

Australian perspectives - port state control on marine pollution

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Abstract

This article investigates the legal regime on port state control toward marine pollution. The discussion mainly focuses on marine pollution by the spills of oil and discharge of ballast water caused by substandard vessels. Since Australia is one of the most environmental conscious nations in the Asian-Pacific region, this paper explores and evaluates how the Australian domestic legal system incorporates the international legal regime on port state control in preventing marine pollution, with a particular emphasis on its legal treatment to detain foreign substandard vessels from assessing open seas.

Key words: Flag state control, port state control, Memoranda of Understanding, Australian distinction between unseaworthy and substandard vessel, power of detention, *Australian Navigation Act*, *Australian Pollution Act*.

1. Introduction

Oceans form an integral part of the global ecosystem. Oceans cover 71% of the earth's surface, contain 80% of the life on earth, and produce 70% of the world's oxygen supply.¹ Merchant ships for international trade are the major users of the oceans. Merchant shipping represents a significant part of international transport of goods through oceans, it accounts for more than 95% of world trade by weight.² Besides, oceans are essential to the international energy trade - about 60% of all oil produced for human energy needs is transported over the oceans.³

One of the major risks associate with shipping activities is the pollution of the marine environment due to accidental or deliberate discharge of oil, the sea receives approximately 3.2 million tons of oil annually, and close to half of this amount enters as a result of tanker operations or other accidental spills from ships.⁴

The likely damage upon a maritime casualty will affect not only the interested parties to a maritime adventure, namely the shipowners, carriers, and cargo owners; but the marine environment and nearby coastal communities. Accidental oil spills create very damaging effects to the coastal marine environments as the currents and tides in the coastal areas are not as strong as in the open sea. Researches indicate that at the site of an accident, the concentration of marine pollution will be highest, and will decrease progressively with distance by dispersion and dilution. Natural dispersion is fastest in the open sea, where the currents, tides, and winds are strongest, and slowest in stagnant waters.⁵

¹ D.W. Toews, J.J. Kay, and E. Lister (2008), *Ecosystem Approach: Complexity, Uncertainty, and Managing for Sustainability*, New York: Columbia University Press.

² V. Lun (2006), *Shipping and Transport Logistics*, Singapore: McGraw-Hill Education.

³ United States Department of Energy, *International Energy Annual (2008)*.

See www.energy.gov/about/index.htm (last accessed in April, 16, 2009).

⁴ Impact of Oil and Related Chemicals and Wastes in the Marine Environment, GESAMP Reports and Studies No. 50.

⁵ Secretary of State for Transport (1994), *Safer Ships, Cleaner Seas*, The Report of Lord Donaldson's Inquiry into the Prevention of Pollution from Merchant Shipping, 141, at 23.

Discharge of ballast water constitutes another type of marine pollution.⁶ The organisms from foreign waters, which are carried with the ballast water pose the risk of introducing a marine invasive species into the unique marine environment around the ports. In Australia, with approximately 95 per cent of Australia's commodities being transported by sea. Each year around 150 million tonnes of ships' ballast water is discharged into Australian ports by 10,000 ship visits from some 600 overseas ports. Most shipping into Australia arrives from the northern Pacific area, with the greatest volume of ballast water being discharged by bulk carriers.⁷ The environmental impacts of invasive species can be significant.

This article will first explain why the flag state control legal regime is structurally unreliable in enforcing the international convention of safety measures on shipping activities; then the author will elucidate how port state control is the better sensible alternative to prevent marine pollution. Australia is one of the most environmental conscious nations in the Asian-Pacific region, this paper will evaluate how the Australia carries out the international port state control legal regime in preventing marine pollution, with a particular emphasis on how its legal treatment on foreign substandard vessels.

2. Maritime Common Law – The Negative Aspects of Liability Limitation Law

The Liability Limitation Law provides that if the ship causes injury without the owner's "privity or knowledge", then the liability of the shipowner is limited to the value of the ship and its "freight pending".

