

THE NAIROBI CONVENTION: REFORMING WRECK REMOVAL IN NEW ZEALAND

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1 Introduction

All parties to the maritime venture share an interest in avoiding maritime casualties. Shipwreck is the worst possible result of a maritime casualty and the ‘nightmare scenario for the seafarer’.¹ When a ship is wrecked, the shipowner will not only have lost a high value asset, but may also incur considerable additional costs through removing the resulting wreck. It is unsurprising that, when faced with a valueless shipwreck, the key question which is likely to occur to the shipowner is ‘[c]an I merely abandon this wreck to the Government and walk away without further liability?’² When a ship is wrecked within New Zealand’s territorial waters this is by no means an easy question to answer. The first part of this paper outlines the circumstances in which the New Zealand Government can at present require the owners of wrecked vessels to have them removed.

The shipping industry is designed to operate across state boundaries. For this reason, maritime law is an area of law which lends itself to the establishment of international legal instruments. There is a proliferation of international maritime treaties and conventions, and New Zealand is a party to many of them.³ In 2007, a major attempt at international standardisation of wreck removal law was finalised in the form of the *Nairobi International Convention on the Removal of Wrecks* (hereinafter the ‘*Convention*’).⁴ The second part of this paper constitutes an examination of the aims of the *Convention*’s framers, and how successful the *Convention* is in fulfilling these goals.

The third major part of this paper comprises an argument that the current state of New Zealand’s wreck removal law means that reform is essential. The *Convention* represents the perfect opportunity both to reform New Zealand’s domestic wreck removal law, and to strive for international harmonisation of wreck removal regimes. In addition, the key test in the *Convention* for when a wreck must be removed is a far superior alternative to the de facto test in New Zealand. As a result, having signed the *Convention*, the New Zealand Government should take the measures necessary under article 3(2) to extend the *Convention*’s application beyond New Zealand’s exclusive economic zone and into its territorial waters.

2 Definitions

Before turning to the circumstances in which the New Zealand Government is able to require the removal of wrecks, it is first necessary to consider what a wreck is. New Zealand’s *Admiralty Act* does not define a ‘wreck’, but it does define a ‘ship’ as including ‘any description of vessel used in navigation’.⁵ Likewise, the *Maritime Transport Act* defines a ship as ‘every description of boat or craft used in navigation, whether or not it has any means of propulsion’.⁶ There are various pieces of New Zealand legislation which define ‘wreck’, and some of these are discussed below. In particular, words such as ‘sunk’,⁷ ‘submerged’,⁸ ‘stranded’,⁹ ‘in distress’,¹⁰

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¹ Gotthard Gauci, ‘The International Convention on the Removal of Wrecks 2007 – A Flawed Instrument’ (2009) *Journal of Business Law* 203, 204.

² Carter Quinby and David R Owen, ‘Recent Amendments to the U.S. Wreck Removal Act’ (1989) *Lloyd’s Maritime and Commercial Quarterly* 15, 15.

³ See, eg. *United Nations Convention on the Law of the Sea (UNCLOS)*, opened for signature 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994); *Convention on the International Regulations for Preventing Collisions at Sea (COLREGs)*, opened for signature 20 October 1972 (entered into force 15 July 1977); *International Convention on Maritime Search and Rescue*, 1979, opened for signature 27 April 1979, (entered into force 22 June 1985).

⁴ *Nairobi International Convention on the Removal of Wrecks (Nairobi Convention)*, opened for signature 19 November 2007.

⁵ *Admiralty Act 1973* (NZ), s 2.

⁶ *Maritime Transport Act 1994* (NZ), s 2.

⁷ *Harbours Act 1950* (NZ), s 208(1).

⁸ *Maritime Transport Act 1994* (NZ), s 110(1).

⁹ *Harbours Act 1950* (NZ), s 208(1); *Maritime Transport Act 1994* (NZ), s 110(1); *Local Government 1974* (NZ), s 650K(1)(a).

¹⁰ *Local Government 1974* (NZ), s 650K(1)(a).

‘derelict’,¹¹ and ‘abandoned’,¹² are used to distinguish a wreck from a ship. At a basic level, a wreck is an object which is not capable of being used in navigation, but if it were, would otherwise fulfil the definition of a ship.

2.1 Insured Ships

The types of wrecks which the Government will want to have removed are only those which are not voluntarily removed by their owners. There is an established pattern to how insured ships, at least, arrive at this point. There are two levels of maritime insurance for ships: hull insurance and protection and indemnity (‘P&I’) insurance.¹³ Following a maritime casualty in which a ship has suffered damage, the owner of the damaged ship will approach his first insurer, the hull insurer. The hull insurer holds an insurance policy for the insured value of the ship as it was previously declared by the shipowner.¹⁴ It is in the hull insurer’s interests to restore the ship back into service for a figure less than the ship’s insured value. This may be possible: the cost of recovery, towage, repair and refitting may be less than the insured value of the ship. The result is a salvage operation. When this is the case for a wreck, the wreck will thus be removed voluntarily by the salvage operators on behalf of the shipowner.

On the other hand it may be physically impossible for the ship to be repaired, or it may be technologically impossible for a salvage operation to be completed. Alternatively, the cost of restoring the ship back into service may be higher than the value of the hull insurance policy. In any of these cases, the hull insurer will pay out the insurance policy to the shipowner. The shipowner, however, will retain ownership of the wreck, and the liabilities attaching to it. One of these liabilities is wreck removal liability. Should the Government then wish to remove the wreck, the shipowner will approach his second, P&I, insurer. The P&I insurer provides liability insurance, including wreck removal liability.¹⁵ The shipowner does not wish to remove the wreck, and neither does the P&I insurer, since the cost of doing so will be significant. It is at this point that it is necessary to consider whether the Government has the authority to compel removal of the wreck.

2.2 Uninsured Ships

However, there is another sort of vessel which the Government may wish to have removed. Not all ships are insured. When an insurer is not involved, the likelihood of a ship becoming a wreck due to the inaction or impecuniosity of the shipowner increases. In such cases, the ship may in fact still be capable of navigation, or may be in the process of having its navigational capability restored. This was the case in *Dorn v Maritime Safety Authority*, *Carter v Ports of Auckland* and *Southland Regional Council v Huggins*, which are discussed below. The statutory definitions of ‘wreck’ are sufficiently wide as to cover both the case when the ship is incapable of navigation (a wreck in the fullest sense) and the case when the wreck is capable of navigation, but the owners refuse for other reasons to remove the ship from its current location. The same criteria for determining if the Government can compel wreck removal apply in both situations. This authority is necessary, since the fact that the shipowner, the insurance company, or the salvor is unprepared to move the vessel gives no indication as to whether the vessel should be moved for reasons which do not concern these parties.

3 New Zealand Law

3.1 Harbours Act 1950

The first piece of legislation relevant to wreck removal is the *Harbours Act 1950*. The *Harbours Act* was repealed in 1999.¹⁶ However, the Act is of more than merely historical interest and, for completeness, it is still necessary to examine its operation. ‘Harbour’ was defined in s 2 of the Act as including:¹⁷

any harbour properly so called, whether natural or artificial, and any haven, estuary, navigable lake or river, dock, pier, jetty, and work in or at which ships do or can obtain shelter, or ship or unship goods or passengers, and any harbour defined under this Act.

¹¹ *Maritime Transport Act 1994* (NZ), s 110(1); *Local Government 1974* (NZ), s 650K(1)(b).

¹² *Harbours Act 1950* (NZ), s 208(1); *Local Government 1974* (NZ), s 650K(1)(a).

¹³ See generally Howard Bennett, *Law of Marine Insurance* (2nd ed, Oxford University Press, Oxford, 2006) 3.40-3.56.

¹⁴ *Ibid*, 331-361.

¹⁵ *Ibid*, 484-487.

¹⁶ *Local Government Amendment Act (No 2) 1999* (NZ), s 10.

¹⁷ *Harbours Act 1950* (NZ), s 2.

