

Assessing the implications of the Nairobi International Convention on Wreck Removal

Michelle Taylor
 Special Counsel
 Norton Rose Fulbright Australia

Overview of the Wreck Removal Convention

- **Entry into force & signatories to the Convention**
- **Background & objectives of the Convention**
 - authority in EEZ – recovery rights for governments – increasing costs for insurers
- **How does the Convention work?**
 - key definitions – scope – triggers for application
 - obligations – flag ship – State party
 - proportionality and reasonableness
 - strict liability regime – defences – limitation of liability – contribution
 - compulsory insurance
- **Interaction with other IMO conventions**
- **Key questions**
 - what power does a State party have against a foreign flagged ship in EEZ?
 - what extent can a State party recover for wreck removal in territorial waters?
 - what are the implications for Australia?
- **Conclusion**

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Entry into force – 14 April 2015 – currently 28 signatories

* Denotes States that will apply the Convention within their territories, including their territorial seas

*Albania	Malaysia
*Antigua and Barbuda	*Malta
*Bahamas	*Marshall Islands
*Bulgaria	Morocco
Congo	*Netherlands
Cook Islands	Nigeria
*Cyprus	*Niue
*Denmark	Palau
*France	*Panama
Germany	Saint Kitts and Nevis
India	South Africa
Iran (Islamic Republic of)	Tonga
*Kenya	Tuvalu
*Liberia	*United Kingdom

Background to the Convention



Torrey Canyon disaster – Source: BBC photo

Coastal States footing the bill?

An Tai - 1997 - RM18 million

Lagik - 2000 - £1.25 million

Photo below – Lagik wreck removal in Port of Wabech
 Source: stevesmaritime.com

Uncertain authority in EEZ?

Torrey Canyon - 1967

Mount Louis - 1984



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Increasing costs of wreck removal

- location
- contractual arrangements
- cargo recovery from container ships
- effectiveness of contractors and the ship's special casualty representative (SCR)
- nature of bunker fuel removal
- influence of government or other authorities
- media and public interest groups

“Of all of these factors, government influence, reflecting public concern, appears to be the dominant factor in rising costs”



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Ref: Large Casualty Working Group of the International Group of P&I Clubs

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Objectives of the Wreck Removal Convention



Source: green4sea.com

- **State party rights in the EEZ**
 - protection of the marine environment
 - safe navigation
- **Ability to extend the application to territorial waters**
 - by notifying Secretary-General under Art. 3(2)
- **Right to recover wreck removal costs from registered owners**
 - direct right against P&I insurers
- **Set of rules that promote uniformity and certainty**
 - underpinned by strict liability regime and compulsory insurance

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How does the Convention work?

applies to **wrecks** which pose a **hazard** in the **Convention area = EEZ**

must follow **maritime casualty**:

"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"

wreck includes:

- a sunken or stranded **ship**
- any part of a ship
- any object that is lost at sea from a ship

ship means:

"a seagoing vessel of any type whatsoever and includes hydrofoil boats, air-cushion vehicles, submersibles, floating craft and floating platforms, except where such platforms are on locations engaged in the exploration, exploitation or production of seabed mineral resources"

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How does the Convention work? (Cont.)

Vessels covered

- vessels not exclusively used in rivers, lakes
- barges – vessels not self-propelled i.e. MOUs, FPSOs **unless** platforms used in exploration, exploitation or production of **seabed mineral resources**
- small craft - with provisos:
 - if < 300 GT (approx. 24m LOA) compulsory insurance cover not required
 - if not registered, reporting requirements relating to flag ships will not apply

Vessels not covered

- warships
- vessels owned or operated by a State and used only on Government non-commercial service, unless the State decides otherwise

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Scope of the Convention

Wreck must pose a **hazard** which means any condition or **threat** that:

- (a) poses a **danger** or **impediment to navigation**; or
- (b) reasonably expected to result in major harmful consequences to marine environment or damage to the coastline or **related interests** of State

Related interests means interest of a State **directly affected** or **threatened** by a wreck such as:

- port, estuarine and fishing activities
- tourist attractions and other economic interests
- health of coastal population
- conservation of marine living resources and wildlife
- offshore and underwater infrastructure

Broadened scope - triggers for application of Convention

List of triggers extend application beyond **actual damage** to include **potential damage** as well as indirect or consequential loss such as pure economic loss

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What occurs in the event of a wreck

Flag ship obligations (Art. 5)

- Master or operator of flag ship must notify – not the registered owner

State party obligations (Art. 7 & Art. 8)

- First, State must require registered owner to remove wreck but State can intervene if necessary

“...the Affected State shall use all practicable means...to warn mariners and the States concerned of the nature and location of the wreck as a matter of urgency...that State shall ensure...all reasonable steps are taken to mark the wreck...all practicable steps shall be taken to ensure...markings conform to the internationally accepted system of buoyage...”



