Appendix 3: Questions for discussion

The Australian Government would welcome stakeholder views on the possible impacts, costs and benefits of implementing the WRC in domestic legislation. Specific comments would be appreciated on questions raised in in the paper and repeated below.

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

   The expansion of powers in the EEZ through the implementation of the WRC would provide a comprehensive liability regime for wreck removal and consolidate AMSA's powers.

   Wreck removal is about safety and the protection of the marine environment. Maritime casualties in the EEZ can pollute or threaten the marine environment. Australia's specific wreck removal laws limit AMSA's powers to deal with wrecks in the EEZ to ships that are regulated Australian vessels. However, most ships transiting through Australia's EEZ are foreign flagged ships.

   Expanded powers in the EEZ under the WRC would:

   a. provide AMSA with a mandate to protect the marine environment from pollution or the threat of pollution from wrecks, regardless of the flag of the ship;
   b. enable AMSA to direct that a foreign shipowner remove any wreck, which means that the foreign shipowner would incur the wreck removal costs not AMSA;
   c. alternatively, enable AMSA to remove the wreck of (or from) a foreign flagged ship and recover the costs directly from the insurer of the foreign shipowner.

   A. *Mandate to protect the marine environment*

   A consideration for wreck removal laws and the protection of the marine environment is the incidence of containers lost overboard. It is internationally recognised that containers lost overboard from ships can harm the marine environment (see: The Dutch Safety Board Report: "*Safe container transport north of the Wadden Islands - Lessons learned following the loss of containers from MSC Zoe*", The Hague, June 2020).

   Overboard containers can float, sink to the seabed and/or drift. Containers can break open upon impact (i.e. during the casualty) or they may subsequently break open; either way, their contents may disperse, depending upon their buoyancy. The potential harmful impact on marine environments in the EEZ, territorial sea and coastal area is particularly relevant where plastics are involved (see: The Senate Environment and Communication References Committee Report: "*Toxic Tide: The Threat of Marine Plastic Pollution in Australia*", Canberra, April 2016).

   AMSA's powers to deal with the protection of the marine environment in the EEZ are underpinned by *United Nations Convention on the Law of the Sea of 10 December 1982* (**UNCLOS**) as well as a number legislative instruments, including:

   a. *Australian Maritime Safety Act* 1990 (Cth) (**AMSA Act**);
   b. *Protection of the Sea (Powers of Intervention) Act* 1981 (Cth) and the *Protocol Relating to Intervention on the High Seas in Cases of Pollution by Substances other than Oil, 1973*, as amended from time to time);
   c. *Protection of the Sea (Civil Liability) Act* 1981.

   These instruments do not specifically refer to wreck removal. Against this background, expanded powers in the EEZ pursuant to the WRC would provide clarity and consolidate AMSA's powers with respect to protecting the marine environment from wrecks of foreign ships.

B. *Direct a foreign flagged shipowner to remove a wreck*

This point is brief, but fundamental. There is an obvious benefit to AMSA having specific powers that enable it to direct that a foreign shipowner remove any wreck. It is far better to be in the position to direct another party to undertake wreck removal operations, than to be in the position of incurring these costs and then seeking to recover them in a foreign jurisdiction. Such recovery is time consuming and costly.

Cost recovery most often becomes a creature of litigation which involves uncertainty and significant legal expense. This is discussed in more detail below.

C. *Ability to recover directly from an insurer*

In the event that a shipowner does not act to remove a wreck within the required timeframe or for any other reason, AMSA may need to take action to remove the wreck itself and then recover the costs. The ability to seek costs directly from an insurer of a foreign shipowner is an important benefit. It would provide AMSA with a line of sight to cost recovery that doesn't currently exist.

Whilst powers for wreck removal under the WRC are arguably limited to party States so as to be consistent with the *Vienna Convention on the Law of Treaties 1969*, it is apparent that most of the major flag states are signatories to the WRC. In addition, it is noted that insurers can limit their liability pursuant to the *Convention on Limitation of liability for Maritime Claims* (**LLMC**) even if this is not available to the relevant shipowner.

However, the benefit of limited rights against an insurer, far outweighs AMSA's present unlimited rights against foreign shipowners. This is because issuing proceedings against a foreign shipowner may have limited prospects of success.

