Maritime Legislation Amendment Bill 2012

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Law and Bills Digest Section

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Maritime Legislation Amendment Bill 2012

Date introduced: 27 June 2012

House: House of Representatives

Portfolio: Infrastructure and Transport

Commencement: Sections 1–3 and Schedule 2 on the day of Royal Assent; Parts 4 and 5 of Schedule 1 on the day after the Royal Assent; and Parts 1–3 of Schedule 1 on 1 January 2013.

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 purpose of the Maritime Legislation Amendment Bill 2012 (the Bill) is to amend the Protection of the Sea (Prevention of Pollution from Ships) Act 1983 to implement amendments to Annexes IV–VI of the International Convention for the Prevention of Pollution from Ships. These amendments were adopted by the Marine Environment Protection Committee of the International Maritime Organisation on 15 July 2011.

Background

The International Convention for the Prevention of Pollution from Ships (MARPOL) is the main international convention covering prevention of pollution of the marine environment by ships from operational or accidental causes. MARPOL was adopted on 2 November 1973 by the International Maritime Organisation.1 It was amended in 1978 in response to a spate of tanker accidents in 1976-1977.2 The combined instrument entered into force on 2 October 1983.

MARPOL includes regulations aimed at preventing and minimising pollution from ships—both accidental pollution and that from routine operations—and currently includes six technical Annexes as follows:

- Annex I: Regulations for the Prevention of Pollution by Oil
- Annex II: Regulations for the Control of Pollution by Noxious Liquid Substances in Bulk

2. For example, in 1976 the oil tanker Urquiola sank at La Coruna, Spain spilling 100 000 tonnes of crude oil and in 1977, the oil tanker Hawaiian Patriot sank 300 nautical miles off Honolulu spilling 95 000 tonnes of crude oil. Norwegian University of Science and Technology website, viewed 18 July 2012, http://www.ntnu.edu/ross/info/accidents

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• 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 Control of Pollution by Garbage from Ships and
• Annex VI: Regulations for the Prevention of Air Pollution from Ships.  

Basis of policy commitment

The Minister for Infrastructure and Transport, Anthony Albanese outlined Australia’s role in, and commitment to, the International Maritime Organisation when he announced Australia’s re-election to second place on the Council of the International Maritime Organisation in 2011, stating:

The result formally recognises Australia’s commitment to the IMO and its important work in international maritime safety, security and pollution prevention.

Australia was elected equal second from our previous position of 18 at the IMO’s 27th Assembly in London which meets every two years ...

We play a significant role on the Council, representing the fourth largest shipping task in the world, with most of these vessels transiting close to significant natural marine and coastal habitats ...

Australia is one of few countries to have served for over 40 years on the Council since the inception of the IMO in 1959, in recognition of the leadership our country has provided in our region.

It is critical that shipping, fundamental to Australia’s economic vitality, meets the highest safety and environmental standards. This result is a signal that we are a major player in this organisation with a deep-seated commitment to its goals.

Most amendments to MARPOL enter into force automatically. These amendments are usually technical in nature and are aimed at improving or formalising international standards. States Parties have a period of 12 months following adoption during which time they can lodge objections to the amendments with the International Maritime Organisation. To date Australia has not objected to any amendments to MARPOL as Australia has been involved in the work to develop the amendments.

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4. A Albanese (Minister for Infrastructure and Transport), Australia’s role in international shipping recognised by the IMO, media release, 26 November 2011, viewed 18 July 2012, http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressrel%2F1265487%22

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Committee consideration

At its meeting of 28 June 2012, the Senate Selection of Bills Committee resolved that this Bill not be referred to Committee.  

On 14 March 2012, the Joint Standing Committee on Treaties (the Committee) tabled its report on the Review into Treaties tabled on 13 October, 2 November, 22 and 24 November 2011 (Report 123). Report 123 reviewed the amendments to Annexes IV and V of MARPOL and, having considered the terms of the National Interest Analyses, recommended that binding treaty action be taken.

In addition, on 10 May 2012, the Committee tabled its report on the Review into Treaties tabled on 22 November 2011 and 7 February 2012 (Report 124). Report 124 reviewed the amendments to Annex VI of MARPOL and, having considered the terms of the National Interest Analysis, the Committee opined that:

> If the amendments to Annex VI are not implemented in Australia, there is a material risk that Australian ships built after 1 January 2013 would be less energy efficient than foreign-flagged ships that do adhere to the new regulations and thus Australian ships would be unable to trade internationally if the amendments were implemented by other nations.

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Key issues and provisions

Offshore Constitutional Settlement and operation of roll back provisions

In 1975, the High Court upheld the validity of the *Seas and Submerged Lands Act 1973* in which the Commonwealth asserted sovereignty over the territorial sea, including the seabed beneath the three nautical miles of waters from the low tide mark, commonly described as coastal waters. Following this decision, the Commonwealth and the states negotiated the Offshore Constitutional Settlement (OCS), in which they agreed to a division of their offshore rights and responsibilities. In accordance with the OCS, the Commonwealth legislated to confer jurisdiction on the states and the Northern Territory over the three nautical miles of the territorial sea adjacent to their respective coastlines.

