

# SOS: THE CALL SIGN OF THE 'SHIPS OF SHAME'

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## I INTRODUCTION

Shipping is one of the few truly international industries in the world. In no other industry would it be possible to set up a transaction that involved so many different national entities as can be lumped together in one shipping deal. Imagine a modern supertanker, which may be owned by a Greek national through a Liberian company. The ship may have been built in Japan but powered by Danish engines. It will no doubt be run by a crew of mixed nationality. It may have been financed through a New York bank and insured in London. It may be time chartered to a multinational oil company to carry Saudi Arabian crude oil from the Gulf to Rotterdam.<sup>1</sup>

Therein lies the problem. Shipping is an international industry regulated through multi-lateral international agreements which have evolved over the last 100 years. There has always been a reticence, however, on the part of governments to impose regulations on shipping in case economic opportunity and competitiveness is threatened.<sup>2</sup>

In December 1992 the House of Representatives Standing Committee on Transport, Communications and Infrastructure released its report on its inquiry into ship safety titled *Ships of Shame*.<sup>3</sup> The Report was focused on

a minority of ships, bad ships, ships that endanger the lives of those who serve on them. Ships that are the source of major risks to the marine environment and marine facilities of the nations they visit. Ships on which seafarers are abused and exploited by officers and management alike. Ships that well deserve to be known as 'ships of shame'.<sup>4</sup>

Many of these ships are 'flag of convenience' ships, the common term used for ships whose interests are from countries such as the US but are registered in countries such as

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<sup>1</sup> R P Barston and P Birnie (eds), *The Maritime Dimension* (1980), 128

<sup>2</sup> Commonwealth, *House of Representatives Standing Committee on Transport, Communications and Infrastructure, Ships of Shame*, Parliamentary Paper No 494 (1992) 3 ('*Ships of Shame*').

<sup>3</sup> *Ibid*

<sup>4</sup> *Ibid* ix.

Liberia or Panama where maritime laws and registration criteria are generally far less stringent.

This paper will consider the history of flags of convenience, examine problems associated with them and the effect that international conventions have had, the current impact that Australian jurisdiction has over these ships and finally what possible solutions there may be for countries such as Australia to raise their standard of operation.

## II THE HISTORY OF FLAGS OF CONVENIENCE

### A Nationality

Every ship has a nationality which, in the first instance, determines the applicable law governing all activities aboard it, regardless of where the ship is located.<sup>5</sup> For example, the UK has applied its law to offences committed on board a British vessel berthed at Rotterdam eighteen miles from sea in *R v Carr and Wilson*<sup>6</sup> and to a British vessel some twenty-two miles off the coast of Western Australia in *Oteri and Oteri v The Queen*.<sup>7</sup>

Historically, because a ship's nationality had not been the cause of any substantial problems, the law governing nationality was not strictly enforced and was open to wide interpretation. This led to what has become known as 'flags of convenience': after World War I, countries such as Panama, Guatemala, Honduras and Nicaragua (without ship building industries of their own), encouraged the growth of their fleets by allowing their citizens to purchase ships abroad, empowering consuls in the US or Europe to issue provisional registries and provided for permanent registration on the arrival of the vessels to the home country.<sup>8</sup> This growth continued, creating a marked increase in the 'flag of convenience' registration of ships.<sup>9</sup>

In the 1920s during Prohibition, entrepreneurial American shipowners ran 'booze cruises' just outside territorial waters by registering their ships in Panama.<sup>10</sup> By the late 1960s new flags of convenience appeared as Cyprus and Singapore experimented with systems that attracted Greek and Chinese owners.<sup>11</sup>

### B Why Flags of Convenience?

Flags of convenience ships are those vessels engaged in international navigation but which are not registered in the state with which the ship is most closely associated.

<sup>5</sup> *R v Anderson* [1868] LR ICC 161 discussed in D A Butler and W D Duncan, *Maritime Law in Australia* (1992) 31.

<sup>6</sup> (1882) 10 QBD 76.

<sup>7</sup> (1976) 11 ALR 142.

<sup>8</sup> Rodney Carlisle, *Sovereignty for Sale: The Origins and Evolution of the Panamanian and Liberian Flags of Convenience* (1981).

<sup>9</sup> Edgar Gold, *Maritime Transport. The Evolution of International Marine Policy and Shipping Law* (1981) 268.

<sup>10</sup> Editorial, 'Follow the flag of convenience' (1997) 342 *The Economist* 85.

<sup>11</sup> Carlisle, above n.8.

There are several reasons why the owners of these vessels choose a flag of convenience. Economic factors are cited as one of the main reasons for the early upsurge in out of state registration of many ships. The shipping boom of the 1950s, which produced high profits, also produced high taxes. Many ship owners looked to other countries where there was minimal taxation, or none at all, to register their vessels. Also, freedom of operation because of less stringent labour legislation requirements, lack of currency exchange and investment controls, and the apparently less stringent safety requirements have also been given as reasons for the registration of ships under flags of convenience.<sup>12</sup> There is little motivation for flag of convenience states to increase their construction and equipment standards of their vessels. States operating under flags of convenience are also disinclined to enforce trade union regulations and requirements.

The practice of flying a flag of convenience for political reasons is also not without precedent.<sup>13</sup> In the 16<sup>th</sup> century the English used flags of convenience to get around Spanish blockades along the coast of South America,<sup>14</sup> during the war of 1812 American ships sailed under the Portuguese flag in order to protect themselves from British warships blockading the American coast, and during Napoleon's continental blockade, English vessels were registered under the colours of tiny German principalities to avoid capture.<sup>15</sup>

Following World War I, US vessels, in particular, began flying the flag of Panama. There were several attractions of the Panamanian registry for these vessels; however, the main reasons were evading restrictions of American maritime law<sup>16</sup> and avoiding payment of American taxes and labour rates.<sup>17</sup> Taxes would be paid only if and when subsidiary companies in Panama declared dividends to parent companies in America – hence earnings could be ploughed back into the Panamanian companies for a considerable time allowing borrowed moneys to be quickly repaid.

