



Protection of the Sea (Powers of Intervention) Amendment Bill 2006

Moira Coombs
Law and Bills Digest Section

Contents

Purpose.	2
Background.	2
United Nations Convention on the Law of the Sea (UNCLOS).	2
Territorial Sea.	3
Exclusive Economic Zone (EEZ).	3
Financial implications	4
Main provisions.	4
Schedule 1 – Amendments.	4
Australia’s Maritime Zones	10
Endnotes.	10

Protection of the Sea (Powers of Intervention) Amendment Bill 2006

Date introduced: 29 March 2006

House: Representatives

Portfolio: Transport and Regional Services

Commencement: Royal Assent

Purpose

To widen the powers of the Australian Maritime Safety Authority (AMSA) to intervene when a maritime casualty has occurred not only on the high seas but in the exclusive economic zone and in the territorial sea. AMSA's powers to issue directions to the owner, master or salvor¹ in possession of a ship or to any other person as necessary have also been widened to allow it to more effectively mount emergency response arrangements when required.

Background

In November 2005, the Australian Transport Council (ATC) comprising Ministers representing the Australian, State and Northern Territory Governments agreed that a national approach was needed for maritime emergency responses and that the *Protection of the Seas (Powers of Intervention) Act 1981* required strengthening.² The intention of the Bill is to implement the ATC agreement on emergency response arrangements for AMSA to be the single national decision-maker with responsibility for intervention in incidents involving threats of significant pollution, covering all ship types in all waters. It also clarifies AMSA's powers of direction to persons whose cooperation would be vital to preventing and mitigating pollution.³

The *Protection of the Sea (Powers of Intervention) Act 1981* implements the *International Convention relating to Intervention on the High Seas in Cases of Oil Pollution Casualties* and the *Protocol relating to Intervention on the High Seas in Cases of Pollution by Substances other than Oil, 1973*. These international instruments relate to maritime casualties and the measures taken on the high seas.

United Nations Convention on the Law of the Sea (UNCLOS)

The maritime zones are governed by the international instruments agreed upon to manage navigational rights and freedoms and degrees of sovereignty over various zones. The Bill makes reference to internal waters, territorial sea and coastal waters, the exclusive

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

economic zone and the high seas. The United Nations Convention on the Law of the Sea (UNCLOS) establishes a comprehensive framework for the determination of the territorial sea baseline and the various maritime zone boundaries. The Convention entered into force on 16 November 1994, and embodies the notion that all problems of ocean space are closely interrelated and need to be addressed as a whole. Today, it is the globally recognised regime dealing with all matters relating to the law of the sea.

Domestically, the *Seas and Submerged Lands Act 1973* declares Commonwealth sovereignty over the territorial sea and certain Commonwealth rights in respect of the contiguous zone, exclusive economic zone (EEZ) and continental shelf.⁴

Territorial Sea

Article 2(1) of the UNCLOS refers to the sovereignty of a coastal state. It extends beyond its land territory and internal waters to an adjacent belt of sea, described as the territorial sea. Sovereignty extends to the air space over the territorial sea as well as its bed and subsoil. Article 3 states that every State has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles. Sovereignty is exercised subject to the UNCLOS Convention and to other rules of international law.

Exclusive Economic Zone (EEZ)

The Exclusive Economic Zone is an area beyond and adjacent to the territorial sea. The outer limit of the EEZ cannot exceed 200 nautical miles from the baseline from which the breadth of the territorial sea is measured. The Australian EEZ is less than 200 nautical miles in certain areas where neighbouring countries' coastlines are less than 400 nautical miles from Australia.

Article 56(1)(b) states that a coastal State has jurisdiction over a number of matters one of which is the protection and preservation of the marine environment, subject to provisions elsewhere in UNCLOS, for example in Article 56(2) where a coastal State is required to have due regard to the rights and duties of other states and act in a manner compatible with the Convention.

