Regulation of Shipping: The Vital Role of Port State Control

Captain Ambrose Rajadurai *

Special Counsel, Norton White Lawyers & Notaries

1 INTRODUCTION

Fishing and navigation remain the oldest uses of the sea and merchant shipping remains the most important means of international transport of goods, accounting for more than 95% of world trade by weight.[1]

In the case of Australia, an island continent, marine transport accounts for nearly three-quarters of the value of all international trade and plays a primary role in domestic trade, particularly in the transportation of bulk commodities. In 2002, the total value of seaborne imports and exports into and out of Australia exceeded $155 billion and there were more than 22,000 ship visits to Australian ports in the year.[2] These accounted for more than 150,000 passenger movements, throughput of about 485 million tonnes of bulk cargo and in excess of 3 million container shipments.

However, as in the case of other industrial activity, there are risks associated with shipping. Recent events, both abroad and at home have increased awareness about these threats although in the main focus has been upon **security** (in particular the threat of terrorist activity) and may have tended to mask the fact that the risks to human life, the environment and property posed by **unsafe** shipping are a far more immediate and damaging threat. The intention here is not to discount the importance of countering threats posed by those seeking to exploit international shipping to violate national security, but rather to highlight that both safety and security have to be concurrently managed and that the skills and resources to do each, are in many instances quite different.

Potential consequences of unsafe shipping activity include:

(a) fire on board a ship carrying toxic or highly flammable cargoes, in proximity to population centres or important shore facilities

---

* Ambrose Rajadurai has played an active part in ship vetting during a diverse marine based career over the last 30 years. He was part of the task force which developed the Oil Companies International Marine Forum, Ship Inspection Report Exchange (SIRE Scheme), has been an active participant in Intertanko's Technical Committee and, earlier last decade, participated in training of Port State Inspectors from various Asia Pacific nations at Nagasaki, Japan. After a seagoing career, he initially came ashore as a Harbour Pilot, before moving on to various operational and commercial management positions within Shell and BHP and later as Chief Operating Officer of Global Carriers Berhad. He subsequently studied law full time at Monash University, graduated with Honours, served articles and was admitted to practice. He is a Master Mariner, Fellow of the Institute of Chartered Shipbrokers, has an MBA from the University of Melbourne and an LLM (Maritime Law) from the University of Queensland.

[1] R.R.Churchill, A.V. Lowe, *The Law of the Sea,* Manchester University Press, 3rd Edition, Manchester, 1999 at p.255

[2] See <www.shippingaustralia.com>; < www.aapma.org.au>.

(b) marine casualty resulting in the blockage of a major port
(c) pollution of the marine environment as a consequence of accidental or deliberate discharge of cargo or ballast overboard[3]
(d) physical damage to facilities, the marine environment[4] or other vessels as a consequence of collision[5]
(e) deliberate or inadvertent breach of immigration and quarantine regulations designed to protect national interests

Until recently, whenever shipping accidents occurred, the community perception was that the field of victims encompassed only those directly connected with the maritime adventure, namely the shipowners, passengers, cargo interests and perhaps crew. The success or failure of maritime adventures were viewed primarily as consequences with commercial implications for those party to them and arguably supported the view that the sole obligation to regulate shipping rested with the flag state. This was perhaps because in recent history, the major imperial powers[6] were also the dominant maritime nations. Thus the majority of shipping was controlled by relatively few nations, with well developed systems and infrastructure to regulate their merchant fleets.. Today, the world merchant fleet is registered under many different "flags", including many nations who do not have the resources to adequately regulate the management of their national fleet. Yet, the primary legal obligation to regulate and ensure the safe operation of ships remains that of the Flag State and there is increasing acknowledgement that in a significant number of instances adequate regulation is not achieved.

This latter view coupled with the realisation that the likely damage contingent upon a maritime casualty will affect a much wider constituency[7] than described above has obliged responsible authorities to reconsider the issue of effective regulation of international shipping. Political and statutory imperatives oblige national and regional authorities to protect their constituents from harm and it is clear that mere reliance on Flag State authorities "doing the right thing" will not be considered sufficient by the public in the event of a major maritime casualty visiting damage on the environment and to local interests.

Towards this end, the port state control (PSC) regime has emerged as an important and effective instrument. This paper will discuss its operation and significance in general with particular reference to application in Australia. Notwithstanding the importance of **security** this paper will focus on the regulation of **safety**, although the introduction of the International Ship and Port Security Code ("ISPS Code")[8] will mean

[3] Or as in the case of the *Prestige* which broke up and sank off the Spanish coast in December 2002, cargo leaking from the sunken wreck – see:
http://europa.eu.int/comm/transport/themes/maritime/prestige/com2002-681-final_en.pdf.
[4] For example contact with delicate coral reef, such as occurred when the container ship *Bunga Teratai Satu* ran aground on Sudbury Reef off the Queensland coast in November 2001 <www.gbrmpa.gov.au/corpsite/management/eim/sudbury>.
[5] The collision between the crude oil tanker *Nagasaki Spirit* and the container ship *Oriental Blessing* in the Malacca Straits on 19th September 1992 resulting in the death of all but 2 crew members of both ships, total loss of both vessels and spill of more than 12 million litres of crude oil into the sea.
[6] Mainly Great Britain, Holland and to a lesser extent the other West European nations with colonies.
[7] Including the environment and nearby coastal communities.
[8] A new IMO Code introduced to combat terrorism. The Code will come into effect on 1 July 2004 and requires comprehensive security systems and procedures on board ships and in ports. Hereafter referred to as ISPS Code. The *Maritime Transport Security Act 2003* (Cth) passed in December 2003 implements the security requirements of SOLAS Chapter XI-2 and the ISPS Code in Australia.

that in monitoring compliance with the international requirements PSC will to an extent also contribute towards security management.

The paper will first briefly describe the broader framework of international maritime law and the other regulatory regimes relevant to shipping in order to provide a basis for discussing PSC in context. This will be followed by an overview of the PSC system, a description of its application in Australian jurisdiction and discussion of the commercial implications of PSC enforcement. The conclusion will suggest that PSC is a vital instrument towards protecting national assets, vested commercial interests, fulfilling international obligations and that the administration of the Australian program by the Australian Maritime Safety Authority (AMSA) has met these objectives.

2 REGULATION OF INTERNATIONAL SHIPPING

The sinking of the *Titanic* in 1912 is credited with initiating inter-governmental cooperation to agree uniform laws to manage the safe operation of international shipping,[9] and today the majority of laws regulating the construction, maintenance and operation of ships are based on instruments generated under the auspices of the International Maritime Organisation (IMO).

These instruments seek to manage safety by addressing two broad areas:

1. The design, construction and maintenance of the structure, fabric and essential equipment of the ship; and
2. The manner in which the ships are operated including navigational rules, the training and certification of crews and criteria for safe handling of cargo.

The intent is that, owners and managers of ships ensure that they are designed, built, maintained and operated in accordance with the provisions of international instruments including conventions and associated rules and regulations.[10]

2.1 FLAG STATE ENFORCEMENT

However, these internationally agreed instruments[11] only have effect at the inter-governmental level and can not be enforced as such at the individual ship level. While in some nations, ratification automatically gives the instrument effect in domestic law, in many countries including Australia, to have practical effect, it will be necessary for ratifying governments to both incorporate the provisions into national legislation and enforce the resulting legislation within their respective jurisdictions. Under international maritime law, the authority with the greatest degree of legal control over an individual ship is the flag state administration and in an "ideal world" flag states will ensure that ships registered within their jurisdiction are adequately managed and operated.[12]

---

[9] E Jansen, Governments' Responsibilities To Ensure That Ships Meet International Convention Standards in D Sanders (Ed.) *The Management of Safety in Shipping,* The Nautical Institute, London, 1991.

[10] In certain instances, the international instruments do not detail the actual requirements and instead refer to for example, criteria stipulated by classification societies, particularly in respect of technical issues.

[11] Conventions, protocols, codes and resolutions agreed under the auspices of the IMO, ILO or other similar multilateral or bilateral inter-governmental "gatherings".

[12] UNCLOS acknowledges this expressly in Article 94, Subsection 1 of which reads:

> *Every State shall effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag.*

It goes on to express in detail a range of measures that the state must take to ensure safety at sea, including ensuring that ships are properly constructed, equipped, maintained and crewed, which essentially require compliance with the subject matter of the aforementioned international instruments.

