

Maritime Transport (Offshore Installations) Amendment Bill

Government Bill

As reported from the Transport and Infrastructure Committee

Commentary

Recommendation

The Transport and Infrastructure Committee has examined the Maritime Transport (Offshore Installations) Amendment Bill and recommends that it be passed with the amendments shown.

Introduction

This bill seeks to amend the Maritime Transport Act 1994 to clarify and strengthen the requirements on owners of offshore oil and gas installations to hold insurance or other financial security against possible damage to the environment in the event of an oil spill.

The Act entitles anyone affected by oil damage from an offshore installation to make a claim against the owner. It specifies that owners have unlimited liability, and provides for owners to hold insurance or other financial security in relation to this liability. This is intended to mitigate the financial risks to the Crown and other parties should the owner be unable to meet their obligations in the event of a major oil spill.

The bill would not remove the unlimited liability of the owner of an offshore installation. Rather, it would clarify the liability of insurers (or persons providing financial security) to the Crown and others affected by an oil spill. It would also confirm the conditions under which a claimant could commence proceedings against an insurer.

The bill would also allow for changes to the Marine Protection Rules. It would allow for new rules to be made specifying the requirements for insurance or other financial security.

Proposed amendments

This commentary covers the main amendments we recommend to the bill as introduced. We do not discuss minor or technical amendments.

Amendments to Part 26A of principal Act

Clause 5 of the bill proposes replacing section 385J in Part 26A of the Maritime Transport Act. New section 385J would clarify the rights of third-party claimants against insurers of regulated offshore installations (such as oil and gas installations located in New Zealand waters). We recommend four main amendments to proposed new section 385J.

The threshold for making a claim should be alleged liability

Proposed section 385J(1) states that new section 385J would only apply if the owner of an oil or gas installation had a liability to a claimant. This contrasts with existing section 385J(1) in the Act, which allows for claimants to commence proceedings to enforce a claim based on alleged liability of the owner.

We consider that alleged liability should be sufficient for a claimant to commence proceedings. This would allow a claimant to commence proceedings even if liability has not been proven, or if it is still the subject of a court judgment. We recommend amending new section 385J(1) to clarify that a claimant may commence proceedings based on alleged liability of the owner of the oil or gas installation to the claimant.

Adding a requirement for claimants to obtain leave of the court

As introduced, new section 385J does not include any requirement for a claimant to obtain leave of the court to commence proceedings against an insurer.

We believe this requirement should be included to ensure that third-party claimants have a legitimate claim. We recommend inserting new section 385J(3A) to clarify that leave of the court must be obtained for action to proceed. We understand, based on case law, it is likely that the court would grant leave if the owner of the installation has had a judgment against it that it has failed to satisfy, or there is:

- an arguable case of liability against the owner,
- an arguable case that the insurer's policy covers liability, and
- a real possibility that, if the claimant obtains judgment against the owner, the owner would not be able to meet it (for example, because the owner is or becomes insolvent during proceedings).

Insurers cannot rely on a defence based on the actions or inactions of an owner

Proposed new sections 385J(3) and 385J(4)(c)(i) would allow for a claimant to commence proceedings to recover an insured amount from the insurer, and for the insurer to use any defence that it would use if the claim were being made by the owner. We are concerned that this would result in insurers relying on defences based on the actions or inactions of the owner during the claims process. Such "after the fact"

defences could include the insurer claiming that they are not liable due to the owner's failure to provide information or assistance to the insurer in relation to the claim.

We recommend inserting section 385J(4A) to confirm that, if a claimant commences proceedings against the insurer, the insurer would not be able to rely on this kind of defence. This subsection would make it clear that an insurer would be prohibited from using a defence in which they rely on any actions or omissions of the owner of the installation that occurred after the event that gave rise to the liability.

Removal of section 385J(8) to avoid confusion

The bill as introduced includes section 385J(8), which references the rights of a claimant in relation to section 9 of the Law Reform Act 1936. Proposed section 385J(4A) would provide for a claimant to commence proceedings if given leave of the court, which makes this reference to section 9 of the Law Reform Act 1936 unnecessary.

We believe the necessary process for a claimant to proceed against an insurer would be made clear in section 385J(4A). To avoid confusion, we recommend removing section 385J(8).

Appendix

Committee process

The Maritime Transport (Offshore Installations) Amendment Bill was referred to the committee on 27 June 2019. The closing date for submissions was 14 August 2019. We received and considered 12 submissions from interested groups and individuals. We heard oral evidence from three submitters at hearings in Wellington.

We received advice from Maritime New Zealand, the Ministry of Business, Innovation and Employment, and the Ministry of Transport.

