THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

ANTARCTIC TREATY (ENVIRONMENT PROTECTION) AMENDMENT BILL 2011

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Sustainability, Environment, Water, Population and Communities, the Honourable Tony Burke, MP)
ANTARCTIC TREATY (ENVIRONMENT PROTECTION) AMENDMENT BILL 2011

GENERAL OUTLINE


The Treaty is a multilateral agreement that requires the parties to ensure that Antarctica is used exclusively for peaceful purposes, guarantees freedom of scientific research, promotes international scientific cooperation, allows for the inspection of facilities between parties, sets aside the question of territorial sovereignty in Antarctica, and provides for regular meetings between the parties. Under Article IX of the Treaty, Measures for the governance of the Antarctic may be adopted by the representatives of Consultative Parties at the annual Antarctic Treaty Consultative Meeting (ATCM) for recommending to their governments.

The Madrid Protocol is a multilateral agreement under the Treaty. It commits parties to the comprehensive protection of the Antarctic environment and its dependent and associated ecosystems, and designates Antarctica as a natural reserve, devoted to peace and science. Under Article 9 of the Protocol, additional annexes to the Protocol may be adopted and become effective in accordance with Article IX of the Treaty.

The three Measures adopted under the Treaty and Madrid Protocol and being implemented through this Bill are:


Measure 4 (2004) outlines procedures for non-State operators (such as tourism operators) to ensure that due to the inherent dangers of carrying on activities in the Antarctic region, their activities are carried out in a safe and self-sufficient manner. The Measure requires the preparation of contingency plans and adequate insurance.
Measure 1 (2005) contains the text of Annex VI to the Madrid Protocol. Annex VI establishes a regime to provide for the prompt and effective response to environmental emergencies. The Annex requires operators to undertake reasonable preventative measures to reduce the risk of environmental emergencies and their potential adverse impact, to establish contingency plans for responding to incidents with potential adverse impacts on the Antarctic environment, and to maintain adequate insurance. The Annex also establishes a liability regime for when an operator fails to respond to an environmental emergency.

Measure 15 (2009) regulates procedures for the landing of passengers in Antarctica by non-State operators including limiting landings to vessels carrying no more than 500 passengers, limiting the number of people ashore at any one time, and specifying guide-to-passenger ratios. The Measure also requires operators to coordinate with one another with the objective of having only one vessel at a landing site at any one time.

The schedules contained in this Bill implement Measure 4 (2004), Measure 1 (2005) and Measure 15 (2009) by redefining, expanding and strengthening a number of provisions in the ATEP Act. Key aspects of the amendments include:

1. amending the long title of the ATEP Act to extend the scope of the legislation;
2. providing the ability for the Minister to grant a safety approval, an environmental protection approval, and to impose conditions on such approvals;
3. implementing new offences and civil penalties regarding unapproved activities, activities carried on in contravention of the conditions imposed by an approval, and offences and civil penalties related to environmental emergencies;
4. establishing a liability regime for environmental emergencies that occur in the Antarctic;
5. establishing an Antarctic Environmental Liability Special Account to receive payments from operators for the costs of response action to an environmental emergency caused by their activities in the Antarctic;
6. implementing new offences and civil penalties applicable to tourist vessels operating in the Antarctic; and
7. making minor and technical amendments to the ATEP Act.

**FINANCIAL IMPACT STATEMENT**

This Bill will have no financial impact.

**REGULATORY IMPACT STATEMENT**

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

The following abbreviations or defined terms are used in this Explanatory Memorandum:

NOTES ON INDIVIDUAL CLAUSES

Clause 1: Short title
1. This clause provides that the short title by which the Act may be cited is the Antarctic Treaty (Environment Protection) Amendment Act 2011 (the Act).

Clause 2: Commencement
2. Commencement of the relevant Schedules of the Act is provided for in the table at clause 2.
3. Except where provided, the commencement of the provisions related to each Measure will only commence on the day the Measure comes into force. This is because the international agreement does not come into force until all 28 Consultative Parties to the Treaty have approved the Measures. It would be inappropriate for Australia to impose obligations on those under Australian jurisdiction prior to the Measures coming into force. When the Measures will come into force is uncertain and not possible to predict. The Minister will, by notice in the Gazette, announce the day that each of the Measures comes into force.
4. The table allows for the early proclamation of the approval provisions in Part 1 of both Schedules 1 and 2 (discussed below). The purpose of providing for the proclamation of these provisions is to enable non-State operators or operators to apply for and be granted a safety approval or environmental protection approval in advance of the offence provisions commencing (Schedule 1, Part 2 and Schedule 2, Part 2 respectively). If it becomes apparent that Measure 4 (2004) or Measure 1 (2005) will come into force, the approval provisions related to the relevant Measure will be proclaimed. The Department will, as a matter of course, take steps to ensure that affected persons are notified of the commencement. The purpose of providing for the early commencement of these provisions is to enable operators to apply for approvals in advance of the offence provisions coming into effect.
5. Item 1 of the table provides that the commencement date for sections 1 to 3 and anything else in the Act not covered by the table is the day the Act receives Royal Assent.
6. Item 2 of the table provides that Schedule 1, Part 1, which relates to the granting of a safety approval, will commence the earlier of a day fixed by proclamation and the day Measure 4 (2004) comes into force.
7. Item 3 of the table provides that Parts 2 and 3 of Schedule 1 will commence on the later of the day after the Act receives Royal Assent and the day that Measure 4 (2004) comes into force. The item will not commence at all if the Measure does not come into force.
8. Item 4 of the table provides that Schedule 2, Part 1, which relates to the granting of an environmental protection approval, will commence on the earlier day of a day fixed by proclamation and the day Annex VI to the Madrid Protocol, attached to Measure 1 (2005) comes into force.
9. Item 5 of the table provides Schedule 2, Part 2, will commence on the later of the day after the Act receives Royal Assent and the day that Measure 1 (2005) comes into force for Australia. The item will not commence at all if the Measure does not come into force.

10. Item 6 of the table provides that Schedule 2, Part 3 will commence on the later day that Measure 4 (2004) and Measure 1 (2005) come into force for Australia. The item will not commence if both Measures do not come into force.

11. Item 7 of the table provides that Schedule 2, Part 4, will commence on the later of the day after the Act receives Royal Assent and the day that Measure 1 (2005) comes into force for Australia. The item will not commence at all if the Measure does not come into force.

12. Item 8 of the table provides that Schedule 3 will commence on the later of the day after the Act receives Royal Assent and the day that Measure 15 (2009) comes into force for Australia. The item will not commence at all if the Measure does not come into force.

13. Item 9 of the table provides that Schedule 4 will commence on the day after the Act receives Royal Assent. The provisions in this Schedule are not linked to any international obligations and provide for consequential matters.

Clause 3: Schedule(s)

14. This clause provides that each Act specified in a Schedule to the Act is amended or repealed as set out in the Schedule and other items in the Schedule have effect according to their terms.

Part 1 – Safety approvals

Antarctic Treaty (Environment Protection) Act 1980

Item 1: Subsection 3(1) (definition of non-State operator)

15. This item defines non-State operator consistently with Measure 4 (2004), the obligations of which apply only to persons undertaking activities in the Antarctic who are not Contracting Parties to the Treaty.

Item 2: Subsection 3(1) (definition of safety approval)

16. This item defines safety approval as an approval granted under section 13AC.

Item 3: After Part 3

17. This item inserts a new Part 3A to the ATEP Act.

Part 3A – Safety approvals

Division 1 Introduction

13AA Simplified outline

18. This section provides a simplified outline with regards to the requirements for, and operation of, safety approvals.

Division 2 Obtaining a safety approval

13AB Application for a safety approval

19. This section provides for applications to be made for safety approvals.

20. For the purposes of obtaining a safety approval for an activity, an ‘activity’ in the Antarctic is considered the same as an activity under Part 3 of the ATEP Act, being an event or process resulting from (or associated with) the presence of humans in the Antarctic, and/or which may lead to the presence of humans in the Antarctic. An activity in the Antarctic includes, but is not limited to, scientific activities, tourist vessels entering the Antarctic (whether making landings or not), construction of facilities or overflights by tourist aircraft that are made for the purpose of visiting the Antarctic.
21. The provision is not intended to have application to shipping and aviation passage over or around the Antarctic, or en route to or from Australia to a third country destination outside of the Antarctic. For example, aircraft that fly over the continent en route to another destination are not caught by the requirement to hold an approval and are distinguished from tourist overflights made for the purpose of visiting the Antarctic. Further, fishing vessels operating in Antarctic waters are dealt with separately under the Convention on the Conservation of Antarctic Marine Living Resources [1982] ATS 9 and are regulated in accordance with the relevant Australian legislation. In accordance with subsection 4(2) of the ATEP Act, innocent passage by vessels under the terms of the United Nations Convention on the Law of the Sea [1994] ATS 31 is not considered an activity for the purposes of this section.

22. As mining in the Antarctic is prohibited by sections 19A and 19B of the ATEP Act, an application cannot be made for an approval in relation to a mining activity.

23. Subsection 13AB(1) provides that a non-State operator who proposes to conduct an activity in the Antarctic may apply to the Minister for a safety approval. A non-State operator is defined in item 1 of Schedule 1, Part 1 of the Act. Subsection 13AB(2) provides that the application must be made in writing in the approved form. This will be made available to the public on the internet and a hardcopy will be provided on request.

24. Subsection 13AB(3) provides that the Minister may request further information from the applicant. This means that if the applicant has not provided sufficient information to enable the Minister to grant the safety approval, the applicant may be informed of this deficiency and provided with an opportunity to present the requested information. The Minister may specify a time period in which this is to occur. This time limitation is to promote efficiency in decision-making.

25. Subsection 13AB(4) gives the Minister the discretion to refuse to grant a safety approval if the applicant does not provide the requested information within the specified timeframe. This is to minimise applications remaining on foot or unprocessed where it is apparent that the applicant is clearly unable to meet the requirements for the safety approval. The refusal to grant the approval is subject to review in the Administrative Appeals Tribunal (item 4 of Schedule 1, Part 1 of the Act).

26. Subsection 13AB(5) gives the applicant the option to withdraw an application at any time prior to the Minister making a decision. This is to allow for efficient administration in those situations where a person decides not to proceed with the activity.

13AC Grant of safety approval

27. This section provides the Minister with discretion to grant a safety approval to a non-State operator who applies for a safety approval in accordance with section 13AB.
28. Subsection 13AC(2) provides that the Minister must not grant the approval unless satisfied that the requirements at paragraphs 13AC(2)(a) and (b) have been met. Specifically, the non-State operator must have in place a contingency plan or plans and insurance or other arrangements to deal with, and meet any costs associated with health and safety, search and rescue, and medical care and evacuation in relation to the proposed activity. These requirements will enhance the safety and self-sufficiency of operators while they are undertaking activities within the Antarctic.

29. The contingency plans and arrangements, including insurance arrangements, will need to demonstrate the non-State operator is capable of properly dealing with and responding to any incident, which could be reasonably expected in the Antarctic in relation to the specific activity in question.

