Submission to Joint Standing Committee on Treaties
Nairobi Convention 2007

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Introduction

This is a submission in response to the invitation of 14 February 2024 from the Joint Standing Committee on Treaties, in respect of its inquiry into the proposed treaty action for Australia to accede to the Nairobi International Convention on the Removal of Wrecks (Nairobi Convention) 2007.

As academic maritime lawyers we have for many years been involved with wreck law in general and the Nairobi Convention in particular.[1]

We have organised lectures and workshops on the Nairobi Convention and engaged in the public and stakeholder consultation process through our submissions in response to the following three documents issued by the Department of Infrastructure (etc):

- Discussion Paper *Australia's accession to the Nairobi International Convention on the Removal of Wrecks 2007* (August 2020);[2]
- Draft Regulatory Impact Statement: *Australia's accession to the Nairobi International Convention on the Removal of Wrecks 2007* (September 2021);[3] and
- Amended Draft Regulatory Impact Statement: *Australia's accession to the Nairobi International Convention on the Removal of Wrecks 2007* (March 2022).[4]

This Submission to JSCOT draws from our earlier submissions with adjustments in light of the *National Interest Analysis* [2023] ATNIA 8 (and its attachments). Many of the issues were covered in more detail than this submission allows in Nicholas Gaskell and Craig Forrest, *The Law of Wreck* (Informa Law, Maritime and Transport Law Library, 2019).[5] In a number of our submissions, below, we provide some specific cross references to this book rather than addressing (and repeating) the issues in the depth that we were able to cover there.

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[1] Summaries of relevant experience are attached as an Appendix to this submission.
[2] See Gaskell and Forrest, *Submission in Response to Discussion Paper* (September 2020).
[3] See Gaskell and Forrest, *Submission in Response to draft Regulatory Impact Statement* (September 2021).
[4] See Gaskell and Forrest, *Submission in Response to March 2022 draft Regulatory Impact Statement* (April 2022).
[5] See e.g. pp 530-534 dealing with "Accession choices for States" (including a checklist for matters to consider when drafting the implementing legislation).

Accession to the Nairobi Convention with application to the EEZ

1. We support the accession to, and implementation of, the Nairobi Convention as it will provide Australia (as the "affected coastal State")[6] with an extension of existing powers to require action from shipowners in respect of wrecks in the EEZ. The benefits that flow from this extension include:
   a. The power to require the master and operator to notify AMSA of most wreck in the EEZ[7] (cf *Navigation Act* 2012 s. 232). This will support existing obligations to report maritime casualties in the EEZ but enable more specific wreck removal information to be provided to AMSA.[8] As was evident in the incidents involving the *YM Efficiency*, *APL England* and *Navios Unite*, early warning is an essential element of wreck removal.
   b. The power to require the registered owner to mark or remove most wreck[9] in the EEZ (*Navigation Act* 2012 s. 229(2)(a) and (b)), or have such a wreck marked, removed, sunk or destroyed, (*Navigation Act* 2012 s. 229(2)(c) and (d)).
   c. The possibility of imposing criminal offences in respect of foreign flagged ships in the EEZ for failure to obey obligations provided for in Art. 9(2)-9(4) of the Nairobi Convention; e.g. to remove the wreck, provide insurance details, or comply with deadlines or conditions as to the removal of the wreck set down by Australia as the affected State. As such, the *Navigation Act* 2012 s. 230 may be extended to cover contraventions of s. 229(a) and (b) in the EEZ (*Navigation Act* 2012*,* s. 229(2)).

   These increased regulatory powers in the EEZ are clearly advantageous and exemplified in their utility in cases similar to the *YM Efficiency* that may occur in the future.

2. The Nairobi Convention will also provide some additional or improved liability provisions in the EEZ.
   a. The power of AMSA to recover from the legal owner of the wreck any expenses incurred by AMSA in connection with locating, marking, removing, destroying or sinking the wreck provided for in *Navigation Act* 2012 s. 229(1)(d) and (e) can be extended to cover those wrecks of foreign vessels in the EEZ.
   b. In some circumstances (e.g. removal of hazardous cargo) the Nairobi Convention may provide additional (insured) protection before entry into force of the Hazardous and Noxious Substances Convention 2010 in a way that may not have been fully appreciated.
      i. While the Nairobi Convention is surprisingly unclear about cargo removal as distinct from hull removal, our opinion is that liability extends not only to the

