Antarctic Treaty (Environment Protection) Amendment Bill 2011

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Law and Bills Digest Section

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Antarctic Treaty (Environment Protection) Amendment Bill 2011

Date introduced: 23 November 2011
House: House of Representatives
Portfolio: Sustainability, Environment, Water, Population and Communities
Commencement: The various commencement dates for the amendments are detailed on pages 4-5 of the Explanatory Memorandum

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/Parliamentary_Business/Bills_Legislation. 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

The Antarctic Treaty (Environment Protection) Amendment Bill 2011 (the Bill) amends the Antarctic Treaty (Environment Protection) Act 1980 (ATEP Act) to implement three measures adopted under the Antarctic Treaty 1961 (the Treaty) and Article 9 of the Protocol on Environmental Protection to the Antarctic Treaty 1998 (the Madrid Protocol). These measures are: Measure 4 (2004) relating to insurance and contingency planning for tourism and non-government activities, Measure 1 (2005) Annex VI to the Protocol relating to liability arising from environmental emergencies and Measure 15 (2009) relating to the landing of tourists from ships visiting Antarctica. The measures seek to improve the strength of arrangements aimed at safeguarding human and vessel safety and the Antarctic environment, thereby also contributing to Australia’s strategic and policy interests in Antarctica.

1. The Madrid Protocol:
   • designates Antarctica as a ‘natural reserve, devoted to peace and science’ (Article 2)
   • establishes environmental principles for the conduct of all activities so as to limit adverse impacts on the Antarctic environment and dependent and associated ecosystems (Article 3(2)(a))
   • prohibits mining for a period of 50 years
   • subjects all activities to prior assessment of their environmental impacts (Article 8)
   • provides for the establishment of a Committee for Environmental Protection, to advise the ATCM
   • requires the development of contingency plans to respond to environmental emergencies, and
   • provides for the elaboration of rules relating to liability for environmental damage.

   The Protocol is also accompanied by Annexes that detail specific measures and procedures relating to: environmental impact assessment; conservation; waste disposal and management; prevention of marine pollution; management of protected areas; liability for environmental emergencies.


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Background

A Lowy Institute policy brief by Ellie Fogarty provides useful background on the Antarctic Treaty and engagement in the region:

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 Antarctica], covering around 42 per cent of the continent (an area about three quarters the size of mainland Australia).

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).

Of particular note is the prohibition of any activity relating to mineral resources, other than scientific research, under Article 7 of the 1991 Protocol on Environmental Protection to the Antarctic Treaty (the ‘Madrid Protocol’). This prohibition becomes reviewable in 2048, after which, unless certain conditions are met, any signatory may withdraw its compliance.

[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
Antarctic Treaty (Environment Protection) Amendment Bill 2011

Weddell Sea and Ross Sea, which respectively cover the continental shelves adjacent to Australia and New Zealand’s claimed territories.  

In recent years, a number of states have increased their activity in Antarctica and have invested heavily in building new bases for their activities. In particular, this has occurred in the area where Australia has suspended though not extinguished territorial sovereignty claims. There are currently around 120 scientific bases in Antarctica and an ever increasing presence of non-ATS states based there pursuing their scientific interests. Countries such as China, India, Russia and even the USA which is not a claimant state but has reserved the right to make claims, have active scientific research programs in Antarctica, and indeed, many of them within Australia’s claimed territory. Both the USA and Russia reject all sovereign claims in the region and reserve the right to make future claims.

A number of states have begun to consider and discuss the use of Antarctic mineral resources. This is argued by some commentators to represent a challenge to the life of the Treaty. The issue of exploitation of mineral resources in the Antarctica will likely be an item on the agenda in 2048. And, if there is a successful push for accessing those resources, then this would represent a potential threat to Australia’s claim.

Deepening engagement with the Antarctic Treaty System and actively improving use of its compliance mechanisms is therefore clearly in Australia’s interest.

The ATEP Act is the cornerstone of Australia’s Antarctic environmental legislation. The ATEP Act gives effect to Australia’s obligations under the Protocol on Environmental Protection to the Antarctic Treaty (the Madrid Protocol), annexes and measures to the Protocol, setting out environmental protection obligations for all activities in the Antarctic Treaty area.

The ATEP Act applies within the Australian Antarctic Territory, and to Australian citizens, organisations and property in the Antarctic Treaty Area. It addresses three main issues:

1. the Conservation of Antarctic fauna and flora, including the specification of permits and specially protected areas
2. Environmental Impact Assessment
3. Inspectors and Offences

Instruments made under the ATEP Act include:

Antarctic Treaty (Environmental Impact Assessment) Regulations 1993

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The international governance of Antarctica is provided by measures adopted by Antarctic Treaty Consultative Parties (ATCPs) under the procedures of Article IX of the Antarctic Treaty.

