



LEGISLATIVE ASSEMBLY OF THE NORTHERN TERRITORY

Legislation Scrutiny Committee

Inquiry into the Marine Pollution Legislation Amendment Bill 2019

December 2019

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Chair's Preface

This report details the Committee's findings regarding its examination of the Marine Pollution Legislation Amendment Bill 2019. Amending the *Marine Pollution Act 1999* and the Marine Pollution Regulations 2003, the primary purpose of this Bill is to improve the administrative operation of the legislation and opportunities to pursue offences against ships suspected of causing marine pollution in Territory coastal waters.

The Committee received one submission from the Department of Primary Industry and Resources which supported the proposed amendments to the legislation. Given the technical nature of the Bill, the Committee also sought advice from its independent legal counsel, Professor Ned Aughterson.

As detailed in this report, Professor Aughterson identified a potential concern that section 4(1) of the *Marine Pollution Act 1999* may operate to limit the extra-territorial application of the proposed legislation in circumstances where a vessel discharges pollutants outside of Territory coastal waters and those pollutants subsequently enter the Territory's coastal waters. Concern was also raised regarding the meaning of *agent* of a ship owner in proposed section 8 due to a lack of clarity as to when a person ceases to be an agent and whether a person will be able to be identified as an agent at all relevant times.

Following consideration of the advice provided by the Department of Environment and Natural Resources, the Committee has recommended that the Assembly pass the Bill with the amendments proposed in recommendations 2 and 3. In both cases these amendments seek to ensure that the Bill is unambiguous and drafted in a sufficiently clear and precise manner.

On behalf of the Committee I would like thank the Department of Primary Industry and Resources for its submission to the Committee's inquiry. I would also like to thank Professor Aughterson and the Department of Environment and Natural Resources for their advice on the Bill. Finally, I thank my fellow Committee members for their bipartisan commitment to the legislative review process.



Ms Ngaree Ah Kit MLA

Chair

Committee Members

	Ms Ngaree Ah Kit MLA Member for Karama	
	Party:	Territory Labor
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	Committee Membership	
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	Sessional:	Legislation Scrutiny
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	Standing:	Privileges
	Mrs Robyn Lambley MLA Member for Araluen	
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	Standing:	Standing Orders and Members' Interests
	Mr Tony Sievers MLA Member for Brennan	
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Acknowledgements

The Committee acknowledges the individuals and organisations that provided written submissions or oral evidence at the public hearings.

Terms of Reference

Sessional Order 13

Establishment of Legislation Scrutiny Committee

- (1) Standing Order 178 is suspended.
- (2) The Assembly appoints a Legislation Scrutiny Committee.
- (3) The ordinary membership of the scrutiny committee will comprise three Government Members, one Opposition Member nominated to the Speaker in writing by the respective Whip and one non-party aligned Member to be appointed by motion.

The Committee's membership will be supplemented by alternate members who may be nominated to participate at meetings and undertake a role on the committee in the place of ordinary committee members. The nomination of alternate committee members will be in writing by the ordinary member to the committee chair.

Alternate Committee members must be from the same category of Members of the Assembly as the ordinary member nominating them such as the same political party or a non-party aligned Member.

- (4) The functions of the scrutiny committee shall be to inquire and report on:
 - (a) any matter referred to it:
 - (i) by the Assembly;
 - (ii) by a Minister; or
 - (iii) on its own motion.
 - (b) any bill referred to it by the Assembly;
 - (c) in relation to any bill referred by the Assembly:
 - (i) whether the Assembly should pass the bill;
 - (ii) whether the Assembly should amend the bill;
 - (iii) whether the bill has sufficient regard to the rights and liberties of individuals, including whether the bill:
 - (A) makes rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review; and
 - (B) is consistent with principles of natural justice; and
 - (C) allows the delegation of administrative power only in appropriate cases and to appropriate persons; and
 - (D) does not reverse the onus of proof in criminal proceedings without adequate justification; and