30. An administrative policy setting out current best practice standards for activities in the Antarctic will be developed and made publicly available. The extent to which the application for a safety approval meets the standards set out in the administrative policy will be a relevant consideration for the Minister in determining whether to grant the safety approval.

13AD Notice of decision

31. This section provides the requirements for notification of decisions made in the granting or refusal of a safety approval.

32. If the Minister is granting a safety approval in relation to an activity he or she is required to provide written notice of the decision to the non-State operator who made the application (subsection 13AD(1)). Subsection 13AD(2) outlines the matters which must be included in the notice of decision to grant a safety approval, specifically the name of the operator, the nature of the activity, and conditions imposed on the safety approval including both mandatory and any other conditions imposed under sections 13AE and 13AF of the Act. The Minister also has discretion to include any other matters that relate to the activity that he or she considers appropriate (paragraph 13AD(2)(e)). The purpose of the notice is to ensure the applicant is notified of the decision and is aware of all the conditions imposed in relation to that approval.

33. Subsection 13AD(3) provides that if the Minister refuses to grant a safety approval written notice must be given to the non-State operator of the decision and the reasons for that decision. The decision of the Minister not to grant a safety approval is reviewable in the Administrative Appeals Tribunal (item 4 of Schedule 1, Part 1 of the Act.)

Division 3 – Conditions of safety approvals

13AE Mandatory conditions

34. This section provides that the conditions at subsections 13AE(a) and (b) are mandatory conditions that must be imposed on a safety approval. This is to ensure that the minimum requirements for contingency plans and insurance, or other arrangements, are in place prior to the activity commencing and are maintained for the entirety of the
activity. In relation to insurance, it must be in place for the period that the activity is being carried on in the Antarctic.

13AF Imposition, variation and revocation of conditions

35. Under subsection 13AF(1) the Minister has discretion, at any time, to impose, vary and revoke conditions on a safety approval, other than the mandatory conditions imposed under section 13AE, which cannot be varied or revoked. The decision to impose, vary or revoke conditions on a safety approval can occur either at the time of granting the approval or at a subsequent time.

36. Subsection 13AF(2) clarifies that the Minister can exercise the power under subsection 13AF(1) at his or her own discretion or after consideration of a request to do so from the holder of the safety approval (see subsection 13AF(3)).

37. A decision by the Minister to impose additional conditions, or vary or revoke a condition on his or her own initiative would usually only happen in serious situations and on advice of the Department.

38. The holder of a safety approval can make a request for the Minister to impose a further condition, or vary or revoke an existing condition imposed on the safety approval (subsection 13AF(3)). The request must be in writing and set out the reasons for the request (subsection 13AF(4)). For example, the holder of a safety approval may request a variation to a condition due to unforeseen changes in the nature of their activity, to ensure currency with best practice or for other reasons.

39. Before imposing, varying or revoking a condition following a request from the holder of a safety approval under subsection 13AF(3), the Minister must be satisfied that the request adequately justifies the reasons for the imposition, variation or revocation, respectively (subsection 13AF(5)).

40. If the Minister imposes a new condition or varies or revokes an existing condition imposed on a safety approval after it has been granted in relation to an activity, he or she must provide written notice of the decision to the holder of the safety approval (paragraph 13AF(6)(a)). Paragraph 13AF(6)(b) provides that if the Minister has included a new condition or has varied or revoked an existing condition, the change will not take effect until the day stated in the notice, and not less than five days from the date of the notice. This means the decision to impose new conditions, or to vary or revoke conditions on a safety approval cannot apply retrospectively. In determining the date the notice will take effect from, consideration may be given to the time it would reasonably take the holder of the safety approval to comply with any newly imposed or varied condition or any time needed to adjust their activities to reflect the revocation of a condition. For example, if the activity was already underway, the time it would take to communicate and give effect to the new, varied or revoked conditions by those in the Antarctic would be taken into account.

41. Subsection 13AF(7) provides that if the Minister refuses a request by the holder of the safety approval under subsection 13AF(3) to impose, vary or revoke a condition on their safety approval, the Minister must provide written notice of the decision and the reasons for that decision.
42. Decisions by the Minister under this section, namely deciding or refusing to impose, vary or revoke conditions on a safety approval are subject to review in the Administrative Appeals Tribunal (item 4 of Schedule 1, Part 1 of the Act).

Division 4 – Variation, suspension and revocation of safety approvals

13AG Variation of safety approval

43. This section sets out the circumstances when a safety approval can be varied. The Minister may vary a safety approval on his or her own initiative if he or she is satisfied that it is necessary to do so (subsection 13AG(1)). In practice, this would only happen in serious situations and on advice of the Department.

44. Subsections 13AG(2) and (3) provide that if the holder of the safety approval wants their safety approval to be varied, they must submit a request to the Minister in writing and provide the reasons for the request. Examples of when a holder of a safety approval may wish to vary a safety approval could be where they propose changes to the time when an activity is to be undertaken or changes in the nature or scope of the activity.

45. The Minister may vary the safety approval, on request by the holder of a safety approval under subsection 13AG(2), only if he or she is satisfied that the reasons set out in the request justify the variation (subsection 13AG(4)).

46. Subsection 13AG(5) provides that if the Minister varies a safety approval under subsections 13AG(1) or (4), written notice, including the date the variation takes effect, must be provided to the holder of the safety approval. It also provides the variation must not take effect less than five days from the date of the notice, making clear that the variation of the safety approval cannot operate retrospectively. In determining the date the variation is to take effect from, consideration may be given to the time it would reasonably take the holder of the safety approval to comply with the variation.

47. Subsection 13AG(6) provides that if the Minister refuses a request by the holder of a safety approval to vary an approval, the Minister must provide written notice of the decision and the reasons for that decision.

48. A decision by the Minister under this section to vary a safety approval or to refuse to vary a safety approval is reviewable by the Administrative Appeals Tribunal (item 4 of Schedule 1, Part 1 of the Act).

13AH Suspension or revocation of safety approval

49. Subsection 13AH(1) provides that the Minister may, by written notice, either suspend or revoke a safety approval if satisfied that a condition imposed on the approval has not been, or is not being complied with, or if the suspension or revocation is appropriate given all the circumstances. Any suspension or revocation of an approval will not take effect until the day stated in the notice, and not less than five days after the notice is given (subsection 13AH(2)). A decision to suspend or revoke a safety approval therefore cannot operate retrospectively. In determining the date the suspension or revocation is to come into effect, consideration may be given to the time it would take for the holder of the approval to leave the Antarctic by the most direct course.
50. If a safety approval is suspended, the notice must also state the period of the suspension, which cannot be longer than 90 days after the day on which the suspension takes effect (subsection 13AH(3)). It is also possible for the Minister to revoke a safety approval while it is suspended (subsection 13AH(5)).

51. Subsection 13AH(4) clarifies that, notwithstanding subsection 13AH(3), if proceedings are commenced in respect of an offence under the ATEP Act or in respect of a contravention of a civil penalty provision, where those proceedings relate to the carrying on of the activity the subject of the safety approval while the safety approval is suspended then the safety approval will remain suspended until the proceedings are completed. Any proceedings include completion of any appeals process for those proceedings.

52. Instances where a safety approval could be suspended or revoked include, where it has become obvious that the holder of the safety approval is unable to meet all or some of the requirements of the approval or where the holder is committing an offence under another provision of the ATEP Act. A decision to suspend or revoke a safety approval would not be made lightly and in most cases suspension would be the first course of action. However if, for example, a mandatory condition was not being complied with, it may be more appropriate to revoke the approval. The decision to suspend or revoke a safety approval is subject to review in the Administrative Appeals Tribunal (item 4 of Schedule 1, Part 1 of the Act).

53. The holder of a safety approval cannot request that the safety approval be suspended or revoked. This is to ensure that, at all times, in the Antarctic, all persons have a safety approval for their activity. Should a holder of a safety approval no longer wish to undertake the activity the subject of their safety approval, they can simply leave the Antarctic.

Division 6 – Miscellaneous

13AK Register

54. This section requires the Minister to establish a register of safety approvals that are granted. The register must be kept in an electronic form (subsection 13AK(3)) and must contain the information outlined in subsection 13AK(2). Regulations may also be made to provide for, or in relation to the register (subsection 13AK(4)). The purpose of the register is to maintain a record of safety approvals granted which will facilitate information sharing at an international level, in line with Australia’s obligations under Article IX of the Treaty.

13AL Monitoring of activity

55. Section 13AL provides that regulations may provide for the monitoring of an activity for which a safety approval has been granted. This may include placing observers on a ship or aircraft to assess how activities are conducted or requiring operators to provide reports in relation to activities.

Item 4: After subsection 28(1A)
56. This item inserts a new subsection 28(1B) after subsection 28(1A) of the ATEP Act to include decisions relating to safety approvals under the new provisions that are reviewable by the Administrative Appeals Tribunal. The reviewable decisions are:

(a) a decision to refuse to grant a safety approval (subsection 13AC(1));

(b) a decision to impose, or refuse to impose, conditions on a safety approval (paragraph 13AF(1)(a));

(c) a decision to vary or revoke, or refuse to vary or revoke, conditions on a safety approval (paragraph 13AF(1)(b));

(d) a decision to vary a safety approval (subsection 13AG(1));

(e) a decision to refuse to vary a safety approval (subsection 13AG(4)); and

(f) a decision to suspend or revoke a safety approval (subsection 13AH(1)).

**Item 5: After paragraph 29(2)(ac)**

57. This item inserts a new paragraph 29(2)(ad) after paragraph 29(2)(ac) of the ATEP Act that will allow for regulations to be made regarding the payment of a fee in relation to processing an application for a safety approval or the grant of a safety approval and the refund of the fee. This is to allow for cost recovery.

**Part 2 – Other amendments**

*Antarctic Treaty (Environment Protection) Act 1980*

**Item 6: After subsection 9(2B)**

58. This item inserts a new subsection 9(2C) in section 9 of the ATEP Act. Section 9 sets out the requirements for the grant and renewal of a permit that is issued under Part 2 of the ATEP Act. The provision provides that if a person applies for a permit under section 9 to undertake an activity, they will not be granted a permit until a safety approval has been issued in relation to that activity. This provision corresponds to a similar provision at subsection 9(2A) that provides that a permit will not be granted unless the Minister has authorised the activity in relation to Part 3 of the ATEP Act.

**Item 7: Section 13AA (before the last paragraph)**

59. This item inserts a new paragraph before the last paragraph in the simplified outline at section 13AA, providing an overview of the requirement to comply with safety approvals.

**Item 8: After Division 4 of Part 3A**

60. This item inserts a new Division 5 to Part 3A of the ATEP Act – “Offences, etc. relating to safety approvals”.

61. There are a number of new offence and civil penalty provisions which are inserted by this item which are discussed below. The penalties imposed for offences under this item
are consistent with the existing penalties imposed under the ATEP Act and both the
goal of both an offence and the civil penalty is to provide flexibility in regulation
and enforcement under the ATEP Act.