Historically, the Liability Limitation Law was designed to encourage investment in shipping and was particularly helpful to shipowner as a means of providing a ceiling for liability prior to the widespread acceptance of limitation of liability through incorporation.⁸ The "privity" requirement has been linked to the fault-based notions of unseaworthiness,⁹ so the basic idea can be recapitulated as a measure for protecting innocent shippers against unlimited liabilities. One of the most celebrated attempts to seek this liability shelter is the petition by the owner of the Torrey Canyon (responsible for a spill off the coasts of England and France in 1967 causing extensive environmental damage and cleanup costs of several million dollars) that sought to limit liability to fifty dollars, the value of a single surviving lifeboat.¹⁰

3. Shipping Conventions on Ship Safety

The sinking of the Titanic in 1912 led to the inter-governmental cooperation on formulating uniform laws for the safe operation of international shipping.¹¹ Today, the majority of laws regulating the construction, maintenance and operation of ships were generated under the auspices of the International Maritime Organization (IMO).

⁶ Ballast water is carried in unladen ships to provide stability. At the ships' destination, the cargo is loaded and the ballast water is pumped out, organisms from foreign waters then establish populations in the surrounding waters of the loading ports. Many iron ore and coal carrying ships arrive empty of cargo and fully ballasted, so enormous volumes of foreign water are pumped into Australian ports.

Australian Museum Home Page www.austmus.gov.au (last accessed in April, 16, 2009).

⁷ Australian Marine Environment Protection Committee (MEPC) (2008), *Briefing on Harmful Aquatic Organisms in Ballast Water*, 58th session: 6 - 10 October 2008.

⁸ G. Gilmore & C. Black (1975), *The Law of Admiralty* §§ 10-1 to 10-3, at 818-21 (2d ed.).

⁹ See *Tug Ocean Prince v. United States*, 584 F.2d 1151, 1155 (2d Cir. 1978).

¹⁰ See *In re Barracuda Tanker Corp.*, 281 F. Supp. 228 (S.D.N.Y. 1968). The claims "were eventually settled for three million pounds and the American limitation proceedings were discontinued."

¹¹ E. Jansen (1991), *Governments' Responsibilities To Ensure That Ships Meet International Convention Standards in D Sanders* (Ed.) *The Management of Safety in Shipping*, The Nautical Institute, London.

The IMO regulations were mainly focusing on two broad areas: (1) The proper design, construction and maintenance of the structure and equipment of the ship [the hardware side]; and (2) The proper operation of the ships [the software side].¹²

4. Flag State Enforcement of International Safety Conventions

Historically, the flag states bear the primary legal obligation to regulate the safe operation of merchant ships. The government of the flag state is responsible for promulgating laws and regulations to effectuate its international obligations.¹³ Flag state is a bearer of the primary legal obligation because international safety conventions¹⁴ can only have effect at the intergovernmental level, and they cannot be enforced at the individual ship level. For example, in Australia and most of the common law jurisdictions, ratification of an international treaty does not automatically give the treaty document legal effect in domestic law. To have practical effect, the domestic legislature must incorporate the treaty provisions into its domestic law. Therefore, flag state is the national entity that can exert the greatest degree of legal control over the individual ship level. As recognized by the UNCLOS, a state is the best authorized body to “effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag”.¹⁵ However, many of these nations do not possess sufficient resources to regulate the registered fleet. The mere reliance on flag states to prevent maritime casualties on the marine environment is impractical.

In fact, merchant ships in the recent times are registered under different “flag nations”, and not all nations take their flag responsibilities very seriously. Some nations even have their vessel registries run by private corporations.¹⁶ The “Flags of Convenience” (“FOC”) nations have contracted out the administration of their fleets. The problem of substandard shipping is correlated with how seriously an individual ship register is administered.¹⁷ The administration structure of FOC attracts irresponsible ship owners to shop around for ship registries with the lowest standards to avoid the costs of compliance with international regulations.¹⁸

5. Port State Control

In addition to the Limitation Act and FOC phenomenon, even responsible flag states would not have unlimited resources to enforce relevant international treaties on its fleet, which scattered throughout the world, on a continuous basis.¹⁹ Therefore, port state control would have a key role to play even in the ideal world that all flag states intend to comply with their full responsibilities.

¹² The measures include the navigational rules, the training and certification of crews and criteria for safe handling of dangerous cargo.

