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AN INQUIRY INTO THE INCREASING USE OF SO-CALLED FLAG OF CONVENIENCE SHIPPING IN AUSTRALIA

COMMENTS BY THE INTERNATIONAL CHAMBER OF SHIPPING (ICS)

The International Chamber of Shipping (ICS) is grateful for the opportunity to submit comments to this important Australian Senate inquiry which is being closely followed by the international shipping community.

ICS is the principal global trade association for ship operators, representing all sectors and trades and over 80% of the world merchant fleet. ICS membership comprises national shipowners' associations from 37 countries, including Maritime Industry Australia Limited (our ICS Full Member) as well as Shipping Australia Limited (an ICS Associate Member). ICS understands that both of our Australian members are also making submissions to this Inquiry.

ICS represents the global shipping industry with its global regulator, the International Maritime Organization (IMO) and all other international bodies which impact on shipping. ICS is also the official Social Partner co-ordinating maritime employers at the International Labour Organization (ILO), where it negotiated the text of the ILO Maritime Labour Convention (MLC), which entered into force worldwide in 2013. In the Australian context, Maritime Industry Australia Limited is the official employers' Social Partner for all ILO maritime matters.

A copy of the ICS Shipping Industry Flag State Performance Table 2014/2015 is attached for information and may be reproduced in its entirety.

NB: The following remarks only concern merchant ships; they do not relate to fishing vessels which are part of a completely different industry operating, for the most part, under different international regulations.

General Remarks

The carriage of energy, raw materials and goods by sea is a massive global industry facilitating about 90% of world trade. Maritime activity supporting offshore exploration and energy production activities is also important. In the 21st Century there is nothing inherently unusual about an international ship registration system in which the owner of a ship may be located in a country other than the State whose flag the ships flies.

In his opening remarks to the IMO Marine Environment Protection Committee, in May 2015, the IMO Secretary-General, Mr Koji Sekimizu, remarked “*We have moved beyond ‘flags of convenience’... they have become international registries with international responsibilities.*”

The term used by the United Nations and IMO Member States to describe those flag States which permit the registration of ships that may be beneficially owned in another country is ‘open register’. However, the shipping industry, as represented by ICS, actually believes that distinctions between open registers and so-called ‘traditional’ maritime flags are not relevant today, particularly when making generalisations about the effective implementation of international regulations governing safety, environmental protection and employment standards.

According to statistics published by the United Nations Conference on Trade and Development (UNCTAD), the largest fleets (in gross tonnage) operating under what are generally accepted to be open registers are, in descending order of size: Panama, Liberia, Marshall Islands, Singapore, Bahamas, Malta, Cyprus and Isle of Man (UK). Other open registers each have a tonnage of less than 1% of the global fleet.¹

Collectively, 64% of the world merchant fleet is registered under these eight largest open register flag States, all of which feature on the ‘white lists’ of quality flags published by the two principal regional Port State Control (PSC) authorities: the Tokyo (Asia Pacific) MOU (which includes Australia) and the Paris (European/North Atlantic) MOU.²

These PSC ‘white lists’ are compiled on the basis of the thousands of co-ordinated ship inspections that are undertaken each year by national PSC authorities throughout these MOU regions, to enforce compliance with IMO and ILO maritime Conventions governing *inter alia* maritime safety, pollution prevention and seafarers’ employment standards. On the basis of the low number of deficiencies and detentions recorded for the inspection of ships under the control of the eight largest open registers, and the fact that all have undergone audits under the IMO Member State Audit Scheme, all of these flag States are regarded by the national PSC authorities covered by the Tokyo and Paris MOUs as being ‘low risk’ for the purpose of Port State Control targeting.

¹ UNCTAD Review of Maritime Transport, 2014.

² Tokyo MOU on Port State Control Annual Report 2014; Paris MOU on Port State Control Annual Report 2014.

These eight open registers (responsible for 64% of the fleet) have all ratified every principal maritime Convention currently in force adopted by the IMO and the ILO, governing safety, pollution prevention, training standards and employment conditions, whereas there are a number of these maritime Conventions that have still not yet been ratified by a large number of OECD flag States.³ The effective implementation and enforcement of these Conventions on board those ships for which these large open registers are responsible is demonstrated by their impressive Port State Control records.