62. A person seeking to rely on a defence under the provisions inserted by this item bears
the burden of proof. This is consistent with established general principles of criminal
responsibility (see for example subsection 13.3(3) of the Criminal Code) and the
evidential burden in relation to civil penalty proceedings. This is because the facts in
issue in relation to each contravention remain wholly within the knowledge of the
person who has allegedly committed the contravention. In addition, the feasibility and
expense of adducing evidence in relation to an alleged contravention within the
Antarctic is excessively prohibitive due to the remote locality and limited access.

Division 5 – Offences etc. relating to safety approvals

13AI Activity must not be carried on without safety approval

63. This section deals with the applicable criminal and civil penalties for carrying on an
activity in the Antarctic without a safety approval.

64. Subsection 13AI(1) provides that a non-State operator contravenes this subsection if
they organise an activity to be carried on in the Antarctic and they, or someone on their
behalf, carries on the activity in the Antarctic when the operator does not hold a safety
approval. This subsection has been included as often the non-State operator is the
organiser of the activity but may not be the person physically undertaking the activity.
This is the case in many tourist operations where operational control is maintained by a
person not physically present in the Antarctic. However, the obligation to obtain a
safety approval rests with the person who organises the activity.

65. Subsection 13AI(2) applies to a person who carries on an activity in the Antarctic. It
provides that a person contravenes this subsection if they carry on an activity in the
Antarctic and the activity was organised by a non-State operator and the operator does
not hold a safety approval at the time the activity is being carried on.

66. Subsection 13AI(3) provides the situations where a contravention of
subsections 13AI(1) and (2) do not apply. The emergency defence in
paragraph 13AI(3)(a) replicates the emergency defence under Part 5 of the ATEP Act
and will be interpreted in the same way.

67. In relation to paragraph 13AI(3)(b), the law of another Contracting Party authorising a
non-State operator to carry on the activity must be a law in relation to the
implementation of Measure 4 (2004). The inclusion of this provision in the Act
recognises each Contracting Party to the Treaty will implement Measure 4 (2004) in
different ways, but with the same objectives.

68. Contravention of subsections 13AI(1) and (2) amounts to both a criminal offence
(subsection 13AI(4)) and the person is also liable to a civil penalty (subsection
13AI(5)).
13AJ Non-compliance with conditions

69. This section deals with the applicable criminal and civil penalties for non-compliance with a condition on a safety approval while carrying on activities in the Antarctic.
70. Subsection 13AJ(1) provides that a non-State operator contravenes the subsection if the operator holds a safety approval in relation to an activity in the Antarctic and a person carries on the activity, and the conditions imposed on the approval are not complied with. The contravention applies to a non-State operator, being the person who holds the safety approval, regardless of whether they or some other person carried on the activity. This is to ensure that even if the non-State operator is the organiser of the activity but does not physically conduct the activity in the Antarctic, they continue to have an obligation to ensure that all those undertaking the activity under their safety approval comply with the conditions of the approval.

71. Subsection 13AJ(1) will not apply if the same circumstances outlined in subsection 13AI(3) are met (subsection 13AJ(2)). Refer to the discussion at paragraphs [66] and [67] above.

72. Contravention of subsections 13AJ(1) and (2) amounts to both a criminal offence (subsection 13AJ(3)) and the person is also liable to a civil penalty (subsection 13AJ(4)).

**Item 9: After subsection 17(4)**

73. This item inserts a new subsection 17(4A) into section 17 of the ATEP Act. It provides that an inspector is able to require any person carrying on an activity or suspected of carrying out an activity in respect of which a non-State operator is required to hold a safety approval, to produce a safety approval. If the person is unable to produce the approval, the inspector is able to require evidence that supports a claim that a safety approval does exist. This is consistent with the current powers inspectors have in relation to permits and Part 3 authorisations under the ATEP Act.

**Part 3 – Application provisions**

**Item 10: Application – pre-commencement applications for a permit**

74. This item provides for transitional arrangements regarding the commencement of the requirement to hold a safety approval. If, at the time of commencement of this item (see discussion regarding commencement at paragraph [7] above), an application has been made for a permit under subsection 9(1) of the ATEP Act and no decision has been made by the Minister, then the applicant will also be required to submit an application for a safety approval prior to a permit being issued under section 9 of the ATEP Act. This is to ensure that once Measure 4 (2004) comes into force all persons undertaking activities in the Antarctic will be required to have a safety approval.

**Item 11: Application – offences etc. relating to safety approvals**

75. Once this item commences (see discussion regarding commencement at paragraph [7] above) sections 13AI and 13AJ apply in relation to an activity carried on in the Antarctic.


Schedule 2 – Implementation of Annex VI to the Madrid Protocol

Part 1 – Environmental protection approvals

Antarctic Treaty (Environment Protection) Act 1980

Item 1: Subsection 3(1) (definition of environmental emergency)

76. This item defines environmental emergency. An environmental emergency will only be an event that arises after the commencement of Annex VI to the Madrid Protocol.

Item 2: Subsection 3(1) (definition of environmental protection approval)

77. This item defines environmental protection approval as an approval granted under section 13BC.

Item 3: Subsection 3(1) (definition of Madrid Protocol)

78. This item updates the definition of Madrid Protocol to include a reference to Annex VI to the Madrid Protocol.

Item 4: Subsection 3(1) (definition of operator)

79. This item defines operator as a person who organises, or intends to organise, an activity to be carried on in the Antarctic. However, the definition does not include, if the person is a Party to the Madrid Protocol, a contractor or subcontractor acting on behalf of the person if the contractor or subcontractor is not an individual. If the person is not a Party to the Madrid Protocol, an operator does not include an individual who is an employee, contractor, subcontractor or agent, or any individual in the service of the operator. See Article 2(c) of Annex VI to the Madrid Protocol.

Item 5: Subsection 3(1) (definition of reasonable preventative measures)

80. This item defines reasonable preventative measures. The definition reflects that in Annex VI to the Madrid Protocol.

Item 6: Before Part 4

81. This item inserts a new Part 3B to the ATEP Act.

Division 1 – Introduction

13BA Simplified outline

82. Section 13BA provides a simplified outline with regards to the requirements for, and operation of, environmental protection approvals.
Division 2 - Obtaining an environmental protection approval

13BB Application for environmental protection approval

83. This section provides for applications for an environmental protection approval. The application of this section to particular activities is the same as that relating to safety approvals. ‘Activity’ is discussed at paragraphs [20] to [22] above.

84. Subsection 13BB(1) provides that an operator who proposes to conduct an activity in the Antarctic may apply to the Minister for an environmental protection approval. The application must be made in writing in the approved form (subsection 13BB(2)). This will be made available to the public on the internet and a hardcopy will be provided on request.

85. Subsection 13BB(3) provides that the Minister may request further information from the applicant. This means that if the applicant has not provided sufficient information to enable the Minister to grant the environmental protection approval, the applicant can be informed of this deficiency and provided with the opportunity to present the requested information. The Minister may specify a time period in which this is to occur. This time limitation is to promote efficiency in decision-making.

86. Subsection 13BB(4) gives the Minister the discretion to refuse to grant the environmental protection approval if the applicant does not provide the requested information within the specified timeframe. This is to minimise applications remaining on foot or unprocessed where it is apparent that the applicant is clearly unable to meet the requirements for the environmental protection approval. The refusal to grant the approval is subject to review in the Administrative Appeals Tribunal (item 7 of Schedule 2, Part 1 of the Act).

87. Subsection 13BB(5) gives the applicant the option to withdraw an application for an environmental protection approval at any time prior to the Minister making the decision. This is to allow for efficient administration in those situations where a person decides not to proceed with the activity.

13BC Grant of environmental protection approval

88. Section 13BC provides for the grant of environmental protection approvals. The Minister has the discretion under subsection 13BC(1) to grant an environmental protection approval to an operator who has applied for the approval in accordance with section 13BB.

89. Subsection 13BC(2) provides that the Minister must not grant the approval unless he or she is satisfied that the requirements at paragraphs 13BC(2)(a)-(c) have been met. Specifically, the operator must:

(a) have undertaken reasonable preventative measures designed to reduce the risk, and potential adverse impact of, environmental emergencies arising from the activity;

(b) have an appropriate contingency plan or plans for responding to incidents with potential adverse impact on the Antarctic environment; and
(c) have or will have the insurance or other financial security referred to in Articles 11(1) and (2) of Annex VI to the Madrid Protocol.

These requirements are further discussed below.

90. An administrative policy setting out current best practice standards for activities in the Antarctic will be developed and made publicly available. The extent to which the application for an environmental protection approval meets the standards set out in the administrative policy will be a relevant consideration for the Minister in determining whether to grant the environmental protection approval.

91. The reasonable preventative measures will need to demonstrate that the operator is capable of properly dealing with and responding to environmental emergencies that could be reasonably expected in the Antarctic in relation to the specific activity in question. Such measures may include, but are not limited to, specialised:

   (a) structures or equipment incorporated into the design and construction of facilities and means of transportation;

   (b) procedures incorporated into the operation or maintenance of facilities and means of transportation; and

   (c) training of personnel.

92. A contingency plan or plans will need to indicate how the operator is capable of properly dealing with and responding to any incident with potential adverse impacts on the Antarctic environment, or dependent and associated eco-systems, including an environmental emergency, which could be reasonably expected in the Antarctic in relation to the specific activity in question. A contingency plan or plans may include, but is not limited to, procedures for:

   (a) conducting an assessment of the nature of the incident;

   (b) notification;

   (c) identification and mobilisation of resources;

   (d) developing and implementing response plans;

   (e) training;

   (f) record keeping; and

   (g) demobilisation.
93. Operators are required to maintain adequate insurance or other financial security, such as the guarantee of a bank or similar financial institution to cover liability under Articles 6(1) and (2) of Annex VI to the Madrid Protocol up to the limits set out in Articles 9(1) and (2) of Annex VI to the Madrid Protocol. A Party to the Madrid Protocol has the option to maintain self-insurance in respect of its State operators. Adequate insurance requirements must be in place for the period that the activity is being carried on the Antarctic. Evidence of insurance or other financial security covering the amounts specified in Article 9 of Annex VI to the Madrid Protocol will be required to be submitted when making the application for an environmental protection approval.

13BD Notice of decision

94. This section sets out the requirements for a notice of decision to grant or refuse an environmental protection approval.

95. If the Minister grants an environmental protection approval in relation to an activity, written notice of the decision must be given to the operator (subsection 13BD(1)).

96. Subsection 13BD(2) outlines the matters which must be included in the notice of the decision to grant an environmental protection approval, namely the name of the operator, the nature of the activity to which the approval relates, the mandatory conditions and any other conditions imposed at the time of the grant under sections 13BE and 13BF of the Act respectively. The Minister also has the discretion to include other matters relating to the approval that he or she considers appropriate (paragraph 13BD(2)(e)). The purpose of the notice is to ensure that the applicant is made aware of the decision, and to ensure they are aware of all the conditions imposed in relation to that approval.

