



SEMAPHORE

Newsletter of the Maritime Law

Association of Australia and New Zealand



NZ Branch Report

Tēna koe, as I write this New Zealand is having its first experience of a widespread COVID-19 outbreak. It goes without saying that this new experience is dominating much of daily life and the maritime industry.

As it stands, most foreign travellers from all countries cannot enter the country, foreign ships are generally barred from entering New Zealand and, for those that make it in, any crew disembarking commercial ships must meet strict isolation and quarantine requirements. Issues relating to these restrictions are common and MLAANZ members are routinely assisting both domestic and international clients navigate the regulatory web.

The New Zealand Branch is not immune from these challenges. At this time of the year, we would usually be gearing up for our annual conference – a highlight of the New Zealand maritime calendar. This year the committee has adopted a cautious approach. The risk of having to cancel last-minute, or have speakers and attendees drop out due to illness, is exceptionally high as we draw nearer to the “peak” of Omicron cases. It was a difficult decision, but we have postponed this year’s conference with the hope that risk will be lower later in the year.



MLAANZ New Zealand Branch secretary Richard Belcher

That said, the news is not all bad. Like the rest of the world, the New Zealand Branch is embracing the new normal. We have a series of webinars lined up, the first was on March 24, 2022 and featured two young MLAANZ members – Gus Gray from Hesketh Henry and Arthur Pan from Duncan Cotterill – alongside Paul David QC. We are looking forward to delivering this webinar series to our members over the course of the coming year.

Maritime Legal Update in New Zealand

There have also been several interesting recent legal developments, some of which are set out below.

Supreme Court Delivers Judgment on Seabed Mining

The Supreme Court has delivered an important decision on the interpretation of the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012. *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127 arose from an application for consent to mine ironsands in the South Taranaki Bight. An Environmental Protection Agency (EPA) Decision-Making Committee (DMC) granted consent, but the decision was overturned by the High Court. The Court of Appeal upheld this decision and the Supreme Court has now also dismissed an appeal. The

application has been returned to the EPA for reconsideration by a DMC in light of the Supreme Court's judgment.

The Supreme Court majority concluded that the Act imposed an environmental bottom-line that a discharge or dumping consent could not be granted if it would result in material harm to the environment. Material harm could not be outweighed by other factors, such as economic benefits.

The Supreme Court unanimously affirmed that Treaty of Waitangi clauses should be given a broad and generous construction. It found that the DMC should have taken into account tikanga-based customary rights and interests, including kaitiakitanga and rights claimed under the Marine and Coastal Area (Takutai Moana) Act 2011, as "existing interests". It also concluded that tikanga was "other applicable law" that the DMC was required to consider.

Legislation to Implement MARPOL Annex VI Passes

Parliament has unanimously passed the Maritime Transport (MARPOL Annex VI) Amendment Act. The Act aligns New Zealand law with Annex VI of the International Convention for the Prevention of Pollution from Ships (MARPOL) to enable New Zealand to accede to Annex VI.

Annex VI deals with air pollution from ships. It contains regulations requiring ships to minimise and manage the emission of ozone-depleting substances, nitrous oxides, sulphur oxides and volatile organic compounds. It also contains requirements for reception facilities for hazardous substances.

The Act empowers the Minister of Transport to make marine protection rules regarding substances covered by Annex VI. It also authorises the Director of Maritime New Zealand to conduct inspections and audits, and to detain ships that are in contravention of the requirements of Annex VI.

Reparation Award for Trawler Sinking Upheld

In *Ocean Fisheries Ltd v Maritime New Zealand* [2021] NZHC 2083, the High Court upheld an order to pay a total of NZ\$737,325.25 in reparation to 19 family members after three crew drowned when the fishing trawler Jubilee sank off the coast of Canterbury. It also ordered NZ\$5000 to be paid to another family member, whom the District Court had mistakenly thought did not want reparation.

The Jubilee foundered as a result of a gradual ingress of water to the fish hold, affecting its stability and causing it to sink by the stern. The three crew appear to have been asleep in the wheelhouse at the time.

Ocean Fisheries (OFL) pleaded guilty to a charge under the Health and Safety in Employment Act 1992 of failing to take all reasonable steps to protect the safety of the crew. In particular, it failed to:

- install high-water-level alarms (which would likely have prevented the sinking and were not difficult or expensive to install, although they were not standard industry practice)
- verify that abandon ship drills were regularly undertaken to check the practicality of emergency escape routes
- ensure effective identification and communication of hazards and risks, including through crew training and communication

The High Court rejected arguments that the District Court had erred by:

- awarding emotional harm that was disproportionate to OFL's culpability
- awarding emotional harm reparation that was inconsistent with comparable cases in both amount and the methodology used
- failing to reduce the level of emotional harm payment to reflect the NZ\$60,000 already paid by OFL to the families

- ordering reparation to the son of one of the deceased and two sons of another deceased where the Court did not have victim impact statements.

We look forward to providing a further update in the next *Semaphore*. For now, haere rā and all the very best for the next quarter of 2022.

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