[6] See Art. 9(10) Nairobi Convention.
[7] The application of the Nairobi Convention to wrecks of non-State parties, and the degree to which Nairobi Convention powers already exist by way of other international Conventions such as the Intervention Convention and the Law of the Sea Convention, is complex, and addressed in detail in Nicholas Gaskell and Craig Forrest, *The Law of Wreck* (Informa Law, Maritime and Transport Law Library, 2019) 377-87.
[8] See further Gaskell and Forrest, n 7, 417-21 on existing reporting obligation and the extent to which the Nairobi Convention will complement these.
[9] Gaskell and Forrest, n 7, 377-87.

removal of the hull of a ship, but also cargo that has been on the ship and floats clear, but also cargo that remains in a wreck where the latter of itself is not a navigational hazard.[10] Each case will be fact sensitive and a claimant under the Nairobi Convention will have to satisfy the evidential criteria (or hurdles) of the Convention; eg that of "proportionality" and "reasonableness" (in Art 2), and the need to show a "danger or impediment to navigation" or a reasonable expectation of "major harmful consequences to the marine environment, or damage to the coastline or related interests" (in Art 1(5)).[11] It may be that lost containers will often pose a hazard to the navigation of fishing vessels (eg when nets may snag the container and capsize the vessel), and that many (but not all) containers will pose environmental threats. But these consequences may not follow automatically, eg where a single container is lost overboard in waters where fishing is unlikely or where the contents of the container are relatively inert. Ultimately, these will be matters for an Australian court to decide, but our view is that the Nairobi Convention will provide greater prospects of financial recovery than at present. We are also of the view that enacting legislation may helpfully clarify that cargo and containers can fall within the definition of "wreck in Art 1(4) of the Nairobi Convention.

ii. The Nairobi Convention extends to cargo removal even when the hull is not removed, while there may be doubts about how far s. 229 of the *Navigation Act* 2012 covers cargo lost overboard where the ship itself is not wrecked, or whether the cost of cargo removal is effectively covered by intervention powers.

iii. The ability to recover cargo removal costs (potentially without limit for the registered owner) means that hazardous substances other than oil[12] could be removed under the strict liability and compulsory insurance regime of the Nairobi Convention even before the HNS Convention 2010 comes into force. Most obviously, this could extend to the container cargo of a sunken ship (see e.g. the *Napoli* and the *Rena*).

iv. Coal will not be covered by the HNS Convention 2010, but it may be arguable that coal spilled in the EEZ involves "major harmful consequences to the marine environment" within the Nairobi Convention.

v. The wider definition of "related interest" may allow for greater scope of recovery, e.g. where a cargo (such as coal, or iron ore) may not be hazardous to health but may have "major harmful consequences for fishing and tourism, or marine living resources" within Art. 1(5)(b) of the Nairobi Convention.

[10] See further Gaskell and Forrest, n 7, 37-9, 396, 481-90.

[11] We assume that the "maritime casualty" criterion (in Art 1(3)) can be applied to cargo lost overboard in heavy weather as this may be an "occurrence" resulting in the "threat of material damage" to the "cargo".

[12] Oil removal costs might be recoverable under the CLC 1992 if "reasonable". It seems from the *Prestige* litigation that the IOPC Fund 1992 will not necessarily allow for all oil to be removed from a sunken tanker, e.g. if the costs are disproportionate. Although the Nairobi Convention itself has an express proportionality requirement, it is possibly arguable that such oil remedial costs could be covered under the Nairobi Convention in so far as it is necessary to remove the hull of the ship containing the oil. There would then be no conflict with the CLC/Fund 1992 under Art. 11 of the Nairobi Convention.

3. Closely associated with the extension of AMSA powers in the EEZ are the benefits that flow from the Nairobi Convention's insurance regime. The major benefit which the Nairobi Convention offers States is its compulsory insurance package which has a number of components.
   a. The Nairobi Convention will allow AMSA to extend the *Navigation Act* 2012 s. 229(1)(e) to recover directly from the insurer of the vessels, as well as from the shipowner, wreck expenses incurred within the EEZ.
   b. AMSA would not have to request and require the shipowner to give security to the satisfaction of AMSA for the removal of a wreck or for marking a wreck (*Navigation Act* 2012 s. 229(1)(a) and (b) as Nairobi Convention insurance (at least for ships of 300 gt and larger) would automatically be in existence for State Party ships and other ships visiting Australian ports (and the vast majority of ships trading internationally as 79% of global tonnage is flagged to States Parties to the Nairobi Convention[13]).
   c. The Nairobi Convention could not have been agreed without substantial input from the International Group of P&I Clubs. This has two practical implications:
      (i) If the P&I Clubs are prepared to issue Nairobi Convention certificates this will be of considerable practical value to States, such as Australia. Locating a solvent insurer in a jurisdiction where it can be sued and has assets is a major problem for any maritime claimant (especially where the shipowner is a one ship company whose only asset is a ship which is now worthless). So far as is known, P&I Club certificates under the CLC and Bunker Convention have never been repudiated.[14]
      (ii) Where the P&I Club is involved from the start it is likely to cooperate with the State, both in terms of practical arrangements (e.g. arranging for contractors) and (possibly) paying directly for expenses. The ability to start an operation quickly has practical, environmental and political advantages.