97. Subsection 13BD(3) provides that if Minister refuses to grant an environmental protection approval, written notice of the decision and the reasons for the decision must be given to the applicant. The decision of the Minister not to grant an approval is reviewable in the Administrative Appeals Tribunal (item 7 of Schedule 2, Part 1 of the Act).

Division 3 – Conditions of environmental protection approvals

13BE Mandatory conditions

98. Section 13BE sets out the mandatory conditions that must be imposed on an environmental protection approval. These conditions outline the minimum requirements for preventative measures, contingency plans and insurance, or other financial security, that must be met at all times that the environmental protection approval is in force. In relation to insurance, adequate insurance requirements must be in place for the period that the activity is being carried on in the Antarctic.

13BF Imposition, variation and revocation of conditions
99. Section 13BF provides for the imposition, variation and revocation of conditions of an environmental protection approval other than the mandatory conditions imposed under section 13BE which cannot be varied or revoked.

100. The Minister may impose conditions, or impose additional conditions on an environmental protection approval (paragraph 13BF(1)(a)) or vary or revoke non-mandatory conditions imposed on an environmental protection approval (paragraph 13BF(1)(b)). The decision to impose non-mandatory conditions on an environmental protection approval can occur either at the time of granting the approval or at a subsequent time. The decision to vary or revoke conditions on an environmental protection approval can occur at any subsequent time. The Minister’s power under section 13BF can be exercised on his or her own initiative, or at the request of the holder of an environmental protection approval (subsection 13BF(2)).

101. A decision by the Minister to impose additional conditions, or vary or revoke a condition on his or her own initiative would usually only happen in serious situations and on advice of the Department.

102. The holder of an environmental protection approval can make a request to the Minister to impose a further condition, or vary or revoke an existing condition imposed on the environmental protection approval (subsection 13BF(3)). The request must be in writing and include the reasons for making the request (subsection 13BF(4)). For example, the holder of an environmental protection approval may request a variation to a condition due to unforeseen changes in the nature their activity, to ensure currency with best practice, or for other reasons.

103. Before imposing, varying or revoking a condition on request by the holder of an environmental protection approval under subsection 13BF(3), the Minister must be satisfied the request adequately justifies the reasons for the imposition, variation or revocation, respectively (subsection 13BF(5)).

104. If the Minister imposes, varies or revokes a condition, either on his or her own initiative or at the request of the holder of the environmental protection approval, the Minister must give written notice to the holder of the approval (subsection 13BF(6)(a)). The notice must specify the date the imposition, variation or revocation takes effect, which must not be less than five days from the date of the notice (subsection 13BF(6)(a)). This means the decision cannot be retrospective. In determining the date the notice will take effect from, consideration may be given to the time it would reasonably take the holder of the environmental protection approval to comply with any newly imposed or varied condition.

105. If the Minister refuses a request by the holder of an environmental protection approval under subsection 13BF(3), the Minister must provide written notice of the decision and the reasons for the decision (subsection 13BF(7)).

106. Decisions by the Minister under this section, namely deciding or refusing to impose, vary or revoke conditions on an environmental protection approval, are subject to review in the Administrative Appeals Tribunal (item 7 of Schedule 2, Part 1 of the Act).
Division 4 – Variation, suspension and revocation of environmental protection approvals

13BG Variation of environmental protection approval

107. Section 13BG provides for the variation of environmental protection approvals. A variation may be necessary, for example, to take into account changes to the time when an activity is being undertaken or changes in the nature or scope of the activity.

108. The Minister may vary an environmental protection approval on his or her own initiative if he or she is satisfied that it is necessary to do so (subsection 13BG(1)). In practice, this would usually only happen in serious situations and on advice of the Department.

109. The holder of the environmental protection approval may request that the Minister vary the approval (subsection 13BG(2)). The request must be in writing and set out the reasons for the request (subsection 13BG(3)). In assessing the request to vary an environmental protection approval, the Minister must be satisfied that the reasons set out in the request justify the variation (subsection 13BG(4)).

110. Subsection 13BG(5) provides that if the Minister varies an environmental protection approval, the Minister must give the holder of the environmental protection approval written notice of the variation and the notice must specify the date on which the variation takes effect. That date cannot be retrospective and must not be less than five days from the date of the notice. In determining the date the variation is to take effect, consideration may be given to the time it would reasonably take the holder of the environmental protection approval to comply with the variation.

111. Subsection 13BG(6) provides that if the Minister refuses a request to vary an approval, the Minister must provide written notice to the holder of the approval of the decision and the reasons for the decision.

112. A decision by the Minister under this section to vary an environmental protection approval or to refuse to vary an environmental protection approval is reviewable by the Administrative Appeals Tribunal (item 7 of Schedule 2, Part 1 of the Act).

13BH Suspension or revocation of environmental protection approval

113. Subsection 13BH(1) provides that the Minister may, by written notice, suspend or revoke an environmental protection approval if satisfied that a condition imposed on the approval has not been, or is not being, complied with, or if the Minister considers suspension or revocation appropriate in all the circumstances. The notice must specify a day on which the suspension or revocation will take effect and this must not be less than five days from the date of the notice (subsection 13BH(2)). A decision to suspend or revoke an environmental protection approval therefore cannot operate retrospectively. In determining the date the suspension or revocation is to come into effect, consideration may be given to the time it would take for the operator to leave the Antarctic by the most direct course.
114. If an environmental protection approval is suspended, the notice must specify the period of suspension, which cannot be longer than 90 days after the day on which the suspension takes effect (subsection 13BH(3)). The Minister is also able to revoke a safety approval while it is suspended (subsection 13BH(5)).

115. Subsection 13BH(4) clarifies that, notwithstanding subsection 13BH(3), if proceedings are commenced for an offence under the ATEP Act or in respect of a contravention of a civil penalty provision, where those activities relate to the carrying on of the activity the subject of the environmental protection approval, while the environmental protection approval is suspended, then the environmental protection approval will remain suspended until the proceedings are completed. Any ‘proceedings’ includes completion of any appeals process for those proceedings.

116. A decision to suspend or revoke an environmental protection approval would not be made lightly, and in most cases a suspension will be the first course of action. However, if for example, a mandatory condition was not being complied with, it may be more appropriate to revoke the approval. The decision to suspend or revoke an approval is subject to review in the Administrative Appeals Tribunal (item 7 of Schedule 2, Part 1 of the Act).

117. The holder of an environmental protection approval cannot request that the environmental protection approval be suspended or revoked. This is to ensure, that at all times, in the Antarctic, all persons have an environmental protection approval for their activity. Should a holder of an environmental protection approval no longer wish to undertake the activity the subject of their environmental protection approval, they can simply leave the Antarctic.

Division 6 – Miscellaneous

13BK Register

118. This section requires the Minister to establish a register of environmental protection approvals. The register must be kept in an electronic form (subsection 13BK(3)) and must include the information outlined in subsection 13BK(2). Regulations may also be made to provide for, or in relation to the register (subsection 13BK(4)). The purpose of the register is to maintain a record of environmental protection approvals granted which will facilitate information sharing at an international level in line with Australia’s obligations under Article IX of the Treaty.

13BL Monitoring of activity

119. Section 13BL provides that regulations may provide for the monitoring of an activity for which an environmental protection approval has been granted. This may include placing observers on ships or aircraft, or requiring operators to provide reports in relation to activities.
Item 7: Before subsection 28(2)

120. This item inserts a new subsection 28(1C) before subsection 28(2) of the ATEP Act to include decisions relating to environmental protection approvals under the new provisions that are reviewable by the Administrative Appeals Tribunal. All decisions made by the Minister in relation to an environmental protection approval are reviewable. These are:

(a) a decision to refuse to grant an approval (subsection 13BC(1));

(b) a decision to impose, or to refuse to impose, conditions on an environmental protection approval (paragraph 13BF(1)(a));

(c) a decision to vary or revoke, or refuse to vary or revoke, conditions imposed on an environmental protection approval (paragraph 13BF(1)(b));

(d) a decision to vary an environment protection approval (subsection 13BG(1));

(e) a decision to refuse to vary an environment protection approval (subsection 13BG(4)); and

(f) a decision to suspend or revoke an environment protection approval (subsection 13BH(1)).

Item 8: Before paragraph 29(2)(b)

121. This item inserts a new paragraph 29(2)(ae) before paragraph 29(2)(b) of the ATEP Act that will allow for regulations to be made providing for the payment of a fee, in respect of processing of an application for an environmental protection approval, or the grant of the approval, and the refund of that fee. This is to allow for cost recovery.

Item 9: At the end of Schedule 3

122. This item adds the text of Annex VI to the Madrid Protocol to the end of Schedule 3 of the ATEP Act.

Part 2 – Environment emergencies etc.

Antarctic Treaty (Environment Protection) Act 1980

Items 10-15: Subsection 3(1)

123. Items 10–12 insert new definitions of Account, authorised officer and cost order into the ATEP Act.

124. Item 13 defines engage in conduct. The definition was located at subsection 20(2) of the ATEP Act (item 27 of Schedule 2, Part 2 of the Act repeals the current subsection 20(2) of the ATEP Act).
125. Item 14 defines *reasonable measures*. The definition lists the matters relevant to determining what is reasonable, which recognises that the Antarctic environment is unique and fragile and its rate of natural recovery may be slow. Due to the remote and harsh nature of operating in the Antarctic, the definition also requires that risks to human life and safety and technological and economic feasibility be taken into consideration when determining what reasonable measures are.

126. Item 15 defines *response action*. A response action may include cleaning up in appropriate circumstances and determining the extent and impact of the emergency. The ‘impact’ refers to the environmental impact, not any other impact of the emergency.

**Item 16: After section 3**

127. This item inserts a new section 3A after section 3 of the ATEP Act. It provides that the Minister may appoint, in writing, an authorised officer for the purposes of a provision of the ATEP Act. The existing authorised officer provisions at subsections 21(2), 21AA(5) and 21AB(4) of the ATEP Act are repealed by item 28 of Schedule 2, Part 2 of the Act. Under section 3A the Minister may appoint those persons listed in subsection 3A(1) to be an authorised officer by instrument, that must be published in the *Gazette*.

128. The appointment of substantive and acting SES and Executive Level 2 officers in the Department as authorised officers is appropriate in this circumstance as the matters for which information are being provided are of a general, non-controversial nature. For example, at subsection 21(2) of the ATEP Act, the furnishing of information in relation to a permit is routine in nature, and the power to grant the permit to which the information relates is delegated to an Executive Level 2 officer. This allows for administrative efficiency regarding these routine matters. The Minister has discretion on who to appoint and is able to limit the scope of the appointment in relation to certain purposes.

129. The instrument of appointment is not a legislative instrument under Schedule 1 to the *Legislative Instruments Regulations 2004* (Cth).