Today, monetary considerations remain one of the major incentives for the registration of vessels under flags of convenience. For example, the primary source of income for the Liberian nation is the registration of ships which is estimated at US\$20 million annually – 99% of Liberia's total official revenue.<sup>18</sup> The European Commission has calculated that tax breaks and lower labour costs save an owner of a Liberian registered ship about \$1 million per ship per year.<sup>19</sup> That is a huge incentive to register a vessel under a flag of convenience, and it demonstrates why it has been and will continue to be such a mammoth task to deal effectively with these ships of shame.

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<sup>12</sup> Gold, above n 9.

<sup>13</sup> See Julie Mertus, 'The Nationality of Ships and International Responsibility: The Reflagging of the Kuwaiti Oil Tankers' (1988) 17 *Denver Journal of International Law and Policy* 207, 211.

<sup>14</sup> 'Follow the flag of convenience,' above n 10.

<sup>15</sup> Mertus, above n 13.

<sup>16</sup> Carlisle, above n 8.

<sup>17</sup> *Ibid.*

<sup>18</sup> Lance Gould, 'The Caribbean Queen of Mean' (1996) 10 *Spy Magazine* 28.

<sup>19</sup> 'Follow the flag of convenience,' above n 10.

### C *Contemporary Flags of Convenience States*

Prior to World War II, Liberia had no shipping tonnage<sup>20</sup> at all; by 1958 it was ranked third in the world. During the same period Panama increased its fleet from 715,525 grt<sup>21</sup> to 4,357,800 grt, ranking eighth. Despite attempts to regulate registration of ships more closely and ensure genuine links between a state and a ship,<sup>22</sup> registration of flags of convenience ships continued to increase. Between 1958 and 1968 the Liberian and Panamanian share of the world's fleet rose from just over 15 million grt to just over 32 million grt. By 1978 the flag of convenience states had approximately 28% of the world fleet and continued to expand at the rate of about one per cent per year.<sup>23</sup>

It is not only supertankers which fly flags of convenience. Of the 300 cruise ships registered in the world, 53 are Bahamian, 41 are Liberian, and 38 are Panamanian.<sup>24</sup> The Carnival Corporation, operating Carnival Cruise Line ships for mainly American tourists, is registered in Panama and made \$502.5 million profit between 1985 and 1988.<sup>25</sup> As a Panamanian corporation it paid no tax. The all-American owned Disney Cruise Line operates two cruise ships, both of which are registered in the Bahamas.<sup>26</sup>

### III THE SHIPS OF SHAME INQUIRY

The *Ships of Shame* inquiry was instigated after the loss of six bulk carriers off the Western Australian coast between January 1990 and August 1991. Its mandate was to inquire into and report on the issue of ship safety at the national and international level.<sup>27</sup> A thirteen person Committee was established to conduct the inquiry, considering such items as cracks and corrosion in ships, loading and unloading practices, operational procedures and design and construction faults. The fundamental problems it identified,<sup>28</sup> however, were the peculiar nature of the international shipping industry, the underlying economic base of international shipping and the breakdown in the regulatory effectiveness of flag states.<sup>29</sup> The Committee conducted public hearings, investigated submissions from sixty-nine persons or organisations and examined sixty-three witnesses, resulting in thirty recommendations being proposed in fourteen areas.

<sup>20</sup> Shipping tonnage is the carrying capacity of a ship which can be described as either deadweight tonnage, which is the tonnage of cargo that a ship is capable of carrying, or gross tonnage, which is the displacement weight of the ship itself.

<sup>21</sup> Gross registered tonnage.

<sup>22</sup> This proposition was put forward by the International Law Commission at the First United Nations Law of the Sea Conference in Geneva in 1958.

<sup>23</sup> Gold, above n 9, 335.

<sup>24</sup> *Ibid.*

<sup>25</sup> *Ibid.*

<sup>26</sup> *Ibid.*

<sup>27</sup> *Ships of Shame*, above n 2, xiii.

<sup>28</sup> *Ibid.* xv.

<sup>29</sup> 'A flag state is the country in which a ship is registered and which undertakes the responsibility for the implementation of international conventions relating to that ship. Under the Geneva Convention of the High Seas every state has the right to sail ships under its flag.' *Ibid.* 13.

## A *Ships of Shame Progress Report*

In 1994 the House of Representatives Standing Committee on Transport, Communications and Infrastructure released its *Ship Safety Review Inquiry Progress Report*<sup>30</sup> which was produced to monitor the implementation of the *Ships of Shame* inquiry recommendations and ongoing initiatives in ship safety regulation.<sup>31</sup> The *Progress Report* also outlined new initiatives to further improve ship safety including port state control performance indicators, the publishing of port state control detention information, the requirement for compulsory insurance cover and increased penalties for breaches of International Labour Organisation (ILO) Convention 147.<sup>32</sup> Included within the report was a powerful statement<sup>33</sup> to the effect that the Committee believes the lack of compliance by flag states with international maritime convention requirements, which the flag states have ratified, is the most serious problem currently facing ship safety. According to the report some flag states ratify an International Maritime Organisation (IMO) Convention and then ignore the responsibilities of the Convention. As the IMO is powerless to intervene, one of the recommendations contained in the *Progress Report* is that the IMO be given the power to sanction member states that do not meet their international maritime convention responsibilities.<sup>34</sup>

The *Progress Report* noted a number of serious problems in the industry, including: that the treatment of the crew on some ships is still inhumane; there remain numerous instances of unsanitary conditions; there is a lack of sufficient food, inadequate medical supplies and equipment; there are inappropriate working areas, insufficient training and lack of attention to accident prevention. In summary, issues related to basic provisions which one would reasonably expect would be provided to the crew of these working vessels.

## B *Ships of Shame Final Report*

In December 1995 the Committee released its final report in its trilogy on ship safety.<sup>35</sup> The findings were unsurprising. Nothing much had changed since the previous reports – the main concerns of the *Final Report* were again the abuse, underpayment and maltreatment of crews and the non-compliance of some flag states with international maritime safety conventions.