The *Protection of the Sea (Prevention of Pollution from Ships) Act 1983* (Prevention of Pollution from Ships Act) contains a number of ‘roll back’ provisions. The purpose of the provisions ‘is to prevent Commonwealth legislation prevailing over state/territory legislation where such legislation applies to that particular sea area’.

Items 64–66 in Part 4 of Schedule 1 to the Bill clarify the operation of the Prevention of Pollution from Ships Act by inserting two new definitions into section 3.

The term ‘sea near’:

- for a state or for an external territory means:
  - the part or parts of the territorial sea that are within three nautical miles of the baseline of the territorial sea and adjacent to the state or territory respectively and
  - the waters of the sea that are on the landward side of the baseline of the territorial sea and adjacent to the state or territory and not within the limits of the state or territory respectively
- for the Jervis Bay Territory means the sea in that territory.

The term ‘outer territorial sea’ means the territorial sea other than the part or parts of the territorial sea that are within three nautical miles of the baseline of the territorial sea and adjacent

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15. ‘State’ is defined at section 3 of the Prevention of Pollution from Ships Act to include the Northern Territory.
16. Proposed subsections 3(1A) and 3(1C) of the Prevention of Pollution from Ships Act.
17. Proposed subsection 3(1B) of the Prevention of Pollution from Ships Act.

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to a state or external territory.\textsuperscript{18} This is the area over which the states and territories have no power to legislate.

The roll back provisions in Part 4 of the Bill apply to various offence provisions in the Prevention of Pollution from Ships Act to distinguish between activities that occur in the 'sea near' a state or territory (which may be subject to legislation by the state or territory) and activities which occur in the 'outer territorial sea' (over which the Commonwealth has jurisdiction).

Strict liability offences

The Prevention of Pollution from Ships Act contains a number of provisions which operate so that a contravention of the provision amounts to a criminal offence of strict liability (that is, a fault element does not have to be satisfied) attracting a financial penalty. This is consistent with the Guide to Framing Commonwealth Offences which specifies that strict liability offences are considered to be appropriate, for example where it is necessary to ensure the integrity of the environment.\textsuperscript{19}

Importantly, the imposition of strict liability will not criminalise honest errors and a person cannot be held liable if he, or she, had an honest and reasonable belief that they were complying with relevant obligations.

\textbf{Items 103–105, 111–113, 115–120, 122–124 and 126} in Part 5 of Schedule 1 to the Bill make uniform amendments to the notes in various sections of the Prevention of Pollution from Ships Act to clarify that in the case of the strict liability offences, it is the defendant who bears an evidential burden if he or she is asserting that certain circumstances existed that mean he or she is not liable. The rationale for this position is that where a matter is peculiarly within the defendant’s knowledge and not available to the prosecution, it is legitimate to cast the matter as a defence.\textsuperscript{20} In the case of the Prevention of Pollution from Ships Act many of the strict liability provisions are directed to the master and owner of the ship.

According to the Explanatory Memorandum:

\begin{quote}
[Masters and owners of ships] have a shared responsibility and both can be expected to be fully aware of the requirements of the legislation ... While the master has immediate responsibility for the ship, he or she is subject to the direction of the shipowner. Shared liability is consistent with offence provisions in other parts of the [Prevention of Pollution from Ships Act] and in other maritime legislation such as the \textit{Navigation Act 1912}.\textsuperscript{21}
\end{quote}

\begin{itemize}
\item \textsuperscript{18} Proposed subsection 3(1D) of the Prevention of Pollution from Ships Act.
\item \textsuperscript{20} Ibid., p. 50.
\item \textsuperscript{21} Explanatory Memorandum, p. 16.
\end{itemize}

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Part 1—prevention of pollution by sewage

Terms of Annex IV

Annex IV of MARPOL entered into force 27 September 2003.\textsuperscript{22} It currently contains requirements to control pollution of the sea by sewage so that the discharge of sewage into the sea is prohibited unless:

- the ship has in operation an approved sewage treatment plant which is certified to meet International Maritime Organisation requirements
- the ship is discharging comminuted (that is, pulverised) and disinfected sewage using an approved system at a distance of more than three nautical miles from the nearest land or
- sewage which is not comminuted or disinfected is discharged at a distance of more than 12 nautical miles from the nearest land.

