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Protection of the Sea (Prevention of Pollution from Ships) Amendment (Polar Code) Bill 2017

Bill McCormick
Science, Technology, Environment and Resources Section

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Royal Assent

Links: The links to the [Bill](#), its [Explanatory Memorandum](#) and [second reading speech](#) can be found on the Bill's home page, or through the [Australian Parliament website](#).

When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the [Federal Register of Legislation website](#).

All hyperlinks in this Bills Digest are correct as at April 2017.

Purpose of the Bill

The purpose of the Protection of the Sea (Prevention of Pollution from Ships) Amendment (Polar Code) Bill 2017 (the Bill) is to amend the [Protection of the Sea \(Prevention of Pollution from Ships\) Act 1983](#) (POTS Act) to fulfil Australia's international obligations under the International Code for Ships Operating in Polar Waters (Polar Code), and in particular to implement stricter requirements for discharging oil, noxious substances, sewage and garbage from ships in Antarctic and Arctic waters.¹

Background

The [Polar Code](#), which entered into force on 1 January 2017, was developed to require increased safety measures for ships and their crew when operating in the harsh polar seas. It also includes measures to protect the pristine marine and coastal environments of the Arctic and Antarctic.²

The vessels that are required to comply with the Polar Code are those that intend to operate within Arctic waters or the Antarctic Area, as defined in the Code.³ Arctic waters are generally those north of 60° North latitude but extend south of Greenland to 58°N and then north of Iceland to the Norwegian islands of Jan Mayen Island (71°N) then to Bear Island (71.5°N) and then to Cape Kanin Nos in Russia (68.65°N).⁴ The Antarctic Area is south of 60° South latitude.

The Polar Code was adopted by the [International Maritime Organisation \(IMO\)](#) along with associated amendments to the [International Convention for the Safety of Life at Sea \(SOLAS\)](#)⁵ in November 2014. Related amendments to the [International Convention for the Prevention of Pollution from Ships \(MARPOL\)](#)⁶ were adopted in May 2015.⁷

Part I-A of the Polar Code contains provisions relating to safety, while Part II-A relates to pollution prevention. Some provisions of the Code are 'requirements', while others are only 'recommendations'. Under the Polar Code, ships intending to operate in polar waters will have to apply for a Polar Ship Certificate designating the ship as Category A, B or C.⁸ Category A ships are those capable of operating in first-year ice of 70–120 cm thickness, and Category B ships are designed for operating in 30–70-cm-thick ice, while Category C ships are designed to operate in open water or in ice conditions less severe than those included in categories A and B. Ships will also have to carry a Polar Water Operational Manual.⁹

The safety provisions in the Code relate to ship structure; stability and subdivision; watertight and weathertight integrity; machinery installations; operational safety; fire safety and protection; life-saving appliances and arrangements; safety of navigation; communications; voyage planning and manning and training.¹⁰ The pollution provisions relate to prevention of pollution from oil, noxious liquid substances, sewage and garbage from ships.

MARPOL aims to prevent and minimise pollution from ships—both from accidental pollution and routine operations. MARPOL 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

1. D Chester, 'Second reading speech: Protection of the Sea (Prevention of Pollution from Ships) Amendment (Polar Code) Bill 2017', Senate, *Debates*, 16 February 2017, p. 1281.

2. International Maritime Organisation (IMO), 'Shipping in polar waters', IMO website, 2017.

3. DNV.GL, 'The IMO Polar Code in force, beginning 1 January 2017: how to comply', DNV.GL website, 21 December 2016.

4. IMO, [International Code for Ships Operating in Polar Waters \(Polar Code\)](#), MEPC 68/21/Add.1, annex 10, p. 9.

5. [International Convention for the Safety of Life at Sea \(SOLAS\)](#), done in London 1 November 1974, [1983] ATS 22 (entered into force for Australia 17 November 1983).

6. [Protocol of 1978 relating to the International Convention for the Prevention of Pollution from Ships \(MARPOL\)](#), done in London 17 February 1978, [1988] ATS 29 (entered into force for Australia 14 January 1988).

7. IMO, 'Shipping in polar waters', op. cit.

8. Polar Code, paragraph 1.3.1. There are also Category C ships which are designed to operate in open water or ice conditions less severe than Category A and B ships.

9. IMO, 'Shipping in polar waters', op. cit.; Polar Code, pp. 5–6.

10. Ibid.

- 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.¹¹

Australia's obligations under MARPOL are implemented through the *POTS Act*.¹² Several previous amendments have been made to MARPOL and the *POTS Act* to specifically protect the Antarctic environment.

