

Environment Legislation Amendment Bill 2013

Portfolio: Environment

Introduced: House of Representatives, 14 November 2013

Summary of committee concerns

1.68 The committee considers that the bill engages fair trial and fair hearing rights. The committee seeks further information from the Minister for Environment before forming a view on whether the bill is compatible with these rights.

Overview

1.69 This bill proposes to amend the *Environment Protection and Biodiversity Conservation Act 1999* (the EPBC Act) to address the implications arising from the Federal Court's decision in *Tarkine National Coalition Incorporated v Minister for Sustainability, Environment, Water, Population and Communities* [2013] FCA 694. The judgment of 17 July 2013 held invalid a decision by the then Minister for Sustainability, Water, Population and Communities to approve an iron ore mine in the Tarkine region of Tasmania because the Minister had failed to comply with a mandatory requirement of the EPBC Act that he consider an approved conservation advice regarding the Tasmanian devil.³⁶

1.70 The bill also seeks to increase the financial penalties for various strict liability offences and civil penalty provisions in the EPBC Act and the *Great Barrier Reef Marine Park Act 1975* (the GBRMP Act) to provide additional protection for listed turtles and dugong species.

Compatibility with human rights

Statement of compatibility

1.71 The bill is accompanied by a statement of compatibility that identifies that the bill engages the right to be presumed innocent in article 14(2) of the International Covenant on Civil and Political Rights (ICCPR) because it increases the financial penalties for various strict liability offences. The statement concludes that the bill is compatible with human rights because the proposed limitation of the presumption of innocence is reasonable, necessary and proportionate. The committee's comments in relation to this aspect of the bill are set out below.

1.72 The committee considers that the bill raises additional issues of concern which are not addressed in the statement of compatibility. The committee's concerns are set out below.

36 Under the EPBC Act, the Minister was required to have regard to the conservation advice in making his decision. In this instance, the Minister was not briefed about the conservation advice before making his decision. The Federal Court considered that the decision was void for jurisdictional error because the EPBC Act expressly required the Minister to consider the conservation advice.

Committee view on compatibility

Right to a fair hearing – amendments relating to approved conservation advice

1.73 To address the *Tarkine* decision, the bill proposes to amend the EPBC Act to provide that a failure to comply with a requirement for specified decisions and instruments under the EPBC Act that the Minister must have regard to any relevant approved conservation advice, does not invalidate those decisions and instruments.³⁷ The explanatory memorandum explains that the requirement to consider approved conservation advice under the EPBC Act will not be otherwise altered by the amendments.³⁸

1.74 The amendments are not restricted to prospective decisions and instruments but would also apply retrospectively to past decisions and instruments made or entered into by the Minister under the EPBC Act. According to the explanatory memorandum, the amendments ‘will not limit the rights of proponents under the EPBC Act’ but no further clarification is provided.³⁹

1.75 The statement of compatibility accompanying the bill does not address whether these changes are compatible with human rights, in particular whether their retrospective application is consistent with the right to a fair hearing in article 14(1) of the International Covenant on Civil and Political Rights (ICCPR). Generally, legislation should not deprive individuals of their right to benefit from the judgments they obtain in proceedings brought under an earlier law, or to continue proceedings asserting rights and obligations under that law.

1.76 The committee intends to write to the Minister for Environment to seek clarification as to whether the amendments relating to approved conservation advice in Schedule 1 of the bill limits the right to a fair hearing in article 14(1) of the ICCPR, including whether their retrospective application would affect:

- any related proceedings currently before the courts; or
- the rights and obligations of the parties in the *Tarkine* case.

Right to a fair trial – increased penalties for strict liability offences

1.77 Schedule 2 of the bill seeks to amend the EPBC Act and the GBRMP Act to increase the financial penalties for various strict liability offences relating to listed dugong and turtles.

