SEMAPHORE

Newsletter of the Maritime Law

Association of Australia and New Zealand

Cleaning Up: Australia's New Offshore Decommissioning Regime

The WA Branch held its third webinar for 2021 on September 16, 2021 titled – "Cleaning up: Australia's New Offshore Decommissioning Regime".

The speakers were Ben Adamson of HWF and Louis Osborn of Clifford Chance. Ben's presentation focused on Australia's New Offshore Decommissioning Regime. Louis presented on the significance of ESG [environmental, social and governance] in the decommissioning context, the recent Montara class action and possible implications for the shipping sector should a court follow the same reasoning as the Federal Court did in that case, and possible alternatives to a complete removal of aging assets.

New Offshore Decomissioning Regime

The speakers outlined that the New Australian Regime for Offshore Decommissioning is stricter than its predecessor. The key legislation is the Offshore Petroleum Greenhouse Gas Storage Act 2006 (OPGGSA). Some of the main features of the new regime include:

(a) trailing liabilities, (the potential liability of former titleholders) – this contemplates that former titleholders can be called upon to remediate a field that they once had but they no longer hold in respect of decommissioning of their former asset. This may make it difficult for titleholders to make a "clean exit" from a field or to be able to make a clean divestiture of an offshore asset. Whilst the previous Decommissioning Regime in Australia also provided for trailing liabilities, it was more restrictive than the new regime. The previous regime applied only in circumstances of revocation, surrender, cancellation, termination or expiry of a title. The amended regime extends to the transfer of control of a title to another entity. This amendment constitutes a significant expansion of the reach of the potential trailing liabilities

(b) heightened oversight of changes in ownership or control of the titleholder – "control" is defined as the power to exercise or control 20% or more of the titleholder's voting rights or holding an interest in 20% or more of the issued securities in the titleholder

(c) NOPTA [National Offshore Petroleum Titles Administrator] is granted special investigative powers under the new regime

(d) expansion of NOPTA's powers of scrutiny over new titleholders

A further interesting issue raised by the presenters was whether the decommissioned asset constitutes "hazardous waste" pursuant to the Basel Convention, and if so what can be done about its disposal.

Federal Court's Decision in Montara

The Federal Court's decision in *Sanda v PTTEP Australasia (Ashmore Cartier) Pty Ltd (No 7)* [2021] FCA 237 was also raised by the speakers. As our readers will be well aware the Federal Court held that the Thai state-owned oil and gas company owed a duty of care to Indonesian seaweed farmers,

which they breached. The court held that at the time of the oil spill in August 2009, injury to the class of persons of which the applicant and group members were a part, was reasonably foreseeable in the event of loss of well control, and the subsequent release of oil through the respondents in the operation of the well.

The court rejected the respondent's submissions, including that no duty of care was owed due to the potential indeterminate nature of such liability. The court held that indeterminacy does not depend solely on the size or number of claims nor on the ability to ascertain the members of the class to whom the duty might be owed. Rather it depends upon what the respondent knew or ought to have known of the number of claimants and the nature of their likely claims. In that regard the court accepted the applicant's submission that where a duty involves the avoidance of physical harm, the limits of physical consequences can be sufficiently identified in terms of time and space for purposes of identifying the class of persons to whom the duty is owed, with sufficient certainty. The court was also satisfied that the respondent breached its duty of care.

The speakers also addressed two interesting alternatives to complete removal of decommissioned assets – ie, the possible use of the decommissioned assets for:

(a) renewable energy projects such as wind, tide or wave projects – this envisages repurposing the topside for a renewable energy project

(b) repurposing the decommissioned facility as an operations and production centre for a fish farm, with fish pens potentially connected to the topside legs or jackets

Both speakers invited the delegates to "watch this space" for future development.

The WA Branch would like to thank our speakers and all of the delegates who attended the webinar for their participation. We trust you found the seminar interesting and informative.

The WA Branch welcomes any ideas for future seminar topics.

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