An action against a foreign shipowner cannot progress until the proceedings can be served. In the absence of a foreign shipowner submitting to the jurisdiction of an Australian court either by:

a. acceptance of service of proceedings, usually through the appointment of lawyers in the jurisdiction; or

b. *in rem* proceedings (i.e. the arrest of a vessel that is owned by shipowner in our jurisdiction),

the only means of pursuing an action against a foreign shipowner is to commence *in personam* proceedings and obtain leave of the court to serve the process abroad, in the country of registration of the shipowner.

Jurisdiction follows the flag (and this is because the shipowner must be a resident of, or registered in, the flag state). Obtaining leave of the court is a relatively straightforward process, however flag states are often not a party to the *Convention on the Service Abroad of Judicial and Extrajudicial Document in Civil or Commercial Matters* (**Hague Convention**).

The Hague Convention provides a process of effecting service in party States, albeit a delayed process. It is relevant that insurers of shipowners are often members of the International Group of P&I Clubs (**IGP&I**). All of the IGP&I members are domiciled in jurisdictions that are party to the Hague Convention. Other protection and indemnity insurers may not be.

In the absence of the Hague Convention or other treaties between the relevant foreign jurisdiction and Australia, local or customary laws will be applicable to service requirements. Therefore local lawyers will need to engaged in the foreign jurisdiction, at significant expense. It is an unfortunate reality that service may never be able to be effected in States that are not party to the Hague Convention.

It is for these reasons that the ability to pursue an insurer of a foreign shipowner directly is critically important in practical terms for the recovery of costs incurred by AMSA.

2. Do the benefits of AMSA's expanded powers offset any burden they may create?

It is submitted so far that the WRC has potential to:

a. provide certainty as to AMSA's powers to protect the marine environment in the EEZ; and

b. extend liability to insurers for wreck removal costs.

It is submitted here that these expanded powers greatly outweigh any burden that they may create.

A primary purpose of AMSA is to protect the marine environment from pollution from ships and other environmental damage caused by shipping (section 2A(b) of the AMSA Act). This purpose reflects Australia's obligations as a party to UNCLOS. The ability of AMSA to undertake this purpose in the EEZ, where removal of wrecks is concerned is currently limited to regulated Australian vessels and is otherwise legally complex.

To forgo AMSA's unlimited right of recovery for wreck removal could be regarded as a burden of expanded powers under the WRC. Australia ratified the LLMC with reservation in accordance with Article 18(1) of the LLMC in order to preserve an unlimited ability to recover for wreck removal costs.

However, as discussed in answer to Question 1 above, this unlimited right of recovery has little practical benefit where foreign shipowners are concerned, due to:

a. the problems associated with effecting service in a foreign jurisdiction; and

b. the uncertainty of being able to enforce any judgment obtained in a foreign jurisdiction.

3. What particular aspects of the current regime governing wreck removal in the EEZ would you like to keep?

The following aspects of the current regime should be kept:

a. AMSA as the authority to recover costs. The WRC is unlike other conventions such as the Bunker Convention, in that it only creates rights for party States, not liabilities to others (for example, commercial fishermen, tourist operators etc). Consideration should be given when drafting implementing legislation to ensure that appropriate provisions deal with any issues about delegation of power to AMSA or title to sue. Commonwealth Government agencies such as AMSA are not the "Crown" or the State. Whilst AMSA may have authority to act on behalf of government bodies as a result of intergovernmental policies or arrangements (such as the National Plan for Maritime Environmental Emergencies), that of itself, may not provide the ability to act for, or on behalf of the State, in so far as the WRC is concerned.

b. A broader definition of shipowner which is discussed in answer to Question 17.

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

There are a number of advantages of the WRC applying in the territorial sea. These are:

a. The avoidance of a duplicity of regimes (see comments in answer to Question 5)

b. The direct right of recovery against insurers, notwithstanding that this right of recovery is limited to the amount recoverable under the LLMC (see comments in answer to Question 1).

c. The compulsory insurance limits are higher than those currently enforceable under Queensland law (i.e. *Transport Operations (Marine Pollution) Act* 1995 (Qld)).

d. The costs recoverable under WRC are arguably much broader than those contemplated by the *Navigation Act* 2012 (Cth) (**Navigation Act**). Under the WRC "removal" means any form of prevention, mitigation or elimination of the hazard created by the wreck, which would capture costs for all aspects of wreck removal operations, not just the removal of the wreck itself. However, under section 229(1)(e) of the Navigation Act, AMSA can only recover "expenses incurred by AMSA in connection with locating, marking, removing, destroying or sinking the wreck".