ICS notes that the Senate inquiry concerns *so-called* 'Flags of Convenience'. In the opinion of ICS, this is actually a pejorative term that has its origins with a political/ industrial relations campaign waged by the International Transport Workers' Federation (ITF) since the 1940s, originally in response to the use by U.S. shipping companies of the Panama and Liberia flags. The term is not recognized by those United Nations agencies that regulate the global shipping industry such as IMO and ILO, or by the United Nations itself which has oversight of the United Nations Convention on the Law of the Sea (UNCLOS).

The designation of a flag State as an 'FOC' by the ITF is actually a purely unilateral decision, taken by its Fair Practices Committee as part of its internal industrial relations policies. According to the ITF website, *'a flag of convenience ship is one that flies the flag of a country other than the country of ownership'*.

However, the ITF currently only lists 34 flags⁴ as being 'FOC', a designation primarily determined by industrial relations considerations rather than objective performance with respect to the level of safety, environmental protection or the employment regulations enforced by the flag State. In fact, there are many other flag States to which the ITF's simple definition would also apply, including many so-called 'traditional' maritime nations in OECD countries which, because of its industrial relations policy, ITF does not appear to designate as 'FOC'.

Ironically, because of the influence of ITF's industrial relations policy, the pay received by many seafarers from developing countries, serving on ships under a flag designated as 'FOC' by ITF, is actually superior to those serving on ships under developing countries' flags which are not open registers. This is because many seafarers on 'FOC' ships are subject to collective bargaining agreements approved by ITF, without which the ships might be subject to boycott action by ITF's dock worker affiliates worldwide. However, this boycott policy is not usually applied by ITF

³ All have ratified SOLAS 74 (and 88 Protocol); MARPOL (including Annexes I – VI); Load Line 66 (and 88 Protocol); STCW 78 (training); ILO MLC 96 (employment standards); CLC/FUND (pollution liability) – with the exception of one of these eight flag States which has not ratified one of the MARPOL Annexes for technical reasons, but which nevertheless enforces the requirements on board its ships.

⁴ Antigua and Barbuda; Bahamas; Barbados; Belize; Bermuda (UK); Bolivia; Burma; Cambodia; Cayman Islands (UK); Comoros; Cyprus; Equatorial Guinea; Faroe Islands (FAS); French International Ship Register (FIS); German International Ship Register (GIS); Georgia; Gibraltar (UK); Honduras; Jamaica; Lebanon; Liberia; Malta; Marshall Islands; Mauritius; Moldova; Mongolia; Netherlands Antilles; North Korea; Panama; Sao Tome and Principe; St Vincent; Sri Lanka; Tonga; Vanuatu.

to ships on what it regards as 'non-FOC' flags, even if the employment conditions might be inferior.

The following remarks refer to the specific Terms of Reference on which the inquiry has sought comment. These answers are relevant to all ships trading to Australian ports, and to those exercising 'innocent passage' as defined by UNCLOS in Australia's territorial waters:

a) The effect on Australia's national security, fuel security, minimum employment law standards and our marine environment;

National security

All foreign ships trading with Australia are subject to the requirements of the IMO International Ship and Port Facility Security (ISPS) Code, which is mandatory under the SOLAS Convention. All ships are also subject to national regulations introduced by Australian Customs, including advance cargo screening rules, and other procedures and standards consistent *inter alia* with those adopted by the World Customs Organization.

Foreign seafarers hold Seafarers' Identity Documents (SIDS) issued as required by applicable ILO Conventions. They are subject to Australian immigration rules which for some nationalities necessitate visas in order to enjoy shore leave (contrary to practice in many other port States worldwide where applicable visa requirements are often waived for seafarers).

Fuel security

Foreign ships have a positive impact on fuel security since Australia is dependent on foreign ships for the transportation of imports of crude oil and petrochemical products, as well as the export of Australian LNG to overseas markets.