¹³ United Nations Convention on the Law of the Sea (UNCLOS).

¹⁴ Conventions, protocols, codes and resolutions agreed under the auspices of the IMO, ILO or other similar multilateral or bilateral inter-governmental “gatherings”.

¹⁵ Article 94(1) of UNCLOS.

¹⁶ FOC registers are often owned and managed by foreign nationals with headquarters located outside the flag state. For example International Registries Inc. which used to manage the Liberian Ship register (on 1 January 2000, IRI ceased acting for the Liberian registry) and now manages the Marshall Islands Registry, has its headquarters in Reston, Virginia, USA close to Washington DC. It was founded by Edward Stettinus, a former US Secretary of State and is a privately held company owned and operated by its senior employees.

¹⁷ For example, in Australia, Flag State Convention (FSC) inspections are restricted to only the surveyors of the governmental agency - the Australian Maritime Safety Authority (AMSA). The AMSA guidelines specify that FSC inspections will be conducted at six monthly intervals for Australian flag ships. If tankers are of 15 years old, it requires FSC inspection at three-month-intervals. FSC inspection at three-month-intervals is mandatory for passenger ships regardless of age. See: *AMSA PSC Procedures, ITS63 Ship Inspection, Targetting of Ships* at 2.3.

¹⁸ G.C. Kasoulides (1993), *Port State Control and Jurisdiction*, Dordrecht, Boston, at 185.

¹⁹ Safer Ships, Cleaner Seas, The Report of Lord Donaldson, see *supra* note 5, at 57.

It is well established that when a vessel is in port, it will be subject to the laws of the “host” nation because the vessel is located within the sovereign territory of the coastal state. Port state control, therefore, has been traditionally limited to regulation of ships which have “moored” at a port, and this includes ships which have anchored, berthed alongside, are at a single point mooring or at an offshore facility.

Both UNCLOS and International Maritime Organization (IMO) made rules to strengthen the legal regime of port state control. The UNCLOS radically expands a port state’s authority on investigating²⁰ and instituting proceedings against breach of international conventions committed by vessels outside a state’s coastal jurisdiction,²¹ namely its internal waters, territorial sea or exclusive economic zone.

In considering the party with most to lose as a consequence of maritime casualty is the coastal state adjacent to the site of the maritime accident, it seems logical that a mere reliance on flag state control to ensure compliance with relevant legislation is not sufficient, and an additional “check” by the port states is necessary. Port state control becomes an effective counterforce to the ever present external environmental threat posed by unseaworthy ships. The cost of port state control is well justified through a fee structure imposed for inspections and fines levied for breaches.

6. Enforcing of International Obligations of Port State Control

Under International Law, the concept of port state control requires a foreign vessel to comply both the laws of its own flag state but also those of the port state. In other words, even if the flag state is not a party to a particular international convention; if the law of a port state makes compliance of that particular international convention mandatory, the port state can enforce the foreign vessels for compliance if they are within the port state’s sovereign territory.²²

Conversely, if a state ratifies an International Convention, it will have an obligation under International Law to enforce relevant provisions as part of its port state control procedures, irrespective of whether such provisions are contrary to domestic legislation.

The real issue regarding substandard shipping and maritime casualties is less related to insufficient international legislation, but more to the fact that the relevant legislation is not properly complied with. Therefore, the problem is one of compliance and enforcement and not one of lack of detailed rules and guidelines. Now the question becomes: If a central government ratifies an international obligation, can the local government (where the port locates) refuse to comply?

In the United States, the issue relates to the concept of vertical preemption and its legal effect on state laws. For example, the *US Federal Water Pollution Control Act* disclaims an intent to preempt the states "from imposing any requirement or liability with respect to the discharge of oil."²³ As a result,

²⁰ Article 218 of UNCLOS provided that:

(1) When a vessel is voluntarily within a port or at an off-shore terminal of a state, that state may undertake investigations and, where the evidence so warrants, institute proceedings in respect of any discharge from that vessel outside the internal waters, territorial sea or exclusive economic zone of that state in violation of applicable international rules and standards established through the competent international organization or general diplomatic conference.