The disadvantages of the WRC applying in the territorial sea are:

a. The unlimited right of recovery against shipowners would be foregone. However, as discussed in answer to Question 1, this right may be illusory in circumstances where it is necessary to seek recovery of costs and enforcement of judgment in a foreign jurisdiction.

b. The temporal limits of the WRC would apply (i.e. 3 years with a maximum of 6 years in certain circumstances) where currently none exist under the Navigation Act.

c. The WRC would prejudice other statutory rights of recovery (if such rights are to be retained). This is because under Article 10(3) of the WRC, no claim for costs against a registered owner may be made otherwise than in accordance with the WRC. This means that all claims for wreck removal costs must be funnelled through the WRC. The Bunker Convention has a similar provision.

5. What need for consistency do you see regarding the wreck removal frameworks that apply:

a. in the EEZ and territorial sea?

Australia should seek to avoid a duplicity of regimes, in an already complex area (see comments in Question 1). It is submitted that the WRC should apply in the EEZ and the territorial sea.

Ships are mobile and because of this, a maritime casualty can also be mobile. It is not a remote possibility that a maritime casualty could impact both the EEZ and the territorial sea. In addition to the ship itself, the WRC covers parts of a ship and cargo, which are objects that could potentially be dispersed within the EEZ and the territorial sea, in circumstances of a maritime casualty. For example, in the scenario of containers falling overboard, containers could potentially be located in both the EEZ and the territorial sea. Further, it is possible that a ship could be stranded in the EEZ and drift into territorial sea or conversely, be stranded in the territorial sea and drift into the EEZ.

In the event of a maritime casualty that transgresses both the territorial sea and the EEZ, it would be difficult (if not impossible) to comply with two legal regimes, from both the perspective of AMSA and the shipowner.

In addition, any cost recovery action would be unnecessarily complicated, potentially involving issues of estoppel / res judicata if separate proceedings were issued in respect of the same incident but under different legal regimes.

b. across the states and Northern Territory?

The comments in (a) above apply equally here.

6. What particular aspects of the current regime governing wreck removal in the territorial sea would you like to keep?

As discussed in answer to Question 3, the following aspects of the current regime should be kept:

a. AMSA as the authority to recover costs.

b. A broader definition of shipowner which is discussed in answer to Question 17.

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)

From a costs recovery perspective, a staged implementation could be problematic in circumstances where a maritime casualty impacts both jurisdictions of the EEZ and the territorial sea (see the comments in answer to Question 5).

8. Should DCVs and recreational vessels be covered by the WRC provisions? What impact would this inclusion have on your industry/sector?

No comment.

9. If DCVs and recreational vessels are covered by the WRC provisions, should it be for the EEZ, territorial sea, or both?

No comment.

10. What benefits do the state and Northern Territory wreck removal provisions offer?

No comment.

11. What implications are there for you and your organisation if the broader definition of a 'wreck', which includes cargo, is adopted?

In the context of the answer to Question 1, to enable AMSA to recover the costs of removing overboard containers from the marine environment from shipowners as part of a wreck liability regime, it is important to specify that the definition of "wreck" includes cargo.

The definition of "wreck" under the Navigation Act includes "any thing" that belonged to or came from a vessel…(i.e. one that is wrecked, derelict, stranded, sunk or abandoned or that has foundered); and "any thing" that belonged to or came from a vessel in distress.

It is unclear as to whether containers carried on board a vessel that subsequently fall overboard, could be described as "any thing that belonged to or came from a vessel". These words suggest something that was once part of a vessel, and an overboard container certainly was not.

Article 1(4) of the WRC distinguishes between (b) any part of a sunken or stranded ship, including any object that is or has been on board such a ship; and (c) any object that is lost at sea from a ship and this is stranded, sunken or adrift at sea. Authors Nick Gaskell and Craig Forrest discuss in "The Law of Wreck", 2019 at p 487 that the drafters of Article 1(4)(c) intended to include cargo and "*It is regrettable that the word "cargo" was not specifically included*…" (see p 488).

To be clear, cargo including containers and their contents should be adopted in any implementing law. A failure to do so, would put AMSA at risk of uncertainty as to whether it can lawfully issue directions against a shipowner to remove containers lost overboard under the WRC. Uncertainty most often results in increased legal costs should any legal action become necessary for cost recovery.