Australia takes its flag responsibilities very seriously and restricts authority to conduct Flag State Convention (FSC) inspections to Australian Maritime Safety Authority[13] surveyors only.[14]
AMSA guidelines[15] specify that, "Australian flag ships under the jurisdiction of the *Navigation Act 1912* (Cth)[16] are eligible for FSC inspection at six monthly intervals (3 months for tankers over 15 years old and passenger ships of any age)."

However it would appear that not all nations view their obligations to the international community consequent upon the privilege to register ships under their national flags, in the same light. Some nations have "privatised" their vessel registries, so that the registry is actually run by a corporation[17] and not by a government department or agency although this in itself should not necessarily mean that proper standards are not maintained.

However it does lead to the vexed debate about "Flags of Convenience" ("FOC's") and their relevance to the question of substandard shipping, because in the main it is the FOC nations which have contracted out administration of their fleets. In this respect it should be noted that many of the worlds leading shipowners[18] with excellent reputations for concern about safety and environmental issues[19] do flag their ships with FOC's. Similarly charterers with similarly impeccable credentials, regularly charter FOC ships. Indeed, the list of generally acknowledged sub-standard flags include so called "legitimate" national flags as well as FOC's and it is a fact that FOC's also feature among those flag fleets that rank at the top of the quality table.

Clearly therefore, the problem of substandard shipping lies not so much with the concept of FOC's but rather with the manner in which individual ship registers are administered.

2.2 COASTAL & PORT STATE CONTROL

The maritime territorial jurisdiction of a State can be divided into two broad categories, coastal state regulation and port state regulation.
Very generally,[20] the focus of the former is primarily concerned with protection of territorial integrity and maritime resources, border protection and the national

[13] The national safety agency with a primary role in maritime safety, protection of the marine environment and aviation & marine search and rescue. Established under the *Australian Maritime Safety Authority Act 1990* (Cth) as a Commonwealth Authority, it is largely self funded through levies on the commercial shipping industry. (hereafter AMSA); see paragraph 4.1 below.
[14] While AMSA does authorize certain classification societies to carry out surveys and inspections for the issue of certificates pursuant to convention requirements, such as SOLAS, AMSA does not delegate authority for FSC 'audit" inspections to third parties.
[15] *AMSA PSC Procedures, ITS63 Ship Inspection, Targetting of Ships* at 2.3.
[16] Hereafter *Navigation Act.*
[17] Often owned and managed by foreign nationals with headquarters located outside the territory of the flag state. For example International Registries Inc. which used to manage the Liberian Ship register (on 1 January 2000, IRI ceased acting for the Liberian registry) and now manages the Marshall Islands Registry, has its headquarters in Reston, Virginia, USA close to Washington DC. It was founded by Edward Stettinus, a former US Secretary of State and is a privately held company owned and operated by its senior employees.
[18] Including some of the largest corporations in the world such as ExxonMobil, Chevron and BHPBilliton.
[19] If only because this makes good business sense, ships are expensive assets, penalties for pollution are prohibitive and accidents have a very negative impact on corporate profits.
[20] As in most such functions, there is often much overlap between the objectives and authorities of the various agencies tasked with Coastal State regulation and those tasked with Port State regulation and in practice there is normally close cooperation and sharing of resources and information. A good example of this is Coastwatch, a division of the Australian Customs Service. This is a civil maritime surveillance and response service which operates in Australia's maritime zones, offshore territories and Australia's EEZ. Customs

obligations to the international community to provide maritime and aviation search and rescue (SAR) services. Thus in a practical sense this entails the exercise of a wide range of regulatory powers over ships "underway" within the State's maritime territorial jurisdiction.

Port state control on the other hand is generally directed towards ensuring that "foreign ships are seaworthy, do not pose a pollution risk, provide a healthy and safe working environment and comply with relevant conventions of the IMO and the International Labour Organisation".[21] It is usually limited to regulation of ships which have "moored"[22] at a port within the territory of the State.[23] The remainder of this article will be concerned only with the concept of port state control.

2.2.1 Port State Regulation

2.2.1.1 Authority & Obligation to Regulate Foreign Ships

While the concept of "right of innocent passage",[24] and practical constraints[25] limit the ability of coastal states to pro-actively regulate the operation of foreign ships under way within their wider maritime jurisdiction,[26] the situation is quite different when a ship is berthed (or anchored) in port.

It is well established in customary law that when a vessel is in port, within the sovereign territory of the coastal state, it will be subject to the laws of the "host" nation. This is reinforced by UNCLOS Article 25(2) where authority is conferred on coastal states to "prevent any breach of the conditions to which admission of those ships to internal waters or to such a call is subject".[27] Article 218 of UNCLOS, "Enforcement by Port States" and Article 219 "Measures relating to Seaworthiness of Vessels" are more explicit in this regard. These provisions validate the inspection of vessels, under International Law, to verify compliance with prescribed operating standards and procedures, irrespective of whether the ship has committed, or is reasonably suspected of, any breaches.

2.2.1.2 Obligation to Maintain PSC Capacity

It is suggested that the wording of UNCLOS Article 219 imposes an obligation upon Port States to maintain a reasonable capacity to monitor vessels within their ports and off-shore terminals for compliance with applicable international rules and standards relating to seaworthiness. Indeed IMO Conventions too, in certain instances require signatory States to enforce compliance by ships from non-signatory States too, this is discussed further at 3.1.2 below.

---

coordinates Coastwatch which uses a combination of private contractors and government service providers and the information generated by it is in turn availed of by a diverse range of government agencies.

[21] *Port State Control in Australia, 2001 Report,* Australian Maritime Safety Authority (hereafter PSC 2001) p.1.

[22] this includes ships which have anchored, berthed alongside, are at a single point mooring or at an offshore facility.

[23] Except in the case of pollution – see paragraph 4.3.3 below.

[24] UNCLOS Article 19 defines the meaning of innocent passage and Article 25(1) clearly states that coastal states may prevent passage which is not innocent.

[25] It will be prohibitively expensive to maintain a resource equipped to board vessels underway for the purpose of conducting safety inspections and in many instances carrying out such inspections when the vessel is underway, likely in congested waters close to shore, will actually compromise safe navigation.

[26] Although in recent times Australian authorities have demonstrated that they are determined to enforce jurisdictional authority offshore – the apprehension of the *Volga* and *Pong Su* are prominent examples.

[27] An obvious condition being compliance with municipal law of the host State.

That this view that port state control authority is not merely a permissive aspect of International Maritime Law but is in fact an obligation upon States is shared by others may be gleaned from one interpretation of the following statement by John Hare:[28]

> Port state control" as a concept, involves the powers and **concomitant obligations** vested in, exercised by, **and imposed upon**[29] a national maritime authority (or its delegee) by international convention or domestic statute or both, to board, inspect and where appropriate detain, a merchant ship flying a flag foreign to that state in order to ensure compliance by that ship with all applicable international safety at sea instruments and with any domestic legislative maritime safety requirements.[30]

Other sources wherefrom Coastal States derive authority (and obligations) to regulate foreign vessels include when they are party to certain International Conventions[31] which empower them to verify and enforce compliance with the provisions of the respective Convention by vessels of other signatory states operating within their jurisdiction[32] or multi-lateral regional agreements such as European Commission legislation.[33]

2.2.1.3 Desirability of Common International Maritime Legislation

Under International Law the concept of Port State Control embraces the requirement of a foreign vessel not only to comply with the laws of its own flag state but also those of the Port State. Thus even if the Flag State is not party to a particular International Convention, if municipal law of the Port State makes compliance mandatory, International Law will respect the Port States right to enforce compliance by foreign vessels within its sovereign territory.[34] Conversely, a State "cannot plead that its municipal law exonerates it from performing its international obligations",[35] and it is respectfully suggested that having ratified an International Convention, a State will have an obligation under International Law to enforce relevant provisions as part of its port state control procedures, irrespective of whether those provisions have been replicated in or are contrary to domestic legislation.[36]

The preferred option is for international regulation of shipping to be coordinated (preferably by the IMO) because unilateral reform of legislation affecting international

---

[28] Of the Department of Marine and Shipping Law, Cape Town University

[29] Emphasis added.

[30] John Hare, *Strong Medicine to Cure a Sick Industry* at http://www.uctshiplaw.com/psc2.htm

[31] Typically such as those discussed at 3.1 below.

[32] Indeed IMO Conventions in certain instances require signatory States to enforce compliance by ships from non-signatory States too – see 3.1.2 below.