- (E) confers powers to enter premises, and search for or seize documents or other property, only with a warrant issued by a judge or other judicial officer; and
 - (F) provides appropriate protection against self-incrimination; and
 - (G) does not adversely affect rights and liberties, or impose obligations, retrospectively; and
 - (H) does not confer immunity from proceeding or prosecution without adequate justification; and
 - (I) provides for the compulsory acquisition of property only with fair compensation; and
 - (J) has sufficient regard to Aboriginal tradition; and
 - (K) is unambiguous and drafted in a sufficiently clear and precise way.
- (iv) whether the bill has sufficient regard to the institution of Parliament, including whether the bill:
- (A) allows the delegation of legislative power only in appropriate cases and to appropriate persons; and
 - (B) sufficiently subjects the exercise of a delegated legislative power to the scrutiny of the Legislative Assembly; and
 - (C) authorises the amendment of an Act only by another Act.
- (5) The Committee will elect a Government Member as Chair.
- (6) The Committee will provide an annual report on its activities to the Assembly.

Adopted 27 November 2019

Recommendations

Recommendation 1

The Committee recommends that the Legislative Assembly pass the Marine Pollution Legislation Amendment Bill 2019 with the proposed amendments set out in recommendations 2 and 3.

Recommendation 2

The Committee recommends that sections 4(1), (2) and (3) of the *Marine Pollution Act 1999* be repealed.

Recommendation 3

The Committee recommends that proposed subsection 8(2) be amended to identify that, subject to the protections for agents provided by subsections 8(3), (4) and (5), a person will remain an agent of a ship owner for the duration of the voyage and while the ship is in the Territory.

1 Introduction

Introduction of the Bill

- 1.1 The Marine Pollution Legislation Amendment Bill 2019 (the Bill) was introduced into the Legislative Assembly by the Minister for Environment and Natural Resources, the Hon Eva Lawler MLA, on 17 October 2019. The Assembly subsequently referred the Bill to the Social Policy Scrutiny Committee for inquiry and report by 11 February 2020.¹
- 1.2 On Wednesday 27 November 2019 the Assembly dissolved the Economic Policy and Social Policy Scrutiny Committees and established the Legislation Scrutiny Committee and referred outstanding Bill inquiries to the new Committee.²

Conduct of the Inquiry

- 1.3 On 18 October 2019 the Committee called for submissions by 13 November 2019. The call for submissions was advertised via the Legislative Assembly website, Facebook, Twitter feed and email subscription service. In addition, the Committee directly contacted a number of individuals and organisations.
- 1.4 The Bill, associated *Explanatory Statement*, and *Statement of Compatibility with Human Rights* was also forwarded to Professor Ned Aughterson for review of fundamental legislative principles under Sessional Order 13(4)(c).
- 1.5 As noted in Appendix 2, the Committee received one submission to its inquiry from the Department of Primary Industry and Resources which supported the Bill. The Committee held a public briefing with the Department of Environment and Natural Resources on 30 October 2019.

Outcome of Committee's Consideration

- 1.6 Sessional order 13(4)(c) requires that the Committee after examining the Bill determine:
 - (i) whether the Assembly should pass the bill;
 - (ii) whether the Assembly should amend the bill;
 - (iii) whether the bill has sufficient regard to the rights and liberties of individuals; and
 - (iv) whether the bill has sufficient regard to the institution of Parliament.

¹ Hon Eva Lawler MLA, Minister for Environment and Natural Resources, *Draft – Daily Hansard – Day 3 – Thursday 17 October 2019*, <https://www.territorystories.nt.gov.au/jspui/handle/10070/754881>, pp.2-4

² Hon Natasha Fyles, MLA, Leader of Government Business, *Draft – Daily Hansard – Day 2 – Wednesday 27 November 2019*, <https://www.territorystories.nt.gov.au/jspui/handle/10070/755087>, p.94

- 1.7 Following examination of the Bill, and consideration of the evidence received, the Committee is of the view that the Legislative Assembly should pass the Bill with proposed amendments as set out in recommendations 2 and 3.

Recommendation 1

The Committee recommends that the Legislative Assembly pass the Marine Pollution Legislation Amendment Bill 2019 with the proposed amendments set out in recommendations 2 and 3.

Report Structure

- 1.8 Chapter 2 provides an overview of the policy objectives of the Bill and the purpose of the Bill as contained in the Explanatory Statement.
- 1.9 Chapter 3 considers the main issues raised in evidence received.

