



SEMAPHORE

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It'll Never Happen Here: Why Adopt the Nairobi Convention on the Removal of Wrecks?

When the *Rena* grounded in 2011 it was apparent that New Zealand had 'dropped the ball' in keeping its maritime conventions up-to-date. Increases in the limits of liability applied internationally had not been updated. So New Zealand law applied a limit of about \$11 million to *Rena*, but in the UK or Australia the limit for the same ship was about \$27 million. The new limits have since been applied by legislation, and since 8 June 2015 further increases in the limits now apply (up 51%).

These increases in limits are all very well but they are merely one piece of the jigsaw of international conventions to be considered in the event of a casualty. This was self-evident to the New Zealand government when it spent almost \$50 million in cleaning up bunker oil pollution in the light of this incident, and faced a protracted and expensive process in ensuring the wreck removal. As the *Rena* was a wreck having hit Astrolabe reef, she was worthless, but fortunately her P&I Club stepped in and a fair settlement was reached in relation to the government's costs, and they assumed responsibility for dealing with the wreck. But what if the ship owner's insurer had relied on the old 'pay to be paid' argument, and so simply walked away?

The Nairobi Convention on the Removal of Wrecks is a solution worth considering. It has sufficient international support to enter into force on 14 April 2015, but only applies in New Zealand if enacted under domestic law. This convention is not presently part of the New Zealand government's legislative calendar, but there are a number of sensible reasons why it should be considered, aside from the fact that it is one of MLAANZ's objectives to promote uniformity of maritime law internationally.

- 1 The first is that the convention enables States to take direct action against insurers to ensure the obligations of the ship owner are honoured. The *Rena* was the only asset of its owner. That is a legitimate and widespread commercial practice, but it enables owners to isolate liabilities within a corporate structure. Without legislation a State has no legal recourse directly to the owner's insurance cover. Just because the Swedish Club did the honourable thing in relation to the *Rena*, does not mean insurers of other vessels of 300 GRT plus, plying the New Zealand coastline, will do the same.
- 2 To put this into context, New Zealand has been fortunate not to incur significant irrecoverable costs for wreck removals. The wreck removal costs in relation to *Rena* exceed \$400 million and are ongoing even today. Since *Rena*, we have had the grounding of *Costa Concordia* which has proved to be the most expensive wreck removal in history. Commercial ships and cruise ships spending time in New Zealand waters are getting larger and larger.
- 3 Under the convention ship owners' liability for wreck removal is strict. While affording the State powers to locate and mark wrecks, warn mariners and "facilitate the removal of wrecks", there are some protections also for owners and their insurers as to who is to do the work. But if it is not done within a reasonable time the state can remove the wreck at the owner's expense, but only by "the most practical and expeditious means available".

- 4 The Convention is crafted with a view fairly to balance the rights of the owner and the State. While inevitably there may be differing views as to whether any particular provision is fair, in what is a contentious issue, the work undertaken by the IMO in achieving compromise represented by the convention cannot be ignored.
- 5 Legislation could ensure that these wreck removal obligations are not subject to limitation.
- 6 Adopting the Convention would rationalise domestic law under the Resource Management Act 1991 and the Maritime Transport Act 1994.

In its 2014/15 annual review, the International Group reported on its outreach programme the purpose of which is to improve co-operation and efficiency in dealing with major removal of wreck operations. With that in mind, it has entered into memoranda of understanding with Australia and South Africa. It is said that discussions with New Zealand are at an advanced stage. While that would presumably be of assistance in dealing with another casualty, it is noteworthy that adoption of a legal framework by which the rights and remedies of the respective parties might be effectively addressed, remains on the backburner.

In answer to, why adopt this convention? Because it represents a carefully thought out framework of rights and obligations, and provides the State with direct redress against those who can afford to pay.

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