[33] For example in the "*Proposal for a Council Framework Decision to strengthen the criminal law framework for the enforcement of the law against ship-source pollution",* COM (2003) 227 final, presented by the Commission of the European Communities on 2 May 2003, which specifies criminal sanctions for ship generated marine pollution incidents, Article 5 stipulates that "relevant authorities of the Port State **must perform a number of checks** and if these raise the suspicion that an offence has been committed, the relevant criminal authorities must be informed".

[34] For example whether a ship is seaworthy or not will be determined according to the provisions of municipal law, which clearly illustrates the importance of uniformity at an international level.

[35] PE Nygh & P Butt (Gen. Eds.), *Butterworths Australian Legal Dictionary*, Butterworths, Sydney, 1997 at p.768.

[36] *Commonwealth v State of Tasmania* (1983) 158 CLR 1, popularly known as the Franklin Dam Case or The Tasmanian Dams Case is an example of a situation where the High Court affirmed the pre-eminence of Commonwealth Legislation over contrary State Legislation because of International Treaty Obligations.

shipping by individual nations or select groups of nations can cause much disruption and difficulty.[37]

Indeed, it is often argued that the real issue regarding substandard shipping and maritime casualties is not that there is insufficient international legislation but that the relevant legislation is not properly complied with. It is suggested here that the problem is overwhelmingly one of compliance and enforcement and not one of lack of detailed rules and guidelines.[38]

It is generally acknowledged that reliance on flag state control alone to ensure compliance with relevant legislation is not sufficient and that an additional "check" is necessary. Apart from the risk to the lives and property on board the ship, the party with most to lose as a consequence of maritime casualty is the coastal state adjacent to the site of the maritime accident. It therefore makes eminent sense for states to endeavour to ensure that ships transiting close to their shores pose minimal risk. Within the international legal framework, having an efficient port state control apparatus is the best way to achieve this.[39] Theuns Steyn[40] argues that over reliance on others "to do the right thing" is parlous and that "port state control is in effect a defence force against the ever present external threat of catastrophe, posed by unseaworthy and unsafe ships". He further argues that the cost of port state control is well justified in being defrayed through fees imposed for inspections and fines levied for breaches.

3 PORT STATE CONTROL - OVERVIEW

3.1 AUTHORITY

In addition to the general right and obligation of Port States to regulate foreign ships vested by UNCLOS as discussed above at 2.2.1, provisions of particular IMO Conventions confer specific rights in this regard. These include:

(a) Regulation 19 of Chapter 1, regulation 6.2 of Chapter IX and regulation 4 of Chapter X1[41] of the International Convention for the Safety of Life at Sea, 1974, as amended (SOLAS 74) as modified by the Protocol of 1988 relating to the International Convention for the Safety of Life at Sea, 1974 (SOLAS Protocol 1988).[42]

(b) Article 21 of the International Convention on Load Lines, 1966 (Load Lines, 66) as modified by the Protocol of 1988 relating to the International Convention on Load Lines, 1966 (Load Line Protocol 88).[43]

---

[37] In protesting the decision of the European Commission to ban single hulled tankers, the General Secretary of the Verband Deutscher Reeder (VDR), the Association of German Shipowners, Dr Hans-Heinreich Noll said, "Such an agreement can only be made on an international basis at the IMO. The action of the EU only weakens the IMO". He added that he hoped that flag states would challenge the ruling at the International Tribunal for the Law of the Sea.

[38] Although this is not to suggest that there is no need for new legislation – improvements in technology and increasing community expectations for safety and environmental management will necessitate continual refinement of the regulatory framework.

[39] Particularly in the case of a country like Australia which does not have to cope with a large volume of transit traffic close to its coast line, unlike countries which border major sea lanes such as the English Channel, Red Sea, Malacca Strait and Straits of Gibraltar.

[40] Of South African Law firm, Denys Reitz, in a paper presented to the Maritime Law Association of Australia and New Zealand at Wellington, New Zealand on 6 November 1995.

[41] International Management Code for the Safe Operation of Ships and for Pollution Prevention (hereafter ISM Code) – paragraph 3.7 of which contains specific guidelines for carrying out verification inspections.

[42] Hereafter SOLAS.

[43] Hereafter LL 66/88.

(c) Articles 5 & 6, regulation 8A of Annexe 1, regulation 15 of Annex II, regulation 8 of Annex III and regulation 8 of Annex V of the International Convention for the Prevention of Pollution from Ships, 1973 as modified by the Protocol of 1978 relating thereto, as amended (MARPOL 73/78).[44]
(d) Article X of the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, 1978, as amended .[45]
(e) Article 12 of the International Convention on Tonnage Measurement of Ships, 1969.[46]

IMO Resolutions A.787(19), *Procedures for Port State Control* adopted on 23 November 1995 and A.882(21), *Amendments to Procedures for Port State Control* adopted on 25 November 1999, "provide basic guidance on conduct of Port State control inspections and afford consistency in the conduct of these inspections, the recognition of deficiencies of a ship, its equipment, or its crew, and the application of control procedures."[47]

It envisages that subject to the provisions of the applicable conventions, inspections may be conducted at the initiative of the Port State authority, at the request or on the basis of, information about the ship provided by a third party.[48]

3.1.1 Port State Control Officers

While Flag State authorities are free to delegate control inspections to "contractors", Resolution A.789(19) invites Governments, when exercising port state control, to limit the exercise of authority to board, inspect, demand remedial action and detain foreign ships under the port state control regime only to officers duly authorised by the Port State.[49]

The designation, Port State Control Officer[50] is defined as:[51]

> A person duly authorised by the competent authority of a Party to a relevant convention to carry out port State control inspections, and responsible exclusively to that Party.

Resolution A.787(19) goes further to clearly specify that Port State Control should only be carried out by Officers complying with the qualification criteria specified in the Resolution.[52] It requires[53] that the individual(s) concerned should have no commercial interest, either in the port of inspection, or in the ships inspected nor be employed by recognised organisations[54] and that they carry an identity card issued by the Port State attesting authority to conduct such inspections.

---

[44] Hereafter MARPOL.
[45] Hereafter STCW 95.
[46] Hereafter Tonnage 69.
[47] IMO circular, STCW.7/Circ.12, issued on 25 January 2002 provides "Advice for port state control officers and recognized organisations on action to be taken in cases where not all seafarers carry certificates and endorsements meeting STCW 95 requirements after 1 February 2002".
[48] For example the Harbour Pilot, stevedores, seafarers welfare organisation representatives etc.
[49] IMO Resolution A.787(19), 2.1.3.
[50] Hereafter PSCO.
[51] IMO Resolution A.787(19) para 1.6.6.
[52] Ibid para 2.5.
[53] Ibid para 2.4.3.
[54] Organisations that meet the criteria set by IMO Resolution A.739(18) and been delegated by the flag state administration to perform certain statutory services – typically "Classification Societies".

3.1.2 Vessels from Non-Convention Flag State

It is particularly interesting to note that IMO Resolution A.787(19) highlights that SOLAS, MARPOL and STCW stipulate that no more favourable treatment is to be given to the ships of countries which are not party to the relevant convention and requires the PSCO to be satisfied that the ship and crew do not pose a danger to life, property or the environment.

The Resolution[55] specifies that "the ship shall be subject to such restrictions as are necessary to obtain a comparable level of safety and protection of the marine environment."

It is therefore quite clear that the nations of the world (or at least the majority of them) share the view that shipowners/operators should not be allowed to avoid compliance with internationally agreed standards to which particular nations have not become party simply by registering their ships under such "flags".

3.2 SCOPE OF THE INSPECTION

As discussed above, the international maritime regulatory system is predicated on the expectation that "Flag State Authorities" properly administer their convention and general obligations to the international community. The basic premise is that where a vessel is in possession of a valid certificate issued by the Flag State, it is prima facie evidence of compliance with relevant convention requirements.[56]

Accordingly, the initial task of the PSCO, on boarding a foreign vessel, is examination of its relevant certificates and documents.[57] If any of the certificates have expired or are invalid for any reason, there will be clear grounds for exercise of control procedures. In such a situation there should be no reason for "embarrassment" on the part of the Flag State which should likely welcome the intervention by the Port State authorities, as the vessel will be in breach of its obligations to the Flag State.

However, the authority of the PSCO is not restricted to mere verification of possession by the vessel of valid Flag State certificates and it is suggested that the primary duty of the PSCO is ascertaining actual compliance with relevant requirements. For example in paragraph 2.2.5 of IMO Resolution A.787(19), it is stipulated that if "the PSCO from general impressions or observations on board **has clear grounds**[58] for believing that the ship, its equipment or its crew do not substantially meet the requirements, the PSCO **should**[59] proceed to a more detailed inspection…."

