

## LEGISLATION NOTE: NEW ZEALAND'S MARITIME TRANSPORT AMENDMENT ACT 2017

Dr Bevan Marten\*

In December 2017 New Zealand's Parliament enacted legislation amending the Maritime Transport Act 1994 (MTA94). In amongst the technical amendments were several matters of wider interest, including an approach to limiting liability for wreck removal that was ultimately abandoned, and some updates to the country's oil pollution liability regime. There were also provisions on matters as diverse as drug and alcohol testing, coastal shipments to offshore islands, rocket launches, and pilots' liability.

### Limitation of Liability for Wreck Removal

New Zealand's global limitation regime is based on the Convention on Limitation of Liability for Maritime Claims 1976 (LLMC), under which shipowners can limit their liability in respect of a range of maritime claims to a maximum sum of money linked to the tonnage of their vessel.<sup>1</sup> Following the passage of the 2017 amendment Act, the MTA94's limitation regime remains substantively unchanged. However, this outcome was not guaranteed. The initial draft of the Bill contained a provision that would have significantly extended the scope of claims not subject to limitation in the context of wreck removal.

The current Act, which gives the LLMC the force of law,<sup>2</sup> states that this regime does not limit or effect sections 33J, 33K, or 110 of the MTA94,<sup>3</sup> which set out the wreck removal powers of regional councils and Maritime New Zealand. Removing these sections from the list of those claims subject to limitation helps public authorities to carry out their responsibilities in respect of hazards to navigation or derelict vessels. For example, Maritime New Zealand could order a vessel's owner to remove a wreck, and that owner could not refuse to do so on the basis that its liability was capped by the LLMC.

This exception is linked to the widely-exercised reservation available to states under article 18 of the LLMC to exclude wreck removal (or, more precisely, claims falling within art 2(1)(d) and (e) of the LLMC) from the limitation regime. To date, New Zealand has made only partial use of this option: it has effectively removed public authorities' claims fitting this description from the regime's scope, but not those of private parties.<sup>4</sup>

The change proposed by the Bill as introduced in late 2016 would have taken maximum advantage of the reservation available in article 18 by broadening the exclusion so that New Zealand's domestic legislation matched the wording of arts 2(1)(d) and (e) and 18(1)(b). This would have removed shipowners' ability to limit liability in relation to:<sup>5</sup>

- (a) claims in respect of the raising, removal, destruction, or rendering harmless of a ship that is sunk, wrecked, stranded, or abandoned, including anything that is or has been on board the ship; and
- (b) claims in respect of the removal, destruction, or rendering harmless of the cargo of a ship.

New Zealand law would then have mirrored the approach taken in Australia, where arts 2(1)(d) and (e) have not been given the force of law.<sup>6</sup>

The effect of the proposed amendment would have been to remove the distinction between "public" and "private" wreck removal, permitting any party that could bring its claim within the description of art 2(1)(d) and (e) of the LLMC to circumvent the liability regime. For example, following a major container ship casualty a private marina owner that removed a partially submerged container from the marina could argue that it was "rendering harmless the cargo of a ship", and its claim was therefore not subject to the owner's right to limit liability under the LLMC. The owner would sit in the same position as a public authority carrying out wreck

---

\* Senior Lecturer, Victoria University of Wellington School of Law; bevan.marten@vuw.ac.nz.

<sup>1</sup> *Convention on Limitation of Liability for Maritime Claims* 1456 UNTS 221. See Bevan Marten, *Maritime Law in New Zealand* (2016) 188-195.

<sup>2</sup> *Maritime Transport Act 1994* (NZ), s 84A.

<sup>3</sup> *Maritime Transport Act 1994* (NZ), s 86(4)(a).

<sup>4</sup> It has done so as a matter of domestic law only: New Zealand has neglected to formally communicate its position at the international level.

<sup>5</sup> *Maritime Transport Amendment Bill 2016 (200-1)* (NZ), cl 8(2).

<sup>6</sup> *Limitation of Liability for Maritime Claims Act 1989* (Cth), s 6.

removal operations, and in a different position than if it were only making a claim for damage to its property under art 2(1)(a) of the LLMC, for example. The explanatory note accompanying the Bill's introduction stated that the reason for this was that the "Exclusion of such claims from limitation potentially leaves more money available to meet claims for pollution damage in the event of a major maritime incident such as the grounding of the *Rena*."<sup>7</sup>

Normally there is a significant advantage in copying an international convention's wording into domestic law where possible, rather than attempting to paraphrase it, because it makes the law clearer and easier to interpret in line with the international instrument's purpose. Nonetheless, on this occasion, New Zealand's approach (which is similar to that of the United Kingdom)<sup>8</sup> is arguably the better one. First, there are important public policy goals connected with wreck removal such as the promotion of navigation safety and the protection of the environment. Giving public authorities an exclusion from the liability regime enables them to perform this important work without being subject to the limitation regime, and therefore having to rely on getting only their *pro rata* slice of the shipowner's liability fund, in competition with other claimants.