Article IX(1) provides for Parties to meet together for the purpose of, among other reasons, “recommending to their Governments, measures in furtherance of the principles and objectives of the Treaty”.

Further Article IX(4) of the Treaty provides that “the measures referred to in paragraph 1 ...shall become effective when approved by all Contracting Parties whose representatives were entitled to participate in the meetings to consider those measures.”

And the long-established practice of the Consultative Parties indicates that they are measures which have been duly approved by all of them to be legally binding. 4

**Basis of policy commitment**

The Bill implements three measures that have been agreed to by treaty parties in recent years.

**Measure 1** which introduces a liability regime for environmental emergencies in the Antarctic, requires all government and non-government operators to implement measures to reduce the risk of environmental emergencies occurring and to establish contingency plans, maintain adequate insurance and respond properly to any environment emergencies that do occur.

**Measure 4** requires non-state operators such as tourism operators carrying out activities in the Antarctic to draw up and put in place appropriate contingency plans and arrangements, including insurance, for health and safety, search and rescue, and medical care and evacuation.

**Measure 15** requires operators of Antarctic tourist vessels carrying more than 500 passengers to refrain from making any landings and, for smaller vessels, restricts the number of passengers that

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may disembark at any one time. It imposes a minimum guide-to-passenger ratio on groups that do disembark. The measure also requires tourist vessels to coordinate with one another to ensure that no more than one vessel is at a landing site at any given time.\(^5\)

As pointed out by the Joint Standing Committee on Treaties:

The three separate Measures contribute to the protection of the Antarctic environment and, given Australia’s strategic and policy interests in Antarctica, their implementation would directly contribute to the maintenance of the Antarctic Treaty system and enhancement of Australia’s standing and influence within it.\(^6\)

The Australian Government acknowledges the legitimacy of tourism activities in Antarctica in so far as they further the principles and objectives of the Antarctic Treaty by being undertaken in accordance with the Treaty and its associated instruments.\(^7\) Thus, those activities should be consistent with the concepts of social responsibility and ecological sustainability.

Tourism will be considered ecologically sustainable if it is assessed in accordance with the Madrid Protocol as having no more than a minor or transitory impact on the Antarctic environment and the intrinsic values of the Antarctica.

Socially responsible activities are activities that: (a) are of a peaceful nature; (b) do not degrade, or pose a significant risk to, areas of biological, scientific, historic, aesthetic or wilderness significance; (c) will not detrimentally affect any other activity in the Antarctic Treaty activity area, in particular scientific research activities and their associated support activities; and (d) have the capacity to respond promptly and effectively to accidents and emergencies.\(^8\)

Most tourists visit Antarctica by ship, with voyages lasting from ten days to several weeks, usually visiting the Antarctic Peninsula from South America. For the largest cruise ships of 500 or more passengers, these voyages normally offer the chance to go ashore. Some tourists fly from South America to land on the Antarctic Peninsula to go mountain climbing or join a cruise ship. It’s also possible to charter yachts. The cheapest way to visit Antarctica, but not land, is to do a 12 hour round trip in a large jet, for example, from Sydney or Melbourne.

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According to the International Association of Antarctic Tour Operators, 33 824 tourists visited Antarctica by ship or plane, of whom 3220 were Australian. The number of tourists actually landing on Antarctica numbered 19 445, of whom 2433 or 12.5 per cent were Australian.

![2010-2011 Tourists by Nationality](image)

Source: International Association of Antarctica Tour Operators

While most of the tourists land in the Antarctic Peninsula, season one vessel landed 146 passengers on the Australian Antarctic Territory in Eastern Antarctica in the 2009–10. There are 200 landing sites in Antarctica which receive tourists with 50 of those receiving more than 100 tourists per season.

The Australian Government issued an Antarctic tourism policy in March 2004 which aimed to make tourism in Antarctica both ecologically sustainable and socially responsible. It was to be implemented through the following:

- an accreditation scheme to encourage adherence to voluntary guidelines and codes of behaviour by all tourist expeditions;

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10. Ibid.

