



Australian Government

**Department of Infrastructure, Transport,
Regional Development and Communications**

Discussion paper: Australia's accession to the *Nairobi International Convention on the Removal of Wrecks 2007*

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Introduction

If a foreign vessel were to wreck within Australia's exclusive economic zone (EEZ), the Australian Government must use a combination of domestic laws, informed by International Conventions, to pursue wreck removal actions and recover costs from liable parties. This would also be the case for any object lost at sea from a ship where the object becomes sunken, stranded or adrift. The complexity of this regime has been illustrated by the *YM Efficiency* incident in June 2018, where 81 shipping containers were lost overboard from a ship southeast of Newcastle. A full case study is at **Appendix 1**. The ship's owner, Taiwanese shipping company Yang Ming, has since refused to pay the significant clean-up and salvaging costs. Consistent with the above regime, which implements the polluter pays principle, in February 2020 the Australian Maritime Safety Authority (AMSA) commenced legal proceedings in the Federal Court against Yang Ming. These proceedings seek to recover costs associated with the clean-up and container removal operation, which is expected to amount to approximately AUD \$22 million. Other wreck examples in Australia include the *MV Tycoon* sinking in 2012 and the container losses attributed to the *APL England* and *Navios Unite* in 2020.

A potential improvement to the current process of wreck removal and associated cost recovery is provided by the *Nairobi International Convention on the Removal of Wrecks 2007*, also known as the Wreck Removal Convention (WRC), of which Australia is currently not a party. The WRC provides a legal basis for an Affected State to remove a wreck where it poses a hazard. Such removal powers extend to hazards created by an object lost at sea from a ship (e.g. lost containers).¹ The WRC holds ship owners financially liable, and requires them to take out insurance or provide other financial security to cover the costs of wreck removal. It also provides Affected States with a right of direct action against insurers.

These provisions can be extended to apply within a State's territorial sea, providing an alternative framework to any domestic legislation that operates currently. Australia's domestic wreck removal framework comprises the *Navigation Act 2012* (the Navigation Act) at the Commonwealth level, as well as state and Northern Territory legislation. The WRC has the scope to not only include foreign vessels and regulated Australian vessels (RAVs) as under the Navigation Act, but also domestic commercial vessels (DCVs) and recreational vessels.

A full copy of the WRC is at **Appendix 2**.

The Department of Infrastructure, Transport, Regional Development and Communications is undertaking an analysis of the potential application of the WRC in the Australian context and the benefits accession could offer Australia. To inform this consideration, the Department is seeking stakeholder views on the issues raised in this paper. Questions are included throughout to guide this input. Any other feedback relevant to the Australian Government's consideration of potential accession to the WRC is also welcomed.

¹ *Nairobi International Convention on the Removal of Wrecks*, opened for signature 19 November 2007 (entered into force 14 April 2015) art 1(4) ('*Wreck Removal Convention*').

Current Australian framework

Chapter 7 of the Navigation Act establishes the Commonwealth regulatory regime for notifying and dealing with any wreck of, or from, RAVs and foreign vessels within the applicable jurisdictional scope. Under the Navigation Act, the term 'wreck' does not cover goods or cargo that have fallen overboard from a ship that is not itself wrecked, derelict, stranded, sunk, abandoned, foundered or in distress.²

The Navigation Act gives AMSA the powers to engage with wrecks. These include powers to require the legal owner of a wreck to remove or mark the wreck³ or to alternatively give security to AMSA's satisfaction for such removal or marking.⁴ AMSA can also mark or remove the wreck itself, in any manner it sees fit, if:

- such actions are considered necessary to save human life, secure safe navigation of vessels, or protect the marine environment; or
- when there is no legal owner of the wreck or if a legal owner does not comply with a written notice to undertake these actions within a specified timeframe.⁵

AMSA can additionally destroy or sink the wreck, or part of the wreck, if deemed necessary.⁶ The Navigation Act also enables AMSA to recover any expenses incurred in locating, marking, removing, destroying or sinking the wreck from the legal owner.⁷

The geographic scope of AMSA's powers differs for RAVs and foreign vessels. For a RAV, AMSA can require the legal owner to mark or remove a wreck of, or from, the ship wherever the wreck is situated. AMSA may undertake removal action themselves for wrecks situated in Australia's EEZ or territorial sea.⁸ In contrast, for foreign vessels, the Navigation Act only applies to wrecks located in Australia's territorial sea.⁹

The Navigation Act does not include any provisions that require the legal owner of either a RAV or foreign vessel to have insurance for removing a wreck in either Australia's EEZ or territorial sea. Even if a ship's legal owner has wreck-related insurance, AMSA currently has no powers under the Navigation Act to directly approach the ship's insurer to recover costs.