The final clause of this definition was a reference to s 3(1), under which certain areas were identified as harbours and placed under the jurisdiction of a Harbour Board.¹⁸ The primary purpose of the *Harbours Act* was to ensure safety within harbours.¹⁹ In line with this purpose, s 208 covered the removal of wrecks. It stated that 'if any vessel is sunk, stranded or abandoned in any harbour or tidal water' it 'may be removed' by 'the [Harbour] Board having jurisdiction over the place where the wreck is'.²⁰ Notice needed to be given to the owner that the wreck had to be removed,²¹ and if it was not, the Board could itself remove it,²² recovering its expenses by selling the wreck if necessary.²³

Although *Carter v Ports of Auckland* ('*Carter*')²⁴ was decided in 2004, its events occurred in 1996, before the *Harbours Act* was repealed.²⁵ In *Carter*, Ports of Auckland Ltd exercised its wreck removal powers under s 208. The Carters challenged this decision by judicial review. The issue upon which the application turned was whether the owners had 'abandoned' their vessel, the *Nivanga*, under s 208. Although the vessel was 'leaking like a sieve' and had 'holes in the waterline which had been covered up with silver paper or newspaper and cemented over',²⁶ it was not the physical state of the vessel which determined its status as a wreck under the Act. Instead it was the nature of the relationship between the Carters and the *Nivanga*. Harrison J held that:

Mr Carter and Ms Wright were completely indifferent to the *Nivanga*'s fate; they had given up all expectations of ever recovering her from [the Maritime Safety Authority]'s custody, ... were content to leave [Ports of Auckland Ltd] the responsibility for removal and sale, and had forsaken and thus abandoned the *Nivanga*.²⁷

Harrison J's conclusion on the requirement of abandonment was based in part on the submission of counsel for the defendant, Ports of Auckland. Counsel submitted that the 'powers of removal and sale are granted for the purpose of safety; it is dangerous to have unsafe vessels in harbours and around ports'²⁸ and that, as a result, 'abandoned' must be given its plain, ordinary meaning in its statutory context, concerned as it is with navigational safety'.²⁹

It is notable that the *Harbours Act* required only abandonment and the fulfilment of procedural requirements as precursors to wreck removal. This is to be contrasted with other Acts currently in force in New Zealand and the *Convention*, discussed below, which require the wreck to constitute a hazard to navigation as a prerequisite to removal. However, this requirement was implicit both in the definition and operation of harbours, and the interpretation of abandonment under the Act, as evidenced by the decision in *Carter*. This seems to be the correct approach. Harbours attract a high volume of maritime traffic; indeed this is the whole purpose of a harbour. If a wreck is within the bounds of a harbour it is almost inevitable that it constitutes a hazard to navigation. In contrast, where a wreck is outside harbour limits, this determination is not automatic, and it is this issue which is now considered.

3.2 Local Government Act 1974

When the *Harbours Act* was repealed in 1999, s 650K was inserted into the *Local Government Act 1974*.³⁰ Under that section, the powers previously granted to Harbour Boards under the *Harbours Act*, including the power to require the removal of wrecks, were transferred to regional councils. However, the geographical area covered by s 650K is considerably wider than the *Harbours Act*, and regional councils have the power to remove wrecks not only in harbours, but in the entirety of their jurisdiction. Under the *Local Government Act 2002*, the seaward boundaries of New Zealand's various regional councils extend to the outer limit of New Zealand's territorial sea.³¹ The result of this is that regional councils have jurisdiction over 'the entire coastline of New Zealand out to the 12 nautical mile limit'.³² Section 650K therefore applies in all of New Zealand's territorial waters, including what were harbours under the *Harbours Act*. Under s 650K(2) of the Act, '[i]f a

¹⁸ *Ibid*, s 3(1).

¹⁹ *Aquamarine Ltd v Southland Regional Council* (1996) 2 ELRNZ 361, 365.

²⁰ *Harbours Act 1950* (NZ), s 208(1) and s 208(1)(a).

²¹ *Ibid*, s 208(1)(a).

²² *Ibid*, s 208(1)(b).

²³ *Ibid*, s 208(1)(c).

²⁴ *Carter v Ports of Auckland Ltd* [2004] 3 NZLR 262.

²⁵ *Ibid*, 264.

²⁶ *Ibid*, 267.

²⁷ *Ibid*, 271.

²⁸ *Ibid*, 267.

²⁹ *Ibid*.

³⁰ *Local Government Amendment Act (No 2) 1999* (NZ), s 6.

³¹ *Local Government Act 2002* (NZ), sch 2, s 1(1).

³² Marty Logan, 'Abandoned Ships' (2009) 52 *Professional Skipper* 52.

wreck on or in any land or waters within the region of a regional council is a hazard to navigation, the council may take steps to remove and deal with the wreck'.³³ As was the case under the *Harbours Act*, in the absence of the owner removing the wreck, the regional council may step in and remove the wreck itself and recover the expenses of removal from selling the wreck and against the owner in personam.³⁴

The most important feature of wreck removal under the *Local Government Act* is the requirement that a wreck pose a 'hazard to navigation'.³⁵ Previously under the *Harbours Act*, it appears to have been assumed that all wrecks in harbours did pose navigational hazards. The scope of the powers now granted to regional councils under the *Local Government Act* recognises that there are circumstances in which, although a ship is wrecked in New Zealand's territorial waters, there may be no need from a navigational safety point of view for the Government to require its removal. Although it is no longer the position that a wreck must be removed simply because it is located in a harbour, it is unlikely to be difficult to prove that a wreck in a harbour poses a hazard to navigation.

If the events of *Dorn v Maritime Safety Authority* ('*Dorn*')³⁶ took place today, prima facie the decision could be based on the *Local Government Act*. However, s 650K of the *Local Government Act* was not inserted until 29 April 1999³⁷ and the events in *Dorn* took place in October 1996 to July 1998.³⁸ As a result, *Dorn* was decided under s 110 of the *Maritime Transport Act* 1994,³⁹ which came into force in February 1995.⁴⁰ No wreck removal cases have yet been decided under the *Local Government Act*. The primary reason for this is the existence of s 15A of the *Resource Management Act*, which came into force in August 1998,⁴¹ a matter of months before s 650K of the *Local Government Act*. The *Resource Management Act* is discussed below, but it suffices to say for present purposes that it is unsurprisingly seen by local authorities as a simpler and more effective means of compelling wreck removal than the *Local Government Act*.

3.3 *Maritime Transport Act 1994*

Section 110 of the *Maritime Transport Act 1994* purports to grant wreck removal powers to Maritime New Zealand (formerly the Maritime Safety Authority).⁴² However, it specifically applies where 'no regional council has jurisdiction over the waters or place where the hazard is located'.⁴³ As mentioned above, regional councils have jurisdiction over all of New Zealand's territorial waters, and under the *Maritime Transport Act*, New Zealand waters are limited to the territorial sea, internal waters and rivers and inland waters of New Zealand.⁴⁴ Logan's claim that s 110 of the *Maritime Transport Act* 'will probably have limited application'⁴⁵ is an understatement. The entire marine area within New Zealand territory is covered by the *Local Government Act*.

An issue may arise in respect of the *Maritime Transport Act*'s application outside New Zealand's territorial waters. It is not beyond the realms of possibility that the *Maritime Transport Act* has extraterritorial effect. If a wreck which was, for example, outside New Zealand's territorial waters but within its exclusive economic zone posed a clear hazard to navigation it is possible that New Zealand may retain some residual authority to remove it. But the *Maritime Transport Act* does not specify an intention of the New Zealand Parliament to acquire wreck removal rights to this effect. Nor is it clear how such authority would align with Part V of the *United Nations Convention on the Law of the Sea*, under which exclusive economic zones are established.⁴⁶

Fortunately there is a more straightforward explanation for the peculiarity of s 110 of the *Maritime Transport Act*. That section came into force on 5 February 1995. At this date, the *Harbours Act* was in force, but neither s 650K of the *Local Government Act*, nor s 15A of the *Resource Management Act*, each of which grants powers to regional councils, was in existence. As a result, at that point s 110 applied only where 'there is no Harbour Board or person having jurisdiction under section 208 of the *Harbours Act 1950*'.⁴⁷ In 1999, the *Harbours Act*

³³ *Local Government Act 1974* (NZ), s 650K(2).

³⁴ *Ibid*, s 650K(2)(b).

³⁵ *Ibid*, s 650K(2).

³⁶ *Dorn v Maritime Safety Authority of New Zealand* [1999] 2 NZLR 482.

³⁷ *Local Government Amendment Act (No 2) 1999* (NZ), s 6.

³⁸ *Dorn v Maritime Safety Authority of New Zealand* [1999] 2 NZLR 482, 484.

³⁹ *Ibid*, 483.

⁴⁰ *Maritime Transport Act Commencement Order 1994* (NZ), s 2(a).

⁴¹ *Resource Management Amendment Act 1994* (NZ), s 6.

⁴² *Maritime Transport Act 1994* (NZ), s 110(1).

⁴³ *Ibid*, s 110(1)(b).

⁴⁴ *Ibid*, s 2.

⁴⁵ Logan, above n 32, 52.

⁴⁶ See generally *UNCLOS*, above n 3, Part V.

⁴⁷ *Maritime Transport Act 1994* (NZ), s 110(1).

was repealed⁴⁸ and s 650K of the *Local Government Act* was inserted, granting wreck removal powers to regional councils.⁴⁹ At the same time, s 110 of the *Maritime Transport Act* was amended to its current state, whereby it applies where 'no regional council has jurisdiction over the waters or place where the hazard is located'. It seems that the intention was to keep s 110 of the *Maritime Transport Act* in line with the transfer of powers from Harbour Boards to regional councils. Parliament appears to have been attempting to avoid the creation of overlapping powers: in the first instance between Harbour Boards and the Maritime Safety Authority and in the second instance between regional councils and Maritime New Zealand. However, the fact that regional councils have jurisdiction over the entirety of New Zealand's territorial waters considerably confuses the matter. In attempting to avoid overlap, Parliament seems to have stripped s 110 of the *Maritime Transport Act* of any application whatsoever.

