

## Consideration of responses

### Environment Legislation Amendment Bill 2013

*Portfolio: Environment*

*Introduced: House of Representatives, 14 November 2013*

*Status: Before Senate*

*PJCHR comments: First Report of the 44th Parliament, tabled 10 December 2013*

*Response dated: 12 February 2014*

#### Information sought by the committee

3.1 Among other things, this bill was introduced 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, which invalidated a decision to approve an iron ore mine because the Minister had failed to comply with a mandatory requirement to consider approved conservation advice regarding the Tasmanian devil.

3.2 The committee sought clarification on whether the retrospective validation of decisions that would otherwise have been invalid due to a failure to consider approved conservation advice was consistent with the right to a fair hearing in article 14(1) of the International Covenant on Civil and Political Rights (ICCPR).

3.3 The committee also sought clarification on whether the proposed amendments to increase the maximum penalty for the civil penalty provision in the Great Barrier Reef Marine Park Act 1975 (GBRMP Act) were consistent with the right to a fair trial in article 14 of the ICCPR.

3.4 The Minister's response is attached.

#### Committee's response

**3.5 The committee thanks the Minister for his response. In particular, the committee is grateful for the timely and detailed way in which the Minister has responded to the committee's concerns, as this has greatly assisted the committee to finalise its consideration of this bill while it is still before the Parliament.**

#### *Retrospective validation of decisions*

3.6 The committee sought clarification whether the bill's proposal to retrospectively validate decisions that would otherwise have been invalid would affect any related proceedings currently before the courts; or the rights and obligations of the parties in the *Tarkine* case. The committee noted that, in general, 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. Such legislative interventions, particularly in cases in which government is one of the litigants, raise issues of compatibility with article 14(1) of the ICCPR.

3.7 In his response, the Minister stated that, ‘there are no related proceedings currently before the courts which would be affected by the retrospective application [of these provisions]’. Further, the Minister advised that ‘there are no related proceedings to the [*Tarkine* case], nor are there any other current proceedings where the failure to consider an approved conservation advice is specified as a ground for review.’ The Minister also confirmed that these changes would not affect the rights and obligations of the parties in the *Tarkine* case.

**3.8 In light of this information, the committee makes no further comment on these provisions. The committee notes that it would have been helpful to have included this information in the statement of compatibility.**

*Increased penalty for civil penalty provision*

3.9 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.

3.10 The committee sought clarification whether the civil penalty provision should be considered ‘criminal’ for the purposes of human rights law. In particular, the committee requested the following information:

- whether the penalty had a punitive or deterrent purpose;
- whether the penalty was of general application (in other words, was it intended to apply to the general population or was 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.

3.11 The Minister’s response provides the following clarification:

- The civil penalty provision is intended to have a deterrent purpose.
- While the civil penalty provision is of general application, it may be viewed as regulating particular kinds of behaviour by those in a place of particular environmental significance. The Minister argues that, in practice, therefore, the proposed maximum penalties ‘apply to a group of persons in a specific regulatory capacity (persons who undertake activities in the Great Barrier Reef Marine Park)’.
- The civil penalty provision does not carry a sanction of imprisonment for non-payment of the penalty.

**3.12 The committee notes the Minister’s view that the provision should not be characterised as ‘criminal’, ‘despite the nature and severity of the penalty, [because] there is no sanction of imprisonment for non-payment of the penalty.’**

---

The committee notes, however, that while imprisonment is a key indicator of criminality, it is not an exclusive factor for the purposes of determining the severity of a penalty.

**3.13** The committee notes the suggestion in the Minister's response that it may be possible to view the offence provision as applying to a specific group of people (persons who undertake activities in the Great Barrier Reef Marine Park) and that this would tend to support characterisation of the offence as 'regulatory'. However, the committee notes that the legislation applies generally to any person and that provisions considered regulatory on this basis tend to apply to specific groups identified by criteria other than engagement in the prohibited conduct.

**3.14** The committee considers that, even if the civil penalty provision were to be viewed as applying to a particular group of persons in a specific regulatory capacity, the committee remains concerned that the significant penalties involved – up to \$2,550,000 for an individual – suggest that the civil penalty provision in question should be considered as 'criminal' for the purposes of human rights law. The committee therefore considers that appropriate procedural protections should be applied to the relevant enforcement proceedings.

**3.15** The Minister's response acknowledges that the committee may take the view that the proposed new maximum penalties may result in the civil penalty provision being considered as 'criminal' for human rights purposes. Accordingly, the response goes on to consider whether particular protections would apply to the relevant enforcement proceedings.