²¹ Port state jurisdiction is provided in Article 25 of UNCLOS that:

(1) The coastal state may take the necessary steps in its territorial sea to prevent passage which is not innocent.
(2) In the case of ships proceeding to internal waters ... the coastal state also has the right to take the necessary steps to prevent any breach of the conditions to which admission of those ships to internal waters ... is subject.

²² For example whether a ship is seaworthy or not will be determined according to the provisions of municipal law, which clearly illustrates the importance of uniformity at an international level.

²³ See Section 311(o), 33 U.S.C.A. § 1321(o), reading:

the state would be free to provide additional requirements or penalties not specified by federal law. In the US, the states regularly impose damage assessment charges, penalties, cleanup costs, and other obligations not specified by federal law.

In Australia, the *Commonwealth v State of Tasmania (Tasmanian Dams Case)*²⁴ affirmed the pre-eminence of international treaty obligations over contrary state legislation.

The *Tasmanian Dam Case* was a landmark decision in Australian constitutional law, which centered around the proposed construction of a hydro-electric dam on the Franklin River in Tasmania, which was supported by the Tasmanian government (the state legislation), but opposed by the environmentalist groups. A four to three majority of the court held that the federal government had legitimately prevented construction of the dam.

One of the legal issues concerns Section 51(xxix) of the *Australian Constitution*, which gives the federal parliament the power to make laws with regard to external affairs. Section 51(xxix) is a nebulously defined provision. The federal government passed a law²⁵ under this provision to prohibit the Tasmanian government to clear and excavate the area for building the dam. The Australian federal government claimed that the law was enacted for fulfilling the obligations of an international treaty²⁶ to which Australia was a party. The Tasmanian government argued that the *Australian Constitution* gave no authority to the federal government to make such regulations. Both governments put their case to the High Court of Australia in 1983.

The High Court recognized that the fact that when the *Australian Constitution* came into effect in 1901, there were few international organizations such as the United Nations in existence. The external affairs power under the Australian Constitution was intended to be ambiguous, which would give it the capability of expansion. The High Court further explained that so long a federal law implements an international law or treaty, it is sufficient that it acquires the international character under Section 51(xxix).

7. Australia's Role in the Tokyo Memoranda of Understanding (Tokyo MOU)

Regional Initiatives--The Memoranda of Understanding (MOU) in Port State Control

The sharing of information is crucial to the success of port state control regime. Without such information sharing, port state control may impose an undue burden on shipping activities when the same ships are inspected at every port. To facilitate information sharing, port states connect their control activities by establishing memoranda of understanding ("MOU's"). The first regional grouping was the 1982 Paris MOU – the Memorandum of Understanding on Port State Control in Implementing Agreements on Maritime Safety and Protection of the Marine Environment ("Paris MOU"),²⁷ which set a framework for subsequent Tokyo MOU, which Australia is a member.

The Tokyo MOU was established for the Asian-Pacific region, which binds the maritime authorities of Australia, Canada, China, Fiji, Hong Kong, Indonesia, Japan, South Korea, Malaysia, New Zealand, Papua New Guinea, Philippines, Singapore, Solomon Islands, Thailand, Vanuatu, and Vietnam.

(2) Nothing in this section shall be construed as preempting any State or political subdivision thereof from imposing any requirement or liability with respect to the discharge of oil or hazardous substance into any waters within such State.

²⁴ (1983) 158 CLR 1.

²⁵ *World Heritage Properties Conservation Act* 1983.

²⁶ Convention Concerning the Protection of the World Cultural and Natural Heritage.

²⁷ The Paris MOU binds the maritime authorities of Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Netherlands, Norway, Portugal, Spain, Sweden, U.K. and Northern Ireland. The Russian Federation became a member on January 1, 1996.