In July 2011, the International Maritime Organisation adopted the most recent amendments to MARPOL Annex IV which are expected to enter into force on 1 January 2013. The amendments establish the Baltic Sea as a ‘special area’ under Annex IV and add new discharge requirements for passenger ships while in a ‘special area’.\textsuperscript{23}

Rationale for the change

According to the International Maritime Organisation ‘the discharge of raw sewage into the sea can create a health hazard. Sewage can also lead to oxygen depletion and can be an obvious visual pollution in coastal areas—a major problem for countries with tourist industries’.\textsuperscript{24}

So serious did that problem become in the Baltic Sea\textsuperscript{25}, that in 2006 the contracting parties to the Helsinki Commission—Baltic Marine Environment Protection Commission—also known as HELCOM\textsuperscript{26} developed the Baltic Sea Action Plan to ensure that all possible measures were taken to reduce

\textsuperscript{26} The contracting parties were Denmark, Estonia, European Community, Finland, Germany, Latvia, Lithuania, Poland Russia and Sweden.

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pollution in the Baltic Sea and to repair the damage done to the environment.\textsuperscript{27} Despite the plan, WWF Global reported in September 2010 that:

\begin{quote}
In total, the Baltic Sea receives more than 350 cruise ship visits with over 2,100 port calls each year. The waste-water produced in these vessels is estimated to contain 113 tons of nitrogen and 38 tons of phosphorus, substances that add to eutrophication of the sea.\textsuperscript{28} Most of this sewage is still discharged into the Baltic Sea. In addition to excess nutrients, the waste water also contains bacteria, viruses and other pathogens, as well as heavy metals.\textsuperscript{29}
\end{quote}

The amendments to Annex IV of MARPOL designate the Baltic Sea as a ‘special area’.\textsuperscript{30} According to the Committee:

\begin{quote}
The designation of the Baltic Sea area as a special area for purposes of Annex IV is aimed at the passenger ships which carry high numbers of passengers to and from the ports in countries that border the Baltic Sea area (Denmark, Estonia, Finland, Germany, Latvia, Lithuania, Poland, Russian Federation and Sweden). Each State Party to Annex IV whose coastline borders a special area will be required to ensure that adequate facilities for the reception of sewage are provided in ports in that state which are used by passenger ships. This will impose obligations on Australia only if, at some time in the future, an area of the sea off the Australian coastline is declared to be a special area for purposes of Annex IV.\textsuperscript{31}
\end{quote}

\textbf{Relevant provisions}

Currently Part IIIB of the Prevention of Pollution from Ships Act puts into effect the terms of Annex IV of MARPOL. The provisions of Annex IV apply to ships engaged in international voyages which have a gross tonnage of 400 or more, and ships of less than 400 gross tonnage that are certified to carry more than 15 persons.\textsuperscript{32}

The amendments in Part 1 of Schedule 1 to the Bill create separate rules in respect of the discharge of sewage from ships depending on whether the ship is, or is not, within a special area. Existing subsection 26D(1) creates an offence where a person is reckless or negligent in causing the discharge

\begin{itemize}
\item \textsuperscript{28} ‘Eutrophication’ refers to excessive richness of nutrients in a lake or other body of water, frequently due to run-off from the land, which causes a dense growth of plant life.
\item \textsuperscript{29} WWF Global, \textit{Cruise ships continue to foul the Baltic Sea}, 22 September 2010, viewed 17 July 2012, \url{http://wwf.panda.org/?195090/Cruise-ships-still-dump-their-sewage-in-the-Baltic-Sea/}
\item \textsuperscript{30} ‘Special area’ is defined as a sea area where special mandatory methods for the prevention of pollution by sewage are required for recognised technical reasons in relation to the sea area’s oceanographical and ecological condition and the character of its traffic. The amendments to Annex IV designate the Baltic Sea as a ‘special area’. \url{http://www.imo.org/ourwork/environment/pollutionprevention/sewage/documents/200(62).pdf}
\item \textsuperscript{31} Joint Standing Committee on Treaties, \textit{Report 123: treaties tabled on 13 October, 2, 22 and 24 November 2011}, op. cit., p. 8.
\item \textsuperscript{32} MEPC.115(51), Regulation 2, viewed 17 July 2012, \url{http://www.mpa.gov.sg/sites/circulars_and_notices/pdfs/shipping_circulars/sc04-21a.pdf}
\end{itemize}

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of sewage into the sea from a ship in certain circumstances. That offence is punishable by a fine not exceeding 2,000 penalty units.  

Items 1–2 amend paragraph 26D(1)(c) so that a discharge of sewage into the sea under subsection 26D(1) will give rise to the offence if the following circumstances are satisfied:

- the discharge occurs when the ship is not in a ‘special area’, discharge occurs into the sea near a state, the Jervis Bay Territory or an external territory and there is no law of that state or territory that makes provision giving effect to Regulation 3 and to paragraph 1 of Regulation 11 of Annex IV to the Convention in relation to the area of the sea where the discharge occurs
- the discharge is in a ‘special area’, the discharge occurs into the sea near a state, the Jervis Bay Territory or an external territory and there is no law of that state or territory that makes provision giving effect to Regulation 3 and to paragraph 3 of Regulation 11 of Annex IV to the Convention in relation to the area of the sea where the discharge occurs
- the discharge occurs in the exclusive economic zone or
- the discharge occurs beyond the exclusive economic zone and the ship is an Australian ship.