**3.16** *Presumption of innocence*: The response states that the standard of proof for civil penalty proceedings is on the balance of probabilities. While acknowledging that this is a lower standard than the criminal standard of proof required under article 14(2) of the ICCPR, the response argues that the effectiveness of the enforcement regime would be undermined if it were necessary for the prosecution to prove the offence beyond reasonable doubt.

**3.17** The committee notes the Minister's view that any limitation of the right to be presumed innocent arising from the enforcement of the civil penalty provision is 'reasonable, necessary and proportionate to preventing the illegal taking of or injury to dugong and turtles' as it is 'aimed at achieving the legitimate objective of protecting species that are of great importance to the World Heritage Listed Great Barrier Reef and for acting as a deterrent for the illegal poaching and trade of these iconic species.'

**3.18** The committee notes that it may be open for the courts to apply the civil standard of proof flexibly, and to take account of the seriousness of the alleged contravention and the potential consequences to the person if it is proved.<sup>1</sup> This

---

1 *Briginshaw v Briginshaw* (1938) 60 CLR 336, [1938] ALR 334. See also *Evidence Act 1995*, section 140.

approach, however, does not represent a third standard of proof, and the standard remains one of proof on the balance of probabilities.<sup>2</sup> The committee, therefore, remains concerned that the application of a civil standard of proof in such proceedings to determine an individual's liability for such penalties may not meet the requirements of the right to be presumed innocent under article 14(2) of the ICCPR.<sup>3</sup>

3.19 *Prohibition against double jeopardy*: The response acknowledges that criminal proceedings may be started against a person for conduct that is substantially the same as conduct constituting the contravention of a civil penalty provision (regardless of whether a declaration of contravention and a pecuniary penalty order has been made against the person). The Minister, however, states:

[I]n my view the likelihood of this occurring in practice is low. This is because there is typically a decision made at the outset of a matter as to what form of appropriate enforcement action should be taken (i.e. either pursuit of a civil penalty or criminal proceedings). This decision will turn on the circumstances of each case and will be made consistently with relevant Australian Government policies, guidelines and agency enforcement policy

**3.20 The committee notes the Minister's view that it would be rare for criminal proceedings to be brought against a person for substantially the same conduct that had given rise to civil enforcement proceedings. However, the committee does not consider that an option not to bring criminal proceedings is a sufficient response to ensure consistency with the prohibition against double jeopardy. The committee remains concerned that the legislation as currently drafted permits such proceedings to be brought, and therefore risks being inconsistent with article 14(7) of the ICCPR.**

3.21 *Privilege against self-incrimination*: The response explains that GBRMP Act and Regulations include powers to compel a person to provide certain information to the GBRMP Authority, however, these powers are considered to be 'so restricted as to not limit article 14(3) of the ICCPR'.

3.22 The response argues that the information that is required to be recorded and supplied to GBRMP Authority relates to logbook recordings of tourist visitation numbers and details of sewage discharges, and therefore:

---

2 See, *Witham v Holloway* (1995) 183 CLR 525; and *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* [1992] HCA 66, (1992) 110 ALR 449.

3 See, for example, *Koon Wing Yee v Insider Dealing Tribunal* [2008] HKCFA 21, para 104-106 (rejecting the argument that an enhanced civil standard satisfies the requirements of article 14(2) of the ICCPR). See also the alternate view of the UK House of Lords in the case of *Clingham v Royal Borough of Kensington and Chelsea; R v McCann* [2002] UKHL 39 (in which the court held that the equivalent right in article 6(2) of the European Convention on Human Rights could be satisfied by an enhanced civil standard, which 'will for all practical purposes be indistinguishable from the criminal standard' (para 83)).

---

The likelihood of information being provided by an individual to the GBRMP Authority which contains evidence that the individual contravened the civil penalty provision is ... considered very low.

3.23 The response also explains that the power to compel information under the relevant GBRMP Regulations only apply to the holders of chargeable permissions. The response argues that:

Such persons voluntarily participate in regulated activities, such as the operation of tourist programs, and it is therefore considered justifiable to expect such persons to have accepted that the information they are required to record and provide to the GBRMP [Authority] could be used as evidence in proceedings against them where such information shows that they have contravened [the civil penalty provisions].

3.24 The response also notes that the 'section 61AIL of the GMRMP Act provides that in most cases evidence of information given or documents produced is not admissible in [any subsequent] criminal proceedings' dealing with substantially the same conduct.