In 1990, the Antarctic was designated as a 'special area' under Annexes I (prevention of oil pollution) and V (prevention of pollution from garbage) because of the fragile ecosystems in the area which required stricter controls to be placed on discharges from ships.¹³ Under this amendment, any discharge of oil or oily mixture into the sea in the Antarctic Area from any ship was prohibited. In addition, all ships flagged from countries who are MARPOL parties were required to retain all garbage while operating in the Antarctic.¹⁴

In 1992, an amendment to Annex II of MARPOL prohibited the discharge of any noxious substance into the sea in the Antarctic area.¹⁵

In 2011, the *POTS Act* was amended to implement Regulation 43 in Annex I of MARPOL, which prohibits the carriage of heavy grade oil (HGO) in ships for use as fuel or as cargo in bulk in the Antarctic.¹⁶

While no similar amendments have placed such additional restrictions on ships operating in Arctic waters under MARPOL, in 2009, the IMO adopted [Guidelines for Ships Operating in Polar Waters](#) which provided:

Procedures for the protection of the environment under normal operations should take into account any applicable national and international rules and regulations and industry best practices related to operational discharges and emissions from ships, use of heavy grade oils, strategies for ballast water management, use of anti-fouling systems, and related measures.¹⁷

Under the Polar Code, ships are now encouraged not to use or carry heavy grade fuel oil in the Arctic, and discharges of oil, noxious substances, sewage and garbage into the sea in Arctic waters are now prohibited or regulated.¹⁸

The Polar Code and accompanying amendments to SOLAS and MARPOL do not apply precisely the same restrictions in the Arctic and the Antarctic. There are differences in conditions as a result of geography: for example, the 'Arctic is an ocean surrounded by continents while the Antarctic is a continent surrounded by an ocean' and as a result there is little multiyear sea ice in the Antarctic compared to the Arctic.¹⁹ The Polar Code preamble states that 'although the Code is intended to apply as a whole to both Arctic and Antarctic, the legal and geographical differences between the two areas have been taken into account'.²⁰

However, there are also similarities and so, for example, the Polar Code applies the same restrictions on the discharge of sewage in both the Antarctic Area and Arctic waters.²¹

11. P Pyburne, [Maritime Legislation Amendment Bill 2012](#), Bills digest, 3, 2012–13, Parliamentary Library, Canberra, 14 August 2012, pp. 3–4.
12. They are also implemented through the [Navigation Act 2012](#): Department of Infrastructure and Regional Development (DIRD), [The International Convention for the Prevention of Pollution from Ships \(MARPOL\)](#), DIRD website, 14 July 2014.
13. IMO Marine Environment Protection Committee (MEPC), [Designation of Antarctic area as a special area under Annexes I and V of MARPOL 73/78](#), MEPC Resolution 42(30), 16 November 1990.
14. *Ibid.*, pp. 3, 5.
15. IMO MEPC, [Designation of the Antarctic area as a special area and lists of liquid substances in Annex II](#), MEPC Resolution 57(33), 30 October 1992, pp. 3, 5.
16. S Power and B McCormick, [Maritime Legislation Amendment Bill 2015](#), Bills digest, 35, 2015–16, Parliamentary Library, Canberra, 2015, p. 3; see also [Protection of the Sea \(Prevention of Pollution from Ships\) Amendment \(Oils in the Antarctic Area\) Act 2011](#).
17. IMO Assembly, [Guidelines for ships operating in polar waters](#), 18 January 2010, p. 33.
18. IMO, [Shipping in polar waters](#), op. cit.
19. *Ibid.*
20. Polar Code, p. 5.
21. DNV.GL, [The IMO Polar Code in force, beginning 1 January 2017: how to comply](#), op. cit.