Minimum employment law standards

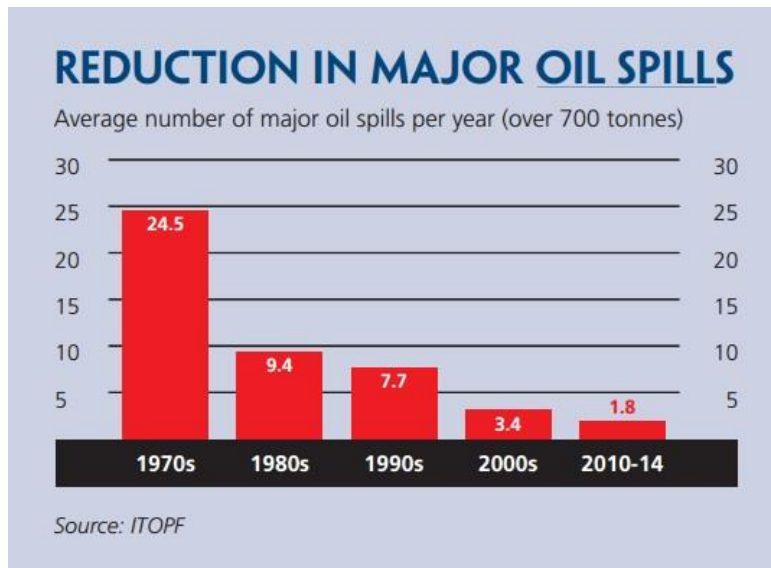
ICS believes that foreign ships have no direct impact on Australia's minimum employment law standards. Except in those trades where Australian requirements may also apply, foreign seafarers are subject to the employment law of their flag State and their country of residence, as well as the requirements of the ILO Maritime Labour Convention (discussed in more detail below).

Marine environment

With respect to the impact on the marine environment, there have been dramatic improvements to the industry's performance in recent decades. In the past 25 years, the average number of oil spills from tankers has halved. The latest figures since 2010⁵ are the lowest yet with less than two spills (over 700 tonnes) per year worldwide (see graph below), although the goal of the industry is to have zero pollution incidents.

⁵ Source ITOPF.

In accordance with the IMO MARPOL Convention, the last single hull tankers (replaced with pollution preventing double hull designs) will have been completely phased-out worldwide and sent for ship recycling during 2015.



The IMO Ballast Water Management Convention, which will protect Australian ecosystems from the invasive species unwittingly transported by ships, is expected to enter into force worldwide in 2016. Once outstanding implementation problems have been fully resolved, all of the large open registers that have not already done so are expected to ratify immediately.

IMO has also established a comprehensive framework of international pollution liability and compensation Conventions, designed to address and respond swiftly to incidents which might result in pollution from a ship. These include the Civil Liability (CLC) and Fund Conventions addressing pollution from spills from oil tankers, and the Bunkers Convention addressing pollution from any spill of ships' bunker fuel. Australia is a Party to these Conventions, as are the largest open registers mentioned above and most other flag States.

These Conventions contain a number of important provisions designed to ensure swift and effective compensation including: the imposition of a strict liability on the part of the shipowner; the channelling of all liability to the shipowner irrespective of which party was actually at fault (thereby avoiding legal wrangles as to liability/fault, for example, between the shipowner and the charterer); a compulsory insurance scheme; and the right of claimants to take direct action against the insurer for compensation in the event that the shipowner is unable to pay the liability. The compulsory insurance scheme means that the shipowner must have satisfactory insurance cover for potential liabilities under the Convention, and must obtain a State Party approved certificate to demonstrate that such insurance is in place.

These IMO Conventions contain limits of liability sufficient to meet current level of claims (while other provisions allow the limits to be increased if, according to agreed

criteria, they are deemed to be insufficient). These provisions apply to all contracting States Parties including open registers.

b) The general standard of Flag of Convenience vessels trading to, from and around Australian ports, and methods of inspection of these vessels to ensure that they are seaworthy and meet required standards;

Under UNCLOS, all ships must be registered with a country – the vessel’s flag State – which has jurisdiction over the ship and is responsible for overseeing its compliance with relevant international safety, environmental and employment standards, most of which are adopted by IMO and ILO, and to which Australia is normally a Party. Virtually every flag State, whether ‘open register’ or not, has ratified the core IMO Conventions addressing safety and environmental standards, the SOLAS and MARPOL Conventions.