**3.25 The committee notes that the nature and scope of the power to compel information under the GMRMP Act and Regulations goes some way towards ensuring that any limitation on the right not to self-incriminate is relatively confined. However, the right not to incriminate oneself will generally require at least explicit protection against the use of information or answers produced under compulsion. The committee, therefore, remains concerned that without the provision of appropriate immunities, consistency with article 14(3) of the ICCPR cannot be guaranteed.**

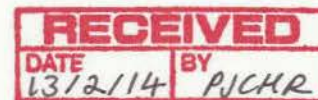
**3.26 The committee thanks the Minister for his detailed response on these issues.**

*Strict liability offences*

3.27 In its initial comments on the bill, the committee had noted its expectation that statements of compatibility should identify and justify each strict liability offence in proposed legislation.

3.28 The Minister's response provides a justification for increasing the financial penalties for the relevant strict liability offences relating to listed dugong and turtles.

**3.29 The committee thanks the Minister for providing these comprehensive explanations and notes that it does not consider that these strict liability offences raise any issues of incompatibility with the right to be presumed innocent in article 14(2) of the ICCPR.**



**The Hon Greg Hunt MP**

**Minister for the Environment**

PDR: MC14-002973

Senator Dean Smith  
Chair  
Parliamentary Joint Committee on Human Rights  
S1.111  
Parliament House  
CANBERRA ACT 2600

12 FEB 2014

Dear Senator Smith

I refer to your letter of 10 December 2013, concerning the report by the Parliamentary Joint Committee on Human Rights (the **Committee**) on the Environment Legislation Amendment Bill 2013 (the **Bill**). I apologise for the delay in responding.

I understand that the Committee has requested clarification on a number of matters set out in its *First Report of the 44<sup>th</sup> Parliament*. Please see my response against each request below.

1. *The Committee seeks 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 International Covenant on Civil and Political Rights (ICCPR), including whether their retrospective application would affect:*
  - a. *any related proceedings currently before the courts; or*
  - b. *the rights and obligations of the parties in the Tarkine case.*

Firstly, I note that since the Committee's *First Report of the 44<sup>th</sup> Parliament*, the Bill has been amended in the House of Representatives to remove the prospective application of the conservation advice amendment. Schedule 1 of the Bill (Amendments relating to approved conservation advice) provides that a failure to have regard to an approved conservation advice will not invalidate a relevant decision under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**) made prior to 31 December 2013.

Further to this, I note that Article 14(1) of the *International Covenant on Civil and Political Rights* (**ICCPR**) protects the right to a fair and public hearing by a competent, independent and impartial tribunal established by law and ensures that all persons shall be equal before the courts and tribunals. I am of the view that the right to a fair hearing in Article 14(1) is not unduly limited by the amendments in Schedule 1 of the Bill relating to approved conservation advice.

I am advised that there are no related proceedings currently before the courts which would be affected by the retrospective application of Schedule 1 of the Bill. Specifically, there are no related proceedings to *Tarkine National Coalition Incorporated v Minister for Sustainability, Environment, Water, Population and Communities* [2013] FCA 694 (the *Tarkine case*), nor are there any other current proceedings where the failure to consider an approved conservation advice is specified as a ground for review.

In relation to the rights and obligations of the parties in the *Tarkine case*, the matter before the Court is finalised. The Court ordered on 17 July 2013 that the decision to approve the taking of the action was invalid and set aside that decision. As a result, a decision as to whether to approve the action under the EPBC Act was required to be made. The former Minister for the Environment, Heritage and Water, the Hon Mark Butler MP, made the decision to approve the proposed action (EPBC referral 2011/5846) on 29 July 2013.

The Statement of Reasons, dated 27 August 2013, for approval under the EPBC Act regarding the action (EPBC referral 2011/5846) details the approved conservation advices which were considered in the making of the decision on 29 July 2013. The making of this decision has not been challenged. Schedule 1 of the Bill does not affect the rights and obligations of the parties in the *Tarkine case*.

In the event that the Committee considers the right to a fair hearing is limited by the approved conservation advice provision, I am of the view that the limitation is aimed at achieving a legitimate objective. That is, as a result of the *Tarkine case* there is genuine legal risk and uncertainty to relevant EPBC Act approvals since January 2007 (when amendments to the EPBC Act made it mandatory to consider relevant approved conservation advice in certain circumstances). The Bill is reasonable and necessary in order to provide the assurance to stakeholders that previous decisions under the EPBC Act will not be invalid because of a technicality, that is, the Department did not attach approved conservation advices to a decision brief.

- The Committee notes that, in this instance, the strict liability offences in the Bill are unlikely to raise issues of incompatibility with article 14(2) of the ICCPR. However, the Committee 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.*

I note the Committee's expectation that the statement of compatibility should identify and provide a justification for each strict liability offence.