Committee consideration

Selection of Bills Committee

On 23 March 2017, the Senate Selection of Bills Committee recommended that the Bill not be referred to a committee for inquiry and report.²²

Senate Standing Committee for the Scrutiny of Bills

The Senate Scrutiny of Bills Committee had comments in relation to proposed section 26BCC of the *POTS Act*, at **item 14** of the Bill, which contains offences for the discharge of sewage in the Antarctic Area and Arctic waters (see further ‘Key issues and provisions’ later in this Digest). In relation to the imposition of strict liability under proposed subsections 26BCC(3) and (4), the Committee noted:

Proposed subsection 26BCC(3) and (4) make it an offence of strict liability if the master and the owner of a ship discharge sewage from the ship in the Antarctic Area and Arctic waters in certain circumstances. The offence carries a significant penalty of 500 penalty units. The *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* states that strict liability offences are generally only considered appropriate where the offence is punishable by a fine of up to 60 penalty units for an individual (300 for a body corporate) ...²³

The Committee requested a detailed justification from the Minister for each proposed strict liability offence with reference to the principles set out in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, in particular the justification for the proposed penalty.²⁴

The Committee also made the following comments in relation to reversal of the evidential burden of proof:

Proposed subsections 26BCC(5), (6), (7), (8) and (9) provide exceptions (offence specific defences) to the strict liability offences relating to the discharge of sewage from a ship in the Antarctic Area and Arctic waters.

Subsection 13.3(3) of the *Criminal Code Act 1995* provides that a defendant who wishes to rely on any exception, exemption, excuse, qualification or justification bears an evidential burden in relation to that matter.

While the defendant bears an evidential burden (requiring the defendant to raise evidence about the matter), rather than a legal burden (requiring the defendant to positively prove the matter), the committee expects any such reversal of the evidential burden of proof to be justified. The reversal of the evidential burden of proof in proposed section 26BCC has not been addressed in the explanatory materials.²⁵

As neither the statement of compatibility with human rights nor the Explanatory Memorandum addresses this issue, the Committee requested the Minister’s advice as to why it is proposed to use offence-specific defences (which reverse the evidential burden of proof) in this instance. The Committee noted that its consideration of the appropriateness of a provision which reverses the burden of proof is assisted if it explicitly addresses relevant principles as set out in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*.²⁶

Policy position of non-government parties/independents

Anthony Albanese, Shadow Minister for Infrastructure, Transport, Cities and Regional Development, said that the Opposition supported the Bill.²⁷ He noted that the Polar Code is not perfect and there are moves to strengthen it further, with New Zealand producing ‘a proposal for phase 2 of the code’.²⁸ He suggested:

22. Senate Standing Committee for Selection of Bills, [Report](#), 3, 2017, The Senate, 23 March 2017, p. 4.

23. Senate Standing Committee for the Scrutiny of Bills, [Scrutiny digest](#), 3, 2017, The Senate, 22 March 2017, p. 32.

24. Ibid., p. 33. See also: Attorney-General’s Department, [A guide to framing Commonwealth offences, infringement notices and enforcement powers](#), Canberra, September 2011.

25. Ibid.

26. Ibid.

27. A Albanese, ‘[Second reading speech: Protection of the Sea \(Prevention of Pollution from Ships\) Amendment \(Polar Code\) Bill 2017](#)’, House of Representatives, *Debates*, 28 March 2017, p. 3453.

Some of the issues that the next wave of reform should examine include further toughening of the minimum structural requirement for ships and the fact that the code applies only to ships with a gross tonnage of more than 500 tonnes, meaning it excludes fishing boats. As well, while the code covers management of ballast water and antifouling paint, complying with these provisions is voluntary. It also allows for food to be thrown overboard as little as 12 nautical miles from the ice, which, for example, is not allowed to happen—not surprisingly—in the Mediterranean Sea.²⁹

Position of major interest groups

While not commenting specifically on this Bill, the Friends of the Earth (FOE) has said that the Polar Code has some noteworthy elements, including a ban on the operational discharge of oil and chemicals and enhanced standards associated with disposal of sewage and garbage into polar seas.³⁰ However, FOE observed that many important issues were not included in the Polar Code: notably eliminating heavy fuel oil use in the Arctic and the inclusion of ‘mandatory invasive species protections, graywater [sic] restrictions, underwater noise abatement and sufficient oil spill response requirements’.³¹

Similarly, Sian Prior of the Antarctic and Southern Ocean Coalition (ASOC) welcomed the Polar Code’s strengthening of controls on the discharge of sewage and garbage, but ‘was very disappointed that an opportunity which could have provided the further protection needed for Antarctic waters has been lost’.³² ASOC would like to see other improvements, such as:

