

Coalition Dissenting Report

Introduction

1.1 The Coalition believes that, overall, the amendment bill is appropriate and will lead to better more modern administration of one of the world's natural icons, the Great Barrier Reef and the surrounding marine park.

1.2 The Committee read submissions from more than 140 submitters, and generally speaking, in relation to the appropriateness of the overall bill, Coalition Senators support the majority Committee report.

Past criminal convictions

1.3 Coalition Senators have longstanding concerns with convictions that occurred under section 38CA of the GBRMP Act in the period 1 July 2004 (when the new Zoning Plan for the reef took effect) to 16 December 2006 (when the regulations were amended to create a more efficient enforcement regime).

1.4 Many of the submissions received by the Committee raised the issue of the unintended consequences of convictions that occurred during this period. The Committee particularly noted submissions from Mr Barry Garlick and Mr Peter Aston, who were both charged with fishing in a green zone.¹ Both were unaware that their behaviour constituted illegal fishing, and both have suffered as a result of their conviction.

1.5 Mr Garlick described his shame at his conviction:

How would you feel if you had to tell someone that you are a convicted criminal? I had to walk in the police station the other day to get my convicted criminal list and I felt ashamed. I like Australia. I do not want to have a criminal conviction. I try to hold myself as much to the law as possible. All I did was go fishing. I enjoyed the environment. I enjoyed being out fishing.²

1.6 Mr Aston also told the Committee that:

Every day I think being a criminal is the most appalling shame I have ever had in my life. I worked for the Public Service essentially through Telecom, as it was called in those days. With everything I have done, I have never even had a traffic fine—though I have two parking fines. I am nearly 70 and I am proud of the fact that I am a citizen of this country. On having a criminal conviction, it is all very well to say, ‘Oh, it’s okay; it’s not really affecting you,’ but it is. It has changed my life very much. I have tried very

1 Mr Barry Garlick, *Submission 14*; Mr Peter Aston, *Submission 15*.

2 Mr Barry Garlick, *Committee Hansard*, 12 September 2008, p. 28.

hard to find ways around this. The fact is that, all through the process, I was not really believing it was happening—that it could happen here in Australia, that it could go this far without somebody saying, ‘This is silly. Let’s just give the man a fine and send him home,’ or something. For it to go on and on and then find that it is locked in—that you are a criminal forever...³

1.7 In addition, the Committee heard of some practical difficulties that have arisen as a result of convictions and potential difficulties that may arise in the future. The Committee heard that insurance companies, for example, require disclosure of criminal convictions. This does not exclude those with convictions from receiving insurance, but ‘they charge us more for our excess’.⁴ Mr Garlick also described to the Committee how his conviction affects his employment both now and into the future:

I work in pest control, so I am in the domestic market—I am going into people’s homes. Would you like someone with a criminal conviction walking through your home, going through your bedroom?

...

From this point on, if I wanted to leave the industry to try to better myself so I can have a better place for my family and my baby daughter, nine times out of ten they ask you if you have a criminal conviction.⁵

1.8 Mr Aston, a writer who lives aboard his boat, described to the Committee his apprehension in applying for a visa now that he has a criminal conviction:

I have been through the whole process of looking up and seeing what is required to apply for this visa and the papers that I would need from the police department to have this record. I have been through that and got copies of the criminal record being held in Australia. I know the process that it would take, but it looks so daunting...⁶

1.9 Evidence given to the Committee showed that 116 recreational fishermen had been convicted of offences occurring in this period⁷ and, from the table helpfully provided by the Department, it is clear that the maximum fines imposed for ‘green zone’ offences did not exceed \$3000.⁸

1.10 Information provided to the Committee by the Department showed that in the same period, 23 commercial and other fishermen were also convicted of offences relating to Zoning Plan. Fines imposed on these fishers ranged from \$1500 to

3 Mr Peter Aston, *Committee Hansard*, 12 September 2008, p. 29.

4 Mr Barry Garlick, *Committee Hansard*, 12 September 2008, p. 28.

5 Mr Barry Garlick, *Committee Hansard*, 12 September 2008, p. 28.

6 Mr Peter Aston, *Committee Hansard*, 12 September 2008, p. 30.

7 DEWHA, *Submission 75*, p. 10.

8 DEWHA, *Submission 75A*.

\$40 000.⁹ Courts assess penalties on the basis of the court's view of the seriousness or otherwise of the offence. The range in penalties applied indicates that in some cases the courts were not treating the offences as being at the top end of the scale of seriousness, but more in line with the circumstances surrounding cases involving recreational fishers.

1.11 Coalition Senators believe that broadly speaking those offenders charged between 1 July 2004 and 16 December 2006 who, had their offences been committed after the 16 December 2006, would have more than likely been issued with an Infringement Notice rather than a criminal charge, should be dealt with as if Infringement Notices were issued.

1.12 The Coalition Senators therefore support an amendment to the Bill which would legislatively treat as spent convictions under section 85ZV of the Crimes Act, those convictions recorded against people charged with committing offences between 1 July 2004 and 16 December 2006, where the fine imposed indicates the offence was of a less serious nature. Additionally, Coalition Senators support those offences being treated as spent convictions under Division 3 of Part VIIC of the Crimes Act, without the exclusions provided by Division 6 of Part VIIC of the Crimes Act.