Proposed subparagraph 26D(1)(c)(ia) which is inserted by item 2 of Part 1 of Schedule 1 is a ‘roll back’ provision. Item 89, in Part 4 of the Bill, inserts proposed subparagraph 26D(1)(c)(ib) to make clear the distinction between a discharge in the ‘sea near’ a state, the Jervis Bay Territory or an external territory and a discharge into ‘the outer territorial sea’. In relation to the ‘sea near’ a state or territory, the Commonwealth law will only apply if there is no law of the state of territory giving effect to the relevant regulations in Annex IV to the Convention. In contrast, Commonwealth law will always apply to the ‘outer territorial sea’.

Items 3–4 amend subsection 26D(3) in the same manner as items 1–2 amend subsection 26D(1), but provide that the master and owner of the ship each commit an offence of strict liability in the event of the discharge of sewage from a ship into the sea. The offence is punishable by a fine not exceeding 500 penalty units. Existing subsection 26D(7) sets out the three circumstances which must be satisfied in order that the offence provisions in subsection 26D(3) will not apply. These are:

- proposed paragraph 26D(7)(a)—if the sewage from the passenger ship has been treated in a sewage treatment plant on the ship—being a plant that has been certified as meeting the requirements of Regulation 9 of Annex IV

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33. Section 4AA of the Crimes Act 1914 provides that a penalty unit means $110. The maximum fine for the offence is $220,000.

34. Regulation 3 of Annex IV requires surveys of ships to be carried out to ensure that the equipment, fittings, arrangements and material fully comply with the applicable requirements of Annex IV.

35. Paragraph 1 of Regulation 11 of Annex IV deals with the discharge of sewage from ships other than passenger ships.

36. Paragraph 3 of Regulation 11 of Annex IV deals with the discharge of sewage from passenger ships.

37. Subparagraph 26D(3)(b)(ia) is a ‘roll back’ provision. Item 90 of Part IV of the Bill inserts proposed subparagraph 26D(3)(b)(ib) to make clear the distinction between a discharge in the ‘sea near’ a state, the Jervis Bay Territory or an external territory and a discharge into ‘the outer territorial sea’.

38. The maximum fine for the offence is $55,000.

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• existing paragraph 26D(7)(b)—if the effluent does not produce visible floating solids in the waters of the sea and does not cause discolouration of the waters of the sea and

• proposed paragraph 26D(7)(c)—if the ship is a prescribed passenger ship and the discharge occurs when the ship is with a special area and the discharge occurs before a prescribed day.

Item 10 is an applications provision which states that the amendments in items 1–8 apply in relation to the discharge of sewage from a ship that occurs on or after the commencement of those items—that is 1 January 2013.

Financial implications

According to the Explanatory Memorandum, ‘the amendments to Annex IV (sewage) will not result in any increased costs or savings to the Australian Government or to the states and territories’. This is because the amendments in Annex IV relate primarily to the discharge of sewage by passenger ships in the Baltic Sea.

Part 2—prevention of pollution by garbage

Terms of Annex V

Annex V of MARPOL deals with different types of garbage including all kinds of food, domestic and operational waste, excluding fresh fish, generated during the normal operation of the vessel; and specifies the distances from land and the manner in which they may be disposed. The most important feature of Annex V is the complete ban imposed on the disposal into the sea of all forms of plastics. In addition it severely restricts discharges of other garbage from ships into coastal waters and ‘special areas’. It entered into force on 31 December 1988.

Annex V was subject to an update which was adopted in 1995, which requires all ships with gross tonnage of 400 tonnes and above, every ship certified to carry 15 persons or more, and every fixed or floating platform engaged in exploration and exploitation of the seabed to provide a Garbage Record Book and to record all disposal and incineration operations.

The date, time, position of ship, description of the garbage and the estimated amount incinerated or discharged must be logged and signed. The Garbage Record Book must be kept for a period of two

41. The ‘special areas’ are established regulation 5 of Annex V. They are the Mediterranean Sea, the Baltic Sea area, the Black Sea area, the Red Sea area, the gulf area, the North Sea, and the Wider Caribbean Region. These are areas which have particular problems because of heavy maritime traffic or low water exchange caused by the land-locked nature of the sea concerned. Paragraph 3, Regulation 6 also makes special rules for the discharge of garbage in the Antarctic area.