The *Final Report* is not, however, all doom and gloom. It does acknowledge that there has been substantial progress in a number of areas including:<sup>36</sup> the introduction of Safety Management systems; the development of strict criteria governing the operation of

<sup>30</sup> Commonwealth, *House of Representatives Standing Committee on Transport, Communications and Infrastructure: Ship Safety Review Inquiry Progress Report*, Unnumbered Parliamentary Paper ('*Progress Report*') (1994)

<sup>31</sup> *Ibid* 2.

<sup>32</sup> See below Part V.

<sup>33</sup> *Progress Report*, above n 30, 24.

<sup>34</sup> *Ibid* 25.

<sup>35</sup> Commonwealth, *House of Representatives Standing Committee on Transport, Communications and Infrastructure, Ships of Shame – A sequel: Inquiry into ship safety*, Parliamentary Paper No 479 (1995) ('*Final Report*').

<sup>36</sup> *Ibid* 75-96

Classification Societies; and the move by the IMO in revising the Standards of Training Certification and Watchkeeping Convention towards auditing, approval and public acknowledgment of administrations demonstrably compliant with the Convention.

#### IV PROBLEMS ASSOCIATED WITH THE SHIPS OF SHAME

So as not to give the wrong impression, it should also be noted that not all flags of convenience vessels are sub-standard. Although many ship owners register their ships under a flag of convenience for economic reasons, not all of them abandon high technical standards for their ships.<sup>37</sup> Obviously, all owners must take at least some care in order to remain profitable; however, these listed areas have been earmarked as particular concern to ships flying flags of convenience.

##### A Crews

One of the major tragedies associated with the ships of shame is the continuing maltreatment of crews, the appalling living conditions on these vessels and the apparent indifference to safety in the workplace of the ship owners. More often than not the crew on flag of convenience ships receive extremely low wages and are exposed to inferior working conditions in comparison to their counterparts on other ships. It has even been suggested that the employment practices and living conditions are reminiscent of the slave trade era.<sup>38</sup> The reduction of labour costs in running these vessels remains an important and profitable reason for registering the ship under a flag of convenience. With the lower wages paid comes the inevitable problem of unqualified crews, which, together with the ever increasing number of ships at sea, results in a secondary problem of safety at sea.

The *Ships of Shame* report also noted that the crew sizes approved by some flag states have been reduced to a level where the crew would not be able to cope adequately with a disaster. This reduction in crew size, together with a lack of training and experience and lack of morale as a result of maltreatment, has resulted in lower maintenance levels, which in turn, according to the *Ships of Shame* report, are major contributing factors to bulk carrier losses. Ultimately, the report noted the importance of professional crews, observing that 'a good crew may save a bad ship in a time of crisis and alternatively a bad crew can ruin a good ship.'<sup>39</sup>

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<sup>37</sup> Economic and Social Committee of the European Community, 1979, Brussels, *EEC Shipping Policy: Flags of Convenience: Own Initiative Opinion on the Problems Currently Facing Shipping Policy, Particularly Maritime Safety, the Growing Importance of the new Shipping Nations, the Development of Flags of Convenience and the Discrimination against certain Flags*, EEC (1979), 17 ('Economic and Social Committee').

<sup>38</sup> *Ships of Shame*, above n 2, 89-90.

<sup>39</sup> *Ibid* 33.

## **B Maintenance**

An additional problem which the report described as 'deplorable and dangerous'<sup>40</sup> is the poor maintenance of safety equipment. As an example, the report refers to port state control inspections by the Australian Maritime Safety Authority in 1991 where 841 cases of missing or defective ship safety equipment was detected with deficiencies in life saving equipment amounting to 29% of the total deficiencies found.<sup>41</sup>

## **C Lack of Control**

The lack of an international body of law to regulate these ships means that control over them is a hit and miss affair. In some ports action is regularly taken against them, in other ports supervision is not exercised. Some ports are even unable to use typical legal remedies, an example being seizure of the vessel, unless the ship owner has defaulted in the payment of wages. Because flag of convenience states are often unwilling or unable to exercise effective control, many of the vessels registered by them are old and sub-standard. This increases the chance of disasters.<sup>42</sup>

## **D Other Issues**

The *Ships of Shame* report also touched on the issues of the rising age of the world fleet, the non-adherence by some loading facilities to loading plans, resulting in loading stresses outside design limits, the use of high tensile steel in the construction of bulk carriers resulting in earlier problems of corrosion than with mild steel, and marine pollution. All of these are heightened in ships flying flags of convenience.

One might expect regulation of this industry to be no more difficult than in many other areas. To date, however, proper regulation has proven elusive. The next section looks at what has been done in this area.

# **V INTERNATIONAL AND DOMESTIC LAWS GOVERNING SHIPPING**

## **A Conventions and Treaties**

A number of international conventions and treaties have been enacted that cover a wide variety of areas involving shipping. The relevant ones are set out below.

- **International Maritime Organisation:** International standards of ship safety are defined through articles and regulations in conventions established by agreement of member states at international conferences convened by the IMO.<sup>43</sup> Numerous codes

<sup>40</sup> Ibid 37.

<sup>41</sup> Ibid.

<sup>42</sup> Ademuni Odeke, 'Port State Control and UK Law' (1997) *Journal of Maritime Law & Commerce* 657.

