

REVIEW OF THE SHIPPING REGISTRATION ACT 1981

**Department of Workplace Relations and Small Business
Australian Maritime Safety Authority
Bureau of Transport and Communications Economics**

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Executive Summary, Conclusions and Recommendations

Establishment of the Review

In response to the Report of the National Competition Policy Review Committee, the Commonwealth, State and Territory Governments agreed to review their legislation which may restrict competition.

The Treasurer released the Commonwealth Legislation Review Schedule on 28 June 1996. The *Shipping Registration Act 1981* (SR Act) is listed on the Schedule for review to commence in 1996-97. The Treasurer stated in his Press Release that the guiding principle of legislation reviews is that legislation should not restrict competition unless it can be demonstrated that the benefits of the restriction outweigh the costs and that the objectives of the legislation can only be achieved by restricting competition.

The Shipping Registration Act

The registration of ships has been a feature of maritime commerce for many centuries. In Britain it was the *Navigation Act 1660* which first required that ships be registered. Over the years the scope of English statutes was widened. A significant change in England's maritime law came in the mid-nineteenth century with the introduction of the *Merchant Shipping Act 1854*, entitled "An Act to amend and consolidate the Acts relating to Merchant Shipping". This Act was eventually replaced by the *Merchant Shipping Act 1894* (MSA 1894), Part I of which concerned registration.

Part I of the MSA applied throughout the British Commonwealth because it provided that a ship was a British ship if it was wholly owned by a British subject or corporation in any part of the Commonwealth. It provided the basis of Australia's ship registration regime until the enactment of the SR Act.

The SR Act came into effect on 26 January 1982 and its principal purpose was to provide Australia with its own regime for the registration of ships. The objectives of the Act are to compel the registration of Australian-owned ships and to provide for the registration of mortgages.

The review investigated whether the regulation in the Act is necessary. The investigation confirmed that the fundamental principle of public international law of the freedom of the seas means that the vessels of any nation, including land-locked ones, have access to all parts of the seas that are not included in the territorial sea or internal waters of another State.

There are two cardinal rules concerning freedom of the seas. The first is that the jurisdiction over a vessel resides solely with the State to which the vessel belongs and the second is that all vessels using the high seas must have a national character. Under public international law, the right of a ship to sail on the open seas is dependent upon its right to fly the national colours of a recognised country.

Reflecting this reality, international law gives every country, including those which are land-locked, the right to register ships. Article 91 of the United Nations Convention on the

Law of the Sea (UNCLOS) states, inter alia, that “Every State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly.” Article 92 of UNCLOS states, inter alia, that “ships sail under the flag of one State only and ... shall be subject to its exclusive jurisdiction on the high seas”.

The only way that Australia could dispense with having a ship register would be if a decision was taken not to allow any ships to fly the Australian flag, ie if a policy decision was made that Australia would not have its own register so that Australian shipowners would then be free to register their vessels in any country they choose. It is likely that such a policy decision would contravene Article 91(1) of UNCLOS which requires that there be a genuine link between a ship and its flag State. For those ships currently on the Australia register, particularly recreational craft, it would be difficult to prove a genuine link if they were all to be flagged in other countries.

The Review Team accepts that registration is a necessary prerequisite for ships to be able to legally navigate the high seas. It has concluded that it is appropriate for Australia to have legislation which conveys nationality to Australian-owned vessels.

Notwithstanding that it is necessary for Australia to continue to have ship registration legislation, there are no reasons why, from a public policy perspective, the Australian ship registration regime should continue to compel the registration of ships. Registration is a facility which should simply be available to shipowners to use if they need it and therefore the legislation should be phrased in terms of ships being entitled, rather than required, to be registered.

The registration of ship mortgages was a feature of the MSA 1894 and these provisions were included in the new Australian legislation. The Review Team concluded that it is not unreasonable that provisions dealing with mortgages over ships are required to be entered on a register maintained for the purposes of UNCLOS.

This is because the powers of a mortgagee are such that in certain circumstances the mortgagee acquires the right to take possession of the ship and thereby be in the position of the legal owner. For example, the mortgagee becomes entitled to the unpaid freight of the ship and may use the ship as if it were the owner. The mortgagee may sell the ship and confer a good title on the purchaser in order to recover a debt.

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

Provision for the registration of mortgages has existed in English legislation since the *Merchant Shipping Act 1854* and a large body of law has developed surrounding such legislation. The whole of this body of law is part of the Australian system of jurisprudence and it has its place in private international law where the law of the place of registration of a ship governs the rights of individuals over the property of the ship.

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

Impact of the Shipping Registration Act

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

The review found that there are essentially three benefits arising from the SR Act. These are the ability to sail overseas, gaining title as a proof of ownership and facilitating the provision of finance. It was not possible to value these due to their intangible nature.

There were three major strategic issues raised in submissions which have implications for the fundamental nature of the registration regime. These issues were

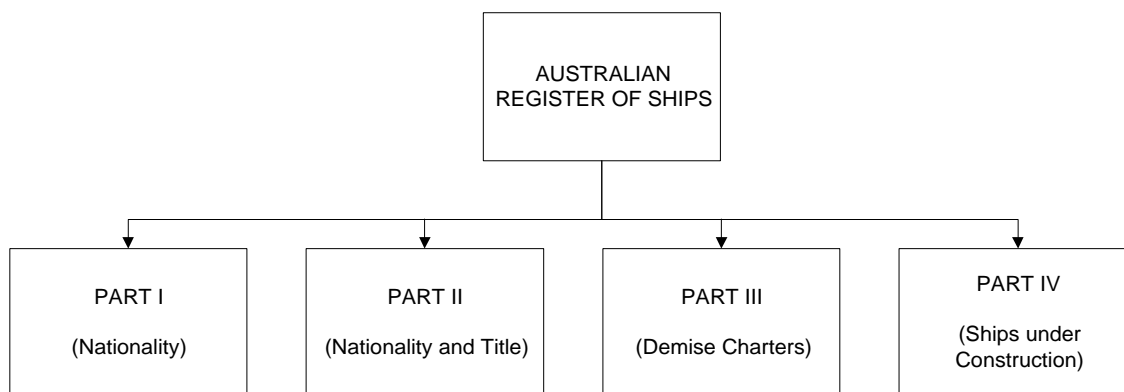
1. the need for simpler registration procedures for yachts (this would be applicable to all small vessels);
2. the registration system should convey indefeasible title to the vessel; and
3. the need for a notice-based system of recording ownership (as distinct from title) and financial interests in a vessel rather than the current title register.

It was the first of these that was the most important in terms of formulating an alternative registration regime. The problem experienced by owners of small craft is that, while most only need nationality in order to travel overseas, the Australian Register of Ships is a title register and they are forced into using a title registration system which is more complex than what they need. Yachting associations stated that registration of title was not needed in order to sail overseas.

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

An Alternative Ship Registration Regime

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



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

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

The Review Team recommends that:

- (i) the Australian Register of Ships be restructured into four parts;**
- (ii) the Act be amended to give effect to the restructuring. This includes ss. 12-14 (obligation to register and exemptions), s.79 (nationality and the States) and s.17 (foreign registered ships); and**
- (iii) discussions be commenced with the States and Northern Territory concerning their participation in the administration of Part I of the restructured Register.**

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

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

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

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

Other Issues

Mortgages

A number of issues were raised in submissions concerning the operation of the SR Act, but which did not question the basic rationale of the Act.

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

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

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

The Review Team recommends that legal advice be sought as to whether there is power in the SR Act for a mortgagee to voluntarily remove a ship mortgage from the register. If the advice is that there is not, it is recommended that consideration be given to amending the SR Act to give a mortgagee such a power.

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

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

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

The Review Team recommends that, to give added protection to mortgagees of bareboat chartered ships, consideration be given to amending the SR Act:

(i) to explicitly provide that, for ships bareboat chartered to Australian operators, the law applying to encumbrances such as mortgages will be the law of the State of underlying registration; and

(ii) to enable the registration for an Australian-owned ship which is bareboat chartered-out to be suspended rather than closed and for a reference to be made in the proposed Part III of the register.

Ships under construction

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

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

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

The Review Team recommends that consideration be given to amending the SR Act to provide for the registration of ships under construction. There would be a separate part (Part IV) of the Register for ships under construction.

Home ports

The SR Act makes provision for home ports and there are 32 gazetted home ports. The concept of a home port originates in the previous system of registration under the MSA 1894 where ships were registered in the various ports of the British Empire and hence the Port of Registry was an important concept.

Submissions were divided on the need for a home port. Some considered that the concept was worthless and that Canberra should be the port of registry for all Australian flag ships while other submissions said that the concept was worthwhile.

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

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

The Review Team recommends that the concept of a home port should be retained but that the list of “approved” home ports should be abolished.

Marking

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

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

Tonnage certificate

Perkins Shipping stated that the cost of tonnage measurement as performed by AMSA surveyors is time consuming and expensive and submitted that a tonnage certificate from a builder or a classification society should be accepted.

Given that tonnage measurement is a calculation of a physical dimension of a ship, and is not an assessment of its safety standard, there would not appear to be any public policy reasons why an AMSA surveyor should perform tonnage measurement. A surveyor employed by a classification society could perform the measurement.

The Review Team recommends that AMSA investigate the delegation of tonnage measurement to ship builders, in the case of a new ship being registered, or a classification society in the case of an existing ship being registered.

Access to the register

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

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

The Review Team recommends that AMSA investigate the feasibility of redeveloping the Register so that it can be available on-line to business.

Consular services

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

Section 3 of the SR Act defines a “proper officer” to be a person holding, or performing the duties of, the following offices in a country or place outside Australia: Ambassador, Minister, Head of a Mission, Charge d’Affaires, Counsellor, Secretary or Attaché of an Embassy, Legation or other post, Consul-General, Consul or Vice-Consul.

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

The Review Team recommends that discussions be entered into with DFAT with a view to amending the definition of “proper officer” to allow locally engaged embassy staff to undertake functions required by the SR Act.

1. Introduction

1.1 Commonwealth Legislation Review Program

In April 1995, the Council of Australian Governments (COAG) accepted a package of reforms which would substantially implement the recommendations of the Report of the National Competition Policy Review Committee (Hilmer Committee).

One element of the package was the adoption of a Competition Principles Agreement which includes, inter alia, regulation review. Under the Agreement, the Commonwealth, State and Territory governments will review by the year 2000 all existing legislation that may restrict competition.

The Treasurer released the Commonwealth Legislation Review Schedule on 28 June 1996. The *Shipping Registration Act 1981* (the SR Act) is listed on the Schedule for review to commence in 1996-97. The Treasurer stated in his Press Release (copy at Appendix 1) that the guiding principle of legislation reviews is that legislation should not restrict competition unless it can be demonstrated that the benefits of the restriction outweigh the costs and that the objectives of the legislation can only be achieved by restricting competition.

1.2 The Shipping Registration Act 1981

The SR Act is “an Act for the registration of ships in Australia, and for related matters”. It provides a system of registration of ownership and encumbrances in respect of Australia-owned ships.

Prior to the introduction of the SR Act, Australian owned ships were registered as British ships under the United Kingdom *Merchant Shipping Act 1894* (MSA). The basis of registration under this Act was that a ship was a British ship if it was wholly owned by a British subject or corporation in any part of the British Commonwealth.

The various countries of the Commonwealth were free to repeal the MSA from the commencement of the *Statute of Westminster* 1931. However, under the British Commonwealth Merchant Shipping Agreement 1931, the laws of each country were required to adopt a common status of ‘British ship’ and to follow closely the provisions of the MSA. This agreement was rescinded by the mutual agreement of all Commonwealth member countries in 1978.

A Bill for shipping registration legislation was introduced into the Commonwealth Parliament on 22 May 1980. The SR Act eventually came into effect on 26 January 1982.

1.3 Administrative Arrangements for the Review

The Terms of Reference for the review were developed from a template provided by the Office of Regulation Review. They focus particularly on the impact of the legislation on competition and the costs and benefits for the economy. They also require the review to examine alternative forms of regulation, particularly non-legislative forms. The Terms of Reference are in Appendix 2.

The review was conducted by a team of seconded officials from the Maritime Division of the Department of Workplace Relations and Small Business¹, the Bureau of Transport and Communications Economics and the Australian Maritime Safety Authority (AMSA).

The conduct of the review was under the oversight of a Steering Committee comprised of a senior executive from both the Department of Transport and Regional Development² (Mr John Bowdler, Deputy Secretary) and AMSA (Mr Paul McGrath, Chief Executive). There was also an Independent Reference Committee (Ms Philippa Lynch, Director of Research, Administrative Review Council and Mr Stuart Hicks, Consultant and former Director-General of Transport in Western Australia) which was established to scrutinise the review to ensure probity of process and full consideration of all relevant issues.

An Issues Paper was prepared which contained relevant background information on the SR Act and which set out the main issues to be covered by the review. The Review Team consulted widely with interested parties such as industry associations, shipping lines, yachting and fishing industry organisations, trade unions, financiers and law firms. Over 100 letters were written to representatives of these organisations sending them the Terms of Reference and the Issues Paper. Twenty four submissions were received from industry associations, financiers, lawyers and individuals.

1.4 Structure of the Report

Chapter 2 commences with a brief discussion of the principle of ship registration and an explanation of the reasons for the introduction of the Act. The objectives of the Act are identified and the appropriateness of these objectives, including compulsory registration, is analysed. This analysis addresses the key objective of legislation reviews which is to establish the case for retaining, modifying or reforming current regulatory arrangements. The analysis in this chapter tests the rationale for maintaining the Act.

There is a brief summary of the main features of ship registration legislation in the United Kingdom, New Zealand, the United States and Canada in chapter 3. The purpose of examining overseas legislation is to provide a comparative background against which alternative registration arrangements could be considered.

The analysis of the issues raised in submissions is undertaken in a two stage process. Those submissions which raised issues which concern the fundamental nature of the current shipping registration regime are analysed in chapter 4 which analyses the impact of the Act on business, in terms of the benefits and costs for industry. The analysis of these issues provides the basis for formulating an alternative registration system to address the costs of the existing system. The alternative system is outlined in chapter 5.

Those issues raised in submissions which did not question the fundamental nature of the current ship registration system, but which were aimed at improving its administration, are analysed in chapter 6.

¹ With the change in Ministerial arrangements of 8 October 1997 the Maritime Division of the Department of Transport and Regional Development and AMSA were transferred to the Department of Workplace Relations and Small Business.

² It was decided that, given the advanced stage of the review at the time of the change in Ministerial arrangements, Mr Bowdler would continue as a member of the Steering Committee.

2. The Shipping Registration Act 1981

There are two purposes of this chapter. The first is to describe the principle of ship registration and the background to the introduction of the Shipping Registration Act (the SR Act), its objectives and main consequences. This discussion will provide an essential lead-in to the second, and principal, purpose of the chapter which is to assess the need for the regulation contained in the Act. This will be done by assessing the appropriateness of the objectives of the Act, as required by the Terms of Reference for the review.

2.1 The Principle of Ship Registration

A brief description of the historical origin of ship registration is in Appendix 3. For the purpose of this chapter, it is relevant to note that the genesis of ship registration was legislation which had the objective of reserving British trade for British vessels.

During the mid-seventeenth century, English law required that ships bringing goods to England or her colonies must be English owned, with the Master and the major part of the crew being English.³

However, it was the Navigation Act 1660, entitled “An Act for the Encouraging and Increasing of Shipping and Navigation”, which first required that ships be registered. This Act required that trade with England’s colonies should be in English ships of which the Masters and three quarters of the crew at least were English.

Later statutes added further provisions to the law to deal with matters such as fraud where foreign ships had been concealed under English names. For example, the Navigation Act required that from 1 April 1661, owners had to declare to the Customs in the port nearest their residence that a vessel was purchased for a valuable consideration, how much was paid for it and also where, when and from whom the vessel was purchased. Over the succeeding years, the scope of the Navigation Acts was amended and gradually widened due to changes in England’s external political and economic circumstances.

A significant change in England’s maritime law came in the mid-nineteenth century with the introduction of the *Merchant Shipping Act 1854*, entitled “An Act to amend and consolidate the Acts relating to Merchant Shipping”. Effective from 1 May 1855, this Act contained eleven Parts, including one which concerned registration. This Act was eventually replaced by the *Merchant Shipping Act 1894* (MSA) which has been described as “... a milestone in merchant shipping legislation, enshrining as it does many centuries of experience in this field”.⁴

2.2 Introduction of the Shipping Registration Act

Until the enactment of the SR Act, United Kingdom shipping registration laws, contained in Part I of the MSA, applied in Australia because this law applied throughout the British

³ Campbell, (1980), p. 2.

⁴ Campbell, (1980), p. 23.

Commonwealth. The basis of the law was that a ship was a British ship if it was wholly owned by a British subject or corporation in any part of the Commonwealth.

In 1978, Australia was the only major independent member of the British Commonwealth to have continued with the MSA system. In his Second Reading Speech on the introduction of the Shipping Registration Bill into the House of Representatives on 22 May 1980, the then Minister for Transport, the Hon Ralph Hunt MP, stated that “the stage has now been reached where it is essential that we legislate to put an end to this anachronism”.⁵ He also stated that the Bill “... is an important step forward in the development of Australia’s status as an independent nation. One of the attributes of national sovereignty is the right of a country to determine the conditions for the grant of its nationality to ships”.

Because of the complexity of the Bill, it was allowed to lie on the Table of the House of Representatives over the winter recess in 1980 with a view to its passage in the following sittings. In the event, the Bill lapsed because a large number of submissions were received necessitating extensive discussion with the States, Northern Territory and industry. It was redrafted and reintroduced into the House of Representatives on 26 February 1981 and passed through the House on 5 March 1981. The Act came into effect on 26 January 1982.

There is little doubt that the Act was introduced for reasons related to national sovereignty. As Davies and Dickey note, “the purpose of the enactment of the *Shipping Registration Act* was thus to provide Australia with its own code for the registration of Australian-owned ships”.⁶

The number of ships registered under the Act as at 30 June each year during the period 1992-1997, by type of ship, is shown in table 2.1. Ship registrations, by type of ship and by State, as at 30 June 1997 are shown in table 2.2.

2.3 Objectives of the Act

The Terms of Reference require the review to identify the objectives of the Shipping Registration Act 1981. The Act does not contain an objects clause and its preamble simply states that it is “an Act providing for the registration of ships in Australia, and for related matters”. The Second Reading Speech for the Bill did not specify any objectives other than, as quoted above, that Australia should have its own ship registration regime.

Nevertheless, it is clear that the objective of the registration provisions of the Act is, as Davies and Dickey state, “... to compel the registration in Australia of certain Australian-owned ships (generally speaking, Australian-owned commercial vessels), and to permit the registration of other ships associated with Australia if their owners so wish”.⁷

Section 12 of the Act requires that every Australian-owned ship shall be registered. However, s. 13 exempts ships less than 24 metres in tonnage length, Government ships, pleasure craft and fishing vessels from the requirement to be registered under s. 12. Section 14 permits these ships and also, inter alia, ships on demise charter to Australian-

⁵ Parliamentary Debates, (1980), p. 3085.

⁶ Davies and Dickey, (1995), p. 43.

⁷ Davies and Dickey, (1995), p. 43.

based operators to be registered. The intent of the Act is therefore to make it compulsory for Australian-owned commercial ships to be registered.

