

Response to Social Policy Scrutiny Committee

Marine Pollution Legislation Amendment Bill 2019

Background

By correspondence dated 18 November 2019 the Social Policy Scrutiny Committee sought comments from the Department of Environment and Natural Resources in relation to matters raised by Professor Ned Aughterson (the Submission) in regards to the Marine Pollution Legislation Amendment Bill 2019 (Amendment Bill).

The Department makes the following comments in relation to the Submission.

Application of the Act – Section 4(1)

The Submission identifies a potential concern that section 4(1) of the *Marine Pollution Act 1999* (the Act) may operate to limit the extra-territorial application of the Act in circumstances where a vessel discharges pollutants outside of Territory coastal waters and those pollutants subsequently enter the Territory's coastal waters.

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 provisions 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 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in a manner contrary to the intent and purpose of the Act, the Department proposes that sections 4(1), (2), and (3) be repealed.

Meaning of *agent* – Section 8

The Submission raises a concern with the meaning of *agent* as proposed in amended section 8 due to potential ambiguity about when a person ceases to be an agent and if the person will be able to be identified as an agent at all relevant times. Specifically, it is unclear if the completion of performing a function in the capacity as an agent will automatically imply that the person is no longer the agent, even where the ship is still located in the Territory.

The Department agrees 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.

The Submission also noted the use of the word 'may' in proposed amended subsection 8(3), and the subsequent voluntary effect the word has on a person allowing them to choose whether to notify the regulator about a change to a person's status as agent.

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.