In addition to this regime in the Navigation Act, the states and Northern Territory have their own wreck removal legislation. These pieces of legislation differ from each other with respect to jurisdiction, scope of application, insurance requirements and the authority that holds the respective wreck removal powers. The relevant pieces of legislation are:

- New South Wales – *Marine Safety Act 1998*
- Northern Territory – *Marine Act 1981* and the *Ports Management Act 2015*
- Queensland – *Transport Operations (Marine Safety) Act 1994*
- South Australia – *Harbours and Navigation Act 1993*

² *Navigation Act 2012* (Cth) s 14 ('Navigation Act').

³ *Ibid* ss 229(1)(a)(i), (b)(i).

⁴ *Ibid* ss 229(1)(a)(ii), (b)(ii).

⁵ *Ibid* s 229(1)(c).

⁶ *Ibid* s 229(1)(d).

⁷ *Ibid* s 229(1)(e).

⁸ *Ibid* ss 229(2)(a), (3)(a).

⁹ *Ibid* ss 229(2)(b), (3)(b).

- Tasmania – *Marine and Safety Authority Act 1997*
- Victoria – *Marine Safety Act 2010*
- Western Australia – *Western Australian Marine Act 1982* and the *Navigable Waters Regulations 1958*

DCVs are regulated separately under the *Marine Safety (Domestic Commercial Vessel) National Law Act 2012* (the National Law). The National Law establishes a singular regulatory framework for the certification, construction, equipment, design and operation of DCVs within Australia's EEZ. DCVs involved in wreck incidents are captured within the above state and Northern Territory wreck removal legislation, as are recreational vessels.

Nairobi International Convention on the Removal of Wrecks

The WRC is an International Maritime Organization (IMO) treaty adopted on 18 May 2007 in Nairobi, Kenya, which entered into force on 15 April 2015. The purpose of the WRC is to establish uniform international rules and procedures to ensure the prompt and effective removal of wrecks, as well as cost recovery for such activities, in the EEZ of a State Party, with an option to extend its application within their territorial sea. The WRC also covers any prevention, mitigation or elimination of hazards created by any object lost at sea from a ship (e.g. shipping containers).

The WRC establishes wreck removal responsibilities for both the Affected State and the registered owner of the ship. Where a wreck from a ship that is flagged to a State party poses a hazard, the Affected State is obliged to ensure all reasonable steps are taken to locate¹⁰ and mark¹¹ the wreck. The Affected State must also facilitate its removal,¹² with removal defined as "any form of prevention, mitigation or elimination of the hazard created by a wreck".¹³ Liability for wreck removal sits with the ship owner. The WRC requires owners of ships 300 gross tonnage (GT) and above to maintain insurance or other financial security to cover wreck removal costs up to the limits of liability as set out under the *Convention on Limitation of Liability for Maritime Claims 1976* (LLMC Convention).¹⁴ The Affected State then has the power to bring any claims for costs relating to the wreck directly against the owner's insurer.¹⁵

Options for accession and application

The Department considers there are a number of ways to improve the management of wreck identification and removal in Australia.

- Continuing with the framework established under the Navigation Act, with minor amendments inspired by the WRC. AMSA would continue to pursue wreck removal and cost recovery under the

¹⁰ *Wreck Removal Convention* (n 1) art 7.

¹¹ *Ibid* art 8.

¹² *Ibid* art 9.

¹³ *Ibid* art 1(7).

¹⁴ *Ibid* art 12(1).

¹⁵ *Ibid* art 12(10).

Navigation Act, while the relevant authorities would respond to wrecks under the state and Northern Territory laws. Possible amendments include implementing a mandatory wreck insurance requirement.

- Ratifying the WRC and implementing its framework in the EEZ, potentially leaving the Navigation Act framework in place for wrecks in the territorial sea. This option would establish expanded and uniform powers for AMSA in the EEZ, while preserving Australia's sovereign rights over what powers to use in the territorial sea. This would establish a regulatory system with differing rights and obligations, depending on the location and/or jurisdiction involved.
- Ratifying the WRC and implementing its framework in the territorial sea and the EEZ, replacing Chapter 7 of the Navigation Act. This option would ensure Australian law regarding wrecks and cost recovery is aligned with international standards currently in force for the majority of the global shipping fleet.
- Expansion of any of the preceding options to include DCVs and/or recreational vessels. This option would provide for complete uniformity for all domestic and State Party ships.

These would provide an alternative to maintaining the status quo. In examining the above options for accession, the Department is seeking stakeholder input on the application of the WRC framework in Australia.

Exclusive economic zone

A State Party to the WRC is able to pursue removal measures against wrecks that pose a hazard in the Convention Area.¹⁶ The Convention Area is defined as the EEZ of a State Party, established in accordance with International Law.¹⁷ The EEZ comprises the area 200 nautical miles outwards from the baselines of the territorial sea.¹⁸ Australia's EEZ is one of the largest in the world with a total marine area of around 10 million square kilometres, which includes 2 million square kilometres off the Australian Antarctic Territory.¹⁹

Under the WRC, wreck removal powers can only be enforced against ships registered to a State that is also a party to the Convention. This is based on the international law rule in the *Vienna Convention on the Law of Treaties* that states 'a treaty does not create either obligations or rights for a third State without its consent'.²⁰ In this circumstance, the granting of consent is provided through accession to the WRC.²¹

Currently the wreck removal provisions in the Navigation Act only apply within the EEZ to RAVs; enforcement against foreign vessels is limited to those wrecks that are situated in Australia's territorial sea.²² Accession to the WRC would expand the ships captured under Australian legislation within the

¹⁶ Ibid art 2(1).