While it is not anywhere stated, a second objective of the Act, one of the “related matters”, is to provide for the transfer and transmission of ships and the registration, priority and transfer of mortgages.

To meet these two broad objectives, the Act :

- (i) confers nationality on Australian ships and grants the right to fly the national colours;
- (ii) provides, in some situations, for the conferment of title in ships⁸; and
- (iii) provides for the registration of mortgages.

2.4 Appropriateness of the Objectives

The Terms of Reference require an assessment of the appropriateness of the objectives of the Act. The assessment will cover the two objectives listed above, ie the compulsory registration of ships and the secondary objective of registering mortgages. It will assess the need for the regulation embodied in the Act, particularly the element of compulsion, because the Act simply replaced one shipping registration regime with another. The Terms of Reference require an explanation of why it is necessary to continue to have shipping registration legislation.

2.4.1 Registration of ships

An assessment of the appropriateness of the Act’s principal objective, to compel the registration of commercial ships and permit the registration of other types of ships, needs to address the question of whether or not Australia is obliged to have this legislation.

Consideration of this question must be made against the background of international law. One of the fundamental principles of public international law is the freedom of the seas which means that the vessels of any nation, including land-locked ones, have access to all parts of the seas that are not included in the territorial sea or internal waters of a State. However, international law also lays down the framework in which this freedom is to operate. Ready notes⁹:

“... in order that the principle of unrestricted access to the high seas should not lead to a situation of anarchy and abuse, international law lays down a number of rules providing a framework for the exercise of that freedom, but looks to individual States to ensure and enforce compliance with those rules through the jurisdiction exercised over their national vessels.”

Ready states that there are two cardinal rules concerning freedom of the seas. The first is that the jurisdiction over a vessel resides solely with the State to which the vessel belongs and the second is that all vessels using the high seas must have a national character. It is

⁸ Davies and Dickey, (1995), p. 54.

⁹ Ready, (1994), p. 1.

the case that if an unregistered ship is on the high seas, it has no legal rights. “Under public international law, the right of a ship to sail on the open seas is dependent upon its right to fly the national colours of a recognised country.”¹⁰

The importance of the nationality of a ship is central to international law. It is relevant to quote from Rienow’s basic work on the topic:

“So essential to the well-being of a vessel is its nationality that it is axiomatic that every vessel must be in a position to establish such a connection ... The entire legal system which States have evolved for the regulation of the use of the high seas is predicated on the possession by each vessel of a connection with a State having a recognized maritime flag. ... The universal recognition of the principle that every ship must maintain a connection with some State has made discussion of the stateless ship of purely academic value. Practically, stateless ships are unknown”¹¹

It is the reality, therefore, that all ships and boats, including those owned by an Australian (individual or company), must be registered if they are to navigate the high seas. Registration, inter alia, confers nationality on a ship and its Registration Certificate can be considered to be its ‘passport’.

Reflecting this reality, international law gives every country, including those which are land-locked, the right to register ships. Article 91 of the United Nations Convention on the Law of the Sea (UNCLOS) states, inter alia, that “Every State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly.” Article 92 of UNCLOS states, inter alia, that “ships sail under the flag of one State only and ... shall be subject to its exclusive jurisdiction on the high seas”.

The Attorney-General’s Department has provided advice to the Review Team that:

“Article 94.2(a) of UNCLOS requires Australia to maintain a register in respect of all ships flying the Australian flag (except for certain exempt ships, being mainly small ships). ... The requirement to maintain a register flows from the general requirement expressed in Article 94(1) of UNCLOS that ‘every State shall effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag’”.

It is clear therefore that there is an obligation to have ship registration regulation and that the primary purpose of registration is to enable vessels to navigate the high seas. That this is the case is indicated by s.20 of the SR Act, concerning the custody of the registration certificate, which provides:

“20. (1) The registration certificate of a ship shall not be used except for the purpose of the lawful navigation of the ship, and shall not be subject to detention by reason of a claim by an owner, mortgagee, charterer, operator or any other person to any title to, lien or charge on, or interest in, the ship.”

¹⁰ Davies and Dickey, p. 65.

¹¹ Rienow, (1937), pp. 13-15.

The Review Team accepts that it is an inevitable conclusion of any examination of international law and shipping that ships need to be registered. However, an issue which arises from this conclusion is whether it is necessary for Australia to have its own shipping registration legislation or whether it would be more efficient for Australian shipowners to register their ships in other countries, eg those with international registers.

The Attorney-General's Department advised the Review Team that "the only way to dispense with a register would be if, theoretically, a decision was taken not to allow any ships to fly the Australian flag", ie if a policy decision was made that Australia would not have its own register so that Australian shipowners would then be free to flag their vessels in any country they choose.

There are two pertinent issues to assess. The first is whether such a decision would be legal and the second is whether it would reduce the administrative burden of registration on Australian shipowners or the wider boating community.

With respect to the first issue, it is relevant that a key principle of UNCLOS (Article 91(1)) is that "there must exist a genuine link between the State and the ship". A decision by an Australian Government not to allow ships to fly the Australian flag would have far reaching consequences with the most important relating to the genuine link with the flag State. As the Attorney-General's Department stated, "... any ships now registered on the Australian register would need to have an alternative registration and to prove a 'genuine link'. This may be difficult."

Companies which flag out their vessels establish a 'genuine link' with the flag State by having shell companies incorporated in that State which 'own' the vessel but with all operations controlled by the parent company from elsewhere. In the event of Australia deciding to not have its own ship registration legislation, it would be relatively easy for a commercial shipowner to set up a shell company in another country as a vehicle to register its vessels. It would be very difficult, but not impossible, for the owners of recreational vessels to establish shell companies overseas to register their vessels. The recreational vessel owner, and also fishing boat owners, with little international commercial experience would probably prefer to register in Australia for reasons of administrative ease.

The Review Team considers that, if all Australian-owned vessels were registered overseas, it would be quite obvious that there would be no genuine links between most of these vessels and their flag States. For this reason alone, it is the view of the Review Team that Australia is obliged to have a ship registration regime.

With respect to the second issue, there are serious doubts about whether there would be a reduced administrative burden from a Government decision to not have ship registration legislation. The first reason is that it would undoubtedly be more difficult for individuals (as opposed to companies) to arrange the registration of their vessels in an overseas country rather than in Australia. As is shown in table 2.2, at 30 June 1997 there were 4,879 recreational vessels and 2,157 fishing vessels registered under the Act and most of these would have been owned by individuals rather than companies. It is the assessment of the Review Team that these owners would find it more administratively burdensome to register their vessels overseas than to register them in Australia.

Apart from the cost factor, registration in Australia means that ships and yachts will be subject to Australian law while they are on the high seas.¹² Comments in a number of submissions indicated that shipowners want to be able to register vessels in Australia to obtain the benefit of Australian law while overseas.

A further reason why it would be inappropriate to not have Australian ship registration legislation is the impact that this would have on Australia's efforts to increase the standards of ship safety internationally. In recent years, Australia has been very active in international and regional maritime fora in drawing attention to the sub-standard quality of much of the international trading fleet and in urging the need for flag States to exercise greater supervision of their fleets.

In support of this position Australia has put in place an active port State control inspection regime and detains those ships which are sub-standard. If Australia decided that it would no longer be a flag State, its credibility to argue the need for more rigorous enforcement of internationally agreed safety standards, and to detain ships that were considered to not meet those standards, would be greatly reduced.

The Review Team accepts that registration is a necessary prerequisite for ships to be able to legally navigate the high seas. For the reasons discussed above, it has concluded that it is appropriate for Australia to have legislation which conveys nationality to Australian owned vessels.

2.4.2 Compulsory registration

The Second Reading speech for the introduction of the Bill in 1980 did not explain why it was being made compulsory for certain ships to be registered and the Review Team has not been able to ascertain the reasons for this decision. Probably the most obvious reason would be the fact that under the MSA 1894 (s.2) every British ship had to be registered. The Act picked up this feature of the British legislation.

It is relevant that s. 9 of the United Kingdom *Merchant Shipping Act 1995* refers to a ship being "entitled" to be registered. Under this section, an owner who is entitled to register a ship in the UK has three options: (i) to register in the UK, (ii) to register abroad, or (iii) to not register a ship at all and terminate a present registration. Gaskell notes that while this section might facilitate "flagging out", it could "... also persuade foreign shipowners to base their operations in the U.K. (e.g. to take advantage of the maritime service industries based here, such as Lloyd's or the financial institutions)"¹³. He also states that the option of not registering would probably not be used by shipowners trading internationally because of the need for a registration certificate in foreign ports.

Gaskell notes that voluntary registration presents obstacles to maintaining an accurate record of British vessels and that it is important to have an accurate register. "It is submitted that maritime safety, the preservation of the environment and the prevention of

¹² The issue of the importation of Australian law aboard ships is complex; see Davies and Dickey, pp. 60-64.

¹³ Gaskell, (1995), p. 21-29.

drug and arms trafficking all demand an accurate and up-to-date record of all ships having the nationality of a particular state such as the U.K.”¹⁴

It needs to be ascertained whether, from a public policy perspective, there are any reasons for the Australian registration system to continue to compel the registration of ships, ie are any social objectives being achieved by compulsory registration such as increasing the number of Australian flag ships?

If registration was not compulsory, then Australian-owned ships could be registered overseas. It could be argued that compulsion has prevented ‘flagging out’ of Australian-owned merchant ships and contributed to the development of a merchant fleet. The pertinent response to this argument is that registration overseas is possible under the current SR Act because a shipowner can set up a company in another country such as Singapore, transfer a ship to that company and then register the ship in Singapore. Making registration compulsory is no guarantee that an Australian-owned ship will in fact be registered in Australia.

From an industry development perspective, compulsory registration will not of itself lead to the growth of an Australian flag merchant fleet with all the attendant economic benefits such as, for example, the balance of payments impact from increased freight earnings. Indeed the Australian flag merchant fleet has declined from 90 to 68 ships over the period 1993-94 to 1996-97 even with compulsory registration.

The Act has two public policy objectives in enabling the registration of ships. The first is to grant Australian nationality to Australian-owned ships (both registered and unregistered (s. 29)) thereby enabling them to voyage overseas. The second is to provide for the registration of ownership and encumbrances to facilitate the provision of finance. As the registration of mortgages is voluntary, there would not appear to be any reason why registration of ships themselves should not also be voluntary.

The Review Team is unconvinced of the force of Gaskell’s arguments regarding the need for an accurate register of (in this instance) Australian-owned ships from the perspective of drugs or arms trafficking. While there may be some substance to the arguments linking Australian registration with ship safety and pollution prevention, as already explained above Australian registration can be avoided. Also, as Australia has such a small international merchant fleet, making registration compulsory is unlikely to have any impact on international ship safety standards.

From a public policy perspective, there is no significant cost for the Commonwealth if a non-registered ship departs from Australia, even though it would be illegal under s. 68 of the SR Act. The costs of such an action would fall on the shipowner in a number of ways. Probably the most important way in which a cost will arise is from the fact that an unregistered ship on the high seas is, under international law, considered to be stateless and would be liable to seizure. A shipowner could also be forced to pay import duty on an unregistered ship in a foreign port or on returning to an Australian port.

However, an administrative cost to the Commonwealth could arise if there was an increase in the number of requests from owners of unregistered ships, particularly recreational

¹⁴ Gaskell, (1995), p. 21-30.

vessels, in overseas ports requiring consular assistance in order to arrange the rapid registration of their vessel.

In general, the Review Team can find no public policy reasons for the Act requiring that “... every Australian-owned ship shall be registered under this Act”. Registration is a facility which should simply be available to shipowners to use if they need it. It would be desirable therefore to remove the element of compulsion from the Act and to phrase the Act in terms of ships entitled to be registered rather than ships required or permitted to be registered. The matter of compulsion will be taken up in chapter 5.

2.4.3 Registration of mortgages

Part III of the Act deals with, inter alia, the registration and priority of mortgages. The reason for the SR Act containing mortgage provisions is that it derives largely from the MSA 1894.

In his Second Reading Speech on the introduction of the Bill into the Parliament, the then Minister for Transport noted that the provisions of Part III of the Bill concerning mortgages had been made “broadly comparable with the British system to ensure that the changeover from that system to the Australian system can be effected with a minimum of inconvenience for shipowners”.¹⁵ As provisions concerning mortgages were a feature of the MSA 1894, they were included in the new Australian legislation.

In terms of the underlying purpose of the Terms of Reference, it needs to be decided whether it is appropriate to have regulation governing ship mortgages (ie provisions concerning security of finance) in the SR Act. The key issues are:

- is it appropriate for the mortgage provisions to remain in the SR Act; and
- if the provisions were removed what would the cost be for the shipping industry and the economy generally?

The assessment of these two specific questions is facilitated by briefly discussing the distinction between the two principal objects of ship registration systems which follow the British model, namely:

- (a) the provision of a public register of ships for the purposes of identification and for the national and international regulation of shipping; and
- (b) the regulation and protection of the private rights of individuals in a particular ship.

The distinction can best be brought out by comparing the system of registration of motor vehicles with the system of registration of land. The registration of motor vehicles is required almost solely for purposes akin to those described in sub-paragraph (a) above. The name of the owner, distinguishing marks, dimensions and specifications of the vehicle are recorded to enable the vehicle to be traced and identified and to fix the identity of the person responsible for the use of the vehicle. Changes of ownership, colour and the like are required to be notified for policing purposes. The fact that a person is registered as owner does not confer any rights on that person as against others laying claim to ownership.

¹⁵ Parliamentary Debates, (1980), p. 3086.

The registration of land transactions on the other hand is almost entirely concerned with the private rights of individuals. Its object is to regulate the interests of individuals in a particular piece of land by requiring dealings with the land to be registered in order to be effectual. Thus the land register provides conclusive evidence of title, encumbrances and the priority of dealings. Changes in the appearance of the land, eg. the construction of buildings etc, are irrelevant to these matters and are not required to be recorded.

As indicated above, the registration of ships has two objectives but only the first of these is directly relevant to the United Nations Convention on the Law of the Sea (UNCLOS). The Convention is not concerned with the regulation of the private rights of individuals, as in the case of registration of land titles, but with the right of a State to interfere with ships flying the flag of another State on the high seas and with the obligation of the flag State to regulate administrative, technical and social matters aboard its own ships on the high seas.

On an initial examination, it may appear that the registration of mortgages has little relevance to the matters which are of primary concern to UNCLOS. However, on further consideration, it is not unreasonable that provisions dealing with mortgages over ships are required to be entered on a register maintained for the purposes of UNCLOS. The powers of a mortgagee are such that in certain circumstances the mortgagee acquires the right to take possession of the ship and thereby be in the position of the legal owner. For example, the mortgagee becomes entitled to the unpaid freight of the ship and may use the ship as if it were the owner. The mortgagee may sell the ship and confer a good title on the purchaser in order to recover a debt.

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

A ship capable of traversing the high seas is a form of property which has features such that it is highly desirable that it can be identified, that its ownership and nationality be certain and that those who have an interest in it be known. In a legal opinion provided to the Commonwealth Government in 1971, the then Solicitor-General stated:

“Both the reasons why ships have been granted nationality and the consequences of such grant seem to me to strengthen the force of the first consideration upon which I have relied, namely, that since an “Australian” ship is a creature of national sovereignty, the Commonwealth would be entitled to determine (inter alia) the provisions which will govern it whilst it remains such a ship. Amongst these would be provisions prescribing how the ship shall be sold, mortgaged or otherwise disposed of, the priorities between persons interested in the ship and the dealings which must appear on the established register. Without describing them, I think they would include provisions substantially the same as those contained in Part I of the *Merchant Shipping Act 1894*.”

Provision for the registration of mortgages has existed in English legislation since 1854 and a large body of law has developed surrounding such legislation. The whole of this body of law is part of the Australian system of jurisprudence and it has its place in private international law where the law of the place of registration of a ship governs the rights of individuals over the property of the ship.

Singh's description of the common features of registration is a particularly useful summary:¹⁶

“ In short, therefore, the essential features of registration not only according to the United Kingdom and Indian laws but those accepted generally are to ascertain, determine and fix:

(a) The ownership of the vessel and to register faithfully all encumbrances, mortgages, etc from time to time;

(b) The exact type of the vessel with its dimensions and specifications for which the vessel is surveyed and measured and any alterations in the engine or hull are duly registered to keep account of the identity of the vessel;

(c) distinguishing marks of the vessel by way of its name, number and draught marks so that its identity is once and for all fixed and known.

In fact the *raison d'etre* of registration is to keep the vessel identified throughout its operational life and hence any changes in its name, ownership, dimensions and specifications, markings such as number etc. have to be faithfully brought to the notice of the Registrar of Ships after the vessel has once been registered.

This aspect is amply provided for by the national laws of a large majority of maritime states of the world.

It may be added that the procedural practices all over the world, whether in Panama or Poland or in Africa and Asia are by and large basically the same as described above.”

References to “registration” therefore include all matters capable of being entered on the register of shipping and this includes mortgages and other registrable interests. This has been the case since at least 1854 and it may predate that year because the *Merchant Shipping Act 1854* was a codification of the law and practices relating to merchant shipping to that date.

If the ship registration system did not contain provisions for the registration of mortgages, and for the regulation of the rights of individuals in relation to mortgages, it is difficult to see how those rights could be regulated. Even if the States and Northern Territory might be persuaded to enact laws for the registration of ships' mortgages, there would be a number of problems if the Commonwealth decided to vacate this field and leave it to the States. The first is that there would be no means of compelling the States to legislate in respect of mortgages if they did not wish to.

More importantly, mortgages are a form of security requiring that title be established and State laws for the registration of mortgages would also need to establish title. If the States did take over this field, Australia could then have as many as seven registers in the place of the one central register which currently exists. As an administrative system, this would be considerably less efficient than the existing system and would impose higher costs on businesses using this system, eg searches of the registers by financiers or law firms.

¹⁶ Singh, (1978), pp. 6-7.

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

2.5 Summary

The Review Team has examined the issue of ship registration in some detail from an historical perspective and there is no doubt that there is a requirement under international law for ships on the high seas to be registered. Those Australian-owned ships, including yachts, which proceed on overseas voyages need to be registered. As UNCLOS requires a genuine link between a ship and its flag State, Australia cannot avoid having ship registration legislation for at least some of the ships presently registered, particularly recreational and fishing vessels owned by individual Australians.

The issue of ship mortgage regulation is somewhat more complex. Nevertheless, the nature of a mortgage and the potential rights of mortgagees are such that a registration system which did not provide for mortgages would be incomplete.

If a mortgage regulation regime was established separately from the Act, this regime would need to provide for the establishment of title so that a mortgagee, or potential mortgagee, would know precisely the nature of all the interests in a ship and the relationship between these interests.

The Review Team has concluded that Australia needs to have ship registration regulation and that it is also appropriate that mortgage regulation be contained in the ship registration regulatory regime.

Nevertheless, the specific form of the existing ship registration regulation may not necessarily be the least costly and there may be alternative regulatory regimes which may be more efficient and impose less costs on the shipping and boating industries.

Before considering alternative administrative regimes, there will be a brief survey of shipping registration regimes in a number of other countries. This survey is undertaken in the next chapter.

3. International Ship Registration Regimes

Most countries of the world, and probably all maritime States, have shipping registration legislation and examination of the features of these regimes can be useful comparison against the Australian regime.

The most relevant countries for comparison are:

- . United Kingdom;
- . New Zealand;
- . United States; and
- . Canada.