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?

At its heart, the WRC states in Article 9(2) that the "registered owner shall remove a wreck determined to constitute a hazard". However, before considering whether there is a hazard, the wreck must follow a "maritime casualty", which is defined to mean:

> "*a collision of ships, stranding or other incident of navigation, or other occurrence on board a ship or external to it, resulting in material damage or imminent threat of material damage to a ship or its cargo*."

The need for a "wreck" to follow a "maritime casualty" is problematic for a number of reasons.

The term "material damage" is ambiguous. It is uncertain whether this is a qualitative and/or quantitative term. For example, what if a ship's IT systems are compromised so that it is unable to navigate, could that be material damage? What if only a small part of a ship's cargo is lost or damaged? What constitutes material damage would be difficult to determine.

In addition, the term "imminent threat" introduces a limit on action that does not currently exist in the wreck removal laws within the Navigation Act.

Further, the nexus between material damage or threat of it, relates to the ship or cargo itself and not to anything external, such as safety to other vessels or the environment. Putting to one side the interpretation issues raised above, the assessment of whether there is material damage (or threat of it) to a ship or its cargo is knowledge that would be in the possession of the shipowner not a government authority. However, determining external factors such as safety or harm to the environment can readily be assessed by a regulator.

In summary, the requirement for a "wreck" to follow a "maritime casualty" would have the effect of limiting liability and government intervention.

13. Is the definition of a 'hazard' in the WRC too broad?

The definition of "hazard" is necessarily broad, however, a few comments can be made with respect to the term "related interests". This widens the concept of protecting the marine environment to include, amongst other things, tourist attractions and economic interests.

Given that it is only the State (or AMSA) that has rights under the WRC, it is submitted that the inclusion of tourist attractions and other economic interests might be outside classes of loss and damage that might be reasonably suffered or protected by a government authority.

By comparison, the POI Protocol definition relevant to taking measures to prevent pollution in Article 1(2)(b) includes:

- hazards to human health;
- harm to living resources and marine life;
- damage to amenities;
- interference with other legitimate uses of the sea.

When considering the definition of "hazard" regard should be had to what interests AMSA can and should protect.

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?

A requirement to consider all the criteria listed in Article 6 of the WRC could impede an immediate or prompt response. For example, if the cargo is containerised, an assessment of the risk of the contents of the containers may be difficult to assess expeditiously, particularly in circumstances where there are many thousands of containers involved.

It is suggested that these criteria should be taken into account only to the extent that they are relevant or practicable.

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?

The concept of proportionality involves an analysis of law and fact. If disputed, evidence (including expert evidence) will be required.

What is considered reasonably necessary may be challenged in terms of what constitutes major harmful consequences to the marine environment, damage to the coastline or related interests of the State.

The requirement to take proportionate measures will not impact AMSA's ability to respond to the maritime casualty, but whether or not the response is proportionate will ultimately affect AMSA's prospects of recovering all of its costs of wreck removal from a shipowner or its insurer.

16. Are there any concerns about the WRC reporting requirements for both the Affected Ship and the Affected State?

Neither the WRC or the Navigation Act provisions are prescriptive about how notice is to be given to the registered owner. The UK Act makes it an offence not to comply with a such a notice.

It is submitted that there should be provisions that establish how that notice might be given or deemed to have been given. This is important for 2 reasons:

a. to successful prosecute a registered owner; and
b. in the event of default on the notice, the State is able to incur costs and recover them directly from the shipowner's insurer.

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?

There is a negative implication of only being able to recover against a "registered owner" and not being able to recover against a "legal owner". This is because it precludes any right of

recovery against a beneficial owner, which in turn, limits the prospects of recovery against a foreign shipowner.

Although there is no definition of "legal owner" in the Navigation Act, section 229(e) contemplates a wider category than the "registered owner" under the WRC as the legal owner would include a registered owner and a beneficial owner.

The term "owner" is defined under section 14 of the Navigation Act to mean one or more of the following:

> *(a) a person who has a legal or beneficial interest in the vessel, other than as a mortgagee;*
>
> *(b) a person with overall general control and management of the vessel;*
>
> *(c) a person who has assumed responsibility for the vessel from a person referred to in paragraph (a) or (b).*

Being able to pursue a beneficial owner as well as a registered owner means there are more foreign jurisdiction options open to AMSA when it comes to service of *in personam* proceedings and enforcement of judgment in a foreign jurisdiction (see comments in answer to Question 1 above). Anecdotally, it is often the case that registered owners are located in non-Hague Convention jurisdictions (such as Panama or Liberia), and beneficial owners are domiciled in owners' places of business (which are more likely to be in Hague Convention jurisdictions and therefore able to be served).