The MOU recognizes the need to avoid unhealthy competition between ports, and acknowledges the necessity for setting up a harmonized system of port state through exchange of information. The MOU requires each contracting member to inspect an annual total of 25 percent of foreign merchant ships calling at its ports. The MOU also provides guidelines for inspection and detention of substandard vessels for the purpose of insuring rectification of defects in the vessels. Since flag states bear the primary responsibilities to ensure compliance of international safety conventions for shipping, the basic premise is that where a vessel has a valid certificate issued by the flag state, it is prima facie evidence of compliance with relevant convention requirements.²⁸

Accordingly, the initial task of the Port State Control Officer (PSCO),²⁹ on boarding a foreign vessel, is to exam its relevant certificates and documents.³⁰ If any of the certificates have expired or are invalid, there will be clear grounds for exercise the next level of control procedures.³¹

However, the “clear grounds” entails more than merely lacking valid documents issued by the flag state. Clear grounds are defined as:³² *“Evidence that the ship, its equipment, or its crew does not correspond substantially with the requirements of the relevant conventions or that the master or crew members are not familiar with essential shipboard procedures relating to the safety of ships or the prevention of pollution.”*³³ Paragraph 2.2.5 of IMO Resolution A.787(19) stipulated that if the PSCO believes that the ship or its crew do not substantially meet the requirements, the PSCO should proceed to a more detailed inspection. After the inspection, if a vessel has deficiencies that are hazardous to safety, health or the environment, the member shall not allow the ship to proceed to sea unless it first removes the hazardous defects.³⁴

To prevent ship owners from running a detention, the MOU stipulates that other members shall refuse such ships to access their ports until the ship owner can provide evidence that the defects have been rectified. Exception is allowed where a ship needs to proceed to a repair port.

However, the exemption could be used as a way to avoid a detention order. For example, when BV withdrew the class of the Cypriot panamax bulk carrier San Marco, the vessel was detained by Vancouver port authorities. The vessel was allowed to proceed under tow, unmanned, for repairs in Mexico. But no repairs were undertaken. The vessel slipped her tow, took her crew back on board, and proceeded to load a full cargo of fertilizer. During this voyage, the vessel hit heavy weather off Cape Town and lost shell plating 14x7m.³⁵

In terms of information sharing, the Tokyo MOU requires each member to publish quarterly data on detentions, with information about the name of the ship, its owner and operator, flag state, and classification society. In light of the publishing data, just like the Paris MOU, the Tokyo MOU recommends its members to avoid inspecting ships which have been inspected by other members within the previous six months unless “clear grounds” for inspection exist.³⁶

Publication allows the shipbrokers to know what ships have been detained and why. It also allows the marine underwriters to better assess the risks of those substandard vessels. It lets the cargo

²⁸ See SOLAS Regulation I – 19(b).

²⁹ Port State Control Officer is the authorized person from the competent authority of a Party State to a relevant convention in carrying out port State control inspections. Paragraph 1.6.6. of IMO Resolution A.787(19).

³⁰ IMO Resolution A.787(19) para 2.2.3.

³¹ When a PSCO exerts port control activities on a vessel that could not provide valid documents issued by its flag state, the flag state would not be embarrassed because the flag state should welcome the intervention by the Port State authorities, as the vessel is in breach of its obligations to the Flag State.

³² Paragraph 1.6. of IMO Resolution A.787(19).

³³ Ibid, paragraph 2.3 lists 10 examples of “Clear grounds”.

³⁴ Paragraph 3.7 of Paris MOU Paris MOU.

³⁵ John Hare (1997), *Port State Control: Strong Medicine to Cure a Sick Industry*, 26 GAJICL 571.

³⁶ Paragraph 3.4 of Paris MOU provides that “Clear grounds” includes notification by another authority or complaint of the ship's master, crew or any person “with a legitimate interest in the safe operation of the ship.”

owners know who the delinquents are, and shipper can avoid putting their cargoes onto the substandard ships.³⁷ With the ease of dissemination of information through the internet, the public can find detention lists on a monthly basis in Lloyds List (U.K., Australia, Canada and the U.S) and even on the internet.³⁸ The information sharing decreases the possibility of unseaworthy ships entering into unsuspecting ports.

