MARITIME INDUSTRY AUSTRALIA LIMITED

Submission

Australia's accession to the Nairobi International Convention on the Removal of Wrecks

Contact: Angela Gillham

Organisation: Maritime Industry Australia Ltd

Address: 473 St Kilda Road
Melbourne Victoria 3004

Phone: 0439 345 191

Email: Angela.gillham@mial.com.au

Date: September 2020

About MIAL

Maritime Industry Australia Ltd (MIAL) is the voice and advocate for the Australian maritime industry. MIAL is at the center of industry transformation; coordinating and unifying the industry and providing a cohesive voice for change.

MIAL represents Australian companies which own or operate a diverse range of maritime assets from international and domestic trading ships; floating production storage and offloading units; cruise ships; offshore oil and gas support vessels; domestic towage and salvage tugs; scientific research vessels; dredges; workboats; construction and utility vessels and ferries. MIAL also represents the industries that support these maritime operators – finance, training, equipment, services, insurance and more. MIAL provides a full suite of maritime knowledge and expertise from local settings to global frameworks. This gives us a unique perspective.

We work with all levels of government, local and international stakeholders ensuring that the Australian maritime industry is heard. We provide leadership, advice and assistance to our members spanning topics that include workforce, environment, safety, operations and fiscal and industry structural policy.

MIAL's vision is for a strong, thriving and sustainable maritime enterprise in the region.

MIAL's overarching position concerning maritime policy in Australia is that we ought to have a sustainable, viable maritime industry. This activity can occur anywhere – coastal, offshore and international. This maritime activity should encompass anything – freight, tourism, passenger movement, port and harbour services, offshore oil and gas, construction, scientific/research, essential services, and government services.

Australia's Accession to the Nairobi Convention

MIAL welcomes the opportunity to provide a submission on Australia's possible accession to the Nairobi International Convention on the Removal of Wrecks (WRC).

MIAL supports the polluter pays principle. Considering the volume of shipping that is conducted safely around the Australian coast, into and out of Australian ports every day, the likelihood of ship related incidents occurring that result in a hazard causing damage to the environment is very low. However, such incidents do occur from time to time, and in these circumstances any hazards or environmental damage that result must be able to be quickly remedied and associated costs recovered from the polluter.

Recent experience suggests that the suite of existing Australian legal frameworks relating to liability and compensation for shipping related incidents not related to oil pollution, is overly complex and difficult to apply and is therefore inadequate. Having ratified the 1992 Civil Liability Convention, the 1992 Fund Convention, the 2003 Supplementary Fund Convention and the 2001 Bunkers Convention, accession to the Wreck Removal Convention would address an existing gap in Australia's ability to access an appropriate liability and compensation regime for wrecks, including lost containers.

Furthermore, where possible, a global industry such as shipping benefits immensely from the certainty and equality, regardless of area of operation and state of registration, that consistent and uniform application of legal frameworks provides, and where such consistency can be achieved domestically within the Australian jurisdiction, it is most welcome.

The Australian community also derives a benefit from assurance that there is a clear framework that applies strict liability, ensuring rapid allocation of responsibility and compulsory insurance to ensure costs of remediation will be met. Also, the ability of the shipowner to limit liability ensures ongoing access to cost effective sea transport.

For this reason, and to ensure adequate coverage of all incidents within the Australian jurisdiction, MIAL also supports extension of coverage of the WRC to Australian territorial waters as provided for in Article 3, paragraph 2 of the Convention.

Specific questions raised on the Discussion Paper

This section outlines the MIAL view with respect to some of the questions posed in the Discussion Paper.

Question 1: What benefits are there to AMSA expanding its powers to remove more wrecks in the EEZ?

AMSA has a very large area of responsibility with regard to responding to pollution incidents from, the outer limits of Australian coastal waters to the limits of the EEZ[1] as well as the regulation of ship

[1] Notwithstanding the fact that in accordance with the response arrangements outlined in the National Plan for Maritime Emergencies provides for state and territory jurisdictions to seek assistance from AMSA to manage and respond to incidents within coastal waters as well.

safety of all Australian commercial vessels (DCV's and RAV's) and foreign vessels in Australian ports. AMSA's role in ensuring ship safety and marine environmental protections within the Australian jurisdiction is enhanced with increased clarity and expansion of powers to deal with wrecks and recover associated costs within the EEZ that accession to the WRC would provide.

Question 4: Should the WRC apply in Australia's territorial sea? Please note any benefits or disadvantages.

The greatest benefit would be derived from the application of uniform laws and alignment with international standards throughout the Australian jurisdiction – including Australia's territorial sea.

Question 5: What need for consistency do you see regarding the wreck removal frameworks that apply: - in the EEZ and territorial sea? - across the states and Northern Territory?

The creation of inconsistent wreck liability and compensation arrangements across the Australian jurisdictions would do little to remedy the current confusing and complex regime.

To the greatest degree possible, consistency between the states/NT and the commonwealth regimes, as well as between the EEZ and territorial sea, that aligns with international practice should be the goal.

