Insurance Council of Australia

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Dear Ms Krol

Response to the Regulatory Impact Statement regarding Australia's accession to the *Nairobi International Convention on the Removal of Wrecks*

The Insurance Council of Australia (**Insurance Council**) welcomes the opportunity from the Department of Infrastructure, Transport, Regional Development and Communications (**Department**) to provide stakeholder feedback on the Regulatory Impact Statement (**RIS**) regarding Australia's accession to the *Nairobi International Convention on the Removal of Wrecks* (**WRC**).

The Insurance Council is the representative body of the general insurance industry in Australia and represents approximately 95 percent of private sector general insurers. As a foundational component of the Australian economy the general insurance industry employs approximately 60,000 people, generates gross written premium of $55.9 billion per annum and on average pays out $169.2 million in claims each working day ($42.4 billion per year).

General Comments

The ICA understands the objectives of the RIS are to improve the Australian Government's cost recovery measures following a maritime casualty in respect of the removal of a wreck itself or removing objects that have come from a ship which pose a hazard.

The RIS indicates that the ability to establish a clear and internationally consistent regulatory framework for wreck removal that holds shipowners accountable for wrecks (including any object that has been on board a ship or lost at sea from a ship) is a key driver behind the accession to the WRC. A perceived benefit of the WRC is the ability to recover wreck-related costs directly from an insurer of the shipowner.

The key issue that requires consideration by the ICA is the compulsory insurance regime that would be created pursuant to the WRC and the resulting implications for Australian marine insurers.

The ICA does not oppose Australia acceding to the WRC. The ICA supports Option 3B raised in the RIS, i.e. opting into the application of the WRC in the territorial sea. However, the ICA's support for Option 3B is subject to insurers being entitled to rely upon policy defences (see the ICA's specific comments below). The ICA's comments in relation to Options 1, 2 and 3A are contained in the Appendix to this submission.

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Comments on Option 3B

The ICA's interests are primarily related to Australian flagged vessels, therefore the fact that some foreign vessels may not be caught by the WRC (i.e. they are flagged by a non-signatory State Party[1]) is not relevant to the ICA. It is noted that only vessels flying the flag of a State Party will be required to meet the compulsory insurance requirements of the WRC.

Article 12 rule 2 of the WRC provides that a certificate attesting that insurance is in place will be issued by the flag state (and for Australia, this will be AMSA). Evidence of insurance will be produced in the form of a certificate (i.e. a "blue card") issued by an insurer accepting the liabilities in the WRC. Importantly, by issuing a blue card under the WRC, the insurer may not be able to rely on policy defences, with the exception of wilful misconduct.[2] Under the WRC an insurer may remain liable for up to 3 months following termination of cover, unless the certificate has been surrendered to authorities (i.e. AMSA) or a new certificate has been issued.[3]

It is submitted by the ICA that the ability to seek recovery for costs arising under the WRC directly from an insurer should (in addition to the defences that are already available under the WRC[4]) be subject to terms, conditions and exclusions under the relevant policy of insurance. For example, if an Australian shipowner is in breach of a warranty (such as an express or implied warranty of seaworthiness as set out in Division 7 of the *Marine Insurance Act 1909* (Cth)) then, if proved, the insurer should not be liable for the loss.

The basis upon which P&I Clubs provide insurance depends upon particular "Club rules" on cover. However, there are standard terms of cover for all 13 members of the International Group of P&I Clubs regarding wreck related liabilities. P&I Clubs accept that by issuing a blue card, the insurer is, in effect, agreeing to act as guarantor for the convention risks. P&I Clubs have the benefit of IG mutual cover. Fixed premium providers, such as the ICA members, are in a different position and cannot unreservedly accept all risks associated with a maritime casualty within the WRC.

The ICA submits that policy defences are contemplated by the insurer's right to require that the shipowner be joined in Article 12 rule 10 of the WRC. It makes sense that a good reason why an insurer would want to have the shipowner present in proceedings would be to shift liability and assist its defence (for example, by asserting the conduct of the shipowner caused or contributed to the loss, or that the shipowner is the proper defendant because it has voided its policy of insurance). It is submitted that the practical effect of this article should be clarified in any enabling legislation so that the benefit of any relevant exclusion under an insurance policy can be accessed by Australian marine insurers.