4. We note that AMSA would need to set up some very clear administrative procedures for satisfying the specific notification requirements in Arts. 5-9 of the Nairobi Convention, e.g. to flag States and registered owners. These procedures almost certainly already largely exist within AMSA. Similarly, AMSA would also need to create and maintain records to satisfy the Nairobi Convention's evidentiary requirements as to whether action taken (or required) by it is both reasonable and proportionate within Art 2. While these two criteria would be express requirements under the Nairobi Convention (that could be utilised by defendants), it seems unlikely that Australian courts would not already imply them. Overall, though, the existing National Plan and MERCOM arrangements provide a good structure to give effect to key operational requirements of the Nairobi Convention. In the context of the *YM Efficiency*, the distinct advantages of the application of the Nairobi Convention in Australia's EEZ clearly offset any regulatory burdens that might arise for AMSA.

[13] *National Interest Analysis* [2023] ATNIA 8, para 22.
[14] For a comprehensive consideration of insurance and wreck generally see Gaskell and Forrest n 7, 173-209, and on the insurance provisions in the Nairobi Convention see Gaskell and Forrest n 7, 491-514.

Accession to Nairobi Convention without application to the territorial sea

5. We note that the NIA proposes that Australia accede to the Nairobi Convention *without* opting-in to its application to the territorial sea - on the basis that this possibility will be considered at a later date.[15] As the NIA notes, there are a number of benefits to extending the Nairobi Convention to the territorial sea.[16] We reiterate our view as to these benefits.

6. One of the drivers for the adoption of the Nairobi Convention is the need for consistency internationally. Consistency is apparent in the Nairobi Convention itself and especially in the framework for the liability and insurance provisions. Indeed, Australia's experience with the *YM Efficiency*, evinces the need for a single uniform regulatory regime, especially in dealing with the shipowner and the relevant insurer (eg P&I Club) liability. The Nairobi Convention allows for differentiation in the territorial sea (Art 4(4) – see above), and subject to that, envisages a liability and insurance regime that is consistent across the territorial sea, EEZ and indeed, within the other waters over which State exercise sovereignty (such an internal waters).

7. This uniformity brings a range of benefits. The current requirement in s .229(1)(a)(ii) and (b)(ii) of the *Navigation Act* 2012 (Cth) is that the legal owner of a foreign vessel in the territorial sea give security to the satisfaction of AMSA for wreck marking and removal in the territorial sea. The Nairobi Convention produces a similar security result, but without any need for any special demand - as the insurance certificate provides appropriate security up to the relevant limits. In theory the s. 229 provision is without limit, although the *Navigation Act* 2012 does not address the practicality of enforcing a demand for high security against the foreign owner of a one ship company whose only asset has sunk.

8. Article 4(4) of the Nairobi Convention ensures that AMSA retains many powers in the territorial sea that the Nairobi Convention limits in the EEZ. These include 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; and the limitation on the extent of an Affected State's intervention if the ship owner removes the wreck.

9. Articles 9(7) and (8) of the Nairobi Convention are also excluded from their application to territorial waters so that AMSA:[17]
   (i) is not bound by the limitation to remove a wreck only in circumstances where the registered owner does not remove the wreck within the deadline set in accordance with paragraph 6(a), or the registered owner cannot be

[15] *National Interest Analysis* [2023] ATNIA 8, para 9.
[16] *National Interest Analysis* [2023] ATNIA 8, para 19.
[17] These are, however, subject to the requirement of proportionality set out in Art. 2(2) and (3) Nairobi Convention. See further Gaskell and Forrest, n 7, 435-6.

contacted, and actions AMSA take are not limited by the requirement that such removal be by the most practical and expeditious means available, consistent with considerations of safety and protection of the marine environment.

(ii) is not bound, in circumstances where immediate action is required and the Affected State has informed the State of the ship's registry and the registered owner accordingly, to remove the wreck by the most practical and expeditious means available, consistent with considerations of safety and protection of the marine environment.