¹⁷ Ibid art 1(1).

¹⁸ *United Nations Convention on the Law of the Sea*, opened for signature 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994) art 57 ('*Law of the Sea*').

¹⁹ Geoscience Australia, 'Oceans and Seas' (Web Page) <<http://www.ga.gov.au/scientific-topics/national-location-information/dimensions/oceans-and-seas>>.

²⁰ *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) art 34.

²¹ *Wreck Removal Convention* (n 1) art 9(10).

²² *Navigation Act* (n 2) ss 229(2)(b), (3)(b).

EEZ to include the majority of the global shipping fleet. As of July 2020, the WRC has 53 contracting States representing 75.90 per cent of global shipping tonnage.

This increase in coverage may increase AMSA's administrative responsibilities, particularly in regards to:

- Locating and marking wrecks
- Notifying mariners about the associated hazards
- Wreck assessment, removal and cost recovery actions

For those foreign vessels not captured by the WRC, Australia would respond to wrecks causing marine pollution (including oil and noxious substances) under the:

- *Protection of the Sea (Powers of Intervention) Act 1981* (POTS POI Act); and
- *Australian Maritime Safety Authority Act 1990* (AMSA Act)

Cost recovery for both these primary powers would be pursued under the *Protection of the Sea (Civil Liability) Act 1981*.

Questions:

1. What benefits are there to AMSA expanding its powers to remove more wrecks in the EEZ?
2. Do the benefits of AMSA's expanded powers offset any burden they may create?
3. What particular aspects of the current regime governing wreck removal in the EEZ would you like to keep?

Territorial sea

A State Party can choose to extend the application of the WRC to wrecks located within its territorial sea through formal notification to the IMO Secretary-General.²³ Upon this notification, the State's Convention Area is expanded to include the territorial sea of that State Party.²⁴ The territorial sea is defined to mean the area 12 nautical miles outwards from the territorial sea baseline.²⁵ Some provisions of the WRC are excluded from application within the territorial sea, for example:

- the need for the Affected State to inform the state of a ship's registry and the registered ship owner that it has determined the wreck to be a hazard;
- the limitation on the extent of an Affected State's intervention if the ship owner removes the wreck; and
- the requirement that State Parties attempt to resolve disputes in the first instance through negotiation or mediation.²⁶

If Australia was to accede to the WRC and apply it to the territorial sea, it would still only apply to wrecks of State Parties due to the international law rule noted above. An expansion of this legislative framework to all ships would rely on Australia's sovereign power within the territorial sea, which is recognised under International Law.²⁷

²³ *Wreck Removal Convention* (n 1) art 3(2).

²⁴ *Wreck Removal Convention* (n 1) art 3(3).

²⁵ *Law of the Sea* (n 18) art 3.

²⁶ *Wreck Removal Convention* (n 1) art 4(4).

²⁷ *Law of the Sea* (n 18) art 2(3).

Australia does not have to apply the WRC framework in the territorial sea but it would provide the shipping industry and the Australian public with a higher level of consistency if the same framework was to apply:

- across the EEZ and the territorial sea; and
- nationally in every state and the Northern Territory.

Any ships that did not fall within the WRC framework would continue to be governed by existing domestic legislation, which in Australia comprises the Navigation Act and the state and Northern Territory wreck legislation.

Questions:

4. Should the WRC apply in Australia's territorial sea? Please note any benefits or disadvantages.
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?
6. What particular aspects of the current regime governing wreck removal in the territorial sea would you like to keep?
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)

Domestic commercial and recreational vessels

Under the WRC, a ship is defined as "a seagoing vessel of any type whatsoever and includes hydrofoil boats, air-cushion vehicles, submersibles, floating craft and floating platforms, except when such platforms are on location engaged in the exploration, exploitation or production of seabed mineral resources".²⁸ Foreign vessels, RAVs, DCVs and recreational vessels would all be captured under this definition, making their owners potentially subject to the wreck removal requirements contained in the WRC. Notably however, the compulsory insurance requirement would only apply to owners of ships that are 300 GT and above.

Currently, the wreck provisions contained in the Navigation Act only apply to foreign vessels and RAVs. Coverage of DCV and recreational vessel wrecks is governed by the individual state and Northern Territory legislation outlined earlier in the paper. At present, certain disparities between these regimes operate regarding the application area, scope of coverage and intervention requirements. Consequently, wreck removal and cost recovery options may be available within some jurisdictions, and not in others, depending on the circumstances of the wreck and/or the type of vessel involved. Accession to the WRC could therefore provide the basis for a single, uniform wreck framework.

