Protection of the Sea (Prevention of Pollution from Ships) Amendment (Oils in the Antarctic Area) Bill 2011

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Protection of the Sea (Prevention of Pollution from Ships) Amendment (Oils in the Antarctic Area) Bill 2011

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House: House of Representatives
Portfolio: Infrastructure and Transport
Commencement: the day after receiving Royal Assent

Links: The links to the Bill, its Explanatory Memorandum and second reading speech can be found on the Bill's home page, or through http://www.aph.gov.au/bills/. When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the ComLaw website at http://www.comlaw.gov.au/.

Purpose

This Bill makes amendments to the Protection of the Sea (Prevention of Pollution from Ships) Act 1983. The Bill implements changes made to Annex I of the International Convention for the Prevention of Pollution from Ships (MARPOL 73/78), which will mean a ban on the use or carriage of heavy grade oils in the Australian Antarctic Territory and to Australian ships elsewhere in the Antarctic Area except where it is necessary to secure the safety of a ship or in a search and rescue operation.\(^2\)

Background

The Antarctic and the Antarctic Treaty System (ATS)

A brief explanation of the ATS is provided by Ellie Fogarty:

Following the exploration of Antarctica from the mid-19th century to the early 20th century, Argentina, Australia, Chile, France, New Zealand, Norway and the United Kingdom claimed sovereignty over territory in the continent. Australia’s claim to the Australian Antarctic Territory (AAT) was, and remains, the largest [formal claim to sovereignty in the Antarctica], covering around 42 per cent of the continent (an area about three quarters the size of mainland Australia).

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1. Annex I is the Regulations for the Prevention of Pollution by Oil.
Until the 1950s, Antarctica was largely overlooked as a place of geostrategic significance. With the advent of the Cold War, however, states began to consider it as a potential location for submarine bases, nuclear testing and intelligence gathering. To quell growing unease, in 1959, the claimant states, with Belgium, Japan, South Africa, the Soviet Union and the United States, negotiated the Antarctica Treaty (the Treaty) to preserve the continent as a demilitarised zone for peaceful and cooperative science, free from international discord. To reach this agreement, existing territorial claims were suspended, new claims were prohibited, and no state activity could be taken as asserting, supporting or denying a claim for the life of the Treaty.

Since the Treaty’s entry into force in 1961, its number of States Parties has grown to 48. In addition to the 12 original signatories, 28 other states also have ‘consultative party’ status, allowing them to vote on decisions concerning Antarctic administration. The Treaty has also been supplemented with several additional instruments focused on protecting the Antarctic environment and wildlife, comprising the broader Antarctic Treaty System (ATS).

[A] growing understanding of Antarctica’s potential to provide food, economic and energy security is influencing the development of a number of states’ Antarctic policies. Antarctica plays an essential role in the global weather system, is a major carbon sink, and has vast marine resources and great potential for bioprospecting. Its major resource attraction, however, is its mineral resources, including coal seams, manganese ores, iron, uranium, copper, lead and other metals. Antarctica’s predicted oil reserves have been estimated at up to 203 billion barrels, with 50 billion barrels expected in the Weddell Sea and Ross Sea, which respectively cover the continental shelves adjacent to Australia and New Zealand’s claimed territories.

As Dr McGarth explains:

The AAT is an external Territory of Australia as a matter of Australian domestic law. Section 17 of the Acts Interpretation Act 1901 (Cth) defines “External Territory” to mean “a Territory, not being an internal Territory, for the government of which as a Territory provision is made in any Act”. The Australian Government declared the AAT to be a Territory under the authority of Australia on the commencement of the Australian Antarctic Territory Acceptance Act 1933 (Cth) in 1936. The Australian Antarctic Territory Act 1954 (Cth) provides for the government of the AAT and applies Australian law to the AAT.

Article IV of the ATS would seem to support Australia’s right to exercise jurisdiction over nationals of other parties to the Treaty.

Article IV of the Antarctic Treaty states:

1. Nothing in the present Treaty shall be interpreted as:

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(a) a renunciation by any Contracting Party of previously asserted rights or claims to territorial
sovereignty in Antarctica;

(b) a renunciation or diminution by any Contracting Party of any basis of claim to territorial
sovereignty in Antarctica which it may have whether as a result of its activities or those of its
nationals in Antarctica, or otherwise;

(c) prejudicing the position of any Contracting Party as regards its recognition or nonrecognition
of any other State’s right of or claim or basis of claim to territorial sovereignty in Antarctica.

2. No acts or activities taking place while the present Treaty is in force shall constitute a basis for
asserting, supporting or denying a claim to territorial sovereignty in Antarctica or create any
rights of sovereignty in Antarctica. No new claim, or enlargement of an existing claim, to
territorial sovereignty in Antarctica shall be asserted while the present Treaty is in force.  

Several states have increased their activity in the area and invested a great deal in building new
bases in the area. In particular, this has occurred in the area where Australia has claimed
sovereignty. There are currently some 120 scientific bases on Antarctica and an ever increasing
presence of non-ATS states. This growing presence in the area combined with icebergs and sea ice
in uncharted waters increase the likelihood of an oil spill in the area, which would have long lasting
and significant environmental consequences.