<sup>43</sup> The principle Conventions of IMO concerning ship safety and pollution are: (1) The International Convention for the Safety of Life at Sea 1974 and the Protocols of 1978 and 1988; (2) The International Convention on Load Lines 1966 and the Protocol of 1988; (3) The International Convention on the International Regula-

of practice have likewise been adopted.<sup>44</sup> The IMO's safety conventions have been adopted by approximately 130 countries covering some 95% of the world fleet.<sup>45</sup>

- **International Labour Organisation:** The ILO is an agency of the United Nations and deals with the employment conditions of seafarers including health and safety on board ships. ILO Convention 147 (Merchant Shipping (Minimum Standards) Convention 1976<sup>46</sup> is the main convention dealing with seafarers and covers such issues as safety standards, social security measures, shipboard conditions of employment and living conditions.<sup>47</sup> The ILO Convention has only been accepted by 38 countries representing only 45% of the world fleet.
- **International Convention for the Prevention of Pollution from Ships:** The impact of the International Convention for the Prevention of Pollution from Ships (MARPOL 73/78) has been substantial in reducing global oil pollution of the marine environment caused by ships. The biggest factor has been the ship construction requirements of MARPOL 73/78 which has reduced the number of spills from tankers down to about one third of the level seen during the 1970s.<sup>48</sup>
- **Other Conventions:** With the introduction of the 1982 Paris Memorandum of Understanding on Port State Control in Implementing Agreements on Maritime Safety and the Protection of the Marine Environment (MOU), there has come to be a shift in emphasis from flag state control to port state control.<sup>49</sup> In addition, there are numerous international maritime conventions on safety and pollution controls<sup>50</sup> which have been ratified by the majority of flag states.

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tions for Preventing Collisions at Sea 1972; (4) The International Convention on Training, Certification and Watchkeeping for Seafarers 1978; and (5) The International Convention for the Prevention of Pollution from Ships 1973 and the Protocol of 1978.

<sup>44</sup> John Chapman, *Ships of Shame: An appraisal and comment* (1993).

<sup>45</sup> *Ibid.*

<sup>46</sup> Adopted 29 October 1976, C147.

<sup>47</sup> Chapman, above n 44.

<sup>48</sup> Australian Maritime Safety Authority, *Protection of the Sea: Conventions and Legislation in Australia* (1996) ('*Protection of the Sea*').

<sup>49</sup> Odeke, above n 42.

<sup>50</sup> A brief listing includes: 1) the 1966 International Convention on Load Lines and its 1988 protocol; 2) the 1974 International convention for the Safety of Life at Sea and its 1978 and 1988 protocols; 3) the 1973 International Convention for the Prevention of Pollution from Ships and its 1978 protocol; 4) the 1978 International Convention on Standards of Training, Certification and Watchkeeping for Seafarers; 5) the 1972 Convention of the International Regulations for Preventing Collisions at Sea; 6) the 1969 International Convention on Tonnage Measurement of Ships; 7) the 1976 Merchant Shipping (Minimum Standards) Convention (ILO Convention No. 147); 8) the 1969 International Convention on Civil Liability for Oil Pollution Damage and its 1976 and 1984 protocols; 9) the 1969 International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties and its 1973 protocol; 10) the 1989 International Convention on Salvage; 11) the 1971 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage and its 1976, 1984, and 1992 protocols; 12) the 1976 Convention on Limitation of Liability for Maritime Claims; 13) the 1986 United Nations Convention on the Conditions for the Registration of Ships; 14) the 1972 Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matters; 15) the 1995 International Convention on Standards of Training, Certification and Watchkeeping for Fishing Vessels Personnel; and 16) UNCLOS.

## B Australian Legislation

In Australia, the Commonwealth Government's jurisdiction over ships extends to trading ships on interstate voyages and all other ships, other than pleasure craft, on international voyages. The Commonwealth's responsibilities are primarily contained in the *Navigation Act 1912* but are also contained in various Acts relating to marine pollution. These Acts bring into force the different IMO conventions which have been ratified by Australia.

Australia has been a member of the IMO since its inception and has been active in developing, and is a party to, many IMO conventions.<sup>51</sup> The Australian Maritime Safety Authority (AMSA) is responsible for ensuring that Australia's obligations under the IMO conventions are fulfilled.<sup>52</sup>

### 1 Navigation Act and the AMSA

The *Navigation Act 1912* provides for extensive safety requirements, ranging from the general prerequisite in section 189 that all ships are liable to inspection and survey, through detailed provisions specifying certificates needed by various kinds of ships<sup>53</sup> and the specific items of safety equipment required by ships, to the offence under s 208(1) of sending a ship to sea in an unseaworthy state, endangering the life of any person. Section 210(1) of the Act gives the AMSA power to detain a ship which is 'unseaworthy or substandard' whether the ship is Australian or foreign. Section 207(1) provides that 'a ship is not to be deemed seaworthy unless it is in a fit state as to condition of hull and equipment, boilers and machinery, stowage of ballast or cargo, number and qualifications of crew including officers and "in every other respect" to encounter the ordinary perils of the voyage then entered upon and is not overloaded.'<sup>54</sup>

Sections 210(2) to (7) set out the procedures for detaining a ship. Section 211(1) provides that 'if it appears that there is "no reasonable and probable cause" for the provisional detention of a ship, the owner may recover the costs of and incidental to the detention and may also recover compensation for "any loss or damage" sustained by reason of the detention.'<sup>55</sup> The AMSA must ensure that there is reasonable and probable cause to detain a vessel and once this has been established, pursuant to s 211(2), the ship owner is liable to pay the costs of the detention if the ship is finally detained or is provisionally detained and was unseaworthy at the time of detention.<sup>56</sup>

The Act also gives effect to the International Convention for the Safety of Life at Sea 1974 (SOLAS). This convention covers such matters as surveys and certificates, construction and stability, machinery and electrical installations, fire protection, detection

<sup>51</sup> *Protection of the Sea*, above n 48, 2.

<sup>52</sup> Chapman, above n 44.

<sup>53</sup> *Navigation Act 1912* (Cth) Part IV, Divisions 2, 2A, 5.

<sup>54</sup> Damien Cremean, 'Dangerous Ships and the Law' (1991) 26(9) *Australian Law News* 28, 28.

<sup>55</sup> *Ibid* 29.