There is a related objection, raised in the New Zealand branch of the Maritime Law Association of Australia and New Zealand (MLAANZ)'s submission on this point, which argued that the proposed amendment did not reflect "the intention of the reservations and would have the effect of elevating some classes of private claimants over others."<sup>9</sup> In other words, it is difficult to justify prioritising a marina owner's claim in tort that can be brought within the description of "wreck removal" over another party's action in tort for damage to its property, given Parliament has allocated responsibility for the public policy goals around wreck removal to government agencies.

P & I Services, which represents the International Group of P & I Clubs in New Zealand, also argued against the reform. It noted that increasing the amount of money available to claimants may look good on paper, but without a means of enforcing claims against offshore owners who decide to simply walk away from their liabilities, such a change would be meaningless. The company put forward the Nairobi Convention on the Removal of Wrecks as the obvious ready-made solution for New Zealand's liability regime for wreck removal,<sup>10</sup> as it includes a compulsory insurance regime with a right of direct action against insurers.<sup>11</sup> As with the oil pollution example below, a critique of this nature shows the importance for New Zealand of undertaking a more thorough review of the MTA94, and the wreck removal and liability provisions in particular. New Zealand has an important decision to make in terms of whether to adopt the Nairobi Convention, which is supported by the insurance industry, or risk designing a unilateral domestic solution that ties in with the existing Resource Management Act 1991.<sup>12</sup>

Ultimately, despite receiving support from the Bay of Plenty iwi Te Runanga o Ngati Whakaue ki Maketu,<sup>13</sup> Parliament's Transport and Industrial Relations Select Committee decided to remove the proposed amendment to the liability regime from the Bill, echoing the tenor of MLAANZ's submission in relation to elevating one class of private claimant above another.<sup>14</sup> It also removed an exclusion relating to claims related to the Hazardous and Noxious Substances Convention,<sup>15</sup> on the basis that New Zealand was not yet a party to that Convention, and it had not yet entered into force internationally.<sup>16</sup> The amending Act therefore does not include this change, and readers of this journal should take heart from this example of MLAANZ and its members successfully engaging with the law reform process.

More disappointing to observe was the level of understanding demonstrated in the speeches given by Members of Parliament, including the former Minister of Transport, referring to this Bill as addressing the problems arising from the *Rena* disaster of 2011.<sup>17</sup> It was the Maritime Transport Amendment Act 2013 that addressed the more immediate shortcomings of New Zealand's legislation, such as by adopting the 1996 Protocol to the LLMC, giving that Convention the force of law (and repealing the previous domestic paraphrasing of the

<sup>7</sup> *Maritime Transport Amendment Bill 2016 (200-1)* (NZ), explanatory note.

<sup>8</sup> *Merchant Shipping Act 1995* (UK), sch 7, pt II, cl 3.

<sup>9</sup> MLAANZ, *Submission on the Maritime Transport Amendment Bill* (1 February 2017) [11]. I contributed to the drafting of this submission as a member of MLAANZ.

<sup>10</sup> *Nairobi International Convention on the Removal of Wrecks* 46 ILM 697. See Nicholas Gaskell and Craig Forrest, 'The Wreck Removal Convention 2007' [2016] *Lloyd's Maritime and Commercial Law Quarterly* 49.

<sup>11</sup> P & I Services, *Submission on the Maritime Transport Amendment Bill* (24 January 2017).

<sup>12</sup> Bevan Marten *Maritime Law in New Zealand* (Thomson Reuters, Wellington, 2016) 159.

<sup>13</sup> Te Runanga o Ngati Whakaue ki Maketu, *Submission on the Maritime Transport Amendment Bill* (27 January 2017).

<sup>14</sup> *Maritime Transport Amendment Bill 2017 (200-2)* (NZ), commentary.

<sup>15</sup> *Maritime Transport Amendment Bill 2016 (200-1)* (NZ), cl 8(2)(c).

<sup>16</sup> See MLAANZ, *Submission on the Maritime Transport Amendment Bill* (1 February 2017) [13]-[19].

<sup>17</sup> See for example Hon Simon Bridges MP, Minister of Transport (16 November 2016) 718 *New Zealand Parliamentary Debates* 15146.