3.1 United Kingdom Legislation

The United Kingdom (UK) legislation which was traditionally the model for ship registration legislation in all Commonwealth countries was Part I of the *Merchant Shipping Act 1894*. The UK legislation has been extensively revised in recent years and was amended in 1983, 1988, 1993 and in 1995.

The *Merchant Shipping (Registration etc.) Act 1993* and associated regulations established a new central register of British ships which came into operation on 21 March 1994 and which is maintained by the Registry of Shipping and Seamen at Cardiff. “The central register replaces the previous system whereby British ships could be registered at any one of 112 registry ports in the United Kingdom.”¹⁷

Ship registration is now governed by Part II (Registration) of the *Merchant Shipping Act 1995* (MSA 1995). This Act continued the central register established by the 1993 Act.

The central register is divided into four parts:

- . Part I for ships owned by “qualified” persons which are not fishing vessels or registered as small ships on Part III of the register;
- . Part II for fishing vessels;
- . Part III for small ships (less than 24 metres in overall length); and
- . Part IV for “bareboat charter ships”.

¹⁷ Ready, (1994), p. 55.

The details of ship registration in the UK are set out in the regulations to the Act. However, the basic provisions of MSA 1995 include:

- a ship is entitled to be registered if it is owned by persons qualified to be owners of British ships (the qualifications are set out in the regulations);
- the registrar may refuse to register or terminate the registration of a ship if the registrar considers that it would be inappropriate for the ship to be, or remain, registered taking into account the safety requirements of the Act;
- when a ship becomes registered at a time when it is already registered under the law of a country other than the UK (except a relevant British possession), the owner is to take all reasonable steps to secure the termination of the registration under the law of the other country;
- a ship is registered for a period of 5 years and registration expires at the end of that period unless it is renewed;
- the registration regulations make provision for a large number of administrative matters including
 - persons by whom and the manner in which registration applications are made;
 - the information and evidence to be provided in applications;
 - the issue of certificates;
 - the marking of ships registered or to be registered;
 - the survey and inspection of ships registered or to be registered and the recording of their tonnage as ascertained (or re-ascertained) under the tonnage regulations; and
 - the charging of fees.

3.2 New Zealand Legislation

The New Zealand *Ship Registration Act 1992* is largely based on Australia's *Shipping Registration Act 1981*. The New Zealand legislation requires that all New Zealand-owned ships which are making overseas voyages and all New Zealand-owned ships over 24 metres (with certain exceptions) be registered. There is a single ship registry, located in Wellington, which is operated by the Maritime Safety Authority of New Zealand.

The New Zealand register is divided into two parts, A and B. All New Zealand ships are required to be registered on Part A except pleasure vessels, ships engaged solely on inland waters and barges that do not proceed on voyages beyond coastal waters. A ship is required to be registered on either Part A or Part B if (a) it is a pleasure craft or does not exceed 24 metres in length, and (b) the ship proceeds on an overseas voyage and (c) it is New Zealand-owned or a majority interest is owned by New Zealand permanent residents.

Part A of the register is therefore particularly aimed at larger commercial vessels and those owners who require mortgage facilities. Registration in Part A provides proof of

nationality, evidence of title (ownership) and mortgage facilities. Ships remain registered in Part A for as long as they are New Zealand-owned.

Part B of the register is principally aimed at ships that require nationality for offshore cruising and racing. While Part B registration proves nationality of a vessel, it does not prove who owns it. Registration under Part B of the Act lasts for five years but is renewable if the particulars of a ship and its ownership remain the same. Registration lapses when a ship is sold.

Some other features of the New Zealand legislation are:

- fishing vessels over 24 metres in length are not exempted from registration;
- names of ships may be reserved prior to registration;
- the priority of mortgages may be altered; and
- any organisation may be appointed to maintain the register or any part of it and an agreement entered into setting out the conditions under which the Register will be maintained.

3.3 United States Legislation

The United States (US) legislation uses the term “vessel documentation” to describe the registration process for commercial ships and recreational vessels that may go on international voyages. US legislation is contained in title 46 of the United States Code.

Some significant features of the US regime are:

- vessels of at least 5 net tons that are not registered under the laws of a foreign country or are not titled in a US state are eligible for documentation if specified ownership criteria are met;
- certificates of documentation identify and describe the vessel and identify the owner of the vessel (as well as containing any additional information specified by the US Secretary of Transportation);
- a certificate of documentation is conclusive evidence of nationality of the vessel for international purposes, but not conclusive evidence of ownership in any proceeding under the laws of the US in which ownership is an issue;
- certificates of documentation may carry various endorsements
 - registry endorsement entitling a vessel to be employed in the US foreign trades
 - coastwise endorsement to enable a vessel to engage in the US coastal trades
 - Great Lakes endorsement to enable a vessel to be employed on the Great Lakes and their tributary and connecting waters in trade with Canada
 - fisheries endorsement to engage in fishing in the territorial sea
 - recreational endorsement to enable a vessel to be operated only for pleasure

- a documented vessel with a recreational endorsement is permitted to proceed between a port in the US and a port of a foreign country without entering or clearing the Customs Service. However, a recreational vessel must comply with all customs requirements for reporting arrivals and all persons on board that vessel are subject to applicable customs regulations.

3.4 Canadian Legislation

Canada is currently in the process of rewriting the *Canada Shipping Act* which was first adopted in the 1930s and which is largely based on the UK *Merchant Shipping Act 1894*. Part I of the Canada Shipping Act concerns ship ownership, registration and mortgages.

Consultations have already been held with industry on Part I (Ownership and Registration) of the *Canada Shipping Act*. The Canada Shipping Act Reform Bill was introduced into the Canadian Parliament on 30 October 1997.

The following summary describes the main proposals with respect to Part I that resulted from these consultations:

- To reflect modern practices in shipping, including financing of ships, it would be proposed to allow, for example, ships to be registered in the name of foreign corporations who maintain a Canadian presence; a lessee under a financing lease; or a bareboat charterer in Canada.
- It would be possible for a Canadian registered ship to be bareboat chartered-out of Canada during the period of the charter.
- The current provisions in the Act on the division of property in ships, including 64 shares, would be continued.
- The essence of the mortgage provisions currently in the Canada Shipping Act would remain and the language simplified. It would be specified that the terms of a mortgage could be altered and that any changes in a mortgage would require notice to all registered interests.
- Owners would be required to give notice to mortgagees regarding the sale of a ship. Owners would be required to inform other mortgagees of the disposal of a ship.
- Certificates of Registry could be valid for a fixed period of time and shipowners would eventually be required to renew certificates.
- The Minister of Transport would be authorized to commercialize any aspect of the Registry system.
- Property in ships would continue to be transferred by Bills of Sale or by operation of law.
- A provision would be added to describe what constitutes acceptable proof of registration, where the transaction has occurred electronically, and would describe what documents are acceptable as evidence in court.

3.5 Summary

Comparisons of legislative regimes across countries are often difficult because of differences in economic, social and legal frameworks. Nevertheless, where legislative regimes in different countries give effect to the same objective, ie granting nationality to ships, there could be advantage in comparison.

There are two features of these foreign ship registration regimes which are interesting and which will be useful in formulating alternatives to Australia's current ship registration regime.

The first of these is the way in which the UK and New Zealand registers are divided into parts. The UK register is divided into four parts and New Zealand into two parts. The effect of this is to group vessels into categories which has the effect of separating commercial from non-commercial vessels. In both countries there is the facility to establish nationality of the vessel without establishing title. Part III of the UK register and Part B of the New Zealand register establish proof of nationality but not proof of title (ownership). The US regime is similar in that a certificate of documentation provides evidence of nationality of the vessel for international purposes but not evidence of ownership.

The second feature which is of interest is that provision in the US regime whereby documented (ie registered) vessels with a recreational endorsement, ie vessels such as yachts, can voyage overseas without entering or clearing with the US Customs Service.

An interesting feature of the UK and New Zealand legislation is the registration for a fixed period. In the UK registration is for five years. In New Zealand, registration under Part A for commercial ships (the title register) lasts while the ship is New Zealand owned while registration on Part B (the nationality register) lasts for five years or until the vessel is sold. Fixed period registration would assist in maintaining the Register with up-to-date accurate information.

Some of the features in overseas legislation would appear to have the potential to simplify the registration of recreational vessels in Australia and are examined further in the investigation of alternative regulatory regimes.

4. Impact of the Shipping Registration Act on Business

While the Review Team concluded in chapter 2 that Australia is obliged to have ship registration legislation, and that it is appropriate for mortgage regulation to be a necessary incident of a ship registration regime, the current administrative structure of Australia's ship registration regime may not necessarily be the most efficient possible.

The Review Team analysed the submissions (listed in Appendix 4) to the review to identify the benefits, costs and overall effects of the SR Act. The conclusions drawn from this analysis are important when assessing the need for an alternative registration regime.

The major interest in the review came from the yachting and the finance/legal sectors although there were submissions from individuals and organisations outside of these groups. There were only two submissions from the commercial shipping sector, Perkins Shipping in Darwin and BHP Transport.

While the Terms of Reference require that the Review Team "... analyse and, as far as reasonably practical, quantify the benefits, costs and overall effects of the SR Act and any alternatives ...", it was not possible to use the standard benefit-cost analysis given the legislative and administrative nature of the Act. The Review Team ultimately relied on reasoned judgements in order to identify the benefits and costs of the SR Act and to determine its overall effect.

4.1 Strategic Issues Raised in Submissions

There were three major strategic issues raised in submissions which have implications for the fundamental nature of the registration regime. These issues were

1. the need for simpler registration procedures for yachts (this would be applicable to all small vessels);
2. the registration system should convey indefeasible title to the vessel; and
3. the need for a notice-based system of recording ownership (as distinct from title) and financial interests in a vessel rather than the current title register.

The views put forward in submissions on these three issues are outlined in this section and the costs and benefits associated with these strategic issues are analysed in section 4.2. Issues of a less strategic or administrative nature, mainly concerning various aspects of the mortgage provisions of the SR Act, were also raised in submissions. Given that the Review Team has concluded that it is appropriate for mortgage provisions to be in the SR Act, these issues are not germane to consideration of alternative administrative arrangements for ship registration and they are analysed in chapter 6 of the report.

4.1.1 Small ship registration

Yachting associations stated that the existing registration procedures for yachts are unnecessarily complex and there needs to be an administratively simpler procedure for

yachts leaving Australia. However, this issue applies equally to all small vessels (ie those less than 24 metres in length) such as recreational craft and fishing boats.

The Yachting Association of Western Australia (YAWA), the Yachting Association of New South Wales and the Victorian Yachting Council (VYC) submitted that small craft such as yachts should be separated from commercial vessels in the register with the YAWA and VYC proposing that there should be a small ships register as in the United Kingdom. These associations were of the view that the current registration provisions are unnecessarily complicated and expensive for recreational craft.

Dayle Smith, a Brisbane barrister with experience in organising and participating in ocean yacht racing, expressed the view that “the present process of obtaining registration is time consuming, very expensive and quite cumbersome to trace the chain of title from when the yacht was first commenced to when it was completed”.

The Australian Yachting Federation stated that most yacht owners do not require registration of title in order to proceed overseas but that any alternative registration system that may be implemented should if possible discourage the trade in stolen boats. The Queensland Yachting Association (QYA) noted that “it would make sense to allow the granting of Nationality for Offshore Racing activity”.

YAWA questioned whether a registration certificate was, in reality, needed for proof of ownership when yachts sail overseas. It quoted the recent experience of a member who found that other foreign yachts in Indonesian waters did not have the equivalent of Australian registration certificates but used documents similar to “licences” issued by State marine authorities in Australia. The submission stated that once in Indonesia, this “licence” and a crew list were the only documents which were of interest to the Indonesian authorities.

Submissions also commented on the duplication of Commonwealth and State registration systems. Currently it is a requirement of the States that vessels coming within their jurisdiction (mainly small vessels such as recreational craft, fishing vessels, etc) be registered. State registration is in the nature of a user licence to carry on a particular activity (such as the provision of a passenger service) or safety certification and is not registration of title. Section 79 of the SR Act preserves State laws for the registration of ships “... where the recording or registration is for a purpose other than the establishment of title, the transfer of title, the registration of a mortgage, the transfer of a mortgage or the grant of nationality in relation to a ship”.

However, as far as small ship owners and financiers are concerned Commonwealth and State registration systems are not mutually exclusive. The Registrar of Ships informed the Review Team that the boating public sometimes confuses Commonwealth and State registration. Submissions also indicated that many small ship owners may wonder why the two systems are not more closely linked.

The National Australia Bank (NAB) stated in its submission that three regimes apply to ships and these are Commonwealth registration legislation (ie ownership), State legislation relating to licensing (ie authority to carry out a particular activity) and certification (ie safety). NAB stated that a financier needs to satisfy itself not only that a vessel has been properly registered but also that it complies with relevant State legislation. NAB argued that these regimes should be integrated so that “... registration would not be permitted unless there was compliance with the other requirements applicable to shipping”.

Ocean Trek Diving Resort drew attention to the lack of complementarity between Commonwealth and State legislation. It stated that, when it transferred the survey of its vessel, which is registered under the SR Act, from Queensland to New South Wales, it had to have the vessel “boat coded” in New South Wales. This required the sighting of a driver’s licence as proof of ownership. Ocean Trek stated that a ship’s registration (under the SR Act) should be more acceptable as proof of ownership than the “Boat Code” in New South Wales.

4.1.2 Indefeasible title

The NAB submitted that “... to provide legal comfort to both a financier and any other person dealing with a registered owner, a provision should be included in any proposed legislation stating that registration of a person or entity as the owner of a vessel (or shares in a vessel) is conclusive and, other than in cases of fraud, constitutes indefeasible title to the vessel (or the relevant shares in the vessel)”.

The Victorian Yachting Council also stated that “the establishment of a “Titles” system for the sale/transfer of recreational boats, similar to that used by the Land Titles office is suggested.”

The key point of relevance of the principle of indefeasibility for this review is that financial institutions can gain the highest level of security for the provision of finance when lending for any property for which a system of indefeasible title can be established.

The registration regime which is put in place by the Act does not involve “title by registration” as ownership of a ship passes upon the execution of a bill of sale. Davies and Dickey note¹⁸ that “... the registration of ships is thus unlike the registration of land in Australia under the Torrens system in that it concerns simply the registration of title, and not title by registration”. Making the Australian Ship Register a register of indefeasible title would mean that ownership of a ship would not pass until the transaction had been entered in the Register.

It is understandable why a financier would want a system of indefeasible title. However, it is doubtful whether it could work for property such as a ship which can be easily withdrawn from a legal jurisdiction. This issue will be discussed further in chapter 5 of the report.

4.1.3 Notice-based record of financial interests

The New South Wales Government operates a scheme known as REVS¹⁹ under the *Registration of Interests in Goods Act 1986* (RIG Act). This Act provides that a mortgage in respect of a boat is a “registrable instrument”.

The former Minister for Fair Trading in New South Wales, the Hon Faye Lo Po’, wrote to the Minister for Workplace Relations and Small Business on 10 November 1997 commenting on the overlap between the SR Act and the RIG Act. She attached a submission prepared by the Department of Fair Trading. The submission stated:

¹⁸ Davies and Dickey, (1995), p. 56.

¹⁹ REVS is the Register of Encumbered Vehicles. On 4 April 1996, boats were gazetted as a “prescribed good” and can be placed on the Register.

“The SRA requires compulsory registration for certain ships and also allows voluntary registration for others, including the boats under 24 metres at which REVS for Boats is targeted. Although NSW vessels registered with ARS are not required to be registered with the WWA, they may be registered with both. ... Advice given by the NSW Crown Solicitors Office is to the effect that the Shipping Registration Act (SRA) covers the field and even though a purchaser may have been issued a clear REVS certificate prior to purchase, ownership of the boat remains subject to any mortgage registered under the SRA.”

The Department proposed an amendment to the Act “... to explicitly exempt NSW boats of less than 24 metres tonnage length from registration with the ARS²⁰. This would have the effect of making NSW REVS the sole register of security interests over NSW boats under this length”.

The Australian Finance Conference (AFC), which represents mainly non-bank financiers, submitted that “arguably, the Act should not establish a title register, and the AFC is certainly not seeking such an outcome ... AFC member companies, as financiers see merit, both in commercial terms and the broader public interest, in there being a register on which they can give public notice of their interests in ships.”

The AFC went on to say that only since the introduction of the REVS for Boats in New South Wales has there been a public record on which financiers could record their interests in leased or hire-purchased marine craft. The AFC submission stated:

“Members have expressed a strong preference, based on experience, for a new system for registration of financial interests in ships based on the REVS-type procedures. Financiers would then give notice of their interests instead of lodging mortgage documents. The system would provide for registration of interests in charges, leases, and hire-purchase finance, as well as mortgages, using electronic registration processes. Members believe that an initiative of this nature would stimulate lending for ships.”

The advantages of a system of notice based on REVS are, according to the AFC, that it is uncomplicated and more economical than lodging mortgage documents, is well known in the community and can be easily accessed by the public, dealers and financiers.

The matters raised by the DFT and the AFC are analysed in section 4.2.2.

4.2 Impact of the Shipping Registration Act

4.2.1 Benefits of the Act

The benefits of registration are somewhat difficult to identify precisely. The SR Act states in s. 63 that a ship that is required to be registered but is not registered “is not entitled to any benefits, privileges, advantages or protection usually enjoyed by a registered ship”. Clearly, the SR Act envisages that there are some benefits.

Davies and Dickey do not discuss benefits but rather “consequences of registration”.²¹ They list these as being the liberty to travel overseas, the conferring of nationality,

²⁰ ARS is the Australian Register of Ships.

²¹ Davies and Dickey, (1995), pp. 55-57.

registering title in certain circumstances and the ability to register a mortgage. The Review Team would not disagree with this list of consequences but would note that they could be considered to be benefits. It would also note that the liberty to travel overseas would seem to be a consequence of the conferral of nationality.

In those submissions that discussed benefits of the Act, the benefits were in fact similar to the consequences listed by Davies and Dickey. The views expressed in submissions indicate that business and the community consider that there are three benefits from the Act: the ability to sail overseas, gaining title as a proof of ownership and facilitating the provision of finance.

Ability to sail overseas

Submissions from yachting associations indicate that the yachting fraternity considers that a major benefit of registration is that it allows a yacht to sail overseas by providing some form of proof of ownership when applying for customs clearance in a foreign country. It also enables them to avoid paying customs duty on returning to Australia. A commercial shipping line, Perkins Shipping of Darwin, stated that "... it require(s) access to the benefits of nationality and safe passage conferred by registration". It also stated that one of the benefits of the conferral of nationality is that it "... gives jurisdiction of Australian law and rights to consular assistance".

The Minerals Council of Australia stated that "the benefit of Australian registration for commercial ship owners in international trades is the identification with a marine administration known for enforcing internationally agreed standards in ships flying its flag."

It is not possible to quantify the value of this benefit. All that can be said is that without the nationality conferral power of the Act, Australian-owned commercial and recreational vessels would be deprived of the ability to voyage to overseas destinations under the Australian flag. Australian companies and individuals could overcome this problem by establishing companies overseas (Singapore, for example), transferring a ship or boat to this company and then registering the ship in Singapore. In effect, their freedom of navigation would not be impaired so it could be argued that the benefit is not large.