<sup>56</sup> *Ibid*.

and extinction, life saving appliances, radiotelegraphy and radiotelephony, carriage of dangerous goods, grain and nuclear ships.<sup>57</sup>

The AMSA performs a number of other roles. AMSA surveyors conduct port state control inspections of foreign flag ships visiting Australian ports as well as Australian flag vessels engaged in interstate and overseas voyages. These inspections and surveys are undertaken to ensure that all ships comply with the relevant provisions of the IMO conventions, including MARPOL 73/78, and with the provisions of the *Navigation Act*.<sup>58</sup> AMSA also has the general power to combat marine pollution throughout Australia's territorial sea 'by virtue of Australia's sovereignty over the territorial sea under international law.'<sup>59</sup> It has been suggested<sup>60</sup> that this general power may be exercised throughout Australia's Exclusive Economic Zone ('EEZ') by virtue of Australia's sovereign rights to protect and preserve the marine environment in the EEZ under the United Nations Convention on the Law of the Sea 1982. The EEZ extends up to 200 nautical miles from the baselines of the territorial sea.<sup>61</sup>

## 2 Classification Societies

The survey of loadline, hull and machinery of Australian ships is delegated between six Classification Societies. The accountability of the Societies and their obligations and responsibilities is set out in a memorandum of understanding.<sup>62</sup> Classification Societies are discussed in greater depth in part VII of this paper.

## 3 Admiralty Act 1988

The *Admiralty Act 1988* (Cth) also provides certain causes of action in respect of sub-standard ships. The Act is one of Australia's best weapons against the ships of shame as its application extends to each external Territory.<sup>63</sup> It applies to all ships irrespective of the place of residence or domicile of their owners and to all maritime claims, general and proprietary, wherever arising.<sup>64</sup> The Act does not apply in respect of an inland waterways vessel or to the use or intended use of a ship on inland waters.<sup>65</sup>

All proceedings in respect of proprietary maritime claims and some proceedings in respect of general maritime claims under the Act may be commenced in rem which provides the unique benefit that the res, which is the named defendant in the action, may be arrested.<sup>66</sup> Pursuant to s 22(4) of the Act, however, a foreign ship exercising a right of

<sup>57</sup> M W D White (ed), *Australian Maritime Law* (1991) 187.

<sup>58</sup> *Protection of the Sea*, above n 48, 21.

<sup>59</sup> Martin Davies and Anthony Dickey, *Shipping Law* (1995) 576.

<sup>60</sup> *Ibid.*

<sup>61</sup> United Nations Convention on the Law of the Sea 1982, art 57.

<sup>62</sup> Chapman, above n 44.

<sup>63</sup> *Admiralty Act 1988* (Cth) s 7 ('*Admiralty Act*'). An example of the extent of the Act is s 4(3)(c) which provides for claims for loss of life and personal injury including seafarers employed on unseaworthy ships.

<sup>64</sup> *Admiralty Act*, s 5(1).

<sup>65</sup> *Admiralty Act*, s 5(3)(a),(b).

<sup>66</sup> Damien Cremean, *Admiralty Jurisdiction Law and Practice in Australia* (1997) 13.

innocent passage is not liable to arrest. The term 'innocent passage' describes both the nature and the limitation of the right:

It is, in the first instance, a right of passage or right to use the waters as a highway between two points outside them. Second, the passage of the vessel in question must be innocent. That is ... the vessel must respect the coastal state regulations regarding, [inter alia], navigation, pilotage and safety.<sup>67</sup>

Once a ship is arrested it cannot be moved at all unless allowed by a court which generally ensures the appearance of the owner in any court proceedings.<sup>68</sup>

The Act, however, does have its drawbacks. The power of arrest is diluted by s 34 which provides that a person may be liable in damages to a party who has suffered loss or damage as a direct result of an unjustified arrest. Although the Court of Admiralty always had the power to award damages where there was bad faith or gross negligence in the arrest of a vessel,<sup>69</sup> s 34 applies where a party has acted 'unreasonably and without good cause' which may occur without bad faith or gross negligence. Wrongful arrest is a matter to be adjudged by degree and whilst the act of wrongfully restraining a vessel should not be sanctioned, Butler and Duncan<sup>70</sup> suggest that compensation for wrongful arrest may now lie in cases of mere error in judgment.

To serve a writ in an action in rem, the vessel must be within the jurisdiction. As Menzies, Gibbs and Mason JJ stated in *Aichhorn & Co KG v The Ship Talbot*:<sup>71</sup>

Since the jurisdiction of the court to entertain an action in rem is based on the presence of the res within the territory of the state under whose authority the court sits, and since the purpose of such an action is to enable the judgment to be satisfied out of the res, it must follow, at least as a general rule, that a writ in an action in rem can only be served if the res is within the jurisdiction.

The obstacle presented by this principle was demonstrated in the *The Ship Talbot* case itself. The ship had not, since the writ was issued, been within the territorial waters of the Commonwealth and the appellants purported to effect service upon her whilst she was berthed at Singapore. Service was ineffective even though the action was brought to recover damages in respect of a breach of contract made within the Commonwealth.

## VII INTERNATIONAL ATTEMPTS TO IMPROVE THE SHIPS OF SHAME

Problems with 'flags of convenience' ships have been acknowledged by international maritime bodies since the ships became common after World War I. The success of these international bodies in addressing the problems has varied.

<sup>67</sup> G P Smith, *Restricting the Concept of Free Seas* (1980), 38.

<sup>68</sup> Davies and Dickey, above n 59, 125-6.

<sup>69</sup> D A Butler and W D Duncan, *Maritime Law in Australia* (1992), 70.

<sup>70</sup> *Ibid.*

<sup>71</sup> (1974) 132 CLR 449, 455.

## **A      *Economic and Social Committee of the EC***

In 1979 the Economic and Social Committee of the European Community released its Own-Initiative Opinion.<sup>72</sup> The Committee established proposed measures on problems facing shipping policy, particularly maritime safety, the growing importance of the new shipping nations, the development of flags of convenience and discrimination against certain flags. The opinion called for the European Community to ensure the maximum degree of safety for humans, the environment and equipment, and to ward off the threat to the European Community shipowners' survival, posed by distortions of competition related to flags of convenience.<sup>73</sup> The Committee set out comprehensive proposals for both short and medium term action at international and state levels.