Such a wreck framework may, however, place an increased burden on Australian ship owners (especially owners of DCVs and recreational vessels 300 GT and above) since they would be required to maintain wreck insurance. Owners of such vessels are likely not involved with the International Group Protection and Indemnity Insurance (P&I) Clubs.²⁹ As such, insurance would be provided either

²⁸ *Wreck Removal Convention* (n 1) art 1(2).

²⁹ The International Group of P & I Clubs comprises 13 clubs that provide marine liability cover (protection and indemnity) for approximately 90 per cent of global ocean-going tonnage. The clubs cover a wide range of liabilities, including wreck removal. Individual clubs are generally 'mutuals', owned and operated by their respective ship owners.

by smaller industry specific insurers, or not at all. Mandatory insurance for DCVs and recreational vessels 300 GT and above would therefore require AMSA to perform checks on the suitability of these products, since it is unlikely they would be underwritten by P&I Clubs. This framework could potentially apply in the states and Northern Territory, replacing the existing wreck removal regime.

Questions:

8. Should DCVs and recreational vessels be covered by the WRC provisions? What impact would this inclusion have on your industry/sector?
9. If DCVs and recreational vessels are covered by the WRC provisions, should it be for the EEZ, territorial sea, or both?
10. What benefits do the state and Northern Territory wreck removal provisions offer?

Changes to the framework

In examining the options for accession to the WRC, the Department is seeking stakeholder input on the following key issues relating to wreck removal.

Definition of 'wreck'

Currently the definition of the term 'wreck' under the Navigation Act does not cover goods or cargo that have fallen overboard from a ship, which is not also wrecked, derelict, stranded, sunk, abandoned, foundered or in distress. These terms are not themselves defined in the Navigation Act (e.g. 'in distress').

Section 14 Navigation Act

'Wreck' includes:

- a) a vessel that is wrecked, derelict, stranded, sunk or abandoned or that has foundered; and
- b) any thing that belonged to or came from a vessel mentioned in paragraph (a); and
- c) any thing that belonged to or came from a vessel in distress; and
- d) jetsam, flotsam and lagan.

In comparison, the WRC definition of a 'wreck' would cover scenarios where a ship's cargo is lost at sea, with the condition that the wreck must have followed a 'maritime casualty'. No similar event precedent applies under the Navigation Act definition of 'wreck'.

Article 1(4) WRC

'Wreck', following upon a maritime casualty, means:

- a) a sunken or stranded ship; or
- b) any part of a sunken or stranded ship, including any object that is or has been on board such a ship; or
- c) any object that is lost at sea from a ship and that is stranded, sunken or adrift at sea; or
- d) a ship that is about, or may reasonably be expected, to sink or to strand, where effective measures to assist the ship or any property in danger are not already being taken.

A maritime casualty is defined as "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”.³⁰ This prerequisite for establishing a wreck under the WRC framework may be disadvantageous compared to the requirements under the Navigation Act.

In the case of the *YM Efficiency*, the containers which fell overboard could be considered a wreck under the WRC, despite the ship itself not having been wrecked, since it occurred after heavy rolling and the subsequent structural damage that occurred to the ship’s lashing systems. This would meet the definition of a ‘maritime casualty’. In contrast, under the Navigation Act, for cargo or any other thing that belongs to a ship to be considered a wreck, it must originate from a ship that is wrecked, derelict, stranded, sunk, abandoned, foundered or in distress. This distinction highlights the WRC’s advantage where the Affected State is able to pursue the ship owner against a broader scope of “wreck”.

Questions:

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

Identification of a hazard

While the WRC provides for a wider definition of a ‘wreck’, its marking and removal can only be pursued after the Affected State has determined it poses a ‘hazard’. This means that wreck removal under the WRC operates upon a ‘dual-trigger to action’, where both a maritime casualty and hazard must be established before an Affected State can commence any activity related to a ‘wreck’. A ‘hazard’ is broadly defined, and allows for consideration of a State’s ‘related interests’.

Article 1(5) WRC

“Hazard” means any condition or threat that:

- a) poses a danger or impediment to navigation; or
- b) may reasonably be expected to result in major harmful consequences to the marine environment, or damage to the coastline or related interests of one or more States.

“Related Interests” means the interests of a coastal State directly affected or threatened by a wreck, such as:

- a) maritime coastal, port and estuarine activities, including fishing activities, constituting an essential means of livelihood of the persons concerned;
- b) tourist attractions and other economic interests of the area concerned;
- c) the health of the coastal population and the wellbeing of the area concerned, including conservation of marine living resources and of wildlife; and
- d) offshore and underwater infrastructure.