There are, however, benefits of being able to sail under the Australian flag. One of the most important is that the conferral of nationality allows for the importation of Australian law on board the ships.²² Another is the pride that may come as a result of flying the national flag. These benefits are intangibles which cannot be valued.

Title as proof of ownership

The establishment of title proves ownership. Dayle Smith stated that registration "... allows a yacht to be bought and sold as items of property under circumstances where title can be fairly clearly demonstrated". The only other submission to comment on the link between title and ownership was the one from Phillips Fox (Derek Luxford) which stated that "the benefits of registration of course are that it makes it easier for any person dealing with a vessel to ascertain the details of ownership ..."

²² See footnote 9, chapter 2.

Derek Luxford emphasised, in discussions with the Review Team, the requirement of ships' financiers, suppliers (eg of bunker fuel) and other service providers to positively identify the chain of ownership of any ship prior to entering into any business relationship. He expressed the view that ship operators could not operate without the certainty of title that registration provides.

Nevertheless, with respect to recreational vessels, there is no information on the extent to which owners register simply to establish title to prove ownership.

Provision of finance

Banks and law firms stressed the benefits of registration from the perspective of mortgages registered under the Act and the provision of finance. The Australian Bankers' Association stated that "we are of the view that a registered mortgage is preferable to alternative forms of security, and that it is attractive to both financier and owner alike".

The NAB, which was the only individual bank to make a detailed submission, stated that "... by registering a vessel, the owner could more easily obtain finance (as the financier will be able to rely upon a register upon which it can note its interest): if the vessel was not registered, it would be more likely to result in finance being provided, if at all, on an unsecured basis (with consequent higher interest rates being applied)".

Dayle Smith also commented that registration of a mortgage "... results in vessels being able to be obtained on a much more competitive rate of interest. This is certainly true of recreation vessels ..."

Mallesons Stephen Jaques commented in its submission that "registration of ownership of a ship and the registration of ship mortgages is fundamental to international ship finance transactions. The current mechanism of registration of title and mortgages must remain in place to ensure financiers have the necessary comfort when lending money to shipowners secured by a mortgage over an Australian registered ship".

It is likely that there is a considerable benefit to industry and individuals from having mortgage provisions in the SR Act but, as with the other benefits, it is not possible to quantify them. To be able to do so would require information on the non-existent "counterfactual situation", ie the interest rates that would have been paid on alternative non-mortgage finance.

4.2.2 Costs of the Act

There are, broadly, four types of cost arising from the operations of the Act:

- direct financial costs of registration;
- economic costs of registration;
- costs arising from having a title ship register; and
- costs arising from only having mortgage registration.

Direct financial costs

The direct financial cost of registration is the fees charged by the Shipping Registration Office. The current schedule of fees is shown in Appendix 5. The registration fee for ships permitted to be registered is \$799 for pleasure craft and fishing boats and \$1,953 for ships on demise charter to an Australian operator. The registration fee for ships required to be registered is \$1,195. Some comments on the impact of the registration charges can be made by using the figures in table 4.1 on the number of new ship registrations in 1995-96 and 1996-97.

Table 4.1 New Ship Registrations by Vessel Type, 1995-96 and 1996-97

	Recreational	Fishing	Govt	Demise charter	Commercial (a)	Total
1995-96	184	69	0	2	34	289
1996-97	191	47	0	4	30	272

Source: Registrar of Ships

(a) This includes international trading vessels and other commercial vessels such as tugs, work boats, ferries etc.

The first comment is that the current fee structure is set to recover the cost of operating the shipping registration office. As ship owners and mortgagees are the beneficiaries of the SR Act, continued cost recovery is justified. There are no public benefits which would warrant less than full cost recovery. Nevertheless, efficiency is necessary and it is an objective of the Australian Shipping Registration Office to minimise the cost of providing its services.

The second comment is that the number of registrations each year is not large so that the total fees paid out by shipowners (the direct financial cost of registration) in any year, in absolute terms at least, will not be large. In 1996-97, this cost would have been less than \$250,000.

The third comment is that the major component (87%) of new registrations in the last two years is for ships permitted to be registered, ie pleasure craft and fishing vessels. Therefore from a financial perspective this sector is contributing the major portion of registration fees collected. However, this does not mean that there is any cross-subsidisation because the fees are set to recover the costs of processing each individual application.

It should be noted that there is a cheaper alternative to full registration for ships such as yachts which may be making an overseas voyage. This is a temporary pass (fee of \$155) which is issued for a specific voyage. To compete in a yacht race (and return home) an owner would need two passes. Yacht owners could therefore achieve the same objective as registration but at a lower cost if they applied for a temporary pass (ie \$310 compared with \$799) although if a yacht owner made frequent voyages overseas, registration would be the cheaper option.

The general view of yachting associations is that registration fees are too high. While the Queensland Yachting Association said that registration cost is not an issue, the YAWA

stated that “...all consider the cost of registration to be excessive” and Dayle Smith said that “the cost of initial registration for a yacht is far too high”. The Victorian Yachting Council stated that it believed that “...it would be more cost effective to have a “Small Ships Register” for pleasure craft ...”

It was suggested that the fees should be linked to some measure of capacity to pay such as net registered tonnage (NRT). For example, the Protection of the Sea Levy (ie an oil pollution levy) is based on the NRT so the larger ships pay proportionally more. It could be argued that this is appropriate for the oil pollution levy because larger ships carry more fuel and are potentially larger polluters. However, the Review Team does not consider ability to pay to be appropriate for registration because it is a service available identically to all ships and boat owners, eg the grant of a certificate of registration. In this circumstance, the administrative cost to process an application is a more appropriate basis to set fees.

It may be argued that the fee structure is unfair because it costs almost as much to register small craft such as yachts as it does to register large commercial ships. This situation arises because fees are based on the administrative effort need to process an application and not the value of the ship. While commercial ship registration may involve complex documentation, it is usually undertaken by solicitors (either from the shipping company or its law firm) who are knowledgeable of the process and therefore there are few difficulties. By contrast, the registration of recreational craft is less complex but the Registrar informed the Review Team that it often requires that a chain of title be established which can be time consuming and this adds to costs.

Economic cost

Some submissions commented on link between registration and the cost of operating Australian flag vessels. The Minerals Council of Australia said that “... for commercial ships it (ie registration) usually attracts other conditions which significantly affect the economics of operation”. The MCA noted that these conditions could include fiscal and workplace (ie industrial) issues.

Phillips Fox said that some of its clients “... consider that the real difficulty they have in registering vessels in Australia is the economic cost of operating Australian flag vessels. This flows principally from labour costs and revenue costs in comparison with registering vessels elsewhere and are not simply in the more traditional open registries”.

The Review Team noted these comments but it is of the view that it is not the SR Act which has the primary impact on the competitiveness of Australian flag shipping. In Australia, it is the *Navigation Act 1912*, rather than the Shipping Registration Act, through which safety standards are enforced.

Similarly, the fiscal environment in which Australian flag shipping operates is the result of specific decisions made in fora such as budget formulation with respect to matters such as taxation and industry policy. The SR Act does not primarily impact on the fiscal environment of Australian flag shipping.

Cost of having a title ship register

Apart from the direct financial cost of registering, a cost arises for those small ship owners who only want nationality but are forced to use a title register which is more complex than

what they need. This could be considered to be an indirect cost, as opposed to the financial cost of fees, which arises from the fact that the Australian Register of Ships is a title register.

The implication of a title register is that if an owner wants to register a ship that has never been registered, there is a requirement to prove ownership back to when the vessel was constructed. If the ship was once registered, but the vendor is not the name of the owner entered in the Register, there is a need to identify the chain of title between the last registered owner and the new owner. This problem occurs when individuals purchase ships permitted to be registered (eg yachts and fishing vessels) and it makes the registration process administratively complex and burdensome to owners.

This type of situation occurs quite frequently according to the Registrar and can only be resolved by time-consuming processes such as filing statutory declarations or court orders to make a variation in the Register.

The cost of being compelled to use a title register has two components. One component is the financial cost of any court action to change an entry in the ship register and the other is the economic cost (ie net income foregone) of any delay in registration while title is established. While the cost of a particular court action could be estimated (ie court fees may be set in a schedule) the economic cost can not be easily valued. For recreational vessels there will be no economic cost (almost by definition). However, for fishing boats the economic cost could be quite high. If a fisherman was delayed from acquiring a boat by some weeks while title was established, the net income lost (ie gross income less production costs incurred) could be considerable.

It could, however, be stated that the costs of having a title register would be offset by the benefits if it was known that shipowners wanted title, ie whatever costs a shipowner incurred in establishing title would be fully offset by one of the benefits of title (see section 4.2.1).

The figures in table 4.2 enable a conclusion to be drawn (even if only tentative) about the importance of one of these reasons, ie mortgage registration, for registering a vessel.

Table 4.2 Australian registered ships with mortgages, as at 5 Sept 1997 (a)

Vessel type	Registered ships	Mortgaged ships	% mortgaged
Pleasure	4923	218	4.4
Fishing	2168	1090	50.3
Government	22	0	0
Charter	19	8	42.1
Commercial (b)	953	313	32.8
TOTAL	8085	1629	20.1

Source: Registrar of Ships

- (a) The table does not show the number of ships that may have had a mortgage which has been discharged.
- (b) This includes international trading vessels and other commercial vessels such as tugs, work boats, ferries etc.

The relevant vessel types on which to focus are pleasure craft and fishing vessels because these vessels are not required to be registered. They therefore are registered voluntarily by their owners for a specific reason, ie to gain nationality or establish title to either prove ownership or register a mortgage. As a vessel needs to be registered before a mortgage can be registered, then it could be concluded that, for

4% of pleasure craft and 50% of fishing vessels, the need to register a mortgage may have been the main reason for registering the vessel.

It is not unreasonable to conclude, therefore, that for the majority of pleasure craft, it was one of the other two reasons, ie to gain nationality in order to sail overseas or to establish title as a proof of ownership, which would have been the prime reason for registration. While there are no data on which to decide the relative importance of these two factors, the fact that only one submission mentioned title as a proof of ownership indicates that it is nationality which is the main reason why yachts are registered.

The category “commercial” is commercial vessels of all sizes, ie international trading vessels such as bulk carriers, tugs, dredges, etc. Some will be over 24 metres in tonnage length and therefore required to be registered and others such as tourist vessels, may be less than 24 metres in length and therefore permitted to be registered. While only 32% of these vessels have a registered mortgage, commercial vessels will be registered under the Act in order to establish title because financiers, and other commercial entities such as bunker suppliers, need to identify as precisely as possible the ownership of the ships with which they enter into business relationships.

The position of charters is somewhat different. Vessels that are demise chartered by Australian operators from overseas owners will frequently be registered by the operator so as to be able to fly the Australian flag. However, a mortgage can also be registered against the vessel (the problems arising from this practice are analysed in chapter 6).

Cost of having only mortgage registration

The existence of mortgage provisions in the SR Act enables the registration of a ship mortgage which will give it priority over an un-registered mortgage. Mortgages can be taken over a ship for a number of reasons one of which is to secure finance. However, the submissions by the Australian Finance Conference (AFC) and the NSW Department of Fair Trading indicate that there are two costs arising from only being able to register mortgages.

The AFC submitted that because only mortgages are registered “... a ship’s mortgage is taken in lieu of other security, eg lease, charge or hire purchase. This restricts customer financing options and ... adds to the cost of financing”. The second cost arises from an overlap between the New South Wales *Registration of Interests in Goods Act 1986* (RIG Act) and the Commonwealth SR Act so that mortgages registered under the latter have priority over interests registered under the former.

Before responding to the submissions, it should be noted that the Commonwealth SR Act creates a title register and it is a logical consequence that it should also make provision for the registration of mortgages (which are linked to title). Section 38(1) of the SR Act states that “a ship or a share in a ship may be made a security for the discharge of an obligation by way of a mortgage under this Act.” In this respect the SR Act is similar to the British, Canadian and New Zealand legislation.

It is also relevant to note that a mortgage is a proprietary maritime claim as defined by s. 4(2) of the *Admiralty Act 1988* and s. 16 of this Act enables proceedings on a proprietary maritime claim to be commenced as an action *in rem* against the ship.

One of the reasons why mortgages are attractive is that any obligation, and not just a repayment to a financier, can be secured by a mortgage. As BHP Transport noted, “That any financial obligation may be so secured means that the ships mortgage has the flexibility to make it a very useful tool able to be accommodated to back up a range of transactions ... The security is effective should it need to be enforced in Australia, and various jurisdictions abroad by virtue of the mortgagee’s right to arrest the vessel in the event of a claim relating to possession, title or mortgage.”

It is clear therefore that registration, and the registration of mortgages, is important for commercial shipping. As Gaskell notes, “Registration is essentially a procedure which provides evidence, in the form of a record, of matters which relate to rights in the vessel. It is used as a means of recording information about the ship and its owner, *e.g.* as to evidence of title and the existence and priority of mortgages. Registration therefore has advantages, in the commercial context.”²³

The fact that historically mortgages may have been the usual way in which ship finance was secured, may, as the AFC argues, lead financiers to take mortgages rather than other types of security. This may add to the cost of financing but the nature or the magnitude of the cost has not been specified.

It was beyond the scope of this review to test whether or not ship financing costs are higher as a result of only being able to register mortgages under the SR Act. While the AFC doubted that, in the current competitive market, mortgages will always be cheaper than other forms of financial interest, submissions from the banking sector were clear that lending without a mortgage would be unsecured with higher interest rates being applied. The issue is therefore open to debate.

Nevertheless the issue can be explored. In doing this it is useful to consider the impact of the current ship registration arrangements on international trading ships (eg tankers and bulk carriers) separately from the impact on pleasure craft and fishing boats. It is accepted that, in an internationalised financial sector, financing options for trading vessels are varied and complex. Many international trading vessels are indeed financed by leases but, as one shipping company executive informed the Review Team, the security for the financier is that it owns the vessel. While a financier may be the legal owner of a vessel, it is not unreasonable to suggest that financiers are generally not interested in becoming involved with ship registration. Nevertheless, the shipping company as the vessel operator will need to register it for the purpose of gaining nationality to trade internationally. The

²³ Gaskell, (1995), p. 21-29.

types of arrangement made to register the vessel, eg a demise charter from the financier, are not known.

The situation is somewhat different with pleasure craft. These vessels generally remain within Australian jurisdiction, or at most leave it infrequently and for short periods, and most will not need to be registered for the purpose of an international voyage. Pleasure craft are also much cheaper than commercial vessels. They are items of personal property, rather than commercial assets, and are often purchased using forms of security other than a registered ship's mortgage, eg hire-purchase agreements or personal loans.

The data in table 4.2 allow some tentative conclusions to be drawn on the issue. The first is that, as only 4.4% of pleasure vessels had a registered mortgage as at 5 September 1997, it is difficult to argue that, for the pleasure craft sector as a whole, there is any significant cost arising from the fact that only mortgages can be registered under the SR Act. There are so few registered mortgages that other forms of security must be taken, eg unregistered mortgage, hire-purchase agreement, mortgage over other real property such as a house or land, etc.

The second conclusion is that whatever cost there may be is likely to be borne by commercial vessels and fishing boats because these are the main users of the mortgage registration facility. The cost presumably is that the financiers of some of these vessels would have preferred to take a security other than a mortgage. It is however difficult to assess the actual level of cost because not all of the mortgages may have been registered by financiers. Some may have been registered by other commercial parties such as, for example, bunker fuel suppliers.

While the Review Team is not able to calculate the cost of the SR Act arising from the fact that only mortgages are registered, nevertheless it can state as a matter of principle that it would be desirable if the SR Act took greater account of the commercial practices in shipping and finance markets in the 1990s.

In this regard, it is relevant that a Bill to amend the Canada Shipping Act was introduced into the Canadian House of Commons in October. One of the clauses of the Bill proposes that a ship will be eligible for registration if it is in the exclusive possession of an eligible person under a financing agreement which provides that the person will acquire ownership on completion of the agreement. A similar amendment to the Australian SR Act would go some way to recognising modern ship financing techniques. This would mean that any ship, eg tanker, yacht or fishing vessel, in the possession of an Australian individual or company under a financing agreement (lease, hire purchase, etc) which conveys ownership at the end of the financing period would be eligible for registration. This point is taken up further in chapter 5.

With respect to the second cost, ie the concern about the overlap between the NSW RIG Act and the Commonwealth SR Act (see 4.1.3), there may be an issue as far as recreational vessels are concerned.

Before considering this matter, the Review Team would note that the statement in the submission by the Department of Fair Trading that the Commonwealth Act allows the voluntary registration of certain ships, "... including the boats under 24 metres at which REVS for boats is targeted", indicates that there may be a misunderstanding about the purpose of registration under both Acts.

Under the Commonwealth SR Act ships are registered for the purpose of being granted nationality. The Act makes it compulsory for commercial ships to be registered (see 2.3 in chapter 2) but other ships such as pleasure craft can be registered if the owner needs nationality for an overseas voyage. It is the ship that is registered. By contrast, the long title of the NSW RIG Act states that it is “an Act with respect to the registration ... of security interests, the interests of lessors and the interests of owners under hire-purchase agreements ...” (see Appendix 6). It is the security interest rather than the property which is registered, although the application for registration must identify the goods concerned (s. 5(1A) of the RIG Act).

The Australian Register of Ships is a title register but, as far as the Review Team is aware, the Register of Interests in Goods is not a title register. If it was, it would be in conflict with s. 79 of the Commonwealth Act which prohibits State law from providing for, inter alia, the establishment or transfer of title or a mortgage with respect to a ship (see 4.1.1). Registration under the RIG Act is not connected to title and is in reality similar to notification.

The Review Team is unable to agree to the NSW recommendation “... to explicitly exempt NSW boats of less than 24 metres tonnage length from registration with the ARS” because there must be the facility to grant nationality to any ship (including those less than 24 metres) if it is needed. The purpose of the Commonwealth Act is fundamentally different from that of the NSW Act and for this reason it would not be appropriate to amend the Commonwealth Act.

There is, however, an overlap between the two Acts because both provide for the registration of security interests, ie mortgages, notwithstanding the different nature of registration under each Act. The issue of concern is that any interest entered in the NSW Register would not have any priority over a mortgage registered under the Shipping Registration Act.

The Manager of REVS informed the Review Team that it is intended to amend the RIG Act so that it will establish priority which will be the order in which interests are registered. Therefore a lease or a hire-purchase agreement would have priority over a mortgage under the RIG Act if they were registered first. Nevertheless, the problem for New South Wales would continue to be that a creditor who registered an interest under the RIG Act would still lose any priority to a mortgage registered at some later date under the Commonwealth SR Act.

Amending the Commonwealth SR Act to exclude boats under 24 metres from its operation with respect to mortgages would not preclude a financier from taking a mortgage over such a boat; it only means that it would not be able to register it. The financier would be able to register the mortgage under the RIG Act and have priority if this Act is amended to provide for priority.

The AFC commented that “AFC members have interests as mortgagees, lessors or owners (under hire-purchase agreements) in boats which are registered on REVS in NSW.” This indicates that registration under the RIG Act rather than the SR Act is acceptable to its members.

However, before making any amendment to the SR Act which restricted the ability of parties to register mortgages over boats less than 24 metres under that Act, it would be necessary to consult with the banks to ascertain their attitude to the RIG Act, as compared

with the SR Act, in terms of the protection of loan. This consultation would need to focus particularly on the larger commercial vessels, eg fishing and tourist vessels, which are still less than 24 metres. This point is taken up again in chapter 5.