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years after the date of the last entry. This regulation does not in itself impose stricter requirements. It is merely a tool for checking that the regulations on garbage are being adhered to.\footnote{Prevention of pollution by garbage from ships, International Maritime Organisation website, viewed 18 July 2012, http://www.imo.org/ourwork/environment/pollutionprevention/garbage/Pages/Default.aspx}

Rationale for the change

Despite the fact that Annex V has been in effect since 1988, marine litter remains a serious threat to marine ecosystems worldwide, and various indicators and monitoring programs show that little or no progress is being made in reducing the problem. The discovery of huge areas of floating garbage—the so called ‘Plastic Soup’—is of particular concern.\footnote{R Cho, ‘Our oceans: a plastic soup’, Earth Institute, Columbia University website, 26 January 2011, viewed 18 July 2012, http://blogs.ei.columbia.edu/2011/01/26/our-oceans-a-plastic-soup/} The nature and extent of the problem is described as follows:

The United Nations Environment Program says around 13,000 pieces of plastic litter are found in every square [kilometre] of sea, but the problem is worst in the North Pacific.

The plastic particles are being vacuumed up by marine life and birds, and the mix is heavy with toxic chemicals ... If microplastic density continues to grow, insect numbers will increase as well ... potentially at the expense of prey such as zooplankton or fish eggs.\footnote{Discovery News, ‘Pacific plastic soup 100-fold increase’, Discovery News website, 9 May 2012, viewed 18 July 2012, http://news.discovery.com/earth/pacific-ocean-plastic-increase-120509.html}


In July 2011, the International Maritime Organisation adopted extensive amendments to Annex V which are expected to enter into force on 1 January 2013. The revised Annex V prohibits the discharge of all garbage into the sea, except as provided otherwise, under specific circumstances.\footnote{Amendments to the Annex of the Protocol of 1978 relating to the International Convention for the prevention of pollution from ships: resolution MEPC.201(62), viewed 18 July 2012, http://www.imo.org/ourwork/environment/pollutionprevention/garbage/documents/201(62).pdf}

Relevant provisions

Part 2 of Schedule 1 to the Bill amends Part IIIC of the Prevention of Pollution from Ships Act. \textbf{Item 13} repeals and replaces section 26EA so that the object of Part IIIC is to give effect to Australia’s obligations regarding the prevention of pollution by garbage from ships under Annex V of MARPOL. In order for Part IIIC to better reflect the terms of Annex V, numerous references to the ‘disposal’ of garbage are amended to refer instead to the ‘discharge’ of garbage.\footnote{For example, items 14, 15, 18, 20, 22, 25, 27, 29, 38, 40, 50, 54, 55, 58 and 59 of Part 2 of Schedule 1 to the Bill.}
The amendments in Part 2 of Schedule 1 to the Bill create separate rules in respect of the discharge of garbage from ships depending on whether the ship is, or is not, within a special area. Existing subsection 26F(1) creates an offence where a person is reckless or negligent in causing the discharge of garbage into the sea from a ship in certain circumstances. That offence is punishable by a fine not exceeding 2000 penalty units.\(^{48}\)

**Items 16–19** amend paragraph 26F(1)(c) so that a discharge of garbage into the sea under subsection 26F(1) will give rise to the offence if the following circumstances are satisfied:

- the discharge occurs when the ship is not in a ‘special area’, discharge occurs into the sea near a state, the Jervis Bay Territory or an external territory and there is no law of that state or territory that makes provision giving effect to Regulations 3\(^{49}\), 4\(^{50}\) and 7\(^{51}\) of Annex V to the Convention in relation to the area of the sea where the discharge occurs
- the discharge is in a ‘special area’, the discharge occurs into the sea near a state, the Jervis Bay Territory or an external territory and there is no law of that state or territory that makes provision giving effect to Regulations 3, 6\(^{52}\) and 7 of Annex V to the Convention in relation to the area of the sea where the discharge occurs
- the discharge occurs in the exclusive economic zone or
- the discharge occurs beyond the exclusive economic zone and the ship is an Australian ship.\(^{53}\)

**Items 21–26** amend paragraph 26F(3) in the same manner as items 16–19, but provide that the master and owner of the ship each commit an offence of strict liability in the event of the discharge of garbage from a ship into the sea.\(^{54}\) The offence is punishable by a fine not exceeding 500 penalty units.\(^{55}\)

Under existing subsection 26F(5), these strict liability offence provisions will not apply if the discharge of garbage was for the purpose of securing the safety of the ship and the persons on board, or saving lives at sea. The amendments in Part 2 of Schedule 1 to the Bill add further exceptions to the strict liability offence.