1.13 Evidence from many witnesses urged this course of action.¹⁰ For example, Mr Phillip Kliese informed the Committee that:

I also support the amendment 5550 (version 1) proposed by Senator MacDonald and Senator Boswell where they ask that people who were convicted under Section 38CA have their convictions treated as spent convictions. It is not fair that a court had no choice other to issue a criminal conviction to granddads and fathers who took their kids and grandkids fishing for the day with no GPS or no way of knowing if they had drifted into a Green Zone. The repercussions that a criminal conviction carries is simply unfair to place upon innocent fishermen.¹¹

1.14 The Coalition Senators considered the alternate amendment submitted by the Opposition which provided for the offences to be treated as having received a Royal pardon as an alternative to the spent convictions proposal. This 'Royal prerogative of mercy' should however only be used in the most extreme cases. The Attorney General's Department representative outlined concerns with this approach:

I can describe how pardon processes have worked in the past and why they do not necessarily sit comfortably with this category of cases. Traditionally the criteria the relevant Commonwealth ministers have applied to pardons is

9 DEWHA, *Submission 75*, p. 10.

10 See, for example, Mr Kevin Charteris, *Submission 3*; Mr David Saville, *Submission 93*; Mr Andrew R Poulsen, *Submission 98*; Mr Rodney Hannemann, *Submission 120*; Ms Carolyn Brooke, *Submission 127*; Mrs Pamela and Mr Jeffrey Matthews, *Submission 134*; Mr Scott Hay, *Submission 135*.

11 Mr Phillip Kliese, *Submission 6*, p. 1.

whether the person is both morally and technically innocent. Possibly the complexion of some of these cases is this: there is a view that the law should have been different at the relevant time, but, if the law was as it was and in fact the person did those things that came within the law as it was framed and enforcement action was taken, it might be difficult to make out the morally and technically innocent grounds.¹²

1.15 On balance, Coalition Senators believe that the interests of justice, and the overall administration of justice, are better served if the convictions in the relevant period are treated as spent convictions.

1.16 The Coalition Senators believe that there is a justifiable case for addressing the issue of convictions recorded against recreational and other fishermen between the time when the amendments to the Marine Park Zoning Plan were introduced on 1 July 2004 and the 16 December 2006 the time when amendments were made to the Act to allow the imposition of an infringement notice in lieu of a criminal conviction.

Representation on the Authority

1.17 The Coalition believes that the administration of the Act would be better served by ensuring that at least one of the Board members is a person who has a close hands-on experience with all aspects of the Marine Park.

1.18 The Coalition Senators also accepted evidence the Association of Marine Park Tourism Operators that there was a good case for defining one of the five Board positions as being filled by a person with knowledge of or experience in the tourism industry or another industry associated with the Marine Park.¹³

1.19 The Committee noted the tremendous importance of tourism to the region and to management of the Park itself:

...marine tourism in the Great Barrier Reef region is worth \$5.1 billion and employs 54,000 people. It is a major export earner and dwarfs other industries in the area (for example commercial fishing contributed \$120m and employed 640 people.)...

Through the payment of the EMC, industry contributes \$8 million per year to the GBRMPA budget of which \$1.2 million was paid to the CRC Reef for applied research.¹⁴

1.20 The Coalition therefore recommends that the Senate agree to amendments circulated by the opposition which reads:

"Schedule 2, item 1, page 12, after subsection 10(6A) insert:

12 Dr Karl Alderson, Assistant Secretary, Criminal Law Branch, Attorney-General's Department, *Committee Hansard*, 12 September 2008, p. 38.

13 AMPTO, *Submission 59*.

14 AMPTO, *Submission 59*.

(6B) At least one member must have knowledge of or experience in the tourism industry or another industry associated with the Marine Park."

Definition of 'fishing'

1.21 Coalition Senators also carefully considered the definition of 'fishing' contained within the amending bill. Coalition Senators accept that charges for offences relating to green zone in the zoning plan do not rely on the definition of fishing contained in the amending bill.

1.22 Coalition Senators note that the offences are committed when:

- a) the person engages in conduct, and
- b) the conduct is engaged in a zone, and
- c) under the zoning plan for that zone, the conduct is
 - (i) prohibited or
 - (ii) requires permission.

1.23 The conduct prohibited under the zoning plan is described as being 'fishing' in an area of the marine park closed to fishing, the relevant definition being that in the Great Barrier Reef Marine Park Zoning Plan 2003, where it is provided (section 1.5 and dictionary) that fishing for the purposes of the zoning plan is 'taking a plant, animal or marine product'

1.24 It therefore follows that the offence under section 38BA happens where an offender takes a plant, animal or marine product, or attempts to do so, and so merely passing through a green zone or having electronic equipment is not a grounds for a charge under section 38BA. The definition of 'fishing' in the bill is according to departmental witnesses at the hearing, only relevant where the taking of a plant, animal or marine product is 'aggravated' pursuant to section 38GA.

1.25 Coalition Senators agree with the majority report under the headings 'Definition of fishing' and 'The committee's views' (paras 2.32-2.48) and support recommendation 2.

Senator Simon Birmingham
Deputy Chair, LP, South Australia

Senator John Williams
NATS, New South Wales

Senator Stephen Parry
LP, Tasmania

Senator the Hon. Ian Macdonald
LP, Queensland

Senator Ron Boswell
LNP, Queensland

Senator Barnaby Joyce
NATS, QLD