10. Article 9(4) of the Nairobi Convention is one provision that is not expressly excluded by Art. 4(a)(ii) where the Nairobi Convention is extended to territorial waters. Article 9(4) allows a shipowner to contract with any salvor or other person to remove the wreck, and only allows the State to lay down pre-conditions for such removal "to the extent necessary to ensure that the removal proceeds in a manner that is consistent with considerations of safety and protection of the marine environment". However, in its application to the territorial sea, it is amended so that its application to the territorial sea is "subject to the national law of the Affected State". This does not therefore appear to limit AMSA's existing powers in the territorial sea.

11. We support the proposal in the NIA that the *Navigation Act* 2012 be amended to apply Nairobi Convention requirements to foreign flagged vessels and RAVs in the territorial sea. Indeed, we noted the possibility of a staged introduction of the Nairobi Convention in our earlier submission.[18] This will address a number of the advantages of its application to the territorial sea noted above. However, we reiterate our point that the primary benefit for Australia in applying the Nairobi Convention to the territorial sea is the resulting ability to bring an action directly against the vessel's insurer.[19]

12. While AMSA may be entitled under the *Navigation Act* 2012 s. 229(1)(e) to recover from the shipowner the expenses incurred in removing the wreck in the territorial sea, the practical difficulty arises in respect of a foreign shipowner with no assets in Australia, as was the case of the *MV Tycoon*. Under the present law there will generally be a statutory liability on the owner of any vessel to remove a wreck, and most insurance policies will cover wreck removal (but subject to policy limits and exceptions). In this regard we note that under the present law there may be uncertainty in Australian law about the extent to which third party claims (eg by a State for wreck removal costs) can be asserted directly against an insurer (particularly a foreign insurer) in the event of the shipowner's insolvency.[20] The Nairobi Convention, if extended to the territorial sea, would enable AMSA to bring an action directly against the vessel's insurer. However, without an

[18] Gaskell and Forrest, *Submission in Response to Discussion Paper* (September 2020) 6.
[19] The extension of the Nairobi Convention to the territorial sea is addressed in Gaskell and Forrest, n 7, 410-14, 435-6, 531.
[20] Cf. the discussion in the NSW Law Reform Commission's Report 143, *Third Party Claims on Insurance Money: Review of s 6 of the Law Reform (Miscellaneous Provisions) Act 1946*.

extension to the territorial sea on acceding to the Nairobi Convention, it is doubtful as to how far any amendments to the *Navigation Act* 2012 can deal with the fundamental insurance problem which is the ability to sue a foreign insurer directly (eg in a foreign forum). We noted two points about this[21] which we reiterate.

13. First, Australia could seek to rely on Commonwealth or State legislation to bring a direct claim against a foreign liability insurer for wreck removal costs, eg where the shipowner is insolvent (as will often be the case). The existing general law on such direct actions has been recently examined in NSW,[22] although it seems that the Australian solutions (eg under the *Corporations Act* 2001 s. 601AG or the *Insurance Contracts Act* 1984 s 51) are more designed for domestic lawsuits against insurers who are amenable to Australian jurisdiction. The practical problems of suing foreign insurers in shipping incidents will be well-known to Australian maritime lawyers, and this is not the place for a detailed examination of the problem and solutions, but there are doubts about the effectiveness of existing legislation in the present context of suing a foreign insurer of an insolvent shipowner after a shipwreck. Australia could seek to draft new legislation with direct action provisions against a wreck liability insurer,[23] but its international effectiveness may be debateable. This is so both with respect to an action against an insurer in a foreign jurisdiction as well as the enforcement of an Australian judgment in a foreign jurisdiction.

14. Secondly, the P&I Clubs are, in practice, vital both in providing financial security, but also in providing expertise in wreck removal. The Clubs have generally refused to respond to national direct-action statutes (eg in individual States within the USA), as opposed to those agreed in an international convention. This may mean that they refuse to issue insurance cover (and certificates) for voyages to countries that provide direct action.[24] They may refuse to respond to national coastal court decisions purporting to bind the Clubs to national direct-action statutes, resisting enforcement outside that coastal state. The resistance may be prolonged, eg relying on the 'pay to be paid' provision in the insurance policy (enforceable eg in the UK), or foreign arbitration provisions in the policy. There are many debates about how far such resistance is effective, especially within the EU with its rules on reciprocal enforcement of judgments, but the point is that this is a commercial reality.