Committee membership

Darroch Ball (Chairperson)

Chris Bishop

Paul Eagle

Raymond Huo

Matt King

Jan Logie

Jami-Lee Ross

Tim van de Molen

**Maritime Transport (Offshore Installations)
Amendment Bill**

Key to symbols used in reprinted bill

As reported from a select committee

text inserted unanimously

~~text deleted unanimously~~

Hon Julie Anne Genter

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Amendments to Part 26A of principal Act

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Part 2

Other amendments to principal Act

6	Section 387 amended (Marine protection rules relating to marine protection documents)	4
7	Schedule 1AA amended	4

The Parliament of New Zealand enacts as follows:

1 Title

This Act is the Maritime Transport (Offshore Installations) Amendment Act **2019**.

cl 2	Maritime Transport (Offshore Installations) Amendment Bill	
2	Commencement	
	This Act comes into force on 1 November 2019 <u>1 January 2020</u> .	
3	Principal Act	
	This Act amends the Maritime Transport Act 1994 (the principal Act).	
	Part 1	5
	Amendments to Part 26A of principal Act	
4	Section 385A amended (Interpretation)	
	In section 385A, repeal the definition of insurance .	
5	Section 385J replaced (Rights of third parties against insurers of regulated offshore installations)	10
	Replace section 385J with:	
385J	Rights of third-party claimants against insurers of regulated offshore installations	
(1)	This section applies if the owner of a regulated offshore installation has a <u>is alleged to have incurred</u> liability to a person (a claimant) under any of the following sections:	15
(a)	section 385B (liability to the Crown and marine agencies for costs of cleaning up pollution):	
(b)	section 385C (liability for pollution damage from marine structures and operations):	20
(c)	section 385D (liability for unattributable pollution damage from marine structures and operations).	
(2)	The claimant may recover the insured amount of the liability from any person (in this section, the insurer) providing insurance or other financial security for the owner's liability for pollution damage to which any certificate of insurance referred to in section 385H relates.	25
(3)	The insured amount of the liability is the amount of indemnity (if any) payable under the terms of the contract of insurance or other financial security in respect of the owner's liability to the claimant.	
<u>(3A)</u>	<u>Proceedings may only be brought by a claimant against an insurer under this section with the leave of the court.</u>	30
(4)	In proceedings brought by a claimant against an insurer under this section,—	
(a)	the insurer stands in the place of the owner as if the proceedings were proceedings to recover damages, compensation, or costs from the owner; and	35

(b)	the parties have the same rights and liabilities, and the court has the same powers, as if the proceedings were proceedings brought against the insured person; and	
(c)	the insurer is entitled to rely on any defence or any other matter in answer to the claim or in reduction of its liability to the claimant—	5
(i)	that the insurer would have been entitled to rely on in a claim made by the owner under the terms of the contract of insurance or other financial security; or	
(ii)	that the owner would have been entitled to rely on in proceedings brought by the claimant against the owner in respect of the liability.	10
(4A)	<u>However, despite subsections (3) and (4)(c)(i), the insurer is not entitled to rely on any defence arising from an act or omission by the owner that occurred after the event that gave rise to the liability (for example, a defence based on a failure by the owner to comply with a condition that the owner provide information or assistance to the insurer).</u>	15
(5)	Nothing in this section—	
(a)	entitles a claimant to recover any amount from a re-insurer under a contract or arrangement for re-insurance:	
(b)	prejudices any claim, or the enforcement of any claim, by any person against the owner of a regulated offshore installation in respect of pollution damage.	20
(6)	Any payment made by the insurer to the claimant under this section in respect of the liability discharges, to the extent of the payment, the liability of the insurer to make a payment to the owner under the terms of the contract of insurance or other financial security in respect of the liability.	25
(7)	An insurer's liability to a claimant under this section is not reduced, discharged, or otherwise affected by—	
(a)	any compromise or settlement between the insurer and the owner in respect of the liability; or	30
(b)	any payment by the insurer to the owner in respect of the liability unless and to the extent that the amount of the payment is or has been paid by the owner to the claimant in respect of the liability.	
(8)	The rights conferred on a claimant under this section are in addition to the rights conferred under section 9 of the Law Reform Act 1936 or any other law.	35
	Compare: Civil Liability (Third Party Claims Against Insurers) Act 2017 (NSW) ss 4, 7, 9–11	

Part 2

Other amendments to principal Act

6 Section 387 amended (Marine protection rules relating to marine protection documents)

- (1) In section 387(4), replace “relevant insurance policy, bond, or other form of financial security” with “relevant insurance or other financial security”. 5
- (2) After section 387(4), insert:
- (4A) Without limiting subsection (4), the marine protection rules may—
- (a) provide for the types of liability and the amount for which insurance or other financial security must be held ~~under~~ for the purpose of section 385H (and may provide for different amounts for different types of liability); and 10
 - (b) set requirements and criteria for regulated offshore installations that must be satisfied in respect of insurance or other financial security for the costs of complying with a marine oil spill contingency plan in accordance with section 313. 15

7 Schedule 1AA amended

In Schedule 1AA, after Part 1, insert:

Part 2

Maritime Transport (Offshore Installations) Amendment Act 2019 20

4 Old section 385J applies to existing proceedings

Section 385J (as in force immediately before its replacement by the Maritime Transport (Offshore Installations) Amendment Act **2019**) continues to apply to any proceedings brought under that section that are commenced before that Act comes into force. 25

Legislative history

20 June 2019	Introduction (Bill 154–1)
27 June 2019	First reading and referral to Transport and Infrastructure Committee