Flag State inspections are frequently delegated to ‘Recognized Organizations’, which are usually classification societies that provide expert maritime survey and auditing functions on behalf of flag States through a global network of surveyors and offices. Ships also need to be certified as being ‘in class’ in order to obtain insurance, which itself is compulsory under IMO Conventions. Third party liability insurers also conduct their own inspections, as do many charterers, particularly those operating in bulk trades (exporting Australian iron ore coal) and oil companies chartering tanker or offshore (energy industry) support vessels.

When calling at an Australian port, IMO and ILO Conventions enable Australia to conduct Port State Control (PSC) inspections in order to ensure that visiting ships comply with all applicable IMO and ILO standards. Under the IMO *‘no more favourable treatment’* principle, and provided Australia has ratified the Convention concerned, Australia can exercise PSC to enforce international standards, even if the ship is registered with a flag State that has not ratified the relevant Convention. PSC officers will record any deficiencies and if sufficiently serious will detain the ship (at great expense to the owner) until the deficiencies have been rectified.

Port State Control has become far more sophisticated in recent years. The Australian Maritime Safety Authority (AMSA) is a member of the Tokyo (Asia-Pacific) Memorandum of Understanding (MOU) on Port State Control, through which PSC inspections are co-ordinated throughout the entire region using a common database to ensure that all ships are inspected at appropriate intervals, with ships being targeted for inspection more frequently, or in extreme cases, immediately, according to the ship’s risk profile.

In addition to taking account of the inspection record of the ships throughout the Tokyo MOU region, the targeting by AMSA will *inter alia* take account of other factors including the overall inspection record of the ship’s flag State. The Tokyo MOU publishes an annual ‘white list’ of low risk flags and a ‘black list’ of flag States whose ships have recorded the most deficiencies or detentions.

As mentioned above, the eight largest open register flag States, collectively responsible for 64% of the world merchant fleet, all feature on the ‘white lists’ of

quality flags published by the Tokyo (Asia Pacific) MOU and also the Paris (European/North Atlantic) MOU.

The most recent Port State Control reports by the Australian Maritime Safety Authority (AMSA) also show that many open registries have been among those with the lowest detention rates, despite accounting for the majority of PSC inspections.⁶

c) The employment and possible exposure to exploitation and corruption of international seafarers on Flag of Convenience ships;

Shipping is the only industry with a comprehensive framework of detailed employment regulations that is enforced on a global and uniform basis, as a result of the standards developed by the ILO.

In a major exercise, of which the shipping industry is very proud, most of the previously existing ILO maritime standards have been consolidated into a single instrument, the Maritime Labour Convention (MLC). The MLC entered into force in 2013 and is now being enforced on visiting ships via Port State Control in Australia, which is a Party to the Convention, something which the industry welcomes. The ILO MLC was negotiated by the world's governments, maritime employers (co-ordinated by ICS), and seafarers' unions co-ordinated by ITF. This tripartite process included the Australian Government, Maritime Industry Australia (then known as the Australian Shipowners Association) and Australian seafarers' unions.

The MLC addresses a wide range of standards including: the obligations of shipping companies with respect to seafarers' contractual arrangements; the responsibilities of recruitment agencies; working hours; health and safety; crew accommodation; catering standards; and seafarers' welfare. New measures have been agreed and will enter into force in 2017 to ensure that shipping companies must have financial guarantees in place to ensure that in the unlikely event of abandonment, the crew will be repatriated and unpaid wages will be recovered.

The MLC also re-enforces the ILO principle of freedom of association and the right of all seafarers to join a trade union of their choice. Another important protection under the MLC is the requirement for ships to have an independent complaints procedure, which must be fully instituted in order for a ship to achieve certification and to subsequently have certification revalidated during MLC flag State inspections that must take place twice every five years. Shipowners must ensure that their ships have procedures on board for fair, effective and expeditious handling of seafarer complaints alleging breaches of the Convention. Seafarers can also communicate any complaints to third parties including trade unions, welfare agencies and Port State Control authorities (all seafarers now having access to mobile phones).