2 Overview of the Bill

Background to the Bill

- 2.1 In presenting the Bill, the Minister for Environment and Natural Resources, the Hon Eva Lawler MLA, noted that the overall purpose of the *Marine Pollution Act 1999* and associated Marine Pollution Regulations 2003 is to “minimise ship-sourced pollution being discharged into coastal waters in order to protect the Territory’s marine and coastal environments.”³
- 2.2 However, following a recent oil slick in the Darwin Harbour, the Minister advised the Assembly that the ability of the *Marine Pollution Act 1993* to pursue alleged offenders was called into question with the subsequent legal proceedings highlighting shortcomings in the legislation:

The ability of the Territory to pursue justice for marine pollution caused by foreign owned ships in Territory coastal waters was found to be ineffective. This is clearly at odds with the intent and purpose of the Act and the Territory’s obligations to prevent and minimise marine pollution. Accordingly, it is necessary that the identified shortcomings are rectified.⁴

The amendments being introduced by this Bill strengthen the Territory’s ability to respond to ship sourced pollution incidents in our marine and coastal environments. The Territory has seen an increase in shipping associated with economic development and industry. We need to ensure this is complemented with good legislation that allows the Territory to be an effective regulator and protector of one of our greatest natural assets.⁵

Purpose of the Bill

- 2.3 As highlighted in the Explanatory Statement, amending the *Marine Pollution Act 1999* and the Marine Pollution Regulations 2003, the primary purpose of this Bill is to:
- improve the administrative operation of the legislation and opportunities to pursue offences against ships suspected of causing marine pollution in Territory coastal waters.⁶
- 2.4 The Committee heard that the Bill addresses two areas of concern. Firstly, acknowledging the complexities associated with collecting evidence and identifying potential suspects, the Bill removes the time limit for commencing proceedings for offences against the Act.⁷ Secondly, the Bill seeks to facilitate the service of documents by:
1. clarifying the definition of ‘agent’ by a clear understanding of who can be identified as an agent of the ship based on the functions they perform;

³ Hon Eva Lawler MLA, Minister for Environment and Natural Resources, *Draft – Daily Hansard – Day 3 – Thursday 17 October 2019*, <https://www.territorystories.nt.gov.au/jspui/handle/10070/754881>, p.2

⁴ Hon Eva Lawler MLA, Minister for Environment and Natural Resources, *Draft – Daily Hansard – Day 3 – Thursday 17 October 2019*, <https://www.territorystories.nt.gov.au/jspui/handle/10070/754881>, p.2

⁵ Hon Eva Lawler MLA, Minister for Environment and Natural Resources, *Draft – Daily Hansard – Day 3 – Thursday 17 October 2019*, <https://www.territorystories.nt.gov.au/jspui/handle/10070/754881>, p.4

⁶ Explanatory Statement, *Marine Pollution Legislation Amendment Bill 2019 (Serial 109)*, <https://parliament.nt.gov.au/committees/spsc/109-2019>, p.1

⁷ Committee Transcript, Public Briefing, 30 October 2019, p.3

2. removing any geographical restriction on the status of an agent – this means an agent will still be considered an agent for the purpose of the Act, even if the ship has left Territory waters;
3. requiring the regulator to be informed if a person is no longer the agent for a particular vessel. Additionally, where the ship's owner is notifying the department of a change in agent details, the owner must give details of the new agent;
4. clarifying the definition of 'owner' to provide a clearer understanding of when a person is considered to have sufficient responsibility for the actions of the ship to be considered an owner. This is necessary because of the complex company structures and contractual arrangements that generally exist in relation to large vessels;
5. enabling documents to be served on an owner of a ship – including a previous owner of the ship – or an owner's agent, including a previous owner's agent.⁸

⁸ Committee Transcript, Public Briefing, 30 October 2019, pp.3-4

3 Examination of the Bill

Introduction

- 3.1 The Committee received one submission from the Department of Primary Industry and Resources which supported the proposed amendments to the legislation. However, the legal advice received from Professor Aughterson identified a potential concern regarding the application of the proposed legislation given the provisions of section 4(1) of the *Marine Pollution Act 1999*. Concern was also raised in relation to the drafting of proposed section 8 regarding the meaning of a ship owner's 'agent'.
- 3.2 The following discussion considers the issues raised by Professor Aughterson and the subsequent advice provided by the Department of Environment and Natural Resources (the Department).