Nonetheless, s 110 remains in force, and there therefore remains a risk that a court may be called upon to apply the section. It applies to hazards, which may be 'any derelict ship, or any floating or submerged or stranded object'.⁵⁰ The section only applies if 'the owner of the hazard has not made arrangements... to secure and remove the hazard'.⁵¹ Crucially, like the *Local Government Act*, s 110(1)(c) requires that the Director of the Maritime New Zealand 'considers the hazard is a hazard to navigation'.⁵² On this proviso, and following notice in writing, the Director may 'take possession of and remove or destroy' and sell the wreck, again recovering expenses either from the sale, or if this is insufficient, from the owner.⁵³

In *Dorn v Maritime Safety Authority*, the vessel *Otago* occupied three different positions in the coastal marine area of the Waikato region at various stages.⁵⁴ Environment Waikato, the regional council, sought the intervention of the then Maritime Safety Authority to remove the vessel.⁵⁵ The Maritime Safety Authority found 'that the vessel was not secure; that its anchor was insufficient for the size of the vessel; and that the vessel could create a hazard in the event of high tides and strong wind conditions'.⁵⁶ In summary 'the vessel was, or was likely to become an obstruction to navigation'.⁵⁷ The Director of the Maritime Safety Authority purported to exercise his powers of wreck removal under s 110 of the *Maritime Transport Act*. When Dorn did not remove the vessel himself, the *Otago* was towed by the Maritime Safety Authority. The plaintiff sought judicial review of the decision 'to remove the wreck on the grounds that it was unlawful and unreasonable'.⁵⁸ He alleged, inter alia, that 'the decision that the *Otago* was a vessel posing a risk to maritime safety was 'without any lawful foundation and invalid'.⁵⁹

Penlington J held that three preliminary conditions must be satisfied before considering obstruction to navigation. First, that the vessel is 'sunk, stranded or abandoned',⁶⁰ second, that the vessel is 'on or near the coasts of New Zealand or any tidal water within the limits of New Zealand or in any river or lake or other inland water',⁶¹ and third (because this case occurred prior to the amendment of the *Maritime Transport Act*) that no Harbour Board has jurisdiction under s 208 of the *Harbours Act*.⁶² Only then can the Director of Maritime Safety consider whether the ship 'is, or is likely to become, an obstruction to navigation'.⁶³ Penlington J held that the first three criteria were satisfied. On the final issue, he held that the Director's 'opinion that the *Otago* was or was likely to become an obstruction to navigation was an opinion which was reasonably open to him at the time he considered the matter'.⁶⁴ As a result, the application for judicial review was dismissed. Dorn appealed to the Court of Appeal,⁶⁵ but the appeal was dismissed, with the Court describing Penlington J's judgment as 'careful and detailed'.⁶⁶

⁴⁸ *Local Government Amendment Act (No 2) 1999* (NZ), s 10.

⁴⁹ *Ibid*, s 6.

⁵⁰ *Maritime Transport Act 1994* (NZ), s 110(1)(b).

⁵¹ *Ibid*, s 110(1)(a).

⁵² *Ibid*, s 110(1)(c).

⁵³ *Ibid*, s 110(3).

⁵⁴ *Dorn v Maritime Safety Authority of New Zealand* [1999] 2 NZLR 482, 484-485.

⁵⁵ *Ibid*, 485.

⁵⁶ *Ibid*, 486.

⁵⁷ *Ibid*, 490.

⁵⁸ *Ibid*, 494.

⁵⁹ *Ibid*.

⁶⁰ *Ibid*, 495.

⁶¹ *Ibid*, (emphasis in original).

⁶² *Ibid*.

⁶³ *Ibid*.

⁶⁴ *Ibid*, 500.

⁶⁵ *Dorn v Maritime Safety Authority of New Zealand* [22 September 1999] Court of Appeal, CA300/98.

⁶⁶ *Ibid*, 1.

The *Maritime Transport Act* has undergone some change since *Dorn*. Most notably, the requirement under s 100A of ‘obstruction to navigation’ has been amended to ‘hazard to navigation’, a change which is reflected in s 110(1)(c).⁶⁷ Any difference between these terms is likely to be minimal; if anything ‘hazard’ is wider than ‘obstruction’, and may cover cases where the ship is not a physical obstruction to the passage of another ship, but makes the process of navigating more difficult because of its position.

3.4 Resource Management Act 1991

3.4.1 Section 314

The final piece of New Zealand legislation which is directly relevant to the removal of wrecks is the *Resource Management Act 1991*. Two sections may be relevant to wreck removal. The first is s 314(1)(a)(i), which states that enforcement orders can be made to ‘[r]equire a person to cease, or prohibit a person from commencing, anything done or to be done by or on behalf of that person, that... [c]ontravenes or is likely to contravene’, inter alia, ‘a rule in a plan’.⁶⁸ Section 64 of the *Resource Management Act* requires every Regional Council to adopt a Regional Coastal Plan.⁶⁹ Section 314 thus grants wide powers to regional authorities to make and enforce rules relating to resource management in their jurisdiction.

There has been one New Zealand case in which s 314(1)(a)(i) was used to compel the removal of a vessel. In *Southland Regional Council v Huggins*,⁷⁰ the plaintiff applied to the Environment Court for an enforcement order against the defendant, whose yacht ‘was damaged in a storm and subsequently grounded at Thule Bay on Stewart Island’.⁷¹ The *Port Oxley* was awaiting repairs, without which the vessel was not seaworthy. Southland Regional Council was made aware of the *Port Oxley*’s position by a member of the public in February 2008, but by 2 December 2008 the yacht had still not been repaired and removed. Rule 10.3.1 of Southland Regional Council’s Regional Coastal Plan states that ‘[e]xcept where a ship has accidentally sunk and its location is unknown, the occupation of the coastal marine area by ships sunken, grounded or abandoned after 15 February 1997 is a discretionary activity’.⁷² ‘Coastal marine area’ is defined in s 2 of the *Resource Management Act* as ‘the foreshore, seabed, and coastal water, and the air space above the water’ and extends to the outer limits of New Zealand’s territorial sea.⁷³ Borthwick J considered whether the orders issued by the Southland Regional Council could legally be enforced. He held that the *Port Oxley* was a ship, that it was grounded and that it was in the coastal marine area.⁷⁴ As a result, an enforcement order was imposed by the Court.⁷⁵

The explanation of rule 10.3.1 of Southland Regional Council’s Regional Coastal Plan recognises the potential ‘adverse environmental effects’ and ‘risk to public and/or navigation safety’ sunken, grounded or abandoned ships in the coastal marine area may pose.⁷⁶ However, the rule does not limit the Regional Council’s ability to remove such vessels to cases where they pose these hazards. Rather, the Regional Council is able to create and enforce wreck removal powers which extend beyond those that Parliament has explicitly enacted under the *Local Government Act* and *Maritime Transport Act*.

3.4.2 Section 15A(2)

The second section of the *Resource Management Act* which has been used to compel wreck removal is s 15A(2). It was inserted by the *Resource Management Amendment Act 1994*,⁷⁷ but did not come into force until 20 August 1998.⁷⁸ This was after the events of both *Carter* and *Dorn* (although before both decisions) explaining why its powers were not exercised in those cases, and a mere eight months before s 650K of the *Local Government Act 1974* replaced s 208 of the *Harbours Act 1950*, explaining why there are no cases decided under that section.

⁶⁷ *Maritime Transport Act 1994* (NZ), s 110(1)(c).

⁶⁸ *Resource Management Act 1991* (NZ), s 314(1)(a)(i).

⁶⁹ *Ibid*, s 64.

⁷⁰ *Southland Regional Council v Huggins* [5 March 2009] Environment Court, Christchurch, C011/09.

⁷¹ *Ibid*, 2.

⁷² Southland Regional Council *Regional Coastal Plan*, (September 2008) Rule 10.3.1 <<http://www.es.govt.nz/documents/planning/coastal-plan/parts/coastal-plan-september-08-10-seabed-and-foreshore.pdf>> at 13 October 2009.

⁷³ *Resource Management Act 1991* (NZ), s 2.

⁷⁴ *Southland Regional Council v Huggins* [5 March 2009] Environment Court, Christchurch, C011/09, 5.

⁷⁵ *Ibid*, 9.

⁷⁶ Southland Regional Council *Regional Coastal Plan*, above n 72, explanation 10.3.1.

⁷⁷ *Resource Management Amendment Act 1994* (NZ), s 6.

⁷⁸ *Resource Management Amendment Act 1994 Commencement Order 1998*, s 2.

