



Environment and Heritage Legislation Amendment (Antarctic Seals and Other Measures) Bill 2006

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Law and Bills Digest Section

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Environment and Heritage Legislation Amendment (Antarctic Seals and Other Measures) Bill 2006

Date introduced: 9 August 2006

House: Senate

Portfolio: Environment and Heritage

Commencement: Sections 1 to 3 and schedule 2, item 2 commence on Royal Assent; schedule 1 commences on a date fixed by proclamation or the day after a six month period from Royal Assent; schedule 2, item 1 commences from 18 March 2005.

Purpose

The main purposes of the Bill are:

- To transfer provisions relating to the protection of Antarctic seals from the current regulations (Antarctic Seals Conservation Regulations 1986) to the body of the *Antarctic Treaty (Environment Protection) Act 1980*.
- To substantially increase the offences in the Act for offences that kill or injure Antarctic native seals, birds or plants or that significantly harm the habitat of these animal populations.
- To increase offences substantially for mining activities by a person in the Territory and in Antarctica by an Australian national.
- To require persons to have a permit to gather or collect rocks or meteorites for scientific research or educational purposes with significant penalties for those without a permit.
- To make minor amendments to the Water Efficiency Labelling and Standards Act 2005.

Currently the law relating to the protection of Antarctic seals is contained in the Antarctic Seals Conservation Regulations 1986 (*the regulations*). The regulations implemented the *Convention for the Conservation of Antarctic Seals 1978*. The regulations provide a framework of protection for the seals by the granting or refusal of permits for certain activities in the Antarctic which may result in the killing or injuring of seals whilst the activities are taking place or the killing of or taking of specimens for scientific research or public education purposes.

The Bill proposes transferring provisions regarding the protection of native seals, native birds, native invertebrates and native plants from the regulations to the Antarctic Treaty

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(Environment Protection) Act 1980. The definitions of *whale* and *native mammal* are repealed as whales and other cetaceans (which include dolphins and porpoises and the like) are protected under the Environmental Protection and Biodiversity Conservation Act 1999 (EPBCA). Having species protected under an Act as opposed to regulations enables heavier penalties to be imposed for offences.

International Instruments implemented by the Antarctic Treaty (Environment Protection) Act 1980

Convention for the Conservation of Antarctic Seals

Australia ratified the Convention on 1 July 1987. The Convention was set up to protect all the species of Antarctic seals. The six species are listed in the Convention (the text of which is found in schedule 1 of the ATEPA) and are currently protected under the regulations are:-

Southern elephant seal	<i>Mirounga leonina</i>
Leopard seal	<i>Hydrurga leptonyx</i>
Weddell seal	<i>Leptonychotes weddelli</i>
Crabeater seal	<i>Lobodon carcinophagus</i>
Ross seal	<i>Ommatophoca rossi</i>
Southern fur seals	<i>Arctocephalus sp.</i>

The Convention came about because of concerns in the 1960s that commercial sealing would be resumed but as yet this has not happened.¹

Protocol on Environmental Protection to the Antarctic Treaty (Madrid Protocol)

The Protocol entered into force for Australia and internationally on 14 January 1998. Article 3 of the Protocol states the environmental principles which it endeavours to promote:-

The protection of the Antarctic environment and dependant and associated ecosystems and the intrinsic value of Antarctica, including its wilderness and aesthetic values and its value as an area for the conduct of scientific research, in particular research essential to understanding the global environment, shall be fundamental considerations in the planning and conduct of all activities in the Antarctic Treaty area.

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Article 7 of the Protocol prohibits any activity connected with mineral resources other than for scientific research. The text of the Protocol can be found in schedule 2 of the *Antarctic Treaty (Environment Protection) Act 1980*.