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48. The maximum fine for the offence is $220 000.
49. Regulation 3 of Annex V deals with the general prohibition on discharge of garbage into the sea.
50. Regulation 4 of Annex V deals with the discharge of garbage outside special areas.
51. Regulation 7 of Annex V deals with exceptions to the prohibition.
52. Regulation 6 of Annex V deals with discharge of garbage within special areas.
53. Subparagraph 26F(1)(c)(ia) is a ‘roll back’ provision. Item 91 of Part IV of the Bill inserts proposed subparagraph 26F(1)(c)(ib) to make clear the distinction between a discharge in the ‘sea near’ a state, the Jervis Bay Territory or an external territory and a discharge into ‘the outer territorial sea’.
54. Subparagraph 26F(3)(b)(ia) is a ‘roll back’ provision. Item 92 of Part IV of the Bill inserts proposed subparagraph 26F(3)(b)(ib) to make clear the distinction between a discharge in the ‘sea near’ a state, the Jervis Bay Territory or an external territory and a discharge into ‘the outer territorial sea’. In relation to the ‘sea near’ a state or territory, the Commonwealth law will only apply if there is no law of the state of territory giving effect to the relevant regulations in Annex IV to the Convention. In contrast, Commonwealth law will always apply to the ‘outer territorial sea’.
55. The maximum fine for the offence is $55 000.

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First, item 30 inserts proposed subsections 26F(5A)–(5B). The exception in proposed subsection 26F(5A) operates where the discharge of fishing gear from a ship is for the protection of the marine environment or for the safety of the ship or its crew. The exception in proposed subsection 26F(5B) operates where the discharge of food wastes from a ship occurred because the retention of those wastes on board presents an imminent health risk to the persons on board the ship.

Second, item 31 repeals existing subsections 26F(6)–(8A) and replaces them with proposed subsections 26F(6)–(8D) which introduce the following exceptions:

• under proposed subsection 26F(6) the discharge of food wastes outside a special area where:

  – the discharge occurs when the ship is proceeding en route and is as far as practicable from the nearest land
  – if the food wastes have been passed through a comminuter or grinder so that the wastes are capable of passing through a screen with openings no greater than 25 millimetres—the discharge occurs when the ship is at a distance of not less than three nautical miles from the nearest land; or if the discharge occurs when the ship is alongside, or within 500 metres of, a fixed or floating platform—the discharge occurs when the ship is at a distance of not less than 12 nautical miles from the nearest land and
  – if the food wastes have not been passed through a comminuter or grinder and the discharge occurs when the ship is at a distance of not less than 12 nautical miles from the nearest land and the ship is not alongside, or within 500 metres of, a fixed or floating platform.

• under proposed subsection 26F(7) the discharge of garbage from a ship outside a special area where:

  – the ship is proceeding en route and is as far as practicable from the nearest land
  – the garbage is cargo residues that cannot be recovered using commonly available methods for unloading and do not contain any prescribed substances\(^56\) and
  – the discharge occurs when the ship is at a distance of not less than 12 nautical miles from the nearest land and the ship is not alongside, or within 500 metres of, a fixed or floating platform.

• under proposed subsection 26F(8) the discharge of animal carcasses outside a special area where:

  – the discharge occurs when the ship is proceeding en route and is as far as practicable from the nearest land, any prescribed requirements are satisfied, and the ship is not alongside, or within 500 metres of, a fixed or floating platform.

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• under **proposed subsection 26F(8A)** the discharge of cleaning agents or additives (from deck wash water or other external surfaces) **outside a special area** where:
  
  – the cleaning agents or additives are not prescribed cleaning agents or additives and
  – the ship is not alongside, or within 500 metres of, a fixed or floating platform.

• under **proposed subsection 26F(8B)** the discharge of food wastes **in a special area** and the ship is proceeding en route where:
  
  – the food wastes **have been passed through a comminuter or grinder** so that the wastes are capable of passing through a screen with no opening greater than 25 millimetres and have not been contaminated by any other kind of garbage
  – the ship is as far as practicable from, and is at a distance of not less than 12 nautical miles from, the nearest land or iceshelf and
  – if the discharge is of introduced avian products (including poultry and poultry parts) in the Antarctic area—those products have been treated to be made sterile.

• under **proposed subsection 26F(8C)** the discharge of cargo residues, cleaning agents or additives from a ship proceeding en route **in a special area** where:
  
  – either the garbage is cargo residues, contained in cargo hold wash water, that cannot be recovered using commonly available methods and that do not contain any prescribed substances; or the garbage is cleaning agents or additives contained in cargo hold wash water and the cleaning agents or additives are not prescribed cleaning agents or additives
  – both the port of departure and the next port of destination are within the special area
  – the ship’s voyage plan does not show the ship transiting outside the special area between the port of departure and the next port of destination
  – neither the port of departure nor the next port of destination have reception facilities that comply with the relevant International Maritime Organisation guidelines and
  – the discharge occurs when the ship is as far as practicable from, and is at a distance of not less than 12 nautical miles from, the nearest land or iceshelf and the ship is not alongside, or within 500 metres of, a fixed or floating platform.