As stated in the statement of compatibility, the Bill does not create new offence provisions under either the EPBC Act or the *Great Barrier Reef Marine Park Act 1975 (Cth)* (**GBRMP Act**). Rather, the Bill increases the maximum financial penalties for specific existing offences where the prohibited conduct concerns dugong or turtles.

The Bill amends the strict liability offences in sections 196A, 196C, 196E, 211A, 211C, 211E, 254A, 254C, 254E of the EPBC Act. The justification provided for in the statement of compatibility and explanatory memorandum for the increases in penalties applies for each of these strict liability offences. That is, the tripling of the penalty units for the relevant offences under the EPBC Act is considered necessary and appropriate to ensure there is an effective deterrence to the illegal killing, injuring, taking, trading, keeping or moving of turtles and dugong and thereby providing additional protection for these species and addressing community concerns about illegal poaching and trade of these species.

The justification for the tripling of penalty units for the GBRMP Act strict liability offences in sections 38BA and 38GA is also that the increase in penalty units is to deter conduct that involves the taking of or injury to dugong, marine turtles or leatherback turtles that are protected species under the GBRMP Act. As with the amendments to the EPBC Act, the increase in penalty units in the GBRMP Act is intended to address community concerns about illegal poaching and trade of these species, in this case in relation to activity in the Great Barrier Reef Marine Park.

The amendments to the EPBC Act and the GBRMP Act form one element of the Government's broader Dugong and Turtle Protection Plan which also includes an Australian Crime Commission investigation into the illegal killing, poaching and transportation of turtle and dugong meat; a specialised Indigenous ranger programme to strengthen enforcement powers for Indigenous rangers; and working with Indigenous leaders toward an initial two year moratorium on the taking of dugong.

3. *The Committee seeks 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:*
  - a. *whether the penalty has a punitive or deterrent purpose;*
  - b. *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*
  - c. *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.*

I note that the Committee, in its interim practice note on civil penalties (**Practice Note 2**), has acknowledged that civil penalty provisions raise complex human rights issues and that the implications for existing practice are potentially significant.

I understand that for the purposes of assessing compatibility with the ICCPR, the Committee is required to ascertain whether the civil penalty amendment in the Bill amounts to a 'criminal' penalty for the purposes of human rights law. I further understand that the Committee will consider the classification, nature and severity of the penalty that attaches to a particular civil penalty provision to assess whether the provision is 'criminal' for the purposes of human rights law.



*a) Classification of the penalty under domestic law*

Whilst I understand that the Committee will in general place little weight on how the penalty is described, for the sake of completeness, the provision is characterised as a civil penalty provision.

As stated in the statement of compatibility, the Bill does not create new civil penalty provisions under the GBRMP Act. Rather, the Bill increases the maximum financial penalty for the specific existing civil penalty provision where the prohibited conduct concerns dugong or turtles.

*b) The nature of the penalty*

If item 53 of the Bill is enacted, a person who engages in conduct of a kind that contravenes section 38BB(1) or (2) of the GBRMP Act and that resulted in the taking of or injury to an animal that is a member of a protected species, and the animal is a dugong, marine turtle or leatherback turtle, the civil penalty for that aggravated contravention is triple that which would have otherwise applied for the aggravated contravention.

The increased penalty is intended to have a deterrent purpose. Proceedings would be instituted by a public authority with statutory powers of enforcement, in this case the Great Barrier Reef Marine Park Authority (GBRMPA). The penalty would be imposed following a finding of culpability.

The increased penalty at item 53 of the Bill is of general application, however, only to the extent that it regulates behaviour in the Great Barrier Reef Marine Park. The Great Barrier Reef Marine Park is established by section 30 of the GBRMP Act. In establishing the Great Barrier Reef Marine Park, and providing for the prohibition and regulation of activities in the Great Barrier Reef Marine Park, the GBRMP Act gives effect to its main object, namely 'to provide for the long term protection and conservation of the environment, biodiversity and heritage values of the Great Barrier Reef Region' (section 2A(1) of the GBRMP Act).

The proposed amendments are therefore directed at regulating particular kinds of behaviour by those in a place of particular environmental significance. In this light, in practice, the proposed maximum penalties apply to a group of persons in a specific regulatory capacity (persons who undertake activities in the Great Barrier Reef Marine Park).

*c) The severity of the penalty*

I note that in assessing whether a pecuniary penalty is sufficiently severe as to amount to a 'criminal' penalty, the Committee will have regard to the matters set out in Practice Note 2.