All parties to the Protocol have agreed that all activities in Antarctica will be planned and conducted so as to:-

- Limit adverse impacts on the Antarctic environment; and
- Avoid
 - Adverse effects on climate or weather patterns;
 - Significant adverse effects on air or water quality;
 - Significant changes in the atmospheric, terrestrial (including aquatic), glacial or marine environments;
 - Detrimental changes in the distribution, abundance or productivity of species or populations of species of fauna and flora;
 - Further jeopardy to endangered or threatened species; or degradation of, or substantial risk to, areas of biological, scientific, historic, aesthetic or wilderness significance; and
- Accord priority to preserving the value of Antarctica for scientific research.²

The Bill also implements further provisions of the Protocol by requiring that the only reason for collecting rocks or meteorites is for scientific research or educational purposes or such educational or cultural purposes as the Minister thinks appropriate. The Minister grants a permit for this purpose and the activities may only be carried on to the extent necessary to collect specimens for the purpose stated in the permit.

Protection of Whales and other Cetaceans

The Environment and Biodiversity Conservation Act 1999 (EPBCA) protects whales and other cetaceans such as dolphins and porpoises hence the deletion of the definitions of *whale* and *native mammal* from the *Antarctic Treaty (Environment Protection) Act 1980*. A whale sanctuary has been created under the Act.³ Whales, dolphins and porpoises are protected in all Commonwealth waters from the three nautical mile state waters limit to the boundary of the exclusive economic zone, that is, out to the 200 nautical mile limit and further in some places.⁴ The penalties under the EPBCA range up to two years imprisonment or a fine not exceeding 1000 penalty units, or both, for recklessly killing or injuring a cetacean. Separate provisions under the EPBCA also protect certain whales through their status as listed threatened species (Blue whale, Humpback whale, Southern right whale, Fin whale and the Sei whale⁵).

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State and Territory governments are responsible for the protection of whales in coastal waters, that is up to the three nautical mile limit. Matters for which they have responsibility include responding to stranded and entangled whales and managing whale watching activities.

Offences and Penalties

The *Antarctic Treaty (Environment Protection) Act 1980* in subsection 4(1) is expressed to apply to any persons and property, including foreign persons and property in the Territory and applies to all Australian citizens outside Australia, Australian expeditions and their members, Australian organizations, members of crew of aircraft, vessels or vehicles that are Australian property and Australian property.

The offences in the *Antarctic Treaty (Environment Protection) Act 1980* and the proposed offences in the Bill are expressed in terms of penalty units. This accords with current drafting practice as the explanatory memorandum points out. A penalty unit is defined in the *Crimes Act 1914* in section 4AA as \$110. Therefore the penalty in section 19A of the current Act is 1000 penalty units or \$110,000 or imprisonment of 16 years or both.

The offences with penalties that have been upgraded to imprisonment for two years or 120 penalty units or both, for example the penalty for subsection 19(1A) brings the offence in this section and other similar sections in this Act into line with similar offences in the *EPBCA*.

Strict liability applies to two new proposed sections in the bill. They are 21AA - *Giving information about an act done in an emergency situation* and 21AB - *Giving further information about an act done in an emergency situation*. Strict liability means that no 'fault' element (such as intention or recklessness) need be proved for an offence to occur.

Technical flaws

There is an error in **proposed new section 21AB(1)** where reference is made to an act mentioned in subsection 21A(2). It should be new subsection 21AA(2), as mentioned in the explanatory memorandum. Subsection 21AA(2) refers to the acts done which must be notified if done in an emergency situation.

Financial implications

The explanatory memorandum states that the bill has no financial impact.

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Main provisions

Schedule 1 – Amendments

Part 1 – Amendments

Antarctic Treaty (Environment Protection) Act 1980

Item 1, subsection 3(1) is amended by expanding the definition of *animal* to include an egg, part of an egg, an eggshell and a dead animal or part of a dead animal. **Items 2 and 3** insert definitions of *disturb* and *interfere*. The definition of *native bird* is also expanded to include an egg, part of an egg or eggshell or a dead bird or part of a dead bird. The new definitions of *animal* and *native bird* exclude native mammal and reference to migratory species. Migratory species are protected under the EPBCA as the Act is expressed to apply to ‘each external territory’ and the Australian Antarctic Territory is an external territory of Australia.