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an environmental monitoring framework capable of identifying both short-term and cumulative impacts arising from tourism activities;

activity guidelines addressing environmental and safety issues which will assist in the planning and conduct of activities commonly undertaken by tourists to ensure that such activities have no more than a minor or transitory environmental impact and are conducted in a safe and responsible manner;

a site management system incorporating site-specific guidelines to identify and put in place management controls for sites identified as being at risk;

an Antarctic shipping code for consideration by the International Maritime Organisation to encourage appropriate environmental and safety standards for commercial shipping in the Antarctic Treaty area;

a co-ordinated inspection/observer scheme to audit compliance with regulatory and voluntary measures governing tourism activities;

effective quarantine procedures to prevent the introduction and spread of exotic species in the Antarctic environment.

a database on tourism activities to assist in the management of these activities; and

a financial security system that requires all tourism activities to carry adequate insurance, provide a bond, or otherwise indemnify or reimburse others against the cost of support provided in the event of accidents or an emergency.  

The XVIII Antarctic Consultative Meeting in 1994 recommended that countries urge tourism operators to act in accordance with Guidance for Visitors to the Antarctic.  The Australian Antarctic Division website lists these guidelines which relate to tourists as well as to those organising and conducting tourism and non-governmental activities and are intended to ensure that all visitors are aware of, and are therefore able to comply with, the Antarctic Treaty and the Madrid Protocol.

The Australian Antarctic Division (AAD) website lists 15 Australian-based companies, or companies with Australian offices, who offer Antarctic or subantarctic tourist voyages or sightseeing flights, or sell berths aboard Antarctic voyages that are known to the AAD.

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There are currently five Australian operators that undertake passenger landing in the Antarctic.¹⁸

There have been a number of significant accidents in Antarctica travel including the 1979 Air New Zealand DC-10 crash into Mt Erebus, the 1989 sinking of Bahia Paraiso in Arthur Harbour on the Antarctic Peninsula and the 2007 sinking of the tourist ship M/V Explorer in the Bransfield Strait between the South Shetland Islands and the Antarctic Peninsula. All the airplane passengers were killed in the Mt Erebus accident. All the ships’ passengers were rescued but there was significant spillage of fuel into the ocean, which in the case of the Bahia Paraiso, required a major clean-up operation.¹⁹ The following table shows some of the incidents involving tourist ships in Antarctica which had the potential to cause an environmental emergency.

<table>
<thead>
<tr>
<th>Vessel</th>
<th>Incident</th>
<th>Outcome</th>
</tr>
</thead>
<tbody>
<tr>
<td>MV Ocean Nova</td>
<td>Grounded in February 2009.</td>
<td>Passengers were evacuated to nearby vessels. The vessel was freed from its position the next day without serious damage to the hull and with no leakage of fuel.</td>
</tr>
<tr>
<td>MV Ushuaia</td>
<td>Grounded in December 2008 puncturing two fuel tanks.</td>
<td>Passengers were evacuated to nearby vessels. A small fuel spill occurred and the vessel was floated free two days later.</td>
</tr>
<tr>
<td>MS Explorer</td>
<td>Sank after being damaged while navigating in ice in November 2007.</td>
<td>Following a mayday call, all passengers and crew were evacuated into lifeboats before the vessel sank. All were safely rescued within five hours. A small fuel spill occurred.</td>
</tr>
<tr>
<td>MV Nordkapp</td>
<td>Grounded in January 2007 with minor damage to the hull.</td>
<td>Passengers were evacuated to nearby vessels and the vessel was later freed from its position. A small fuel spill occurred.</td>
</tr>
<tr>
<td>Bahia Paraiso</td>
<td>Grounded in January 1989.</td>
<td>Vessel foundered and resulted in a spill of 600 000 litres of fuel and lubricants into surrounding waters and onto nearby shores. Clean-up operation recovered 65 000 litres of fuel (approx).</td>
</tr>
</tbody>
</table>


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Committee consideration

On 24 November 2011 the Bill was referred to the House of Representatives Standing Committee on Climate Change, Environment and the Arts for inquiry and report. The Committee Chair, Mr Tony Zappia MP, reported to the House by oral statement on 16 February 2012. In noting the uncontroversial nature of the Bill, the considerable level of stakeholder consultation that had already occurred and the treaties committee’s previous consideration of the provisions of the Bill, the committee ultimately recommended that the House pass the Bill:

The committee understands that the three measures have been agreed to by all parties to the Antarctic Treaty, which are at varying stages of implementing the measures. Importantly, the committee understands that the bill before the House seeks to legislate no more and no less than is required under the measures that have been agreed to.

During its inquiry, the committee received a private briefing from the Australian Antarctic Division to discuss aspects of the bill. The committee notes that the Australian Antarctic Division has previously undertaken a thorough consultation process with relevant stakeholders, including Australian tourism operators and other interested parties. The outcome of the consultation suggested general support for the measures from industry, and no significant concerns were raised.