• under **proposed subsection 26F(8D)** the discharge of garbage from a ship proceeding en route **within a special area** where:
  
  – the garbage is cleaning agents or additives contained in deck wash water or other external surfaces wash water and the cleaning agents or additives are not prescribed cleaning agents or additives and
  – the ship is not alongside, or within 500 metres of, a fixed or floating platform.

Third, **items 32 and 34** insert **proposed subsections 26F(9)–(10)** which contain exceptions for:

• the accidental loss of garbage due to damage to a ship or its equipment where all reasonable precautions were taken to prevent or minimise the loss and
• for accidental loss of fishing gear, where all reasonable steps were taken to prevent the loss.

In each of the exceptions described above, the defendant bears the evidential burden in proving that the discharge occurred in the circumstances as outlined in existing subsection 26F(5) and proposed subsections 26F(6)–(10).

**Items 44–52** amend existing section 26FC which requires Australian ships that have a gross tonnage of 400 or more to have a ‘shipboard waste management plan’. In order for section 26FC to better reflect the terms of Annex V, numerous references to the ‘shipboard waste management plan’ are amended to refer instead to the ‘garbage management plan’. Importantly, **item 45** amends paragraph 26FC(1)(a) so that the requirement for a garbage management plan will apply more widely to all ships with a gross tonnage of 100 or more—rather than as currently, to those ships with gross tonnage of 400 or more.

In addition, **items 47, 56** and **57** apply so that the garbage management plan and the placards placed on board a ship outlining the kinds of garbage that may or may not be discharged from the ship, and the conditions of any discharge, must be written in the working language of the crew.

**Financial implications**

According to the Explanatory Memorandum ‘the revised Annex V (Garbage) is expected to have a minimal cost impact on Australia’. The rationale for this view is that:

> Many Australian shipowners and operators already follow a policy of not discharging waste at sea, other than food waste in some circumstances, which is fully consistent with the revised Annex V. While the expansion of the requirements for placards and garbage management plans to fixed and floating platforms will have an administrative impact, this impact is expected to be negligible.

However it should be noted that the revised Annex V will result in an increased demand for waste reception facilities in ports. According to the Australian Maritime Safety Authority:

> ... most of the issues we have tend to be in some of the bulk ports, the major ports up in the north-west of Western Australia and in Queensland—it is very difficult to drive a waste removal truck up next to a ship if a ship is berthed one or two nautical miles offshore on a narrow jetty. So some of those infrastructure issues can be a problem in some of the bulk ports.

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57. Explanatory Memorandum, p. 15.
58. Ibid.
59. Evidence of P Nelson (Manager, Marine Environment Standards, Marine Environment Division, Australian Maritime Authority), *Public Hearing before the Joint Standing Committee on Treaties*, 6 February 2012, viewed 18 July 2012, [http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22committees%2Fcommjnt%2Fe6a9aafce826b-4f0c-b674-388cb3ee5fa6%2F0003%22](http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22committees%2Fcommjnt%2Fe6a9aafce826b-4f0c-b674-388cb3ee5fa6%2F0003%22)

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Part 3—prevention of air pollution

Terms of Annex VI

Annex VI of MARPOL sets limits on sulphur oxide (SOx) and nitrogen oxide (NOx) emissions from ship exhausts and prohibits deliberate emissions of ozone depleting substances; designated emission control areas set more stringent standards for SOx, NOx and particulate matter. It entered into force on 19 May 2005.

Australia enacted the Maritime Legislation Amendment (Prevention of Pollution from Ships) Act 2006 to reflect the terms of Annex VI. At that time the key obligations of the 1997 Protocol included:

- Regular surveys and inspections of ships to verify compliance with the requirements of the 1997 Protocol. For ships of gross tonnage 400 or more, the surveys are specified in the 1997 Protocol; for ships below this size, the survey and inspection regime is left to the flag state to determine (Regulation 4).

- The issue of an International Air Pollution Prevention Certificate, after inspection, to any ship of 400 gross tonnage or more engaged in voyages to ports or offshore terminals under the jurisdiction of other Parties (Regulation 6).

- Marine diesel engines (other than emergency engines) with a power output of more than 130kW installed on ships built on or after 1 January 2000 and existing engines undergoing major conversion (which includes installing new engines in existing ships) must comply with specified emission standards for NOx using the test procedure and test methods set out in the NOx Technical Code. These NOx requirements will apply retrospectively from 1 January 2000 once the Annex enters into force (Regulation 13).

- Fuel oil supplied to ships must have not more than 4.5% sulphur content except that in the case of ships operating in designated sulphur emission control areas a limit of 1.5% is specified (Regulation 14).

- Shipboard incinerators installed on or after 1 January 2000 must meet specified performance standards and must be operated by trained personnel. The incineration of certain substances, such as oil cargo residues and garbage containing more than traces of heavy metals, is prohibited (Regulation 16).