Item 5 repeals the definition of native mammal. **Item 6** inserts a definition of *native seal*. **Item 10** repeals the definition of *whale*.

Item 11, proposed new subsection 3(6) provides that expressions used in the Act and the Seals Convention will have the same meaning as the Convention.

Grant and Renewal of Permit

Item 13, subsection 9(1) is substituted to give the Minister power to grant permits in writing to authorise a person to carry on certain activities specified in **proposed new subsection 9(1AA)**. **Proposed new subsection 9(1AB)** provides that subsection 9(1) is subject to section 9 and the restrictions on permits set out in section 10. **Proposed new subsection 9(1AC)** enables the Minister to grant a permit subject to conditions that the Minister considers appropriate. Subsection 9(2) is substituted to include reference to the Seals Convention.

Item 15 inserts **new section 9A - Authorities under Permits**. **Proposed new subsection 9A(1)** provides that a person to whom a permit is granted may authorise other persons to accompany the persons named in the permit to carry out the activities designated in the permit.

Proposed new subsection 9A(2) provides that a person to whom the permit is granted must not authorise any other person unless both the permit contains a condition allowing the permit holders to do so and that the authorisation is given in accordance with the requirements of that condition or any other conditions in the permit. **Proposed new subsection 9A(3)** provides that a person authorised to accompany a person to whom the permit is granted must also comply with the conditions of the permit. **Proposed new subsection 9A(4)** provides that the permit authorises the activity specified in the permit subject to the compliance of other persons authorised by the person to whom the permit is

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granted. **Proposed new subsection 9A(5)** provides that a person to whom a permit is granted, despite authorising other persons to carry on an activity is not prevented from carrying on the activity specified in the permit.

Item 20 repeals subparagraphs 10(1)(b)(i) and (ii) and substitutes them with **new subparagraphs (i) to (iv)**. Section 10 provides that a permit should not authorise the killing or injuring of native birds or native seals unless a permit as in subparagraphs (i) and (iii) relates to the construction and operation of scientific support facilities and monitoring or conserving the environment, an historic site or monument or any unintended consequences of scientific activities. Subparagraph (ii) relates to native birds and seals in providing specimens for scientific research or other educational or cultural purposes as decided by the Minister.

Item 25 proposed new subsection 10(1C) provides that a permit to gather, collect or remove a meteorite or a rock must state that the activities authorised will only be carried on to the extent necessary to provide specimens for scientific research, public education or other educational or cultural purposes as the Minister thinks appropriate. **Item 66 proposed new section 19AA** creates offences relating to the gathering or collecting of rocks and meteorites without a permit. **Proposed new subsection 19AA(2)** creates an offence for a person who removes the rock or meteorite from the Antarctic whether or not it was collected by that person in the first place. The penalty for both these offences is imprisonment for two years or 120 penalty units, or both. The wording of section 19AA(1)(c), 19AA(2)(c) and 19AB(c) 'the person does not gather or collect the meteorite in accordance with a permit' is somewhat clumsy when it is intended to convey a person without a permit. **Proposed new subsection 10(1D)** provides that a permit should state that all reasonable precautions have been taken to prevent the introduction of micro-organisms when a person returns native seals, native birds or native plants to the Antarctic. **Item 66, proposed new section 19AB** creates an offence for a person who returns indigenous species to the Antarctic but fails to do so in accordance with the permit. The penalty for this offence is the same as for section 19AA.

Subsection 12(2) is amended by **item 26** to include the additional requirement of the Minister to take into account the principles and purposes of the Seals Convention.

Item 27 amends subsections 12N(1), (2) and (3) to change the reference from the regulations to section 12PA in relation to notices of variation, suspension and revocation of authorisation.

