SEMAPHORE

Newsletter of the Maritime Law

Association of Australia and New Zealand

NZ Branch Report

The NZ Branch of MLAANZ recently made a submission on the Maritime Transport (Offshore Installations) Amendment Bill. The Bill proposes changes to the mandatory requirements for offshore operators to provide evidence of financial security to ensure compensation for all statutory pollution claims, and the associated provisions that deal with the direct right of action against insurers/providers of that financial security.

The Bill

The Bill's stated purpose is "to clarify and strengthen the requirements on owners of offshore oil and gas installations to hold insurance or other financial security in relation to their liability for clean-up and compensation resulting from an oil spill".

Notable aspects include:

- currently, operators/owners of offshore installations are strictly liable for all pollution damage as defined by the legislation. They must have insurance or financial security to cover all statutory liabilities up to an amount specified in the rules (although they are liable in full without limit for pollution damage, which may well exceed the level of insurance required under the current rules). There is a direct right of action against insurers in the current legislation and the defences insurers can rely on are limited
- one of the stated objectives of the proposed amendments is to provide certainty in relation to the liability of insurers (or for those who provide financial security for claims) to the Crown and to other third parties who are affected by the pollution. The objective is to ensure that the liability of insurers or other parties providing security is limited to the amount specified in the marine protection rules, even if the liability of the offshore operator for pollution damage exceeds that amount. The proposed amendments also reverse the current position that limits defences and provides that an insurer can rely on any defence that it would have been entitled to rely on against its insured. New section 385J is based closely on New South Wales' Civil Liability (Third Party Claims Against Insurers) Act 2017
- the amendments to the Maritime Transport Act (MTA) will be supported by amendments to the marine protection rules, which will specify more detailed requirements relating to the amount of insurance or financial security required
- the rules will include a scaled framework for specifying the amount of cover required, based on the modelling of a credible worst-case scenario event from a particular installation
- under the draft rules, although offshore operators will remain strictly liable for all pollution damage as is defined by the Act, they will no longer be required to have insurance or financial security to ensure compensation for all statutory liabilities. The proposed changes will remove the requirement to provide a financial security regime for claims relating to loss of profit from impairment of the environment. This is to meet the preference of the offshore industry which wants to use existing insurance policies that do not cover such liabilities to meet their regulatory requirements

Summary of MLAANZ Submission

One of the stated objectives of the proposed amendments is to provide certainty in relation to the liability of insurers (or, in the case of financial security, to the persons providing the financial security) to the Crown and to other third parties who are affected by the pollution.

The NZ Branch supported the general policy objective of providing certainty to insurers on the limit of their liability where they are subject to direct claims for pollution damage under the MTA. We also recommended an amendment to the equivalent provision for insurers of oil tankers under section 366 MTA, noting the current legislation does not properly implement the protection afforded to insurers under the Civil Liability Convention where they are subject to direct claims.

The oral presentation on behalf of MLAANZ by Paul David QC and Stacey Fraser outlined the reasons why MLAANZ did not consider the current draft provision in the Bill met its stated policy objectives. In our view, instead of revoking and replacing the provisions that deal with direct action as proposed (s385J), the policy objective would have been better addressed within the legislative framework by appropriate amendment to the existing s385J so that this section and s366, which has the same general purpose in the context of claims against insurers of ships, would continue to align.

Copies of the Bill and all submissions can be seen at this link.

Officials have now reported back on the Bill and we are in the process of reviewing that report and the proposed amendments.

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