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61. The Protocol of 1997 to amend MARPOL 73/78 added Annex VI, Regulations for the Prevention of Air Pollution from Ships, which is referred to as ‘the 1997 Protocol’ or ‘Annex VI’. It contains regulations to prevent and control harmful air emission from vessels through set standards on the emissions from diesel engines, the release of volatile organic compounds from cargoes carried in tankers and the use of ozone depleting substances. It also specifies requirements for type, approval and operation of shipboard incinerators.

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• Fuel oil supplied to ships must meet minimum quality standards and the sulphur content documented by the supplier by means of a bunker delivery note. This document is to be kept on board a ship and retained for three years after delivery of the oil (Regulation 18).

Rationale for the change

Despite the fact that Annex VI of MARPOL entered into force on 19 May 2005, the 2009 IMO report into greenhouse gases concluded that:

Shipping is estimated to have emitted 1,046 million tonnes of CO₂ in 2007, which corresponds to 3.3% of the global emissions during 2007. International shipping is estimated to have emitted 870 million tonnes, or about 2.7% of the global emissions of CO₂ in 2007.

Exhaust gases are the primary source of emissions from ships. Carbon dioxide is the most important GHG [greenhouse gas] emitted by ships. Both in terms of quantity and of global warming potential, other GHG emissions from ships are less important.

Mid-range emissions scenarios show that by 2050, in the absence of policies, carbon dioxide emissions from international shipping may grow by a factor of 2 to 3 (compared to the emissions in 2007) as a result of the growth in shipping.

A significant potential for reduction of GHG through technical and operational measures has been identified. Together, if implemented, these measures could increase efficiency and reduce the emissions rate by 25% to 75% below the current levels. Many of these measures appear to be cost-effective, although non-financial barriers may discourage their implementation.

In 2011, the International Maritime Organisation adopted mandatory technical and operational energy efficiency measures which will significantly reduce the amount of greenhouse gas emissions from ships; these measures were included in Annex VI and are expected to enter into force on 1 January 2013.


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Relevant provisions

**Item 62**, in Part 3 of Schedule 1 to the Bill, inserts **proposed section 26FEW** into Part IID of the Prevention of Pollution from Ships Act to provide that an Australian ship which has a gross tonnage of 400 or more and is engaged on an overseas voyage, must keep on board a ship energy efficiency management plan. According to the International Maritime Organisation:

> The Ship Energy Efficiency Management Plan (SEEMP) is an operational measure that establishes a mechanism to improve the energy efficiency of a ship in a cost-effective manner. The SEEMP also provides an approach for shipping companies to manage ship and fleet efficiency performance over time.  

**Proposed subsection 26FEW(4)** provides that the owner and master of the ship commit a strict liability offence in circumstances where the ship energy efficiency management plan is not on board a ship. The penalty for contravention of proposed section 26FEW is 200 penalty units.

The contents of the ship energy efficiency management plan will be prescribed by regulation: **proposed subsection 26FEW(3)**. According to Regulation 22 of Annex VI of MARPOL, the ship energy efficiency management plan is to be developed taking into account guidelines adopted by the International Maritime Organisation. Those guidelines were formalised and adopted on 2 March 2012.

Financial implications

According to the Explanatory Memorandum:

> The Annex VI amendments would incur little or no cost on Australia as the EEDI [Energy Efficiency Design Index] regulations would only apply to prescribed ships that will be built after 1 January 2013 for international trade. These regulations would not apply to Australian ships that are currently in operation. Existing Australian international ships that are over 400 GT would be required to carry on board a [Ship Energy Efficiency Management Plan], an operational document, which can be achieved at a negligible cost.

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66. This means that the maximum penalty is $22 000 for an individual.


68. Explanatory Memorandum, p. 15.

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Schedule 2—repeal of acts

The Government’s stated aim in introducing the Stevedoring Levy (Collection) Bill 1998\(^{69}\) (the Collection Bill) and the Stevedoring Levy (Imposition) Bill 1998\(^{70}\) (the Imposition Bill) was to underpin proposed administrative arrangements that were designed to improve productivity in the stevedoring industry, in the wake of the Patrick’s dispute.

The Government committed the Commonwealth to establishing the Maritime Industry Finance Company (MIFCo) as a wholly owned Commonwealth Company under the Corporations Law. MIFCo, which has since been deregistered, was a company limited by guarantee with the authority to administer a loan facility of up to $250 million from financial institutions which it used to pay stevedoring employees sums equal to their redundancy entitlements.

Funds for the payment of the redundancies were raised over time by a levy on the loading and unloading of containers and vehicles in Australia. It was always intended that the scheme would be wound up within six or seven years of its inception.\(^{71}\) The levy ceased to be collected in May 2006.\(^{72}\)


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70. Further information about the Bill is contained on the Bill homepage: [http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fbillhome%2Fr516%22](http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fbillhome%2Fr516%22)


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