It is my view that the provision should be characterised as not being 'criminal' as, despite the nature and severity of the penalty, there is no sanction of imprisonment for non-payment of the penalty. If a term of imprisonment were felt to be an appropriate sanction in a particular circumstance there are separate offence provisions within the GBRMP Act which could be relied upon regarding offences in relation to turtles and dugongs. However, should the Committee come to the view that the proposed new maximum penalties should be characterised as 'criminal' for the purposes of human rights law, the following considers the particular protections which would apply to the relevant enforcement proceedings.

### *Presumption of Innocence*

I note that the standard of proof that applies to civil proceedings is proof on the balance of probabilities, but that the Committee considers that article 14(2) of the ICCPR requires that the case against a person be demonstrated on the criminal standard of proof, namely proof beyond reasonable doubt (paragraph 1.19 of Practice Note 2). In this instance, the effectiveness of the enforcement regime would be undermined if it were necessary for the prosecution to prove the offence beyond reasonable doubt. This limitation is aimed at achieving the legitimate objective of protecting species that are of great importance to the World Heritage Listed Great Barrier Reef and for acting as a deterrent for the illegal poaching and trade of these iconic species. This is therefore considered reasonable, necessary and proportionate to preventing the illegal taking of or injury to dugong and turtles.

### *Prohibition against double jeopardy*

I note that Article 14(7) of the ICCPR involves the prohibition against double jeopardy. I note again, as above, that the civil penalty amendment does not seek to amend the existing operation of the GBRMP Act more broadly.

The existing section 61AII of the GBRMP Act precludes the Federal Court from making a declaration of contravention or a pecuniary penalty order against a person in relation to a civil penalty provision if the person has been convicted of an offence constituted by conduct that is substantially the same as the conduct constituting the contravention. Further, section 61AIJ requires proceedings for a declaration of contravention or a pecuniary penalty order against a person for contravention of a civil penalty provision to be stayed if criminal proceedings are or have started against the person for an offence constituted by substantially the same conduct alleged to constitute the contravention, and may resume if the person is not convicted of the offence.

Whilst section 61AIK of the GBRMP Act provides that criminal proceedings may be started against a person for conduct that is substantially the same as conduct constituting the contravention of a civil penalty provision (regardless of whether a declaration of contravention and a pecuniary penalty order has been made against the person), in my view the likelihood of this occurring in practice is low. This is because there is typically a decision made at the outset of a matter as to what form of appropriate enforcement action should be taken (i.e. either pursuit of a civil penalty or criminal proceedings). This decision will turn on the circumstances of each case and will be made consistently with relevant Australian Government policies, guidelines and agency enforcement policy.

I also note that, section 61AIL of the GBRMP Act provides that in most cases evidence of information given or documents produced is not admissible in criminal proceedings if:

- (a) *the individual previously gave the evidence or produced the documents in proceedings for a pecuniary penalty order against the individual for a contravention of a civil penalty provision (whether or not the order was made); and*
- (b) *the conduct alleged to constitute the offence is substantially the same as the conduct that was claimed to constitute the contravention.*

Further, should the Committee consider that Article 14(7) of the ICCPR is limited by the amendments, it is my view that the limitation is reasonable, necessary and proportionate to deter and prevent the illegal taking of or injury to dugong and turtles.

*Privilege against self-incrimination*

I note that Article 14(3)(g) of the ICCPR involves the privilege against self-incrimination.

The GBRMPA has powers to compel a person to provide certain information. Pursuant to section 39P of the GBRMP Act, Regulation 167 of the GBRMP Regulations requires the holder of a chargeable permission to provide the GBRMPA with certain information. However, the information that is required to be recorded and supplied to GBRMPA pursuant to section 39P relates to logbook recordings of tourist visitation numbers and details of sewerage discharges. The likelihood of information being provided by an individual to the GBRMPA pursuant to section 39P which contains evidence that the individual contravened section 38BB (1) or (2) is considered very low.

Further, the Regulations made pursuant to section 39P only apply to the holders of chargeable permissions. Such persons voluntarily participate in regulated activities, such as the operation of tourist programs, and it is therefore considered justifiable to expect such persons to have accepted that the information they are required to record and provide to the GBRMPA could be used as evidence in proceedings against them where such information shows that they have contravened sections 38BB (1) or (2).

The scope of this power is considered to be so restricted as to not limit Article 14(3) of the ICCPR. However, should this be interpreted as a possible limitation, it is considered reasonable, necessary and proportionate to preventing the illegal taking of or injury to dugong and turtles. Again, the amendment is aimed at achieving the legitimate objective of protecting turtles and dugong.

I trust that the above information meets the Committee's requirements and that my response will be considered by the Committee in its next report.

Yours sincerely,



Greg Hunt