Clear grounds are defined as:[60]

> Evidence that the ship, its equipment, or its crew does not correspond substantially with the requirements of the relevant conventions or that the master or crew members are not familiar with essential shipboard procedures relating to the safety of ships or the prevention of pollution.[61]

IMO Resolution A.787(19) provides comprehensive guidelines for carrying out "more detailed inspections" under Chapter 3. However in most cases detailed inspections require physical inspection of the vessel and its equipment and will usually be very demanding on time and resources of Port State control authorities and economic

---

[55] At paragraph 1.5.2.
[56] See SOLAS Regulation I – 19(b).
[57] IMO Resolution A.787(19) para 2.2.3.
[58] Emphasis added.
[59] Ibid.
[60] IMO Resolution A.787(19) para 1.6.
[61] Ibid para 2.3 lists 10 examples of "Clear grounds".

reality will limit the number of such detailed inspections requiring comprehensive physical survey of suspect vessels, which can be undertaken.

3.2.1 Ship Management Systems

The introduction of the ISM Code and the advent of the ISPS Code provide additional "indicators" to assist PSCO's distinguish between well operated and substandard[62] vessels without physically inspecting the structure of the vessel and its equipment.[63]

There is now wide ranging acceptance that even a brand new vessel which is in perfect repair and fully outfitted with all necessary equipment can be "substandard". The Australian High Court decision in *Great China Metal Industries Limited* v *Malaysia International Shipping Corporation,*[64] where Gaudron, Gummow and Hayne JJ[65] stated that when evaluating the concept of seaworthiness enshrined in the contract of carriage, the factors to be taken into account extend to more than just the physical condition of the ship and/or its equipment and essentially relates to the overall management of the vessel, flagged this trend.

The English High Court adopted similar reasoning in a more recent case, *Papera Traders Co. Limited & Others v Hyundai Merchant Marine Co Limited & The Keihin Co. Limited*[66] to rule that a pure car carrier which was totally destroyed by fire was "un-seaworthy" as a consequence of the crew not being properly conversant with the fire fighting systems on board.[67]

While both *Eurasian Dream* and *Bunga Seroja* were civil cases dealing specifically with the concept of seaworthiness in the context of commercial contracts, it is suggested that they clearly support the view that Courts will find that a badly managed ship, even if well found, with respect to structure and equipment (as in the case of a "brand new" ship) is unseaworthy.

3.2.2 Distinction between an "unseaworthy" and a "substandard" vessel

The terms "unseaworthy" and "substandard" are often used interchangeably particularly in media reports and indeed the definition of substandard ship in IMO Resolution A.787(19)[68] supports this view. However, in so far as application in Australia is concerned, they do not mean the same thing and it is important that the distinction between the terms be noted, because there may be significant commercial implications.

Most if not all contracts of carriage by sea, impose an obligation upon the carrier to provide a seaworthy ship[69] although *COGSA* provides that an absolute undertaking by the carrier to provide a seaworthy ship is not to be implied in any contract for the carriage of goods by sea.[70] Section 45 of the *Marine Insurance Act 1909* (Cth)[71] on the

---

[62] Defined in IMO Res. A.687(19) para 1.6 as "A ship whose hull, machinery, equipment, or operational safety is substantially below the standards required by the relevant convention or whose crew is not in conformance with the safe manning document."

[63] These Codes focus on the management systems of the vessel and the operators rather than the physical "hardware" of the ship and its equipment.

[64](1998) 196 CLR 161; [1998] HCA 65 (hereafter *Bunga Seroja*).

[65] *Bunga Seroja* (n.62) at p.174-181.

[66] [2002] EWHC 118 (Comm) hereafter "*Eurasian Dream"*.

[67] The loss of the ship and its cargo was attributed to the crew's inability to properly use the ships fire fighting systems. This in turn was attributed to inadequate management systems relating to training and handover procedures.

[68] "A ship whose hull, machinery, equipment, or operational safety is substantially below the standards required by the relevant convention or whose crew is not in conformance with the safe manning document".

[69] *Carriage of Goods by Sea Act* 1991 (Cth) (hereafter *COGSA*) Sch 1 Art 3 r1(a).

[70] Ibid Part 4 s.17.

other hand, clearly emphasises the importance of seaworthiness in contracts of marine insurance.

By the same token, section 59 of the *Navigation Act* stipulates that in every contract of service, express or implied between an owner and master or between an owner/master and a seaman, there is an obligation upon the owner, master and any agent to exercise reasonable care to ensure that the vessel is maintained in a seaworthy condition at the commencement of, and throughout, every voyage.

The *Navigation Act* defines "seaworthy" in section 207 in terms of a fit state to 'encounter the ordinary perils of the sea'. On the other hand, section 207A of the *Navigation Act* states that substandard has a different meaning:[72]

> (1) A ship is, for the purposes of this Act, substandard if the ship is seaworthy, but conditions on board the ship are clearly hazardous to safety or health.
> (2) In determining whether a ship is substandard, regard shall be had to such matters as are prescribed.[73]

This suggests that the terms "substandard" and "unseaworthy" are not synonymous for the purposes of the *Navigation Act* and therefore proof of detention by PSC in itself, need not necessarily serve as proof of breach of contractual obligations requiring a ship to be maintained in a seaworthy condition. [74]

3.3 INTERNATIONAL COOPERATION

The concepts of national sovereignty and "freedom of the seas" central to current appreciation of the international regulatory regime applicable to merchant shipping have obvious implications for the manner in which Port and Coastal States exercise control over "foreign" vessels. It is suggested that in this regard, while Port State authorities should be careful not to exceed their authority and violate the sovereignty of the Flag State, this concern should not result in obligations to the wider international community, including States at ports of which vessels are subsequently scheduled to visit, being ignored. Failure to take adequate action against a substandard vessel in deference to the wishes of the Flag State may result in breach of the Port State's obligations to other States whose territorial waters the vessel may transit or to whose ports it may visit.

3.3.1 Regional Port State Control Agreements

Its international nature, the technical diversity involved and the complex management and crewing structures that are a feature of the shipping industry today, make it patently obvious that effective regulation of commercial shipping requires international cooperation. IMO Resolution A.682(17) "Regional Cooperation in the Control of Ships and Discharges" recognises this and has contributed to the development of regional PSC agreements. These relatively informal groupings rely on Memorandums of Understanding (MOU) for their structure and by and large, agreements arrived at, at these fora are not intended to be (and are usually not) legally binding on the parties, notwithstanding that there is a general expectation that parties will act in a way

---

[71] Hereafter *MIA*.

[72] There is a view that the concept of "substandard ship", and the enactment of s.207A, resulted from a deal done by the then government and the ACTU to end the "ship repair" dispute (which was predominantly, if not exclusively, taking place in Port Kembla). The definition of substandard ship is taken straight out of the Control provision of ILO Convention No. 147 and therefore relates to crew conditions.

[73] These are contained in *Marine Orders Part 11- Substandard ships- Issue 2.*

[74] Because in Australia, Section 210 of the *Navigation Act* authorises detention of unseaworthy and substandard ships.

consistent with the aims of the group. These groupings primarily serve as a conduit for sharing of port state control inspection data, and the exchange of relevant experience, knowledge and technology towards combating risks posed by substandard ships.