Bateman, Rothwell and Vanderzwaag comment that

there have been many imperatives for change associated with increased concern for the threats to the marine environment posed by ships and shipping operations... This has led to a tightening of controls over shipping, as well as providing an incentive for regional cooperation to achieve the objective of safer ships and cleaner seas. In many instances, tighter controls involved some new regulations that amounted to restrictions on the rights and freedoms of navigation.⁵

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

The Explanatory Memorandum states the

Attorney-General's Office of International Law has advised that the proposed amendments to powers of intervention within the EEZ are consistent with Australia's rights and obligations under international law. The UNCLOS provides for coastal States to implement measures to protect the marine environment of their EEZ and to avoid pollution from maritime casualties. Article 221 of UNCLOS gives the coastal State broader rights than the Intervention Convention of 1969 to improve and strengthen protective measures in the EEZ.

Article 221 of UNCLOS states the following:

Measures to avoid pollution arising from maritime casualties

1. Nothing in this Part shall prejudice the right of States, pursuant to international law, both customary and conventional, to take and enforce measures beyond the territorial sea proportionate to the actual or threatened damage to protect their coastline or related interests, including fishing, from pollution or threat of pollution following upon a maritime casualty or acts relating to such a casualty, which may reasonably be expected to result in major harmful consequences.

2. For the purposes of this article, "maritime casualty" means a collision of vessels, stranding or other incident of navigation, or other occurrence on board a vessel or external to it resulting in material damage or imminent threat of material damage to a vessel or cargo.

Financial implications

The Explanatory Memorandum states that there is no direct financial impact.

Main provisions

Schedule 1 – Amendments

Items 2 to 21 insert new definitions into subsection 3(1). They included definitions for the purposes of the Principal Act:

- aircraft
- Australian coastal area
- Australian ship
- civil proceeding
- constitutional corporation

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

- controller of a tangible asset
- amendment to the definition of Convention
- electronic communication
- engage in conduct
- exclusive economic zone
- goods
- high seas
- internal waters
- amendment of the definition of protocol
- services
- ship
- supply
- tangible asset
- territorial sea
- UN Convention on the Law of the Sea

Item 22 repeals section 3A of the Act which refers to the applicability of Chapter 2 of *Criminal Code 1995*. Chapter 2 codifies the general principles of criminal responsibility under the laws of the Commonwealth. It applies to any offence irrespective of how it is created (See section 2.1 Criminal Code). Section 3A of the current Act is therefore redundant.

Item 24 repeals subsection 5(1) and substitutes the following:

1. **New subsection 5(1)** provides that this Act does not exclude or limit the operation of any law of a state/territory that is able to operate concurrently with this Act, that is, where no conflict exists;
2. **New subsection 5(1A)** provides that a direction issued under this Act will prevail over any direction (however described) in a state/territory law to the extent of any inconsistency;
3. **New subsection 5(1B)** clarifies that new subsection 5(1A) does not limit the operation of s.109 of the *Constitution*. Section 109 states that “when a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid”;
4. **New subsection 5(1C)** provides that a direction issued under this Act will prevail over any other direction issued under any other Commonwealth Act unless there is a

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

provision enacted after the commencement of this subsection and that expressly refers to a direction made under this Act.

The effect of points 2 and 4 is that AMSA will have the legal power to override any Commonwealth, State or local government agency when mounting an emergency response to a maritime casualty.

Items 25 to 27 amend subsection 7(1) of the Act and streamlines the section on delegations by the Minister. **Item 28** inserts a note referring to the general provisions in the *Acts Interpretation Act 1901* relating to delegations, the effects of a delegation and the exercise of certain powers and functions by a delegate. **Item 29** repeals subsections 7(2) and (3).

Items 30 to 32 amend section 8 which deals with the taking of measures in relation to oil pollution under the *International Convention relating to Intervention on the High Seas in cases of Oil Pollution Casualties 1969*. The Convention refers to ‘measures on the high seas’. The purpose of these amendments to section 8(1) and (2) is to indicate that AMSA may take measures not only on the high seas but also elsewhere, such as in internal waters, the Australian coastal waters (that is the territorial sea) and the exclusive economic zone to minimise the impact of pollution from a marine casualty occurring on the high seas.