4.3 Overall Impact of the Act

The benefits of the SR Act are that it enables Australian-owned ships to voyage to overseas destinations and it facilitates the provision of finance for ship purchase or acquisition under more favourable conditions associated with mortgages.

The main implication from the nature of the registration system which arises from the analysis in section 4.2.1 of the costs of the Act relates to registration of pleasure craft and nationality. The majority of registrations each year are pleasure craft (mainly yachts) and most of these do not have mortgages registered against them. They are registered therefore to either gain nationality or to establish title as a proof of ownership. Since only one submission stated the latter as a reason for registering, there is a strong likelihood that the majority of yachts are registered to gain nationality.

If this is the case, then it would appear to the Review Team that the Australian ship register, by forcing owners to use a title register to gain nationality when they don't need or want title, is unnecessarily complex. It is relevant that the United Kingdom and New Zealand registers have parts which grant nationality only without proof of ownership (as discussed in chapter 3).

The Review Team is of the view that the Australian ship register needs a similar flexibility and an alternative registration scheme to give this flexibility is outlined in the next chapter.

A secondary issue which arose from the analysis of the costs of the existing registration regime relates to the fact that only mortgages can be registered, and the request from the AFC for a notice-based record of financial interests. There is a need for the SR Act to reflect modern ship financing practices. The way in which this might be achieved is outlined in the next chapter in the context of the formulation of an alternative registration regime.

5. An Alternative Ship Registration Regime

The registration of ships for nationality purposes, and the overlap of Commonwealth and State registration (notwithstanding the different purposes of each), are to some extent inter-related issues. The link is that most of the vessels which are registered, ie recreational vessels and fishing boats, come within the regulatory jurisdiction of the States and Northern Territory. The policy task is to develop an alternative registration system which is simpler and cheaper for owners of these types of vessels, who generally only need nationality, and which eliminates as much as possible of the administrative overlap between the Commonwealth and States/Northern Territory.

A development which is relevant to consideration of a registration regime which would meet these objectives is the work currently being undertaken by the National Marine Safety Committee.

5.1 National Marine Safety Committee

The National Marine Safety Committee (NMSC) was established pursuant to an Inter-Governmental Agreement on a National Marine Safety Regulatory Regime entered into by the Commonwealth, State and Northern Territory Governments. The NMSC is to provide advice to the Council of Transport Ministers on marine safety matters and to carry out certain functions including, inter alia:

- develop, coordinate, monitor and evaluate the national marine safety system, including performance indicators;
- develop draft model legislation and appropriate marine safety standards and arrangements which provide for consistent regulatory and legislative marine safety practices in all jurisdictions;
- develop and coordinate a National Marine Safety Strategy and secure the agreement of all Commonwealth, State and Territory marine safety authorities to its implementation.

The objective of the National Marine Safety Strategy is to improve safety outcomes by putting in place arrangements that, inter alia:

- are based on consistent application of common regulations and standards, including relevant international conventions and standards;
- provide for mutual recognition of certification;
- provide for the seamless movement of vessels and crews nationally; and
- share costs equitably and minimise the cost imposts resulting from either inconsistent regulation or inefficient administrative arrangements.

There are currently over 551,000 vessels “registered”²⁴ under State and Northern Territory legislation with 96% of these being recreational vessels. Details are shown in table 5.1.

The regulation of recreational vessels is uneven across the States and Northern Territory and this matter has been referred to a working group of the NMSC to make recommendations to Ministers on whether or not it is desirable to go down the path of common standards/regulation for recreational vessels. At this point in time it is not known whether or not recreational vessels will eventually be subject to a uniform safety regime.

It is also the case that there is no link at the moment between registration and safety. However, the two are not unrelated because the registration of a vessel can provide information which could be used for identification for search and rescue purposes.

For example, most yachts are required to have a sail number but there is no uniformity in the issuing of these numbers. A sail number could be issued by the Australian Yachting Federation, a State yachting association or a local yacht club depending on the type of yacht. When it is considered that a yacht will have a hull identification number (issued by a State regulatory authority or a builder) and an official number if it is registered under the SR Act, then a yacht could have up to three identification numbers issued by any one of six different organisations. Standardisation of the various identification numbers would be a useful step to make yacht identification easier for search and rescue purposes.

The review of the SR Act and the work of the NMSC are exercises which are mutually relevant because the philosophy underpinning the work of the NMSC, of harmonising standards across the States and Northern Territory, is relevant to the general issue of registration of recreational craft. The objective of the alternative registration scheme which is outlined in this chapter is to reduce the complexity of the registration process. However, it is also an objective of the Review Team to not recommend any changes in the administrative arrangements which would make it more difficult to achieve, at any time in the future, consistency in any aspect of the safety regulatory administrative framework particularly as it affects recreational vessels.

5.2 Legal Requirement for the Grant of Nationality

The United Nations Convention on the Law of the Sea (UNCLOS) places an obligation on State Parties to fix the conditions for the grant of nationality to ships but it leaves the implementation of the obligation to the discretion of individual parties. Australia currently implements this requirement through s.29 of the SR Act which provides:

- “29. (1) The following ships shall, for all purposes, be taken to be Australian ships and to have Australian nationality:
- (a) registered ships;
 - (b) unregistered ships (other than ships required to be registered) being:
 - (i) Australian-owned ships referred to in section 13;
 - (ii) ships wholly owned by residents of Australia or by residents of Australia and Australian nationals; or
 - (iii) ships operated solely by residents of Australia or Australian nationals or both.”

²⁴ It was stated earlier in section 4.1.1 that “registration” under State and Northern Territory laws is in the nature of user licensing or safety certification.

The Attorney-General’s Department has advised the Review Team that:

“There is nothing in UNCLOS which would preclude ships from being placed on State or Territory registers, however, UNCLOS does require that any nationality consequently acquired be Australian nationality. Accordingly, if all Australian ships were to be licensed etc under State and Territory legislation, with some then being entered on a national register, the implementation of UNCLOS obligations regarding nationality could be by way of a provision, either in Commonwealth legislation (ie the SR Act) or in each of the State and Territory laws, to the effect that all ships licensed under relevant State and Territory laws shall have Australian nationality.”

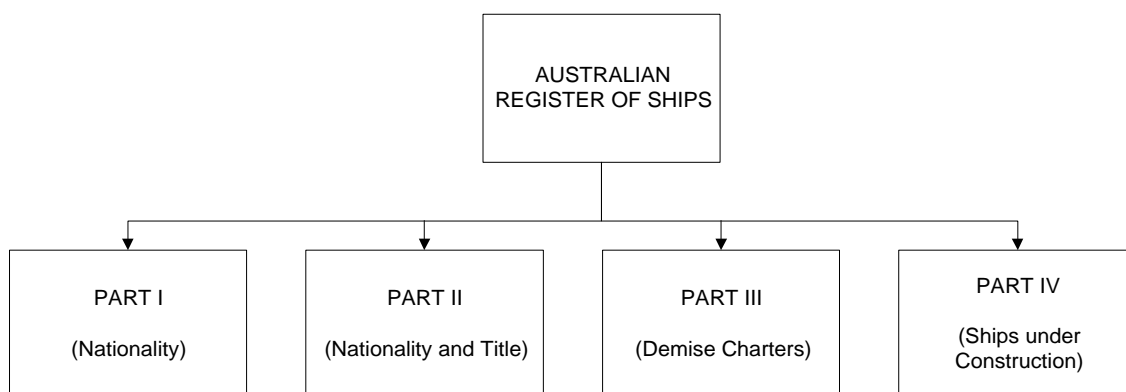
The implementation of any cooperative scheme to grant nationality would require amendment to Commonwealth legislation. Certainly, s. 79 of the SR Act would need to be amended to, at the minimum, delete the reference to the States not being able to grant nationality.

The Attorney-General’s Department raised some jurisdictional issues which could arise under the Offshore Constitutional Settlement if nationality were to be granted to Australian ships under State and Territory legislation. However, it concluded that provided that State legislation was not to be used to regulate matters beyond the three mile limit from relevant baselines, and that Commonwealth legislation would continue to govern rights to fly Australian flags, there would not be any need to change the Offshore Constitutional Settlement.

5.3 An Alternative Ship Registration Regime

Having regard to the comments made in submissions concerning the complexity of the process of gaining nationality, the conclusions arrived at in chapter 4 and the legal advice regarding the implementation of UNCLOS obligations, the Review Team considers that Australia’s shipping registration regime would operate more efficiently if the register was divided into four parts with each part providing a specific service from which a shipowner could choose depending on circumstances.

This alternative administrative arrangement is represented diagrammatically below.



The Review Team also is of the view that the shipping registration regime would operate more efficiently if it incorporated the following features:

- registration was voluntary, ie ships should be entitled rather than required to be registered (see 2.4.2);

- registration under Parts I and II was for a fixed period, eg five years; and
- registration under Part III was for the period of the charter.

The restructured register would continue to provide for the registration, transfer and priority of ship mortgages but it would not provide indefeasible title.

The registration options would be:

- Part I: recreational and fishing vessels requiring nationality only (ie no proof of ownership or title)²⁵;
- Part II: ships which require both title and mortgage facilities (the establishment of title would automatically convey nationality);
- Part III: ships on demise charter;
- Part IV: ships under construction (see 6.2).

The proposal that registration be voluntary means that the current demarcation of 24 metres, with respect to the requirement to be registered, would not be necessary. This change would require the amendment of ss. 12-14 of the Act as there would no longer be a distinction between ships required and permitted to be registered and no need for the provision for exemption for certain ship types from the requirement to be registered.

A fixed period of registration, rather than the current practice of “life” registration, would assist in keeping the register up to date and accurate. Registration under Part III in the United Kingdom and under Part B in New Zealand is for a period of five years which would appear to be a period short enough to keep the register accurate but long enough to avoid imposing a heavy administrative burden on shipowners. However, other registration periods, eg four or six years, may be equally acceptable.

Part I would be administered jointly by the Commonwealth, and the State and Northern Territory Governments if the latter were willing to participate. That is, if an owner wished to register a vessel for the purpose of gaining nationality, this could be done with a Commonwealth agency (presently AMSA located in Canberra) or with an appropriate State or Northern Territory government agency. Parts II, III and IV of the Register would be administered by the Commonwealth Government.

The Review Team is proposing that recreational and fishing vessels be eligible for registration under Part I because, while these vessels are currently exempt from registration, if they need nationality they are forced into a title system. While other types of vessels could in theory be registered on Part I, from a policy perspective it would be desirable that eligibility for registration under Part I be restricted to those ships that are not subject to the *Navigation Act 1912*, ie the existing jurisdictional division between the Commonwealth and the States/Northern Territory (deriving from the Offshore Constitutional Settlement) should be maintained where possible.

²⁵ The proposed Part I would be similar to Part III of the British register (known as the Small Ships Register) and Part B of the New Zealand register.

The imperatives of maritime commerce require all commercial vessels, such as international trading vessels, tourist vessels, etc, to establish title so that other commercial parties have as much certainty as possible about who they are dealing with. Commercial vessels are also often subject to a mortgage and for this title needs to have been established. The myriad of commercial interests, such as financiers, bunker fuel suppliers, etc will often want to be able to take a mortgage over a ship.

There will, of course, be administrative issues arising from the restructuring of the Register which will need to be resolved. Four particular issues which have been raised already are:

1. There will need to be the facility to transfer between Parts of the register at any time.
2. Waterways Authority in New South Wales noted that the registration regime in New South Wales is annual and that two different registration periods for those vessels on Part I would cause administrative problems.
3. The possibility that the term of a loan secured by mortgage will exceed the proposed five year registration period under Part II could cause problems if registration is not renewed.
4. The need to put in place an effective link between registration under the SR Act (which triggers flag state responsibilities) and the safety regime put in place by the *Navigation Act 1912*.

These matters are not addressed in this report except to note that they are the types of issue that will arise from a restructuring of the existing registration regime and will need to be examined and resolved to maximise the efficiency of the new regime.

It is proposed that Part III of the register be reserved for demise charters, ie a ship which is either bareboat chartered-in by an Australian operator from a foreign owner or bareboat chartered-out by an Australian owner to a foreign operator. This may address some of the particular problems that can arise for mortgagees of ships which are demise chartered, both into and out of Australia (this issue is addressed in detail in chapter 6). However, to record in the register that a ship is bareboat chartered-out would require an amendment to s. 17 of the SR Act.

As Australia is required by UNCLOS to maintain a register of ships flying its flag, it would be necessary under the proposed arrangement to continue to maintain a central record of all ships registered under all Parts of the Register. This will require that those States and Northern Territory which participate to periodically send to Canberra details of all vessels to which they had conveyed nationality under Part I. The proposed registration arrangement has resource implications for the States/Northern Territory which would need to be addressed.

The Review Team recommends that:

- (i) **the Australian Register of Ships be restructured into four parts;**
- (ii) **the Act be amended to give effect to the restructuring. This includes ss. 12-14 (obligation to register and exemptions), s. 79 (nationality and the States) and s. 17 (foreign registered ships); and**

(iii) discussions be commenced with the States and Northern Territory concerning their participation in the administration of Part I of the restructured Register.

5.4 Implications for the States and Northern Territory

The States require that most recreational vessels (but not all as will be discussed below) be registered under their own legislation. The purpose of the proposal that Part I of the Register be administered by the States and Northern Territory jointly with the Commonwealth is to provide a type of registration “one stop shop” which recreational vessel owners can avail themselves of if they wish, ie they can obtain nationality at the same time as they register under State and Northern Territory legislation.

The proposal has been discussed in broad terms with State officials. While in general the proposal was not opposed in principle, a number of concerns were raised. These concerns are:

- There is a reluctance by State marine agencies to accept additional administrative activities which depart to any significant extent from their existing core functions.
- There are reservations about the administrative workload that may result from the proposal. Some States considered that, if the proposal was adopted, additional costs should be met by the Commonwealth. There was also a lack of enthusiasm on the part of the States for undertaking significant legislative amendments to give effect to the proposal.
- As not all States require the registration of all types of recreational vessels, it could be difficult to link nationality to State registration. In Victoria, Tasmania and South Australia, for example, recreational vessels which are not provided with propulsion motors, and this includes yachts of all sizes, are exempt from registration; and
- There are reservations about the suitability of using State registration for nationality purposes because State registration does not involve inspection of a vessel or verification of the details supplied by the person seeking registration.

Detailed negotiations between the Commonwealth and the State and Northern Territory Governments will be required to implement the alternative registration system which has been outlined in this chapter. This report will not canvass any of the issues to be negotiated but, in order to more fully explain the alternative regime, a number of points of principle will be stated:

- It is not the intention to force the States and Northern Territory to undertake any significant administrative effort on non-core functions. Under the proposal, only those vessel owners wanting nationality would use Part I. The issue of a certificate of nationality by the States or Northern Territory will simply be a minor “add-on” to their own registration process.
- In the last two financial years the numbers of new registrations and closures of registration of recreational and fishing vessels under the SR Act were not large except for Queensland and New South Wales, as indicated by the figures in table 5.2. With the exception of these two States, the additional administrative workload, including data transfer, should be minimal.

- Owners of vessels which are not required by State legislation to be registered (eg non-motor propelled vessels such as yachts) will be able to obtain nationality by registering under Part I directly with the Commonwealth.
- It is not intended to link registration of recreational craft with safety inspections or with verification of the identity of the owner or the details of the vessel supplied by the owner. The proposed system would rely on a declaration by the owner seeking registration but there would be penalties in the SR Act for those individuals making false declarations.
- It is expected that, because Part I would not convey title, registration under this Part would be simpler than under the current system and that the cost to small boat owners should be less than at present. However, implementation of the new system would need to be preceded by a review of the fee structure. The principle of cost recovery should be continued.

5.5 Indefeasible Title

The request by the National Australia Bank for title to be indefeasible was outlined in chapter 4. It is understandable that mortgagees want as much security as possible over the assets for which they provide finance. Since ships are movable assets, any security over the ship is necessarily somewhat tenuous and they would want to strengthen this security if possible.

In a conversation with the Review Team, a representative of the National Australia Bank reiterated the recommendation in its submission that the Act be amended to provide indefeasible title.

The matter was considered by the Review Team in some detail. The principle of “indefeasibility of title” is a feature of real property law where, under the Torrens system of “title by registration”, an individual who purchases land in good faith, on becoming registered as the owner of that land, acquires good title despite any defects in the vendor’s title. In a discussion of the origins of indefeasibility, Neave, Rossiter and Stone²⁶ note that Torrens “... concluded that a new scheme was required to achieve security and simplicity in matters of title to land. ... In short, Torrens attempted to make titles to land “independent” by making the register conclusive and by barring “retrospective investigation of title”: ...”. It seems fairly clear to the Review Team that in practice the principle of indefeasibility can only be applied to land.

Many parties, other than secured and unsecured mortgagees, can have an interest or a claim in a ship and these are not recorded on any register. The rights of these parties are generally regulated by the common law and, to a lesser extent, by the *Admiralty Act 1988* and the *Navigation Act 1912*.

Phillips Fox commented in its submission on the issue of security for mortgagees and its comments are relevant to the issue of indefeasibility:

“Some mortgagees would prefer a system of title to a vessel by registration like Torrens Title to land. However, such a system has not been developed anywhere in the world to

²⁶ Neave, Rossiter and Stone, (1988), pp. 390-398.

our knowledge and we doubt that it would be acceptable to the international maritime community. The recent Convention on Liens and Mortgages does not propose such a system. In any event, it is very difficult to see how such a system would overcome the well recognised rights of people with maritime claims such as salvors, masters and seamen, the Admiralty Master, revenue authorities and many others. The legislation would either have to overturn these recognised priorities or else contain so many exceptions that the mortgagee would probably be no better off than it is at the moment. Nevertheless, in theory the Act could be amended to deal with these matters but there will have to be consequential amendments to the other legislation mentioned above and there will be major changes to the common law. We doubt that the Shipping Registration Act is the place to deal with all these issues, particularly as they have very significant international ramifications.”

The Review Team is unable to agree with NAB’s recommendation. It is of the view that it is not possible to have indefeasible title for ships when ownership (and title) passes through the execution of a bill of sale in a commercial transaction and the transaction is then registered after the event. While registration can provide strong evidence of title, it is always possible that, through a court order, title can be defeated in favour of another party.

The Review Team is therefore not proposing that there be any amendments to the SR Act to implement a shipping registration regime which includes the principle of indefeasible title.

5.6 Non-Mortgage Financial Interests

The Review Team gave careful consideration to the submissions by the Australian Finance Conference and the New South Wales Minister for Fair Trading concerning the registration of non-mortgage securities. The issues arising from their submissions were analysed in chapter 4.

The ship mortgage provisions came into the shipping registration regime over some hundreds of years and developed to service the financial needs of merchant shipping. This continues to be the primary purpose of the mortgage provisions and it is essential that there be the facility to register mortgages.

Apart from commercial ships, the predominant type of vessel in Australia is the recreational vessel, as the figures in table 5.1 indicate. While the value of these vessels will vary greatly, their purchase is likely to be financed by consumer credit or personal loans from a financier (bank, credit union, etc). These transactions are more in the nature of consumer, rather than commercial, finance and the evidence from table 4.2 is that registered mortgages are rarely taken over recreational vessels.