When determining whether a wreck poses a hazard, the Affected State must take into account a 15 part criteria,³¹ which captures the type of wreck involved, its location and relationship to nearby traffic, and other geographical factors that may necessitate its removal. Wreck removal under the Navigation

³⁰ *Wreck Removal Convention* (n 1) art 1(3).

³¹ *Wreck Removal Convention* (n 1) art 6.

Act is also restricted, with the exercise of AMSA's powers contingent upon a finding of necessity for the purposes of saving human life, securing safe navigation or protecting the marine environment. AMSA can also pursue removal where the legal owner is absent, or where they do not comply with a notice to remove the wreck or provide sufficient security.³²

The ability to consider 'related interests' under the WRC when determining whether a wreck poses a hazard provides a wider scope for State intervention. Accession would therefore equip AMSA with the ability to consider wider interests and potentially expand the types of wrecks they would have powers to remove.

Conversely, the WRC requires any wreck removal measures be proportionate to the hazard – that is to not go beyond what is reasonably necessary to remove a wreck, cease as soon as the wreck has been removed, and not unnecessarily interfere with the rights of the other States and persons concerned.³³ The determination of what constitutes 'reasonably necessary' measures could potentially lead to disputes between an Affected State and the ship owner, the insurer and other impacted parties. Since no such requirement operates under the Navigation Act, the WRC potentially encroaches upon Australia's sovereign rights within its territorial sea to deal with wrecks how it sees fit.

Questions:

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

Wreck reporting requirements

Affected ship

Under the WRC a State Party is obliged to require the master and operator of any ship flying its flag to report without delay to the Affected State when they are involved in a maritime casualty resulting in a wreck.³⁴ If Australia were to accede, an Australian flagged ship would be required to report to any Affected State when it has suffered a maritime casualty resulting in a wreck. Foreign vessels, where the flag state is a party to the WRC, would similarly be required to report to Australia in the event of a wreck occurring within Australia. The content of the report is prescribed under the WRC.

Article 5(2) WRC

Such reports shall provide the name and the principal place of business of the registered owner and all the relevant information necessary for the Affected State to determine whether the wreck poses a hazard in accordance with article 6, including:

- a) the precise location of the wreck;
 - b) the type, size and construction of the wreck;
 - c) the nature of the damage to, and the condition of, the wreck;
 - d) the nature and quantity of the cargo, in particular any hazardous and noxious substances;
- and

³² *Navigation Act* (n 2) s 229(1)(c).

³³ *Wreck Removal Convention* (n 1) arts 2(2)-2(3).

³⁴ *Wreck Removal Convention* (n 1) art 5(1).

- e) the amount and types of oil, including bunker oil and lubricating oil, on board.

The Navigation Act imposes a similar notification obligation upon the master or owner of a ship that has wrecked, with minor differences to the content of the report (e.g. the nature of the wreck). For the master or owner of a foreign vessel, these reporting obligations only apply if the ship is located in Australia's territorial sea.³⁵ If Australia were to accede to the WRC that same master or owner would have a reporting obligation in the EEZ, so long as the ship was flagged to a State Party. The reporting timeframe under the Navigation Act equates to the 'without delay' requirement that exists under the Wreck Convention.

Affected State

The Navigation Act requires AMSA to, as soon as reasonably practicable after becoming aware of a wreck, publish a notice on its website or in a nautical publication setting out the details relating to the wreck.³⁶ The WRC similarly requires Affected States to issue notices of the nature and location of wrecks as a matter of urgency in order to warn mariners and any other States concerned.³⁷

Question:

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

Liability for wreck removal

Persons liable

Under the WRC, the 'registered owner of a ship' is liable for the costs of locating, marking and removing the associated wreck.³⁸ The 'registered owner' is defined as the "person or persons registered as the owner of the ship or, in the absence of registration, the person or persons owning the ship at the time of the maritime casualty". Where the ship is owned by a State and operated by a company registered as the operator of the ship in that State, the 'registered owner' is taken to be that company.³⁹

The wreck removal obligations under the Navigation Act are directed towards the legal owner of the wreck. The reference to legal owners becomes problematic in cases where there could potentially be more than one legal owner, such as when cargo constitutes the wreck. In these situations, there could be different legal owners for each container or its contents. For cost recovery purposes, it may not be possible nor practical to issue notices to every legal owner, creating cost recovery difficulties for AMSA.

The WRC also establishes strict liability for the registered owner of a ship, holding them liable for wreck removal costs regardless of fault or circumstance (subject to some exceptions). Since channeling strict liability to the registered owner of the ship creates a clearly traceable path to the responsible entity, claims are straightforward and should be resolved quickly. The advantage for AMSA is that there is a single, identifiable, responsible entity who will be liable for wreck removal costs

³⁵ *Navigation Act* (n 2) s 232.

³⁶ *Navigation Act* (n 2) s 234.

³⁷ *Wreck Removal Convention* (n 1) art 7(1).

³⁸ *Wreck Removal Convention* (n 1) art 10(1).