As proposed treaty actions, the measures were also examined by the Joint Standing Committee on Treaties, which presented its unanimous report in October 2011. While a variety of organisations were contacted, the treaties committee only received one brief submission, which was supportive of the measures. The committee supported the measures, noting that they would contribute to protecting the Antarctic environment...The committee also notes that in most cases Australian tourism operators already have exemplary standards of operation and are largely meeting the requirements of the bill on a voluntary basis. The passage of this bill would therefore merely formalise the arrangements already in place.

Given the uncontroversial nature of the bill, the considerable level of stakeholder consultations that have taken place to date and the treaties committee’s previous consideration of the provisions of the bill, the committee has determined that a more detailed level of inquiry is unnecessary. The committee therefore recommends that the House pass the bill.


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As mentioned, the measures had also been examined by the Joint Standing Committee on Treaties, which presented its unanimous report on 12 October 2011. The Committee ultimately concluded:

The Committee recognises the importance of the proposed amendments and supports their approval.

The three separate Measures contribute to the protection of the Antarctic environment and, given Australia’s strategic and policy interests in Antarctica, their implementation would directly contribute to the maintenance of the Antarctic Treaty system and enhancement of Australia’s standing and influence within it.

The Commonwealth Government is not expected to incur any costs – those costs that are expected will be absorbed within normal operating activities – and tourist and non-government operators are, to a large degree, already applying the necessary measures to their operations.

This confluence of interests and circumstances draws the Committee towards the conclusion that these amendments should be supported with binding treaty action.22

The recommendation that binding treaty action be taken was made despite the fact that Australia is not yet bound by any of the agreed amendments. As the Committee explained:

Each Measure will only come into force when all 28 consultative party members have approved them. To date, five have approved Measure 1, ten have approved Measure 4 and only one – Japan – has approved Measure 15. Thus, Australia is not yet bound by any of the amendments, and will only be bound when all other members have approved.23

Financial implications

According to the Explanatory Memorandum, the Bill is not expected to have any financial impact.24

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23. Ibid., p. 10.


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Regulatory Impact Statement

Regulation Impact Statements were tabled along with National Interest Analyses that were prepared for the Measures.

On 5 July 2011, Regulation Impact Statements were tabled in Parliament regarding a suite of measures related to the regulation of activity in the Antarctic region. The measures include liability arising from environmental emergencies, landing persons from passenger vessels, and insurance and contingency planning for tourism and non-government activities.

The measures were adopted unanimously by Parties to the Antarctic Treaty. The measures impose a number of obligations on tourist operators in the Antarctic region, including requiring tourist operators (whether by boat or plane) to undertake contingency/accident planning, maintain adequate insurance or other financial security and carry/land only a certain number of passengers at one time. To implement these obligations domestically, amendments are required to the Antarctic Treaty Act 1960 (Cth) and the Antarctic Treaty (Environment Protection) Act 1980 (Cth).

Regulation Impact Statements for the measures were prepared by the Department of Sustainability, Environment, Water, Population and Communities, and were assessed as adequate by the Office of Best Practice Regulation.25

Key provisions


Insurance and contingency planning for tourism and non-governmental activities in the Antarctic Treaty area

Part 1—Safety approvals

Antarctic Treaty (Environment Protection) Act 1980

Obtaining a safety approval


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**Proposed section 13AB** provides that a non-state operator may apply for a safety approval in relation to an activity (other than a mining activity) to be carried on in the Antarctic. The Minister may, by written notice, request that the applicant provide further information within a specified time period and may refuse to grant approval under section 13AC, if that information is not supplied.

**Conditions on safety approvals**

**Proposed 13AC** provides that the Minister may grant the approval only if the Minister is satisfied that the non-state operator has or will have in relation to the activity:

- an appropriate contingency plan
- sufficient arrangements for health and safety, search and rescue, and medical care and evacuation, and
- adequate insurance or other arrangements that will cover any costs associated with search and rescue, and medical care and evacuation.

These are mandatory conditions imposed on all safety approvals and cannot be varied or revoked.

**Proposed section 13AF** provides the Minister may also impose further conditions on a safety approval, and may vary or revoke those conditions. If the Minister is satisfied that it is necessary to do so, the Minister may vary a safety approval on his or her own initiative or at the request of the holder of the approval. The Minister may suspend or revoke a safety approval if the Minister is satisfied that there has been non-compliance with the conditions imposed on the approval or that the suspension or revocation is appropriate in all the circumstances (proposed section 13AH).