Paragraph 8(2)(b) currently specifies that AMSA may issue directions to the owner of a ship, the master or any salvor in possession of a ship. **Item 33** inserts a fourth option that AMSA may also issue directions **to any other person** as well. **Item 34** inserts a list of likely persons to whom AMSA can issue directions. It is not intended as an exhaustive list but merely a form of clarification.

New subsection 8(2C) provides that AMSA must not issue directions to a ship which is not the polluting ship unless the ship is in Australian waters or it is an Australian ship.

Item 35 provides that the Minister and AMSA when exercising powers under section 8 must act in accordance with Articles III and V of the Convention. The Convention’s articles deal with marine casualties occurring on the high seas. Item 35 inserts clarification as to the application of the measures taken under the Act and interprets Articles III and IV of the Convention as applying to measures taken elsewhere than on the high seas, that is in the territorial sea or the exclusive economic zone.

Items 36 and 37 amend section 8 and provide that all expressions used in section 8 have the same meaning as in the Convention with the exception of terms used such as ‘high seas’, and those terms used in section 8(2B)(c), (d), (e), (f), (g) or (h) or in section 8(2C)(a), (b), (c) or (d) such as:

- tangible asset
- goods
- services

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

- internal waters
- Australian coastal sea
- Exclusive economic zone
- Australian ship.

New definitions for these terms have been included in section 3 of the Act.

Item 38 provides that a direction issued to any other person under subparagraph 8(2)(b)(iv) will be taken to be related to the ship involved in the marine casualty. The Explanatory Memorandum states that this will establish a legal relationship between a ship involved in a maritime casualty and any other person to whom a direction has been given by AMSA. The person is ordinarily unconnected with the casualty. The purpose is to allow any person directed by AMSA to benefit from the immunity and compensation provisions under this Bill.

Items 39 to 47 inserts provisions into section 9 similar to those inserted into section 8. Section 9 deals with maritime casualties caused by substances other than oil. Reference is made to the *Protocol relating to Intervention on the High Seas in cases of Pollution by Substances other than Oil, 1973*. See **items 30-38**.

Item 49 substitutes paragraph 10(1)(a) with **new paragraph 10(1)(a)** which inserts a detailed list of ships in internal waters to which the section now applies. Previously subsection 10(6) exempted ships engaged intra-state trade, fishing vessels and pleasure craft. However under **item 53** subsections 10(6) and (7) are repealed as the Explanatory Memorandum comments that the Australian, State and Northern Territory Governments have agreed that the Government's powers of intervention should be extended to all ships in all waters, including the internal waters of a State.

Item 50 provides that AMSA may now take measures in response to a maritime casualty within the EEZ at an earlier stage than is possible at present under the Act. **New paragraph 10(1)(ba)** is inserted after section 10(1)(b) to include any ship in the exclusive economic zone. This now enables AMSA to respond to maritime casualties in the EEZ, in internal waters (new paragraph 10(1)(a)) as well as in the Australian coastal sea (10(1)(b)) and on the high seas (10(1)(c)). The Explanatory Memorandum notes that the Authority will be able to act at an earlier stage than presently under the Act.

Item 51 and 52 introduce similar changes in relation to whom directions may be issued to be consistent with items 34 and 43.

Item 53 provides a **new subsection 10(6)** which provides that a direction will relate to a ship even if a direction has been issued to 'any other person.'. The Explanatory Memorandum states that this will allow that person to benefit from the immunity and compensation provisions as provided under the Act.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

Item 54 and **56** repeal the definitions of *Australian coastal sea* and *internal waters* from section 10(8) as they have been inserted into section 3(1). **Item 55** inserts a definition of *continental shelf* into subsection 10(8). **Item 57** repeals a definition of *noxious substance* and **item 59** replaces it with a definition of *substance other than oil*. **Item 58** repeals the definition of ship in section 10(8) as an expanded definition has been included in subsection 3(1).