⁶ In 2014, 66% of AMSA PSC inspections were carried out on ships from the eight largest open registers. The average detention rate for these flags was 7.2%, against an overall average detention rate of 7.2%. In 2013, these eight flags accounted for 64% of AMSA PSC inspections, with an average detention rate of 7.0% against an overall average detention rate of 7.0%. In 2012, the same flags accounted for 65% of AMSA PSC inspections, with an average detention rate of 6.1% against an overall average detention rate of 6.6%.

The MLC is now being enforced on a global basis. The Convention requires flag States that have ratified the Convention (normally using Recognized Organizations) to inspect ships in their fleet in order to verify that MLC standards are in place, with compliant ships being issued with a Maritime Labour Certificate. The flag State is also required to review the shipowners' plans for ongoing compliance, as set out in a Declaration of Maritime Labour Compliance (DMLC). All Parties to the Convention, including Australia, are also able to conduct Port State Control inspections on any ship calling in their ports, regardless of whether the ship's flag State has ratified the MLC.

The world's largest open registers were among the very first to ratify and implement the MLC following its adoption by the ILO in 2006. Many so-called 'traditional' OECD flag States have yet to ratify or fully implement the Convention, thus leaving their ships vulnerable to increased likelihood of PSC inspection but without administrative support to the crew from the flag State.

The shipping industry is also probably unique in that, via the ILO, it has an agreed international minimum wage for (non-officer grade) Able Seafarers. This is now referenced in the MLC and is periodically updated (most recently with effect from January 2015) by the ILO Joint Maritime Commission, which comprises employers' and union representatives from around the world, including maritime employers' and seafarers' union representatives from Australia.

Please also see our general remarks, above, about pay on board ships registered with flags that are designated by ITF as 'FOC'.

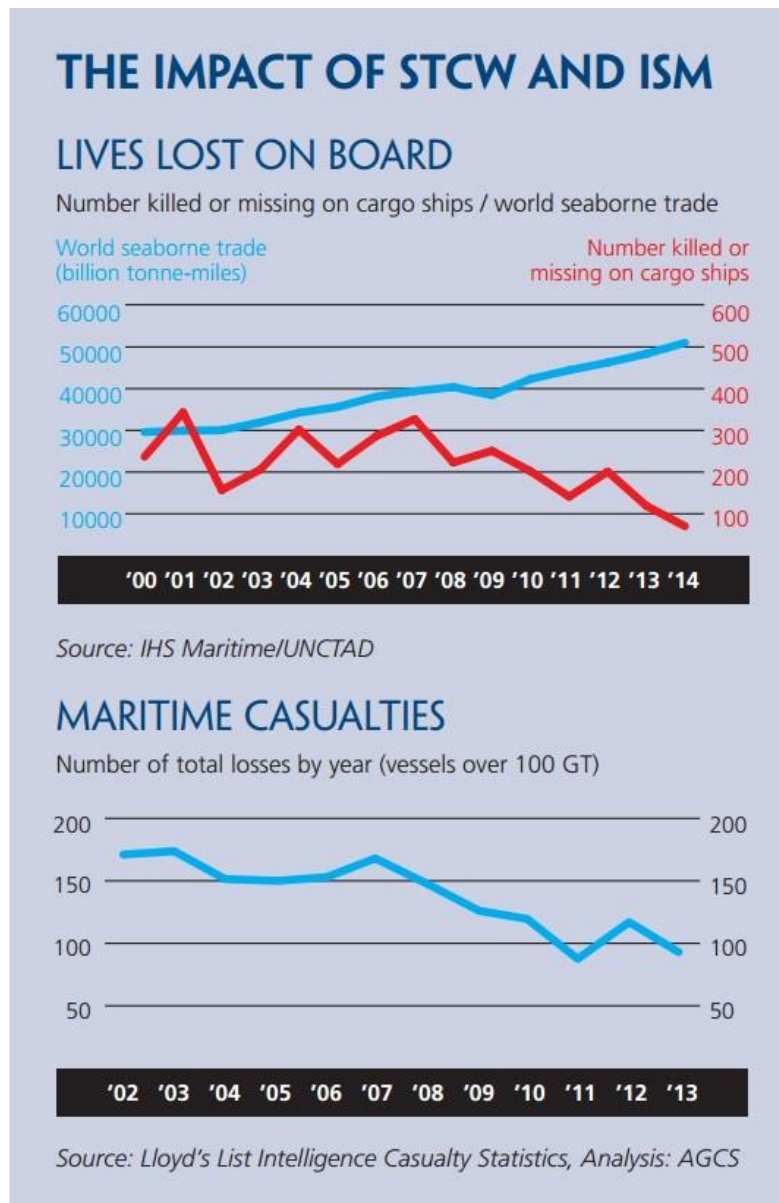
d) Discrepancies between legal remedies available to international seafarers in state and territory jurisdictions, opportunities for harmonisation, and the quality of shore-based welfare for seafarers working in Australian waters;