**Item 17: Before subsection 9(3)**

130. This item inserts a new subsection 9(2D) into section 9 of the ATEP Act. Section 9 sets out the requirements for the grant and renewal of a permit that is issued under Part 2 of the ATEP Act. The provision provides that if a person applies for a permit under section 9 to undertake an activity, they will not be granted a permit until an environmental protection approval has been issued in relation to that activity. This provision corresponds to a similar provision at subsection 9(2A) that provides that a permit will not be granted unless the Minister has authorised the activity in relation to Part 3 of the ATEP Act.
Item 18: Section 13BA (before the last paragraph)

131. This item inserts a new paragraph before the last paragraph in the simplified outline at section 13BA providing an overview of the requirement to comply with an environmental protection approval.

Item 19: Paragraph 13BC(2)(c)

132. This item repeals the current paragraph 13BC(2)(c) and substitutes new paragraphs 13BC(2)(c) and (d) dealing with insurance and financial securities. This amendment will take effect when Annex VI to the Madrid Protocol enters into force which will allow the cost order provisions at section 13CF to commence.

Item 20: Paragraph 13BE(c)

133. This item replaces the current paragraph 13BE(c) and substitutes new paragraphs 13BE(c) and (d) dealing with insurance and financial securities. This amendment will take effect when Annex VI to the Madrid Protocol enters into force which will allow the cost order provisions at section 13CF to commence.

Item 21: After Division 4 of Part 3B

134. This item inserts a new Division 5 of Part 3B to the ATEP Act. This Division contains the offence and civil penalty contravention provisions in relation to environmental protection approvals.

135. There are a number of new offence and civil penalty provisions which are inserted by this item which are discussed below. The penalties imposed for offences under this item are consistent with the existing penalties imposed under the ATEP Act and both the offence and civil penalty provisions have been calculated to deter non-compliance. The inclusion of both an offence and the civil penalty is to provide flexibility in regulation and enforcement under the ATEP Act.

136. A person seeking to rely on a defence under the provisions inserted by this item bears the burden of proof. This is consistent with established general principles of criminal responsibility (see for example subsection 13.3(3) of the Criminal Code) and the evidential burden in relation to civil penalty proceedings. This is because the facts in issue in relation to each contravention remain wholly within the knowledge of the person who has allegedly committed the contravention. In addition, the feasibility and expense of adducing evidence in relation to an alleged contravention within the Antarctic is excessively prohibitive due to the remote locality and limited access.

Division 5 - Offences etc. relating to environmental protection approvals

13BI Activity must not be carried on without environmental protection approval

137. Section 13BI deals with non-compliance with the requirement to have an environmental protection approval in relation to an activity being carried on in the Antarctic.

138. Subsection 13BI(1) provides that an operator contravenes the subsection if the operator organises an activity to be carried on in the Antarctic and they, or someone on their behalf, carries on the activity in the Antarctic when the operator does not hold an
environmental protection approval. This subsection has been included as often the operator is the organiser of the activity, but may not be the person undertaking the activity. This is the case in many tourist operations where operational control is maintained by a person not physically present in the Antarctic. However, the obligation to obtain an environmental protection approval rests with the person who organises the activity.

139. Subsection 13BI(2) applies to a person who carries on an activity in the Antarctic. It provides a person contravenes this subsection if they carry on an activity in the Antarctic and the activity was organised by an operator and the operator does not hold an environmental protection approval. The person who carries on the activity will have contravened this subsection if the operator who organised the activity does not hold an environmental protection approval.

140. Subsection 13BI(3) provides the situations where a contravention of subsections 13BI(1) and (2) do not apply. The emergency defence in paragraph 13BI(3)(a) replicates the emergency defence under Part 5 of the ATEP Act and will be interpreted in the same way.

141. In relation to paragraph 13BI(3)(b), the law of another Party authorising an operator to carry on the activity must be a law in relation to the implementation of Annex VI to the Madrid Protocol. The inclusion of this provision in the Act recognises each Party to the Madrid Protocol will implement Annex VI to the Madrid Protocol in different ways, but with the same objectives. The relevant Party must be a party to the Madrid Protocol, and not the Treaty.

142. Paragraph 13BI(3)(c) ensures that where the Minister gives a direction to an operator, that direction is followed.

143. Contravention of this section is both a criminal offence (subsection 13BI(4)) and the person is also liable to a civil penalty (subsection 13BI(5)).

13BJ Non-compliance with conditions

144. Section 13BJ deals with the applicable criminal and civil penalties for non-compliance with a condition imposed on an environmental protection approval while carrying on activities in the Antarctic.

145. Subsection 13BJ(1) provides that an operator contravenes this subsection if the operator holds an environmental protection approval in relation to an activity in the Antarctic and a person carries on the activity and the conditions imposed on the approval are not complied with. The obligation is imposed on an operator, being the person who holds the approval, regardless of whether they or some other person carry on the activity. This is because, even if the organiser of the activity is not physically conducting the activity in the Antarctic, they continue to have an obligation to ensure that all those undertaking the activity under their environmental protection approval comply with the conditions of the approval.

146. Subsection 13BJ(1) will not apply if the same circumstances outlined in subsection 13BI(3) are met (subsection 13BJ(2)). Refer to the discussion at paragraphs [140] to [142] above.
147. Contravention of this section is both a criminal offence (subsection 13BJ(3)) and the person is also liable to a civil penalty (subsection 13BJ(4)).

**Item 22: After Part 3B**

148. This item inserts a new Part 3C to the ATEP Act. This part contains all the provisions in relation to environmental emergencies in the Antarctic.

149. There are a number of new offence and civil penalty provisions which are inserted by this item which are discussed below. The penalties imposed for offences under this item are consistent with the existing penalties imposed under the ATEP Act and both the offence and civil penalty provisions have been calculated to deter non-compliance. The inclusion of both an offence and the civil penalty is to provide flexibility in regulation and enforcement under the ATEP Act.

150. A person seeking to rely on a defence under the provisions inserted by this item bears the burden of proof. This is consistent with established general principles of criminal responsibility (see for example subsection 13.3(3) of the Criminal Code) and the evidential burden in relation to civil penalty proceedings. This is because the facts in issue in relation to each contravention remain wholly within the knowledge of the person who has allegedly committed the contravention. In addition, the feasibility and expense of adducing evidence in relation to an alleged contravention within the Antarctic is excessively prohibitive due to the remote locality and limited access.

**Part 3C – Environmental emergencies**

**Division 1 – Introduction**

13CA Simplified outline

151. This section provides a simplified outline of Part 3C with regards to environmental emergencies in the Antarctic.

**Division 2 - Obligations of operators in relation to environmental emergencies**

13CB Notification of an environmental emergency

152. Section 13CB deals with the failure to notify the Minister, or an authorised officer, of an environmental emergency. The notification requirement is to ensure that the Minister is immediately made aware of any environmental emergencies in the Antarctic that arise from the activities of Australian operators and that, if necessary, this information can be passed onto the Antarctic Treaty Secretariat and other Parties to the Madrid Protocol. It will also enable effective response action to be undertaken.

153. Subsection 13CB(1) provides that an operator contravenes the subsection if they organise an activity to be carried on in the Antarctic and a person carries on the activity (whether the person is the operator or another person) and the activity causes an environmental emergency and the operator does not immediately notify the Minister, or an authorised officer, of the emergency. ‘Immediately’ will be interpreted in the context of the operating environment of the Antarctic at the time of the notification. *Authorised officer* is defined at item 11 of Schedule 2, Part 2 of the Act.
154. Subsection 13CB(2) provides that subsection 13CB(1) does not apply if the operator has already notified another Party to the Madrid Protocol of the environmental emergency.

155. Subsections 13CB(3) and (4) set out the offence and civil penalty respectively.
156. This section does not affect the privilege against self-incrimination. However, the privilege only applies to natural persons and not to bodies corporate. An operator who is a body corporate must notify the Minister of an environmental emergency whether or not this might incriminate the operator.

13CC Operator must ensure that prompt and effective response action is taken

157. The purpose of section 13CC is to encourage operators whose activities give rise to environmental emergencies in the Antarctic take prompt and effective response action. This is to minimise the need for a Party to the Madrid Protocol to take response action on behalf of an operator, in accordance with Article 5(2) of Annex VI to the Madrid Protocol. Response action is defined at item 15 of Schedule 2, Part 2 of the Act. If an operator holds an environmental protection approval, as a first step, they would implement their contingency plans in relation to the environmental emergency.

158. Subsection 13CC(1) provides that an operator contravenes the subsection if they organise an activity to be carried on in the Antarctic and a person carries on the activity (whether the person is the operator or another person) and the activity gives rise to an environmental emergency and the operator does not ensure that prompt and effective response action is taken in relation to the emergency. It is a contravention of this subsection if the operator takes response action, but it is not prompt and effective.

159. Subsection 13CC(2) provides that subsection 13CC(1) does not apply where the environmental emergency has arisen as a result of circumstances beyond the control of the operator. Paragraph 13CC(2)(a) recognises the importance of protecting human life or safety in an inhospitable part of the world. Situations which would reasonably be beyond the control of the operator are covered in paragraphs 13CC(2)(b)-(d). A natural disaster event (paragraph 13CC(2)(b)) would need to be of such exceptional character in the circumstances of the Antarctic that it would not have been reasonably foreseeable, and the operator would still be required to have taken all reasonable preventative measures to reduce the risk of any environmental emergency and their potential adverse impact. Paragraphs 13CC(2)(c) and (d) cover acts of terrorism, and acts of belligerency against the activities organised by the operator respectively. The intention is that these defences are not available if the act of terrorism or act of belligerency is caused by the operator.

160. Contravention of this section is both a criminal offence (subsection 13CC(3)) and the person is also liable to a civil penalty (subsection 13CC(4)). The penalties have been set at a high level to recognise the potential of adverse impacts on the Antarctic environment.
Division 3 – Ministerial directions

13CD Directions in relation to an environmental emergency

161. Subsection 13CD(1) provides the Minister with the power to give a written direction to an operator whose activity has given rise to an environmental emergency in the Antarctic. The direction would be given to the operator who organised the activity, regardless of whether they are the person who is actually carrying on the activity in the Antarctic or not. This reflects the obligation that operators who organise activities remain responsible for the actions of people carrying on the activity in the Antarctic. The Minister’s power to direct includes the power to direct someone to act or not to act or to vary action that is being taken.

162. While this power of direction is broad, it is limited to situations where an environmental emergency has arisen, and would only be used in extraordinary circumstances. The power to direct is not delegable, and would be incident and location specific. An example of when a direction may be appropriate would be where an operator decided that a reasonable response action would be to set fire to an oil spill. In the situation, depending on the circumstances, the Minister may choose to direct the operator not to take that action. The direction power may also be used where, due to the specific circumstances of the environmental emergency, the action identified in the operator’s contingency plan would be inappropriate in the circumstances.

163. This power of direction is not reviewable in the Administrative Appeals Tribunal. This is because the power will only be used in extraordinary circumstances and only in those instances where the Minister, usually on advice of experts in the Department, believes there is no alternative option.