8. Australian Safety Maritime Authority (AMSA)

Australia has designed one of the most comprehensive domestic legislation to carry its port state control program in the Asian-Pacific region. The Australian Safety Maritime Authority (AMSA) conducts port state control in Australia, and as a member of the Asia-Pacific MOU, Australia does more than comply with its 25% inspection target. In 1996, it inspected 2,901 vessels, of which 248 were detained. Australia has published data about delinquent flags, substandard classification societies, with details of detentions indexed by ship type, on the AMSA website on a monthly basis.³⁹

In the mid-2008, the Council of Australian Governments (COAG) agrees to consider the establishment of a single national system for maritime safety regulation.⁴⁰ Currently across Australia, maritime safety is regulated by more than 50 pieces of legislation administered by eight independent maritime safety agencies. Under the proposed reform, the AMSA would responsible for regulating vessel design, construction, and equipment, vessel operation (e.g. safety management systems), and crew certification and manning.

The legislative basis of the AMSA's inspections is based on the Section 210 of the *Commonwealth Navigation Act 1912*.⁴¹ Section 210 provides that if it appears to the AMSA that a ship is unseaworthy or substandard, the AMSA may order the ship to be provisionally detained. The AMSA must then issue a report as to whether the ship is unseaworthy or substandard. The AMSA will issue a report to the ship master on whether the ship be finally detained or be released unconditionally.

9. Australian Distinction between an “Unseaworthy” and a “Substandard” vessel

In IMO Resolution A.787(19),⁴² the terms “unseaworthy” and “substandard” ships are used interchangeably. However, the two terms do not mean the same thing in Australian legal context.

In carriage of goods by sea, there is an obligation upon the carrier to provide a seaworthy ship.⁴³ For example, the Australian Insurance law⁴⁴ clearly stresses the importance of seaworthiness in contracts of marine insurance. Section 59 of the *Navigation Act* provides that in every contract of service between a ship owner/master and a seaman, there is an obligation upon the ship owner/master to exercise reasonable care to ensure that the vessel is in a seaworthy condition at the commencement of, and throughout, every voyage. Section 207 of the *Navigation Act* defines “seaworthy” as a fit state to

³⁷ John Hare, *Port State Control*, see super note 35, at 580.

³⁸ The public can find monthly detention lists in the following websites:

- The United Kingdom at Marine Safety Agency www.detr.gov.uk/msa/det97/det97.htm
- Australia at AMSA PSC Statistics www.amsa.gov.au/sp/shipdet/sdetlink.htm
- The United States at United States Coastguard www.uscg.mil/hq/g-m/psc/detained.htm

³⁹ AMSA Home Page, www.amsa.gov.au (last accessed in April, 16, 2009).

⁴⁰ National Approach to Maritime Safety Regulation, www.amsa.gov.au/namsr/ (last accessed in April, 16, 2009).

⁴¹ Section 210 of the *Commonwealth Navigation Act, 1912* (Austl.) (detention of unseaworthy and substandard ships).

⁴² IMO Resolution A.787(19) provides that “A ship whose hull, machinery, equipment, or operational safety is substantially below the standards required by the relevant convention or whose crew is not in conformance with the safe manning document”.

⁴³ Schedule 1, Article 3 r1(a) of *Carriage of Goods by Sea Act 1991* (Cth).

⁴⁴ Section 45 of the *Marine Insurance Act 1909* (Cth).

encounter the ordinary perils of the sea. On the other hand, section 207A of the *Navigation Act* states that substandard has a different meaning:

- (1) A ship is substandard if the ship is seaworthy, but conditions on board the ship are clearly hazardous to safety or health.
- (2) In determining whether a ship is substandard, regard shall be had to such matters as are prescribed.⁴⁵

Therefore, even a brand new vessel with all necessary equipment can be “substandard”. The Australian High Court decision in *Great China Metal Industries Limited v Malaysia International Shipping Corporation*⁴⁶ opined that when evaluating seaworthiness in a carriage contract, the Court shall consider more than just the physical condition of the ship, but also the overall management of the vessel. Courts could find that a “brand new”, but badly managed ship, as unseaworthy.