Convention), and adopting the Bunkers Convention 2001. This was not mentioned in any of the speeches during the Bill's passage through Parliament.

The 2017 legislation had no such effect, as originally introduced or as enacted, for the reasons pointed out in the submission of P & I Services: without addressing wreck removal in a comprehensive manner, including a means of taking actions outside of New Zealand against shipowners' liability insurers (as provided for in the Nairobi Convention), there is no sense merely stripping back the shipowner's right to limit liability. Neither the previous National-led government, nor the new Labour-led government, have shown any inclination towards putting the resources into such an undertaking. The speeches reported in Hansard may give us some comfort that the risks involved in shipping, brought into stark relief by the *Rena*, are still fresh in our representatives' memories. However, it remains important for us as maritime lawyers to explain the ongoing risks faced by New Zealand in the event that our next disaster involves an irresponsible owner, perhaps backed by an insurer that is not a member of the International Group of P & I Clubs, who decides to simply wash its hands of the wreck.

## Civil Liability for Oil Pollution

One group of provisions was aimed at tidying up New Zealand's civil liability regime for oil pollution compensation in Part 25 of the MTA94. This is a very unsatisfactory hybrid of domestic pollution legislation and the International Convention on Civil Liability for Oil Pollution Damage 1992 (CLC).<sup>18</sup> The amending provisions, which entered into force in June 2018, are not an attempt to comprehensively reform this regime. Instead they primarily provide for New Zealand's adoption of the Supplementary Fund Protocol 2003.<sup>19</sup> This significantly raises the limit of liability applicable to pollution damage caused by oil tankers, in exchange for a very small rise in oil pollution levies. It was an uncontroversial decision of obvious benefit to New Zealand given the country's extensive, isolated, and environmentally significant coastline.<sup>20</sup> Australia adopted the same Protocol in 2009.

Other shortcomings of the regime were left untouched, with the exception of amending the MTA94's definition of "CLC ship" to match that provided in the CLC itself.<sup>21</sup> This provision is a good example of the well-known dangers of bringing international liability conventions into force using a domestic "paraphrasing" of their articles. The former New Zealand definition introduced the requirement that the ship be "registered in, or (if unregistered) flying the flag of, a CLC State" – which does not appear in the CLC Convention.<sup>22</sup> This could have resulted in an embarrassing position for New Zealand in the (admittedly unlikely) event of a casualty involving a tanker flying the flag of a state not party to CLC92, because New Zealand's provisions relating to the Fund's compensation would not have applied.<sup>23</sup> In this way a seemingly minor change in wording could have a massive financial impact in the wake of a disaster. While this particular problem has now been covered off, others remain, stemming from the attempt to merge the tanker-specific CLC regime with a domestic pollution regime applicable to all vessels.<sup>24</sup> The entirety of these sections needs to be revised.

## Other Provisions

### Drug and Alcohol Testing

The bulk of the Maritime Transport Amendment Act 2017 amended the drug and alcohol testing regime, which was originally introduced in 2013 to meet New Zealand's international obligations under the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers.<sup>25</sup> This proved the most controversial aspect of the Bill: 18 of the 23 Select Committee submissions focused on it. In particular, the introduction of random drug testing was opposed by elements of the industry concerned that the Health and

---

<sup>18</sup> *International Convention on Civil Liability for Oil Pollution Damage as amended by the Protocol of 1992* 1956 UNTS 255 (CLC); Bevan Marten, *Maritime Law in New Zealand* (2016) 183-186.

<sup>19</sup> *Protocol of 2003 to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1992*.

<sup>20</sup> Transport and Industrial Relations Select Committee, New Zealand Parliament, *International treaty examination of the Protocol of 2003 to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1992 (Supplementary Fund Protocol)* (16 March 2015).

<sup>21</sup> *Maritime Transport Amendment Act 2017* (NZ), s 11; amending *Maritime Transport Act 1994* (NZ), s 342; see also *Maritime Transport Amendment Act 2017* (NZ), s 13, amending *Maritime Transport Act 1994* (NZ), s 370 (definition of "Convention ship").

<sup>22</sup> CLC, art I(1). Having a ship registered in a contracting state is relevant to the compulsory insurance requirement under art VII of the CLC92, but not to an owner's liability under arts III-VI, nor to compensation from the Fund's under art 4 of the Fund Convention.

<sup>23</sup> *Maritime Transport Act 1994* (NZ), ss 370 (definitions of "CLC ship" and "Convention ship") and 372.

<sup>24</sup> For examples see Bevan Marten, *Maritime Law in New Zealand* (2016) 187-188.