Prohibition against Mining in the Territory

Existing section 19A contains a prohibition against mining (including exploration) in the Territory and its offshore continental shelf. **Item 68** repeals the existing penalty of \$100,000 and substitutes it with a significantly upgraded maximum penalty of imprisonment for 16 years or 1000 penalty units (\$110,000) or both. **Item 69, proposed subsection 19A(2)** provides that the gathering or collecting of a rock or meteorite or its

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removal does not come within the prohibition if the activity is done in accordance with a permit. The note relating to this subsection relates to subsection 13.3(3) of the *Criminal Code 1995* that a defendant bears the evidential burden in relation to establishing that the activity of gathering or collecting a rock or meteorite and its removal is done in accordance with a permit.

Section 19B prohibits mining by an Australian national in the Antarctic as a whole as opposed to just the Territory. **Item 71** repeals the existing penalty of \$100,000 and substitutes a penalty of imprisonment for 16 years or 1000 penalty units (\$110,000) or both. **Proposed subsection 19B(2)** provides that the gathering or collecting of a rock or meteorite or its removal from the Antarctic does not come within the prohibition if the activity is done in accordance with a permit. **Item 78** repeals subsection 21(1) and substitutes (1) which provides that a person with a permit who does an act specified in **proposed new subsection 21(1AA)** of causing death or injury to or interferes with native seals, birds or plants, gathers or collects native plants or enters or carries on an activity in an Antarctic specially protected area, must notify the Minister as soon as practicable after the events. The penalty for failing to do so is 60 penalty units.

Item 80, proposed new section 21AA relates to providing information about an act done in an emergency situation. **Proposed new subsection 21AA(1)** provides that a person while in an emergency situation such as saving a person from death or injury, or securing the safety of a ship, aircraft etc does an act that is set out in **proposed new subsection 21AA(2)** must notify the Minister or an authorised officer within 30 days after the act occurred. **Proposed new subsection 21AA(3)** provides that subsection 21AA(1) does not apply if it is not possible to inform the Minister within 30 days, however the person notifies the Minister as soon as practicable after the act was done. The onus is on the person to prove the circumstances in relation to subsection 21AA(3). Strict liability applies to subsection 21AA(1).

Proposed new section 21AB is similar to proposed new section 21AA. The explanatory memorandum refers to section 21AB and a person who does an act referred to in 21AA(2). However, section 21AB refers to “an act mentioned in 21A(2).” This is an error.

Proposed new section 21AB provides that a person in an emergency situation and who does an act in subsection 21AA(2) must provide a written report to the Minister within 60 days after the act was done, describing the action and why it was taken. Subsection 21AB(1) does not apply if it is not possible to give the written report to the Minister within 60 days but the person gives the written report as soon as practicable after that day. The person bears an evidential burden in relation to subsection 21AB(2). Strict liability applies to subsection 21AB(1).

Item 81, proposed new subsection 21A(2) substitutes the existing subsection and restructures the existing subsection. The monetary penalty is decreased from \$100,000 to 420 penalty units or \$46,200. However the penalty now includes imprisonment for 7 years or 420 penalty units or both.

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Item 88 subsection 29(5) is repealed and substituted. It now provides that the regulations may prescribe penalties not exceeding 50 penalty units or \$5500 for offences against the regulations.

Concluding Comments

The bill reconciles the provisions of the *Antarctic Treaty (Environment Protection) Act 1980* with the *Environment Protection and Biodiversity Conservation Act 1999* and brings into line the offences with the latter Act and the penalties to make them uniform between the two acts. The references to whales and native mammals are now removed from the *Antarctic Treaty (Environment Protection) Act 1980* because of the comprehensive protection framework that now exists in the provisions of the *Environment Protection and Biodiversity Conservation Act 1999*.

Endnotes

1. Internet Guide to International Fisheries Law www.oceanlaw.net/texts/summaries/seals.htm.
2. Australian Government Antarctic Divisions, Introducing the Madrid Protocol, <http://www.aad.gov.au/default.asp?casid=825>.
3. See map of the Australian Whale Sanctuary, Department of Environment and Heritage site, <http://www.deh.gov.au/coasts/species/cetaceans/sanctuary.html>.
4. Department of Environment and Heritage, factsheet, Protecting whales and dolphins, 27/2/06.
5. *ibid.*

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