

**Consultation by The Government of Australia on The Nairobi International
Convention on The
Removal of Wrecks, 2007 (Wreck Removal Convention)**

This response to the Government's consultation on the ratification of the Nairobi International Convention on the Removal of Wrecks ("WRC") is co-authored by the International Group of Protection and Indemnity Associations ("the Clubs") and the International Chamber of Shipping ("ICS").

The Government's consultation and explanatory notes has set out the relevant aspects of the WRC so in the interests of brevity, we have limited our comments to the issues that we consider to be most relevant to the consultation.

About the co-responders

The thirteen Clubs which comprise the International Group between them provide marine liability insurance (protection and indemnity) cover for in excess of 90% of the world's ocean-going tonnage, including 95% of tankers. Each Club is an independent, not-for-profit mutual insurance association, providing insurance cover arrangements for its shipowner and charterer members against third party liabilities arising out of the use and operation of ships.

The International Chamber of Shipping (ICS) is the principal global trade association for the shipping industry, representing shipowners and operators in all sectors and trades and is concerned with all technical, legal, employment affairs and policy issues that may affect international shipping. Its membership comprises national shipowners' associations in Asia, Europe, Africa and the Americas whose member shipping companies operate over 80% of the world's merchant tonnage.

Ratification of International Conventions

The Clubs and the ICS fully support the ratification of international conventions developed and agreed by the International Maritime Organisation (IMO). It is crucial for the efficiency of world trade that the same legislation and regulations governing matters such as navigational safety, environmental protection, and liability and compensation apply to all ships engaged in international trade and that in so far as possible the same legislation applies in all jurisdictions to which a ship may trade.

Upon entry into force in 2015, the WRC established an internationally recognised framework of strict liability for shipowners for the costs of locating, marking and removing hazards to navigation and threats to the marine environment pursuant to a maritime

casualty. Shipowners are required to maintain insurance for such liability in accordance with the convention, and insurers are obliged to respond to claims for eligible and legitimate costs that are brought directly against them.

Scope of Application

The WRC applies only within the exclusive economic zone of a State Party. In other words, from the commencement of the zone that starts where the territorial limits end to the extent of the exclusive economic zone or other area so designated up to 200 nautical miles from the baseline.

Crucially, States can elect to extend the application of certain provisions of the Convention to wrecks deemed to be a hazard located within their territory, including the area from the baseline to the limit of the territorial sea.

The WRC will be an important addition to the suite of other liability and compensation conventions that the Government of Australia has already ratified, namely the 1992 Civil Liability Convention, the 1992 Fund Convention, the 2003 Supplementary Fund Convention and the 2001 Bunker oil convention.¹ While these important oil pollution conventions apply from the baseline to the outer limit of the EEZ they do not provide a legal framework for other risks for damage that could arise from shipping, including loss of containers, environmental damage or risks to navigation from non-oil cargoes, which may enter the marine environment, and the ship itself.

Many incidents that could trigger the WRC occur in territorial waters and coastal areas and include groundings in shallow or inshore waters resulting in restrictions to the approaches to anchorages, ports and harbours. Regrettably, maritime accidents often result in costly and time-consuming operations whether that is to remove a wrecked ship or recover cargo that has entered the water.

An assessment of risk and vulnerability to any coastline is likely to conclude that coastal areas are more vulnerable and in the opinion of the co-responders it would make sense for the WRC to be applied in Australia's territorial waters and this is easily achieved by notifying the Secretary-General of IMO at the time of ratification that Australia wishes to make use of the opt-in provision at Article 3 paragraph 2 of the Convention and extend the application of the Convention to wrecks located within its territory.

To summarise, opting in would align Australian law with the international standards in force for most of the world fleet and would have the following benefits to the Government (Federal or State):

- By extending the geographic scope of application of the internationally agreed provisions on wreck removal as contained in the Convention from the baseline to the extent of the EEZ, and therefore apply the strict liability provisions to such geographical area; and

¹ In addition, we would urge Australia to ratify the 2010 HNS Convention to complete the suite of liability and compensation conventions developed and agreed by IMO to ensure that those who suffer damage have access to the comprehensive international liability and compensation regime.

- the compulsory insurance and direct action against insurers provisions would apply in respect of measures taken under Articles 7, 8 and 9 of the Convention (locating, marking and removal of wrecks) in a State's EEZ, territory and in territorial sea.

