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Committee Secretariat
Transport and Infrastructure Committee
Parliament Buildings
Wellington

Dear Committee Members,

# ICNZ submission on the Maritime Transport (Offshore Installations) Amendment Bill

Thank you for the opportunity to submit on the *Maritime Transport (Offshore Installations) Amendment Bill* ('the Bill"), which was introduced to Parliament on 29 June 2019. ICNZ represents general insurers that insure about 95 percent of the New Zealand general insurance market, including about a trillion dollars' worth of New Zealand property and liabilities.

Please contact Andrew Saunders (andrew@icnz.org.nz or 04 914 2224) if you have any questions on our submission or require further information.

## Submission

ICNZ recognises that the current regime for offshore financial assurance needs to be revised to both significantly increase the level of assurance required and to reform the framework to make it compatible with international insurance market practice in this area. We are therefore generally supportive of the progression of the Bill and the planned accompanying changes to *Marine Protection Rules - Part 102*.

### Clause 5 of the Bill (section 385J replaced)

ICNZ agrees the current section 385J of the *Maritime Transport Act 1994* ('the Act') is highly problematic and needs to be reformed, particularly because the insurer is effectively put in the shoes of the insured, rather than the third party claimant being put in the shoes of the insured. We support reforming section 385J (as provided in clause 5 of the Bill) so that claims made by third parties against an insurance policy for liabilities arising from pollution damage under Part 26A of the Act are explicitly limited to the scope and quantum of the insurance policy. We note the Bill provides a completely reworked section 385J in place of the current provision and that this has been based on the New South Wales' *Civil Liability (Third Party Claims Against Insurers) Act 2017* ('the NSW Act').

In contrast to the NSW Act that is cited in the Bill and current section 9[1] of the *Law Reform Act 1936* the Bill does not however require the leave of the court before a claimant can take an action directly against an insurer for the insured's relevant liability. In the context of reform of section 9 being considered currently as part of a review of insurance contract law being undertaken by the Ministry of Business, Innovation and Employment (MBIE), ICNZ has advocated that section 9 should apply in cases of insolvency of the insured only and that third parties should be required to get leave of the court before bringing an action against an insurer directly.[2]

We consider leave of the court should also be required before a third party can bring an action against an insurer directly under section 385J. This would be consistent with both the NSW Act on which the new section 385J has been based and section 9 of the *Law Reform Act 1936* and would provide a way for the Court to ensure that a third party has a valid basis on which to proceed against an insurer. When considering whether to grant leave courts look at matters such as whether there is a prima facie claim against the insured and whether the insured has a prime facie claim under the policy of insurance. We recognise that section 385J of the Act applies to types of financial security other than insurance and that different treatment for those types of financial security may be appropriate.

We also note that subclause 8 of proposed section 385J provides that its rights "are in addition" to rights under section 9 of the *Law Reform Act 1936*, in contrast to the current provision that does not refer to section 9. The rationale for this change is not outlined specifically in the Bill or its supporting material and we note a cross-reference of this kind risks introducing uncertainty given there are differences in the basis and scope of these provisions. The efficacy of this cross-reference and the relationship between the two provisions will also need to be reconsidered following likely changes to section 9 as part of the current review of insurance contract law.

One further aspect that is worthy of consideration is whether there is a need for section 385J to explicitly recognise and provide for the potential for there to be multiple insurance contracts held by different parties, or whether this can be simply managed through application of the provisions, the marine protection rules, or guidance? This is relevant where there are multiple insurance policies, each held by a different joint venture participant company in relation to their respective shares of a petroleum permit.[3]

## Clause 6 of the Bill (section 387 amended)

ICNZ supports clause 6 of the Bill, which will enable the making of marine protection rules that specify more specific requirements and criteria for insurance or other financial security that must be held in relation to regulated offshore installations.

The types of relevant insurance policy (e.g. Operators Extra Expense (OEE) for oil/gas well control situations) have evolved internationally over the last 50+ years and current policy wordings reflect practical learnings and legal experience from around the world over that time. Whilst we understand insurers can provide some variations to standard polices to suit certain clients or jurisdictions, insurers

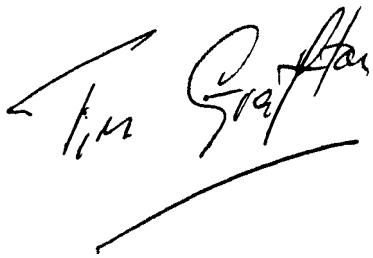
[1] Section 9 of the New Zealand's *Law Reform Act 1936* allows a third party who has been wronged by a person with insurance to claim directly against the person's insurer, by creating a statutory "charge" that attaches to the insurance money from the date of the event giving rise to the third party's claim. The charge attaches even if the insured is insolvent or bankrupt, which means that the third party's claim is prioritised over claims from the insured's other creditors.

[2] Refer to page 21 of ICNZ's submission dated 5 July 2019 on the options paper titled 'Insurance Contract Law Review' (released by MBIE in April 2019), which is available from: www.icnz.org.nz/fileadmin/Assets/Submissions/ICNZ_submission_on_ICLR_Options_Paper_050719.pdf.

[3] An exploration or mining permit issued under the *Crown Minerals Act 1991*.

are limited by their underwriting rules and prudential regulations as well as commercial considerations. Allowing the marine protection rules to be more specific in terms of the type and scope of insurance that can be used to meet the assurance requirements in the Act provides the ability to align these specific assurance requirements with international insurance practice and regulatory expectations in other relevant jurisdictions. Achieving this through appropriate revisions to the marine protection rules will be fundamental to putting in place a workable regime for offshore financial assurance. We note consultation on this is planned following progress of the Bill.

Yours sincerely,



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