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What constitutes a hazard – criteria (Art. 6)

- type, size & construction of wreck
- depth of water, tidal range, currents & particularly sensitive sea areas
- proximity of shipping routes or established traffic lanes, traffic density & frequency, type of traffic
- nature & quantity of wreck's cargo, amount & types of oil onboard & damage likely to result
- vulnerability of port facilities
- prevailing meteorological & hydrographical conditions
- submarine topography of area
- height of wreck above or below surface of water at lowest tide
- acoustic and magnetic profiles of wreck
- proximity of offshore installations, pipelines, cables etc.
- any other circumstances that might necessitate removal of wreck

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Wreck removal by registered owner

Registered owner shall:

- remove wreck determined to be a hazard
- contract with salvor but State can impose conditions

If wreck not removed within reasonable time – and immediate action required – State can **intervene** and remove wreck

State can only intervene and impose conditions **to extent necessary** to ensure:

- **safety and protection of marine environment**

Right of intervention continues after wreck removal has commenced

“...Affected State...may remove the wreck by the most practical and expeditious means available...Art.9(8)”



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Proportionality and reasonableness

- Wreck removal measures must be proportionate to the hazard

Measures shall:

- > not go beyond what is reasonably necessary to remove wreck
- > cease as soon as wreck removed
- > not unnecessarily interfere with rights of other States, including flag State

- What is reasonable?

“...the operations that [are] reasonable from an objective technical point of view and... the relationship between the costs and the benefits derived or expected [are] reasonable...”

- What benefits or outcomes could be relevant?

- > environmental restitution
- > economic loss
- > cultural concerns

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Defences – limitation of liability - contribution

Defences

- war, hostilities, insurrection
- natural phenomenon of an exceptional, inevitable and irresistible character
- third party act or omission done with intent to cause damage

Contribution

- claims against third parties are preserved

“Nothing in this article shall prejudice any right of recourse against third parties...” Art.10(4)

Limitation of liability

- only applies to States that ratified LLMC without reservation for wreck removal
- Australia ratified LLMC with reservation so shipowners have unlimited liability for wreck removal

UK Act

- provides where 2 or more ships are involved and costs cannot reasonably be separated, the registered owner's liability is to be joint and several (s255G)

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Compulsory insurance regime

By example, applies to:

- 300+GT flying flag of State party
- 300+GT wherever registered - entering or leaving a port in territory of a State party, that has so applied the Convention
- 300+GT wherever registered - arriving and leaving an offshore facility in territorial waters of a State party, that has so applied the Convention

“Any claim for costs arising under this Convention may be brought directly against the insurer...” Art.12(10)



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Interaction with other IMO conventions

Registered owner will **not be liable** under the Convention for wreck removal costs – if, and to the extent that, liability for such costs would **conflict** with the following conventions:

- CLC
- HNS - not yet in force
- Nuclear Energy
- Bunker

Example – Australian authorities make a claim for clean-up and wreck removal

- a claim is made against registered owner seeking recovery under Bunker Convention and Wreck Removal Convention
- registered owner claims defence of the LLMC
- Bunker Convention will apply in priority over the Wreck Removal Convention
- it will need to be determined how much of the State's claim falls outside the ambit of the Bunker Convention and therefore outside any limitation fund

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What powers do State parties have in EEZ?

- Can only compel removal of wreck in EEZ if flag State is a party
- No power to compel removal of wreck by registered owner of non-party flag State
- State parties to co-operate when effects of a maritime casualty resulting in a wreck involve more than one State
- Regional co-operation can occur through MOUs
- If cannot resolve by negotiation, arbitration, judicial settlement, dispute is to be resolved under Part XV of UNCLOS



Source: quora.com

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What about territorial sea?

Against extension

- States should not have sovereignty fettered

Positive argument

- Desire for uniformity and certainty of law

Extension to territorial sea:

- is "without prejudice" to the wreck removal rights of the State other than locating, marking and removing the wreck
- removes the requirement to comply with any conflicting operative provisions dealing with:
 - notifying the flag State
 - restrictions on measures to the extent of safety and protection of the marine environment
 - wreck removal deadlines
- does not require compliance with strict liability regime and compulsory insurance for measures taken outside scope of Convention

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What are the implications for Australia?

Reasons against

- power of intervention in EEZ
- wreck removal powers in territorial sea: Navigation Act
 - recover from legal owner – wider than registered owner in Convention
 - recovery of unlimited costs
- temporal limits would apply where currently none exist
- potential to prejudice other statutory rights of recovery
- do all wrecks need to be removed?

Positive arguments

- power to recover wreck removal costs in EEZ for environment protection and safe navigation
- avoid duplicity of regimes in EEZ and territorial waters
- direct right of recovery against P&I insurers
- higher insurance limits under LLMC than local laws (i.e. TOMPA)

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Conclusion

- Potential to be a valuable tool in EEZ
- Query whether can provide uniformity and certainty in territorial sea



Rena grounds on Astrolabe Reef on 5 October 2011

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