Australia continues to take an active interest in the region and to play a significant role in protecting
that environment, including through participation in annual Antarctic Treaty Consultative Meetings.

The 2005 Antarctic Treaty Consultative Meeting requested the International Maritime
Organization (IMO) examine ways to restrict the use of heavy grade oils in Antarctic waters.

The IMO’s Marine Environment Protection Committee adopted, on 26 March 2010, amendments
to Annex I of the International Convention for the Prevention of Pollution from Ships (MARPOL)
to ban the use or carriage of heavy grade oils in the Antarctic area, except where it is necessary
to secure the safety of a ship or in a search and rescue operation.  

Prevention of Pollution from Ships

The most important convention, providing a comprehensive approach to dealing with ocean
dumping by creating international guidelines to prevent ship pollution of the marine environment
(from accidental or operational causes), is the International Convention for the Prevention of
Pollution from Ships (MARPOL ). The IMO7 is responsible for managing MARPOL.  

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5. Cited in Dr C McGrath, ibid.
6. A Albanese (Minister for Infrastructure and Transport), ‘Second reading speech: Protection of the Sea (Prevention of
Pollution from Ships) Amendment (Oils in the Antarctic Area) Bill 2011’, House of Representatives, Debates, 14
September 2011, p. 10 170, op. cit.
7. The IMO was established under a treaty and its purpose is: ‘to provide machinery for cooperation among
Governments in the field of governmental regulation and practices relating to technical matters of all kinds affecting

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The technical requirements of this Convention are included in six separate Annexes:

**Annex I** - Regulations for the Prevention of Pollution by Oil

**Annex II** - Regulations for the Control of Pollution by Noxious Liquid Substances in Bulk

**Annex III** - Regulations for the Prevention of Pollution by Harmful Substances Carried by Sea in Packaged Form

**Annex IV** - Regulations for the Prevention of Pollution by Sewage from Ships

**Annex V** - Regulations for the Prevention of Pollution by Garbage from Ships

**Annex VI** - Regulations for the Prevention of Air Pollution from Ships.

The legislation giving effect to MARPOL in Australia is the *Protection of the Sea (Prevention of Pollution from Ships)* Act 1983 and the *Navigation Act 1912*, and several Parts of Marine Orders made under this legislation.  

MARPOL has designated ‘Special Areas’ as locations where, due to the site’s unique oceanographic and ecological value, all overboard discharges of garbage (except ground food wastes) are prohibited. Food wastes may not be discharged within 12 nautical miles of the nearest land in Special Areas. To date, MARPOL has designated nine Special Areas – the Mediterranean Sea; Baltic Sea; Black Sea; Red Sea; Persian Gulf; Gulf of Aden; North Sea; Antarctic area; and the Wider Caribbean (including the Gulf of Mexico).

### Financial implications

The Explanatory Memorandum states that there are no financial impact arising from this Bill. However, it is also silent on the issue of enforcement and whether extra resources will be devoted to enforce these new provisions.
Key provisions

New definitions in subsection 3(1)

**engage in conduct**

**Item 1** inserts a new definition of *engage in conduct*, consistent with the definition in the Criminal Code. **Items 3 and 4** repeal the old definition of *engage in conduct*.

**heavy grade** oil means

- crude oil having a density at 15°C higher than 900 kg/m$^3$
- oil, other than crude oil, having a density at 15°C higher than 900 kg/m$^3$ or a kinematic viscosity at 50°C higher than 180 mm$^2$/s or
- bitumen, tar and their emulsions.

**Prohibition of carriage or use of heavy grade oil on Australian ships in the Antarctica Area**

**Proposed section 10A** makes it an offence to carry as cargo in bulk or to use, or carry for use, heavy grade oil on a ship in the Antarctic area. The master and owner of the ship will each be guilty of an ordinary offence attracting a penalty of up to 2000 penalty units (which translates to $220 000).**11

**Proposed subsection 10A(2)** provides that the master and owner of the ship will each be guilty of a strict liability offence attracting a penalty of up to 500 penalty units (which translates to $55 000).

Sharing the responsibility between the master and owner of the ship is consistent with other parts of the *Protection of the Sea (Prevention of Pollution from Ships) Act 1983* and in other maritime legislation such as the *Navigation Act 1912*. The penalties imposed seem to be consistent with penalties for like offences in the PPS Act.

**Proposed subsection 10A(4)** provides an exception in circumstances where the heavy grade oil is carried or used as a fuel on an Australian ship for the purpose of securing the safety of a ship or saving life at sea.

**Proposed subsection 10A(5)** provides an exception in circumstances where the heavy grade oil is a residue of that heavy grade oil that was carried or used as oil before the ship entered the Antarctic area, and is not cleaned or flushed from a tank or pipeline of the ship.

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11. One penalty unit is defined as $110 under section 4AA of the *Crimes Act 1914* (Cth).

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Prohibition of carriage or use of heavy grade oil on foreign ships in the Australian Antarctic Territory

Proposed section 10B mirrors the offences created above with respect to foreign ships in the Australian Antarctic Territory. The same exceptions as above are also provided in proposed subsections 10B(4) and 10B(5)
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