Question 7: If the WRC framework were to be adopted in the EEZ and the territorial sea, would a staged implementation assist in the transition? (e.g. first in the EEZ then in the territorial sea)
It is difficult to imagine what benefits would be derived from a staged implementation of WRC framework. Such a process may lead to avoidable unnecessary confusion in relation to the application of the framework, compliance requirements and complicate the circumstances relating to any liability and compensation action taken between partial and full implementation.

The approach to transition that should be adopted should focus on the provision of adequate communication of Australia's accession to the WRC, along with suitable lead in time to ensure industry is well prepared for compliance.

Question 8: Should DCVs and recreational vessels be covered by the WRC provisions? What impact would this inclusion have on your industry/sector?
While it is extremely difficult to predict potential impacts associated with the application of the WRC on an industry as diverse as the DCV sector, it is reasonable to assume that a commercial operation should hold adequate 'third party' insurance to cover any costs associated with the creation of a hazard or environmental damage associated with a wreck resulting from the activity of that business.

Some DCV operators that sit above the 300GT threshold for the carriage of compulsory insurance, already hold P&I insurance and adjustments to coverage required to ensure compliance with the WRC is unlikely to result in a significant and disproportionate additional cost.

However, the burden of compliance should not be disproportionate to potential damage caused, nor create a barrier to entry to entry for smaller operators.

MIAL does not make comment on recreational vessels.

Question 9: If DCVs and recreational vessels are covered by the WRC provisions, should it be for the EEZ, territorial sea, or both?
The provisions of the WRC should apply throughout Australian waters, including the territorial sea and the EEZ.

Question 12: Do you see the need for a 'wreck' under the WRC to follow a 'maritime casualty' event as a limiting factor for industry liability and government intervention?
The definition of 'maritime casualty' seems to be adequately broad so as not to create a limiting factor for industry liability and government intervention.

Question 13: Is the definition of a 'hazard' in the WRC too broad?
The definition of 'hazard' is suitably broad.

Question 14: Does the requirement for AMSA to determine whether a wreck poses a hazard before commencing removal impede its ability to respond to wrecks promptly or appropriately?
Whether or not a wreck poses an overt hazard, or a potential hazard should not take very long to establish, and is necessary to ensure proportionality in relation to AMSA's response.

Question 15: When do you see the need for wreck removal measures to be proportionate to the hazard acting as a limit on AMSA's response capability?
Experience suggests that in certain circumstances, external factors (such as political factors) can have an undue influence over the measures that are taken to remedy a situation. As such, the principle of proportionality that is enshrined within the WRC is important.

However, given the very broad and wide-ranging meaning of 'hazard', it is unlikely that the need for wreck removal measures to be proportionate to the hazard will act as a limit on AMSA's response capability unnecessarily, if at all.

Question 16: Are there any concerns about the WRC reporting requirements for both the Affected Ship and the Affected State?
MIAL has no concerns about the WRC reporting requirements for the Affected Ship and the Affected State.

Question 17: Are there any negative commercial implications related to holding the registered owner of the ship liable, as opposed to the legal owner of a wreck?
MIAL can see no negative commercial implications related to this.

Question 18: Should persons other than the ship owner (e.g. charterers) be held liable for wrecks that occur in relation to that ship?
For the reasons outlined in the discussion paper (the creation of a clear, identifiable, responsible entity), it is appropriate that the shipowner be held liable.

Question 19: Would a requirement to hold wreck-related insurance help the government recover costs incurred during wreck removal?
Together, the requirement for shipowners to hold wreck related insurance with the ability for the government to claim directly against the insurer, make recovering costs associated with wreck removal easier.

Question 20: Do ship owners or operators currently hold wreck-related insurance?
Aside from ships that fly the flag of parties to the WRC, which would necessarily hold wreck related insurance, MIAL understands that most large operators (RAV and DCV operators) hold P&I Insurance. However, as the DCV sector is very diverse, it is impossible to provide an entirely accurate picture.

Question 21: Would the requirement to hold wreck related insurance create a barrier to entry for newcomers to the shipping sector, particularly for DCV and recreational vessel owners?

A requirement to hold wreck related insurance should not create a barrier to entry for newcomers to the shipping sector, particularly those who would normally hold P&I insurance.

Question 22: How much of a financial burden would maintaining wreck-related insurance be for ship owners? Is this burden the same for all ship owners (e.g. DCV and recreational vessel owners)?
The additional financial burden associated with maintaining wreck related insurance for operators who already hold P&I insurance will be negligible.

Question 26: Is the WRC time limit for commencing cost recovery actions too restrictive? If so, why?
MIAL does not hold the view that the time limits for commencing cost recovery action are restrictive.

Question 28: Are the defences available in Article 10 so broad as to obstruct or prevent AMSA's cost recovery actions?
The defences in Article 10 are appropriate and, with regard to recent incidences in Australian waters, had Australia been a party to the WRC, the defences in article 10 would not have absolved the shipowner of liability, nor had the effect of limiting AMSA's ability to recover costs.

Question 29: Is it important for AMSA to have the authority to select a salvor and set conditions for salvage operations in both the EEZ and the territorial sea?
MIAL is of the view that the benefits arising from Australia's accession to the WRC outweigh any disadvantages relating to the inability of AMSA to direct salvage operations within the EEZ. The ability for an Affected State to intervene on matters of safety and protection of the marine environment should be sufficient.