<sup>25</sup> *International Convention on Standards of Training, Certification and Watchkeeping for Seafarers* 1361 UNTS 2.

Safety At Work Act 2015 already provided sufficient protections, and there was insufficient evidence of a drug problem that needed addressing in the industry.<sup>26</sup>

### **Coastal Shipping**

Another minor change proposed in the Bill, ultimately removed at the last minute, was a clause effectively removing the Chatham Islands (home to around 600 people) from New Zealand's cabotage regime. It would have removed from the definition of "coastal cargo" shipments from a New Zealand offshore island to mainland ports, thus permitting a foreign-flagged vessel to service the Chathams without authorisation from the Minister of Transport.<sup>27</sup>

The cabotage regime in what is now section 198 of the MTA94 was by far the most fiercely contested aspect of the original Act, both in submissions from the public and parliamentary debates.<sup>28</sup> The threat of foreign competition represented by this amendment similarly met with stiff opposition from Chatham Islands Shipping Ltd, a not-for-profit organisation that demise charters the Cook Islands-flagged *Southern Tiare* to provide the current Chathams service, as well as the New Zealand Shipping Federation.<sup>29</sup> This opposition was taken up by the Labour Party and Green Party members of the Select Committee, and following New Zealand's change of government in late 2017 the Labour-led government had the clause removed from the Bill.

### **Pilots' Liability**

A final point addressed, following submissions from the New Zealand Maritime Pilots Association and Wellington lawyer John Burton, was the liability of pilots engaged in remote pilotage.<sup>30</sup> This practice is used in some New Zealand ports, for example during particularly rough weather, when a pilot is forced to give instructions to a vessel from a second vessel, or while onshore.<sup>31</sup> Section 60B of the MTA94, the provision limiting pilots' liability for negligence, did not comfortably match this practice as it applied to a pilot carrying out duties "while on board a ship." This exclusion has now been widened to include remote pilotage.<sup>32</sup>

### **Rocket Launches**

New Zealand's fledgling space industry, almost entirely the product of United States company Rocket Lab,<sup>33</sup> has seen the rapid development of an entire legislative regime in the Outer Space and High-altitude Activities Act 2017. The maritime sector has also been affected, through the introduction of s 33M(1A) of the MTA94. This empowers regional authorities to enact bylaws regulating rocket launches, including provisions that prohibit or regulate the use of ships. In this context regional authorities will have to be cautious, particularly where foreign-going shipping is concerned, as too strict a set of prohibitions may fall foul of New Zealand's international obligations relating to freedom of navigation. There will be a fine line to draw between achieving safety goals on the one hand, and unduly interrupting commercial, recreational and fishing operations on the other.

### **Final Comment**

The new Labour-led government in New Zealand took the unusual step, for this century, of appointing an Associate Minister of Transport to whom all maritime responsibilities have been delegated (Green MP Hon Julie-Anne Genter, whose professional background is in the transport sector). New Zealand has not had a dedicated "Minister of Marine" for many decades, and it will be interesting for the maritime sector to see whether having someone in government with this concentrated focus has any impact on progressing maritime policies effectively in this jurisdiction. Issues such as air pollution from shipping and the fate of New Zealand's coastal trade should be high on the agenda for a Minister in this position – but perhaps we will need to reinstate

<sup>26</sup> See for example Maritime Union of New Zealand Inc, Rail and Maritime Transport Union Inc, New Zealand Merchant Service Guild IUOW Inc, *Submission on the Maritime Transport Amendment Bill* (16 February 2016) [25].

<sup>27</sup> *Maritime Transport Amendment Bill 2016 (2001-1)* (NZ), cl 34.

<sup>28</sup> Bevan Marten, *Maritime Law in New Zealand* (2016)112-113.

<sup>29</sup> Chatham Islands Shipping Ltd, *Submission on the Maritime Transport Amendment Bill* (27 January 2017); New Zealand Shipping Federation, *Submission on the Maritime Transport Amendment Bill* (31 January 2017).

<sup>30</sup> New Zealand Maritime Pilots Association, *Submission on the Maritime Transport Amendment Bill* (26 January 2017); John Burton, Izard Weston, *Submission on the Maritime Transport Amendment Bill* (9 December 2016).

<sup>31</sup> *Maritime Rules Part 90: Pilotage* (NZ), r 90.23.

<sup>32</sup> *Maritime Transport Act 1994* (NZ), s 60B(3)(b).

<sup>33</sup> See *Maritime Transport Act 1994* (NZ), s 33M(1B).

the entire *Ministry* of Marine before any headway can be made against the cycleways, expressways, electric vehicles, and regional air routes that continue to dominate national discourse.