There are currently eight regional PSC agreements in existence, namely:[75]

- The Paris Memorandum of Understanding on Port State control (Paris MOU)
- The Latin America Agreement (Acuerdo de Vina del Mar)
- The Memorandum of Understanding on Port State control in the Asia-Pacific region (Tokyo MOU)
- The Memorandum of Understanding on Port State control in the Caribbean region (Caribbean MOU)
- The Memorandum of Understanding on Port State control in the Mediterranean region (Mediterranean MOU)
- The Indian Ocean Memorandum of Understanding on Port State control (Indian Ocean MOU)
- The Memorandum of Understanding on Port State control for the West and Central African region (Abuja MOU)
- The Memorandum of Understanding on Port State control for the Black Sea (Black Sea MOU)

4 AUSTRALIAN PORT STATE CONTROL

The agency responsible for representing relevant Australian interests at the IMO and other international fora and with regulating shipping and navigation by administering IMO conventions and Australian domestic legislation which implement them, is the Australian Maritime Safety Authority.[76]

4.1 AUSTRALIAN MARITIME SAFETY AUTHORITY

The recognition that Australia's "almost total reliance on shipping for trade means that maritime regulation and government's services to shipping must be efficient, sensible and relevant"[77] caused the Australian Parliament to pass the *Australian Maritime Safety Authority Bill 1990.*

The *Australian Maritime Safety Authority Act 1990*[78] provides for the establishment of an Authority[79] called the Australian Maritime Safety Authority[80] and the various details necessary for its proper functioning. The stated main objects of the Act are:[81]

(a) To promote maritime safety; and
(b) To protect the marine environment from:
(i) Pollution from ships; and
(ii) Other environmental damage caused by shipping; and
(c) To provide for a national search and rescue service; and
(d) To promote the efficient provision of services by the Authority

[75] PSC 2001, n.19, p.3.
[76] Zada Lipman and Gerry Bates, *Pollution Law in Australia* (LexisNexis Butterworths, Australia, 2002), p.418; Michael White (ed.), *Australian Maritime Law*, (2nd Ed, The Federation Press, Sydney, 2000), p.195.
[77] *Australian Maritime Safety Authority Bill 1990* , Second Reading Speech by the Hon. R.J.Brown, Member for Charlton-Minister for Land Transport).
[78] Hereafter *AMSA Act.*
[79] Ibid s.5.
[80] Hereafter AMSA.
[81] *AMSA Act 1990* s.2A.

4.1.1 AMSA Organisational Structure

AMSA is constituted as an independent corporate entity governed by a seven member Board of Directors, responsible to the Minister for Transport and Regional Services.[82] A Chief Executive[83] who reports to the Board oversees the management of the organisation.

4.1.2 AMSA's Authority to Generate Subordinate Legislation

Section 425 (1AA) of the *Navigation Act* authorises AMSA to pass subordinate legislation which it exercises through the issue of *Marine Orders*.[84]

4.2 REGULATORY STRUCTURE FOR MERCHANT SHIPPING IN AUSTRALIA

Detailed discussion of the division of powers between the state (and territory) parliaments (and governments) and the Commonwealth is outside the scope of this paper, suffice to state that the High Court of Australia determined[85] that passage of the *Seas and Submerged Lands Act 1973* (Cth) vested in the Commonwealth sovereignty over the territorial sea. *The Offshore Constitutional Settlement*, *1979* and subsequent legislation[86] restored to the States (and Northern Territory) sovereignty and title out to the three mile limit.[87]

Therefore for all practical purposes the regulation of international shipping is largely administered by the Commonwealth although State (and Territory) governments have jurisdiction out to the three mile limit, while so far as the regulation of domestic shipping goes, *The Uniform Shipping Laws Code*[88] (currently being revised by the Australian Transport Council) sets out criteria for creation of uniform legislation[89] by the various legislative bodies.

It should however be noted that State legislation designed to regulate aspects not exclusive to shipping may have relevance to shipping and operators must be conscious of this. For example, although the *Offshore Constitutional Agreement*, *1979* expressed that the Commonwealth would continue to control ship sourced marine pollution,[90] increased community concern about the environment and concomitant political imperatives has resulted in increasing differences between legislative requirements pertaining to pollution issues within respective state jurisdictions in the last decade. Of particular concern[91] is that legislation is frequently amended and repealed and where purported to give effect to international conventions often does not mirror the provisions of the conventions. In most, if not all states (and the Northern Territory), in

---

[82] The responsible Minister under the *AMSA Act 1990.*
[83] The sole Executive Director.
[84] See http://www.amsa.gov.au/sd/mo/mo_index.htm.
[85] *New South Wales v Commonwealth* (1975) 135 CLR 337 (the *Seas and Submerged Lands Act case*).
[86] Passed by the Commonwealth, States and Northern Territory parliaments.
[87] Although the limit of the Australian territorial sea has been extended to the 12 mile limit, State (and Northern Territory) sovereignty remains only up to the 3 mile limit, for more commentary on this see Lipman & Bates (n.74) p.382.
[88] White, (n.74), p.200 The new *National Standards for Commercial Vessels* already replace quite a bit of the *Uniform Shipping Laws Code.*
[89] For the survey, manning, construction and operation of commercial vessels.
[90] There was considerable uniformity in relevant State legislation, based on the draft *Pollution of Waters by Oil and Noxious Substances Act* 1986 or 1987, which essentially gave effect to MARPOL.
[91] To those who share the view that uniformity and international comity (let alone national comity) are critical for orderly and effective regulation of shipping.

the event of an environmental pollution incident[92] the relevant State Environment Protection Agency will investigate and where appropriate prosecute those responsible. For example the Victorian government is currently proposing unilateral legislation pertaining to management of ships ballast water discharges in state waters.

Notwithstanding the foregoing, it is still the case that in so far as Port State Control activity is concerned, the sole agency responsible throughout Australia is AMSA, which essentially applies Federal legislation in the carriage of its inspection and enforcement task.

4.3 AUSRALIAN LEGISLATION GIVING EFFECT TO PSC

Australia subscribed to the international regime giving effect to Port State Control measures by virtue of the following provisions in the relevant conventions (as later amended) which it ratified:

a) SOLAS 1974, Chapter 1, Regulation 19
b) STCW 1978, Article X
c) MARPOL 73/78, Article 5
d) Load Line Convention 1966, Article 21

4.3.1 Authority to Inspect Foreign Ships

Authority to conduct Port State control inspections on foreign ships pursuant to these international obligations, is vested in AMSA inspectors[93] by:

1. The *Navigation Act,* s.190AA
2. The *Protection of the Sea (Prevention of Pollution from Ships) Act, 1983*[94] s27(1)
3. *Marine Order 11 – Substandard Ships*

4.3.2 Authority to Detain Unseaworthy & Substandard Foreign Ships

Power is given to AMSA inspectors to detain ships by certain sections of the *Navigation Act*, these include:

1. s.14(9)(a) which permits detention or prevention from going to sea of a vessel which is not manned in accordance with the minimum manning requirements;
2. s.120(2) which arguably requires an inspector to detain a ship if it is found that the provisions and (potable) water are not of good quality;
3. s.227C which authorises a ship with incorrectly positioned load line markings to be detained;
4. s.231D which require detention of ships, where the number of persons with appropriate radio operating certification does not comply with the requirements. This could be a particular problem in ships licensed under the GMDSS system which do not carry dedicated radio operators and rely on navigating officers having the relevant radio operating certifications.
5. s.254(2), authorises detention of ships where the carriage of particular cargo is deemed to affect its safety. This could include dangerous cargoes or even fairly innocuous goods such as grain or slurry[95] that, because of their particular stowage characteristics could compromise stability and safety.

---

[92] Typically an oil spill.
[93] Who are the designated PSCO's in Australia; see paragraph 3.1.1 above; the power to appoint surveyors is vested in AMSA by s.190 of the *Navigation Act.*
[94] Hereafter *Pollution Act.*
[95] Potential free surface moment tending to reduce the available stability margins beyond acceptable limits.

However, the most evident (and invoked) provision permitting detention is that authorising detention of Unseaworthy / Substandard ships detailed in s.210.

Although close reading of s.206W or s.227A might suggest that only customs officers can prevent the sailing of ships which do not possess valid safety convention or load line certificates, such a situation should also constitute grounds to permit a PSCO to inspect such a vessel to establish seaworthiness. The *Navigation Act* also authorises detention of vessels in possession of valid certificates if detailed inspection reveals that the actual condition on board does not correspond with that ostensibly evidenced by the relevant certificate.

4.3.2.1 Ships Merely Seeking Refuge in an Australian Port

It should also be noted that s.204A exempts from certain requirements of the *Navigation Act* vessels not bound for but compelled to seek refuge in Australian ports.

It is suggested that the exemption only extends to the following:

1. Division 2 of the *Navigation Act* dealing with statutory survey requirements for steamships
2. Division 6A of the *Navigation Act* concerned with requirements pertaining to radio installations and radio navigation aids on safety convention ships
3. s.215 of the *Navigation Act* relating to certain provisions regarding life saving and fire fighting equipment
4. Compliance with the requirements of *Marine Orders* issued by AMSA

Importantly, the exemption does not apply to s.190AA[96] nor s.210[97] of the *Navigation Act.* In other words, foreign vessels compelled by stress of weather or force majeure to enter an Australian port are liable to being inspected and detained by Australian PSC should they be found to be "Unseaworthy / Substandard".