Section 15A(2) states that '[n]o person may dump, in the coastal marine area, any ship, aircraft, or offshore installation unless expressly allowed to do so by a resource consent'.⁷⁹ If s 15A(2) is breached, enforcement officers may issue an abatement notice under s 322, requiring the person who dumped the ship (the owner) to cease its contravention of the Act (remove the ship).⁸⁰ The language used in s 15A(2) is markedly different to that used in the *Harbours Act*, *Local Government Act* and *Maritime Transport Act*. As with the enforcement of regional coastal plans, under s 15A(2) there is no requirement that a wreck constitutes a hazard to navigation as a precondition to compulsory removal.

The word 'dump' is crucial to the application of the section. If the word was instead 'place' or 'position', for example, ships would never be allowed to anchor in New Zealand without a resource consent. Clearly this is not the intention, but the word 'dump' is the only part of the section which indicates it may cover wrecks. An argument could be made that 'dumping' requires an intentional act, and since shipwreck is typically the consequence of unintended events, it is not covered by s 15A(2). However, the *Resource Management Act* defines dump in relation to a ship as its 'deliberate disposal or abandonment'.⁸¹ While an unintended shipwreck is probably not the deliberate disposal of a ship, it would seem to constitute deliberate abandonment. The cases we are most concerned with – when a ship is of no value to the shipowner, and where they attempt to avoid the cost of removing the wreck by waiting for the Government to require them to do so – would generally involve deliberate abandonment. It is clear that Parliament intended the section to apply at least to ships which are deliberately sunk in order to provide a diving location. One example of this is the HMNZS *Wellington*, which was sunk in Island Bay in Wellington on 13 November 2005.⁸² When a shipowner wants to sink a vessel, it is reasonable that they are required to obtain resource consent under the *Resource Management Act* before doing so. The HMNZS *Wellington's* owner, the SINKF69 Charitable Trust, did obtain resource consent before sinking the vessel.⁸³ As a result they were not in contravention of s 15A(2) of the Act.

However, regional councils have regarded s 15A(2) of the *Resource Management Act* as granting them considerably wider wreck removal powers than the removal of ships which have been deliberately sunk without resource consent. When the *San Cuvier* ran aground on 27 July 2008 east of Opotiki, Environment Bay of Plenty, the regional council with jurisdiction over the *San Cuvier's* resting place, sought to have the vessel removed.⁸⁴ In doing so, it threatened to invoke its powers under s 15A(2) of the *Resource Management Act*.⁸⁵ It seems unlikely that the *San Cuvier* posed a hazard to navigation. She was 'some distance from deep water' in an 'isolated' area.⁸⁶ This meant that the regional council could not successfully enforce its powers under the *Local Government Act*. The *San Cuvier's* insurers did not challenge this decision, and the vessel was removed.

The natural meaning of 'dump' would indicate that s 15A(2) was not intended to apply to cases such as the *San Cuvier*. The definition of 'dump' in s 2 of the Act seems to defeat this argument. However, s 2 states that its definitions should be authoritative 'unless the context otherwise requires'.⁸⁷ There are contrary indications if one considers the context of the enactment. First, the other subsections of s 15A indicate that the section's coverage is narrow. Subsections (1) and (3) concern the dumping of general and radioactive waste material respectively.⁸⁸ How the removal of unintended wrecks fits in with this context is unclear. Second, s 15A(2) states that dumping is forbidden 'unless expressly allowed ... by a resource consent'.⁸⁹ In the context of deliberately wrecked ships this makes perfect sense, as in the case of the HMNZS *Wellington*. But it is an odd addition to a section which applies to unintended wrecks. It seems unlikely that a regional council would consider granting a resource consent for a unintended shipwreck on a retrospective basis. Third, if s 15A(2) were intended to apply to cases such as the *San Cuvier*, Parliament's enactment of s 650K of the *Local Government Act* is perplexing. It seems unlikely that, eight months after a wide power allowing regional councils to remove shipwrecks came into force, Parliament would enact a second, considerably narrower, power without expressly repealing the original power. However, this may be explained partially by the fact that s 15A(2) was enacted some four years in advance of the date from which Regional Councils could make use of it.

⁷⁹ *Resource Management Act 1991* (NZ), s 15A(2).

⁸⁰ *Ibid*, s 322.

⁸¹ *Ibid*, s 2.

⁸² SINKF69, *About SINKF69*, (2005), Dive Wreck <<http://www.divewreck.co.nz/Documents/AboutSinkF69.pdf>> at 13 October 2009.

⁸³ *Ibid*.

⁸⁴ Professional Skipper, 'San Cuvier Wreck Removed' (2009) 55 *Professional Skipper* 55.

⁸⁵ *Ibid*.

⁸⁶ *Ibid*.

⁸⁷ *Resource Management Act 1991* (NZ), s 2.

⁸⁸ *Ibid*, s 15A(1) and s 15A(3).

⁸⁹ *Ibid*, s 15A(2).

Whether s 15A(2) constitutes part of the formal law of New Zealand on wreck removal is a jurisprudential question beyond the scope of this paper. It is unfortunate that the use of s 15A(2) to compel the removal of unintended wrecks has not yet come before a Court. But this is not surprising: the wide discretion s 15A(2) has been taken to grant to regional councils means that plaintiffs' chances of success are low. Whether the subsection should be used to remove unintended wrecks is debatable. But at present it is being used for this purpose.

3.5 Historic Places Act 1993

There may, however, be one instance in which the *Local Government Act*, *Maritime Transport Act* and *Resource Management Act* cannot be used to remove wrecks. Under s 10(1) of the *Historic Places Act* 1993 'it shall not be lawful for any person to destroy, damage, or modify... the whole or part of any archaeological site'.⁹⁰ In s 2, 'archaeological site' is defined inter alia as 'the site of a wreck of any vessel where that wreck occurred before 1900' which 'is or may be able through investigation by archaeological methods to provide evidence relating to the history of New Zealand'.⁹¹ While New Zealand's maritime history is relatively recent, there are wrecks in New Zealand's waters which would qualify as archaeological sites.⁹² The relationship between the provisions which grant wreck removal powers in the various statutes and the *Historic Places Act's* protection of shipwrecks is unclear. It seems unlikely that the *Resource Management Act* grants powers to regional councils to remove wrecks within their jurisdiction which occurred before 1900. Nonetheless, if this is an exception to the rule that all wrecks are susceptible to removal, then it is a very narrow one.

3.6 The De Facto Position

Under the *Harbours Act*, *Local Government Act* and *Maritime Transport Act*, wide discretion was granted to government bodies to decide when wrecks must be removed. In part this explains the few cases which have fallen to be decided under these sections by Courts since, in the regular course of events, it makes no sense to challenge the discretion. In both *Carter* and *Dorn*, the challenge to authority was unsuccessful and in both cases costs were awarded against the plaintiffs.⁹³ The discretion granted to regional councils under the *Resource Management Act* is even wider than under the other Acts. While the Environment Court has upheld the use of s 314 to compel the removal of a vessel from the coastal marine area, s 15A(2) is yet to receive this endorsement.

In the absence of comprehensive judicial consideration of New Zealand's wreck removal system, the current position appears to be as follows. If a wreck which is not protected by the *Historic Places Act* is within New Zealand's territorial waters, whether in a harbour or not, the regional council with jurisdiction over the area where the ship rests has three options. First, if the wreck is a hazard to navigation, it can invoke the *Local Government Act*. Second, whether the wreck is a hazard to navigation or not, and if there is a provision in the regional council's Regional Coastal Plan which prohibits occupation of the coastal marine area by wrecked vessels, it can invoke s 314 of the *Resource Management Act*. Third, again whether the wreck is a hazard to navigation or not, it can invoke the s 15A(2) of the *Resource Management Act*.

It seems that regional councils may be accustomed to dealing with all issues under the *Resource Management Act* and as a result are unaware that they have wreck removal powers under the *Local Government Act*. Alternatively, where they are aware of s 650K of the *Local Government Act*, regional councils prefer to apply the *Resource Management Act* given the wider discretion that it grants. There is no need to prove that any wreck is a hazard to navigation, and to do so would open the matter up to the potential of costly and time-consuming litigation. New Zealand's de facto wreck removal law is thus: if a wreck which is not protected by the *Historic Places Act* is within New Zealand's territorial waters, the regional council with jurisdiction over the area can invoke the *Resource Management Act* and the wreck must be removed. This position is evaluated below.

4 International Law

The text of the *Nairobi International Convention on the Removal of Wrecks* was adopted in Nairobi in May 2007.⁹⁴ In October 2008, the Netherlands joined France, Italy, and Estonia as the only signatories to the

⁹⁰ *Historic Places Act* 1993 (NZ), s 10(1).

⁹¹ *Ibid*, s 2.

⁹² Piers Davies and Paul Myburgh, 'New Zealand' in Sarah Dromgoole (ed) *The Protection of the Underwater Cultural Heritage* (Martinus Nijhoff, Leiden, The Netherlands, 2006) 189, 192.