10. Power of Detention based on *Australian Navigation Act*

The *Navigation Act* gives AMSA inspectors the power to detain unseaworthy and substandard foreign ships on the following legal grounds:

- (1) If the ship is not manned with the minimum manning requirements;⁴⁷
- (2) if the provisions and (potable) water are not of good quality;⁴⁸
- (3) If the ship has incorrectly positioned load line markings;⁴⁹
- (4) If the number of persons with appropriate radio operating certification does not comply with the requirements.⁵⁰
- (5) If the ship carries particular cargo which is deemed to affect its safety.⁵¹ This could include even fairly innocuous goods such as grain or slurry.⁵²

If detailed inspection reveals that the actual condition on board does not correspond with the relevant certificate, Section 210 of the *Navigation Act* also authorizes the detention, even the vessel does possess valid certificates.⁵³ Section 210 even permits provisional detention without actual physical inspection if a ship appears unseaworthy or substandard from an external visual appraisal or from report of a PSC member. However, the power vested in section 210 is likely one of detention, not of arrest. Accordingly, the detention power exercised by AMSA under the *Navigation Act* is restricted to preventing substandard / unseaworthy vessels from departing from Australian ports, but do not extend to the right of arresting a substandard / unseaworthy vessel innocently passage through Australian maritime territory.

11. Detention Power of Foreign Ships based on *Australian Pollution Act*

The *Australian Pollution Act* grants a far more extensive power to AMSA to regulate substandard shipping in cases of actual or suspected marine pollution. The *Pollution Act*, unlike the *Navigation Act*, actually authorizes the AMSA to detain a foreign ship, if there is “clear grounds for believing that a pollution breach had occurred in the Australian territorial sea or Economic Exclusion Zone (EEZ)⁵⁴” that is related to that foreign ship, even if the ship is in all respects compliant at the time.

⁴⁵ These are contained in *Marine Orders Part 11- Substandard ships- Issue 2*.

⁴⁶ (1998) HCA 65.

⁴⁷ Section 14(9)(a) of the *Commonwealth Navigation Act, 1912* (Austl.).

⁴⁸ *Ibid.*, Section 120(2).

⁴⁹ *Ibid.*, Section 227C.

⁵⁰ *Ibid.*, Section 231D.

⁵¹ *Ibid.*, Section 254(2).

⁵² Potential free surface movement that would reduce the available stability margins beyond acceptable limits.

⁵³ Section 210 of the *Commonwealth Navigation Act, 1912* (Austl.).

⁵⁴ On August 01, 1994, Australia declared an EEZ extending 200 nautical miles from its coastline. Within its EEZ, Australia has sovereign rights to conserve and manage the living (e.g. fisheries and genetic material) natural resources. It also has jurisdiction over offshore marine scientific research and the protection and preservation of the marine environment. Australian Department of Agriculture, Fisheries and Forestry Home Page, www.daff.gov.au/fisheries/domestic/zone (last accessed in April, 16, 2009).

The *Pollution Act* also grants AMSA the power to detain and escort foreign vessels in the territorial sea and the EEZ into Australian port if the ship is suspected of causing the pollution. This provision is apparently contrary to the concept of “the right of innocent transit”, but the Australian legal scholars submit that the legislation is valid under UNCLOS Part XII for the reason that the act of causing pollution renders the transit non-innocent. Subject to UNCLOS Article 228,⁵⁵ Australian authority may prosecute against a foreign ship for polluting Australian breaches, up to three years after the breach, with service on the agent of the ship as deemed to be served on the owner or master.⁵⁶

12. Conclusion

Liability limitation law and the failure of flag state control make port state control a better legal alternative to prevent marine pollution by substandard vessels. Both UNCLOS and IMO made rules to facilitate the legal regime of port state control. Australia, through the *Tasmanian Dams Case*, places the enforcement of international law obligations a priority over conflicting domestic laws, which creates a relative effective legal framework on disallowing the substandard vessels to access the international waters once they entered the Australian ports. In addition, as a member of the Tokyo MOU, Australia publish the detention list of all substandard vessels with their flag states and classification societies, which let the public at large knows about who the miscreants are.

Australia even distinguishes an unseaworthy vessel from that of a substandard vessel, and the port state control authority can detain even a brand new foreign vessel if the management side deficiency makes it substandard vessel. The *Australian Pollution Act* grants more power to the port authorities than the *Navigation Act* in detaining and escorting pollution suspected foreign vessels even 200 nautical miles from the Australian coastline.

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⁵⁵ Section 29 of the *Australian Pollution Act*.

⁵⁶ Ibid s.29A.