164. The use of a direction is so extraordinary that a person will not be liable for another offence under the ATEP Act if they are following a direction (for example items 24 and 26 of Schedule 2, Part 2 of the Act).

165. Subsection 13CD(2) provides that an operator must comply with a direction under subsection 13CD(1).

166. Subsection 13CD(3) provides that neither the Minister nor the Commonwealth would be liable to any action or proceeding in relation to an act done in compliance, or purported compliance with a direction.

167. Subsection 13CD(4) provides that the direction is not a legislative instrument within the meaning of section 5 of the Legislative Instruments Act 2003 (Cth). The provision is declaratory of the law and is not intended to be an exemption from the Legislative Instruments Act 2003.
13CE Non-compliance with direction

168. Subsection 13CE(1) provides that an operator contravenes the subsection if the operator is given a direction under subsection 13CD(1) and the operator engages in conduct that contravenes the direction. Engage in conduct is defined at item 13 of Schedule 2, Part 2 of the Act and means to do an act or omit to perform an act. Therefore, an operator will contravene the subsection if they fail to follow the direction, or if they act in a manner that does not comply with the direction.

169. Subsection 13CE(2) provides that if the operator has engaged in the conduct that contravenes the direction in an emergency to prevent a death or serious injury or to secure the safety of a ship or aircraft, or the safety of equipment or facilities of high value or to protect the environment, subsection 13CE(1) does not apply. The emergency defence in paragraph 13CE(2) replicates the emergency defence under Part 5 of the ATEP Act and will be interpreted the same way.

170. Subsections 13CE(3) and (4) set out the offence and civil penalty respectively. As directions will only be given in extraordinary circumstances where no alternative is available, the offence and civil penalty have been calculated to reflect the need to promote compliance.

Division 4 - Cost orders

171. This division implements the liability regime of Annex VI to the Madrid Protocol. Liability will arise in the case of an environmental emergency if no response action is taken, or if the response action is not prompt or effective. Liability will also arise even if the operator had no knowledge of the environmental emergency or that their activity gave rise to the environmental emergency.

13CF Costs order – response action taken by Party to Madrid Protocol

172. Subsection 13CF(1) provides for a Party to the Madrid Protocol to apply for a costs order against an operator who did not take prompt and effective response action in relation to an environmental emergency that arose from an activity carried on in the Antarctic which they organised, for which the Party took response action. Subsection 13CF(2) limits the amount payable. Subsection 13CF(3) provides exceptions to a costs order where the environmental emergency was caused by one of the matters listed at paragraphs 13CF(3)(a)-(d). Subsections 13CF(4)-(6) specify who can apply for an order, and in what time period that application can be made.

173. The Court (defined at item 6 of Schedule 4 of the Act) must be satisfied that:

(a) an activity was carried on in the Antarctic;
(b) that activity gave rise to an environmental emergency;
(c) the operator who organised the activity is not a Party to the Madrid Protocol;
(d) the operator did not take prompt and effective response action in relation to the environmental emergency; and
(e) the Party to the Madrid Protocol that made the application to the Court took response action (whether directly or through an agent or other person authorised by them).

174. The operator who organised the activity cannot be a Party to the Madrid Protocol, because disputes between State Parties are dealt with in the international realm. If an operator does not take prompt and effective response action, Article 5(2) of Annex VI to the Madrid Protocol encourages the Party of the operator and other Parties to take such action. If a Party wishes to authorise a person to take action on their behalf, that person must be specifically authorised for that purpose, and the evidential burden would rest with the Party to prove that the person was authorised.

175. The amount that a Court can order an operator to pay will depend on the situation surrounding the cause of the environmental emergency (subsection 13CF(2)). If the environmental emergency resulted from an act or omission of the operator that was done with the intention of causing the emergency, or recklessly with the knowledge that the emergency would probably result, then no limit applies to the amount that can be ordered (paragraph 13CF(2)(a)). In this case, all costs incurred by the Party in taking the response action will be recoverable. This is to deter operators from intentionally or recklessly causing an environmental emergency.

176. In all other circumstances the amount payable will be the lower of the costs incurred by the Party in taking the response action or the amount prescribed by the regulations (paragraph 13CF(2)(b)). Currently, the limits are prescribed at Article 9 of Annex VI to the Madrid Protocol and are subject to review. Prescribing by regulation ensures flexibility with current standards. While a Party will be able to apply for the actual costs of the response action undertaken, response action means reasonable measures, so that, when making the application, the Party will need to demonstrate that the response action taken falls within that definition (item 14 of Schedule 2, Part 2 of the Act).

177. The exceptions to an order are provided for in paragraphs 13CF(3)(a)-(d). The purpose of the exceptions is to provide that where the environmental emergency arises as a result of circumstances beyond the control of the operator they are not liable for costs. Paragraph 13CF(3)(a) recognises the importance of protecting human life or safety in an inhospitable part of the world. Situations which would reasonably be beyond the control of the operator are covered in paragraphs 13CF(3)(b)-(d). A natural disaster event (paragraph 13CF(3)(b)) would need to be of such exceptional character in the circumstances of the Antarctic that it would not have been reasonably foreseeable, and the operator would still be required to have taken all reasonable preventative measures to reduce the risk of any environmental emergency and their potential adverse impact. Paragraphs 13CF(3)(c) and (d) cover acts of terrorism, and acts of belligerency against the activities organised by the operator respectively. The intention is that these defences are not available if the act of terrorism or act of belligerency is caused by the operator.

178. If Australia was the Party to the Madrid Protocol to take response action the application must be made by the Minister (paragraph 13CF(4)(a)). This power cannot be delegated due to the serious nature of the matter. If the Party that takes response action is another Party to the Madrid Protocol the application must be made by that Party (paragraph 13CF(4)(b)).
179. The time for application to the Court will depend on whether the Party to the Madrid Protocol that takes the response action knows, or reasonably should know, the identity of the operator whose activity gave rise to the environmental emergency. If the operator is known, then an application must be made within three years from the day the response action began (paragraph 13CF(5)(a)).

180. If the operator is unknown at the time the response action was taken, then the application must be made within three years from the day the identity of the operator became known, or reasonably should have been known (paragraph 13CF(5)(b)). This is to ensure that if a Party to the Madrid Protocol comes across an environmental emergency, without knowing whose activity gave rise to the emergency, there will be no impediment to taking the response action and recovering costs. Given the remoteness of the Antarctic, this scenario is likely. However, for fairness, once the identity of the operator is known, the Party has three years to make the application which is adequate time to bring an application for a costs order.

181. Despite the extra time provided to allow for the determination of the identity of the operator where it is not known, no application can be made more than 15 years after the day on which the Party to the Madrid Protocol began the response action (subsection 13CF(6)). This is to provide certainty for operators and for insurance purposes.

13CG Costs order – no response action taken by any person

182. Section 13CG provides for the situation where an activity is carried on that gives rise to an environmental emergency in the Antarctic, and the operator who organised the activity does not take prompt and effective response action, and no Party to the Madrid Protocol takes response action under Article 5(2) of Annex VI to the Madrid Protocol. In these circumstances the Minister may apply to the Court for an order that the operator pay an amount to the Commonwealth (subsection 13CG(1)). In accordance with Article 6(2)(b) of Annex VI to the Madrid Protocol, this amount will then be transferred to the Fund. The purpose of this section is to ensure that even where no response action is taken by anyone, the operator responsible for the environmental emergency is liable to pay an amount of money that reflects the costs of the response action that should have been taken in relation to that environmental emergency.

183. Subsection 13CG(1) sets out the matters that the Court must be satisfied with if it were to make an order. The provisions are similar to subsection 13CF(1), with the only difference being paragraph 13CG(1)(d) that no Party to the Madrid Protocol takes response action. Similarly, the limits on the amount that the Court can order at subsection 13CG(2) are determined using the same approach as that taken at subsection 13CF(2), and the exceptions at subsection 13CG(3) are the same as those at subsection 13CF(3) (see discussion above).

184. Only the Minister can apply for an order in relation to section 13CG. This power is not delegable, due to the serious nature of the matter. Subsection 13CG(4) provides that an application must be made within 15 years of the Commonwealth becoming aware of the environmental emergency, recognising that due to the remoteness of the Antarctic, it may be some years after the actual environmental emergency occurred that the Commonwealth becomes aware of the event. However, the inclusion of a time limit provides some certainty for operators and for insurance purposes.
**13CH Enforcement of costs order**

185. Section 13CH provides for the enforcement of costs orders made by virtue of sections 13CF or 13CG. The section provides that any amount payable under a costs order is taken to be a civil debt payable by the operator to the plaintiff (subsection 13CH(2)) and that the plaintiff may enforce the costs order as if it were an order made in civil proceedings to recover the debt (subsection 13CH(3)). Any debt arising from the costs order is taken to be a judgment debt (subsection 13CH(4)).

**13CI Joint and several liability**

186. Subsection 13CI(1) provides that where an environmental emergency arises from an activity or activities that are organised by two or more operators, the operators are jointly and severally liable. This would for example apply to the situation where two operators organised the one activity, or where two operators organise two activities, that result in an environmental emergency. An example of the former would be where two companies operate one vessel which gives rise to an environmental emergency. An example of the latter would be where two vessels each organised by a different operator collide and the collision gives rise to an environmental emergency.

187. Subsection 13CI(2) provides that where one of the operators can demonstrate that the environmental emergency, or part of the environmental emergency, did not result from their activity, they are not jointly and severally liable in relation to the environmental emergency or that part of the environmental emergency.

**Division 5 - Special Account**

188. This Division establishes the Antarctic Environmental Liability Special Account and includes related provisions.

189. The objectives of the Antarctic Environmental Liability Account are twofold. The first is to ensure that money expended by the Commonwealth in meeting its international obligations under Article 5(2) of Annex VI to the Madrid Protocol can be recovered. The second objective is to ensure that a costs order awarded for the purposes of Article 6(2)(b) of Annex VI to the Madrid Protocol shall be paid to the Fund as required. These amounts will be in relation to environmental emergencies in the Antarctic. Any amounts that are appropriated will be in relation to specific court actions in relation to the emergency.

**13CJ Name of Account**

190. Section 13CJ establishes the Antarctic Environmental Liability Special Account, which is defined as the Account (item 10 of Schedule 2, Part 2 of the Act). The Account is a special account for the purposes of the Financial Management and Accountability Act 1997 (Cth) (subsection 13CJ(2)).

**13CK Credits to the Account**

191. Section 13CK provides for amounts to be credited to the Account.
Paragraph 13CK(a) refers to amounts paid to the Commonwealth under a costs order (item 12 of Schedule 2, Part 2 of the Act). These are amounts paid under an order under subsection 13CF(1) for the costs of response action in relation to an environmental emergency taken by Australia (as a Party to the Madrid Protocol), or under subsection 13CG(1) for the costs of response action that should have been taken in relation to an environmental emergency when no response action is taken by any person.