⁹³ *Carter v Ports of Auckland Ltd* [2004] 3 NZLR 262, 273; *Dorn v Maritime Safety Authority of New Zealand* [1999] 2 NZLR 482, 500.

⁹⁴ *Nairobi Convention*, above n 4.

Convention.⁹⁵ Under art 18(1), the *Convention* will not come into force until a year after the date on which the 10th State signs.⁹⁶ Shaw notes that this is a 'relatively small number and suggests that the final text has achieved a broad acceptance internationally'.⁹⁷ His point is that members of the International Maritime Organisations were so satisfied with the final text of the *Convention* that they made a conscious decision to require a low number of signatories so that the *Convention* may come into force in the near future. On the other hand, the fact that the *Convention* is yet to come into force, over three years after the text was adopted, may belie the claim of widespread acceptance.

'Wreck' is defined widely in art 1(4) as 'a sunken or stranded ship', any part thereof, any object lost from a ship, or 'a ship that is about, or may reasonably be expected, to sink or to strand, where effective measures to assist the ship... are not already being taken'.⁹⁸ Under art 9(2) '[t]he registered owner shall remove a wreck determined to constitute a hazard'.⁹⁹ There are two ways in which a wreck may constitute a hazard under art 1(5). First, it may 'pose a danger or impediment to navigation'.¹⁰⁰ This is substantially similar to the requirements in New Zealand legislation of 'hazard to navigation', discussed above. Second, it 'may reasonably be expected to result in major harmful consequences to the marine environment, or damage to the coastline or related interest of one or more States'.¹⁰¹ This environmental concern is not found in any New Zealand legislation, although it could be argued that the *Resource Management Act* was intended to deal with such a case. As Shaw states, ' "[h]azard" is clearly defined to apply not only to marine perils, but also to the threat of harmful consequences to the marine environment'.¹⁰² Article 6 contains a list of criteria to be taken into consideration when determining whether a wreck poses a hazard under art 1, ranging from 'proximity of shipping routes or established traffic lanes' to 'the amount and types of oil... on board the wreck'.¹⁰³

The *Convention* applies to wrecks in the Convention area of a State Party.¹⁰⁴ The Convention area is defined in art 1(1) as the exclusive economic zone, the area between the 12 nautical mile territorial limit and 200 nautical mile from the coast of a State which is a signatory to the *Convention*.¹⁰⁵ It includes the contiguous zone. In addition, there is provision in art 3(2) for a State Party to extend the Convention area beyond its exclusive economic zone and into its territorial waters.¹⁰⁶ This was a matter of some debate throughout the drafting of the *Convention*. Griggs states that:¹⁰⁷

one major issue, highlighted in a 1996 CMI [Comité Maritime International] report on the Draft Convention was whether IMO should aim, instead, for a universal wreck removal law covering both territorial and extra-territorial waters.

The 'opt-in' provision was the resolution of the debate between those who wanted the *Convention* to have extended coverage and those who did not. It was inserted 'as a result of last-minute pressure, from CMI, among others',¹⁰⁸ and its 'somewhat cumbersome wording shows the problems encountered in achieving a broadly acceptable compromise'.¹⁰⁹ In one sense, there is no need for the 'opt-in' provision. State Parties (or even states who do not wish to sign the *Convention*) can give the *Convention* effect domestically without being told they are able to do so by the International Maritime Organization. On the other hand, one of the primary goals of the *Convention* was to instigate a more uniform approach to wreck removal,¹¹⁰ and any measures which can be taken to encourage this are constructive.

⁹⁵ International Maritime Organisation, *Netherlands signs Wreck Removal Convention*, (2008) IMO.org <http://www.imo.org/Newsroom/mainframe.asp?topic_id=1709&doc_id=10326> at 13 October 2009.

⁹⁶ *Nairobi Convention*, above n 4, Art 18(1).

⁹⁷ Richard Shaw, 'The Nairobi Wreck Removal Convention' (2007) 13 *Journal of International Maritime Law* 429, 438.

⁹⁸ *Nairobi Convention*, above n 4, Art 1(4).

⁹⁹ *Ibid*, Art 9(2).

¹⁰⁰ *Ibid*, Art (5)(a).

¹⁰¹ *Ibid*, Art 1(5)(b).

¹⁰² Shaw, above n 97, 434.

¹⁰³ *Nairobi Convention*, above n 4, Art 6.

¹⁰⁴ *Ibid*, Art 3(1).

¹⁰⁵ *Ibid*, Art 1(1).

¹⁰⁶ *Ibid*, Art 3(2).

¹⁰⁷ Patrick Griggs, 'Wreck Removal Convention 2007' (2008) 7 *Shipping and Transport International* 20, 20.

¹⁰⁸ *Ibid*, 21.

¹⁰⁹ Shaw, above n 97, 435.

¹¹⁰ *Nairobi Convention*, above n 4, Preamble.

5 The Future of New Zealand's Wreck Removal Law

New Zealand has four options in light of the *Convention*. The first option is to disregard the *Convention* and maintain the current framework for wreck removal outlined above. The second option is to undertake domestic reform of New Zealand's wreck removal legislation. The third option is to become a signatory to the *Convention*. The fourth option is to both become a signatory to the *Convention* and take the opportunity under art 3(2) to extend the *Convention's* application to New Zealand's territorial waters. Maintaining the status quo is untenable. Purely domestic reform is a possibility, but is unnecessary because of the *Convention*. On the other hand, adopting the *Convention* without any review of the New Zealand legislation would create an inconsistent and inoperable situation. The best option is the fourth one: to both sign the *Convention* and extend its application to New Zealand's territorial waters.

5.1 A Call for Reform

5.1.1 Incoherence

New Zealand's wreck removal law is difficult to comprehend. There are four sections in three statutes which purport to give wreck removal powers on at least two bases to two Government authorities. In addition, there is the *Historic Places Act*, which may or may not establish an exception to these powers. Why New Zealand needs four different ways to remove wrecked vessels is uncertain. Why these powers are spread across four different statutes is even less clear. None of the statutes makes any reference to any of the other statutes: there is no prescribed interaction whatsoever between the various provisions.

The effect of s 110(1)(b) of the *Maritime Transport Act* is that, while nominally Maritime New Zealand has wreck removal powers, in practice they cannot exercise them. The result of this is that the task of removing wrecks falls entirely to regional councils. It is questionable whether regional councils are best placed to carry out this role. *Dorn* indicates that regional councils often lack the resources and technical and legal expertise to deal with the removal of wrecks. It was for this reason that Environment Waikato requested the involvement of the then Maritime Safety Authority in that case. While Maritime New Zealand may lack the necessary funding to deal with wrecks in the entire territorial waters of New Zealand, they are at least maritime experts, whereas regional councils have a considerably wider policy ambit. It is unfortunate that s 110(1)(b) strips the agency best placed to deal with wreck removal from any authority to do so.

Most crucially, perhaps, there are different tests set out across the Acts for wreck removal. Whereas the *Local Government Act* and *Maritime Transport Act* require that a wreck pose a hazard to navigation, the *Resource Management Act* makes no such enquiry necessary. The arguments for each approach are discussed below.

5.1.2 Wide Discretion

The de facto position is that non-historic wrecks can be removed by a regional council under either s 15A(2) or 314 of the *Resource Management Act*. A remarkably wide discretion is granted to regional councils. Authorities need no reason to remove the wreck beyond the fact that the wreck exists and is in the coastal marine area. There is no requirement that regional councils give reasons for their decision to compel removal. There is no requirement that the wreck poses a hazard to navigation, as was previously the case in New Zealand, and is one criterion for removal under the *Convention*. New Zealand's territorial waters cover a vast area, and while some of this area is used extensively for navigation by other vessels, there are inevitably also large portions which are rarely navigated. Given this contrast between the vastness of New Zealand's territorial waters and the infrequent navigation of the majority of these waters, it may be that a hazard to navigation requirement is the more defensible policy position.

On the other hand, if only those wrecks which posed a hazard to navigation were subject to removal, the result may be that considerably more wrecks would be abandoned in New Zealand's territorial waters. The environmental consequences of this could be significant. The use of the *Resource Management Act* to compel wreck removal answers this concern, albeit not explicitly. Regional councils have the authority to remove wrecks which pose no hazard to navigation but do present an environmental danger. However, their power extends considerably wider than this, to wrecks which pose no navigational or environmental hazard.

5.1.3 Burden on Shipowners

Wreck removal is an expensive operation to undertake. This is always the case, even when wrecks pose hazards to navigation. But in cases such as *Dorn* and *Carter* there were navigational safety reasons for requiring removal. Under the *Resource Management Act*, wrecks may be harmless both to the navigation of other vessels and to the environment, and still need to be removed. In the case of the *San Cuvier*, for example, the ‘impassable’ nature of the local topography meant that the only option for removal was ‘cutting up the wreck and removing it by helicopter’.¹¹¹ Peculiarly, the remote position of the *San Cuvier* meant both that she posed no hazard to navigation and that the cost of removing her was greatly inflated.