Application of the Act

- 3.3 Noting that the proposed legislation deals with conduct occurring within jurisdiction or which has a direct impact on the Northern Territory, Professor Aughterson identified a possible limitation to extra-territorial jurisdiction arising from the provisions of section 4(1) of the *Marine Pollution Act 1999* which provides that the Act applies 'to all ships in coastal waters':

It is not clear why s 4(1) has limited the operation of the Act to ships 'in' coastal waters. It might be that it represented an earlier and perhaps cautious view as to the scope of the Territory's extra-territorial jurisdiction. If that is the case, it does not reflect modern Australian and international jurisprudence as to the scope of a state's extra-territorial jurisdiction. Some countries, particularly the United States, take a very broad view as to the scope of jurisdiction where extra-territorial conduct has an impact, even an indirect impact, on a state. In any event, it is clear that the NT would have jurisdiction in circumstances where pollutants are released by a ship and those pollutants enter coastal waters.⁹

Professor Aughterson further noted that section 4(1) would also seem to be inconsistent with section 9 of the Act which provides that "there can be liability where a ship discharges pollutants outside coastal waters, but the pollutants enter coastal waters."¹⁰

- 3.4 The Department subsequently advised the Committee that:

It is the intent of the legislation to apply to ships outside Territory coastal waters that are the source of pollutants that enter Territory coastal waters. This intention is implied by section 9 that identifies that a ship located outside coastal waters is responsible for discharged pollutants that enter coastal waters, and the offence provision that address the circumstance of a discharge of a pollutant from a ship into coastal waters, irrespective of the ship's location.

However, the Department agrees that there is uncertainty caused by section 4(1), as a narrowly read interpretation could potentially have negative impacts on the operation of the legislation by restricting the interpretation of the meaning of a

⁹ Professor Ned Aughterson, *Legal Advice on the Marine Pollution Legislation Amendment Bill 2019*, (unpublished), 12 November 2019, p.3

¹⁰ Professor Ned Aughterson, *Legal Advice on the Marine Pollution Legislation Amendment Bill 2019*, (unpublished), 12 November 2019, p.3

ship owner's *agent* as proposed in amended section 8, as well as other provisions.

To address the risk associated with section 4(1) on the meaning of *agent* in section 8, and noting that the section potentially operates in a manner contrary to the intent and purpose of the Act, the Department proposes that sections 4(1), (2), and (3) be repealed.¹¹

Committee's Comments

- 3.5 To ensure the legislation is drafted in a sufficiently clear and precise manner, the Committee has recommended that sections 4(1), (2) and (3) of the *Marine Pollution Act 1999* be repealed. As noted by the Department, this amendment will ensure that section 4 does not limit the extra-territorial application of the Act and does not negatively impact on the operation of the proposed legislation by restricting the interpretation of the meaning of a ship owner's agent set out in clause 5, as well as other provisions.

Recommendation 2

The Committee recommends that sections 4(1), (2) and (3) of the *Marine Pollution Act 1999* be repealed.

Meaning of Agent

- 3.6 Clause 5 replaces section 8 of the *Marine Pollution Act 1999* to provide a new 'meaning of agent'. As noted in the Explanatory Statement:

The meaning of *agent* in section 8 is amended to provide clarity and more realistic reflection of the types of activities a person is likely to perform as a ship owner's agent; remove any geographical limitations on a person's status as a ship owner's agent as a result of the location of the ship ... Subclause 1 steps out in more detail the types of activities a person can perform on behalf of the owner for the person to be classed as an agent. Subclause 2 clarifies that a person who undertakes any of the activities in subclause 1 and therefore is an agent, undertakes those activities for a ship that is coming into the Territory, in the Territory or leaving the Territory. This amendment clarifies the nexus between the operation of the law and the Territory.¹²

- 3.7 However, Professor Aughterson expressed the view that:

there is some uncertainty as to when an agency ends and whether there will necessarily be an identifiable agent at all times while a ship is in the NT or on a voyage to or from the NT. That does not seem to be consistent with the objectives of the present amendments.