Paragraph 13CK(b) refers to voluntary payments made by a person to the Commonwealth for the purposes of the Account. These amounts could be paid as an alternative to having to make an application to a Court for an order under subsections 13CF(1) or 13CG(1), such as through an agreed outcome at alternative dispute resolution. Paragraph 13CK(c) allows for gifts or bequests to be made for the purposes of the Account.

13CL – Purposes of the Account

Paragraph 13CL(a) refers to payments to the Fund. The Fund will be maintained and administered by the Antarctic Treaty Secretariat. Amounts paid into the Fund will be from costs orders under subsection 13CG(1) or voluntary payments or gifts and bequests.

Paragraph 13CL(b) refers to paying or discharging costs, expenses and other obligations incurred by the Commonwealth. This provision is to ensure that when Australia (as a Party to the Madrid Protocol) takes response action in circumstances where an operator has not taken response action, the costs of that response action can be reimbursed to the Commonwealth. This will ensure Australia can meet its international obligation under Article 5(2) of Annex VI to the Madrid Protocol without costs becoming an issue.

Paragraph 13CL(c) refers to meeting the expenses of administering the Account, the costs of which would be incidental.

Division 6 – Miscellaneous

13CM Payment to fund

Section 13CM provides that if the Commonwealth is required or permitted to make a payment to the Fund, that payment must be done in a timely manner. This is to ensure that funds do not sit in the Account unnecessarily.

Item 23: Before subsection 17(5)

This item inserts subsection 17(4B) into section 17 of the ATEP Act. It provides that an inspector is able to require any person to produce an environmental protection approval or if the person is unable to produce the approval the inspector is able to require evidence that supports a claim that an environmental protection approval does exist and the contents of that approval. This provision is consistent with the existing powers.
inspectors have in relation to permits and Part 3 authorisations under the ATEP Act and will allow effective enforcement of the environmental protection approval provisions.

**Item 24: After paragraph 19(3)(c)**

200. This item inserts a new paragraph 19(3)(ca) after paragraph 19(3)(c) of the ATEP Act which provides that the offences at section 19 of the ATEP Act do not apply if the action was done in compliance with a direction given by the Minister under subsection 13CD(1). This is to ensure that where the Minister gives a direction to an operator, that direction is followed.

**Item 25: At the end of subsection 19(3)**

201. This item inserts a note after subsection 19(3) of the ATEP Act in relation to the provisions of subsection 19(3). The note has been inserted to assist the reader, and is merely declaratory of section 6A of the ATEP Act that applies Chapter 2 of the Criminal Code to all offences in the ATEP Act. The note has been inserted at this point for consistency where a similar note has been inserted in relation to the same defences elsewhere in the ATEP Act.

**Item 26: At the end of section 19AA**

202. This item inserts a new defence to the offence at section 19AA of the ATEP Act if the action was done in compliance with a direction given by the Minister under subsection 13CD(1). This is to ensure that where the Minister gives a direction to an operator, that direction is followed. The note has been included to assist the reader, and is merely declaratory of section 6A of the ATEP Act that applies Chapter 2 of the Criminal Code to all offences in the ATEP Act.

**Item 27: Subsection 20(2)**

203. This item repeals the current subsection 20(2) of the ATEP Act which defines *engage in conduct*. The definition has been moved to subsection 3(1) of the ATEP Act (see item 13 of Schedule 2, Part 1 of the Act).

204. The item inserts a new subsection 20(2) to the ATEP Act which is a defence to the offence at subsection 20(1) of the ATEP Act if the action was done in compliance with a direction given by the Minister under subsection 13CD(1). This is to ensure that where the Minister gives a direction to an operator, that direction is followed. The note has been included to assist the reader, and is merely declaratory of section 6A of the ATEP Act that applies Chapter 2 of the Criminal Code to all offences in the ATEP Act.

**Item 28: Subsections 21(2), 21AA(5) and 21AB(4)**

205. This item repeals subsections 21(2), 21AA(5) and 21AB(4) of the ATEP Act which previously contained authorised officer provisions. These have been moved to new section 3A of the ATEP Act (item 16 of Schedule 2, Part 2 of the Act).

**Item 29: At the end of subsection 21A(4) (before the note)**

206. This item inserts a new defence at the end of subsection 21A(4) (before the note) of the ATEP Act to the offences at subsections 21(2) and 21(3) of the ATEP Act. It provides a
defence to those offences if the action was done in compliance with a direction given by the Minister under subsection 13CD(1). This is to ensure that where the Minister gives a direction to an operator, that direction is followed.

**Item 30: At the end of section 27**

207. This item adds to the list of those powers of the Minister that are not delegable the power to give a direction under section 13CD and the powers under sections 13CF and 13CG to apply for a costs order.

**Part 3 – Amendment relating to safety approvals**

*Antarctic Treaty (Environment Protection) Act 1980*

**Item 31: At the end of subsections 13AI(3) and 13AJ(2)**

208. This item inserts a defence to the contraventions at subsections 13AI(3) (failing to hold a safety approval) and 13AJ(2) (contravening a condition of a safety approval), if the action was done in compliance with a direction given by the Minister under subsection 13CD(1). This is to ensure that where the Minister gives a direction to an operator, that direction is followed.

**Part 4 – Application and savings provisions**

*Antarctic Treaty (Environment Protection) Act 1980*

**Item 32: Definitions**

209. This item provides definitions for the interpretation of Schedule 2, Part 4 of the Act. Commencement means the commencement of this item, which is the later of the day after the Act receives Royal Assent and the day Annex VI to the Madrid Protocol comes into force for Australia.

**Item 33: Application – pre-commencement applications for a permit**

210. This item relates to the application for a permit under subsection 9(1) of the ATEP Act. If an application is made for a permit prior to commencement of this Part, but the Minister does not make a decision before commencement, when making the decision the Minister must consider the new section 9(2D) (item 17 of Schedule 2, Part 2 of the Act) which requires the Minister not to grant a permit for an activity unless the operator also has an environmental protection approval in relation to the activity.

**Item 34: Application – offences etc. relating to environmental protection approvals**

211. This item provides that the offences and civil penalties of failing to have an environmental protection approval (section 13BI) and contravening a condition of an environmental protection approval (section 13BJ) only apply in relation to activities carried on in the Antarctic after commencement.

**Item 35: Application – provisions relating to environmental emergencies**
212. This item provides that the offences and civil penalties of failing to notify of an environmental emergency (section 13CB), failing to take prompt and effective response action (section 13CC) and the power to give a direction (section 13CD) only apply in relation to an activity carried on in the Antarctic that causes or gives rise to an environmental emergency if the activity is carried on after commencement.

Item 36: Application – costs orders

213. This item provides that costs orders under sections 13CF and 13CG only apply in relation to an activity carried on in the Antarctic that gives rise to an environmental emergency if the activity is carried on after commencement.

Item 37: Saving of designation etc. as an authorised officer

214. This item provides that if a person was designated as an authorised officer prior to commencement under subsections 21(2), 21AA(5) or 21AB(4) of the ATEP Act, and that designation has not ended, then the designation or authorisation will continue as if it were an appointment under the new section 3A (item 16 of Schedule 2, Part 2 of the Act).

Part 1 – Amendments

*Antarctic Treaty (Environment Protection) Act 1980*

**Item 1: Subsection 3(1) (definition of *guide*)**

215. This item defines *guide* as a person who has relevant expertise in relation to the Antarctic in the opinion of the vessel organiser. The definition applies to persons engaged by the organiser to supervise the onshore activities of passengers who disembark onto land within the Antarctic.

**Item 2: Subsection 3(1) (definition of *passenger*)**

216. This item defines *passenger* as excluding someone employed, or engaged in any capacity on board a vessel on the business of the vessel or who is a *guide*. Passengers include tourists travelling to the Antarctic.

**Item 3: After Part 2**

217. This item inserts a new Part 2A to the ATEP Act as described below.

218. There are a number of new offence and civil penalty provisions which are inserted by this item which are discussed below. The penalties imposed for offences under this item are consistent with the existing penalties imposed under the ATEP Act and both the offence and civil penalty provisions have been calculated to deter non-compliance. The inclusion of both an offence and the civil penalty is to provide flexibility in regulation and enforcement under the ATEP Act.

219. It is a defence under each offence and civil penalty provision that the contravention does not apply in an emergency to prevent a death or serious injury or to secure the safety of a ship or aircraft, or the safety of equipment or facilities of high value or to protect the environment. The emergency defence in each of these provisions replicates the emergency defence under Part 5 of the ATEP Act and will be interpreted in the same way.

220. A person seeking to rely on the defence bears the burden of proof. This is consistent with established general principles of criminal responsibility (see for example subsection 13.3(3) of the Criminal Code) and the evidential burden in relation to civil penalty proceedings. This is because the facts in issue in relation to each contravention remain wholly within the knowledge of the person who has allegedly committed the contravention. In addition, the feasibility and expense of adducing evidence in relation to an alleged contravention within the Antarctic is excessively prohibitive due to the remote locality and limited access.

Part 2A – Vessels

12AA – Simplified outline
221. This section provides a simplified outline of Part 2A.

12AB Prohibition on passengers disembarking from certain vessels

222. Section 12AB provides that it is a contravention of this section for passengers to disembark from certain vessels within the Antarctic where those vessels are carrying more than the prescribed number of passengers. Section 12AB applies to persons who organise for a vessel to carry passengers to the Antarctic, unless the person is a Contracting Party to the Treaty. Contravention of section 12AB will occur if the vessel is carrying more than the prescribed number of passengers and any of the passengers disembark from the vessel (either directly, or indirectly via, for example, a rigid inflatable boat) onto land within the Antarctic.

223. The prohibition on disembarkation of passengers within the Antarctic under the provisions of Measure 15 (2009) applies to passenger vessels carrying more than 500 passengers. As this figure may change over time by agreement of the Antarctic Treaty Consultative Meeting to a further Measure, the specific numbers will be provided by regulation. The prohibition reduces the risks to human and vessel safety, and the Antarctic environment.

224. Subsection 12AB(2) provides the defence to a contravention of subsection 12AB(1).

225. Subsections 12AB(3) and (4) set out the offence and civil penalty respectively.

12AC Limit on the number of passengers that disembark from vessels

226. Section 12AC limits the number of passengers that may disembark from vessels onto land within the Antarctic at a particular time. Section 12AC applies to persons who organise for a vessel to carry passengers to the Antarctic, unless the person is a Contracting Party to the Treaty. Contravention of section 12AC occurs where any of the passengers disembark from the vessel (either directly or indirectly via, for example, a rigid inflatable boat) onto land within the Antarctic, and at the same time more than the prescribed number of passengers are on land.

227. The limit on the disembarkation of passengers within the Antarctic under the provisions of Measure 15 (2009) applies to vessels carrying no more than 500 passengers. The maximum number of passengers allowed ashore at any one time is 100. As this figure may change over time by agreement of the Antarctic Treaty Consultative Meeting to a further Measure, the specific numbers will be provided by regulation. The limitation reduces the risks to human and vessel safety, and the Antarctic environment.