Alternatively, it could be argued that the costs associated with wreck removal should be borne by shipowners. They are the parties who benefit from maritime commerce and they should meet the costs of wreck removal even if those costs are high. Moreover, in reality, commercial shipowners have P&I insurance which covers their wreck removal liability, so these costs are diluted throughout the industry. But it is not so much the costs of wreck removal in isolation which are objectionable. Rather, it is the dichotomy between the wide discretion granted to regional councils to decide when to require removal and the high costs of this decision. For the regional council to impose significant costs on individuals without needing to justify this decision by reference to the harm a wreck will cause is unreasonable.

5.1.4 The Underwater Cultural Heritage

Another objection to the *Resource Management Act* is that while it offers seemingly extensive protection for the environment, it offers no protection for the underwater cultural heritage of New Zealand. While some protection may be granted to pre-1900 shipwrecks under the *Historic Places Act*, there are culturally and historically significant wrecks in New Zealand’s territorial waters which do not fall within this category, such as the wreck of the *Rainbow Warrior*.¹¹² This criticism is not unique to the *Resource Management Act*. As Davies and Myburgh state, ‘some of the provisions in these [maritime law] statutes potentially clash with the aim of *in situ* preservation of [underwater cultural heritage sites].’ Having said that, the removal of historic wrecks for navigational safety reasons is more defensible than the removal of wrecks which are navigationally and environmentally harmless, yet historically and culturally valuable, but the latter seems to be permitted under the *Resource Management Act*.

The wider point is that there is an ever-present potential conflict between navigational safety and environmental concerns on the one hand and underwater cultural heritage concerns on the other. What is required is a balancing of these two policy issues on a case by case basis. In some instances a wreck’s position may mean that, although historic, it should be removed for safety reasons, whereas in other cases an historic wreck may pose a minor environmental hazard but one which can be managed without resorting to removal. Unfortunately New Zealand’s statutory wreck removal law does not facilitate this analysis. This is the result of a fragmented statutory regime; one which is overcomplicated where non-historic wrecks are concerned and even more so in terms of historic wrecks.

5.1.5 Procedure

In the *Harbours Act*, *Local Government Act* and *Maritime Transport Act*, explicit systems are in place for authorities who wish to compel the removal of a wreck. In the *Local Government Act*, for example, s 650K(2) and (3) place detailed procedural requirements on regional councils in relation to wreck removal. Aspects such as notice, agency, time periods, the identification of the owner, sale, recovery of expenses, and destruction of the wreck are all covered in these subsections.¹¹³ Section 650K is specifically designed with wreck removal in mind and its procedural requirements are explicit and comprehensible.

The *Resource Management Act*, by contrast, applies to a much wider area than wreck removal. It contains none of the procedural requirements set out in the *Local Government Act*. While s 322 of that Act concerns the processing of abatement notices, the wide scope of these provisions means that the requirements are considerably less detailed than those in the *Local Government Act*. The result of this difference is that the procedure for forcing wreck removal under the *Resource Management Act* is far less explicit than under the other Acts, a difference which could lead to substantial uncertainty on the part of shipowners, their insurers and

¹¹¹ Professional Skipper, above n 84, 55.

¹¹² Davies and Myburgh, above n 92, 192.

¹¹³ *Local Government Act 1974* (NZ), s 650K(2) and (3).

the regional councils attempting to compel removal. While the wide discretion granted under the *Resource Management Act* makes regional councils' job easier, it also means that their role is far more than merely mechanical, as it was under the other statutes concerning wreck removal. Doubt has already been thrown on regional councils' ability to deal satisfactorily with wreck removal cases, and the lack of procedural guidance in the statute which they favour is unhelpful in resolving this issue.

5.2 Domestic Reform

Should New Zealand decide to make changes to its wreck removal law, one option would be to simply repeal s 15A(2) of the *Resource Management Act*. The result of such a move would be that the provisions in the *Local Government Act* would be the only way to compel the removal of wrecks in New Zealand waters and only those wrecks posing hazards to navigation would be required to be removed by a regional council. While such an approach would undoubtedly be an improvement on the status quo, it too is deeply flawed. First, the advantages of uniformity with the *Convention* would be circumvented. Second, and more acutely, such a move would not provide sufficient protection for the marine environment. One of the advantages of the *Resource Management Act* is that wrecks which pose no hazard to the safe navigation of other vessels, but which pose an environmental hazard can be removed by an exercise of the relevant regional council's powers. This is not the case with the *Local Government Act* or the *Maritime Transport Act*, where the only hazard sufficient to require removal is a navigational one. Should New Zealand return to a system of compulsory wreck removal based purely on hazard to navigation, growing environmental risks posed by wrecks would not be offset.

Alternatively, New Zealand could repeal all of the sections which have been discussed, and enact a dedicated wreck removal statute. This would entail considering which approach to wreck removal is the most sound. The International Maritime Organization has, however, already considered such issues. The conclusion they have reached in the *Convention* is the correct approach. Moreover, merely reforming New Zealand's wreck removal law on a domestic level would circumvent the secondary advantages of signing the *Convention*. These are now discussed.

5.3 International Reform

5.3.1 Convention Viewpoints

Since the adoption of its text, the *Convention* has not been universally accepted in the maritime community. Gauci, for example, argues that the *Convention* is an 'unusual addition' to the set of conventions covering maritime areas,¹¹⁴ primarily because 'the international community has not been enterprising enough in the adoption of this instrument, as it is based largely on the model of conventions initiated in the 1960s, and which have very little to do with wreck removal'.¹¹⁵ However, Gauci is also critical of the substance of the *Convention*, describing the dual definition of hazard – navigational and environmental – as 'interesting'.¹¹⁶ The result of this definition, he argues, is that the *Convention* 'does not fully clarify the overlap between the wreck removal and oil pollution civil liability regimes'.¹¹⁷ This may be the case, yet the criticism is somewhat harsh. The *Convention* was never intended to be a comprehensive redefinition of the liability of shipowners for the risks of pollution. Rather, it concerns a much more narrow set of circumstances, in which the wreck of a vessel poses a direct and immediate environmental hazard. In these circumstances, the *Convention* represents a position which fairly balances the interests on either side, and in any case is a considerable improvement on New Zealand's current regime.

Shaw and Griggs, who were both interested in the development of the *Convention* from its early stages, are broadly supportive of the final text of the *Convention*. Shaw emphasises that 'the prospects of a coastal state recovering the expenses it has incurred in removing a wreck through legal action are very poor, in the absence of insurance provisions such as those in the Nairobi Convention'.¹¹⁸ Thus Shaw takes an approach to the *Convention* which stresses the importance of its insurance provisions, which are discussed below. Griggs' emphasis is entirely different, and he proclaims a hope 'that the [Convention] will ... be seen as an encouragement to states to grant access when faced with a request for a place of refuge for a ship in distress'.¹¹⁹

¹¹⁴ Gauci, above n 1, 203.

¹¹⁵ *Ibid.*, 204.

¹¹⁶ *Ibid.*

¹¹⁷ *Ibid.*, 218.

¹¹⁸ Shaw, above n 97, 429.

¹¹⁹ Griggs, above n 107, 23.

In other words, Griggs hopes that the uniformity encouraged by the *Convention* will promote a more sympathetic maritime community. The divergent nature of the interests with which each commentator is concerned in these statements – those of coastal states and those of ships in distress, respectively – gives a good indication that the *Convention* can protect the interests of all parties involved in a case of wreck removal.

5.3.2 The Correct Approach

The position codified in New Zealand's *Resource Management Act*, under which wide discretion is granted to regional councils wishing to remove wrecks, represents the situation in which no reasons for requiring the removal of wrecks are necessary. At the other end of the spectrum is the position represented by the *Local Government Act*, the *Maritime Transport Act* and the *Harbours Act*, whereby only one narrow policy reason, navigational safety, is considered to be a sufficiently strong reason to compel removal.

Neither position is acceptable. New Zealand's wreck removal regime should recognise that navigational safety concerns are paramount but that they are not the sole consideration. Conversely, wreck removal law should not grant an unfettered discretion to regional councils to remove harmless wrecks. As Jim Fitzpatrick, the United Kingdom's Parliamentary Under-Secretary of State for Transport, stated upon introducing the Marine Navigation Bill to the House of Commons, '[a]ny statutory safety measures need to offer a balance between excessive controls and prudent management'.¹²⁰ The position taken in the *Convention* on the removal of wrecks, under which the environment and navigation are afforded specific protection, is the reasonable middle ground between these positions. New Zealand's answer to the question '[c]an I merely abandon this wreck to the Government and walk away without further liability?' should be 'only when the wreck does not pose a hazard to navigation or the environment.'