³⁹ *Wreck Removal Convention* (n 1) art 1(8).

in all but very limited circumstances. As liability is strict, there is less room for legal challenge. This increases the likelihood that the registered owner and their insurer will meet claims without recourse to formal debt recovery proceedings.

The WRC further provides an alternative avenue for recourse through direct access to the insurers of ships 300 GT and above, up to the wreck removal limits in the LLMC Convention. This is important because ship owners can be difficult to pursue when based overseas or when their only asset, the ship, is lost. Insurers, especially members of the P&I Group, are more likely to be accessible and able to pay.

Questions:

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

Compulsory insurance

Under the Navigation Act, AMSA can recover from the legal owner of the wreck any expenses incurred in connection with locating, marking, removing, destroying or sinking the wreck.⁴⁰ However, since AMSA's powers against foreign vessels are restricted to those situated in Australia's territorial sea,⁴¹ their cost recovery powers do not extend to foreign vessels in Australia's EEZ. This does not preclude AMSA from recovering costs associated with combatting pollution in the marine environment under existing domestic legislation. The Navigation Act also places no requirement for ships to have insurance for removing wrecks in Australia.

The WRC offers the advantage of mandating wreck-related insurance or other financial security for ships 300 GT and above and flying the flag of a State Party.⁴² The Affected State is also empowered to directly engage with insurers to recover costs.⁴³ The insurance must be sufficient to cover liability up to the limits of liability under the LLMC Convention.

Questions:

19. Would a requirement to hold wreck-related insurance help the government recover costs incurred during wreck removal?
20. Do ship owners or operators currently hold wreck-related insurance?
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?
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)?

Liability limitation

Australia is a party to the LLMC Convention, which is implemented in Australia through the *Limitation of Liability for Maritime Claims Act 1989*. In acceding to the LLMC Convention, Australia exercised its right to note a reservation, which removes any liability limits for:

⁴⁰ *Navigation Act* (n 2) s 229(1)(e).

⁴¹ *Navigation Act* (n 2) ss 229(2)(b), (3)(b).

⁴² *Wreck Removal Convention* (n 1) art 12(1).

⁴³ *Wreck Removal Convention* (n 1) art 12(10).

- claims in respect of the raising, removal, destruction or the rendering harmless of a ship, which is sunk, wrecked, stranded or abandoned, including anything that is or has been on board such ship; the precise location of the wreck; and
- claims in respect of the removal, destruction or the rendering harmless of the cargo of the ship.

The Navigation Act reflects this and imposes no limits on the liabilities of the liability of the relevant parties.

Given Australia's reservation under the LLMC Convention, ship owners would still face unlimited liability under the WRC, but those with ships 300 GT and above would be required to hold insurance up to the wreck-related LLMC limits.⁴⁴ Accession to the WRC would offer the advantage of guaranteeing a degree of cost recovery through the insurance provider, up to the applicable LLMC limit, or pursuing full cost recovery against the ship owner.

Questions:

23. Where does the insurance industry sit in the wreck removal process? Does this change given the scale of the wreck?
24. Will the insurance industry be able to provide wreck-related insurance to all ships, including DCVs and recreational vessels?
25. Will the insurance industry be able to provide coverage for costs beyond the LLMC limit?

Time limit for cost recovery

Under the WRC, an Affected State's right to recover costs is limited to those actions taken within three years of a wreck being determined to pose a hazard, and a maximum of six years from the date of the maritime casualty.⁴⁵

No such time limit for cost recovery applies under the Navigation Act, notwithstanding that if court proceedings are required, then the limitation period applicable to the relevant court will apply. While the fixed time limit operating under the WRC can provide certainty to both the ship owner and AMSA, it is nevertheless a potential limiting factor on AMSA's cost-recovery measures.

Question:

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

Defences and exceptions

Under the Navigation Act, the legal owner of a wreck is responsible for any costs associated with locating, marking, removing, destroying or sinking the wreck, even if the legal owner is not responsible for the wreck-causing incident. The WRC also establishes strict liability for the ship owner with regards to wreck removal costs; however, a defence is available if they can prove that the maritime casualty was preceded by the events or actions outlined in Article 10.

Article 10(1) WRC

⁴⁴ *Wreck Removal Convention* (n 1) art 12(10).

⁴⁵ *Wreck Removal Convention* (n 1) art 13.

Subject to Article 11, the registered owner shall be liable for the costs of locating, marking and removing the wreck under articles 7, 8 and 9, respectively, unless the registered owner proves that the maritime casualty that caused the wreck:

- a) resulted from an act of war, hostilities, civil war, insurrection, or a natural phenomenon of an exceptional, inevitable and irresistible character;
- b) was wholly caused by an act or omission done with intent to cause damage by a third party; or
- c) was wholly caused by the negligence or other wrongful act of any Government or other authority responsible for the maintenance of lights or other navigational aids in the exercise of that function.

The WRC also outlines specific exceptions to liability in Article 11.