228. Subsection 12AC(2) provides the defence to a contravention of subsection 12AC(1).

229. Subsections 12AC(3) and (4) set out the offence and civil penalty respectively.
12AD Requirement relating to the number of guides in relation to disembarked passengers

230. Section 12AD requires a minimum ratio of guides in relation to the number of disembarked passengers on land within the Antarctic at a particular time. Section 12AD applies to persons who organise for a vessel to carry passengers to the Antarctic, unless the person is a Contracting Party to the Treaty. Contravention of section 12AD occurs where any of the passengers disembark from the vessel (either directly or indirectly via, for example, a rigid inflatable boat) onto land within the Antarctic and, while the passengers are on land, less than the prescribed guide to passenger ratio exists.

231. The limit on the disembarkation of passengers within the Antarctic under the provisions of Measure 15 (2009) applies to vessels carrying no more than 500 passengers. A minimum guide to passenger ratio of 1:20 is to be maintained while passengers are ashore. As this figure may change over time by agreement of the Antarctic Treaty Consultative Meeting to a further Measure, specific numbers will be provided by regulation. The requirement reduces the risks to human and vessel safety, and the Antarctic environment.

232. Subsection 12AD(2) provides the defence to a contravention of subsection 12AD(1).

233. Subsections 12AD(3) and (4) set out the offence and civil penalty respectively.

12AE Requirement to coordinate

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

235. The coordination requirement is being introduced to reduce the risks to human and vessel safety, and the Antarctic environment.

236. Subsection 12AE(2) provides the defence to a contravention of subsection 12AE(1).

237. Subsections 12AE(3) and (4) set out the offence and civil penalty respectively.
Schedule 4 – Amendments commencing on the day after Royal Assent

Antarctic Treaty (Environment Protection) Act 1980

Item 1: Title

238. This item repeals the current long title of the ATEP Act and replaces it with, “An Act relating to the Antarctic and the protection and conservation of the environment of the Antarctic, and for related purposes”. The change reflects the broader range of matters that the ATEP Act can deal with, including safety approvals, environmental protection approvals, environmental emergencies, and the regulation of vessels.

Items 2 and 3: Preamble

239. These items amend the preamble to the ATEP Act to include a reference to the Treaty because Measure 4 (2004) and Measure 15 (2009) are made under the Treaty.

Items 4 to 8: Subsection 3(1)

240. These items insert definitions into subsection 3(1) of the ATEP Act.

241. Item 4 defines civil penalty order, which is explained in paragraphs [255] to [258] below.

242. Item 5 defines civil penalty provision. A number of civil penalty provisions are introduced by the Act and the definition applies if the relevant section includes the words “civil penalty” at the foot of the section.

243. Item 6 defines Court. For the purposes of the ATEP Act an action may be brought in a variety of courts.

244. Item 7 defines evidential burden. In the civil penalties introduced by the Act, the evidential burden with respect to defences has been placed upon the person seeking to rely upon the defence.

245. Item 8 defines penalty unit as having the meaning given in section 4AA of the Crimes Act 1914 (Cth). A penalty unit is, as at the date of publication of this Explanatory Memorandum, $110 but may be subject to change.

Item 9: Section 6

246. This item replaces section 6 of the ATEP Act. The new section 6 provides that the Crown is not liable to a pecuniary penalty or to be prosecuted for an offence.

Item 10: After section 6A

247. This item inserts a new section 6B after section 6A of the ATEP Act. Section 6B provides for the conduct rule to apply, being that any proceedings against a person for an offence or a civil penalty should refer to the physical elements of the contravention rather than the subsections stating the offence or civil penalty.
**Item 11: Paragraph 17(1)(b)**

248. This item amends paragraph 17(1)(b) of the ATEP Act so that an inspector can exercise the powers in subsection 17(1) in relation to a contravention of a civil penalty provision. This power is appropriate in the Antarctic context and will allow effective enforcement of the new civil penalty provisions.

**Item 12: After paragraph 17(4)(a)**

249. This item inserts a new paragraph 17(4)(aa) after paragraph 17(4)(a) of the ATEP Act, that is consistent with paragraph 17(4)(a) relating to offences to allow an inspector to require a person to state his full name and address in relation to contravention of civil penalty provisions. This power is appropriate in the Antarctic context and will allow effective enforcement of the new civil penalty provisions.

**Item 13: Subsection 17(6)**

250. This item amends subsection 17(6) of the ATEP Act to ensure inspectors appropriately identify themselves in relation to all their general powers in section 17 of the ATEP Act.

**Item 14: Subsection 18(1)**

251. This item amends subsection 18(1) of the ATEP Act so that an inspector can exercise the seizure powers in subsection 18(1) in relation to a contravention of a civil penalty provision. This power is appropriate in the Antarctic context and will allow effective enforcement of the new civil penalty provisions.

**Item 15: Subsection 18(1)**

252. This item amends subsection 18(1) of the ATEP Act to provide for the retention of seized items in relation to a contravention of civil penalty. This power is appropriate in the Antarctic context and will allow effective enforcement of the new civil penalty provisions.

**Item 16: Part 5 (heading)**

253. This item repeals the current heading for Part 5 of the ATEP Act and replaces it with, “Part 5 – Offences relating to the environment etc.”. The new heading distinguishes the current offences in the ATEP Act from the new offences which are outlined in different Parts.

**Item 17: After Part 5**

254. This item inserts a new Part 5A to the ATEP Act dealing with civil penalty provisions.
Part 5A – Civil penalty provisions

Division 1 – Obtaining a civil penalty order

22 Civil penalty orders

255. Subsections 22(1) and (2) provide that the Minister may apply to the Court (as defined in subsection 3(1) (item 6 of Schedule 4 of the Act)) for an order that a person who is alleged to have contravened a provision of the ATEP Act which imposes a civil penalty, pay a pecuniary penalty to the Commonwealth, within six years of the alleged contravention.

256. Subsections 22(3) and (4) provide that, if the Court is satisfied that a person has contravened a civil penalty provision, it may order the person to pay a pecuniary penalty to the Commonwealth. This is known as a civil penalty order (item 4 of Schedule 4 of the Act).

257. Subsection 22(5) provides the maximum penalty amounts that may be determined by the Court. The penalty amount for each contravention must not exceed the amount specified in the relevant civil penalty provision if the person is an individual. If the person is a body corporate then the amount of the civil penalty provision must not exceed five times the pecuniary penalty specified in the relevant section.

258. Subsection 22(6) provides that the Court must have regard to all relevant matters in determining a pecuniary penalty including those listed in subsection 22(6).

22A Civil enforcement of penalty

259. Section 22A provides that a pecuniary penalty is a debt due to the Commonwealth which the Commonwealth may enforce.

22B Conduct contravening more than one civil penalty provision

260. Section 22B provides that where conduct contravenes two or more civil penalty provisions, proceedings may be instituted against any of those provisions. The person will only be liable for one pecuniary penalty in relation to the same conduct.

22C Multiple contraventions

261. Section 22C allows the Court to make a single civil penalty order against a person for multiple contraventions of a civil penalty provision, if each of the contraventions are founded on the same facts or form a series of contraventions of the same or similar character.

262. The penalty in this case must not exceed the maximum total penalty that could be ordered if a separate civil penalty order was made for each contravention.

22D Proceedings may be heard together
263. Section 22D provides that a Court may direct that more than one civil penalty proceeding be heard at the same time.

264. An example of an instance when two matters could be heard together would be:

(a) if an environmental emergency occurs and the operator fails to notify the Minister or an authorised officer of the incident, under section 13CB; and

(b) the operator also fails to ensure that prompt and effective response action is taken in relation to the incident, under section 13CC.

265. Both matters in the example above would presumably rely on the same or similar evidence. It would therefore be expedient and a more efficient use of the Court’s time for them to be heard together.

22E Civil evidence and procedure rules for civil penalty orders

266. Section 22E provides that the rules of evidence and procedure for civil matters apply to proceedings for a civil penalty order.

22F Contravening a civil penalty provision is not an offence

267. Section 22F clarifies that a contravention of a civil penalty provision is not an offence (as distinct from provisions that may result in criminal prosecution).

Division 2 – Civil proceedings and criminal proceedings

22G Civil proceedings after criminal proceedings

268. Section 22G provides that where a person is convicted of a criminal offence for conduct under the ATEP Act, the Court cannot make a civil penalty order for conduct that is the same or substantially the same.

22H Criminal proceedings during civil proceedings

269. Section 22H provides that, if criminal proceedings are underway or commence for an offence under the ATEP Act, any proceedings for a civil penalty order against the same person and in relation to conduct that is the same or substantially the same, are stayed. The civil penalty proceedings may be resumed if the person is not convicted of the criminal offence.

22J Criminal proceedings after civil proceedings

270. Section 22J provides that criminal proceedings may be commenced regardless of whether a civil penalty order has been made against the same person for the same or substantially the same conduct.

22K Evidence given in civil proceedings not admissible in criminal proceedings

271. Section 22K provides that evidence given by an individual in civil penalty proceedings against them for conduct that is the same or substantially the same cannot be used in criminal proceedings.
Section 22K does not apply in relation to criminal proceedings for the falsity of any evidence given by an individual during civil penalty proceedings.

Division 3 – Miscellaneous

22L Ancillary contravention of civil penalty provisions

Section 22L provides that anyone who is involved in the contravention of a civil penalty provision, even in an ancillary manner, as described in paragraphs 22L(1)(a)-(e) will be taken to have contravened the provision.

22M Mistake of fact

Subsection 22M(1) provides that a person will not be liable for a civil penalty if they can show that they were under a mistaken but reasonable belief about the facts surrounding a contravention, and those facts would not have led to the contravention.

Subsection 22M(2) provides that if the person reasonably believes the circumstances in the present situation to be the same as those in a past situation which did not constitute a contravention, a person may be regarded as having been under a mistaken belief.

Section 22M(3) requires a person relying upon subsections 22M(1) or (2) to bear the evidential burden.

22N State of mind

Section 22N provides that it is not necessary to prove a person’s state of mind to prove a contravention of a civil penalty provision.

Item 18: At the end of section 27

This item adds a new subsection 27(d) at the end of section 27 of the ATEP Act. Subsection 27(d) provides that the Minister is not able to delegate his or her powers with regard to applications for a civil penalty order.

Item 19: At the end of paragraphs 29(2)(a) and (ab)

This item adds the word “and” to the end of paragraphs 29(2)(a) and (ab) of the ATEP Act.

Item 20: After paragraph 29(2)(ab)

This item inserts a new paragraph 29(2)(ac) after paragraph 29(2)(ab) of the ATEP Act that provides for a refund of a fee referred to in paragraph 29(2)(ab) of the ATEP Act.

Item 21: At the end of paragraphs 29(2)(b) to (i)

This item adds the word “and” to the end of paragraphs 29(2)(b) to (i) of the ATEP Act.

Item 22: After subsection 29(2)
282. This item inserts a new subsection 29(2A) after subsection 29(2) of the ATEP Act providing that a fee under subsection 29(2) of the ATEP Act must not be such as to amount to taxation.