4.3.2.2 Geographical Limits of AMSA's Powers of Detention

It is submitted that the *Navigation Act* only authorises AMSA to detain vessels which are actually in an Australian port because the power of detention arises only after the power of inspection is exercised and, arguably, the power to board and inspect a vessel is only given to the Authority by the *Navigation Act* in the case of vessels already in an Australian port.[98]

While it may be argued that s.190AA of the *Navigation Act,* by authorising a surveyor to board a vessel at any reasonable time for the purpose of inspection, does not limit this right to only when a ship is in port, the concept of the right of innocent passage through the territorial sea militates against arguments supporting the right of AMSA to board vessels underway and in transit through the territorial sea or even the inland sea for the purpose of conducting "control" inspections.

On the other hand it could be argued that in s.210 of the *Navigation Act* permits provisional detention without inspection as it is plausible that a ship may "appear to be unseaworthy or substandard" without actual physical inspection, merely from an external visual appraisal or indeed on the basis of reports from external sources.[99]

---

[96] Power to inspect.
[97] Power to detain.
[98] However it should be noted that this limitation only applies to exercise of power pursuant to the *Navigation Act*, see paragraph 4.3.3 below.
[99] Such as from another PSC Authority.

However, even if this argument is accepted, the power vested is explicitly one of detention, not arrest or apprehension. The word detention is defined as:[100]

1. the act of detaining
2. the state of being detained
3. keeping in custody; confinement

Accordingly, it is suggested that the better view is that the port state control powers of detention vested in AMSA by the *Navigation Act,* are restricted to preventing substandard / unseaworthy vessels from departing from Australian ports but do not extend to the right to apprehend vessels exercising their right of innocent passage through Australian maritime territory. Towards this end, it is suggested that if a ship found to be substandard / unseaworthy is not detained[101] and subsequently sails the *Navigation Act* does not permit its apprehension while still within Australian maritime jurisdiction let alone once it enters international waters. Notwithstanding that s.208 makes it an offence to take or send an unseaworthy ship to sea, it is suggested that AMSA have no power to apprehend such a vessel once it has left port.

4.3.3 Powers of Detention of Foreign Ships for Pollution Breaches

In his keynote address delivered on 19th March 2003 to The Fourth International Marine Salvage Conference held at London, the then Secretary General of the IMO highlighted the high level of intolerance for pollution in the community when he said:

> For me the most obvious, yet largely un-stated aspect of the whole Prestige affair has been the confirmation, if any were needed, of the major shift in public opinion that has taken place over the past decade or so. Damage to the environment now commands the headlines and arouses public indignation to a far greater extent than does loss of the lives of seafarers. This is a fact and can be attributed to pollution having a personal impact on large numbers of individuals, their livelihoods and the local economy. As such, it inevitably shapes the contexts within which all of us concerned with maritime safety have to work.

This has been recognised by the Australian Parliament and is manifested in that far more extensive powers are granted to AMSA to regulate substandard shipping in cases of actual or suspected marine pollution.

The *Pollution Act,* unlike the *Navigation Act,* actually authorises AMSA to detain a foreign ship in port suspected of having caused a pollution breach in the Australian territorial sea or EEZ. In other words, even if the ship is in all respects compliant at the time, as long as there are "clear grounds for believing that a pollution breach had occurred" the *Pollution Act* authorises detention.

Notably, the *Pollution Act* also permits foreign vessels in the territorial sea and the EEZ to be detained and subsequently escorted into port if suspected of having caused pollution. This provision is apparently contrary to the concept of "the right of innocent transit" but it is submitted that the legislation is validated by the provisions of UNCLOS Part XII and arguably causing pollution renders the transit no longer innocent.[102]

---

[100] A Delbridge, J Bernard, B Blair, S Butler, P Peters, C Yallop (eds.), *Macquarie Dictionary* (Revised 3rd ed., Macquarie Library, Sydney, 2002) p.520.

[101] As distinct from a detained vessel which sails – for which severe penalties are prescribed by s.212 of the *Act.*

[102] Although this latter argument would hold true only in the case of a vessel proven to have caused pollution before being apprehended as opposed to one merely suspected of having done so.

It should be noted that the right to detain a vessel in the EEZ only accrues when there is "clear objective evidence" of the breach.

Prosecution for pollution breaches may be brought against a foreign ship, up to three years after the breach subject to the provisions of UNCLOS Article 228,[103] with service on the agent of the ship being taken to be service on the owner or master as the case maybe.[104]

4.4 APPLICATION OF PSC POWER BY AMSA

AMSA endeavours to apply its PSC powers in conformance with IMO guidelines,[105] in a consistent manner throughout Australia. Approximately 40 AMSA surveyors[106] are permanently stationed at 14 ports around the country, with PSC inspections also being regularly carried out at another 55 ports.[107] AMSA characterises a foreign ship as being "eligible" for inspection if it has not been inspected by an AMSA inspector in the previous 6 months (3months for tankers and passenger ships) and has set itself a current target to inspect 50% of foreign ships calling at Australian ports. It further refines this effort through a "focussed inspection program" and "targeting of high risk vessels" to achieve more efficient use of resources.

4.4.1 Consistency, Uniformity & Objectivity

AMSA is acutely conscious of the importance of maintaining the credibility of Australia's PSC program both with domestic as well as overseas based stakeholders.[108] It believes that consistency; uniformity and objectivity are the hallmarks of a credible and successful PSC and accordingly strives not only to ensure that these characterise the actual conduct of its program but that it is seen to be doing this.

4.4.1.1 PSCO Selection, Training & Procedures

Towards this end it has rigorous selection criteria, and the minimum qualifications required for AMSA surveyors is a Certificate of Competency as Master Class 1, Engineer Class 1 or Degree in Naval Architecture or equivalent qualifications.[109] All new AMSA surveyors receive initial PSC training and thereafter periodic refresher training is an integral part of a PSCO's employment terms.

AMSA surveyors are guided by defined procedures, Instructions to Surveyors (ITS), in the conduct of their duties, and that relating to ship inspections is *ITS 63*. These instructions define how ship inspections should be carried out, the procedures to be followed in the event a ship has to be detained, those that need to be adhered to before a provisional detention order is lifted etc. They are supplemented by a Ship Inspection Manual containing detailed guidance on ship inspections.

---

[103] *Pollution Act* s.29.
[104] Ibid s.29A.
[105] IMO Res.A.787(19) as amended.
[106] For the purpose of this paper the terms AMSA inspector, surveyor and PSCO are used as if they mean the same.
[107] PSC 2001, p.1, 14.
[108] Adverse (and arguably unfair and misinformed) media comment about AMSA's PSC program, during and after the *Kirki* incident because the ill fated vessel had undergone an AMSA PSC inspection not long before the casualty, provided valuable learning in this regard.
[109] Position descriptions for AMSA surveyors may be viewed at <http://www.amsa.gov.au>.

4.4.1.2 The Inspection

Further all ship inspections are conducted using the ship inspection record book which contains an inspection checklist of items for the inspector to "work through" so that all Australian PSC inspections follow a similar format.

The record book also contains two forms for issue to the shipmaster on completion of the inspection. Form A is the report of the PSC inspection that is issued after every PSC inspection. Apart from details of the ship, details of its various statutory certificates and classification survey data the inspector also records on form A whether any deficiencies were detected or not and whether the ship was detained. In the event the ship was detained and subsequently released from detention, the form also records the date of release from detention.[110]

Form B describes each deficiency observed by the inspector and the action required to be taken in respect of each. Specific code numbers are issued for different remedial actions that may be required.

These forms are printed in triplicate on copy paper. The original is issued to the Master, the first copy sent to AMSA head office and the third remains in the book that is retained as a record of the inspection. In the event the ship is detained, AMSA procedures are for copies of Forms A & B also to be sent to the Flag State, IMO and the responsible organisation[111] in accord with IMO Res.A.787(19) provisions.

4.4.2 Ship Inspection Risk Management

4.4.2.1 Targeting

There are about 65 ports (some quite remote) around Australia where foreign ships call, of which only 14 are manned by AMSA surveyors.[112] Therefore, to better utilise resources and attempt to target the most risky vessels AMSA has developed a Ship Inspection Decision Support System (SIDSS). This model uses parameters (based on evaluation of statistical data collected since 1995) identified as being statistically indicative of the "propensity to be substandard" of a particular ship, (such as, Ship type; Flag of Registry; Classification Society; Age; Prior Inspection; History and Time since last special Survey), to allocate risk ratings to individual ships scheduled to call at Australian ports. This program is subject to continuing refinement by consultant statisticians and other experts.[113]

4.4.2.2 Focussed Inspection Campaign

Another "tool" AMSA uses to manage risk is the focussed inspection campaign.[114] These entail concentrating inspections on particular risk aspects for a defined period. The purpose here is to encourage owners and operators to pay particular attention to specific aspects identified as being "generic" problem areas based on inspection statistics.

