compensation Acts, Workplace Relations Act, Income Tax, Payroll Tax etc do not appear to apply to these seafarers or their employers.

AIMPE and the other maritime unions have however taken steps to test the application of the Workplace Relations Act (and the Maritime Industry Seagoing Award made thereunder) to the CSL vessels' crew.

Of course the Crimes At Sea Act 2000 does ensure that Australian criminal law applies to these vessels and the persons on them.

Interestingly a recent NSW Court of Appeal case *Union Shipping New Zealand* v *Morgan* [2002] NSWCA 124 indicates that the common law may also apply to foreign seafarers on foreign vessels in Australian, or at least NSW, ports. In that case, the Court of Appeal dismissed an appeal by the shipping company against a decision by the primary judge to allow the hearing in NSW of a claim arising from an allegedly tortious injury suffered by a New Zealand seafarer whilst the NZ vessel was discharging its cargo in Port Kembla. After a detailed review of the relevant texts (including *Cheshire, Dicey, Kahn-Freund, Nygh* and *O'Connell*) Heydon JA, Hodgson JA and Santow JA rejected the old concept that the law of the flag should apply in all respects on board a ship. Their Honours found that New South Wales law applies.

It would not be appropriate to move on without noting that in *Maritime Union of Australia and others v Hon. John Anderson and others* [2000] FCA 850, the unions challenged the approach of the Minister to the granting of SVPs. Had the unions' application been successful the CSL Yarra may well have been the beneficiary and had access to the fertilizer cargoes of WMC Fertilizers and Western Bulk Carriers out of Townsville. Kenny J of the Federal Court found, however, that the unions had no standing in the matter.

That judgement effectively entrenched the highly manipulative method of SVP applications that have come to be accepted practice over the past 7 years. Applicants tailor the terms and timing of their applications to ensure that no licensed Australian ship is capable of fulfilling the requirements.

INCOME TAX ASSESSMENT ACT

While the Tax Act is not a piece of Maritime legislation, the discussion about the maritime industry indicated that tax is a core issue in the shipping business. The Tax Act has a big impact on Australian seafarers.

This is especially the case in relation to the participation of Australian seafarers in international shipping. Recently the taxation of the overseas earnings of an Australian resident seafarer was the subject of litigation in the Federal Court of Australia in *Chaudhri v Commissioner of Taxation* [2001] FCA 554 (15 May 2001). A subsequent application to the High Court for leave to appeal this decision was turned down so the Federal Court decision stands.

In essence the decision means that s.23AG of the Income Tax Assessment Act is to be interpreted as meaning that the earnings of an Australian seafarer overseas are not earnings in a foreign country and are therefore not subject to the normal exemption for foreign earnings of Australians working overseas.

> *"1 Mr Chaudhri was at all times in the year of income a resident of Australia.*
> *2 At all relevant times, Mr Chaudhri was employed by a company incorporated in Bermuda pursuant to a contract of employment which stipulated that it was deemed to have been made in Hong Kong and to be governed in all respects by the laws of Hong Kong. The parties to that contract agreed to submit to the jurisdiction of Hong Kong.*
> *3 Mr Chaudhri served, pursuant to this contract of employment, as an officer aboard two merchant ships which flew the Panamanian flag.*
> *4 Since departing Australia for his employment on 18 September 1995 and until his return to this country on 19 January 1996 (a period well in excess of ninety-one days), the ship on which Mr Chaudhri served, as one would expect, docked at various foreign ports and travelled through the territorial waters of foreign countries and on the high seas.*
> *5 The income which was derived by Mr Chaudhri in the relevant year of income pursuant to his contract of employment was income derived by him in his capacity as an employee engaged in foreign service and thus salary or wages as those words are used in the definition of "foreign earnings" in s 23AG(7) of the Income Tax Assessment Act 1936 ("the Act").*
> *6 The question which arises for decision is whether the income which Mr Chaudhri earned in the year of income was exempt from income tax under s 23AG of the Act. As that section stood during the year of income, it provided relevantly as follows:*
>
> > *"(1) Where a resident, being a natural person, has been engaged in foreign service for a continuous period of not less than 91 days, any foreign earnings derived by the person from that foreign service is exempt from tax.*
> >
> > *(2) An amount of foreign earnings derived in a foreign country is not exempt from tax under this section if the amount is exempt from income tax in the foreign country only because of any of the following:*
> >
> > ...
> >
> > *(7) In this section:*
> >
> > ...