- A ban on the discharge of any untreated sewage into Antarctic waters;
- The introduction of controls for the discharge of grey water (i.e. galley water, laundry room water, shower/bathwater, sink water), which can contain high levels of detergents, chemicals and faecal coliforms. The discharge of grey water is completely unregulated in Antarctic waters;
- Regulation of discharges of ballast water, which can contain invasive species that could settle in Antarctic waters, and controls on hull fouling to prevent the introduction of invasive species via ships’ hulls; and
- Tailored regulation of oil spill response addressing equipment required to be carried onboard, training for crews, and the possible response from a ship, bearing in mind that any oil spill response will initially have to be delivered by the vessel responsible for a spill or other vessels in the vicinity rather than from further afield.³³

Financial implications

The Explanatory Memorandum states that the Bill will have no financial impact for the Commonwealth.³⁴

Statement of Compatibility with Human Rights

As required under Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth), the Government has assessed the Bill’s compatibility with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of that Act. The Government considers that the Bill is compatible.³⁵

Parliamentary Joint Committee on Human Rights

As was the case with the Senate Scrutiny of Bills Committee, the Parliamentary Joint Committee on Human Rights noted that the ‘statement of compatibility does not provide an assessment of reverse burden offences or

28. Ibid., pp. 3453–3454.

29. Ibid., p. 53; IMO MEPC, [Establishment of the date on which Regulation 5\(1\)\(a\) of MARPOL Annex V in respect of the Mediterranean sea area special area shall take effect](#), MEPC Resolution 172(57), 4 April 2008.

30. Friends of the Earth (FOE), [U.N. finalises Polar Shipping Code after six years](#), media release, 15 May 2015.

31. Ibid.

32. Pan European Networks (PEN), [‘Polar priorities’](#), PEN website, 27 May 2015.

33. Ibid.

34. [Explanatory Memorandum](#), Protection of the Sea (Prevention of Pollution from Ships) Amendment (Polar Code) Bill 2017, p. 2.

35. The Statement of Compatibility with Human Rights can be found at page 3 of the Explanatory Memorandum to the Bill.

strict liability offences and does not identify that any rights are engaged and limited'.³⁶ The Committee commented that the statement of compatibility for the Bill 'has either not addressed, or has not sufficiently addressed, whether the strict liability offence is a permissible limit on human rights'.³⁷ Therefore the Committee requested the Minister to provide further information as to:

- whether the strict liability and reverse burden offences are aimed at achieving a legitimate objective for the purposes of international human rights law
- how the strict liability and reverse burden offences are effective to achieve (that is, rationally connected to) that objective and
- whether the limitation is a reasonable and proportionate measure to achieve the stated objective.³⁸

Key issues and provisions

The Bill has one Schedule, which amends the *POTS Act* to implement the 2015 amendments to MARPOL which adopted the environment-related provisions of the Polar Code. Since there are already stricter provisions in MARPOL and the *POTS Act* relating to prevention of pollution from oil, garbage and noxious substances in the Antarctic, many of the amendments in the Bill extend coverage of these provisions to the Arctic waters. The most comprehensive amendments relate to increased restrictions and prohibitions on the discharge of sewage from ships in both the Antarctic and the Arctic.

New definitions relating to the Polar Code

Item 1 of Schedule 1 of the Bill proposes to add several new definitions to subsection 3(1) of the *POTS Act*. Most of these new terms are referred to as having 'the same meaning as in the Polar Code'. While five have precise definitions in the Polar Code, the term 'areas of ice concentration exceeding 1/10' is not further defined. It is not clear why a reference was made to a definition in the Polar Code when in fact there is no such definition.

The other new definitions and their corresponding meaning in the Polar Code are as follows:

- **Category A ships** are those designed to operate in polar waters in at least medium first-year ice, that is, sea ice of one winter's growth of 70–120 cm thickness³⁹
- **Category B ships** are those designed to operate in polar waters in at least thin first-year ice, that is, sea ice of one winter's growth of 30–70 cm thickness⁴⁰
- **Fast ice** is defined as 'sea ice which forms and remains fast along the coast, where it is attached to the shore, to an ice wall, to an ice front, between shoals or grounded icebergs'⁴¹ and
- An **ice-shelf** is thick floating ice that is 2–50 metres or more above the water and attached to the coast.⁴²

Discharge of oil

Subsection 9(1B) of the *POTS Act* prohibits discharge of oil or oily mixtures from a ship into the sea.⁴³

Subsection 9(4) provides a number of exceptions to this prohibition, subject to certain conditions being met.

36. Parliamentary Joint Committee on Human Rights, [Report](#), 3, 2017, The Senate, 28 March 2017, p. 5.

37. *Ibid.*, p. 6.

38. *Ibid.*, pp. 6–8.