A proposal for consideration is that in the event the insurer is entitled to raise a defence under the policy of insurance, then it is the insurer that must join the shipowner. This is a matter of procedure

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[1] It is noted that page 21 of the RIS records that 78% of the global fleet by tonnage is registered to a State Party that is a signatory to the WRC).
[2] See Article 12 rule 10 of the WRC.
[3] See Article 12 rule 6 of the WRC.
[4] See Article 10 rule 1: act of war, intentional act or omission by a third party, or wrongful act of any Government responsible for navigational aids; and Article 12 rule 10: wilful misconduct of the registered owner.

and it is appropriate that procedural law is within the sovereignty of States (i.e. it is not typically dealt with by international conventions).

In addition, there is the problem of vessels that are abandoned or dumped in coastal waters.[5] Australian marine insurers do not consider that the costs associated with regulators removing such vessels should be underwritten by the marine insurance industry.

It is likely that the definition of "maritime casualty" within the WRC is not broad enough to encompass the abandonment or dumping of a vessel.[6] It is also noted that relevant state and territory legislation currently applies to abandoned / dumped wrecks in coastal waters.[7]

The ICA does not support including additional provisions beyond the scope of the WRC to include abandoned or dumped vessels within the wreck removal regime. It is further submitted by the ICA that any definitional provisions in legislation that implements the WRC should make it clear that the abandonment or dumping of vessels in coastal waters is excluded or outside the scope of Australia's wreck-related laws.

It is noted that Canadian legislation implementing the WRC refers to "*wrecked, **abandoned** or hazardous vessels*" thereby broadening the definitional scope of the WRC. It is also relevant that under Australia's current wreck removal laws, the Navigation Act 2012 (Cth) (**Navigation Act**) defines a "wreck" to include: "*(a) a vessel that is wrecked, derelict, stranded, sunk or **abandoned** or that has foundered…*"[8] (our emphasis).

The ICA is concerned to ensure that abandoned or dumped vessels within coastal waters governed by the states and territories of Australia, remain the problem of the regulators.

It is also relevant to consider Article 10 rule 3 of WRC which states that no claim for costs for may be made against a registered owner otherwise than in accordance with the provisions of the WRC. This means that a regulator will be precluded from taking action for wreck removal under any other law. With this in mind, regulators' powers to deal with abandoned or dumped vessels outside the scope of the WRC, should be expressly preserved.

Applying the WRC to DCVs

The ICA notes that AMSA estimates there are 27,000 DCVs in Australia but only 251 (approximately) would likely meet the 300 GT threshold.[9] The application of the WRC to *all* DCVs would significantly change marine insurance requirements in Australia. The ICA considers that the benefits for fixed premium insurers (i.e. the ability to obtain insurance premiums associated with a compulsory

[5] Page 21 of the RIS notes that MSQ reported that between 1 July 2018 and 24 March 2021, a total of 592 wrecks were removed from Qld coastal waters and of those, 82 were ex-commercial ships.
[6] Page 22 of the RIS notes that an abandoned ship would meet the definition of a "wreck" if the abandonment followed upon a maritime casualty as defined by the WRC. However, this would need to be determined on a case by case basis, depending upon whether the maritime casualty event created material damage to the ship or threat of it (see Article 1 of the WRC).
[7] For example in Qld see: *Transport Operations (Marine Safety) Act 1994*; *Transport Operations (Marine Pollution) Act 1995*; *Transport Infrastructure Act 1994*.
[8] See s 14 of the Navigation Act.
[9] See page 22 of the RIS.

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insurance regime) would be outweighed by the exposures of the costs to remove wrecks and clean up associated environmental hazards.

The ICA anticipates that this exposure is likely to drive up marine hull insurance premiums, creating affordability concerns for DCV owners and operators. The ICA notes that industries and areas that are highly reliant on DCV owners and operators, such as the tourism industry in North Queensland, are likely to see detrimental flow on impacts as insurance-holders are faced with increased costs associated with maintaining cover. Therefore, the ICA does not support the application of the WRC to all DCVs. For completeness, the ICA also does not support the application of the WRC to recreational vessels.