**Register of safety approvals**

The Minister must cause a register of safety approvals to be kept (proposed section 13AK). That register must include certain information about the safety approval:

- the name of the holder of the approval
- nature of the activity to which the approval relates
- conditions imposed on the approval, and
- any other information prescribed by the regulations.

**Monitoring of an activity**

**Proposed section 13AL** provides that the regulations may provide for the monitoring of an activity in relation to which a safety approval has been granted. The Bill and Explanatory Memorandum are not explicit about the purpose of this monitoring. No examples are offered about the types of activities that may warrant the need for such monitoring, and the Explanatory Memorandum does not consider whether extra resources might be required in the future, given the apparent growth of certain activities in the region.

**Proposed subsection 28(1B)** provides that all decisions made by the Minister in relation to the following are reviewable by the AAT:

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• a decision to refuse to grant approval of a safety approval
• a decision to impose, or refuse to impose, conditions on a safety approval
• a decision to vary, revoke or refuse to vary or revoke, conditions on a safety approval
• a decision to vary or refuse to vary a safety approval, and
• a decision to suspend or revoke an environmental protection approval.

Part 2—Other amendments

If a person is a non-state operator, the Minister must not grant the person a permit authorising an activity unless the person holds a safety approval in relation to the activity (proposed subsection 9(2C)).

Division 5—Offences etc. relating to safety approvals

In general terms, new offence and civil penalty provisions are created for carrying out an activity without a safety approval and also, failing to comply with conditions attached to a safety approval (proposed section 13AI and proposed section 13AJ respectively). An offence under these provisions will not be committed if: the activity is carried on in an emergency to save a person from death or serious injury; to secure the safety of a ship or aircraft or the safety of equipment of high value; to protect the environment; the non-state operator is authorised to carry on the activity under a law of a Contracting Party; or the activity is carried on in compliance with a direction given (in relation to an environmental emergency) to the non-state operator under subsection 13CD(1) (proposed subsections 13AI(3) and 13AJ(2) and Item 31 of Schedule 2).

According to the Explanatory Memorandum, these offences are designed to be an effective deterrent against non-compliance and the offence and civil penalty provisions are consistent with existing penalties under the ATEP Act. Item 31 inserts a defence to failing to hold a safety approval and contravening a safety approval condition, where the action was done in compliance with a direction given by the Minister under proposed subsection 13CD(1).

There are also offences and civil penalties relating to environmental emergencies which are discussed further below.


Part 1—Environmental protection approvals

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27. Ibid., p. 12.

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This part contains amendments relating to applications by an ‘operator’ for an environmental protection approval. An ‘operator’ means a person who organises, or intends to organise, an activity to be carried on in the Antarctic but does not include:

- if the person is a Party to the Madrid Protocol—a contractor or subcontractor acting on behalf of the person if the contractor or subcontractor is not an individual, or
- otherwise—an individual who:
  - is an employee, contractor, subcontractor or agent of the person, or
  - is in the service of the person (item 4).

The application of this section to particular ‘activities’ is the same as that relating to safety approvals (proposed section 13AB).

**Obtaining an environmental protection approval**

An operator may apply for an environmental protection approval in relation to an activity (other than a mining activity) to be carried on in the Antarctic. The Minister may, by written notice, request that the applicant provide further information within a specified time period and may refuse to grant approval under section 13BC, if that information is not supplied (proposed section 13BB).

**Grant of environmental protection approval**

**Proposed section 13BC** provides that the Minister may grant the approval. However, the Minister must not do so unless satisfied that the operator has or will have in relation to the activity, reasonable preventative measures designed to reduce:

- the risk of environmental emergencies arising from the activity, and
- the potential adverse impact of environmental emergencies arising from the activity.

Also, an operator must have an appropriate contingency plan for responding to incidents with potential adverse impact on the Antarctic environment, or dependent and associated eco-systems, that arise from the activity. In addition, the operator must have or will have the insurance, or other financial security, that is referred to in Articles 11(1) and (2) of Annex VI to the Madrid Protocol up to the limits referred to in those Articles. These articles are discussed in further detail below under the heading ‘Liability under Measure 1 (2005)’.

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28. ‘Activity’ has the same meaning given under Part 3 of the ATEP Act. An even or process resulting from (or associated with) humans in the Antarctic, and/or the presence of humans in the Antarctic. Including: scientific activities, tourist vessels entering the Antarctic, construction of facilities or overflights by tourist aircraft for the purposes of visiting the Antarctic.