Ships are large and complex structures and it must be recognised that a typical PSC inspection[115] can at best be a very broad-brush appraisal capable of only detecting relatively obvious deficiencies. Less obvious deficiencies are usually only detected by

---

[110] Generally the longer a ship is detained the more adverse the opinion of it will be with commensurate commercial implications for owners.
[111] Typically classification society which acted on behalf of flag State in issuing relevant certificates.
[112] PSC 2001 (n.19) p.6.
[113] Id.
[114] Ibid, p.3.
[115] Typically lasting 4-8 hours.

chance or intuition on the part of the inspector who goes looking for the weakness that his "gut feel" tells him is there.[116] It is suggested that the value of PSC lies as much in its deterrent effect and its capacity to educate as in detecting and detaining obviously substandard vessels. The value of the focussed inspection program where owners/operators are informed in advance of the increased concentration on particular aspects is arguably directed towards the deterrence and education aspects of PSC rather than that directed towards detection.[117]

4.4.3 International Cooperation

AMSA is an active member of the Indian Ocean MOU and the Tokyo MOU. In addition AMSA openly publishes relevant PSC inspection data on its website to share information of substandard ships freely.

This information about a ship that may be published and the manner of such publication is prescribed by *Marine Orders Part 55, Publication of Inspection Data, Issue 1*.[118]

5 COMMERCIAL IMPLICATIONS OF PORT STATE CONTROL

5.1 CONSEQUENCES OF A PORT STATE DETENTION

International Conventions sanction national laws vesting unilateral powers in PSCO's to detain ships under certain circumstances. Unlike the arrest of a ship, there is no requirement for prior consideration of the relative merits of detention by a judge.

Although there is some attempt to temper this power in International Conventions[119] ultimately the unilateral power to provisionally detain a vessel is vested in the PSC authority and in most if not all jurisdictions this is delegated to individual PSCO's.

In practice, therefore, there is no legal avenue for a shipowner to prevent a provisional detention order being issued[120] and, once detained, the Owner can not immediately procure the ship's release by lodging financial security[121] with relevant parties as can normally be done in the case of an arrested vessel.

In general, release from detention is only achieved by demonstrating that the deficiencies relating to the detention have been satisfactorily rectified. In most instances these are achieved relatively quickly and often before the vessels scheduled departure from port, in which case, there is often no apparent penalty. However in case of serious deficiencies or in cases where there is delay in remedying deficiencies,[122] the prevention of the ship from leaving port can have serious implications for many parties.

In a sense, these consequences can be viewed as coercive rather than punitive in that they create an incentive for parties with the capacity to weed out substandard shipping to do something about it.

---

[116] AMSA refer to this as "local knowledge" in PSC 2001 at p.6, although it is suggested that the term used here more accurately describes the "intuitive skill" that some experts appear to possess.

[117] Although of course if operators ignore the "notice" and do not ensure strict compliance in the nominated area, detection of breach will be more likely.

[118] Order No 7 of 1997.

[119] For example see SOLAS Chapter 1 Regulation 19(f).

[120] Apart of course from the obvious one of ensuring that the vessel is properly maintained and operated.

[121] Such as a Letter of Guarantee from the P&I Club.

[122] For example because of delay in obtaining spare parts or locating crew members certificates of competency.

5.1.1 For the Shipowner/Charterer

Ships are expensive assets with high capital value and equally high operating costs. Detention therefore has significant cost implications for the shipowner, not only in possible loss of revenue but also because unplanned repairs or other remedial work obliged to be undertaken at short notice is inevitably more expensive.

However, even in cases where the ship is not apparently delayed[123] there is a negative aspect to detention, in that it reflects poorly on the particular vessel as well as on the reputation of the owner/manager/charterer with commensurate impact on future employment prospects.

5.1.1.1 Off-Hire

Under a voyage charter party when a vessel is detained and consequently delayed from completing the voyage within the time originally budgeted for, the increased voyage cost clearly falls to the owner. However in the case of a time charter[124] because hire remains payable unless the charterer can establish that the detention falls precisely within the wording of an off hire clause, the owner may be entitled to continuing hire payments even while the vessel is detained.

Quite simply, as the contractual obligations of the parties are governed by the terms of the Charterparty, the precise wording of the off hire clause is crucial. Whether the charterer accepts the risk of detention or not will ultimately be a function of the relative negotiating positions of the parties and the competence of their respective representatives in securing the best overall outcome for their principals.

It has been suggested that the relevant "boiler plate" clause[125] in *Baltime 1939* for example may not be sufficient to allow for off hire.[126] On the other hand, this writer suggests that the off hire provision in *Shelltime 4*[127] which gives the Charterer the right to declare the vessel "off hire from the commencement of such loss of time until she is again ready and in an efficient state to resume the service from a position not less favourable to Charterers than at which such loss of time occurred", is only triggered if "loss of time" occurs. In other words, if the deficiencies are remedied within the scheduled port time of the vessel and no disruption or delay to cargo operations was caused, it is suggested that the Charterers will not be entitled to declare the vessel off hire for the duration the detention order was in force.

In the event the charterparty is silent on the question of PSC detention it will be necessary for the court to determine who is to wear the burden. In this regard it should be noted that the detention itself is merely the consequence some other "breach", so the matter may well be decided on the basis of whether the breach that gave rise to the detention in itself triggers the off hire provision. In the *Roachbank*[128] the applicable test was prescribed as the answer to the question whether the vessel is "fully efficient and capable in herself of performing the service immediately required by the Charterer". An important point in this decision was the stipulation that if the word "whatsoever" was not used and there is no additional clause clarifying the meaning of "detention/arrest",

---

[123] Because deficiencies are remedied within the scheduled "port time".
[124] Under English Law and in jurisdictions such as Australia which look to English law to form the basis of their legal framework.
[125] Clause 11, *Suspension of Hire etc.*
[126] Gard News 155 at <http://www.gard.no/publications/gardnewsr/a53/a55/art>.
[127] At Clause 21 (a) (v) which reads "due to detention of vessel by authorities at home or abroad attributable to legal action against or breach of regulations by the vessel, the vessels owners, or Owners (unless brought about by the act or neglect of Charterers)…".
[128] (1987) 2 Lloyd's Rep. 498; (1988) 2 Lloyds Rep. 337.

detention would not trigger the off hire provision because it would originate from "outside" the vessel. Of course in such a situation, the cause of the detention itself may overcome the difficulty, as discussed above, in the event that the detention can be shown to be justified.

5.1.1.2 Notice of Readiness & Laytime

For Notice of Readiness (NOR) to be valid and laytime to commence, the vessel must have arrived at the stipulated place and the underlying facts relating to the notice must be true at the time the notice was issued. If the vessel is subsequently found to have a particular deficiency, which is subsequently remedied after service of the NOR, then the NOR would be invalid. In the *Delian Spirit*[129] it was established that "readiness" relates to both physical and legal readiness. Accordingly, a subsequent PSC detention might invalidate the NOR.

Detention of a vessel and consequent delay to its schedule could also result in a vessel missing the laycan for a subsequent fixture.

5.2 WRONGFUL EXERCISE OF PSC POWERS

There are two obvious areas of concern with respect to incorrect or wrongful exercise of PSC powers, namely:

a) unjustified detention; and
b) release of information obtained pursuant to exercise of PSC powers, which could be detrimental to the interests of particular parties.[130]

Ship operating is an expensive business and potential costs and losses in the event of a detention can be significant.[131] It is natural that in the event that parties suffer large losses, there will be a determination to recover such loss from others.

5.2.1 Liability of PSC Authorities and PSCO's

In Australia s. 211 of the *Navigation Act* allows for compensation to be paid to Owners of ships provisionally detained without reasonable and probable cause and the same section also allows AMSA to recover its costs incurred as a result of having to detain a ship from the shipowner.[132] As the clause expressly refers to provisional detention, it is arguable that in the event of a "final" detention, AMSA has no liability, however in a practical sense this issue is likely to be moot. It is also noteworthy that where AMSA acts pursuant to complaint by another and is subsequently liable to pay the shipowner compensation, s.214 provides for AMSA to recover same from the complainant, while s.213 allows AMSA to demand security costs from complainants.[133]

---

[129] (1971) 1 Lloyd's Rep. 506.

