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COMPULSORY PILOTAGE IN THE TORRES STRAIT

On 6 October 2006, Australia introduced compulsory pilotage for the Torres Strait and Great North East Channel.¹ This initiative was hotly debated at the International Maritime Organization (IMO) and has been formally protested by the United States and Singapore. However, Australia adopts the position that compulsory pilotage was necessary to protect sensitive marine habitats in the Torres Strait, and is in accordance with international law.

Transit Passage

The principles governing transit passage through straits used for international navigation are set out in Section 2 of Part III of the *United Nations Convention on the Law of the Sea 1982* (UNCLOS). Introduction of this regime overcame the difficulty that many straits, which had previously been high seas, became territorial seas when the maximum width of the territorial sea was extended to 12 nautical miles. Without this regime, only innocent passage would have been available through these straits and this is a more restrictive regime not available to aircraft or submerged submarines, and able to be suspended in certain circumstances by a coastal state.

Transit passage is defined in Article 38(2) as the exercise of the freedom of navigation and overflight by ships and aircraft through a strait used for international navigation 'between one part of the high seas or an exclusive economic zone and another part of the high seas or exclusive economic zone'. Passage must be 'continuous and expeditious', and Article 42(2) states that the laws and regulations of States bordering straits shall not 'in their application have the practical effect of denying, hampering or impairing the right of transit passage'.

Coastal States adjoining a strait used for international navigation have considerable service responsibilities towards vessels using the strait, such as the provision of navigational aids, hydrographic charts, search and rescue services, and marine pollution contingency arrangements, but UNCLOS makes no provision regarding cost-recovery. Compulsory pilotage schemes have been considered from time to time as a means of enhancing navigational safety, and by some, for recovering costs. However, the contrary argument is that refusal of access to a strait to a vessel because it would not accept a pilot would amount to hampering or impairing the right of transit passage.

Torres Strait

The waters of the Torres Strait are shallow and strewn with numerous islands, small islets, reefs and shoals. The northern half of the Strait is only navigable by vessels with a very shallow draft, and deep draft vessels are restricted to using narrow channels between the various islands off Cape York, principally the Prince of Wales Channel immediately North of Hammond Island. Navigation in the Strait is extremely hazardous. Apart from the complex topography of the area, tidal streams and currents are very strong, and visibility is frequently impaired by flash squalls and storms.

International shipping passing through the Torres Strait uses the Prince of Wales Channel. Most ships are bound for Australian ports and then use the Inner Route of the Great Barrier Reef. However, ships bound to and from South Pacific ports use the Great North-East Channel into the Coral

Sea (see Figure 1). It is these latter vessels to which the UNCLOS straits' transit passage regime principally applies. Ships using the Inner Route pass through Australia's internal waters and territorial sea, and their passage does not constitute transit passage within the meaning of Article 38(2).



Figure 1 – Torres Strait Shipping Routes and PSSA

The Torres Strait Treaty between Australia and Papua New Guinea (PNG) establishes sovereignty over islands in the Strait and a system of agreed maritime boundaries. It is a complicated treaty creating territorial sea enclaves, non-coincident seabed and water column boundaries, and a large Protected Zone with extensive management arrangements. The principal purpose of the Protected Zone is to acknowledge and protect the traditional way of life and livelihood of the traditional inhabitants, including fishing and free movement. Generally the Strait is an area of high marine biodiversity with sensitive marine habitats and extensive fishing activity both commercial and subsistence.

Particularly Sensitive Sea Areas

As a result of concerns over the risks of pollution damage to the environmentally sensitive Great Barrier Reef, Australia applied to the IMO to have it identified as a particularly sensitive sea area (PSSA). This was approved in 1990 along with a recommendation that IMO member States should inform ships flying their flags to comply with the system of pilotage introduced by Australia.² That system became a compulsory one and this has been accepted without challenge by other countries.

With regard to the Torres Strait, the IMO had earlier adopted a resolution promoting voluntary pilotage in the Strait.³ This was extended further with a 1991 resolution, superseding the earlier one, recommending that certain classes of vessel use a pilot when passing through the Torres Strait and Great North East Channel.⁴ While these recommendatory regimes were initially reasonably successful, non-compliance has increased significantly. Data from 1995 and 2001 shows that while 70 per cent of vessels on eastbound voyages were taking a pilot in 1995; this figure had fallen to 32 per cent by



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2001.⁵ Similar figures for westbound voyages were 55 per cent and 38.5 per cent. As a consequence, Australia and Papua New Guinea agreed that the risks of a major shipping incident in the Strait were unacceptably high. Analysis by Det Norske Veritas in 2001 indicated that compulsory pilotage would reduce these risks by 35 per cent.⁶

As a result of these concerns, Australia and Papua New Guinea jointly proposed an extension to the existing Great Barrier Reef PSSA to include the waters of the Torres Strait. This was approved in July 2005 through a resolution regarding Governments informing ships flying their flags to comply with the system of pilotage introduced by Australia.⁷ Australia subsequently issued the regulations establishing a compulsory pilotage regime for the Torres Strait and Great North East Channel. These regulations recognise the principle of sovereign immunity for warships and government vessels not employed on commercial service. They also include a system of pilotage exemption for masters of ships that use the Torres Strait on a regular basis. Other countries and international shipping organisations, including INTERTANKO and the International Chamber of Shipping, protested these regulations at the 55th Session of IMO's Marine Environment Protection Committee held in August 2006.⁸

Arguments For and Against

The main arguments used against compulsory pilotage in the Torres Strait are that the IMO did not specifically approve it; it has the practical effect of 'denying, hampering or impairing the right of transit passage' and is thus contrary to UNCLOS; and it establishes a precedent that if adopted by other countries adjacent to a strait used for international navigation would constitute a very significant impairment of the freedom of navigation. The issue of whether or not the Torres Strait is a strait used for international navigation is not in dispute. Australia agrees that it is such a strait.