1.78 The statement of compatibility accompanying the bill makes a general statement that ‘a number of sections in the [bill] engage the right to the presumption of innocence [in article 14(2) of the ICCPR] because they increase the penalties for strict liability offences’. Without specifying the quantum by which the

37 Schedule 1 of the bill.

38 Explanatory memorandum, p 2.

39 Explanatory memorandum, p 2.

penalties are being increased, the statement goes on to say that the increase in penalties for the strict liability offences in the bill is 'considered necessary and appropriate to ensure there is an effective deterrence to contraventions of the obligations under the EPBC Act and GBRMP Act'.⁴⁰ The statement concludes that 'the application of strict liability is a proportionate limitation of the right to the presumption of innocence because of the high public interest in protecting and conserving marine turtle and dugong populations. ... The effectiveness of the enforcement regime would be undermined if it were necessary for the prosecution to prove that a person intended not to comply with those provisions'.⁴¹

1.79 The committee notes that the amendments will triple the financial penalties for various strict liability offences in the EPBC Act and GBRMP Act. The resultant increase to the applicable maximum penalties for the relevant offences will range from 180 penalty units to 6000 penalty units.

1.80 Strict liability offences engage and limit the right to be presumed innocent until proven guilty in article 14(2) of the ICCPR because they allow for the imposition of criminal liability without the need to prove fault. Strict liability offences, however, will not necessarily be inconsistent with the presumption of innocence provided that they are within reasonable limits which take into account the importance of objective being sought and maintain the defendant's right to a defence. In other words, the strict liability offence must pursue a legitimate aim and be reasonable, necessary and proportionate to that aim.

1.81 In this instance, the committee considers that the strict liability offences in the bill are unlikely to raise issues of incompatibility with article 14(2) of the ICCPR as they appear to be restricted to the physical elements of circumstance (for example, in respect of the EPBC Act, that the animal to which the offence relates is a member of a listed threatened species), and involve matters which are likely to be peculiarly within the knowledge of the defendant. While the penalties fall at the high end of the scale, they may nevertheless be considered to be justifiable, given their protective objectives and the provision of appropriate exemptions for native title holders to exercise native title rights to harvest marine turtles and dugong for the purpose of personal, domestic, or non-commercial communal needs.

1.82 The committee, however, emphasises its expectation, as set out in its Practice Note 1, that statements of compatibility should include sufficient detail of relevant provisions in a bill which impact on human rights to enable the committee to assess their compatibility. This includes identifying and providing a justification for each strict liability offence and reverse onus provision in bills.

40 Statement of compatibility, p 4.

41 Statement of compatibility, p 4.

Right to a fair trial – increased penalty for civil penalty provision

1.83 The bill proposes to amend a civil penalty provision in the GBRMP Act to triple its maximum penalty from 5,000 to 15,000 penalty units for an individual (and from 50,000 to 150,000 penalty units for a body corporate), where that conduct involves the taking of, or injury to, dugong or turtles that are protected species under the GBRMP Act.⁴²

1.84 As our predecessor committee has noted on multiple occasions, where a penalty is described as 'civil' under national or domestic law, it may nonetheless be classified as 'criminal' for the purposes of Australia's human rights obligations because of its purpose, character or severity. As a consequence, the specific criminal process guarantees set out in article 14 of the ICCPR may apply to such penalties and proceedings to enforce them.

1.85 The committee set out in its Interim Practice Note 2 the expectation that statements of compatibility should provide an assessment as to whether civil penalty provisions in bills are likely to be 'criminal' for the purposes of article 14 of the ICCPR, and if so, whether sufficient provision has been made to guarantee their compliance with the relevant criminal process rights provided for under the ICCPR. These issues are neither identified nor addressed in the statement of compatibility accompanying this bill.

1.86 The committee intends to write to the Minister for Environment to seek clarification as to whether the proposed amendments to increase the maximum penalty for the civil penalty provision in the GBRMP Act are consistent with the right to a fair trial in article 14 of the ICCPR. In particular, the committee requests the following information:

- **whether the penalty has a punitive or deterrent purpose;**
- **whether the penalty is of general application (in other words, is it intended to apply to the general population or is it restricted to a group of persons in a specific regulatory capacity?); and**
- **whether particular protections, such as the presumption of innocence, the prohibition against double jeopardy and the privilege against self-incrimination, would apply to the relevant enforcement proceedings.**

42 Item 53 of the bill (amending section 38GB of the GBRMP Act).