
Great Barrier Reef Legislation Amendment Bill 2014

Sponsor: Senator Waters

Introduced: Senate, 13 February 2014

Summary of committee concerns

1.25 The committee seeks clarification whether the bill is consistent with the prohibition against retrospective criminal laws.

Overview

1.26 This bill seeks to amend:

- the *Environment Protection and Biodiversity Conservation Act 1999* to prohibit certain developments adversely affecting the Great Barrier Reef World Heritage Area; and
- the *Environment Protection (Sea Dumping) Act 1981* to prohibit the dumping of dredged material within the Great Barrier Reef World Heritage Area.

1.27 The explanatory memorandum states that the amendments are intended to implement 'key recommendations that the World Heritage Committee has made to ensure the Great Barrier Reef does not get added to the "world heritage in danger" list'.¹

Compatibility with human rights

Statement of compatibility

1.28 The bill is accompanied by a brief statement of compatibility that states that the bill is 'confined solely to changing how major ports and other industrial developments which would impact the world heritage values of the Great Barrier Reef are regulated under our national environment laws'.² The statement concludes that the bill is compatible with human rights because it 'does not engage any human rights in a positive or negative manner'.³

Committee view on compatibility

Presumption of innocence

1.29 The bill proposes to make it an offence to dump dredged material within the Great Barrier Reef World Heritage Area, which attracts a maximum penalty of 250

1 Explanatory memorandum, p 1.

2 Statement of compatibility, p 1.

3 Statement of compatibility, p 1.

penalty units or imprisonment for 12 months or both.⁴ Strict liability applies to the Great Barrier Reef element of the offence.⁵

1.30 Article 14(2) of the International Covenant on Civil and Political Rights (ICCPR) protects the right to be presumed innocent until proven guilty according to law. 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.

1.31 However, strict liability offences will not necessarily be inconsistent with the presumption of innocence provided that they are within reasonable limits which take into account the importance of the objective being sought and maintain the defendant's right to a defence. In other words, such offences must be reasonable, necessary and proportionate to that aim.

1.32 The statement of compatibility does not provide any justification for the strict liability offence in the bill, however, the explanatory memorandum states that the application of strict liability is appropriate because it may otherwise:

be difficult to prove that a person knew they were in the Great Barrier Reef (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 dredging industry, to know the requirements of the law.⁶

1.33 The committee considers that the application of strict liability in the offence is likely to be compatible with the presumption of innocence. Notwithstanding the fact that the offence carries a penalty of up to 12 months' imprisonment, strict liability is only being applied to the jurisdictional elements of the offence, which does not go to the core of the criminality being addressed.

1.34 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 affect human rights to enable the committee to assess their compatibility. This includes identifying and providing a justification for strict liability offences.

4 Proposed new section 10AA(1) of the *Environment Protection (Sea Dumping) Act 1981*, inserted by item 2 in Schedule 2 to the bill.

5 Proposed new section 10AA(2) of the *Environment Protection (Sea Dumping) Act 1981*, inserted by item 2 in Schedule 2 to the bill.

6 Explanatory memorandum, p 2.

Prohibition against retrospective criminal laws

1.35 In addition to the strict liability offence of dumping dredged material in the Great Barrier Reef World Heritage Area discussed above, the bill also proposes to make it an offence to load dredged material on a vessel or platform in Australia or Australian waters for the purpose of dumping such material in the Great Barrier Reef World Heritage Area.⁷ Both these offences carry penalties of up to 12 months' imprisonment. The bill further provides that no permits or approval could be given for these prohibited activities after 31 December 2013.⁸

1.36 The intended effect of the proposed amendments would appear to be that, following the commencement of the proposed amendments, a person could be prosecuted for carrying out acts which, if carried out before commencement pursuant to a permit issued after 31 December 2013, would not have been criminal offences at the time they were committed. Thus, the bill would appear in effect to provide for the retrospective application of these new offences.

1.37 Article 15 of the ICCPR prohibits retrospective criminal laws and provides that no-one can be found guilty of an offence that was not a crime at the time it was committed. The prohibition supports long recognised criminal law principles that there can be no crime or punishment without a prior provision by law. This is an absolute right which cannot be limited.

1.38 The committee intends to write to Senator Waters to seek clarification as to whether and how these amendments are compatible with the prohibition against retrospective criminal laws in article 15 of the ICCPR.

7 Proposed new section 10CA(1) of the *Environment Protection (Sea Dumping) Act 1981*, inserted by item 2 in Schedule 2 to the bill.

8 Item 4 in Schedule 2 to the bill.