39. [Polar Code](#), introduction, paragraph 2.1.

40. *Ibid.*, paragraph 2.2.

41. *Ibid.*, Part II-A, paragraph 4.1.3.

42. *Ibid.*, paragraph 4.1.2.

43. Note that the prohibition only applies to discharges into certain sea areas (such as in Australia's [Exclusive Economic Zone](#) (EEZ)), or in the case of a discharge that occurs beyond Australia's EEZ, the prohibition applies to Australian ships. For further information on the EEZ and other maritime zones, see Geoscience Australia (GA), [Maritime boundary definitions](#), GA website.

However, the exceptions generally do not apply to discharges from ships in ‘[special areas](#)’,⁴⁴ such as the Antarctic Area.⁴⁵

Items 2, 5, 6 of the Bill amend the exceptions in paragraphs 9(4)(a), (d) and (e) to add ‘and not in Arctic waters’ after ‘not within a special area’. This means that the exceptions to the prohibition on ships and tankers discharging oil or oily mixture into the sea will no longer apply to ships within Arctic waters.

Similarly, **item 4** amends the exception in paragraph 9(4)(c) by replacing ‘within an area other than the Antarctic area from a ship’ with ‘from a ship that is within an area (other than the Antarctic Area or Arctic waters)’. This means the exception to the oil discharge prohibition for ships of less than 400 tonnes does not apply in the Antarctic Area or Arctic waters.

Discharge of noxious substances

Subsection 21(1) of the *POTS Act* contains an offence for recklessly or negligently discharging noxious substances or mixtures from a ship into the sea.⁴⁶ Subsection 21(1B) contains a strict liability version of this offence.⁴⁷

Subsections 21(4) to 21(9) contain exceptions to this strict liability offence, as long as certain conditions are met. However, subsection 21(13) provides that these exceptions do not apply to discharges of noxious substances in the Antarctic Area. **Items 7 and 8** of the Bill amend subsection 21(13) to extend this so that the exceptions also do not apply to discharges in Arctic waters.

Discharge of sewage

Operational requirements of the Polar Code in relation to Prevention of Pollution by Sewage from Ships state that:

- 4.2.1 Discharges of sewage within polar waters are prohibited except when performed in accordance with MARPOL Annex IV and the following requirements:
 - .1 the ship is discharging comminuted and disinfected sewage in accordance with regulation 11.1.1 of MARPOL Annex IV at a distance of more than 3 nautical miles from any ice-shelf or fast ice and shall be as far as practicable from areas of ice concentration exceeding 1/10; or
 - .2 the ship is discharging sewage that is not comminuted or disinfected in accordance with regulation 11.1.1 of MARPOL Annex IV and at a distance of more than 12 nautical miles from any ice-shelf or fast ice and shall be as far as practicable from areas of ice concentration exceeding 1/10; or
 - .3 the ship has in operation an approved sewage treatment plant certified by the Administration to meet the operational requirements in either regulation 9.1.1 or 9.2.1 of MARPOL Annex IV, and discharges sewage in accordance with regulation 11.1.2 of Annex IV and shall be as far as practicable from the nearest land, any ice-shelf, fast ice or areas of ice concentration exceeding 1/10.
- 4.2.2 Discharge of sewage into the sea is prohibited from category A and B ships constructed on or after 1 January 2017 and all passenger ships constructed on or after 1 January 2017, except when such discharges are in compliance with paragraph 4.2.1.3 of this chapter.

44. MARPOL defines certain sea areas as ‘special areas’ which are provided a higher level of protection than other areas: see further IMO, ‘[Special areas under MARPOL](#)’, IMO website, 2017.

45. The ‘Antarctic Area’ is defined in subsection 3(1) of the *POTS Act* as the sea area south of 60° south latitude.

46. Note the prohibition only applies to discharges into certain sea areas (such as in Australia’s Exclusive Economic Zone (EEZ)), or in the case of a discharge that occurs Australia’s EEZ, the prohibition applies to Australian ships. For further information on the EEZ and other maritime zones, see GA, ‘[Maritime boundary definitions](#)’, op. cit.

47. The imposition of strict liability means that a fault element (such as recklessness) does not need to be satisfied, but the offence 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.