Article 11(1) WRC

The registered owner shall not be liable under this Convention for the costs mentioned in Article 10, paragraph 1 if, and to the extent that, liability for such costs would be in conflict with:

- a) the *International Convention on Civil Liability for Oil Pollution Damage, 1969*, as amended;
- b) the *International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996*, as amended;
- c) the *Convention on Third Party Liability in the Field of Nuclear Energy, 1960*, as amended, or the *Vienna Convention on Civil Liability for Nuclear Damage, 1963*, as amended; or national law governing or prohibiting limitation of liability for nuclear damage; or
- d) the *International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001*, as amended;

provided that the relevant convention is applicable and in force.

The Navigation Act offers no equivalent exceptions to a legal owner's wreck liability.

Questions:

27. In what other circumstances should a ship owner not be liable for the costs associated with a wreck removal?
28. Are the defences available in Article 10 so broad as to obstruct or prevent AMSA's cost recovery actions?

Salvage

Under the WRC, an Affected State has limited ability to influence the salvage operation if it is being undertaken by the ship owner in the EEZ. The ship owner has the freedom to choose the salvor. The Affected State is able to set conditions on the wreck removal to the extent necessary to ensure it proceeds in a manner consistent with considerations of safety and protection of the marine environment. These must be set out prior to the commencement of the removal.⁴⁶ For example, if Australia were to accede to the WRC, it would be prevented from requiring an appropriately qualified Australian company be contracted as the salvor for operations in the EEZ.

⁴⁶ *Wreck Removal Convention* (n 1) art 9(4).

If the salvage operation is being undertaken by the ship owner in the territorial sea, the WRC does provide the Affected State with a greater ability to influence the process. The Affected State may legislate to influence the choice of salvor and intervene unconditionally during the salvage operation. However, any conditions on the operation must be in place before it commences.⁴⁷

These limitations appear to be a disadvantage when compared with the Navigation Act, which does not limit AMSA's ability to influence the choice and operations of the salvor wherever that wreck is located.⁴⁸ Currently, AMSA obtains salvage services via normal government procurement processes to ensure government and taxpayers get value for money. This process enables AMSA to exert significant control over the request and delivery of the required services.

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?

Next steps

The Department invites interested stakeholders to respond to any or all of the questions in this Discussion Paper through wreckconvention@infrastructure.gov.au by Friday 4 September 2020. To assist you, a full list of questions is included at **Appendix 3**. The Department intends to publish the responses it receives; please let us know if you would prefer to remain anonymous.

Your responses will feed into the development of a Regulation Impact Statement (RIS), which will thoroughly examine several options on how Australia could accede to the WRC. The RIS will involve a cost/benefit analysis on the impact of each option as well as further consultation with affected stakeholders. If the Department believes that, based on the RIS, accession to the WRC is beneficial, a National Interest Analysis (NIA) will be completed on the impact of the proposed treaty on the national interest.

The RIS, NIA and the treaty text will then be tabled in the Parliament for scrutiny by the Joint Standing Committee on Treaties (JSCOT). JSCOT will examine the treaty and table a report providing a recommendation on accession to Parliament. If Parliament approves accession, further work will occur on implementing any legislative changes and acceding to the treaty.

⁴⁷ *Wreck Removal Convention* (n 1) art 4(4).

⁴⁸ *Navigation Act* (n 2) s 241(1)(a); *International Convention on Salvage*, opened for signature 28 April 1989, 1953 UNTS 165 (entered into force 14 July 1996) art 9.

Appendix 1: Case study – *YM Efficiency*

Background

Figure 1: YM Efficiency



On 1 June 2018, the *YM Efficiency* containership carrying 2,249 cargo containers on its way to Port Botany from Taiwan encountered rough weather, resulting in the loss of 81 containers overboard. The containers were lost approximately 30 kilometres off the coast of Newcastle in Australia's EEZ. Damage to a further 62 containers on-board, as well as structural damage to the ship, was also sustained. However, the ship itself did not wreck and was able to berth at Port Botany on 6 June 2018. The *YM Efficiency* is owned by a subsidiary of the Taiwanese shipping company, Yang Ming Marine Transport Corporation, and is registered in Liberia. It is insured by Britannia P&I, a member of the International Group of Professional Indemnity and Insurance Clubs.

Figure 2: Damaged containers on YM Efficiency



On receiving notification of the incident, AMSA immediately commenced drift modelling of the lost containers and disseminated maritime safety information to alert shipping to the hazards posed by the lost and drifting containers. Under Australia's National Plan for Maritime Environmental Emergencies, NSW Roads and Maritime Services (RMS) led the on-shore clean-up in collaboration with the ship's insurance correspondent, AusShip P&I, and contractor, Varley Group. Over 1000 tonnes of debris was cleared from around 400 kilometres of NSW coastline, including plastics, wooden furniture, tyres and paper products. Five containers were able to be recovered close to shore. Underwater surveys conducted by AMSA located another 60 containers, with 16 containers remaining unaccounted for.