However, the ICA recognises that even if Australia accedes to the WRC and implements a compulsory insurance regime that does not extend to vessels less than 300 GT, there is always a possibility that legislators could expand these laws in the future to include smaller vessels (i.e. all DCVs).

The potential for this expansion of WRC coverage gives further weight to the importance of ICA's submission that any direct right of cost recovery against insurers should be balanced by the insurers' entitlement to rely upon policy defences (as discussed in Option 3B above).

Next Steps

We trust that our observations are of assistance. If you have any questions or comments in relation to our submission please contact Aparna Reddy, the Insurance Council's General Manager, Policy – Regulatory Affairs, on telephone: 02 9253 5176 or email: areddy@insurancecouncil.com.au.

Yours sincerely

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Executive Director and CEO

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Appendix: Response to Options 1, 2 and 3A

Option 1

Option 1 is to retain the status quo, i.e. maintain the existing framework under the Navigation Act. The Navigation Act does not require the legal owner of either a RAV[10] or a foreign vessel to maintain insurance for wreck removal. Even if such insurance is in place, AMSA currently has no power to seek direct recovery from an insurer.

The ICA understands there is considerable momentum behind acceding to the WRC. The ICA notes that the International Group (IG) of P&I Clubs is in favour of Australia's accession to the WRC on the basis that alignment with an internationally recognised framework with agreed limitations on liability (i.e. under the LLMC) will bring the benefit of certainty. The ICA agrees in general terms, that uniformity and certainty are beneficial for the marine insurance market. For this reason, the ICA does not consider there is a basis to oppose all reforms in favour of the status quo.

Further, the number of Australian flagged vessels that exceed 300 GT is limited in number (estimated to be 590).[11] A large proportion of these vessels (being ocean going ships) are insured by members of the IG of P&I Clubs. As a result, Australian marine insurers are unlikely to be significantly impacted by wreck removal law reform proposals that apply to vessels of 300+ GT. However, to the extent that any law reform could extend to smaller vessels (i.e. DCVs), then the Australian marine insurance market could potentially be adversely affected. This is discussed in more detail in the ICA's response to Option 3B.

Option 2

Amendments to the Navigation Act, i.e. incorporating some benefits of the WRC but not acceding to it, would implement the compulsory insurance regime (with a direct right against insurers) as follows:

a) for all RAVs[12] (300+ GT) regardless of location;

b) only for foreign vessels (300+ GT) in the territorial sea.

This would mean that maritime incidents in the EEZ involving foreign vessels would remain governed by Australia's current laws which include the *Protection of the Sea (Powers of Intervention) Act 1981* (Cth), *Protection of the Sea (Prevention of Pollution from Ships) Act 1983* (Cth) and the *Protection of the Sea (Civil Liability) Act 1981* (Cth).

Incorporating an analogous compulsory insurance regime to the WRC as proposed in Option 2 is not supported by the ICA on the grounds it would defeat the purpose of adopting laws that are internationally consistent. Australian marine insurers would take the risk of insuring vessels without the defence of applicable limits within the LLMC (which is a feature of the WRC). As a result, reinsurance may be difficult because Australian law is substantially different or "out of step" in a global market.

Arguably, Australian insurers would also lose the benefit of caselaw in comparable jurisdictions (such as the UK[13]) for clarity and certainty.

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[10] Regulated Australian vessels as defined by s14 of the Navigation Act.
[11] See page 35 of the ACIL Allen Final Report.
[12] See s14 of the Navigation Act.
[13] The UK has implemented the WRC into its national law.

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Option 3A

The ICA submits that a dual regulatory regime for the EEZ and territorial sea should be avoided.

Option 3A would create unnecessary complexity in the event of a maritime incident that impacts both the EEZ and the territorial sea (for example, if containers are lost in the EEZ as well as the territorial sea). It would be difficult to assess the risks associated with the different legal frameworks that would apply to each maritime boundary.