The alternative registration regime outlined earlier in this chapter will, if implemented, result over time in small vessels such as pleasure craft and fishing vessels, being registered on Part I and commercial vessels on Part II. It would be desirable if this was complemented by the security interests for small craft also being registered under State arrangements such as New South Wales REVS.

The Review Team has no criticism with New South Wales REVS and it is of the view that a system of notification of security interests which is designed to safeguard the interests of owners and financiers of vessels less than 24 metres is to the benefit of that part of the

marine sector. Indeed, the Review Team considers that it would be a desirable policy objective for vessels less than 24 metres to be brought under State/Northern Territory jurisdiction as much as possible including for the registration of security interests. Certainly pleasure craft, which are in the nature of personal property, are probably better suited to State registers of encumbrances, notwithstanding that New South Wales is the only State which currently has this type of register, rather than the SR Act which is better suited to the needs of commercial vessels.

Nevertheless, if an individual wishes to purchase or build a vessel less than 24 metres, and this can be done most cheaply with finance secured by a mortgage registered under the Commonwealth SR Act, then this option should continue to be open to the individual. For this reason, the Review Team is not recommending that there be an amendment to restrict the access of boats less than 24 metres to the SR Act.

It is conceded that problems of overlap may continue to arise between the NSW RIG Act and the Commonwealth SR Act. However, this type of problem is currently addressed through cooperation between the respective offices and the NSW authority warns inquirers about interests registered under the Commonwealth Act. If the Commonwealth register becomes available on-line (see 6.7), it should be easier to search and therefore make it easier to be aware of overlap with the NSW register.

Even if there was support among small ship owners to amend the SR Act in the manner recommended by the NSW Minister, there would need to be thorough consultation with the banks and an assessment made of the potential impact of the amendment on the supply of finance for ships less than 24 metres.

However, given the reform initiatives which are occurring in the field of personal property security law, and with the likely introduction of REVS type registers in other States in the future, the interaction of State registers of encumbrances and the SR Act should be monitored.

The Review Team recognises the complexity of financing arrangements associated with the acquisition of international trading vessels. As discussed earlier in section 4.2.2, it is doubtful whether a financier (which in many cases is a consortium) which may be the legal owner of a vessel, will be interested in registration.

As a general principle, it is desirable for legislation which regulates an aspect of commercial activity to take account of all developments and innovations in that activity. It would be desirable if the SR Act recognised the complexity of modern ship financing techniques and the fact that many ships are acquired through complex leasing transactions. Canada appears to be moving in this direction with the inclusion of a clause in its Bill (C-15) to reform the Canada Shipping Act providing that a ship may be registered if it was in the exclusive possession of a qualified person under a financing agreement, where the agreement provides for the acquisition of ownership on completion of the agreement.

The feasibility of amending the SR Act to insert a similar provision should be investigated. This provision need not be limited to international trading vessels but could be extended to any vessel (eg yacht, fishing vessel, etc) in the exclusive possession of an individual or company under a financing agreement which provided for the acquisition of ownership at the end of the agreement.

It may also be possible to notify forms of finance, where a non-mortgage secured loan is advanced to the purchaser who then remains the registered owner, by way of a caveat lodged with the registrar. There may need to be an examination of the SR Act (ss. 47(A)-(E)) to determine whether an amendment was required to do this.

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

(i) examining the feasibility of amending the Act so that a ship could be entitled to be registered if it is in the exclusive possession of a person or company under a financing agreement which provides for the acquisition of ownership at the completion of the agreement; and

(ii) examining whether the caveat provisions of the Act currently allow the notification of non-mortgage interests and, if they do not, amending the Act to allow this.

6. Other Issues

In the previous chapter, the Review Team outlined the changes, from a structural point of view, that it recommended should be made to the ship registration regime to make it less administratively complex.

A number of issues relating to the operation of the Act were raised in submissions (listed in Appendix 4) which recommended that amendments be made to the Act. These recommendations did not question the existence or the fundamental nature of the current shipping registration regime and they are analysed in this chapter.

6.1 Status of a Mortgage where a Ship Ceases to be Entitled to be Registered

6.1.1 Description of the problem

The question of the status of a registered mortgage when the ship to which it is attached ceases to be registered was raised in three submissions. Mallesons Stephen Jaques (Mallesons) raised the matter by stating that “the Act does not provide, however, for a situation where a ship is transferred from the Australian Register of Ships to a foreign register under the existing financial arrangements.” The latter was a mortgage registered on the Australian Register of Ships.

Mallesons gave an illustration of the problem and it is useful to quote it in full:

“A ship is owned by a British company. The British owner demise charters the ship to an Australia-based operator for a term of 5 years. The ship is registered on the Australian Register of Ships under section 14(d) of the Act. The British owner borrows money from a Norwegian bank under a 10 year loan agreement, giving the bank a first priority mortgage over the ship as security. The bank registers the mortgage on the Australian Register of Ships. At the end of the demise charter the British owner, with the bank’s consent, enters into a new 5 year demise charter with a Liberian corporation. The bank instructs its Australian solicitors to remove the mortgage from the Australian Register of Ships and register the mortgage on the Liberian register once the ship has been deleted from the Australian register and registered in Liberia. The solicitors must advise the bank that the vessel’s registration can only be discharged from the Australia register if the bank discharges the shipowner from its obligations under that mortgage. The bank points out that this is unacceptable because of insolvency issues.”

Mallesons recommended that “section 44 of the Act should be amended to allow a ship mortgage to be removed from a ship’s register without being released or discharged”.

Corrs Chambers Westgarth (Corrs) raised the issue in terms of the owner of an Australian registered ship registering the ship on the register of some other country. Corrs stated that “... this will result in the ship ceasing to be entitled to be registered on the Australian Register. This means that, effectively, the interests of a mortgagee under a registered ships mortgage is then liable to be closed”.

In its submission, Corrs recommended that:

“... Section 66 be amended to provide that the registration of a ship on the Australian Register (including, in relation to any registered mortgage), cannot be closed unless all registered ships mortgages have been released or the consent of the holders of all registered ships mortgages to the closure of registration has been obtained.”

The Export Finance and Insurance Corporation (EFIC) raised this matter in the context of a ship being sold to a non-Australian national and it questioned the status of the mortgage in this type of situation. EFIC stated: “ It is not clear whether the non-Australian purchaser would be able to require immediate issue of deregistration papers, without having to wait for the mortgagee’s 60 day period to expire. We would suggest that the section would benefit from either or both of the following:

- notice being given to the mortgagee(s), say, 60 days *prior* to closing of registration of the ship; and
- clarification in the SRA that deregistration papers would only be issued once the appropriate time period had expired without orders to the contrary being made.”

6.1.2 Consideration of the problem

The issue raised in submissions arises from either the expiry of the charter of a foreign-owned ship to an Australia operator or the sale of an Australian-owned ship to an overseas party.

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

In considering the problem faced by mortgagees in the late twentieth century, it is useful to recall the position of a mortgagee of a ship as described in Laming v. Seater²⁷ towards the end of the nineteenth century:

“The mortgagee of a ship holds a security over a floating subject which in the very act of use as a ship may be withdrawn from the jurisdiction and control of the courts to which the mortgagee can have recourse and in that use is exposed to the perils of the sea whereby the value of the security may be wholly or in great part destroyed.”

Ship mortgagees are in the same position today as they were at the end of the last century because of the nature of the shipping business. However, because bareboat (or demise) chartering, which results in a temporary change of flag, is more prevalent today compared to the time of the above judgement, the problem for mortgagees has also become more prevalent. Ready describes the bareboat charter as “one of the most noteworthy and controversial developments in the ship registration field in recent years ...”.²⁸ The issue of

²⁷ (1889), 16 Court of P. Sess. Cas. 828 at p. 832

²⁸ Ready, (1994), p. 33.

the status of mortgages raised in the submissions is therefore by no means exclusive to Australia.

Removal or release of a mortgage

The Mallesons and Corrs submissions refer to the removal or release of mortgages. As a starting point in considering the problem, the Review Team questions the statement in the Mallesons submission that "... the vessel's registration can only be discharged from the Australian register if the bank discharges the shipowner from its obligations under that mortgage".

Section 66 of the SR Act provides a course of action for mortgagees faced with the closure of registration when a ship ceases to be entitled to be registered. While registration of the ship is closed, registration is not closed with respect to a mortgage and the section prescribes a 60 day period within which the mortgagee can make an application to a Supreme Court for such orders in respect of the ship as the Court thinks fit. The Registrar is required to give effect to such Orders made by the Court. If the mortgagee does nothing, the registration of the mortgage is deemed to be closed after the 60 days.

Subsection 66(11) of the Act provides that closure of the register with respect to a mortgage shall not prejudice any rights of the mortgagee that exist independently of the provisions of s. 66. According to Davies and Dickey²⁹ the extent of the effect of closure is to deprive the mortgagee of priority and rights arising therefrom under the SR Act. Closure does not annul the mortgage security and all rights and powers of the mortgagee continue to accrue to that person except that the mortgage is now an unregistered mortgage.

This provision is not unique to the Australian Act. Similar provisions are included in the United Kingdom and New Zealand legislation which both provide that the termination of the registration of a ship does not affect the entry in the register of any undischarged mortgage.

However, there is no provision in the SR Act to remove or release a mortgage except by a discharge through s. 44 (ie the mortgagor fulfils all financial obligations to the mortgagee) or through s. 66.

In this respect it is relevant to note that while ships over 24 metres are required to be registered, there is no requirement for any mortgage to be registered although, given the priority that registration brings, it is understandable why a financier would want to register a mortgage. The interesting issue is that if a financier voluntarily registers a mortgage but subsequently decides, for whatever reason, that it no longer wants it to be registered, can the mortgage be voluntarily 'de-registered'?

The Review Team is uncertain as to whether there is an implicit power in the SR Act for the Registrar to deregister a mortgage and remove it from the register. Legal advice would be required to clarify this point. However, from a regulatory policy perspective, if a financier can voluntarily register a mortgage then it should be able to voluntarily deregister it. The Review Team cannot see any in-principle problems with the recommendation in

²⁹ Davies and Dickey, (1995), p. 150.

the Mallesons submission that s. 44 be amended to provide that a mortgage be removed from the register at the request of the mortgagee and upon notice to the registered owner.

The Review Team recommends that legal advice be sought as to whether there is power in the SR Act for a mortgagee to voluntarily remove a ship mortgage from the register. If the advice is that there is not, it is recommended that consideration be given to amending the SR Act to give a mortgagee such a power.

However, the pertinent issue with respect to a mortgagee's security is whether such an amendment would assist a mortgagee in the situation where a ship is taken off the Australian register and put on a foreign register.

Phillips Fox commented on the general issue of mortgagees' security and its comments put the issue into some perspective:

“Mortgagees generally would prefer the Act to provide them with more certain (and perhaps more preferential) priority than is the case at the moment. We suspect non Australian mortgagees share this view as much as Australian mortgagees and lenders. However, this problem is not peculiar to Australia and it is not brought about simply by the failure of the Act to deal with priorities other than the relation to registered mortgagee.”

As Australia cannot legislate extra-territorially in relation to a ship no longer entitled to be registered, the proposed amendment to s. 44 would not increase the mortgagee's security in the contexts of the expiry of a bareboat charter or the sale of an Australian-owned ship overseas. To maintain its priority, the financier would need to re-register the mortgage in the next country of registration. To ensure that the priority of its mortgage is maintained, the financier would need to coordinate with the owner to ensure that the mortgage is registered as soon as possible after the ship was re-registered.

Currently the mortgagee is notified by the Registrar under the provisions of s. 66 but without notification of the sale or closure of the register the mortgagee might be in danger of losing priority in the time taken to transfer registration of a mortgage to a foreign register.

Consent of a mortgagee to, and prior notice of, the closure of registration

The recommendations in submissions by Corrs and EFIC concerning s. 66 of the SR Act were to the effect that registration should not be closed until either the consent of mortgagees is obtained (Corrs), or deregistration papers are issued or until the expiry of a 60 day period of notice of closure (EFIC).

The Corrs recommendation means that, in the case of an intended sale of a ship to a party not eligible to register the ship in Australia, an owner would not be able to sell (because registration could not be closed) unless all mortgage holders had consented to the closure of registration.

The effect of the EFIC recommendation is that notice would be given 60 days prior to the expiry of a bareboat charter or the sale of a vessel. This would be feasible in the case of a bareboat charter because the expiry date would be known in advance. Whether it would actually add to a mortgagee's security is open to question because presumably the mortgagee would already be aware of the expiry date of the charter.

However, the recommendation would be more difficult to implement in the case of a ship sale because shipowners will often not know when a ship will be sold. The profitability of shipping lines depends on their ships being traded continuously and this in turn depends on the maintenance of cargo flows. Shipowners will often need to respond quickly to changes in trade flows by buying or selling ships. Any measure which has the effect of delaying a sale would increase the cost of the trade in ships and could have adverse repercussions on the ability of Australians to charter or sell ships.

The Review Team's response to the submissions is that Australia cannot prevent a ship being registered on a foreign register and if it ceases to be Australian-owned it is no longer eligible for registration. If a ship is sold when it is overseas, and therefore is no longer an Australian-owned ship, the Registrar, on being given notice, has no option but to close its registration. The aim of registration is to provide a genuine link between the nationality of a ship and the nationality of the owner. A Registrar must be able to close the registration of a ship immediately on receiving notice that it is no longer entitled to be registered.

Nevertheless, mortgagees are not in a totally vulnerable position at law. Davies and Dickey³⁰ have some interesting comments on the general issue of the sale of ships and mortgagees. They state that it may appear that a mortgagor "... has an unfettered power to dispose of the mortgaged property without the consent, or even the knowledge, of the mortgagee". However, after discussing the effects of s. 40 and s. 45 of the SR Act, they note that "... the mortgagee is nonetheless owner of this property 'to the extent necessary to make the ship available as a security under the mortgage' the power of disposal under s 45 is 'subject to this Act', and thus subject to a mortgagee's rights in respect of the mortgaged property pursuant to s 40. These rights will almost certainly preclude any power of disposal in the mortgagor."

In general, by providing for the registration of ships, the SR Act facilitates maritime commerce. The Review Team considers that amending the Act to implement either of the recommendations in the Corrs or EFIC submissions would act to delay shipowners' business decisions and would probably increase the cost of maritime commerce. For this reason such an amendment is not supported.

Additional protection for mortgagees

Notwithstanding that the Review Team rejects an amendment to s. 66 of the SR Act, it may be possible to "tighten" the provisions of the Act to reduce the scope for uncertainties to arise for mortgagees as a result of the operation of the Act with respect to vessels bareboat chartered in and out.

An interesting feature of the United Kingdom *Merchant Shipping Act 1995* is s. 17, concerning ships bareboat chartered-in by British ship operators, and in particular ss. 7 which provides that the private law provisions for registered ships do not apply to ships bareboat chartered-in.

Discussing the implications of s. 17, Gaskell (1995) states that the section makes a distinction between the law of the state of registration and the law of the flag. The effect of ss. 7 is that all public law matters affecting the ship will be subject to British public law while private law concerning title, such as the rights of the registered owner, the creation

³⁰ Davies and Dickey, (1995), pp. 148-9.

and priority of mortgages and the transfer of rights of ownership and mortgages, will be dealt with by the law of the country of original registration. “It appears to be intended that, for a ship bareboat chartered-in, the existence of the foreign mortgage may be recorded on the U.K. register, albeit that this would be for information only. It must be emphasised that all questions relating to such registered mortgages, *e.g.* as to their priority, will be governed by the foreign law.”³¹

It is relevant to note that Article 16 of the International Convention on Maritime Liens and Mortgages concerns the temporary change of flag. It requires, *inter alia*, that there be cross-referenced entries between the register of the State of basic registration and the register of temporary registration (ie the flag State). This means that a ship which is bareboat chartered-out by an Australian owner to a foreign operator would continue to have its registration noted in the Australian register, ie there would be a type of suspended registration..

While Australia has not acceded to this Convention (indeed it has very little international support), the principles underlying Article 16 nevertheless have merit and are worth considering.

There is, however, no requirement in the Convention on Maritime Liens and Mortgages that mortgages registered in the State of registration be entered in the register of the flag State. Ready discusses the protection of mortgagees in the situation where vessels change jurisdictions. He states³²:

“As far as regards the law applicable to the determination of title to a vessel and the existence, nature and extent of creditor’s liens, it is clearly desirable that the law of the flag State should refer such matters to the laws of the State of basic registration.”

It would be useful if Australian law separated the responsibility for the exercise of public and private laws, at least with respect to mortgages, as currently there is no provision in the Australian law for recognising the priority of mortgages in a foreign register. “Under Australian law, the priority of such mortgages is determined by the ordinary rules relating to chattel mortgages.”³³

With a clear identification of the jurisdiction applicable to mortgages, situations such as that illustrated in the Mallesons submission may not arise because, to continue with that illustration, the Norwegian bank would not have been able to register the mortgage in Australia but would have had to use the British register. It could be argued that a separation of responsibility for public and private law may simply result in a mortgagee’s problem being shifted from one jurisdiction to another. However, the Review Team considers that, as a general principle, it is better to register a mortgage over a bareboat chartered ship on the register in the country of the ship’s owner, ie in the Mallesons’ illustration Britain, rather than the register in the country of the bareboat charterer, ie Australia.

³¹ Gaskell, (1995), p. 21-48.

³² Ready, (1994), pp. 39-42.

³³ Davies and Dickey, (1995), p. 143.

While submissions focussed on chartered-in ships being returned to their owner, the same problem would occur for mortgagees when Australian-owned ships are bareboat chartered-out. While Australia has not traditionally been a ship owning nation and has not had a large supply of ships to charter out, nevertheless the Act provides for chartering-out. Subsection 12(2) provides that “where an Australian-owned ship is operated by a foreign resident under a demise charter, the Authority may ... exempt the ship during the term of the charter from the requirement to be registered.”

While the ship remains entitled to be registered, ss. 17(1) precludes the registration in Australia of ships that are registered under the laws of a foreign country. The Registrar uses Regulation 33 to close the registration of the ship for the period of the demise charter.

A financier with a mortgage over an Australian-owned ship which is bareboat chartered-out could potentially encounter a problem with the priority of its mortgage depending on the legal regime in the country of the ship’s temporary registration. There would be no problem in the United Kingdom because its legislation does not apply private law provisions to ships bareboat chartered-in.

However, if the legal regime in the country where the ship is temporarily flagged does not recognise the priority of a mortgage registered in Australia, Australia cannot legislate extra-territorially to create this recognition. There is little that Australia can do in this situation and the financier will need to re-register the mortgage. There currently is no provision in the SR Act to maintain a basic registration in Australia of ships which are bareboat chartered-out. It would be useful if, in accordance with Article 16 of the International Convention on Maritime Liens and Mortgages, there was a cross-referencing in the Australian register for ships bareboat chartered-out.

The Review team recommended in chapter 5 that there be a separate part of the register (Part III) for demise charters. While this would be for registering ships bareboat chartered in, a reference could also be made in this part to ships bareboat chartered-out.

The Review Team recommends that, to give added protection to mortgagees of bareboat chartered ships, consideration be given to amending the SR Act:

(i) to explicitly provide that, for ships bareboat chartered-in to Australian operators, the law applying to encumbrances such as mortgages will be the law of the State of underlying registration; and

(ii) to enable the registration for an Australian-owned ship which is bareboat chartered-out to be suspended rather than closed and for a reference to be made in the proposed Part III of the register.