Subject to the observation made [above] in relation to s 4(1) of the Act, while it is clear from the amendment that a person can be an agent where a ship is in or outside the Territory, it is not clear that the person will necessarily be an agent at all relevant times. That is because it is not clear that the person remains an agent after making an arrangement or performing a function under replacement subsection 8(1). Compare s 7(2)(c) of the Queensland *Transport Operations (Marine Pollution) Act 1995*, which provides that the person remains an agent

¹¹ Department of Environment and Natural Resources, *Response to Legal Advice*, 4 December 2019, <https://parliament.nt.gov.au/committees/spsc/109-2019>, p.1

¹² Explanatory Statement, *Marine Pollution Legislation Amendment Bill 2019 (Serial 109)*, <https://parliament.nt.gov.au/committees/spsc/109-2019>, p.2

‘until the ship goes outside coastal waters.’ While it is acknowledged that the object of the NT amendment is to allow identification of an agent even where the ship is beyond coastal waters, as presently drafted it is not clear that the person referred to in replacement section 8(1) will necessarily be the agent at all relevant times, whether the ship is within or outside coastal waters.¹³

3.8 Proposed subsection 8(3) then provides that a ship owner, or the person who is the ship owner’s agent ‘may’ give the Chief Executive Officer written notice that:

- (a) the person is no longer the ship owner’s agent; or
- (b) the person will not be the ship owner’s agent by a time specified in the notice.

However, as Professor Aughterson pointed out, in contrast to the existing provision under section 8(2) of the *Marine Pollution Act 1999* or, for example, section 7(2) of the *Transport Operations (Marine Pollution) Act 1995* (Qld), the giving of notice would appear to be optional:

By use of the word ‘may’ (give notice), it is evident that the giving of the notice, whether by the agent or the owner, is not mandatory. In that context, compare the present provision under the NT Act, s 8(2), which provides that for the purposes of the Act the person ‘remains the ship owner’s agent’ until they give statutory notice. Nor is there any requirement that a substitute agent be in place where an agency ends. While replacement subsection 8(5)(b) provides that a notice given by the owner ‘must specify the person who is or will be appointed to be the ship owner’s agent after the agent’s appointment expired or expires’, it remains that by s 8(3) the giving of the notice appears to be optional. Further, even if notice is given by the owner, s 8(5) does not say that any notified replacement agency has to arise immediately after the expiration of the original agency. On that basis, it would follow that there could be periods during which there is no identifiable agent.¹⁴

3.9 While acknowledging that the proposed section 8 may not be of concern in relation to the service of documents given that proposed section 97(2)(b) provides that they can be served on a ‘previous’ agent, Professor Aughterson noted that although this will assist where the previous agent can be located and is still within the jurisdiction:

any lack of continuity of agency may have an impact on other provisions. For example, by s 50 of the Act there is a duty on an agent to report certain incidents. In relation to that example, there is an important question as to when the agency and the reporting obligation ends or whether an agency exists at a given relevant time.

Even if replacement section 8 could be interpreted expansively in terms of when an agency ends, or to enable the identification of an agent at all relevant times, another difficulty arises because of s 4(1) of the Act. Section 4(1) provides that the Act applies to ‘all ships in coastal waters. That raises the question of whether replacement subsection 8(2) would be read down, consistent with s 4(1), to refer only to voyages while the ship is within coastal waters. On that basis, agency would not arise where (in the circumstances set out in s 9 of the Act) the ship discharges pollutants outside of coastal waters but the pollutants enter coastal waters.¹⁵

¹³ Professor Ned Aughterson, *Legal Advice on the Marine Pollution Legislation Amendment Bill 2019*, (unpublished), 12 November 2019, pp.1-2

¹⁴ Professor Ned Aughterson, *Legal Advice on the Marine Pollution Legislation Amendment Bill 2019*, (unpublished), 12 November 2019, p.2

¹⁵ Professor Ned Aughterson, *Legal Advice on the Marine Pollution Legislation Amendment Bill 2019*, (unpublished), 12 November 2019, p.3

- 3.10 In relation to Professor Aughterson's concern regarding potential ambiguity about when a person ceases to be an agent and whether a person will be identifiable as an agent at all relevant times, the Department agreed that:

there is some uncertainty as to when an agency ends and whether there will necessarily be an identifiable agent at all times while a ship is in the Territory or on a voyage to or from the Territory. While replacement subsection 97(2)(b) does permit service on a 'previous' agent, it would be preferable for the Act to definitely provide for a person to be able to be identified as an agent at all relevant times. Completion of one or any of the agent's functions identified in proposed amended subsection 8(1) should not, and is not intended to, imply that the agency has ceased.