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Liability under Measure 1 (2005)

Articles 11(1) and (2) of Annex VI to the Madrid Protocol provide that each Party may require its operators to maintain adequate insurance or other financial security, such as the guarantee of a bank or similar financial institution, to cover liability under Article 6(1) and Article 6(2) respectively, up to the applicable limits.

Article 6(1) provides that a Party may bring an action against an operator for environmental emergencies for a failure to take prompt and effective response action to emergencies arising from its activities.

Article 6(2)(a) provides that a Party may bring an action against a state operator for environmental emergencies arising from its activities. When a state operator should have taken prompt and effective response action but did not, and no response action was taken by any Party, the state operator shall be liable to pay the costs of the response action which should have been undertaken, into the fund established by Article 12.

Article 6(2)(b) provides that a Party may bring an action against a non-state operator for environmental emergencies arising from its activities.

Article 6(2) is important in terms of its inherent goal of deterrence. Article 6(2) is meant to provide a disincentive for operators to argue that a response action was unfeasible, while constraining liability avoidance when a response action was indeed feasible. Articles 6(2)(a) and (b) are also designed to avert scenario where liability for significant environmental damage may enjoy a means of escape.

Because Article 6(2)(b) provides for liability of a non-state operator where the non-state operator failed to take response action and no Party takes response action, it may be an incentive for states to devote resources to monitoring private operators.

It is worth noting that terms of the treaty are such that the insurance requirement is subject to a limitation: while insurance is required for liability under Article 6(1), it is optional for liability under Article 6(2).²⁹

Article 8(2) shields Parties, or their operators, from liability for an emergency caused by response action if the action was ‘reasonable’ under the circumstances.

An issue left unaddressed by Article 11 is the potential liability for those whose advice or decisions cause activity which results in environmental damage, and whether such personal liability may be insured against.³⁰ This issue is not considered by the Bill.

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³⁰ Warning: All viewers of this digest are advised to visit the disclaimer appearing at the end of this document. The disclaimer sets out the status and purpose of the digest.
Division 3—Conditions on environmental protection approvals

As mentioned, the Minister may grant the approval if the Minister is satisfied that the operator meets certain requirements in relation to the activity. Mandatory conditions relating to those requirements are imposed on all environmental protection approvals and those conditions cannot be varied or revoked (proposed section 13BE and proposed section 13BF). The mandatory conditions imposed on environmental protection approvals are:

The operator must undertake in relation to the activity, reasonable preventative measures designed to reduce:

• the risk of environmental emergencies arising from the activity, and
• the potential adverse impact of environmental emergencies arising from the activity.

Also, an operator must have an appropriate contingency plan for responding to incidents with potential adverse impact on the Antarctic environment, or dependent and associated eco-systems, that arise from the activity. In addition, an operator must have the insurance, or other financial security, that is referred to in Articles 11(1) and (2) of Annex VI to the Madrid Protocol up to the limits referred to in those Articles.

Proposed section 13BF provides that (subject to proposed subsection (5)) the Minister may at any time impose further conditions on an environmental protection approval, or vary or revoke those conditions other than conditions imposed by proposed section 13BE (mandatory conditions). If the Minister is satisfied that it is necessary to do so, the Minister may vary an environmental protection approval on his or her own initiative or at the request of the holder of the approval. The Minister may suspend or revoke an environmental protection approval if the Minister is satisfied that there has been non-compliance with a condition imposed on the approval or that the suspension or revocation is appropriate in all the circumstances (proposed section 13BH).

Register of environmental protection approvals

The Minister must cause a register of safety approvals to be kept (proposed section 13BK). That register must include certain information about the safety approval:

• the name of the holder of the approval
• nature of the activity to which the approval relates
• conditions imposed on the approval, and
• any other information prescribed by the regulations.

Monitoring of an activity

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Proposed section 13BL provides that the regulations may provide for the monitoring of an activity in relation to which an environmental protection approval has been granted. The Explanatory Memorandum states that monitoring may include placing observers on ships or aircraft, or requiring operators to provide reports in relation to activities.  

Review of certain decisions by the Administrative Appeals Tribunal

Proposed subsection 28(1C) provides that all decisions made by the Minister in relation to environmental protection approvals are reviewable:

- a decision to refuse to grant approval of environmental protection approval
- a decision to impose, or refuse to impose, conditions on an environmental protection approval
- a decision to vary, revoke or refuse to vary or revoke, conditions on an environmental protection approval
- a decision to vary or refuse to vary an environmental protection approval, and
- a decision to suspend or revoke an environmental protection approval.

