



Administrative Review Council

SHIPPING REGISTRATION BILL

REPORT No 10

ADMINISTRATIVE REVIEW COUNCIL

SHIPPING REGISTRATION BILL 1980

Report to Attorney-General

1. The Shipping Registration Bill 1980 ("the Bill") was introduced into the Parliament on 22 May 1980. In his Second Reading Speech, the Minister for Transport stated that, in view of the wishes of several States and the widespread interest in the subject, the Bill should lie on the table over the winter recess (Commonwealth Parliamentary Debates (House of Representatives), 22 May 1980, p.3085). The Council resolved to examine the Bill because the review arrangements proposed therein appeared to leave room for improvement and because the procedure envisaged by the minister allowed time for the Council to make recommendations which could be included in the Bill. The Council has consulted with officers of the Attorney-General's Department and of the Department of Transport and has had before it draft drafting instructions from the latter Department for amendments relevant to review arrangements.

The Appropriate Review Authority

2. The Bill provides for jurisdiction of both State and Territory Supreme Courts (clause 59(5) - "prescribed courts" - and clauses 66 and 70) and the Administrative Appeals Tribunal (clause 78). With one exception, the jurisdiction proposed to be vested in courts does not call for comment. The Council has, however, considered whether the powers in clause 59 of the Bill

(orders for rectification of the register) should be vested in the courts or in the Tribunal.

3. Clause 59 is not clearly phrased but probably and appropriately covers the issue of entitlement to registration of ships as well as amendments of existing register entries. If there be any doubt that the courts' powers so extend, it is recommended that clause 59 be amended to remove that doubt.

4. Because of the necessary nexus of registration and rectification, the question is whether the whole registration function should be subject to the courts or the Tribunal. Given the phrasing of the substantive provisions relating to entitlement to registration and the details to be included on the register, determination of these issues is a matter of interpreting the relevant legislation and applying the facts to the law so found. There would appear to be no constitutional impediment to vesting a jurisdiction to review a rectification or refusal of rectification in either the courts or the Administrative Appeals Tribunal.

5. It is considered that jurisdiction in the courts in respect of registration and the content of the register is desirable. There are likely commonly to arise disputes between individuals or corporations as to ownership, which the parties would normally wish to have determined with binding effect (a determination which the Tribunal cannot make). These latter disputes cannot satisfactorily be separated from those involving only an applicant for registration and the Registrar.

The Jurisdiction of Courts and Tribunal

6. The Council has examined the Bill with a view to ensuring that adequate provision is made for review on the merits. In so far as the Bill allows for

review on the merits by the prescribed courts, Council has accepted that such a review is satisfactory. In so far as the Act confers discretions upon the Minister or the Registrar, which are not subject to review on the merits by the prescribed courts, the Council has sought to ensure that there be a review in all appropriate cases by the Administrative Appeals Tribunal. The recommendations which follow give effect to this concept.

7. The Courts. The Council accepts the general structure established by the Bill, including the choice of State Courts to exercise the jurisdiction under the Bill and has not separately examined whether those Courts are appropriate. One provision, decisions under which should be reviewable by the Courts, confers a subjectively phrased power on the Registrar. So as to ensure that the prospective parties have a full review on the merits on the issue of residence, the Council recommends that the provisions of clause 3(3)(b) should be amended by omission of the words "the Registrar is satisfied that".

9. The Tribunal. The Council agrees in general with the provisions of clause 78(2) of the Bill.

10. The Council recommends that clause 78 be amended to confer upon the Administrative Appeals Tribunal a right to review decisions of "proper officers" under clause 22(1) and of the Registrar under clause 22(4).

11. The Council recommends that clause 27 be revised to empower the Registrar to disallow a name proposed on initial registration or a proposed change of name, on grounds to be specified in Regulations made under paragraphs 83(2)(m) and (n) or by reason of a direction of the Minister under clause 28. It is recommended that a decision by the Registrar to disallow a name should be subject to review by the Administrative Appeals Tribunal

under clause 78 except where the disallowance is by direction of the Minister under clause 28.

12. The Council understands that clause 28 will be revised to empower the Minister to direct the Registrar to disallow names that are likely to prejudice Australia's relationships with other nations or with international organizations. The Council recommends that there be no review by the Tribunal of disallowance of a name on these grounds. Decisions made on these grounds under this Bill would not be appropriate for review.

13. As drafted, sub-clause 93(2) provides for closure of registration by operation of law where evidence of entitlement to registration to the satisfaction of the Registrar has not been provided within three months. It is recommended that sub-clause 93(2) should be amended to provide that, upon the expiration of the time and in the circumstances provided, the Registrar shall remove the ship concerned from the register. It is further recommended that a reference to this clause be added to clause 78(2)(b) so that the decision of the Registrar may be reviewable.

14. It is recommended that clause 78 be amended by removal of the requirement that internal re-consideration be a pre-requisite for external review. Although internal consideration is found useful in some jurisdictions, it is desirable that reviews by the Administrative Appeals Tribunal with respect to registration should be completed as quickly as possible and that the processing of an application should not be delayed while an internal review process proceeds. The lodgment of an application for review with the Administrative Appeals Tribunal will not of itself preclude re-consideration by the Minister or the Registrar of many of the decisions which are the subject of review.

Clause 56

15. Clause 56 contains a broad exclusion of actions against the Commonwealth, the Minister, or an officer, employee, servant or agent of the Commonwealth. This provision does not follow the equivalent provision in the United Kingdom Merchant Shipping Act 1894. It may exclude avenues of judicial review such as that under the Administrative Decisions (Judicial Review) Act 1977. While land registration legislation in Australia often excludes liabilities of officers, such legislation authorises successful actions to be paid out of appropriate funds. Reference is made to section 134 of the New South Wales Real Property Act 1900 which provides:

- "(1) The Registrar-General shall not individually nor shall any person acting under his authority be liable to any action or other proceedings for or in respect of any act or matter bona fide done or omitted to be done under this Act.
- (2) A successful claim against the Registrar-General under this Act shall be satisfied in the manner provided by law for the satisfaction of claims against the assurance fund."

16. It is recommended that clause 56 be deleted from the Bill.