- 4.2.3 Notwithstanding the requirements of paragraph 4.2.1, category A and B ships that operate in areas of ice concentrations exceeding 1/10 for extended periods of time, may only discharge sewage using an approved sewage treatment plant certified by the Administration to meet the operational requirements in either regulation 9.1.1 or 9.2.1 of MARPOL Annex IV. Such discharges shall be subject to the approval by the Administration.⁴⁸

Division 1 of Part IIIB of the *POTS Act* gives effect to Australia's obligations under Annex IV of the [Protocol on Environmental Protection to the Antarctic Treaty](#) (Antarctic Protocol).⁴⁹ In particular, section 26BC currently prohibits the discharge of untreated sewage into waters of the Antarctic Area. Where the discharge occurs beyond the 12 nautical mile [territorial sea](#) adjacent to the Australian Antarctic Territory, the offence only applies to Australian ships.

This offence does not apply if such discharge was done to secure safety of the ship or saving life at sea.⁵⁰ It also does not apply if the sewage was discharged from a holding tank at a prescribed rate while the ship was moving at least four knots and at least 12 nautical miles from the nearest land or ice shelf.⁵¹

Items 9–13 simply insert the word 'untreated' in front of the word 'sewage' wherever it appears in the Division, clarifying that the offence only applies to the discharge of untreated sewage. The Explanatory Memorandum states this 'ensures clarity and consistency' with Annex IV of the Antarctic Protocol.⁵² Article 6(1)(a) of Annex IV of the Antarctic Protocol states that each party to the Protocol shall eliminate all discharge into the sea of untreated sewage within 12 nautical miles of land or ice shelves.

Item 14 then inserts **proposed Division 1A** into Part IIIB of the *POTS Act* to regulate the discharge of sewage from ships in the Antarctic Area and Arctic waters. This gives effect to Australia's obligations under Annex IV of MARPOL and the new Polar Code.

In particular, **proposed section 26BCC** contains offences for discharging sewage in these areas. The offences in **proposed subsections 26BCC(1) and (3)** apply in the Antarctic Area, but only to Australian ships if the discharge occurs outside the outer limits of the exclusive economic zone (EEZ) adjacent to the Australian Antarctic Territory. **Proposed subsection 26BCC(1)** is a fault-based offence, where the person must be reckless or negligent in causing the discharge. **Proposed subsection 26BCC(3)** is a strict liability version of this offence, with a lower maximum penalty.

Proposed subsections 26BCC(2) and (4) apply to Australian ships in Arctic waters. **Proposed subsection 26BCC(2)** is a fault based offence where the person must be reckless or negligent and **proposed subsection 26BCC(4)** is a strict liability offence.

Proposed subsections 26BCC(5)–(9) contain a number of exceptions to the strict liability offences. For example, under **proposed paragraph 26BCC(5)(a)**, the strict liability offences do not apply if the discharge is for the purpose of securing the safety of the ship and persons on board, or saving life at sea. The **notes to proposed subsections 26BCC(5)–(9)** provide that the defendant bears an evidential burden to prove the relevant matters in these exceptions.

As noted earlier in this Digest, the Senate Scrutiny of Bills Committee raised concerns in relation to strict liability in proposed subsections 26BCC(3) and (4). The Committee requested a detailed justification from the Minister for each proposed strict liability offence. The Committee also made comments in relation to reversal of the evidential burden of proof in the case of proposed subsections 26BCC(5)–(9). It has requested 'the Minister's

48. [Polar Code](#), op. cit., pp. 39–40

49. [Protocol on Environmental Protection to the Antarctic Treaty](#), done in Madrid 4 October 1991, [1998] ATS 6 (entered into force for Australia and generally 14 January 1998).

50. *POTS Act*, subsection 26BC(3).

51. *Ibid.*, subsection 26BC(4).

52. [Explanatory Memorandum](#), Protection of the Sea (Prevention of Pollution from Ships) Amendment (Polar Code) Bill 2017, p. 5.

advice as to why it is proposed to use offence-specific defences (which reverse the evidential burden of proof) in this instance’.⁵³

In light of the Committee’s concerns, it may be best to wait for the Minister’s response to clarify these two issues. However, the Explanatory Memorandum does state:

The justification for the need for the strict liability offences is to ensure the integrity of the regulatory regime as it relates to the pristine natural environments of the Antarctic Area and Arctic waters. Further, the offences do not include imprisonment as a penalty ...⁵⁴

Discharge of sewage in other sea areas is covered by the existing Division 2 of Part IIIB of the Act. Subsection 26C(2) specifically excludes the sea in the Antarctica Area from this Division. **Item 15** amends subsection 26C(2) to provide that Arctic waters are also not covered by Division 2 of Part IIIB.