To address this uncertainty, the Department is of the view that the proposed amended section 8 be changed to identify that a person who is an agent of a ship in the Territory will continue to be an agent while the ship is in the Territory and outside of the Territory while the relevant voyage of the ship continues. This approach will ensure that should any reporting obligations be required of the agent, or any ship source pollutants are discharged and impact Territory coastal waters, an agent will be identifiable under the Act.

The Department suggests that replacement subsection 8(2) be amended to identify that, subject to the protections for agents provided by subsections 8(3), (4) and (5), a person will remain an agent of a ship owner for the duration of the voyage and while the ship is in the Territory.¹⁶

- 3.11 With regards to Professor Aughterson's comments about the use of the word 'may' in proposed subsection 8(3), and the subsequent effect that the giving of notice regarding agency arrangements would appear to be optional, the Department advised that:

Proposed subsections 8(3), (4) and (5) have been included to provide protections for agents and owners rather than for administrative purposes. The provisions offer a legislative avenue to cease the statutory agency relationship while requiring specific information (e.g. details of replacement agent) to be provided to the Department in certain circumstances.

The provisions are considered to be necessary to accommodate the proposed changes to section 8 that identify continuity of the agency until the end of the ship's voyage. In a practical sense, the Department does not consider it to be necessary to generally obtain and hold information about agency arrangements; and as such it is considered appropriate to use the word 'may' in replacement subsection 8(3). The Department does not recommend any amendments in this regard.¹⁷

Committee's Comments

- 3.12 The Committee is satisfied with the Department's advice and has recommended that subsection 8(2) be amended to clarify that a person remains an agent of a ship owner for the duration of the voyage and while the ship is in the Territory. As this proposed amendment will ensure that a person will be identifiable as an agent at all relevant

¹⁶ Department of Environment and Natural Resources, *Response to Legal Advice*, 4 December 2019, <https://parliament.nt.gov.au/committees/spsc/109-2019>, pp.1-2

¹⁷ Department of Environment and Natural Resources, *Response to Legal Advice*, 4 December 2019, <https://parliament.nt.gov.au/committees/spsc/109-2019>, p.2

times, it also addresses Professor Aughterson's concern as to the voluntary nature of the giving of notice regarding agency arrangements in proposed subsection 8(3).

Recommendation 3

The Committee recommends that proposed subsection 8(2) be amended to identify that, subject to the protections for agents provided by subsections 8(3), (4) and (5), a person will remain an agent of a ship owner for the duration of the voyage and while the ship is in the Territory.

Appendix 1: Submissions Received and Public Briefing

Submissions Received

1. Department of Primary Industry and Resources

Public Briefing – 30 October 2019

Department of Environment and Natural Resources

- Karen Avery: Executive Director, Environment Policy and Support
- Kathleen Davis: Director, Environment Policy

Note

Copies of submissions, hearing transcripts and tabled papers are available at:
<https://parliament.nt.gov.au/committees/spsc/109-2019>.

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<https://www.territorystories.nt.gov.au/jspui/handle/10070/755087>

Marine Pollution Act 1999 (NT)

Marine Pollution Legislation Amendment Bill 2019 (Serial 109),

<https://parliament.nt.gov.au/committees/spsc/109-2019>

Marine Pollution Regulations 2003 (NT)

Professor Ned Aughterson, *Legal Advice on the Marine Pollution Legislation Amendment Bill 2019*, (unpublished), 12 November 2019

Statement of Compatibility with Human Rights, *Marine Pollution Legislation Amendment Bill 2019 (Serial 109)*, <https://parliament.nt.gov.au/committees/spsc/109-2019>

Transport Operations (Marine Pollution) Act 1995 (QLD)