SEMAPHORE
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Australian Update on the Nairobi Wreck Convention

Australia is the cautionary tale for nations that rely on trade predominately by sea and have not yet acceded to the Nairobi International Convention on the Removal of Wrecks 2007 (Nairobi Wreck Convention).

The purpose of the Nairobi Wreck Convention is to provide a uniform international regime for state parties to remove, or have removed, shipwrecks that may have the potential to affect adversely the safety of lives, goods and property at sea, as well as the marine environment.

Australia's primary mode of transport for the import and export of goods is by sea. This is projected to double by 2030 according to the Bureau of Infrastructure, Transport and Regional Economics[1], and elevates the risk for significant container losses due to the increase in ship movement, particularly through sensitive marine areas along the east coast of Australia, the Great Barrier Reef and the Torres Strait. This increase in ship movement coupled with the effects of climate change that cause severe weather patterns further the risk of ship and cargo wrecks occurring in Australian waters. These incidents have been shown to interrupt trade, threaten the safety of other ships, risk lives at sea, and damage the marine and coastal environment.

In recent history, Australia has been subjected to maritime casualties involving the loss of significant numbers of containers overboard and substantial clean-up efforts. The only avenue available to the Australian Government to recover costs from liable parties when a ship breaks down, loses cargo overboard, or otherwise becomes a wreck in its Exclusive Economic Zone (EEZ) has been through a combination of powers within the Navigation Act 2012 (Cth), the Protection of the Sea (Powers of Intervention) Act 1981 (Cth) and the Protection of the Sea (Civil Liability) Act 1981 (Cth).

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There are clear gaps within this regulatory framework that impact the Australian Government's ability to recover costs, and direct liable parties to remove or have removed wrecks within its EEZ (including cargo and containers overboard).

These gaps were apparent during the aftermath of maritime casualties within the EEZ, namely the YM Efficiency. Whilst en route to Sydney in 2018 the YM Efficiency encountered gale force winds and rough seas off the coast of New South Wales as a result of an east coast low.

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The ship sustained structural damage to its superstructure and lost 81 containers overboard due to heavy rolling. This incident resulted in substantial debris washing ashore, with the clean-up costs and removal of containers costing in excess of A$17 million (about US$11.5 million)[2].

In May 2020 the APL England was similarly hit with adverse weather whilst steaming towards Melbourne. A series of heavy rolls resulted in the loss of 50 containers overboard. The clean-up costs and removal of containers for this incident also cost a sizable amount of money to the Australian Government[3]. Shortly after the APL England incident, in June 2020 the Navios Unite lost three containers overboard in rough seas whilst travelling from Freemantle to Adelaide. Due to the location of the loss of these containers, there has been no indicative recovery costs, however, the Australian Maritime Safety Authority tasked one of its jets to survey the incident, searching an area of 1600 square kilometres[4].

In its current state, Australia's legislative framework does not provide a solution for the Australian Government to easily recover the costs of a wreck removal within its EEZ or territorial sea, and as a result it can be forced to litigate through an action via the Federal Court. If Australia had been a state party to the Nairobi Wreck Convention at the time of the YM Efficiency incident, it would have had a direct right of recovery against the insurer as well as the shipowner, albeit subject to the applicable limitation of liability under the Convention on Limitation of Liability for Maritime Claims.

As of 28 February 2024, the Australian Government has referred the Nairobi Wreck Convention to its Joint Standing Committee on Treaties for consideration and to hold public hearings prior to presenting a report to parliament containing advice on whether to accede to the Convention. Its National Interest Analysis submitted to the Committee proposes that Australia accedes to the Nairobi Wreck Convention without opting in to its application to the territorial sea, dictating that its jurisdiction would only cover the EEZ. The National Interest Analysis notes that whilst there are obvious benefits for the Nairobi Wreck Convention's reach into the territorial sea, this can be considered at a later date by the Australian Government.

This appears to be a short-sighted approach, as the policy priorities of the Department that administers the relevant legislation will shift accordingly on accession, "mission accomplished" as it were. The appetite of the various states and territories in Australia to adopt a consistent approach for the coastal waters and territorial sea of Australia as guided by the Nairobi Wreck Convention will wane and the momentum for accession will be an opportunity lost. The states and territories have demonstrated in the past to be capable of legislative reform and working with the Federal Government to establish its national law regime regarding domestic commercial vessels. Any suggestion that state and territory parties would delay and obstruct the process is unwarranted.

From a commercial perspective, one of the critical benefits for extending the Nairobi Wreck Convention's reach into the territorial sea is that the P&I Clubs are unlikely to refuse to engage with a claim that is not purporting to bind the insurers by way of domestic legislation only, as opposed to an international convention that has been agreed with input from the P&I Clubs at the International Maritime Organization (IMO)[5]. Notably, one of the submissions to the Joint Standing Committee on Treaties by industry body Shipping Australia recommended that Australia make use of the opt-in provision of the Nairobi Wreck Convention to extend its application to wrecks located within Australia's territorial sea to achieve international uniformity[6].

The next six months will be decisive on the approach taken by the Joint Standing Committee on Treaties and whether it adopts and recommends to Parliament the approach proposed in the National Interest Analysis to not op-in to the territory sea application, which arguably undermines the Nairobi Wreck Convention's efficiency and consistency across maritime zones. At the very least, it would be wise for the Australian Government to make a positive commitment for application in the territorial sea

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and consult with states and territories after accession[7], rather than wait for the next maritime casualty in coastal waters.

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1 Bureau of Infrastructure, Transport and Regional Economics, "Containerised and non-containerised trade through Australian ports to 2032-33", report 138, December 2014

2 Australian Transport Safety Bureau investigation report "Loss of containers overboard from YM Efficiency", 13 February 2020

3 Australian Transport Safety Bureau investigation report "Loss of containers overboard from APL England", 16 December 2022

4 Australian Maritime Safety Authority, media release, 26 June 2020

5 Joint Standing Committee on Treaties submission by Professor Nicholas Gaskell and Professor Craig Forrest, 27 February 2024

6 Joint Standing Committee on Treaties submission by Shipping Australia Limited, 27 February 2024

7 Joint Standing Committee on Treaties submission by Professor Nicholas Gaskell and Professor Craig Forrest, 27 February 2024

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