## **B      *1981 UN Conference on Trade and Development***

In 1981 the United Nations Conference on Trade and Development (UNCTAD) met in Geneva to approve recommendations from its secretariat that flags of convenience ships should be phased out. Its conclusion was that genuine links and control between a ship and the country whose flag it flies must be evident.

This idea was not new. In 1981 Michael Baily wrote that '[a]fter a 30 year run in which many pockets have been filled and headlines written ... the "flag of convenience" or "open registry" may be about to meet its doom.'<sup>74</sup> Both the UN and Baily turned out to be far too optimistic.

The idea behind the 'genuine link' is that the main corporate entity involved must register its ship in its own location, so as to manage and pay taxes and conform with local safety regulations and labour agreements. If the genuine link test is applied to flags of convenience ships, most of the current objections over them would be removed, because most would have insufficient connection to be able to register in the country of convenience.<sup>75</sup> On the other hand, the difficulty with this principle is the differing and often elastic interpretations of the meaning of 'genuine link'.

## **C      *Intergovernmental Maritime Consultative Organisation***

The United Nations organisation in London, the Intergovernmental Maritime Consultative Organisation (IMCO) is approaching the task of improving the safety of ships from another angle. IMCO is raising the standard of safety by tougher international regulations for ships, crews and operators irrespective of their flag, and enforcing these regulations by surveillance of port states which these ships visit as well as by keeping tabs on flag states whose enforcement powers may be defective. IMCO also offers technical

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<sup>72</sup> Economic and Social Committee, above n 37.

<sup>73</sup> Ibid.

<sup>74</sup> Michael Bailey, 'An attempt to scuttle the Flags of Convenience fleet' (1981) Times 16.

<sup>75</sup> Ibid.

support to countries such as Cyprus which aspire to build up registries but lack the necessary experience and organisation.<sup>76</sup>

Port state control can be difficult because the limited time spent by a ship in port generally restricts inspections to equipment and structure that is accessible such as safety equipment and load line closing appliances.<sup>77</sup> Inspection of ballast tanks – crucial for proper enforcement of certain safety requirements – is usually not possible because they are used during cargo operations. The cost and time associated with the rigging of necessary scaffolding to inspect ballast tanks restricts the inspections to only a quick, cursory check. One way to aid compliance in this critical area, however, would be to force mandatory inspection of ballast tanks every three to five years.

## **D**      ***Classification Societies***

Classification Societies are another form of watchdog over ship safety. Originating as far back as 1760, these societies were formed to survey and report on the condition of ships' hulls to insurance underwriters. This role has changed: today they publish and implement rules for the design, construction, testing and survey of ships to internationally accepted standards. Ships meeting these standards are designated by various classes and inspections and surveys are carried out at regular intervals to ensure that class standards are maintained.<sup>78</sup>

Unfortunately, there are several problems with the classification system. Firstly it is voluntary. Although it is a necessity if the ship owner wishes to insure a vessel at a reasonable premium, it may be more economical for an owner to pay the higher insurance premiums associated with being unclassified and save by incurring lower maintenance costs. It ends up becoming simply a financial cost-benefit analysis. Secondly, the quality of the Classification Societies' inspections is declining as the intensity of competition for clients increases.<sup>79</sup> As it is the ship owners who pay the fees of the Societies, the Societies are dependent on their business.

## **E**      ***European Community***

Between 1993 and 1995 the European Community developed policies relating to the improvement of maritime safety and the protection of the marine environment within its own waters and ports. It began this improvement program because it was considered that safety, pollution prevention, and shipboard living and working conditions could only be effectively enhanced through the drastic reduction of the number of substandard ships in its waters and ports.<sup>80</sup>

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<sup>76</sup> Ibid.

<sup>77</sup> See Chapman, above n 44.

<sup>78</sup> Ibid.

<sup>79</sup> *Ships of Shame*, above n 2, 53.

<sup>80</sup> Odeke, above n 42.

The adopted policies included minimum requirements for vessels bound for and leaving European Community ports and carrying dangerous or polluting goods<sup>81</sup> and the enforcement of international standards relating to vessel safety, pollution prevention, and living and working conditions.<sup>82</sup>

## F *International Transport Workers' Federation*

For the past fifty years the International Transport Workers' Federation (ITF) has been trying to stem the flow of ship owners who register their vessels under a flag of convenience. Through 446 affiliated national unions in 120 countries, the ITF has almost five million members.<sup>83</sup>

The ITF is a powerful body. Approximately one hundred ITF inspectors are employed world wide to hand out 'blue tickets' which are akin to a union seal of approval. Hostile shipowners without these tickets risk strikes, boycotts and the loss of perishable cargo. Friendly shipowners, on the other hand, are guaranteed safe passage – albeit at a cost of a donation to the Federation's welfare fund of about \$5,000.00 per vessel or \$250.00 per seaman.<sup>84</sup> Before blue tickets are handed out, inspectors also insist that crew receive at a minimum the seafarers wages of \$856.00 per month rather than the minimum deckhand's wages of only \$385.00 per month that are recommended by the ILO.<sup>85</sup> An example of the power of the ITF was demonstrated when the shipping company, Adriatic Tankers, was slow in paying its crews' wages. The ITF led the creditors which seized the Greek firm's vessels and brought the company down.

## G *Luxembourg*

In 1991 the Prince Henry became the first ship to be registered under Luxembourg's new maritime flag. Luxembourg, which is two hundred and fifty kilometres from the nearest coast, has gone into the ship registration business in order to reduce the number of European ships registered under flags of convenience from countries such as Panama and Liberia.<sup>86</sup>

Luxembourg has taken up the challenge to combine its tax breaks with tougher labour rules than other flag havens. For a vessel to fly a Luxembourg flag, minimum wages must be paid to seafarers from the European Community and from certain other countries.<sup>87</sup> Luxembourg hopes that the tax incentives will bring some ship registrations back to Europe at the same time making money from its ship registrations and diversifying its economy. Ship owners registering vessels in Luxembourg must open offices there which, it is hoped, will also bring insurers, banks and law firms.<sup>88</sup>

<sup>81</sup> Council Directive 93/75/EEC of 13 September 1993, 1993 O.J. (L 247) 19.