18. Should persons other than the ship owner (e.g. charterers) be held liable for wrecks that occur in relation to that ship?

It is suggested that a bareboat charterer be specifically included in the relevant definition of "owner" for wreck removal liability . A bareboat charterer is the employer of the master and crew and therefore would have tortious liability for a wreck caused by the negligent navigation or operation of a vessel.

It is also suggested that an operator or manager of a vessel be considered in the relevant definition of "owner" for the purposes of wreck removal liability (in similar terms to the definitions contained in sections 14(b) and (c) of the Navigation Act above). This is because an operator or manager could potentially have a place of business in an Australian jurisdiction.

In this regard, it is interesting to compare the definitions used in the WRC with those in the Bunker Convention. Under the WRC, only the "registered owner" is liable for wreck removal (while it is noted that the operator of the ship has reporting obligations to the Affected State).

Under the Bunker Convention, the "shipowner" is liable for pollution damage, which is defined under Article 1 to mean:

the owner, including the registered owner, bareboat charterer, manager and operator of the ship.

The term "registered owner" is referred to in Article 7 of the Bunker Convention dealing with compulsory insurance. Despite a bareboat charterer, manager and operator all being potentially liable, only a registered owner is required to maintain insurance to cover the liability for pollution damage.

The *Protection of the Sea (Civil Liability for Bunker Oil Pollution Damage) Act* 2008 (Cth) (**Bunker Act**) did not give Article 1 the force of law in Australia. It is noted that the definition of "registered owner" from Article 1 was imported into the Bunker Act but not "shipowner".

This means that only a registered shipowner is liable under Australian law for bunker pollution damage.

For the purposes of wreck removal (and arguably bunker pollution) liability, it makes sense to extend liability to all parties who have a legal interest in the ownership of a vessel as well as operators, managers and bareboat charterers.

19. Would a requirement to hold wreck-related insurance help the government recover costs incurred during wreck removal?

Yes, please refer to the comments in answer to Question 1 above.

20. Do ship owners or operators currently hold wreck-related insurance?

Wreck-related insurance is an offering of P&I Club cover. It is noted that wreck-related insurance is compulsorily required in Queensland. The *Transport Operations (Marine Pollution) Act* 1995 (Qld) (**TOMPA**) requires $10M insurance cover for salvage and wreck removal for all ships >35 LOA.

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?

No comment.

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)?

No comment.

23. Where does the insurance industry sit in the wreck removal process? Does this change given the scale of the wreck?

No comment.

24. Will the insurance industry be able to provide wreck-related insurance to all ships, including DCVs and recreational vessels?

No comment.

25. Will the insurance industry be able to provide coverage for costs beyond the LLMC limit?

No comment.

26. Is the WRC time limit for commencing cost recovery actions too restrictive? If so, why?

No, it is consistent with other conventions, for example the Bunker Convention.

27. In what other circumstances should a ship owner not be liable for the costs associated with a wreck removal?

An additional circumstance where a shipowner may not be liable for costs associated with a wreck removal could potentially be cyber-attacks where the ship or its cargo are used as a means of inflicting harm (for example, the ship's onboard systems are infiltrated so as to use the ship as a weapon). This is because such events are often specifically excluded by P&I Club cover.

This could be considered further with reference to shipowner and P&I Club interests.

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 consistent with those in the Bunker Convention and the CLC. The defences of themselves are not so broad as to obstruct or prevent AMSA's cost recovery actions. However, it is relevant to consider in this context the implications of Article 12(10). For ease of reference, Article 12(10) states:

> *Any claim for costs arising under this Convention may be brought directly against the insurer or other person providing financial security for the registered owner's liability. In such a case the defendant may invoke the defences (other than the bankruptcy or winding up of the registered owner) that the registered owner would have been entitled to invoke, including limitation of liability under any applicable national or international regime. Furthermore, even if the registered owner is not entitled to limit liability, the defendant may limit liability to an amount equal to the amount of the insurance or other financial security required to be maintained in accordance with paragraph 1. Moreover, the defendant may invoke the defence that the maritime casualty was caused by the wilful misconduct of the registered owner, but the defendant shall not invoke any other defence which the defendant might have been entitled to invoke in the proceedings brought by the registered owner against the defendant. <u>The defendant shall in any event have the right to require the registered owner to be joined in the proceedings</u>* (my emphasis).