Section 11 relates to the directions made under the Act and the measures that can be taken under this section. **Item 60** substitutes existing wording in subsection 11(1) to refer to 'first ship' as other ships may be involved when a casualty involving the first ship occurs. **Items 61 to 77** amend each of the actions taken under subsection 11(1) to include wording that emphasises that the actions are independent of one another. This is done by the inclusion of the phrase 'require or prohibit' and the addition of 'or'. **Item 78** provides for new actions (g) to (u) in section 11(1). It enables AMSA to make directions in relation to any of these actions, not only to the first ship but to other entities or persons as necessary. The Explanatory Memorandum mentions that AMSA has always had these powers but this section clarifies the types of directions that may be given so as to avoid dispute when an emergency situation arises.

Item 80 provides in section 12 how the owner of a tangible asset or the controller of a tangible asset are to be addressed when a direction is issued. **Item 83** provides that a direction can be served on the owner of a ship, the master or the salvor in possession of a ship. **Item 84** provides for the service of directions on persons other than the owner, master, or the salvor of a ship. **New subsection 17(8)** provides for the service of directions on a person in accordance with the provisions of new subsections 17(8) and (9). **New subsection 17(9)** provides for service of directions on a person, either an individual or a body corporate in accordance with section 28A of the *Acts Interpretation Act 1901* which clarifies what is meant by service and modes of delivery when serving documents. **New subparagraph 17(9)(e)** includes sending a direction by electronic means. **New subsection 17(10)** provides for service of a direction on a *body politic*. A *body politic* according to the Explanatory Memorandum could include a State or one of its civil authorities such as local government or a port authority.

Item 85 provides in **new section 17A** that immunities from criminal and civil proceedings apply to the following for acts done or omitted when exercising powers under the Act:

- Minister
- Delegate of the Minister
- The Authority
- Member of the Authority
- Member of staff of the Authority
- Delegate of the Authority

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

- A person specified in a direction in relation to paragraphs 11(2)(a) and (b)
- A person who is the subject of a direction unless it is a proceeding under the *Protection of the Sea (Civil Liability) Act 1981*, or is inconsistent with international agreements to which Australia is a party.

New Section 17A does not apply to **new section 22** that relates to compensation for the acquisition of property.

New section 17B provides that if a person, who is or was the subject of a direction and who is not the owner of a ship incurs expenses as the result of being directed to supply a service to the owner of a ship that person may recover that debt in the Federal Court or other court of competent jurisdiction. Section 17B(1) does not apply if it is inconsistent with international agreements to which Australia is a party.

Item 89 repeals subsections 19(1), (2) and (3) and substitutes **new subsection 19(1)** with a new penalty for breaching a direction under the Act. The penalty proposed is 2000 penalty units or five years imprisonment or both. In the existing provision the penalty is \$20,000 for an individual and \$50,000 for a body corporate. Now the fine is increased substantially to \$220,000 dollars or imprisonment for five years or both.

Item 97 repeals section 22 and substitutes provisions relating to the compensation for acquisition of property. Compensation must be on just terms in accordance with the provisions under section 51(xxxi) of the Constitution and if a dispute arises proceedings may be commenced in the Federal Court or other court of competent jurisdiction.