<sup>82</sup> Council Directive 95/21/EEC of 19 June 1995, 1995 O.J. (L 157) 1.

<sup>83</sup> 'Follow the flag of convenience', above n 10.

<sup>84</sup> *Ibid.*

<sup>85</sup> *Ibid.* 86.

<sup>86</sup> Editorial, 'The old red, white and blue' (Jan 12, 1991) 318 *The Economist* 60, 60.

<sup>87</sup> *Ibid.*

<sup>88</sup> *Ibid.*

## H United States

On some indicators, the US is a world leader in maritime reform aimed at combating problems associated with flags of convenience. In 1992 a bill was tabled to bring the so-called 'voyages to nowhere' under the merchant marine laws; thus requiring American flagged ships and American crews. The bill was intended to combat foreign flagged vessels that return to the same port without having passengers disembark in a foreign country, as these were able to neglect American labour, safety and hiring laws. Under the bill any ships departing American ports to engage in such voyages would have to be built, owned and operated in the US.<sup>89</sup> Although this bill is arguably aimed at boosting American maritime competitiveness as much as attempting to combat the problems associated with flag of convenience vessels, it is bound to have some effect on the growth of flags of convenience ships.

In 1993 another bill was approved, with a view to prevent American shipowners from changing their registrations to other countries, to extend American maritime industry tax benefits so that they are comparable with those of foreign governments.<sup>90</sup> And in April 1994 the House Education and Labour Committee approved a bill to extend some American labour and wage laws to commercially operated foreign flag vessels that regularly navigate American waters. The bill requires any ship regularly engaged in business at American ports or which makes or processes goods on board for sale in America, to pay its crew the minimum recognised wages and overtime. Crew members also have a right to bargain collectively.<sup>91</sup>

## VIII REMEDIES TO THE 'SHIPS OF SHAME' PROBLEM

According to the *Ships of Shame* inquiry,<sup>92</sup> safety in shipping operations can be more effectively achieved at the international level than by individual countries acting unilaterally because of the international nature of the industry. But if individual countries, like Australia, do not take their own stand on this issue, it could be decades before an acceptable level of safety in shipping is achieved. After all, the problem is now decades old and still no closer to a satisfactory resolution.

Financial difficulties will always be at the forefront of any solution to eliminate ships of shame, or to ensure that the destruction they cause to the environment is minimised. Any solution is going to cost someone who cannot or does not want to afford it. Inflatable booms are a perfect example: when an oil slick is discharged into the sea it takes only twelve hours to lose control of it. After that, the ensuing environmental damage is catastrophic – wildlife coated with oil, tonnes of floating fish, and slimy sludge spreading in all directions. Inflatable booms are an invention that have proven extremely effective for

<sup>89</sup> 'Three measures aim to boost maritime competitiveness' (1992) 50 *Congressional Quarterly Weekly Report* 1948, 1948.

<sup>90</sup> 'Bill gives tax break to US shipping' (1993) 51 *Congressional Quarterly Weekly Report* 1360, 1360.

<sup>91</sup> 'Bill on foreign flag ships gets panel approval' (1994) 52 *Congressional Quarterly Weekly Report* 885, 885.

<sup>92</sup> *Ships of Shame*, above n 2, 10.

use in cases where the oil has not yet dispersed and can be contained, by acting on the principle that oil will float on the water. So why are these relatively simple items not mandatory on all oil tankers? The answer is that the cost of installing automatic inflatable booms would be enormous.

Countries can take action both unilaterally and in concert with other countries, or through other international bodies. I examine these two forms before examining what action Australia could take in this regard.

## A Unilateral Action

First, on a basic level, countries need to implement measures for the protection of their own territories. This will involve a more rigorous port state control regime than is currently undertaken by many states. The enforcement authority of coastal states with respect to vessels in port has long been recognised as one of the keys to the development of an effective international regime of ship safety. Investigation, detention, and similar acts of enforcement are more readily accomplished and less obstructive to the trade process when a vessel is lying at anchor in port than when a vessel is at sea.<sup>93</sup>

Second, customary international law does not recognise the existence of a right of access to a port for a foreign vessel.<sup>94</sup> The International Court of Justice in a case concerning military and paramilitary activities in and against Nicaragua<sup>95</sup> noted that it is 'by virtue of its sovereignty that the coastal State may regulate access to its ports.' Although the contrary position has been taken by the arbitrator in *Saudi Arabia v Aramco*<sup>96</sup> – who held that the ports of every State must be open to foreign merchant vessels unless vital interests of the State require otherwise – McDorman<sup>97</sup> points out that the accuracy of this comment has been rejected by virtually all authorities.<sup>98</sup>

McDorman also suggests, however, that the rights of access to a port and the right to non-discriminatory treatment for foreign merchant vessels may exist under the 1923 Convention and Statute on the International Regime of Maritime Ports.<sup>99</sup> He also suggests that although the General Agreement on Tariffs and Trade (GATT) is silent on the issue of vessel access to ports, the denial of a right of access may amount to a trade barrier inconsistent with GATT.

If it is the case that the states may regulate access to their ports, governments could restrict access to those ships which are of an acceptable standard only, and not allow ships of shame to have port access. Of course there would be many issues which would need to be resolved for this to take effect: determining objective tests of what is a sub-standard ship being one of the most complex.

<sup>93</sup> T McDorman, 'Port State Enforcement: A Comment on Article 218 of the 1982 Law of the Sea Convention' (1997) 28 *Journal of Maritime Law & Commerce* 305.