Prevention of pollution by garbage

Part IIIC of the *POTS Act* implements Annex V of MARPOL, which relates to the prevention of pollution by garbage. Section 26EA specifically provides that the object of the Part is to give effect to Australia’s obligations under Annex V of MARPOL. **Item 16** of the Bill adds a reference to the Polar Code to section 26EA, meaning that the object of the Part is also to give effect to Australia’s obligations under the Polar Code.

In particular, the Polar Code provides:

- 5.2.1 In Arctic waters, discharge of garbage into the sea permitted in accordance with regulation 4 of MARPOL Annex V, shall meet the following additional requirements:
- .1 discharge into the sea of food wastes is only permitted when the ship is as far as practicable from areas of ice concentration exceeding 1/10, but in any case not less than 12 nautical miles from the nearest land, nearest ice-shelf, or nearest fast ice;
 - .2 food wastes shall be comminuted or ground and shall be capable of passing through a screen with openings no greater than 25 mm. Food wastes shall not be contaminated by any other garbage type;
 - .3 food wastes shall not be discharged onto the ice;
 - .4 discharge of animal carcasses is prohibited; and
 - .5 discharge of cargo residues that cannot be recovered using commonly available methods for unloading shall only be permitted while the ship is en route and where all the following conditions are satisfied:
 - .1 cargo residues, cleaning agents or additives, contained in hold washing water do not include any substances classified as harmful to the marine environment, taking into account guidelines developed by the [International Maritime] Organization;
 - .2 both the port of departure and the next port of destination are within Arctic waters and the ship will not transit outside Arctic waters between those ports;
 - .3 no adequate reception facilities are available at those ports taking into account guidelines developed by the Organization; and
 - .4 where the conditions of subparagraphs 5.2.1.5.1, 5.2.1.5.2 and 5.2.1.5.3 of this paragraph have been fulfilled, discharge of cargo hold washing water containing residues shall be made as far as

53. Senate Standing Committee for the Scrutiny of Bills, [Scrutiny digest](#), 3, 2017, The Senate, 22 March 2017, pp. 33–34.

54. [Explanatory Memorandum](#), Protection of the Sea (Prevention of Pollution from Ships) Amendment (Polar Code) Bill 2017, p. 6.

practicable from areas of ice concentration exceeding 1/10, but in any case not less than 12 nautical miles from the nearest land, nearest ice shelf, or nearest fast ice.

5.2.2 In the Antarctic area, discharge of garbage into the sea permitted in accordance with regulation 6 of MARPOL Annex V, shall meet the following additional requirements:

- .1 discharges under regulation 6.1 of MARPOL Annex V shall be as far as practicable from areas of ice concentration exceeding 1/10, but in any case not less than 12 nautical miles from the nearest fast ice; and
- .2 food waste shall not be discharged onto ice.⁵⁵

Items 17–36 of the Bill amend the Act to reflect this provision of the Polar Code.

Section 26F of the *POTS Act* currently prohibits the discharge of garbage into the sea by ships in certain areas, including by Australian ships beyond the EEZ adjacent to the Australian Antarctic Territory. Subsection 26F(1) is a fault based offence where the person must be reckless or negligent as to causing the discharge of garbage, while subsection 26F(3) is a strict liability offence. Subsections 26F(5), (5A) and (5B) provide exceptions whereby subsection 26F(3) does not apply if discharge of garbage is for the ship's safety or to save lives; to discharge fishing gear for the protection of the marine environment or for the safety of the ship or crew; or to the discharge of food wastes if their retention presents a health hazard to those on board.

Subsections 26F(6), (7), (8) and (8A) provide exceptions to the strict liability offence for specific types of garbage (such as food wastes, cargo residues and animal carcasses), provided the discharge occurs in the specified manner into seas outside a special area. **Items 17–24** amend these subsections so that the exceptions do not apply to discharges in Arctic waters, consistent with the Polar Code.

Subsections 26F(8B) and (8C) provide further exceptions to the strict liability offence where the discharge of certain types of garbage occurs inside a special area, provided certain conditions are met (these conditions are more stringent than those in the above subsections). **Items 25, 26, 29 and 30** extend the application of these exceptions to discharges in Arctic waters.

