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Submission on the Maritime Transport (Offshore Installations) Amendment Bill
Transport and Infrastructure Select Committee
Submitted online

PEPANZ Submission: Maritime Transport (Offshore Installations) Amendment Bill

Executive Summary

i. Overall, we **support** the Maritime Transport (Offshore Installations) Amendment Bill but consider some amendments are warranted.

ii. We **support** requirements for petroleum operators/owners to demonstrate financial assurance for potential impacts of incidents such as oil spills.

iii. We **partially support** Clause 6:

   a. We support the intent of Clause 6 which allows Marine Protection Rules (set by the relevant Minister) to "provide for the types of liability and the amount for which insurance or other financial security must be held". This is important as it means market standard product may be deemed acceptable in the yet-to-be-revised Marine Protection Rules.

   b. Although it is a useful start, the Bill will merely *enable* Marine Protection Rules to specify market standard insurance but does not *require* it be accepted. This leaves open the possibility that unworkable Rules may be promulgated, and we wish for the Committee to be aware of this risk. To mitigate the risk of unworkable rules being promulgated, we prefer that the Bill *requires* that the Marine Protection Rules specify market standard insurance must be accepted (while giving flexibility to specify which insurance products are acceptable, e.g. the well-established "EED 8/86" policy).

iv. We **partially support** Clause 5:

   a. We **support** the aspect which limits the liability faced by insurers to the sum and scope of the insurance policy, because it is not appropriate for the insurer to face the strict and unlimited liability of the petroleum operator/owner.

   b. We **do not support** the aspect which amends the regime for 'direct right of action' (this relates to how claimants can make a claim directly to the insurer rather than to the insured party).

   We understand the clause, which amends the regime for 'direct right of action', may be drafted in anticipation of where an ongoing insurance law review may land. We do not support prejudging the outcome of a separate review in this way. If other aspects of insurance law are ultimately amended, relevant sections of the Maritime Transport Act can be amended as part of an omnibus bill or through consequential amendments.

   The 'direct right of action' in current section 385J is unique and not aligned with how insurance policies typically operate. This 'direct right of action' provision in the Act should be removed, on the basis that it is misaligned with current insurance practice and law in New Zealand. The 'direct right of action' could be reinstated in a revised and improved form through omnibus legislation arising from the general review of insurance law if deemed appropriate.

Introduction

1. The Petroleum Exploration and Production Association of New Zealand ("PEPANZ") represents private sector companies holding petroleum exploration and mining permits, service companies and individuals working in the industry.

2. This document constitutes PEPANZ's submission on the Maritime Transport (Offshore Installations) Amendment Bill, which closes for consultation on 14 August 2019.
3. We wish to present to the select committee in support of our submission.

Background

4. The Maritime Transport Act 1994 ("MTA") imposes a strict, unlimited liability regime for petroleum operators/owners in the event of incidents causing harm to third parties. We support this liability framework. As a way to demonstrate that owners can meet at least a portion of their liabilities, financial assurance has been required although traditionally at low levels well below what operators in fact insure for.
5. PEPANZ has engaged on many iterations of proposals to significantly increase the monetary levels of offshore financial assurance since 2014. PEPANZ supported the decision in September 2017 to increase levels up to $600 million with the assurance requirement determined under a risk assessment framework. This new regime however was not brought into force due to guidance being needed to finalise the regime. Our support for higher financial assurance requirements has been on the critical proviso that 'market standard insurance' will be accepted by the regulator as a means of demonstrating financial assurance (as it is in other comparable jurisdictions).
6. Regulatory practice in New Zealand to date has meant that non-standard cover has been required at the in-force level of ~$27 million (this cover required so-called 'MTA Endorsements' to cover the liabilities under the MTA). At smaller sums, bespoke policy with 'MTA Endorsements' has generally been obtainable to date, but is very unlikely to be able to be obtainable at larger amounts and this has been our key concern.
7. We would not expect to see "guidance" materials be relied on too heavily in implementing these reforms, given that these materials have no real legal standing and can be easily amended.

Clause 6

8. We partially support clause 6.

The Bill should not only <u>enable</u> subsequent Rules to allow market standard insurance, but should <u>require</u> the Rules to accept market standard insurance.