5.3.3 Uniformity

The key reason New Zealand should sign the *Convention* is that it represents the best policy setting to balance competing interests. Nonetheless, there are other compelling reasons for signing the *Convention*. One of these is the uniformity between the wreck removal regimes of various countries that the *Convention* creates. The text of the *Convention* itself recognises the value of uniformity. The preamble states that there is a 'need to adopt uniform international rules and procedures to ensure the prompt and effective removal of wrecks and payment of compensation for the costs therein involved'.¹²¹

The international nature of maritime operations means that some degree of uniformity between the legal systems of countries is inherently desirable. Such concerns are even more acute in the case of wreck removal. Although shipowners do determine to a degree the jurisdictions in which their vessels operate, the unintended nature of shipwreck means it is unlikely that they will familiarise themselves with the wreck removal regimes of each jurisdiction. The *Convention*, should it be widely ratified, would enhance the degree of certainty in inherently uncertain times for shipowners. Whether a ship was wrecked in the exclusive economic zone of Estonia, the United Kingdom, or New Zealand, shipowners would know that its wreck could only be compulsorily removed if it posed a hazard to navigation or the environment. In the same way that salvage awards are made based on the uniform factors in the *International Convention on Salvage*,¹²² wrecks would be removed based upon cohesive and comparable reasoning, regardless of which country was intending to exercise its power under the *Convention*.

5.3.4 The Exclusive Economic Zone

In the same way that uniformity on the international level is desirable, certainty in New Zealand's domestic regime is a potential benefit of an adoption of the *Convention*. In spite of the *Territorial Sea, Contiguous Zone, and Exclusive Economic Zone Act 1977*, the situation as to wreck removal within New Zealand's contiguous zone and exclusive economic zone is currently uncertain. It is unclear what powers, if any, the New Zealand government has to remove wrecks beyond the 12 nautical mile territorial limit but within the 200 nautical mile exclusive economic zone. As discussed earlier, s 110 of the *Maritime Transport Act* may apply outside New Zealand's territorial waters, but this is unclear. *Sellers v Maritime Safety Inspector* indicates that the *Maritime Transport Act* may grant powers to the Director of Maritime New Zealand within the exclusive economic zone

¹²⁰ United Kingdom, *Parliamentary Debates*, House of Commons, 6 May 2008, 475 Hansard, HC, col 29WS, (Jim Fitzpatrick).

¹²¹ Nairobi Convention, above n 4, Preamble.

¹²² *International Convention on Salvage*, opened for signature 28 April 1989, (entered into force 14 July 1996).

if they are consistent with international law,¹²³ but the extent to which wreck removal powers fall into this category has not been determined.

Adopting the *Convention* would not only serve to clarify any uncertainty as to the operation of New Zealand's exclusive economic zone, but would also seem to grant the New Zealand Government additional powers; namely the power to remove wrecks which pose hazards to navigation or the environment in the exclusive economic zone. Especially in the case of environmental hazards, such an approach would be progressive. Growing calls for increased environmental protection would be answered by the ability of the New Zealand government to require the removal of environmentally hazardous wrecks in the exclusive economic zone where they were unable to do so previously. The *Territorial Sea, Contiguous Zone, and Exclusive Economic Zone Act 1977* does anticipate the New Zealand government '[p]rescribing measures for the protection and preservation of the marine environment of the [exclusive economic] zone',¹²⁴ yet few steps in this direction appear to have been taken. This is perhaps unsurprising, given that less than three per cent of New Zealand's exclusive economic zone has been surveyed.¹²⁵ Any measures such as the *Convention* which increase the amount of protection afforded to the marine environment are to be encouraged and supported.

5.3.5 The Underwater Cultural Heritage

One of the criticisms made of New Zealand's current wreck removal regime is the lack of protection it grants to historic wrecks. In this respect, too, the *Convention* may be superior. The limitation periods established by art 13 are creative. The right to recover costs is extinguished three years after the ship was determined to pose a hazard to navigation or the environment.¹²⁶ In addition, however, there is an absolute bar on bringing an action under the *Convention* 'after six years from the date of the maritime casualty which resulted in the wreck'.¹²⁷ It is unclear if 'bringing an action' under the *Convention* means removing a wreck or if it is limited to recovering costs after doing so. Griggs states that it is only rights of compensation which are affected,¹²⁸ whereas Gauci indicates that, regardless of when the hazard was determined, vessels which were wrecked more than six years ago cannot be removed using the *Convention's* provisions. He points out that 'it is obviously the case that the Nairobi Convention was not intended to be applicable to historic wrecks'.¹²⁹

Protection for historic wrecks is contained in the *UNESCO Convention on the Protection of the Underwater Cultural Heritage*, to which New Zealand is not a state party.¹³⁰ This convention exhibits a preference for *in situ* preservation of underwater cultural heritage,¹³¹ which is defined to include wrecks 'which have been partially or totally under water, periodically or continuously, for at least 100 years'.¹³² It is notable that this is a 'moving' definition, unlike the definition in the *Historic Places Act*, which is set at the year 1900.

Gauci's interpretation of the limitation period provisions seems to reflect the natural meaning of 'bringing an action'. Yet, the existence of a dedicated underwater cultural heritage treaty is a strong indication that the *Convention* was not intended to apply to historic wrecks. Moreover, if Gauci's interpretation were preferred, it would protect six-year-old wrecks, which can hardly be determined to constitute archaeological sites. Griggs' interpretation must be correct: wrecks must still be able to be removed under the *Convention* even if the incident occurred over six years previously, although in such a case compensation cannot be recovered.

There is no explicit interaction between the wreck removal and underwater cultural heritage conventions, and this is necessarily the case since states will not always be parties to both conventions. Nonetheless, if New Zealand signs the *Convention on the Protection of the Underwater Cultural Heritage* this should not dissuade the New Zealand Government from also signing the *Convention on the Removal of Wrecks*.¹³³ If both

¹²³ *Sellers v Maritime Safety Inspector* [1999] 2 NZLR 44, 57.

¹²⁴ *Territorial Sea, Contiguous Zone, and Exclusive Economic Zone Act 1977* (NZ), s 27.

¹²⁵ Davies and Myburgh, above n 92, 192.

¹²⁶ *Nairobi Convention*, above n 4, Art 13.

¹²⁷ *Ibid.*

¹²⁸ Griggs, above n 107, 23.

¹²⁹ Gauci, above n 1, 213.

¹³⁰ *UNESCO Convention on the Protection of the Underwater Cultural Heritage*, opened for signature 6 November 2001, (entered into force 2 January 2009).

¹³¹ *Ibid.*, Art 2(5).

¹³² *Ibid.*, Art 1(1)(a).

¹³³ Australia's position is that it is 'considering ratification' of the *Convention on the Protection of the Underwater Cultural Heritage*. If Australia does so, New Zealand might be expected to also ratify the *Convention*. See Department of Sustainability, Environment, Water, Population and Communities, Australian Government, *Commonwealth considers ratification*, (18 August 2010) <<http://www.environment.gov.au/heritage/shipwrecks/international/unesco2001.html>>, at 29 September 2010.

instruments were in force, four categories of wreck would be created. First, 100-year-old wrecks in the exclusive economic zone and pre-1900 wrecks in the territorial sea of New Zealand ('historic wrecks') not posing an environmental or navigational hazard would be preserved *in situ*. Second, non-historic wrecks posing an environmental or navigational hazard would be removed. Third, non-historic wrecks not posing an environmental or navigational hazard could not be removed under the *Convention*. The fourth category – historic wrecks posing an environmental or navigational hazard – remains the most problematic. The New Zealand Government would be subject to conflicting responsibilities at international law: to preserve historic wrecks and to ensure navigational and environmental safety. However, this conflict would arguably allow a weighing of the policy interests which does not seem to be possible under New Zealand's current statutory regime. *In situ* preservation is a preference rather than a requirement under the *Convention on the Protection of the Underwater Heritage*; likewise, under the *Convention on the Removal of Wrecks*, the government is able but not required to compel the removal of a hazardous wreck. When those policy interests conflict, it is desirable that the Government make a discrete decision as to whether removal or preservation of a particular wreck is preferable.

5.3.6 Other Key Components

While the focus to this point has been on the question of when the government should be able to enforce the removal of wrecks, there are of course other aspects to the *Convention*. Shaw outlines three 'key components' of the text.¹³⁴ The first is the ability of coastal states to compel wreck removal, discussed above. The second is 'strict liability on the shipowner for the costs of reporting, marking and removing a wreck if required to do so by the coastal state'.¹³⁵ And the third is 'compulsory insurance and direct action against insurers'.¹³⁶ The *Convention* operates as a cohesive instrument. Focusing on the powers granted in terms of the first of these components without considering the second and third components may present an inaccurate depiction of its function. Without wanting to give a comprehensive account of the operation of the entire convention, strict liability and compulsory insurance are now considered.