Subsection 26F(8B) provides that the strict liability offence in subsection 26F(3) does not apply to the discharge of food wastes in certain circumstances. This includes where the discharge occurs when the ship is proceeding en route, the food wastes have been ground to less than 25 mm, and the food waste is discharged more than 12 nautical miles from the nearest land or ice shelf.⁵⁶

In particular, paragraph 26F(8B)(f) currently permits the discharge of food waste as far as practicable, and at least 12 nautical miles, from the nearest land. **Item 27** repeals this paragraph and replaces it with **proposed paragraphs (f), (fa) and (fb)**. **Proposed paragraph 26F(8B)(f)** permits the discharge of food waste when the ship is as far as practicable from, and at least 12 nautical miles from, the nearest land or nearest ice shelf in all special areas, other than the Antarctic Area. **Proposed paragraph 26F(8B)(fa)** applies to discharges in the Antarctic Area and Arctic waters, permitting discharge of food waste as far as practicable from the nearest land or areas of ice concentration exceeding 1/10; and at least 12 nautical miles from the nearest land, ice-shelf or fast ice. **Proposed paragraph 26F(8B)(fb)** prohibits discharge of food wastes onto ice in the Antarctic Area or Arctic waters.

Subsection 26F(8C) outlines the conditions under which the strict liability offence in subsection 26F(3) does not apply to the discharge of two specific categories of garbage in a special area.⁵⁷ Those conditions include:

55. *Polar Code*, op. cit., pp. 40–41.

56. Note that, in addition, if the discharge is of avian products in the Antarctic Area, the products must have been sterilised: *POTS Act*, paragraph 26F(8B)(g).

57. The first category is cargo residues that are contained in cargo hold wash water, that cannot be recovered using commonly available methods for unloading and that do not contain any prescribed substances. The second category is cleaning agents or additives contained in cargo hold wash water and the cleaning agents or additives are not prescribed cleaning agents or additives.

- the discharge occurs when the ship is proceeding en route (paragraph 26F(8C)(b))
- the port of departure and the next port of destination are within the special area (paragraph 26F(8C)(d))
- the ship's voyage plan shows that the ship will not transit outside the special area between port of departure and next port of destination (paragraph 26F(8C)(e))
- the port of departure or destination do not contain appropriate reception facilities for these categories of garbage (paragraph 26F(8C)(f))
- the discharge occurs more than 12 nautical miles from the nearest land or ice shelf (paragraph 26F(8C)(g)) and
- the discharge does not occur when the ship is within 500 metres of a fixed or floating platform (paragraph 26F(8C)(h)).

As noted earlier, **items 29 and 30** extend the coverage of subsection 26F(8C) to Arctic waters. **Item 31** then replaces paragraph 26F(8C)(d) to extend the exception to include instances where both the port of departure and the next port of destination are within a special area or Arctic waters.

Item 32 also extends the coverage of paragraph 26F(8C)(e) to Arctic waters when the voyage plan shows the ship staying within the special area or Arctic waters when transiting between the port of departure and the next port of destination.

As noted above, paragraph 26F(8C)(f) provides an exception to discharge of two categories of garbage where the port of departure and the next port of destination do not contain appropriate reception facilities. Paragraph 26F(8C)(g) provides the exception to discharge if it occurs more than 12 nautical miles from the nearest land or ice shelf.

Item 33 repeals paragraphs 26F(8C)(f) and (g) and substitutes **proposed paragraphs 26F(8C)(f), (g), (ga) and (gb)**.

- **proposed paragraph 26F(8C)(f)** simply rewords the existing paragraph and clarifies that it applies when both the port of departure and the next port of destination are within a special area
- **proposed paragraph 26F(8C)(g)** mirrors proposed paragraph 26F(8C)(f) for Arctic waters rather than a special area
- **proposed paragraph 26F(8C)(ga)** applies to discharges in special areas other than the Antarctic Area, permitting discharges that occur when the ship is as far as practicable from the nearest land and at least 12 nautical miles from the nearest land or nearest ice-shelf and
- **proposed paragraph 26F(8C)(gb)** applies to discharges in the Antarctic Area and Arctic waters, permitting discharge of cargo residues or cleaning agents where the ship is as far as practicable from the nearest land or areas of ice concentration exceeding 1/10 and at least 12 nautical miles from the nearest land, nearest ice-shelf or nearest fast ice.

Subsection 26F(8D) outlines the conditions under which the strict liability offence in subsection 26F(3) does not apply to the discharge of cleaning agents or additives in a special area. **Item 36** extends the coverage of this subsection by adding 'or in Arctic waters' after the words 'the ship is within a special area'.

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