

## **Environment Protection and Biodiversity Conservation Amendment (Declared Fishing Activities) Bill 2012**

*Introduced into the House of Representatives on 11 September 2012*

*Portfolio: Sustainability, Environment, Water, Population and Communities*

### **Committee view**

1.2 The committee notes that the bill engages the right to the presumption of innocence contained in article 14(2) of the International Covenant on Civil and Political Rights (ICCPR) and the right to a fair hearing contained in article 14(1) of the ICCPR. The committee seeks further information from the Minister for Sustainability, Environment, Water, Population and Communities before forming a view on whether the bill is compatible with these rights.

### **Purpose of the bill**

1.3 This bill as introduced sought to amend the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) to:

- enable the Minister, with the agreement of the Fisheries Minister to make an interim declaration declaring a fishing activity, to be a 'declared fishing activity' on an interim basis if both Ministers agree that:
  - there is uncertainty about the environmental, social or economic impacts of the fishing activity;
  - it is appropriate to consult with fishing concession holders who consider themselves to be detrimentally affected by the making of a final declaration for the same fishing activity; and
  - the declared fishing activity should be prohibited while consultation occurs;
- enable the Minister, with the agreement of the Fisheries Minister, to make a final declaration declaring a fishing activity to be a declared fishing activity for a period of no longer than 24 months if both Ministers agree that:
  - there is uncertainty about the environmental, social or economic impacts of the fishing activity;
  - it is appropriate to establish an expert panel to conduct an assessment of the fishing activity; and
  - the declared fishing activity should be prohibited while the expert panel conducts its assessment of the fishing activity;

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- require the Minister to consider the written submissions of declaration affected persons before making a final declaration and that the Minister cannot make a final declaration for a fishing activity that has not been the subject of an interim declaration;
  - create civil penalty and offence provisions for engaging in a declared fishing activity;
  - provide for the establishment of an expert panel to conduct an assessment of the potential environmental, social or economic impacts of the declared fishing activity, as specified in its terms of reference, and report to the Minister; and
  - provide for the publication of the report of the expert panel and the tabling of the report in Parliament.

1.4 The bill passed the House of Representatives on 13 September 2012 with the following amendments:

- The declaration powers will apply only to *commercial* fishing activities;
- For interim declarations, the Minister may only specify a commercial fishing activity that had not been engaged in before 11 September 2012 in a Commonwealth marine area;
- A declared commercial fishing activity may be assessed only for its potential environmental impacts (and not its social and economic impacts); and
- These powers will sunset 12 months after the commencement of the Act.

### **Compatibility with human rights**

1.5 The statement of compatibility for the bill relates to the bill as introduced. The government amendments to the bill did not include any assessment of their human rights compatibility and there is no requirement to provide a statement of compatibility for amendments to a bill.

**1.6 The government amendments to the bill do not appear to give rise to any human rights issues to the extent that they are aimed at providing further clarity to the operation of the declaration powers in the bill and circumscribing their potential reach. However, the committee considers that it will generally be good practice to provide a compatibility assessment for amendments where practicable and particularly where the amendments could give rise to human rights concerns.**

#### *Right to the presumption of innocence*

1.7 The statement of compatibility states that the bill engages the right to the presumption of innocence, as it creates a new criminal offence in respect of people

who engage in 'declared [commercial] fishing activities' in the Commonwealth marine area. The offence is punishable by 7 years imprisonment and strict liability applies to the circumstance that an action is taken in a Commonwealth marine area.

1.8 The right to the presumption of innocence is contained in article 14(2) of the ICCPR. Generally, consistency with the presumption of innocence requires the prosecution to prove each element of a criminal offence beyond reasonable doubt. Strict liability offences engage the presumption of innocence because they allow for the imposition of criminal liability without the need to prove fault.

1.9 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.

1.10 According to the statement:

[I]t is appropriate that strict liability apply to the Commonwealth marine area element of the offence as it may be difficult to prove that a person knew they were in a Commonwealth marine area (or were reckless to that fact) making the offence difficult to prosecute and accordingly undermining the deterrent effect of the provisions. The application of strict liability is also justifiable on the basis that a defendant can reasonably be expected, because of his or her professional involvement in the fishing industry, to know the requirements of the law. Although the penalty for the offence is higher than those applicable to most other offences in the EPBC Act, it is identical to the offences in Part 3 of the EPBC Act and is at an appropriate level to deter people from engaging in declared fishing activities.

The imposition of strict liability still allows a defendant to raise a defence of honest and reasonable mistake. This ensures that a person cannot be held liable if he or she had an honest and reasonable belief that they were complying with relevant obligations. Although it is possible that this defence may not cover a situation where a person is on a prescribed vessel which for some reason such as engine failure, for example, enters a Commonwealth marine area, a ministerial declaration will generally specify the fishing activity by reference to a number of criteria (such as the type of vessel and the method of processing, carrying or transshipping fish), rather than a single characteristic. This will mitigate the possibility of a declaration applying arbitrarily to a particular operator who is not intended to be caught by a declaration.

1.11 The statement concludes that the application of strict liability is a proportionate limitation on the right to the presumption of innocence because of the

public interest in ensuring the sustainable use of resources in the Commonwealth marine area.

1.12 The committee notes that a penalty of imprisonment for a strict liability offence would be appropriate only in limited cases. A strict liability offence which has imprisonment as a penalty should usually have a general defence of 'taking reasonable steps', 'due diligence', or another defence of a similar nature to be compliant with the presumption of innocence.

**1.13 Before forming a view whether the strict liability offence in the bill is consistent with the right to the presumption of innocence in article 14(2) of the ICCPR, the committee proposes to write to the Minister for Sustainability, Environment, Water, Population and Communities to seek further information as to whether it would be appropriate in these circumstances, given the severity of the penalty, to enable a defendant to rely on another defence in addition to the defence of mistake of fact allowed by s 9.2 of the Criminal Code for this offence, particularly as the Minister has acknowledged that the mistake of fact defence may not cover situations where a prescribed vessel inadvertently enters a Commonwealth marine zone.**

*Right to a fair hearing*

1.14 Article 14(1) of the ICCPR provides a general fair procedures guarantee by protecting the right to a fair and public hearing by an independent and impartial tribunal established by law in the determination of rights and obligations. The requirement to comply with article 14(1) of the ICCPR extends to particular executive and administrative decisions where the outcome has a direct impact on 'private law' rights and obligations (ie where the legal position of a private party is at stake).

**1.15 Before forming a view on whether the bill is compatible with article 14(1) of the ICCPR, the committee proposes to write to the Minister for Sustainability, Environment, Water, Population and Communities to seek clarification on the following questions:**

- **Whether the matters covered in the bill may be considered to fall within the scope of article 14(1) of the ICCPR; and**
- **If so, what review rights are available to affected individuals seeking to challenge a declaration or any decisions that may flow from a declaration?**