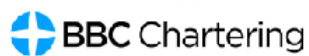


SAL VOTING MEMBERS





Loss of containers at sea – a test case

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AMSA's recovery action in the *YM Efficiency* incident highlights the 'fragmented framework' of Australia's wreck removal legislation and some of its shortcomings.

The recent incidents involving the loss of containers off the New South Wales coast from the *YM Efficiency* (2018) and *APL England* (2020) "have highlighted the importance of having strong and clear laws for wrecks and debris falling from operating ships" and, not for the first time, placed the spotlight on the "current fragmented [legislative] framework in Australian waters".¹ These incidents were also the catalyst for Department of Infrastructure, Transport, Regional Development and Communications (Department) releasing a Discussion Paper in August 2020, "Australia's accession to the *Nairobi International Convention on the Removal of Wrecks 2007*" (WRC) which, among other things, invited responses to a series of questions for the purpose of the Department examining the options for accession to the WRC.

Shipping Australia submitted a non-shipping submission in response to the Discussion Paper which expressed its support for "accession in full to the Convention, without reservation or amendment", noting that Australia's reservation of its position under the *Convention on the Limits of Liability for Maritime Claims* with the effect that shipowners were subject to unlimited liability for all costs associated with the removal of wrecks, was inconsistent with the WRC and "the unlimited liability

reservation must be removed upon accession to the Nairobi Convention".

The Discussion Paper refers to legal proceedings commenced in the Federal Court of Australia by the Australian Maritime Safety Authority (AMSA) in February 2020 against the owners of the *YM Efficiency*, All Oceans Transportation Inc (All Oceans).² A review of AMSA's claim in the proceeding illustrates the 'fragmented framework' and its potentially limited scope to recover clean-up and debris removal costs where incidents occur in Australia's exclusive economic zone (EEZ). Other lacunas in the legislative matrix are also evident.

The background to AMSA's claim against All Oceans is as follows: Shortly after midnight on 1 June 2018 the *YM Efficiency*, a 4,250 TEU container ship, lost 81 containers overboard in heavy seas approximately 16 nautical miles east-south-east of Newcastle, New South Wales. It follows that the incident occurred in Australia's EEZ, which comprises the area 200 nautical miles from the baselines of the territorial sea and has a total marine area of about 10 million square kilometres. The territorial sea is the area 12 nautical miles outwards from the territorial sea baseline. The relevance of this demarcation is that the wreck removal provisions in the *Navigation Act 2012* (Cth) that AMSA is able to enforce against ships that are not registered in Australia are limited to "wrecks" that are located in Australia's territorial sea.³ Some of the containers drifted

into the territorial sea and others were washed-up ashore. However, 60 of the containers lost overboard settled on the seabed within Australia's EEZ.

Another limiting factor that applies in circumstances such as those which occurred with the *YM Efficiency* is that the definition of 'wreck' in the *Navigation Act* does not cover goods or cargo that have fallen overboard from a ship, unless the ship is also "wrecked, derelict, stranded, sunk, abandoned, foundered or in distress".⁴ In other words, the loss of cargo overboard of itself does not constitute a wreck.

This is to be contrasted with the definition of wreck in the WRC, which includes "any object that is lost at sea from a ship and that is stranded, sunken or adrift at sea"⁵ where there has been a 'maritime casualty' which is defined as "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".⁶

However, in order to trigger the WRC's provisions with respect to removal, the wreck must present a 'hazard', that is "poses a danger or impediment to navigation" or "may reasonably be expected to result in major harmful consequences to the marine environment, or damage to the coastline or related interests of one or more States".⁷ This assessment requires taking account of various criteria such as the size of the wreck, depth of water, tidal range and currents, nature and quantity of the cargo, and

¹ Department of Infrastructure, Transport, Regional Development and Communications' update Claims for Wreck Removal / The Wreck Removal Convention

² Federal Court No. NSD121/2020

³ ss 229(2)(b) & (3)(b) *Navigation Act*

⁴ s 14 *Navigation Act*

⁵ Article 1(4) *Nairobi International Convention on the Removal of Wrecks 2007*

⁶ Article 1(3) *Nairobi International Convention on the Removal of Wrecks 2007*

⁷ Article 1(5) *Nairobi International Convention on the Removal of Wrecks 2007*

the damage likely to result should the cargo be released into the marine environment, height of the wreck above or below the surface of the water at lowest astronomical tide, and any other circumstances that might necessitate the removal of the wreck.⁸ It follows that the WRC includes a *check and balance* element to its application although the scope of its application is capable of being very broad.

Returning to the *YM Efficiency*, it has been reported that All Oceans “refused to pay the significant clean-up and salvaging costs”⁹ that were incurred by AMSA. On 8 February 2020, AMSA issued proceedings in the Federal Court and arrested the *YM Eternity* as surrogate ship for the *YM Efficiency* in respect of its claims for the costs associated with the clean-up and container removal operation in relation to the containers that were lost overboard from the ship that at the time “were expected to amount to approximately AU\$22 million”.¹⁰ It is understood that this estimate has since been revised down to AU\$17 million.

Due to the jurisdictional constraints relating to wreck removal that are outlined above, in framing its claim against All Oceans, AMSA relied on its statutory powers to deal with the protection of the marine environment, as well as bringing claims in negligence, nuisance and ‘tort on the high seas’. All of these claims present a degree of novelty on the facts as pleaded and could be described as a test case.