Australia strongly refutes the arguments against compulsory pilotage. Firstly, it notes that the IMO endorsed the regime when it recommended that Governments should 'inform ships flying their flag that they should act in accordance with Australia's system of pilotage for merchant ships 70 m in length and over or oil tankers, chemical tankers, and gas carriers, irrespective of size'.⁹ This language is identical to that used by the IMO when it recommended that ships act in accordance with Australia's system of pilotage for the Inner Route of the Great Barrier Reef. Australia also notes that it is not in the nature of the IMO to formally approve traffic management schemes but rather to recommend their acceptance.

Secondly, Australia does not accept that compulsory pilotage amounts to 'denying, hampering or impairing' passage through the Torres Strait. The regime is aimed solely at enhancing safe navigation and protection of the marine environment. It is a commercial system with pilotage revenues going to a private company rather than a Government agency. It is a commercial cost and not a fee for transit. While Australia has made certain guarantees relating to the availability of a pilot, in the event that one was not available and the transiting vessel had taken all the appropriate actions to request a pilot and report its transit, this would be accepted as a defence to any subsequent charge.

Lastly, Australia does not accept that its arrangements in the Torres Strait are a precedent for other straits used for international navigation. The Torres Strait is arguably one of the most hazardous and navigationally difficult stretches of water in the world routinely used by international shipping. The level of shipping traffic through the North East Channel is

not high (about two ships per day), and it is administratively and operationally feasible to provide a pilot without delaying passage. However most importantly, the Torres Strait has been approved by the IMO as a PSSA for which special mandatory measures to preserve and protect the marine environment are required.¹⁰ Australia's scheme is not a direct application of compulsory pilotage to a strait. It is a necessary and proportionate measure to protect an approved PSSA. Any other country or countries seeking to use the Torres Strait precedent would first have to go through the step of having the strait approved as a PSSA by the IMO.

Australia has put in place measures to ensure that ships approaching the Torres Strait are notified well in advance of their approach of the need to take on a pilot when transiting the Torres Strait. Ships planning to enter Australia's exclusive economic zone are required to report their intentions and are tracked using the Australian Maritime Information System (AMIS) managed by the Border Protection Command. Their movements are then monitored within the Torres Strait and Great Barrier Reef by REEFCENTRE, which operates the vessel traffic and information system for these shipping routes.

As a vessel approaches the Torres Strait, it is interrogated by Automatic Identification System (AIS) shore stations and tracked by shore-based radar. Within the vicinity of the Prince of Wales Channel, it will also be identified by remotely operated video cameras. Should a vessel not take a pilot and fail to identify itself, it will be positively identified by surveillance aircraft and subject to legal proceedings when it next enters an Australian port. No attempt will be made to physically enforce the compulsory pilotage regime by denying passage.

Conclusion

Advice from the Australian Maritime Safety Authority (AMSA) is that since the introduction of compulsory pilotage, there has been 100 per cent compliance with the regime. One ship transited the North-East Channel without a pilot in the very first days of the new requirement for compulsory pilotage. As that vessel followed all the appropriate procedures for requesting a pilot but one was not available, and the vessel continued on passage without a pilot, AMSA does not regard this incident as a breach of the regulations and will not take action against the ship if she were to enter any Australian port in the future. Despite the international protests, compulsory pilotage is achieving its objective of improved protection for the sensitive and pristine marine habitats of the Torres Strait and adjacent areas.

¹ Australian Marine Notice 8/2006 & associated Marine Orders Part 54.
² IMO Resolution MEPC.45(30) adopted on 16 November 1990.
³ IMO Resolution A.619(15) adopted on 16 November 1987.
⁴ IMO Resolution A.710(17) adopted November 1991.
⁵ IMO document LEG 89/15 dated 24 August 2004. *Torres Strait PSSA Associated Protective Measures – Compulsory Pilotage* submitted by Australia and Papua New Guinea, paragraph 6.
⁶ IMO document NAV 50/3 dated 22 March 2004. *Torres Strait PSSA Associated Protective Measures – Compulsory Pilotage* submitted by Australia and Papua New Guinea, paragraph 5.8.
⁷ IMO Resolution MEPC.133(53) adopted on 22 July 2005. IMO document MEPC 53/24/Add.2
⁸ IMO document 55/23. *Report of the Marine Environment Protection Committee on its Fifty-fifth Session*, dated 16 October 2006, especially pp. 52-54.
⁹ IMO Resolution MEPC.133(53) adopted on 22 July 2005. IMO document MEPC 53/24/Add.2
¹⁰ UNCLOS Article 211 (6)(a).