`foreign earnings' means income consisting of earnings, salary, wages, commission, bonuses or allowances but does not include any payment, consideration or amount that...

`foreign service' means service in a foreign country as the holder of an office or in the capacity of an employee."

The Full Court went on to decide that :

> *31... a policy of subjecting to Australian income tax the earnings of an Australian resident who is outside the jurisdiction of any country levying taxation would seem entirely rational.*
> *32 In our opinion, the learned Deputy President of the Tribunal was correct in holding that the income which Mr Chaudhri derived was not exempted from tax in accordance with s 23AG.*

In interpreting this provision of the Tax Act, the Federal Court did a fine job of defending the revenue base for the ATO. However this leaves the Australian resident international seafarer disadvantaged in comparison to most other international seafarers. Not only crews from Third World nations but even for example seafarers from the UK are exempt from tax on income earned on international voyaging (over a minimum period). Crudely put, it is just far cheaper to employ seafarers of virtually any other nationality than Australians because they don't have income tax taken out of their pay.

Obviously in the context of the Australian domestic economy it jars to hear it argued that a group of employees should not be subject to the normal income tax laws. However when the global overview is taken, Australia's policy disadvantages Australian seafarers.

By contrast of course Australian merchant bankers, lawyers and consultants etc. working overseas do take advantage of the provisions of s23AG of the ITA Act and return home subsequently enriched by the experienced.

APPENDIX 1

NAVIGATION ACT AMENDMENTS

The current structure of the Navigation Act Coasting Trade provisions is as follows:

Licensed ships are required to pay Australian wages and have a library (s288);

If no licensed ship is available [or if the licensed ships are inadequate] then the Minister may issue a single voyage permit or a continuing voyage permit (s286);

Minister must be satisfied issuing a permit is in the public interest (s286);

Minister may impose any conditions on a permit (s286);

Permit ships are not deemed to be in the coasting trade (s286(2));

Minister can cancel a continuing voyage permit with not less than 6 months notice (s286(4));

Ships in receipt of subsidies or bonuses from a foreign govt. may not participate in the coasting trade (s287);

Every seaman employed on a ship in the coasting trade must be paid wages at the current rates ruling in Australia (s289).

AMENDMENTS REQUIRED FOR LEVEL PLAYING FIELD IN THE COASTING TRADE

Seafarers on permit ships should be paid at Australian award rates and conditions [add to s286];

Seafarers on permit ships should be subject to Australia income tax legislation [add to s286];

Parties applying for permit must agree to pay Australian corporate taxation [add to s286];

Ships receiving tonnage tax concessions or other similar tax concessions should not be eligible to apply for a permit [add to s287];

Minister should be able to cancel any permit for any breach [add to s286(4)];

Applications for permits must be public and must be made 8 weeks in advance [add to s286];

Permit ships should be part of coasting trade [alteration to s286(2)]; and

Flag of Convenience vessels should not be eligible for the grant of permits.

APPENDIX 2

16th September 2002

International Shipping Scene Post 1999.

Cyprus

Tonnage Tax approved by EU 24/9/02.
No details

Finland

Tonnage Tax approved 16/04/02.
Based on the Norwegian model whereby revenues retained in a company for future investment qualify for tonnage tax; while those paid to shareholders in a dividend would be taxed according to the normal 29% corporate income tax.

German

Tonnage Tax arrangements amended in 1999 such that depreciation of between 50% to 60% is available.

Greece

In September 2001, the tonnage tax was halved. No details of new rate.
Income tax relief for seafarers same date, no details.

In July 2001, the Government granted complete tax immunity to cargo shipping companies prepared to list their shares in Athens.

Italy

In July 2002, Government announces introduction of tonnage tax by 2003 and introduces e70M incentives to replace aging tankers.

Pakistan

April 2002 Tonnage Tax introduced of $0.15 per voyage per GT

Singapore

As of February 8 2001 the Annual Tonnage Tax is capped at a maximum of Sing $ 10,000. Initial registration fees halved from Sing $ 100,000 to 50,000.

Spain

Tonnage Tax introduced April 2002. Calculated on the net tonnage. Exempts owners from Capital Gains Tax on vessel sales.

Sweden

October 2001 Government introduces reimbursement of all social security contributions and taxes of seafarers.

Tonnage Tax under consideration.

USA

Tonnage Bill before Congress and tax exemptions are a part of that Bill for US mariners in the US Fleet.