6.2 Ships under construction

Austal Ships and the Export Finance and Insurance Corporation (EFIC) both raised the issue of the security over ships under construction.

Austal Ships said that as part of its contract conditions it is often required to deliver vessels to customers overseas and to do this it normally uses a temporary pass issued under s. 23

of the SR Act. As security for providing finance, financiers take a charge under the Corporations Law over the assets of the company including the vessels under construction. Its submission then stated that “there seems to be some legal opinion that considers that the security under the Corporations Law has no effect once the vessel is registered with the Australian Shipping Registry.” This probably refers to paragraph 262(1)(d) of the Corporations Law which provides for the registration of charges in relation to personal chattels but which specifically excludes “... a ship registered in an official register kept under an Australian law relating to title to ships”.

Austal Ships said that the issue is that financiers require that a mortgage be taken out over the ship once it is completed but that a mortgage cannot be registered against a temporary registration. It requested that “... the regulations (be) changed so that a temporary registration does not invalidate any charge under the Corporations Law”.

EFIC also commented on the interplay between the SR Act and the Corporations Law. “To protect its position as a financier to the best extent possible, EFIC commonly registers a charge over the ship under construction in accordance with the Corporations Law and holds a mortgage in escrow for registration under the SRA

once the ship floats and is able to move.” EFIC’s main concerns arising from this are, firstly, that its security position becomes subject to substantial uncertainty between when the ship first floats and when it is registered and, secondly, that the situation effectively requires dual registration involving substantial time and cost to comply.

EFIC argued that there would be substantial time and cost savings in streamlining the process and recommended that there be an amendment to either the SR Act or the Corporations Law to provide for one security registration regime to apply from the commencement of construction of a ship through to operation of the ship.

There are two pertinent issues with respect to ships under construction:

1. The change in the legal regime governing the financier’s security when a ship under construction floats and becomes a ship as defined in the SR Act, and the impact on the security of a mortgage when a ship is on its delivery voyage using a temporary pass.
2. The impact on a mortgage of a change in ownership when a ship is handed over to the customer.

With respect to the first issue, the Review Team recognises that it would be preferable if financiers only had to use one legal regime to register a security or charge taken when providing finance for the construction of ships. However, there is doubt about whether the Corporations Law is in fact nullified when a ship is issued with a temporary pass or provisional registration under the SR Act.

This issue was the subject of correspondence between the former Minister for Industry, Science and Technology and the former Attorney-General in 1995-96. The latter advised the former:

“Once a temporary pass is granted to a ship, subsection 23(3) of the Shipping Act deems the ship to be registered under the Act. However, the reference, in subsection 23(3) of the Shipping Act, to unregistered ships that are granted temporary passes being “deemed to be registered”, is limited to the purposes of the Shipping Act and of “lawful

navigation” ... I am advised that the grant of a temporary pass to an unregistered ship will not cause the vessel to be a “ship registered in an official register kept under an Australian law relating to title to ships”. It therefore follows that the grant of a temporary pass to an unregistered ship will not result in the automatic removal of the charge over such a vessel from the Australian Register of Company Charges (under the Corporations Law). In these circumstances, the question of an anomaly in the operation of the Corporations Law and the Shipping Act would not appear to arise.”

The former Attorney-General did go on to say that he had referred the matter to the former Minister for Transport “... in view of the apparent uncertainty regarding the interpretation of the provisions of the Shipping Act”.

The Review Team examined this matter in some detail. It was informed by the Registrar of Ships that particulars of a ship which has been issued with a temporary pass are not entered on the Register as the ship is only “deemed to be registered” for the purpose of making the intended international voyage. The Registrar will not register a mortgage against a temporary pass because the latter is, by definition, temporary for the purpose of navigation and it does not establish title.

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

EFIC stated in its submission that one option was to amend the SR Act to make it “... the sole regime for the registration of ships and registration of securities over those ships (including in relation to ships under construction), to the exclusion of the Corporations Law”. It is relevant that the Canada Shipping Act (CSA) currently makes provision for ships under construction. Section 45(2) of the CSA states that “a builder’s mortgage ... may be filed with the registrar ...” The effect in law of a builder’s mortgage is spelt out by s. 46 of the CSA:

“46. Every builder’s mortgage

- (a) binds the recorded vessel to which it relates during the period from the commencement of building until launching;
- (b) binds the recorded vessel to which it relates at and from the time of its launching until its registration in Canada as a British ship; and
- (c) operates in all respects as if it were a mortgage made after the registration of the recorded vessel to which it relates as a British ship pursuant to this Part, and subsection 47(2) and sections 48 to 54 respecting a registered mortgage apply with such modifications as the circumstances require to a builder’s mortgage.”

The CSA was adopted in the 1930s (hence the reference to British ships) and is currently being reformed. The Canada Shipping Act Reform Bill, Part I to revise the registration provisions was introduced into the Canadian House of Commons on 30 October 1997. This Bill continues to provide for builder’s mortgages.

The Review Team considers that the Australian Act could be improved if it was amended so that its scope was widened to allow the registration of ships under construction and mortgages against a ship under construction. This would provide a financier with an alternative security registration regime to a company charge registered under the Corporations Law.

An amendment would not be required to the Corporations Law so that paragraph 262(1)(d) would still exclude ships on the Australian Ship Register. There would therefore be two alternative regimes for the registration of securities over ships under construction and a financier could choose the one which best met its needs.

If a company was building a ship under contract, with the contract requiring delivery overseas, it may be preferable for a financier to take a charge over the ship under the Corporations Law and for a temporary pass to be issued to facilitate the delivery voyage.

EFIC's concern is that this "... will not prevent the owner holding the temporary pass from later obtaining permanent registration of the vessel in the Australian register, thereby allowing another financier to register a mortgage over the vessel in that registry and take priority over the company charge registered under the Corporations Law."

The Review Team would make two responses to this. The first is that the temporary pass would be used in the circumstance where a ship is on its delivery voyage. There would, presumably, be contractual arrangements with the prospective owner so that the builder could not change the temporary pass to full registration. The second response is that the Review Team would expect there to be clauses in the contracts between the financier and the shipbuilder to minimise the scope for fraud. If, for any reason, the contract under which the ship was built could not be completed (eg the prospective purchaser goes bankrupt during the delivery voyage) so that the ship returns to Australia and is permanently registered, the Review Team would be surprised if there were no clauses in the contracts between the financier and the shipbuilder which prevented the builder from registering another mortgage against the ship.

If a shipbuilder was building a ship without a firm order, and then taking it overseas to find a buyer, the financier could find it preferable to take a mortgage under the proposed amendments to the SR Act relating to a ship under construction. Under the proposed amendment, the SR Act would be the regime governing the security while the ship was being constructed and while it was overseas pending a sale.

<p>The Review Team recommends that consideration be given to amending the SR Act to provide for the registration of ships under construction. There would be a separate part (Part IV) of the Register for ships under construction.</p>

There are two administrative matters which would require consideration at some later date. These are:

1. the point at which registration of a ship under construction must cease. Some possible points would be
 - (i) the builder of the ship decides to enter it on the Australian register;
 - (ii) the ship is delivered to an owner not entitled to register in Australia;
 - (iii) the ship is entered on a foreign register; or

- (iv) the ship commences trading, eg on a time charter, but has not been sold by the builder.
2. the necessity to amend the Act to permit the transfer of a “ship under construction” in Part IV to a “ship” in Part II of the register in a seamless manner on its sale to an owner entitled to register in Australia.

6.3 Variations to mortgages

The Act currently does not make any provision for the registration of a variation to a registered mortgage.

The EFIC submission requested that consideration be given to “... including provisions in the SRA expressly allowing registration of variations to existing ship mortgages”.

It is relevant that s. 41 of the New Zealand *Ship Registration Act 1992* provides for the alteration of the terms of a mortgage such as, inter alia, increasing or decreasing the amount secured, the interest rate, the term or currency of the mortgage, etc.

However, under the Australian Act, a mortgage is registered but no details are specified. The Registrar informed the Review Team that, because of this, it is not necessary to register variations. All registration does is notify any party that chooses to search the register that there is a mortgage over the ship. Its terms, including whether or not there had been any variations to the terms, are not relevant for the registration process.

It is the view of the Registrar that variations could be made to mortgages without having to make, and then register, a new mortgage.

6.4 Home port

One of the features of Australia’s current shipping registration regime is the concept of a home port. This concept originates in the previous system of registration under the *Merchant Shipping Act 1894* where ships were registered in the various ports of the British Empire and hence the Port of Registry was an important concept.

Prior to the establishment of the SR Act there were 20 ports of registry in Australia with a register in each port. The Act established a central register and so the Port of Registry was not relevant. The Second Reading Speech for the reintroduction of the Shipping Registration Bill into the House of Representatives in 1981 stated that “... because of the importance of the port of registry concept for legal and other purposes, the Bill makes provision for the adoption of a concept of home port for each ship ...” Regulation 35 states that a home port can be selected from the list published in the Gazette. Currently there are 32 ports gazetted as home ports (these are listed in Appendix 7).

A number of submissions commented on the concept of home ports. Mallesons Stephen Jaques and Dayle Smith both considered that the concept should be discontinued. The former stated that “... Canberra should be the port of registry for all Australian flag ships”. Dayle Smith argued that the concept, with respect to yachts, is “wholly useless both in theory and in practice” because it only tells where the registration shows its home port as being but not where a yacht actually comes from.

Ocean Trek Diving Resort, which operates a tourist vessel on Jervis Bay, objected to being restricted to using Port Kembla which is the gazetted home port which is closest to Jervis Bay. The Queensland Yachting Association recommended the retention of home ports because of the “... tremendous pride in displaying your home port on the vessel”.

Phillips Fox stated that, in its experience, the home port is not a major consideration except for the impact of revenue laws (such as stamp duty) on commercial shipowners who will utilise the home port which best suits them for revenue or administrative reasons. It noted: “In our view it is a worthwhile concept to retain in the Act. It can be relevant when it comes to disputes involving the ownership of a vessel but only where there are significant differences between the laws of the different states.”

The Review Team is of the view that the one residual advantage in the concept of home port, apart from factors of pride, relates to the legal regime aboard a ship. Davies and Dickey discuss the situation with respect to both the criminal and civil law³⁴. With respect to the criminal law, they state that “... all jurisdictions except Queensland enacted complementary legislation to extend the operation of State and Territory criminal law to Australian ships”. With respect to areas of civil law which differ from jurisdiction to jurisdiction, Davies and Dickey state: “The solution indicated in the Canadian case of *Canadian National Steamship Co v Watson* is that in such circumstances the law applicable on board an Australian ship on the high seas is that of its home port. (That case in fact said port of registry, but these no longer exist in Australia. The home port is the corresponding alternative.)”

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

The Review Team recommends that the concept of a home port should be retained but that the list of “approved” home ports should be abolished.

6.5 Marking

Sub-section 26(1) of the SR Act states: “A ship shall not be registered until it has been marked in accordance with the regulations with marks directed by the Registrar by notice in writing ... and evidence of a kind specified in the regulations of the ship’s having been so marked has been lodged with the Registrar.” Regulation 20 sets out the requirements with respect to marking and it specifies where on a ship, and the manner in which, a name will be inscribed.

Marking originated from the need to identify commercial ships and its primary purpose continues to be to facilitate the identification of a ship, particularly for circumstances such as collisions. Given the increased activity of private international yacht cruising, there is a

³⁴ Davies and Dickey, (1995), pp 62-64

need to be able to identify yachts and therefore they need to be clearly marked. However, the prescriptive marking requirements contained in the Regulations do not seem to be warranted for recreational vessels.

The Yachting Association of Western Australia (YAWA) stated: “With a yacht it should be sufficient to have the name clearly marked anywhere on the side. Few yachts would normally have their name on the bow.” In addition, the marking requirements appear to be based on ship construction methods which have changed considerably. YAWA stated:

“The requirement for the marking of the Official Number inside has lost much of its validity in yachts which do not have main beams into which the number can be carved. To have it engraved in a piece of timber which is then screwed on is no more permanent than having it painted inside somewhere, remembering that not all yachts even have a main bulkhead these days.”

Ocean Trek Diving Resort commented that the required marking of its vessel was in effect a tattooing and caused a break in the protective sealing of the hull which negated the beneficial effect of sealing. Dayle Smith made a similar comment that “... it requires very large letters to effectively be cut into the bulkhead of a yacht”.

Having regard to comments in submissions, and the basic purpose of marking, the Review Team considers that the current marking requirements involve an unnecessary degree of administration and cost for recreational vessels and for fishing vessels.

Perkins Shipping of Darwin said that there was scope for streamlining the marking procedure. This would be achieved if registration was “... effective on the issue of the Marking Note so that both the Registration certificate and Marking Note can be issued together”. Perkins stated that owners should be given 30 days in which to complete the marking as it is in a shipowner’s interest to ensure that marking is completed as soon as possible and that the marking corresponds to the registration certificate.

The marking process only occurs for ships that are being registered in Australia for the first time and do not have an official number. The current practice is that a marking note is sent to the owner. Once a ship has been marked, the marking note is signed by the owner or one of the owners to the effect that the markings have been applied, with the signature being witnessed, and then returned to the Registrar. The registration certificate will then be issued.

The process may be somewhat cumbersome and, as Perkins states, it may be more streamlined if the marking note and registration certificate were issued concurrently. However, ships that are to be registered need to be identifiable and they are not identifiable unless they have been marked.

Given that the requirement for an AMSA surveyor to witness the marking of a ship required to be registered has now been discontinued, the Registrar effectively accepts that the ship has been marked in accordance with the marking note. The potential cost is that ships would not be marked in accordance with the marking note and over time the Register would become inaccurate. This cost is likely to be very small. If the registration certificate is issued with the marking note, there is a risk that the marking note will not be returned. This is likely to be negligible for commercial ships but it may be a possibility for recreational vessels.

In a subsequent letter to the review team, Perkins Shipping stated:

“The “accuracy” of current procedure depends on “the signature” of the owner, i.e. the verification of the marking is made by a party that may have a vested interest in expediting the receipt of the registration certificate for Customs clearance and it is conceivable that it may be signed before the marking is actually completed. The assurance of the register to commercial parties is the entire validation process of registration which identifies the existence and ownership of the ship not limited to the marking on the ship ... Therefore to add a ship to the register prior to the receipt of the marking note does not make the register inaccurate. An inaccurate marking would be an inaccurate marking not an inaccurate entry in the register.” (Perkins’ emphasis)

The value of a register derives from the certainty that all parties may have that it is accurate and this value will be reduced if changes are introduced which could potentially result in inaccuracies being introduced into it. The key issue is whether sending out the registration certificate with the marking note will lead to any inaccuracies in the register. The Review Team’s conclusion is that it probably would not. However, to issue the registration certificate concurrently with the marking note would require an amendment of ss. 26(1).

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

6.6 Tonnage Certificate

Section 16(1) of the SR Act states that “a ship shall not be registered unless and until a certificate relating to the tonnage measurement of the ship issued under, or otherwise having effect by virtue of, the *Navigation Act 1912* has been lodged with the Registrar.”

Perkins Shipping stated that “the cost of tonnage measurement performed by AMSA surveyors ... is very time consuming and expensive”. It submitted that a tonnage certificate should be accepted from a builder or a classification society.

Given that tonnage measurement is a calculation of a physical dimension of a ship, and is not an assessment of its safety standard, there would not appear to be any public policy reasons why an AMSA surveyor should perform tonnage measurement. A surveyor employed by a classification society could perform the measurement.

The Review Team recommends that AMSA investigate the delegation of tonnage measurement to ship builders, in the case of a new ship being registered, or a classification society in the case of an existing ship being registered.

6.7 Access to the Register

Submissions generally, but particularly from financiers and a number of law firms, were unanimous in stating that electronic or on-line access to the Register is highly desirable. Being able to search the Register at any time would bring considerable efficiency gains

and it was also felt that the cost of accessing the Register would be reduced. For example, the National Australia Bank stated that it "... has access to various public records relating to charges over property held by the Australian Securities Commission and also has access to information relating to details of real property supplied by the relevant Land Titles Offices in a number of states".

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

The Review Team recommends that AMSA investigate the feasibility of redeveloping the Register so that it can be available on-line to business.

6.8 Consular Services

Section 3 of the SR Act defines a "proper officer" to be a person holding, or performing the duties of, the following offices in a country or place outside Australia: Ambassador, Minister, Head of a Mission, Charge d'Affaires, Counsellor, Secretary or Attaché of an Embassy, Legation or other post, Consul-General, Consul or Vice-Consul.

The duties of a proper officer are specified in ss. 21, 22 and 65 of the SR Act and include the issue of new or provisional registration certificates. These duties form part of the wide range of notarial services which the Department of Foreign Affairs and Trade (DFAT) performs overseas as part of its consular responsibilities. DFAT has been reviewing how it delivers notarial services and it stated in its submission that it "... is in the process of identifying ways to enable locally-engaged staff (LES) to perform notarial acts".

DFAT stated that it would be consulting with Commonwealth agencies to identify those notarial functions which are still required by legislation to be performed by an Australian-based diplomatic or consular officer. It nominated the SR Act as being relevant due to the definition of "proper officer". In subsequent advice to the Review Team, DFAT stated that "... the *Consular Fees Act 1955* was recently amended to authorize locally engaged staff at Australian overseas missions to perform notarial acts and charge the prescribed fees. Complementary amendments to the *Consular Fees Regulations* have also been drafted."

The Review Team considers that the functions performed by "proper officers" under the SR Act are commercial in nature and are unlikely to involve issues of national security. After all, the Register can be searched by any individual and any details of a ship on the Register can be obtained for a fee. The degree of risk, in terms of breaches of national security, involved in using locally engaged staff to perform notarial services in connection with the SR Act would be low.

The Review Team recommends that AMSA enter into discussions with DFAT with a view to amending the definition of "proper officer" to allow locally engaged embassy staff to undertake functions required by the SR Act.

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8. Appendices

Appendix 1

PRESS RELEASE BY TREASURER No. 40

28 June 1996

COMMONWEALTH LEGISLATION REVIEW SCHEDULE

NB. This Press Release not included in this www document

REVIEW OF THE SHIPPING REGISTRATION ACT 1981

TERMS OF REFERENCE

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

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

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

1. The Task Force is to:

- (a) identify the objectives of the *Shipping Registration Act 1981* and assess the appropriateness of these objectives;
- (b) assess the effectiveness of the *Shipping Registration Act 1981* against the objectives identified in (a); and
- (c) assess the efficiency of the *Shipping Registration Act 1981*.

2. In assessing the matters in (1), the Task Force is to have regard to:

- (a) Australia’s rights and duties as a flag State under the United Nations Convention on the Law of the Sea; and
- (b) the effects on the environment (including the link between ship registration, safety certification and environmental protection), welfare and equity, occupational health and safety, economic and regional development, consumer interests, the competitiveness of business including small business, and efficient resource allocation.

3. In the light of findings under (1) and (2) above, investigate and report on appropriate future arrangements for national registration of ships taking into account

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

ORIGINS OF THE REGISTRATION OF SHIPS

Registration of Ships

The earliest forerunner of shipping registration legislation in England was legislation restricting trade to English ships. “As early as 1381, legislation provided that goods exported from or imported to England must be carried in English ships. However, owing to the scarcity of English shipping, the law was not enforced.”³⁵ In the mid-seventeenth century, legislation prohibited foreign ships from trading with English colonies (principally those on the mainland of North America and the West Indies).