ICS is not qualified to comment on issues concerning jurisdiction and welfare in different Australian states and territories, but sees no difference as to how these might be more or less relevant to foreign ships using open registers than to other flag States.

e) Progress made in this area since the 1992 House of Representatives Standing Committee on Transport, Communications and Infrastructure report *Ships of shame: inquiry into ship safety*

The Ships of shame inquiry was a ground breaking and influential exercise that still resonates throughout the global industry today, particularly with respect to bulk carrier safety. The safety record of these vessels has improved dramatically as a result of measures subsequently taken by IMO and its Member States, as well as measures taken by industry and bulk carrier terminals. The number of maritime casualties and lives lost, especially in Australian trades, bears no comparison to the situation over 20 years ago, although challenges still exist outside of Australia.

In addition to the Maritime Labour Convention, the most important development since 1992 is probably the implementation of the IMO International Safety Management (ISM) Code, mandatory under the SOLAS Convention, which has applied across the world fleet since 2002. Under the ISM Code, all ships and shipping companies, regardless of flag, must now have a comprehensive Safety Management System (SMS) in place, governing every aspect of safety and environmental management, and subject to rigorous internal and external audit, in order to be issued by flag States with what is, in effect, a license to operate.



Another fundamental change was the adoption of the 1995 amendments to the IMO Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW). As well as mandating uniform standards of competence, regardless of the country responsible for training and certification, the revised STCW Convention placed new obligations on flag States to take direct responsibility for the standards of training and competence of foreign seafarers serving on their ships. This is of

particular relevance to open registers, on whose ships the majority of seafarers are recruited from other countries.

Since the adoption of the ISM Code and STCW 95, there has been a dramatic improvement in the industry's safety record (see graph above).

Since the *Ships of Shame* inquiry, it is fair to say that far more attention is now given by IMO, its Member States, and the industry itself to the critical importance of flag State performance.

On the one hand there has been a far more systematic and co-ordinated approach to Port State Control by the regional MOU authorities (which has been replicated around the world using the Paris and Tokyo MOUs as a model) with the result that it is now almost impossible for a ship using a poorly performing ship register to trade within these PSC regions without being targeted for frequent and rigorous inspection.

IMO, meanwhile, has introduced the IMO Member State Auditing Scheme, whereby maritime administrations are now subject to external audit by teams comprising representatives of other Member States, in order to identify areas that might require improvement, linked to IMO's Technical Co-operation programme. The IMO Audit Scheme will become mandatory in 2016. In practice, however, most responsible flag States have already undergone these IMO audits on a voluntary basis, in part because failure to do so would lead to the increased risk of their ships being targeted by Port State Control.

The industry itself has also pressed for the highest standards of flag State performance. ICS has developed criteria for what shipowners should reasonably expect of a responsible flag State, and publishes an annual Shipping Industry Flag State Performance Table which is widely used by ship operators, and is taken very seriously by all responsible flag States who are keen to ensure its accuracy (a copy of the latest ICS Table for 2014/2015 is enclosed with this submission).

There are a number of smaller flag States that still have considerable work to do, and ICS continues to suggest that shipowners should think very carefully about using such flags. The largest of these currently is Tanzania, but Mongolia, Moldova, Cambodia and Sierra Leone are also conspicuous examples, according to the ICS Table. In practice, however, very few ships are registered under such flags and they are unlikely to trade to nations that have well developed systems of Port State Control targeting, such as Australia.

f) Any related matters

Please refer to our general remarks at the start of this submission.

ICS hopes that these comments are useful. ICS will be happy to provide further information to the Australian Senate if requested, and to contribute further to this Inquiry if helpful.