Strict Liability

The second key component, the imposition of strict liability on shipowners, can be dealt with succinctly. Given the ultimate goal of a State Party in exercising its wreck removal powers under the *Convention*, it is unsurprising that registered owners are strictly liable for the costs of dealing with their wrecked vessels. In a sense, strict liability balances the limited powers of removal granted to coastal states under the *Convention*. While there may be only limited instances in which the state can compel removal – when the wreck is a hazard to navigation or the environment – once the relevant determination has been made, the registered owner is required to deal with the wreck quickly, effectively, and, except in exceptional circumstances, at their own expense. Exceptional circumstances constitute those defined in art 10(1), including where the wreck is a result of an act of war, a natural phenomenon of an 'exceptional, inevitable and irresistible character', the act or omission of a third party with intent to cause damage, or the lack of working lights or other navigational aids maintained by the Government. Shaw points out that in this regard the *Convention* reflects the exceptions to strict liability in the *Civil Liability Convention*, *Hazardous and Noxious Substances Convention*, and *Bunker Pollution Convention*. It seems to be a well-established means of balancing the position of governments and shipowners in a wide range of areas.

Compulsory Insurance

The third key component is the compulsory insurance regime for vessels registered in State Parties to the *Convention* prescribed by art 12. Article 12 is based largely on similar provisions found in the same trio of conventions which initially formulated the strict liability requirements found in art 10. Compulsory insurance benefits states attempting to remove vessels. It can be seen as a way of off-setting the narrow discretion granted to governments under the *Convention*. Recovering wreck removal costs from foreign shipowners is difficult in all circumstances, but even more so for uninsured vessels. In the instance of the hazard to navigation or the environment requirement being satisfied, coastal states have an assurance not only that the shipowner will be required to pay the expenses, but also that even if the shipowner becomes insolvent as a result of the wreck these costs will be covered by insurance.

¹³⁴ Shaw, above n 97, 431.

¹³⁵ *Ibid.*

¹³⁶ *Ibid.*

It suffices to say that even Gauci, who is more critical of the *Convention* than the other commentators, is supportive of compulsory insurance. A compulsory insurance regime benefits ships in distress as well as State Parties. Gauci states that compulsory insurance is 'likely to constitute an inducement to a coastal state which happens to be in a quandary as to whether to allow a place of refuge to a ship in distress'.¹³⁷ This reflects Griggs' position. If a State Party can be almost certain that ships flying the flags of State Parties are insured, it will know that it will usually be able to recover the expenses of removal should the ship become wrecked, and therefore be more likely to help ensure the safety of that vessel. Moreover, the compulsory insurance regime can be seen as a compelling reason for states to sign the *Convention*, given that it would appreciably increase the protection of vessels registered in that country when operating internationally.

5.4 International and Domestic Reform

The significant benefits in signing the *Convention* outweigh any disadvantages in doing so. However, should New Zealand simply sign the *Convention* without any review of its domestic wreck removal regime, the result would be no substantial improvement on the law of wreck removal in this country. First, the incoherence of New Zealand's domestic wreck removal law, outlined above, would not only endure, but an extra layer of inconsistency would be introduced. Second, New Zealand's domestic law of wreck removal would fail to conform to the best approach taken by the *Convention*. It is for these two reasons that the New Zealand government should seek to extend the *Convention's* application into New Zealand's territorial waters under art 3(2).

Should New Zealand sign but not extend the *Convention*, one removal standard would apply to wrecks within the exclusive economic zone, and an entirely different standard would apply within territorial waters. One concern is the fact that this latter standard is seriously flawed. But an additional concern is the inconsistency that this legal situation would create. Prima facie, the non-historic wreck of a vessel registered in another State Party to the *Convention* which lies 13 nautical miles from New Zealand's coast could only be removed if it was determined to constitute a hazard to navigation or the environment. Yet the same wreck lying 11 nautical miles from the coast could be removed under the *Resource Management Act* without the hazard requirement being fulfilled. Signing the *Convention* has its advantages, but if it were to exacerbate rather than solve the inconsistency of New Zealand's wreck removal regime, then signing would be illogical.

One of Gauci's fundamental concerns with the *Convention* is that it is 'too geographically restricted',¹³⁸ given that in its original form it only covers the exclusive economic zone of State Parties. This is a valid concern. Moreover, it could be argued that the *Convention* is restricted further by the fact that it only applies to wrecks of ships registered in other State Parties. However, an extension of the *Convention* into the territorial waters of State Parties would constitute a significant answer to both these criticisms. When extended State Parties can use the *Convention* to remove all wrecks in their territorial waters, regardless of the status of the flag state of the wreck.¹³⁹ Uniformity is to be regarded as one of the key goals of the *Convention*. Not extending the *Convention* would abrogate this advantage.

If we accept that the *Convention's* approach to the circumstances in which governments should be able to compel wreck removal is fundamentally correct, and I have argued that it is, from the point of view of simply enacting the best policy the New Zealand Government should seek to replicate these provisions in its domestic legislation. There is no reason why the hazard to navigation or the environment standard contained within the *Convention* is more suited to wrecks in the exclusive economic zone than in territorial waters. The first half of the test – hazard to navigation – has formed part of New Zealand's domestic wreck removal navigation in the past. The hazard to the environment element is the natural extension of this position as policy moves to reflect a greater appreciation of the need to protect the natural environment. Further, while it has been the case that in the past the New Zealand Government has sought to rewrite provisions of international instruments to which it is a party in its domestic legislation, with varying degrees of success,¹⁴⁰ there is no need for such an approach to be taken in the current instance. Article 3(2) makes it as straightforward as possible to extend the application of the *Convention*.

¹³⁷ Gauci, above n 1, 217.

¹³⁸ Ibid, 223.

¹³⁹ Griggs, above n 107, 21.

¹⁴⁰ See, eg, Paul Myburgh, "The Limitations of the Limitation Convention" (2004) 25 *Maritime Advocate* 23.

6 Conclusion

As mentioned above, few states have at this point signed the *Convention*, and it is not yet in force. However both the United Kingdom¹⁴¹ and Canada¹⁴² appear to at least be considering implementing the *Convention*. The largely slow uptake may be due to dissatisfaction with the text itself, natural hesitancy, or contentment with current domestic wreck removal regimes. It seems unlikely that the *Convention* is unpopular due to the wreck removal terms it sets out. The *Convention* reaches the most balanced position available on wreck removal. It at least clarifies the wreck removal powers of State Parties in the exclusive economic zone, and seems to grant explicit powers to governments which they currently have only in theory. Moreover, the strict liability and compulsory insurance provisions in the *Convention* are likely to be attractive to governments seeking to increase the likelihood of recovering wreck removal expenses against foreign shipowners. Finally, the uniformity entailed by adoption of the *Convention* is an inherently desirable policy interest in maritime law, and one which should be pursued for the benefit of the maritime industry as a whole.

For those countries which are satisfied with their domestic wreck removal regimes, the most likely reason for not signing the *Convention* is a reluctance to lead the world on wreck removal reform. The *Convention* presents increasing marginal returns: as each Government signs the *Convention*, it becomes more beneficial to each subsequent non-member state to do so, as it will then be able to compel the removal of a greater number of potential wrecks from its exclusive economic zone. It is considerably more beneficial to be a signatory to the *Convention* when it has 100 members than when it has four. A hesitant attitude towards the *Convention* is understandable, but undesirable. If every Government thought this way, a means of considerably improving international wreck removal law may never come into effect.

New Zealand is poorly placed to take a non-committal approach to the *Convention*. The Government should not be content with New Zealand's current domestic wreck removal regime. While the effect of s 15A(2) of the *Resource Management Act* is to grant wide discretion to regional councils to compel wreck removal, this is inconsistent with the explicit wreck removal provisions in the *Maritime Transport Act* and *Local Government Act*. Moreover, the de facto law is procedurally uncertain, places higher than necessary burdens on shipowners to remove wrecked vessels, and does not facilitate a balancing of policy interests in respect of the underwater cultural heritage. It would be possible to remedy these deficiencies by purely domestic development. But this would abrogate the non-domestic advantages of the *Convention*. Furthermore, the *Convention* has been constructed to make the extension of its provisions to State Parties' territorial waters as straightforward as possible. Article 3(2) of the *Convention* presents a golden opportunity for much needed reform of New Zealand's domestic wreck removal law, and this opportunity should not be missed. New Zealand should be one of the leaders in the reform of wreck removal law, not merely a late adopter.

¹⁴¹ See *Wreck Removal Convention Bill* (UK), the second reading of which is scheduled for 19 November 2010, <<http://services.parliament.uk/bills/2010-11/wreckremovalconvention.html>> at 23 July 2010.

¹⁴² See Transport Canada, "Nairobi International Convention on the Removal of Wrecks, 2007: Discussion Paper", (2010), *Transport Canada*, <<http://www.tc.gc.ca/eng/policy/acf-acfi-nairobi-menu-2210.htm>> at 23 July 2010.