AMSA says that the action it has taken with respect to pollution clean-up measures, including locating, recovering and disposing of the containers, was in accordance with its statutory functions under the *Australian Maritime Safety Authority Act 1990*¹¹ (AMSA Act). Under the *Protection of the Sea (Civil Liability) Act 1981* (Civil Liability Act), AMSA can recover the costs it incurs in performing its functions under the AMSA Act in prevention or mitigating or attempting to prevent or mitigate pollution in the marine environment caused by the *discharge or disposal* from a ship in the EEZ.¹² AMSA says that the costs it incurred in the prevention or mitigation of pollution damage are recoverable from All Oceans as a debt pursuant to the Civil Liability Act.¹³

However, *discharge or disposal* are not defined terms in either the Civil Liability Act or the AMSA Act. Whether the involuntary loss of containers overboard from the *YM Efficiency* constitutes “*discharge or disposal*” for the purposes of the Civil Liability Act is unclear. Not surprisingly, in its defence All Oceans denies there was a *discharge or disposal from a ship* in the terms contemplated by the Civil Liability Act as a result of the containers being “*accidentally lost overboard*”, or there was the required threat of pollution to the marine environment for AMSA to take the action that it did. All Oceans also alleges that AMSA’s clean-up actions would increase the risk of pollution and the containers becoming a navigational hazard. It is also alleged that the requisite Ministerial approval was not obtained by AMSA for the clean-up action taken. Reference is also made in All Oceans’s defence to AMSA not being entitled to perform its functions in a manner that are inconsistent with the *United Nations Convention on the Law of the Sea* (UNCLOS). However, how it said that AMSA’s conduct was inconsistent with UNCLOS is unclear. It is also put that Australia lacks constitutional power for the recovery provision in the Civil Liability Act to apply to the EEZ in the absence of a discharge or disposal in contravention of the federal MARPOL legislation.¹⁴

AMSA also claims that the pollution clean-up measures were taken in the exercise of its powers under the *Protection of the Sea (Powers of Intervention) Act 1981* (Powers of Intervention Act) which relates to the taking of measures to prevent pollution of the sea by oil or noxious substances.¹⁵ In support of this head of claim, AMSA says that the containers and their contents were a noxious substance which escaped from the *YM Efficiency* and, as such, its claim for pollution prevention measures is recoverable from All Oceans as a debt pursuant to the Civil Liability Act.¹⁶

In response, All Oceans pleads that the *YM Efficiency* is not a ship within the meaning of the Powers of Intervention Act on the basis that it has not been in Australian internal waters or within the Australian coastal sea since 5 July 2018, and the clean-up measures taken by AMSA took place after this time. All Oceans also denies that the containers and their

contents contain a noxious substance and that the clean-up measures taken were in proportion to the damage.

AMSA has also advanced arguments that All Oceans breached its duty to AMSA to take reasonable care in the safe loading of the containers, navigation, management and operation of the ship to avoid causing pollution damage and/or causing AMSA to clean up pollution damage, and incur loss and expenses by being negligent in its conduct, including failing to stow and lash the containers on board, and sailing the ship in an unseaworthy condition. In response, All Oceans denies that it was negligent and that it owed a duty to AMSA.

AMSA also asserts that, as the incident created pollution damage, All Oceans committed a nuisance against the *related interests* of Australia as defined in the Powers of Intervention Act (e.g. fisheries, tourist attractions, health of population and conservation of living marine resources)¹⁷ and that All Oceans also committed a “*tort on the High Seas*” by reason of the alleged negligence and nuisance. All Oceans repeats its denial that the incident resulted in any escape of oil or noxious substances so as to engage the Powers of Intervention Act, and denies that AMSA has any rights that have been interfered with, nor has there been any endangerment or interference with the public that could give rise to a private or public nuisance as a matter of law. In answer to the claim for “*tort on the High Seas*”, All Oceans says it discloses no cause of action and should be struck out.

On any analysis, AMSA’s claims in negligence, nuisance and tort on the High Seas could be described as creative and should the Federal Court action proceed to trial it will be interesting to see how the Court deals with these claims. Perhaps of more interest will be how the Court reconciles the complex statutory interpretation issues that arise against the equally complex factual background. One thing we can be assured of is that the judgment will provide a detailed analysis of the statutory framework that AMSA relies on to advance its claim against All Oceans. Whether that analysis favours AMSA or the factual findings would have resulted in a different outcome under a WRC regime remains to be seen. ▲

⁸ Article 1(5) Nairobi International Convention on the Removal of Wrecks 2007

⁹ p 3 Department of Infrastructure, Transport, Regional Development and Communications’ Discussion paper “Australia’s accession to the Nairobi International Convention on the Removal of Wrecks 2007”

¹⁰ Ibid p 3

¹¹ s6(1)(a) of the Australian Maritime Safety Authority Act 1990

¹² s22A(1) of the Protection of the Sea (Civil Liability) Act 1981

¹³ s22A(3) of the Protection of the Sea (Civil Liability) Act 1981

¹⁴ Protection of the Sea (Prevention of Pollution from

Ships) Act 1983

¹⁵ s10 of the Protection of the Sea (Powers of Intervention) Act 1981

¹⁶ s22A(1) of the Protection of the Sea (Civil Liability) Act

¹⁷ s10(8) of the Protection of the Sea (Powers of Intervention) Act 1981