Proposed subparagraph 29(2)(b) provides that regulations may be made for payment of a fee to be paid in respect of processing of an application for an environmental protection approval, or the grant of an approval, and for the refund of that fee. This is to permit cost recovery.

Item 9 incorporates Annex VI to the Protocol on Environmental Protection to the Antarctic Treaty into schedule 3 of the ATEP Act.

Part 2—Environmental emergencies etc.

Proposed subsection 3(1) inserts key definitions. These include:

reasonable measures means measures which are:

- appropriate, practicable and proportionate, and
- based on the availability of objective criteria and information, including information about:
  - the risks to the Antarctic environment, and the rate of its natural recovery
  - the risks to human life and safety, and
  - technological and economic feasibility.

response action means reasonable measures taken after an environmental emergency has occurred to avoid, minimise or contain the impact of the emergency and includes:

- cleaning up in appropriate circumstances, and

32. Ibid., p. 22

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• determining the extent and impact of the emergency.

Proposed section 3A empowers the Minister to appoint an SES or acting SES employee, or an APS employee who holds or performs the duties of an Executive Level 2 or equivalent position in the Department as an authorised officer for the purposes of a provision of the Act. The Explanatory Memorandum states that this is appropriate as the matters for which information is being provided are of a general and non-controversial nature.\(^{33}\)

Proposed section 9(2D) provides the Minister must not grant a person who is an operator, a permit authorising an activity unless the person holds an environmental protection approval in relation to the activity.

Proposed paragraph 13BC(2)(c) basically provides that an operator must have or will have adequate insurance or other financial security in respect of an amount the operator would be required to pay if a costs order were made in relation to an environmental emergency arising from the activity. The amount for which the operator is indemnified under that insurance or other financial security must be at least equal to the amount prescribed by the regulations made under proposed subparagraph 13CF(2)(b)(ii).

Division 5—Offences etc. relating to environmental protection approvals

In general terms, new offence and civil penalty provisions are created for carrying out an activity in the Antarctic without an environmental protection approval and also, failing to comply with conditions attached to an approval (proposed section 13BI and proposed 13BJ respectively).

Part 3C—Environmental emergencies

The amendments in this part of the Bill deals with environmental emergencies in the Antarctic.

Division 2—Obligations of operators in relation to environmental emergencies

Proposed section 13CB provides that if an environmental emergency is caused by an activity carried on by a person in the Antarctic, the operator who organised the activity must immediately notify the Minister, or an authorised officer, of the emergency. The maximum penalty for a failure to comply is two years imprisonment or 120 penalty unit points ($13,200)\(^{34}\) or both. The civil penalty is 500 penalty units ($55,000). This section is not contravened if the operator has already notified a Party to the Madrid Protocol of the environmental emergency.

Proposed section 13CC(1) imposes an obligation on the operator to also ensure that prompt and effective response action is taken in relation to the environmental emergency. This obligation does not extend to circumstances where the environmental emergency was caused by an act or omission

\(^{33}\) Ibid., p. 23.

\(^{34}\) Section 44 of the Crimes Act 1914 provides that one penalty unit means $110.

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necessary to protect human life or safety, or an event of exceptional character which could not have been foreseen and for which reasonable preventive measures were taken by the operator.

Subsection (1) also does not apply to acts of terrorism or an act of belligerency against the activities of the operator. The maximum penalty attached to a contravention of subsection (1) is a term of imprisonment of seven years or 420 penalty units ($46 200) or both. The civil penalty is 1000 penalty units ($110 000).

Division 3—Ministerial directions

**Proposed section 13CD** deals with Ministerial directions in relation to an environmental emergency. The Minister may give the operator a direction in relation to the emergency. The operator must comply with the direction. Neither the Minister or the Commonwealth is liable to any action or proceeding for or in relation to an act done or omitted to be done by an operator in compliance, or purported compliance, with the direction. A direction given under proposed subsection 13CD(1) is not a legislative instrument.

**Proposed section 13CE** makes it an offence and provides for a civil penalty in relation to a failure to comply with a Ministerial direction made under proposed subsection 13CD(1) and to engage in conduct which contravenes the directions. Exceptions apply where the operator’s conduct was done to save a person from death or serious injury, or to secure the safety of a ship or aircraft or equipment of high value, or to protect the environment.

Division 4—Costs orders

If the operator does not take prompt and effective response action in relation to the emergency, a Court may in certain circumstances make a costs order against the operator (proposed 13CF). A limit is placed on the amount payable to the lower of the costs incurred by the Party in taking the response action or the amount prescribed by the regulations.