It is uncertain as to what the underlined phrase means. In the event that an insurer requires the joinder of a registered owner, is it the case that the action is not properly constituted until that occurs? If so, this entirely circumvents the benefit of a direct action against the insurer.

This provision, which also appears in the Bunker Convention has been lifted from the corresponding provision in Article 8(8) of the CLC 1992, which in turn adhered to the corresponding text in CLC 1969.

It is difficult to contemplate circumstances where an insurer would want to join the shipowner, who is not already party to the proceedings. If there is an indemnity dispute between the insurer and shipowner (for example on the basis of wilful misconduct by the shipowner), then that claim would be subject to the jurisdiction provisions of the policy of insurance and would not necessarily be within the jurisdiction of the court where the maritime casualty has occurred.

Circumstances where an insurer may have good reason to join a shipowner, would be to enable the insurer to avail itself of one of the shipowner defences under Article 10. By joining the shipowner as a co-defendant, the insurer would obtain disclosure from the shipowner of relevant evidence that it may not otherwise have access to.

However, the text of Article 12(10) is ambiguous as to the mechanism by which the shipowner is to be joined. One view of the intention is simply that the insurer is entitled to join the shipowner without objection by the plaintiff. However, if that is the intended meaning, the text could have provided simply that the insurer is *entitled* to join the shipowner, whereas the language used actually suggest a *right to require steps* which must be taken by the plaintiff (i.e. AMSA).

If it is the case, that a co-defendant is necessary for the insurer to prove the elements of a defence, then this provision is unlikely to be either:

a. a condition of commencing direct proceedings against an insurer; or
b. a hindrance to the continuation of the proceedings,

however, it could potentially be a condition of obtaining judgment.

As discussed above, the process of joining a foreign shipowner could cause significant delay to the proceedings and add considerable legal expense, depending upon the jurisdiction. In an extreme case, it could frustrate the proceedings entirely if the shipowner no longer exists, for example has been deregistered.

Such an interpretation seems contrary to the principle of compulsory insurance and direct action provisions. Anecdotally, there have been surprisingly few legal actions instituted on the basis of a right of direct action against an insurer.

This provision is arguably a procedural one (along with other provisions such as limitation provisions), which means that local laws and courts may determine how effect is to be given to it. As a result, there is an opportunity to consider this issue when enacting any legislation giving effect to this provision.

In this regard, it could be argued that an insurer's right cannot be an unqualified one that ultimately leads to the frustration of legal proceedings, in circumstances where the shipowner cannot be served, found or becomes insolvent / deregistered.

Another consequence might be that the court could stay the proceedings until the shipowner is joined, however to do so, it might require good reasons from the insurer as to why this is necessary, and why the proceedings cannot be allowed to continue in their existing form, while steps to join the shipowner are in progress. Unless insurers could point to some reason for obtaining a substantive benefit from joining the shipowner, it could be inferred that the only reason to require it is to delay the proceedings.

A suggested way to deal with this is to provide that for the purpose of Article 12(10), the words:

> *The defendant shall in any event have the right to require the registered owner to be joined in the proceedings*

could be replaced with:

> *The defendant shall in any event have the right to join the registered owner in the proceedings*.

In this way, the insurer will have the procedural ability to avail itself of the Article 10 defences, and remove any burden from the plaintiff if join a foreign shipowner.

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?

Yes it is important for AMSA to maintain control with respect to the salvor appointed and the conditions of the salvage operations. This is to ensure that the appropriate environmental assessments are undertaken for the purposes of the salvage operations in accordance with relevant laws, including pursuant to the *Environment Protection and Biodiversity Conservation Act* 1999 (Cth) (**EPBC Act**).

Notably, section 28 of the EPBC Act provides that the Commonwealth or a Commonwealth agency must not take inside or outside the Australian jurisdiction an action that has, will have or is likely to have a significant impact on the environment inside or outside the Australian jurisdiction.

AMSA has exemption from the EPBC Act for certain operations, however such an exemption may not apply to salvage operations performed under the WRC. As a result, it is necessary for AMSA to maintain control to ensure that the EPBC Act is complied with, if required.