15. We note, and appreciate, that the NIA concludes that 'Australia's interests are best served by avoiding the significant delay state and territory government negotiations

[21] Gaskell and Forrest, *Submission in Response to March 2022 draft Regulatory Impact Statement* (April 2022) paras 12-14.
[22] See the discussion in the NSW Law Reform Commission's Report 143 (2016), *Third Party Claims on Insurance Money: Review of s 6 of the Law Reform (Miscellaneous Provisions) Act 1946*, referred to in Gaskell and Forrest, *Submission in Response to draft Regulatory Impact Statement* (September 2021) fn 22.
[23] See the 2022 Draft Regulatory Impact Statement Option 2, 16-17.
[24] Complicated arrangements have been made in relation to issuing non-Club certificates for the tanker trade to the US, but that is a market that is far more important than Australia's.

would cause for implementation of the Nairobi Convention if the optional clause were also adopted'[25] (i.e. its application to the territorial sea), especially in light of the fact that there are now 67 States Parties, accounting for more than 79% of global tonnage, such that an estimated 89.9% of foreign vessels in Australia's territorial sea will be subject to the Nairobi Convention.[26] But our concern would be that a staged approach would seem to undermine the efficiency of the Nairobi Convention and the need for consistency across the maritime zones, given that most wrecks occur in coastal waters. There is a risk that legislative inertia would delay further action indefinitely. As such, if a staged approach is to be taken, we consider that an extension to the territorial sea should be a positive commitment now albeit subject to further discussions with the States and Territories.

16. We also take the opportunity to reiterate our point[27] that implementing legislation (both for the EEZ and amendments of the *Navigation Act* 2012 in any future application to the territorial sea) should ensure (so far as possible) that Australia's enactment of the Limitation of Liability for Maritime Claims Convention (LLMC) 1996[28] is clarified to protect against limitation forum shopping that aims to avoid Australia's existing LLMC provisions opting for unlimited liability of *shipowners* for wreck removal. The problem could occur if shipowners (and insurers) seek to establish limitation funds in LLMC 1996 States that themselves have not opted for such unlimited liability.[29] Australia is entitled under the LLMC to have such unlimited liability and may need to strengthen its LLMC legislation so that there is no obligation to recognise a foreign fund that seeks to defeat that choice.[30]

Conclusion

17. Like most maritime law treaties that impose liabilities on shipowners, the Nairobi Convention is a compromise that reflects the practical difficulties faced by States in enforcing claims against foreign flagged ships with few assets. It does not guarantee 100% recovery for all losses following a shipwreck. In our opinion, though, the Nairobi Convention provides a reasonable internationally agreed balance between shipowners, their insurers and States. It gives additional rights in the EEZ, backed by compulsory insurance and direct action against the insurer.

18. In addition, the Nairobi Convention provides a blueprint for extending the protections into territorial waters. Our preference would be for that further extension to be legislated as a necessary second stage, once it is possible to reach agreement on the administrative

[25] *National Interest Analysis* [2023] ATNIA 8, para 19.
[26] *National Interest Analysis* [2023] ATNIA 8, paras 22 and 52.
[27] Gaskell and Forrest, *Submission in Response to Discussion Paper* (September 2020) 5-6.
[28] See the *Limitation of Liability for Maritime Claims Act* 1989.
[29] We refer to this as an 'Isle of Man' defence, as occurred in litigation involving the wreck of the *Baltic Ace* in 2012: see further Gaskell and Forrest, n 7, 119-124.
[30] See further Gaskell and Forrest, n 7, 128-131.

and operational boundaries with the Australian States and Territories (in accordance with an updated Offshore Constitutional Settlement). That second stage should not be delayed unduly.

19. In order to provide for the highest level of protection for Australia, and to avoid drafting 'traps', we consider that great care is needed in the actual legislative implementation.[31] In particular:

- Clarification is needed to ensure that cargo and containers can fall within the definition of "wreck" in Art 1(4);[32]
- Clarification is needed about limitation of liability under the Limitation of Liability for Maritime Claims Act 1989;[33]
- The implementing Act should be drafted (like legislation in the UK and the Netherlands) so that its liability provisions apply to "ships" without any express restriction as to the nationality of ship.
- Consideration should be given to clarifying how far Australian State and federal direct-action statutes are applicable to foreign insurers of foreign shipowners with no assets in the jurisdiction.[34]

[31] See the checklist referred to in n 5, above.
[32] See para 2(b)(i), above.
[33] See para 16, above.
[34] See para 14, above. This issue probably goes further than the current contemplated legislation.