Division 5—Special Account

This Division also establishes the Antarctic Environmental Liability Special Account and deals with other miscellaneous matters. The purposes of the Antarctic Environmental Liability Special Account are:

- making payments to the fund referred to in Article 12 of Annex VI to the Madrid Protocol
- paying or discharging the costs, expenses and other obligations incurred by the Commonwealth in taking response action under Article 5(2) of that Annex (whether directly or through an agent or other person authorised by the Commonwealth), and
- meeting the expenses of administering the Account.

Part 4—Application and savings provisions

**Item 33** provides that an application for a permit under subsection 9(1) of the ATEP Act which is made prior to the commencement of this Part, but for which a decision has not been made prior to
commencement, then the Minister must consider the new section 9(2D) which requires the Minister not to grant a permit for an activity unless the operator also has an environmental protection approval in relation to the activity.

Item 34 provides that offences and civil penalties of failing to have an environmental protection approval and contravening a condition of that approval, only apply in relation to activities carried on in the Antarctic after commencement of those provisions.

Item 35 provides that offences and civil penalties of failing to notify of an environmental emergency (proposed section 13CB), failing to take prompt and effective action (proposed section 13CC) and the power to give a direction in relation to an activity (proposed section 13CD) only apply in relation to an activity carried out which causes or gives rise to an environmental emergency if the activity is carried on after commencement. The same applies to costs orders under proposed sections 13CF and 13CG.

**Schedule 3—Implementation of Measure 15 (2009) Landing of persons from passenger vessels in the Antarctic Treaty area**

According to the Explanatory Memorandum,

> this Measure regulates procedures for the landing of passengers in Antarctica by non-State operators including limiting landings to vessels carrying no more than 500 passengers, limiting the number of people ashore at any one time, and specifying guide-to-passenger ratios. The Measure also requires operators to coordinate with one another with the objective of having only one vessel at a landing site at any one time.\(^{35}\)

**Proposed section 12AB** creates a prohibition against passengers disembarking from certain vessels within the Antarctic where those vessels are carrying more than the prescribed number of passengers. Section 12AB applies to persons who organise for a vessel to carry passengers to the Antarctic, unless the person is a Contracting Party to the Treaty. Contravention of section 12AB will occur if the vessel is carrying more than the prescribed number of passengers and any of the passengers disembark from the vessel (either directly, or indirectly via, for example, a rigid inflatable boat) onto land within the Antarctic.\(^{36}\) Offence and civil penalties are provided for contravention of this section. It is not a contravention of this section if passengers disembark in defined emergency circumstances (proposed 12AC).

**Proposed section 12AD** requires a minimum ratio of guides in relation to the number of disembarked passengers on land within the Antarctic at a particular time. According to the Explanatory Memorandum, a minimum guide to passenger ratio of 1:20 is to be maintained while

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36. Ibid., p. 40.

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passengers are ashore. This figure may change over time by agreement of the Antarctic Treaty Consultative Meeting to a further Measure, thus specific numbers will be provided by regulation. Proposed subsections 12AD(3) and (4) set out the offence and civil penalty respectively. The offence penalty is 12 months imprisonment or 60 penalty units ($6600) or both. The civil penalty provision is 500 penalty units ($55 000).

Proposed section 12AE provides that it is a contravention of this section for a person to fail to coordinate with other persons in respect of the use of landing sites in the Antarctic. The objective of section 12AE is that no more than one vessel should be at a landing site in the Antarctic at the same time. The provisions apply to persons who organise for a vessel to carry passengers to the Antarctic, unless the person is a Contracting Party to the Treaty.

Schedule 4—Amendments commencing on the day after Royal Assent

Antarctic Treaty (Environment Protection) Act 1980

Item 6 provides that the Act binds the Crown in each of its capacities. Though, the Act does not make the Crown liable to a pecuniary penalty or to be prosecuted for an offence.

Item 11 amends paragraph 17(1)(b) to enable an inspector to exercise the powers in subsection 17(1) in relation to a contravention of a civil penalty provision. This is aimed at enhancing effective enforcement of the new civil penalty provisions.

Item 14 amends subsection 18(1) so that an inspector can exercise the seizure powers in subsection 18(1) in relation to a contravention of a civil penalty provision. Item 15 correspondingly provides for the retention of seized items in relation to a contravention of civil penalty. These amendments are meant to provide for the effective enforcement of the new civil penalty provisions.

37. Ibid., p. 39.
38. Ibid., p. 41.
39. Ibid.
40. Ibid.

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