[130] During the course of a PSC inspection and particularly when a vessel is detained, PSC authorities usually obtain access to much information which the shipowner would normally not readily disclose to competitors and others. Release of this information to those who would not normally have access to it could be damaging.

[131] "Ball park" daily charter rates for a typical "handy" bulk carrier of about 30,000 MT deadweight carrying capacity is US$10,000, rising to nearly double this for a large bulk carrier of tanker in a "normal market" In the "bullish" market of first quarter 2004, rates five times as high are not uncommon. If port charges and other losses are also considered it will not be difficult to appreciate that even a relatively short detention can result in "losses" in the hundreds of thousands of dollars.

[132] *Navigation Act* s.211 (1).

[133] Except where the complaint is made by 3 or more of the crew members and in the opinion of AMSA is not frivolous or vexatious – s.213(2).

On the other hand, for obvious reasons, the Australian parliament has taken the step of protecting PSCO's against being held personally liable. Section 384 of the *Navigation Act* provides:

> (1) No action shall lie against any official for anything done under the provisions of the Act, unless direct proof of corruption or malice be given.
> (2) Any such action must be commenced within 3 months from the date of the act forming the subject of such action.
> (3) If the plaintiff in any such action discontinues, or is non-suited, or if judgement is given for the defendant, the latter shall have treble costs.

5.2.2 Avenues of Appeal

Although many, if not most, countries have provisions allowing for appeal against PSC detentions in most cases, for practical reasons, these are not exercised. As of February 2000, it was reported that "there appeared to be no successful cases of recovery against wrongful detention in the UK, Sweden, Norway, Denmark, Spain, France, Germany or Holland, although one unsuccessful application was made in Holland in 1994 concerning the *Pauline Oliveiri.*[134]

In Australia the avenue for appeal on the merits of a decision to detain a vessel is via the Administrative Appeals Tribunal (AAT) pursuant to the *Administrative Appeals Tribunal Act 1975.* A review by the AAT can result in the decision being affirmed, a new decision being substituted by the Tribunal or a reference back to the original decision maker for reconsideration.

In the case of a dispute on a point of law, approach may be made to the Federal Court pursuant to the *Administrative Decisions (Judicial Review) Act 1974* (Cth). A review under this Act may lead to the:

(1) Grant of an injunction;
(2) Grant of a statutory order in the nature of prerogative writ, other than habeas corpus;
(3) The making of a declaratory order;
(4) Grant of an Order to Review.

The *Navigation Act* s.377F allows application to be made to the AAT for review of:

(1) A decision under ss 210(1) provisionally to detain a ship;
(2) A decision under ss 210(6) finally to detain a ship or to order its release on conditions
(3) A decision under ss 210(7) refusing to order the release of a ship; or
(4) A decision under ss 213 (1) requiring a complainant to give security for costs and compensation

Section 25(4) of the *Administrative Appeals Tribunal Act 1975*[135] gives the Tribunal power to review any decision in respect of which application is made to it under any enactment, while s.43(1) allows the Tribunal to exercise all the powers and discretions enjoyed by the decision maker pursuant to the relevant enactment. The AAT will therefore have the same power as a PSCO to board the vessel, conduct interviews of the crew, etc. to fully investigate the complaint.

Section 44 of the *AAT Act* allows for appeal against a decision of the AAT to the Federal Court, but only on points of law.

---

[134] Gard News 155 at <http://www.gard.no/publications/gardnewsr/a53/a55/art>.
[135] Hereafter *AAT Act.*

5.2.2.1 Appeal to AAT against Decision by AMSA

As the process can take some considerable time, an appeal to the AAT in the event of a provisional detention is not a practical choice in the case of the vast majority of PSC decisions, particularly those provisionally to detain a vessel. In the case of detention, in the vast majority of instances, the most expeditious and economical manner to secure release would be to remedy the identified deficiencies and this is the route most often taken by Owners.

Shipowners and others connected with the ship and voyage also stand to suffer loss as a consequence of the misuse of confidential information obtained by PSC authorities through exercise of their considerable powers. However, publication of data is one of the few functions under the *Navigation Act* that is not reviewable by the AAT.

6 CONCLUSIONS

It is submitted that, with respect to managing the risk to the local environment and economic interests posed by substandard shipping, it is not sufficient to merely expect that flag state administrations live up to their obligations even while maintaining continuing and concerted effort towards this end.

Equally, there is a compelling argument in favour of simultaneous domestic regulation of shipping simply because the potential damage that may be wrought by a maritime casualty has intolerable implications for local interests.

The most effective method of achieving this is through the Port State regime, for a range of reasons, including the following:

1. It is sanctioned by the United Nations and consistent with the arguments in favour of comity in international maritime law;
2. The PSC program specifically addresses the issues relevant to managing the risks posed by substandard shipping as opposed to other risks not exclusive to shipping such as security and quarantine issues;
3. The commercial consequences of breach of PSC requirements should in time introduce an element of self-regulation by industry and they create an incentive for parties with the capacity to weed out substandard shipping to do something about it.

Unlike countries geographically located adjacent to major shipping lanes, such as the English Channel or the Malacca Straits, Australia is effectively at the "end of the line" and does not have to contend with risk posed by a high volume of through traffic. Therefore an effective PSC program which regulates the quality of ships that call at Australian ports will simultaneously regulate the quality of the majority of ships transiting through territorial waters and the maritime jurisdiction in general.[136] Equally, as a major consumer of freight, Australia is in a very good position to manage the quality of shipping that calls at its ports,[137] as in most instances the bigger the customer, the greater its ability to influence the habits of suppliers. It should also be recognised that well operated and managed shipping does not necessarily translate into higher transportation costs. Safer ships should contribute to greater overall efficiency and economy resulting in savings through reduced damage and loss, reduced insurance premiums, improved vessel turnaround times, lower stockholding costs, etc. all of

[136] With the exception of ships enroute to New Zealand, fishing vessels and vessels on exceptional voyages, such as the vessels transporting spent nuclear fuel from the UK to Japan and vice versa.

[137] Apart from being a major exporter of large volumes of bulk commodities, because of Australia's geographical location, the freight tonne-mile demand is increased. As in all markets, a major consumer has better leverage over suppliers.

which should offset higher unit freight costs resulting from use of better maintained and managed ships.

Towards this end AMSA has had a good record not only in progressively improving the quality of ships calling at Australian ports but doing so in a manner compatible with continuing sustainability of the program and acceptable to industry.[138] However, this is an effort that will have to be continued and constantly revised to remain relevant as industry practice, ships and risk evolve. Any diminution in effort or commitment will inevitably result in progressive regression.

There is a real danger that the more effective the PSC program is, the greater the perception that the need for such a program is being overstated. To an extent this may already be happening and the quite reasonable concern over security and border protection could threaten to diminish appreciation of the value of an effective PSC program particularly if the distinction between the two is not appreciated. It should be recognised that the skill sets required to manage security and border protection are quite different from those required to manage risk posed by substandard ships and to attempt to meld these two separate imperatives may be counterproductive.

An effective PSC program will depend to a very great extent on the competence of the PSCO's and the support systems they have access to. Ships are very large and complex structures and it will be practically impossible to fully inspect even a relatively small commercial vessel to ensure compliance with applicable legislation in the short space of time available to carry out a typical PSC inspection.[139] The effectiveness of an inspection will therefore depend very much on the technical knowledge and experience of the inspector in being able to identify potential areas for detailed scrutiny after a brief initial appraisal. Towards this end possession of relevant technical qualifications and practical merchant shipping experience is invaluable. It is respectfully submitted that suggestions to the effect that military trained personnel could perform efficiently as PSCO's is dangerous and reflects confusion about the distinction between the imperatives of the PSC initiative and the concerns about "border protection" and security.

An effective PSC program is critical to protecting the marine environment, complying with the nations' international obligations and supporting domestic economic interests. It is vital that the government, industry and the public fully and appropriately support the national agency vested with this task.

[138] A Western Australian Marine Industry Workshop in Fremantle in early August 2003 was informed by Dr Ken Moss, the then Chairman of AMSA, that the standard of ships trading to West Australian ports has been improving over the past two years - as reported on page 7 of *Lloyds List DCN,* 28 August 2003.
[139] Typically 4 – 8 hours.