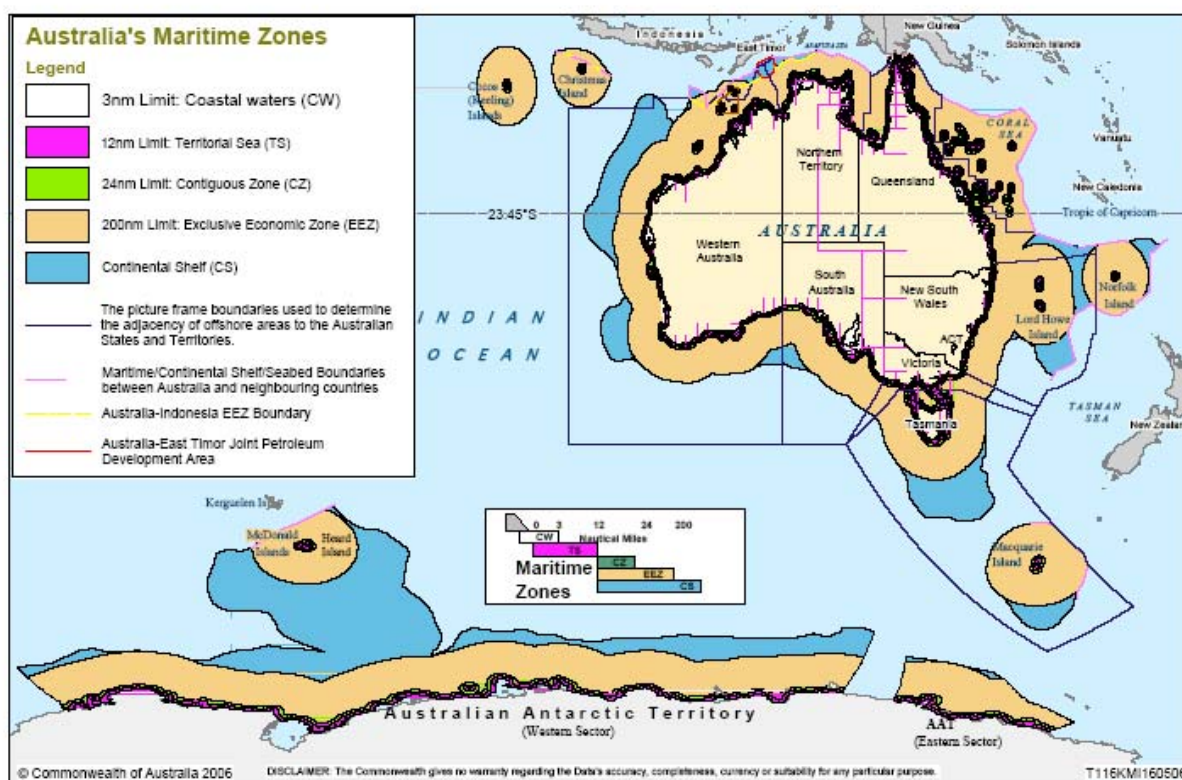
Item 98 repeals section 24 of the *Protection of the Sea (Powers of Intervention) Act 1981*. The extension of the powers of the Authority to make directions under the Act makes this section redundant.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

Australia's Maritime Zones



Endnotes

1. A person or company involved in a salvage operation for the protection of maritime property.
2. Minister for Transport and Regional Services, Hon. Warren Truss MP, second reading speech, 29 March 2006.
3. *ibid.*
4. Geoscience Australia http://www.ga.gov.au/image_cache/GA3746.pdf
5. Sam Bateman, Donald R. Rothwell and David Vanderzwaag, Navigational rights and freedoms in the New Millennium: dealing with 20th Century Controversies and 21st Century Challenges in *Navigational Rights and Freedoms and the New Law of the Sea* edited by Donald R. Rothwell and Sam Bateman, The Hague, Martinus Nijhoff Publishers, 2000, p. 317–18.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

© Copyright Commonwealth of Australia 2006

Except to the extent of the uses permitted under the *Copyright Act 1968*, no part of this publication may be reproduced or transmitted in any form or by any means including information storage and retrieval systems, without the prior written consent of the Department of Parliamentary Services, other than by senators and members of the Australian Parliament in the course of their official duties.

This brief has been prepared to support the work of the Australian Parliament using information available at the time of production. The views expressed do not reflect an official position of the Parliamentary Library, nor do they constitute professional legal opinion.

Members, Senators and Parliamentary staff can obtain further information from the Parliamentary Library on (02) 6277 2795.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.