9. We support the intent of Clause 6 of the Bill which allows Marine Protection Rules (which are set by the relevant Minister as tertiary legislation) to "provide for the types of liability and the amount for which insurance or other financial security must be held". This is an important first step, as it means market standard insurance *may* be deemed acceptable in the yet-to-be-revised Marine Protection Rules.
10. However, the Bill's explanatory note is overly optimistic when it states "These changes will enable owners of regulated offshore installations to meet the Act's requirements using insurance policies that are consistent with internationally available best practice policy wording and available on the international market". In contrast to the optimism expressed in the explanatory note, the Bill will merely *enable* Marine Protection Rules to specify that the use of market standard insurance, but does not *require* it be accepted.
11. This leaves open the possibility that unworkable Rules may be promulgated, and we wish for the Committee to be aware of this risk. To mitigate this risk, we prefer that the Bill *requires* that the Marine Protection Rules specify market standard insurance must be accepted (while giving flexibility for the Rules to specify which insurance products are acceptable, e.g. the well-established "EED 8/86" policy).
12. Deeming standard insurance as acceptable is crucial because the relevant insurance policies applying to the upstream petroleum sector are, like other types of insurance, subject to a set of standard terms and conditions. These policies represent conventions developed over many years of practical and legal experience around the world. The global insurance and re-insurance market in turn is based on adherence with standard approaches.
13. We note that standard market insurance is acceptable to regulators in other jurisdictions in which our members operate. It is important to note that in assessing the risk that parties are insuring, underwriters rely on classification societies (e.g. Bureau Veritas), to confirm that the insured operations comply with relevant standards. This is effectively an independent third-party verification of the insured risks

Clause 5

14. We partially support Clause 5.

The bill makes a positive change to ensure that insurers are only liable for the insured amount

15. Current Section 385J of the MTA means that the insurer faces liabilities greater than the financial limit and scope of the insurance policy that they provide. This places upon the insurer the strict and unlimited liability that the petroleum operator faces and is inappropriate, non-standard, and apparently unintended.

16. We support that the bill addresses the current problem by limiting the liability of the insurer to the sum and scope that their insurance policy relates (i.e. insurers will no longer face the strict and unlimited liability of the petroleum operator).
17. The bill, however, appears to go beyond the immediate solution outlined in the prior paragraph. The bill proposes to amend the nature of how claimants can exercise a direct right of action (this relates to how claimants can make a claim directly to the insurer rather than only to the insured party). We understand that the current provision in the MTA for direct right of action is unique in New Zealand law[1].

The Bill should not amend the regime for direct claims ahead of a broader insurance law review

18. The Ministry of Business, Innovation and Employment is undertaking a broad review of insurance law in New Zealand[2], and we infer that the current Maritime Transport (Offshore Installations) Amendment Bill intends to make changes to the direct claims framework *in anticipation* of where that insurance review will land. We do *not* support this and consider prejudging the outcome of other ongoing policy work to be a risky approach to legislation and public policy. If insurance law is to be eventually amended, the eventual amendment legislation can update the MTA through an omnibus bill or through consequential amendments.
19. Prejudging the outcome of a separate review, as this current bill proposes, means that aspects of insurance policy in the MTA will be amended *before* the parliamentary process on the substantive matters takes place. Ultimately, if the broad insurance reform does not eventuate as anticipated then the MTA will be out of sync and need to be again revised.
20. We recommend that the core issue in s385J be addressed by clarifying that insurers only faces liability of the scope and sum that the relevant insurance cover prescribes. We recommend that the MTA's framework for 'direct right of action' be amended through omnibus/consequential amendments as part of changes to insurance legislation if the insurance law review (and parliament) deems it appropriate.
21. The current 'direct right of action' in section 385J (which allows claimants to claim directly from the insurer) should be repealed on the basis that it is misaligned with current insurance practice and law in New Zealand. The 'direct right of action' could be reinstated in a revised form through omnibus legislation arising from the general review of insurance law.

Reference should be to "alleged liability"

22. In clause 5's amendment to s385J(1), reference to "liability" should be recast as "alleged liability", as it will not necessarily be proven at the time of the claim.

If the clause if largely retained, direct right of action should be specified as a last resort

23. If, contrary to our preferences, the committee decides to fundamentally retain amendments to s385J as proposed in the bill, we suggest the bill include the principle that the claimant make claims from the petroleum operator in the first instance, and only approach the insurer as a last resort. This is to account for the fact that direct claims are not the standard approach.

Marine Protection Rule 102 and guidance

24. We understand that consultation on amendments to Marine Protection Rule 102 and associated guidance will open once the Bill has passed. Although not within the Committee's direct ambit, we note our intention to make formal comment on amendments to Rule 102 at the appropriate time. Issues we expect to raise will include:
    - ensuring that that Rule 102 will enable accessible market-standard insurance to be accepted;
    - ensuring clarity about how assurance requirements for Rule 102 (on third party liability) relate to assurance requirements for Rule 131 (on well-control in the case of loss of well-control/ blowout); and
    - the workability of transitional provisions.

[1] Except for section 9 of the Law Reform Act 1936 which allows statutory charges to be made.
[2] https://www.mbie.govt.nz/business-and-employment/business/financial-markets-regulation/insurance-contract-law-review/. *Insurance contract law review: Options paper*. See pages 42-44 especially.