Figure 3: Contents of lost containers from the YM Efficiency washed ashore

Salvage operation

On 12 December 2019, AMSA entered into a contract with Ardent Oceania to recover and dispose of the 60 underwater containers. The salvage operation began on 3 April 2020 and located a further three lost containers, leaving only 13 containers unaccounted for. The operation was successfully completed on 8 May 2020, with 63 containers and 700 tonnes of debris recovered.

The expected cost to recover and dispose of the 63 containers is approximately \$17 million. If a decision is taken to locate and clean up the remaining 13 containers, it is estimated to cost up to \$5 million – bringing Yang Ming's total debt to approximately \$22 million.

Actions to recover cost

AMSA has attempted to engage with the Taiwanese owner of the *YM Efficiency* about its responsibility to remove the containers from the seafloor and to reimburse AMSA for the clean-up and recovery costs incurred. However, Yang Ming and its insurer, Britannia P&I, have taken the position that the containers do not constitute pollution and should be left undisturbed on the ocean floor. AMSA's view is that leaving the containers in-situ underwater poses a safety risk to local fishers, as well as an unacceptable environmental risk for the local community and future generations. Yang Ming and its insurer have a separate agreement with the NSW Government to pay for the clean-up of washed-up debris on beaches and the shoreline following the incident.

If Australia had been a party to the WRC, the owner of the *YM Efficiency*, operating under the flag of Liberia, which is a State Party to the WRC, would have been liable for the costs of locating, marking and removing the lost containers in Australia's EEZ. Cost recovery would have been facilitated by their insurance arrangements required under the WRC, with AMSA also being able to directly engage with Britannia P&I to seek reimbursements for the recovery operations up to the LLMC liability limit. The continued refusal of Yang Ming and its insurer to discuss payment for the clean-up operations has left AMSA with no other option but to pursue legal action to recover the outstanding debt. The case is currently before the Federal Court of Australia. Further information on the *YM Efficiency* incident is available in the Australian Transport Safety Bureau's (ATSB) investigation report⁴⁹ and AMSA's website⁵⁰.

⁴⁹ Australian Transport Safety Bureau, 'Loss of containers overboard from YM Efficiency' (Web Page, 13 February 2020) <https://www.atsb.gov.au/publications/investigation_reports/2018/mair/344-mo-2018-008/>.

⁵⁰ Australian Maritime Safety Authority, 'Incident History – YM Efficiency' (Web Page, 27 May 2020) <<https://www.amsa.gov.au/news-community/campaigns/incident-history-ym-efficiency>>; Australian Maritime Safety Authority, 'Operational Updates – YM Efficiency' (Web Page, 19 May 2020) <<https://www.amsa.gov.au/news-community/campaigns/operational-updates-ym-efficiency>>.

Appendix 2: Nairobi International Convention on the Removal of Wrecks

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 the paper and repeated below.

1. What benefits are there to AMSA expanding its powers to remove more wrecks in the EEZ?
2. Do the benefits of AMSA's expanded powers offset any burden they may create?
3. What particular aspects of the current regime governing wreck removal in the EEZ would you like to keep?
4. Should the WRC apply in Australia's territorial sea? Please note any benefits or disadvantages.
5. What need for consistency do you see regarding the wreck removal frameworks that apply:
 - a. in the EEZ and territorial sea?
 - b. across the states and Northern Territory?
6. What particular aspects of the current regime governing wreck removal in the territorial sea would you like to keep?
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)
8. Should DCVs and recreational vessels be covered by the WRC provisions? What impact would this inclusion have on your industry/sector?
9. If DCVs and recreational vessels are covered by the WRC provisions, should it be for the EEZ, territorial sea, or both?
10. What benefits do the state and Northern Territory wreck removal provisions offer?
11. What implications are there for you and your organisation if the broader definition of a 'wreck', which includes cargo, is adopted?
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?
13. Is the definition of a 'hazard' in the WRC too broad?
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?
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?
16. Are there any concerns about the WRC reporting requirements for both the Affected Ship and the Affected State?
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?
18. Should persons other than the ship owner (e.g. charterers) be held liable for wrecks that occur in relation to that ship?

19. Would a requirement to hold wreck-related insurance help the government recover costs incurred during wreck removal?
20. Do ship owners or operators currently hold wreck-related insurance?
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?
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)?
23. Where does the insurance industry sit in the wreck removal process? Does this change given the scale of the wreck?
24. Will the insurance industry be able to provide wreck-related insurance to all ships, including DCVs and recreational vessels?
25. Will the insurance industry be able to provide coverage for costs beyond the LLMC limit?
26. Is the WRC time limit for commencing cost recovery actions too restrictive? If so, why?
27. In what other circumstances should a ship owner not be liable for the costs associated with a wreck removal?
28. Are the defences available in Article 10 so broad as to obstruct or prevent AMSA's cost recovery actions?
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?