Responses to specific questions set out in the consultation

Using the same question numbers that are laid out in the consultation paper we have provided a narrative under each question of relevance to us, which you may find helpful.

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

- A. At present, we assess that the current legal framework in Australia does not give government bodies sufficient powers to deal with wrecks, including objects lost at sea, to intervene in relation to non-Australian ships. A significant proportion of the costs associated with locating, marking and removing wrecks (as defined in Article 1.4 of the WRC) deemed to be a hazard will continue to be met by the Government purse.

The compulsory insurance regime in Article 12 forms a central part of the Convention. It follows the structure applied in other IMO Liability Conventions² and first adopted in the Civil Liability Convention 1969.

A vessel flying the flag of a State Party³ or entering or leaving a port in its territory or arriving at or leaving from an offshore facility in its territorial sea⁴ will be required to meet the compulsory insurance requirements of the Convention. A Certificate attesting that insurance is in place must be carried on board. The Certificate will be issued by the flag state or, if the flag state is not party to the Convention, by a State Party once it is satisfied that there is insurance or other financial security in place which meets the requirements of the Convention. Evidence of insurance is normally produced in the form of a certificate ("blue card") issued by an insurer accepting the liabilities set out in the Convention. An insurer who issues a blue card is in effect agreeing to act as guarantor.

The main consequences of issuing a blue card are as follows:

- The insurer cannot rely on policy defences, with the exception of wilful misconduct⁵.
- The insurer may remain liable for a period of up to three months following the termination of cesser of an entry during the policy year⁶.

The requirement for ships to hold WRC insurance when visiting Australia's ports, terminals and harbours should facilitate the recovery of costs if they are incurred by a proper authority whose actions are taken in accordance with the Convention to mitigate a risk or threat posed by a wreck deemed to be a hazard. This

² The Civil Liability Conventions 1969 & 1992, Bunkers Convention 2001 and Hazardous and Noxious Substances Convention 2010. The Athens Convention 2002 on passenger liabilities is different in some respects.

³ Art 12.1 & 12.11

⁴ Art 12.12

⁵ Art 12.10.

⁶ Art 12.6

principle on which the WRC insurance provisions work is already understood by the Australian Government by virtue of the arrangements that are in place under the 1992 CLC and 2001 Bunker oil convention.

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

- A. This depends on the rules on cover. The standard terms of cover for all thirteen clubs in the International Group include risks for wreck-related liabilities. However, a shipowner whose flag State has ratified the WRC is obliged to maintain insurance in accordance with the Convention.

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. We cannot comment on potential implications for DCV and recreational vessel owners. We note, however, that a deep water construction vessel such as platforms on location engaged in the exploration, exploitation or production of sea bed mineral resources is not within scope (WRC Art.1.2). Recreational vessels of 300gt or more are likely to maintain third party liability insurance. In any event, the insurable limit under the WRC is calculated in accordance with the tonnage limits established by the 1996 Limitation Convention, as amended, which already applies in Australia.

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)?

- A. Not all shipowners are required to carry insurance in accordance with the WRC. Vessels under 300gt are excluded from the compulsory insurance requirement. Commercial and SOLAS vessels >300gt are unlikely to trade without third party liability insurance. Either way, no additional cost is made on the P&I premium for blue cards issued under the WRC. We cannot comment on potential cost implications for 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?

- A. Shipowners are liable in accordance with the convention and issuers of the WRC blue card tacitly accept the responsibilities that arise under the convention. P&I insurers will work alongside State authorities, the shipowner, salvors, hull insurers and others in order to facilitate the most effective removal of a hazard or wreck. The scale of the operation is irrelevant. The clubs have significant experience in the handling of wreck cases including major high-profile incidents. In any event, the Government of Australia and the International Group of P&I Clubs have signed a Memorandum of Understanding on the handling of casualties and the ratification of the WRC will complement the MoU.

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

- A. Insurance is available through the Clubs under the IG mutual cover arrangements or under fixed premium providers, and such insurance is widely available for all vessel types.

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

- A. The Government of Australia is currently party to the LLMC. The consultation paper notes that Australia submitted a reservation at the time of ratification, the effect of which removes the owner's right to limit for liabilities arising under LLMC article 3.2 subclauses (d) and (e). Whether the Government ratifies the WRC or not, the reservation to LLMC is already in place so to some extent the question is moot. A shipowner would then rely on standard P&I cover for wreck removal costs, subject to Club Rules, above the WRC Article 12 calculated limit.

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