The basis of this legislation was the principle of mercantilism, the underlying objective of which was national self-sufficiency. Some of the features of this principle included

- exports to and imports from the colonies must be carried in English ships or those of the colonies;
- certain specified colonial goods must be shipped only to England;
- England should have a monopoly on shipping manufactured goods to the colonies.

However, it was the *Navigation Act 1660* (12 Chas. II, c.18, s.10) which first required that British ships be registered. The Act stipulated that trade with England’s colonies must be “in such ships as do truly and without fraud belong only to the people of England or Ireland, Dominion of Wales or Town of Berwick upon Tweed, or are of the built of and belonging to any the said Lands, Islands, Plantations or Territories, as the Proprietors and right Owners thereof, and whereof the Master and Three Fourths of the Mariners at least are English”.

To prevent fraud, s.10 of the Act required that from 1 April 1661, an owner of a foreign-built ship declare to the Customs at the port nearest to his abode that he was not an alien and that the vessel was purchased for a valuable consideration. On compliance, the Act provided that the owner or owners would

... receive a Certificate under the Hand and Seal of the Chief Officer or Officers at the Port where such Person or Persons so making Oath do reside, whereby such Ship or Vessel may for the future pass and be deemed as a Ship belonging to the said Port and enjoy the Privilege of such a Ship or Vessel; and the said Officer or Officers shall keep a Register of all such Certificates as he or they shall so give, and return a Duplicate thereof to the Chief Officers of the Customs at London.

The Navigation Act 1660 did not contain any provisions concerning such matters as marking of the ship’s name and port of registry, division of property or tonnage

³⁵ Campbell, R.D., (1980), *The Ship’s Register*, Government printer, Wellington, p2

measurement. Nevertheless, Campbell considers that the provisions of the Act “... marked the Genesis of world-wide ship registration ...”³⁶

A 1696 statute, entitled “An Act for Preventing Frauds and Regulating Abuses in the Plantation Trade” consolidated various statutes passed since 1660 and introduced further provisions regarding registration of ships. The Act required that goods could only be imported or exported to or from the Plantations in ships built in England, Ireland and the Plantations. Because of frauds that had occurred, ships’ names were not to be changed or ownership transferred to another port without registering “de novo”. This Act also introduced provisions concerning shares in ships and required that “... particulars of the sale of one or more shares were to be endorsed on the registration certificate and witnessed to prove that the entire ownership remained English”.³⁷

It was not until the enactment of the *Navigation Act 1786* (26 Geo. III, c.60) that detailed general provisions concerning the registration of ships were laid down for the first time. This Act was amended a number of times and it was eventually replaced by the *Navigation Act 1823* (4 Geo. IV, c.41). This Act introduced a new code of shipping law, including provisions making the system of registration universal and compulsory as a condition of claiming privileges as a British ship and required that a transfer of a share in a British ship should take place only by bill of sale entered on the Registry. The Act also refers to mortgages of ships for the first time.

This Act was amended a number of times and was eventually replaced by the *Merchant Shipping Act 1854*. This Act was in turn amended a number of times up to 1894 when it was repealed by the *Merchant Shipping Act 1894*. This latter Act provided the regime for the regulation of Australian owned ships until the introduction of the *Shipping Registration Act 1981*.

It is relevant to note that the start of the British shipping registration practice in 1660 appears to have coincided in point of time with similar developments in other countries. For example, the first article of the Hanseatic Ordinance of 1614 prohibited the building of ships in the Hanse Town to all except citizens and persons having the particular permission of the magistrates of the place.

Louis XIV of France, by an Ordinance dated 24 October 1681, required all his subjects to make a declaration in the Admiralty of the place of residence of all ships belonging to them, whether built in France or other countries, and of the names of the several part-owners, who were Frenchmen only, and resident of France, in order to preserve the privileges of the national flag of the French subjects.

Registration of Ships’ Mortgages

It is a long established British practice that the registration of ships has included the registration of mortgages. The precise origins of the mortgage are unclear. Somewhere between the *Navigation Act 1660* and the *Merchant Shipping Act 1854*, a mortgage of a

³⁶ *ibid*, p3

³⁷ *ibid*, p4

ship was effected by means of a transfer, as in the case of a sale, and “all such transfers to be valid had to be entered on the register and endorsed on the certificate of registry.”³⁸

Section 66 of the *Merchant Shipping Act 1854* created a new instrument called a “mortgage”, and mortgages were to be in the form of that instrument and were required to be registered. The effect of that Act was that no mortgage was valid or binding unless registered.

³⁸ Abbott’s Law of Merchant Ships and Seamen, Fourteenth Edition (1901), pp. 101-102

**PERSONS AND ORGANISATIONS WHO MADE SUBMISSIONS TO THE
REVIEW**

Perkins Shipping

Ocean Trek Diving Resort

ANZ Bank

Yachting Association of Western Australia

National Australia Bank

Australian Bankers Association

Mallesons Stephen Jaques

Mr Asome

Queensland Yachting Association

Victorian Yachting Council

Public Interest Group on Maritime Policy

Corrs Chambers Westgarth

Department of Foreign Affairs and Trade

Australian Fisheries Management Authority

Dayle Smith

Minerals Council of Australia

Austal Ships

Australian Finance Conference

Department of Industry Science and Tourism

Australian Yachting Federation

BHP Transport

Phillips Fox

Yachting Association of New South Wales

New South Wales Minister for Fair Trading

Appendix 5

Schedule of Fees pursuant to the Shipping Registration Act

(As from July 1992)

Item	Service	Fee (\$)
1	Lodging application for registration or re-registration of: (a) ship required to be registered * (b) ship permitted to be registered ** other than ship referred to in (c) (c) ship on demise charter to an Australian based operator other than an Australian owned ship.	1,195 799 1,953
2	Lodging application for grant of provisional registration certificate or new registration certificate under section 21 of the Shipping Registration Act (replacement certificate).	95
3	Lodging application for grant of provisional registration certificate under section 22 or 22A of the Shipping Registration Act.	155
4	Lodging application for extension of period of currency of provisional certificate.	82
5	Lodging application for grant of temporary pass.	155
6	Lodging request for approval of change of name of registered ship.	82
7	Lodging request for change of home port of registered ship.	82
8	Lodging application for issue of certificate of entitlement to fly Australian national flag or red ensign.	82
9	Supply of deletion certificate.	50
10	Lodging documents for registration of transfer, transmission, mortgage, transfer of mortgage or transmission of mortgage in relation to: (a) ship required to be registered * (b) ship permitted to be registered ** other than ship referred to in (c) (c) ship on demise charter to an Australian based operator other than an Australian owned ship.	416 250 686
11	Lodging documents for registration of discharge of mortgage.	82
12	Lodging caveat.	153

13	Lodging request for extension of time for lodging documents.	82
14	Lodging application for exemption from registration.	308
15	Inspection of register in relation to a registered ship.	21
16	Search by staff of the Australian Shipping registration Office of the Register - for each period of 15 minutes or part of such a period.	21
17	Supply of certified extract of the Register or of a document forming part of or associated with the Register - by facsimile or by post - by facsimile and by post.	41 82
18	Supply of certified copy of Register entry - by facsimile or by post - by facsimile and by post.	21 42
19	Supply of certified copy of documents forming part of or associated with the Register, for each page - by facsimile or by post - by facsimile and by post.	21 42

* Commercial ship 24 metres or more in tonnage length.

** Commercial ship less than 24 metres in tonnage length, government ship, pleasure craft and fishing vessel.

EXCERPTS FROM THE
REGISTRATION OF INTERESTS IN GOODS ACT 1986
(Sections 1-5, 8 and 9)

An Act with respect to the registration, in relation to motor vehicles and any other prescribed goods, of security interests, the interests of lessors and the interests of owners under hire-purchase agreements; and for other purposes.

Short title

1. This Act may be cited as the Registration of Interests in Goods Act 1986.

Commencement

2. (1) Sections 1 and 2 shall commence on the date of assent to this Act.

(2) Except as provided by subsection (1), this Act shall commence on such day as may be appointed by the Governor and notified by proclamation published in the Gazette.

Definitions

3. (1) In this Act, except in so far as the context or subject-matter otherwise indicates or requires:

"Commercial Tribunal" means the Commercial Tribunal of New South Wales;

"Commissioner" means the Director-General of the Department of Fair Trading holding office as such under Part 2 of the Public Sector Management Act 1988.

"corresponding law" means a law of a participating State that provides for the registration of interests in goods;

"creditor", in relation to a registrable interest in goods, means the person in whom the registrable interest is vested;

"dealer", in relation to goods, means:

(a) where the goods are a motor vehicle a dealer within the meaning of the Motor Dealers Act 1974; or

(b) in any other case a person prescribed as a dealer in the goods;

"debtor", in relation to a registrable interest in goods, means:

(a) where the registrable interest is a security interest in the goods the person whose performance of an obligation is secured by the security interest;

(b) where the registrable interest is the interest in the goods of a lessor the lessee of the goods;

(c) where the registrable interest is the interest in the goods of the owner under a hire-purchase agreement to which the goods are subject the hirer of the goods; or

(d) where the registrable interest is any other prescribed interest in the goods the person prescribed as the debtor;

"goods" means all chattels personal other than:

(a) things in action and money; and

(b) anything that may be the subject of an agreement registrable under the Liens on Crops and Wool and Stock Mortgages Act 1898;

"hire-purchase agreement" means:

(a) a letting of goods with an option to purchase the goods; or

(b) an agreement for the purchase of goods by instalments (whether described as rent or hire or otherwise) not being an agreement whereby the property in the goods being purchased passes at the time of the agreement or upon, or at any time before, delivery of the goods;

"hirer", in relation to a hire-purchase agreement, means the person to whom goods are let, hired or agreed to be sold under the hire-purchase agreement;

"lease", in relation to goods, means a contract for the hiring of the goods that is not a hire-purchase agreement;

"motor vehicle" means any motor car, motor carriage, motor cycle, tractor, or other vehicle propelled wholly or partly by any volatile spirit, steam, gas, oil or electricity, or by any means other than human or animal power, and includes a trailer or caravan, but does not include any vehicle used on a railway or tramway;

"owner", in relation to a hire-purchase agreement, means the person by whom goods are let, hired or agreed to be sold under the hire-purchase agreement;

"participating State" means a State or Territory that is prescribed for the purposes of this definition, being a State or Territory which has enacted legislation that provides for the registration of interests in goods that arise under the law of that State or Territory;

"prescribed goods" means:

(a) a motor vehicle; or

(b) any other goods prescribed by the regulations, whether situated in the State or elsewhere;

"prime identifier", in relation to goods, means the particulars of those goods prescribed as the prime identifier for the purposes of this Act;

"purchase", in relation to goods, means acquire the goods from a person selling or exchanging the goods and having, or purporting to have, authority to dispose of the goods by that means;

"Register" means the Register of Interests in Goods maintained under section 4;

"registered" means recorded in the Register otherwise than in accordance with section 5 (3);

"registrable interest", in relation to goods, means:

(a) the interest in the goods of the person to whom is owed the obligation of which the performance is secured by a security interest to which the goods are subject;

(b) the interest in the goods of a lessor of the goods;

(c) the interest in the goods of the owner under a hire-purchase agreement relating to the goods; or

(d) any other prescribed interest in the goods, whether arising under the law of New South Wales or of a participating State;

"regulations" means regulations made under section 21;

"security interest", in relation to goods, means an interest or power:

(a) reserved in or over an interest in the goods; or

(b) created or otherwise arising in or over an interest in the goods under a bill of sale, mortgage, charge, trust or power, by way of security for the payment of a debt or other pecuniary obligation or the performance of any other obligation but does not include an interest or a power reserved or created, or otherwise arising, under a lease or hire-purchase agreement or an agreement excluded from this definition by the regulations;

"this Act" includes the regulations.

(2) In this Act, a reference to payment of a purchase price is a reference:

(a) where the purchase is effected otherwise than by an exchange to a manner of giving valuable consideration in satisfaction of the purchase price;

(b) where the whole of the purchase price is not paid at one time to the first payment of part of the purchase price; or

(c) where the purchase is effected by an exchange to the making of the exchange.

(3) For the purposes of this Act, a person is without notice of a registrable interest only if under section 164 of the Conveyancing Act 1919 (read subject to section 8 of this Act) the person is not prejudicially affected by notice of the interest.

Register to be maintained

4. (1) The Commissioner shall maintain a Register of Interests in Goods for the purposes of this Act.

(2) The Register may be maintained in or upon any medium, or combination of mediums, capable of having information recorded in or upon it or them.

(3) The Commissioner may, from time to time, vary the manner or form in which the whole or any part of the Register is maintained.

(4) Section 24 of the Stamp Duties Act 1920 does not impose any duty or liability on the Commissioner in relation to the making under this Act of a recording in the Register, and the Commissioner is not concerned to inquire, before making a recording in the Register relating to a registrable interest in goods, whether the instrument giving rise to the registrable interest is liable to stamp duty, or is unstamped, or is insufficiently stamped.

Registration of interest in prescribed goods

5. (1) Application may be made for registration of a registrable interest in prescribed goods.

(1A) Such an application is not properly made unless:

(a) it is made in a manner approved by the Commissioner and lodged with the Commissioner; and

(b) it specifies the prime identifier of the goods concerned and such other information relating to the goods and the interest concerned as may be prescribed; and

(c) it is accompanied by the prescribed fee payable in respect of an application for registration or arrangements have been made with the Commissioner for payment of the fee.

(2) If an application is properly made, the Commissioner is to register the interest to which the application relates by recording in the Register the prime identifier of the goods and the prescribed information relating to the goods and interest.

(3) The Commissioner may record in the Register a reference to other prescribed information, including information received from the Commissioner of Police in relation to prescribed goods reported to the Commissioner of Police as having been stolen or otherwise unlawfully obtained and may cancel or amend any such recording.

(4) A recording made under subsection (3) is not a recording of, and does not operate to create, a registrable interest in the goods to which the recording relates.

Search certificates and notice

8. (1) The Commissioner shall, upon application made in relation to specified goods of a class specified in an order in force under section 9 (1), issue a certificate specifying:

(a) the time and date of certification;

(b) whether or not the goods are, at that time, affected by a registered interest; and

(c) if the goods are so affected such particulars as may be prescribed.

(1A) A certificate may take the form of a statement or such other form as the Commissioner approves and may be issued on the date the application is dealt with or on a later date.

(2) The Commissioner may include in a certificate under subsection (1) information relating to matters that may be recorded under section 5 (3).

(3) For the purposes of this Act and section 164 of the Conveyancing Act 1919, a person, or the solicitor or agent of a person, who obtains a certificate under subsection (1):

(a) shall be deemed to have made, on the date of certification, a proper search of the Register for registrable interests in the goods to which the certificate relates, the result of the search being correctly reflected in the certificate; and

(b) is not affected by notice of any information (other than the information in the certificate) relating to a registrable interest in those goods by reason only of a failure to make a further search in the Register before the end of the day that next succeeds the day of certification.

(4) For the purposes of this Act, and notwithstanding section 164 of the Conveyancing Act 1919, a person is not, by reason only of a failure by the person, or by any other person, to make a search as to:

(a) interests registered under any Act other than this Act; or

(b) instruments registered, deposited, filed or recorded under any Act or registered under the Companies (New South Wales) Code, affected by notice of a registrable interest in goods of a class specified in an order in force under section 9 (1).

(5) The Commissioner may, in relation to specified goods of a class specified in an order in force under section 9 (1), issue a certificate as to the state of the Register in relation to those goods at a particular time, or during a particular period, that preceded the time and date of issue of the certificate.

(6) The Commissioner may charge for a certificate under subsection (1) or (5) such fee as may be prescribed.

(7) A certificate purporting to have been issued under subsection (1) or (5) is, without proof of the signature (if any) of the Commissioner or, as the case may be, the delegate of the Commissioner, admissible in evidence in any proceedings and, except in relation to matter that may be recorded under section 5 (3), is evidence of the matters specified in the certificate.

(7A) If a certificate under this section specifies that goods are not affected by a registered interest, the certificate is evidence only in relation to the goods identified by the prime identifier specified in the certificate despite any other information used to identify goods that is also specified in the certificate.

(8) The State is not liable, and the Commissioner and other persons engaged in the administration of this Act are not liable, in respect of the reliability of any information given by the Commissioner or any such person in relation to a matter that may be recorded under section 5 (3).

Purchase of goods that are subject to a registrable interest

*9. (1) The Minister may, by order published in the Gazette, notify that, on and from a specified day, this section has effect in relation to prescribed goods of a specified class.

* See Gazette No. 57 of 12.5.1995, p. 2358.

(2) Where goods of a class specified in an order in force under subsection (1) are the subject of a registrable interest (whether the registrable interest arose before, or arises on or after, the day specified in the order) and the goods are purchased as provided by subsection (3) or (4):

(a) the property (if any) in the goods of the creditor who has the registrable interest is divested from the creditor and vested in the purchaser; and

(b) the purchaser acquires the goods freed and discharged from the registrable interest.

(3) Goods are purchased as provided by this subsection if the goods are purchased:

(a) by a person who is not a dealer in the goods from a dealer in the goods;

(b) except as provided by paragraph (c) in good faith and for value; and

(c) with or without notice of the registrable interest.

(4) Goods are purchased as provided by this subsection if the goods are purchased otherwise than as referred to in subsection (3) (a):

(a) from the debtor under the registrable interest to which the goods are subject;

(b) in good faith and for value; and

(c) without notice, at the time of payment of the purchase price, of the registrable interest.

(5) Subject to subsection (6), in any proceedings before a court or other tribunal having authority to receive and consider evidence, an assertion that a specified purchase was a purchase as provided by subsection (3) or, as the case may be, a purchase as provided by subsection (4) is, except in relation to the giving of value, evidence that the purchase specified was a purchase in accordance with the assertion.

(6) In any proceedings before a court or other tribunal having authority to receive and consider evidence, it shall be presumed, unless the contrary is proved, that a purchase is not a purchase as provided by subsection (3) or (4) if:

(a) the purchaser and the seller are corporations that are, for the purposes of the Companies (New South Wales) Code, deemed to be related to each other;

(b) one of the purchaser and the seller is a corporation and the other a natural person who, within the meaning of the Companies (New South Wales) Code, is a director or officer of the corporation; or

(c) the purchaser and the seller are related to, or associated with, each other as prescribed.

(7) In subsection (4), a reference to a purchase from the debtor under a registrable interest includes a reference to a purchase from a person other than the debtor who is in possession of the goods in circumstances where the debtor's right to possession of the goods has been lost or the debtor is estopped from asserting that right against the purchaser.

Appendix 7

GAZETTED HOME PORTS

NSW	VIC	QLD	SA	WA	TAS	NT
Sydney	Melbourne	Brisbane	Port Adelaide	Fremantle	Hobart	Darwin
Newcastle	Geelong	Bundaberg	Kingston	Dampier	Burnie	Gove Harbour
Port Kembla	Portland	Cairns	Goolwa		Devonport	
Yamba		Gladstone			Launceston	
Jervis Bay		Hamilton Is				
		Hayman Is				
		Mackay				
		Maryborough				
		Mooloolaba				
		Port Douglas				
		Rockhampton				
		Southport				
		Townsville				