<sup>94</sup> *Ibid.*

<sup>95</sup> *Nicaragua v United States* (1986) ICJ 14, 111.

<sup>96</sup> (1963) 27 ILR 117, 212.

<sup>97</sup> McDorman, above n 93.

<sup>98</sup> See, eg. D O'Connell, *The International Law of the Sea* (1984) vol 2, 848.

<sup>99</sup> McDorman, above n 93. Note that Canada and the US are not signatories to this Convention.

Finally, there is the ability of the Classification Societies to control their members. Since shipowners pay the fees of the Society, there will always exist the problem of conflict of interest and corruption. If the Classification Societies were either state run or state funded, on the other hand, this might eliminate these problems. Making the Societies more independent would allow them to more accurately classify vessels which in turn would give states an accurate basis on which to allow or disallow ships access to their ports.

## B Collective Action

The second avenue open to countries or corporations to help eliminate the ships of shame problem is that a country can influence or help to instigate measures in concert with other countries or within the framework of international organisations, conventions and treaties. For example, an initiative which is to be applauded comes from the major oil companies, the main charterers of tanker tonnage, who have introduced ship inspection and vetting guidelines. These guidelines ensure that vessels used by the oil companies or those using their facilities meet acceptable standards of construction, operation and maintenance.<sup>100</sup>

Insurance providers may be another avenue where pressure can be brought to bear. Chapman, in his appraisal of the *Ships of Shame* Report, acknowledges the theory that insurance providers can apply prohibitive premiums to weed out unsafe ships, although at the same time noting that in the cutthroat world of international shipping, the temptation to chase premiums is often too great.<sup>101</sup> The *Ships of Shame* Committee did, however, note that marine insurers are responding to the risks associated with substandard shipping and premium rates are rising.<sup>102</sup>

## C Action by Australia

In taking a more pro-active role to combat some of the problems caused by the ships of shame, the Australian legislature could extend the operation of the *Admiralty Act 1988* on several levels. Australian legislation commonly allows a person or body the implied power to detain a ship for non-payment of certain fees and charges.<sup>103</sup> This power of detention is often accompanied by the power of sale; it is most often found in legislation dealing with securing payment of harbour dues.<sup>104</sup> The power to detain a ship could be expanded under the Act. Detention of a vessel may be appropriate in general maritime claims where no proceeding can be commenced as an action in rem and an arrest warrant under the *Admiralty Act 1988* cannot be issued<sup>105</sup> or where an arrest warrant is not available, for example, where a caveat against arrest is in force.<sup>106</sup> An order for

<sup>100</sup> *Ships of Shame*, above n 2, 25.

<sup>101</sup> Chapman, above n 44.

<sup>102</sup> *Ships of Shame*, above n 2, 92.

<sup>103</sup> Davies and Dickey, above n 59, 98-9.

<sup>104</sup> See, for example, *Quarantine Act 1908* (Cth), *Lighthouses Act 1911* (Cth), *Environmental Protection (Sea Dumpage) Act 1981* (Cth).

<sup>105</sup> *Admiralty Rules 1988* (Cth) r 43(3).

<sup>106</sup> *Ibid* r 43(7).

detention of a vessel may be obtained by an application to a court; in contrast, the procedure for application of an arrest warrant must follow commencement of an action in rem.<sup>107</sup>

Section 22 of the *Admiralty Act 1988* provides for service of an action in rem or arrest of a ship in any place within Australia, 'including a place within the limits of the territorial sea of Australia.' Although not defined in the Act, the 'territorial sea' as defined in the *Seas and Submerged Lands Act 1973* (Cth) extends 12 nautical miles from the baselines. The *Seas and Submerged Lands Act 1973* also provides for a 'contiguous zone', which does not extend beyond 24 nautical miles from the baselines of the territorial seas, and an 'exclusive economic zone', which does not extend beyond 200 nautical miles from the baselines of the territorial seas.<sup>108</sup> With the jurisdiction of the *Admiralty Act 1988* currently confined to 12 nautical miles, an extension into the contiguous zone or preferably into the exclusive economic zone would provide jurisdiction over a much wider area which in turn would give Australia control over a far greater number of vessels than is presently the case. This extended control might then contribute to solving some of the ships of shame problem, but may create new problems as the increased area to cover would require enormous human resources and funds far in excess of those expended today.

## IX CONCLUSION

As concluded in the *Ships of Shame* Progress Report, eradication of substandard shipping requires a range of measures aimed at the main participants in international shipping, namely ship owners and managers, classification societies, flag states, charterers and cargo owners. The Report has been partially successful in raising the profile of ship safety both in Australia and overseas, receiving wide support from governments and world shipping organisations.<sup>109</sup> As an example, the recent revision of the Standards of Training Certification and Watchkeeping Convention will require accreditation of training systems by the IMO in order for seafarers qualifications to be recognised.<sup>110</sup>

More important for Australians, in 1995 the Australian Minister for Transport, Laurie Brereton, announced a series of new environmental safety measures to protect the Great Barrier Reef and the Torres Strait.<sup>111</sup> The initiatives included the implementation of a ship reporting system through the inner route of the Reef and Torres Strait, the introduction of additional ship routing measures where appropriate and the survey and charting of the outer route through the Coral Sea. These will aid in controlling some abuses of ships of shame by ensuring proper navigation systems are maintained on board.

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<sup>107</sup> *Ibid* r 39.

<sup>108</sup> Cremean, *Admiralty Jurisdiction Law and Practice in Australia*, above n 66, 108.

<sup>109</sup> *Progress Report*, above n 30, 1.

<sup>110</sup> *Ibid*.

<sup>111</sup> Australian Maritime Safety Authority, 'New navigational and environmental safety measures' (1993) 4 *Safety Aboard* 1.

But the flag of convenience states remain a problem area in international maritime law. Although some measures have been taken to improve safety and environmental concerns, much more remains to be done. Substandard vessels, unskilled seamen and avaricious ship owners of the world must not have loopholes in the law through which they can operate.

