

Quarantine Charges (Imposition-General) Bill 2014

Quarantine Charges (Imposition-Customs) Bill 2014

Quarantine Charges (Imposition-Excise) Bill 2014

Quarantine Charges (Collection) Bill 2014

Portfolio: Agriculture

Introduced: House of Representatives, 6 March 2014

Summary of committee concerns

1.62 The committee seeks further information on the compatibility of a number of measures in the Quarantine Charges (Collection) Bill 2014 with the right to privacy, the right to freedom of movement, and the right to a fair hearing.

Overview

1.63 The Quarantine Charges (Collection) Bill 2014 (the bill) forms part of a legislative package intended to re-align Australia's biosecurity and quarantine imports system with an efficient and effective cost-recovery model, consistent with the *Australian Government Cost-Recovery Guidelines*.

1.64 The bill provides the authority to collect charges which are proposed to be imposed by the Quarantine Charges (Imposition-General) Bill 2014, the Quarantine Charges (Imposition-Excise) Bill 2014 and the Quarantine Charges (Imposition-Customs) Bill 2014. The bill includes a number of measures to:

- provide that regulations may be made to determine the manner in which quarantine charges are to be paid;
- provide the Commonwealth with powers to refuse service to a person liable to a charge or late payment fee, and to suspend or revoke permits;
- provide for enforcement powers to deal with goods and vessels to recover unpaid charges and late payment fees, to make directions in relation to any such goods and vessels (with a related offence for engaging in conduct that contravenes a direction) and to sell goods and vessels to recover outstanding debts;
- provide the Commonwealth with the power to deal with goods and vessels that are abandoned or forfeited; and
- provide for the remitting or refunding of fees in exceptional circumstances.

Compatibility with human rights

Statement of compatibility

1.65 The bill is accompanied by a statement of compatibility which states that the bill engages the right to privacy,¹ the right to freedom of movement,² the right to liberty (including the prohibition against arbitrary detention)³ and the right to work and rights in work.⁴

1.66 The statement of compatibility concludes that the bill is compatible with the human rights and that, to the extent that the bill may limit human rights, those limitations are reasonable, necessary and proportionate to achieve the legitimate objective of the bill.⁵

Committee view on compatibility

Right to privacy

1.67 In relation to the right to privacy, the statement of compatibility notes that Article 17 of the International Covenant on Civil and Political Rights (ICCPR) prohibits arbitrary or unlawful interferences with an individual's privacy. However, this right may be subject to permissible limitations which are provided by law and are not arbitrary. In order for limitations not to be arbitrary, they must seek to achieve a legitimate objective and be reasonable, necessary and proportionate to achieving that objective.

1.68 The committee notes that existing enforcement powers in Part VIA of the *Quarantine Act 1908* (Enforcement) are applied to the bill (proposed section 41). The statement of compatibility advises that the application of Part VIA is intended to protect 'the ability of the Commonwealth to collect quarantine charges when they are due and payable'.⁶ While these enforcement provisions are recognised as engaging the right to privacy, the statement of compatibility notes:

- the powers would only be available to officers with the appropriate training, expertise and authority;

1 Article 17 of the International Covenant on Civil and Political Rights (ICCPR).

2 Article 12 of the ICCPR.

3 Article 9 of the ICCPR.

4 Articles 6 and 7 of the International Covenant on Economic, Social and Cultural Rights.

5 Statement of compatibility, p 9.

6 Statement of compatibility, p 6.

- many of the powers contain a test of reasonableness such that the powers would be exercised only when a quarantine officer believes it is reasonable to do so; and
- the enforcement provisions would be required to be exercised in compliance with the *Privacy Act 1988*.⁷

1.69 While the committee notes that the above factors appear relevant to an assessment of the compatibility of the bill with the right to privacy, it notes that there is no information provided as to the specific powers contained in Part VIA of the Quarantine Act, or their engagement and compatibility with human rights in the context of their application to the bill. The committee's usual expectation is that, where a bill seeks to incorporate the provisions of another Act, the statement of compatibility identifies the substantive elements of the incorporated provisions, and their potential engagement and compatibility with human rights.

1.70 The committee intends to write to the Minister to seek further information on the compatibility of Part VIA of the *Quarantine Act 1908*, as applied in the context of the bill, with the right to privacy.

Right to freedom of movement

1.71 In relation to the right to freedom of movement, the statement of compatibility notes that Article 12 of the ICCPR includes the right to move freely within a country for those lawfully within the country, the right to leave any country and the right of citizens to enter a country. The right may be restricted in certain circumstances, including where the objective of the restriction is to protect national security, public order, public health or morals or the rights and freedoms of others. However, any such restriction must be necessary and proportionate to protect the purpose for which it is imposed, and should be as least intrusive as possible to achieve that purpose.⁸

1.72 The statement of compatibility identifies the proposed power of the Director of Quarantine to detain a vessel the subject of a charge (proposed section 24) as engaging the right to freedom of movement, insofar as the detention of a vessel may restrict the movement of individuals relying on that vessel to move.⁹ However, it is anticipated that the detention of non-commercial vessels would be 'extremely rare', and that it would accordingly be 'highly unlikely' that an individual's freedom of movement would be affected.¹⁰ The measure is therefore characterised as necessary

7 Statement of compatibility, p 6.

8 Statement of compatibility, pp 6-7.

9 Statement of compatibility, p 7.

10 Statement of compatibility, p 7.

to enforce the Commonwealth's capacity to recover costs for the services that it has provided, and proportionate to the potential risk to the Commonwealth's ongoing capacity to provide biosecurity and quarantine services.

1.73 As set out above, the bill applies Part VIA of the Quarantine Act (proposed section 41). These enforcement provisions are recognised as engaging the right to freedom of movement, with the statement of compatibility noting:

- the powers would only be available to officers with the appropriate training, expertise and authority; and
- many of the powers contain a test of reasonableness such that the powers would be exercised only when a quarantine officer believes it is reasonable to do so.

1.74 While the committee notes that the above factors appear relevant to an assessment of the compatibility of the bill with the right to freedom of movement, it notes that there is no information provided as to the specific powers contained in Part VIA of the Quarantine Act, or their engagement and compatibility with human rights in the context of their application to the bill. The committee's usual expectation is that, where a bill seeks to incorporate the provisions of another Act, the statement of compatibility identifies the substantive elements of the incorporated provisions, and their potential engagement and compatibility with human rights.

1.75 The committee intends to write to the Minister to seek further information on the compatibility of Part VIA of the Quarantine Act (Enforcement), as applied in the context of the bill, with the right to freedom of movement.

The right to a fair hearing

1.76 Proposed new section 14 of the bill provides for the power to suspend or revoke a number of approvals or authorisations made under the Quarantine Act where a person has not paid a quarantine charge or late payment fee which is due and payable. As set out in the statement of compatibility, this measure may have implications for the right to work.¹¹ The committee notes that a decision to suspend or revoke a permit under proposed section 14 will not be subject to merits review (although judicial review will be available).¹²

11 Statement of compatibility, p 8.

12 Explanatory memorandum, p 13.

1.77 In the committee's view, the non-availability of merits review for decisions under proposed section 14 engages the right to a fair hearing, which provides that in the determination of rights and obligations, a person is entitled to a fair and public hearing by a competent, independent and impartial tribunal.¹³

1.78 The non-availability of merits review is justified in the explanatory memorandum accompanying the bill on the basis that, as the Quarantine Act does not contain merits review mechanisms, it would be inappropriate to provide for such review mechanisms in the bill.¹⁴

1.79 While the committee accepts that there may be some administrative or regulatory benefits to a degree of conformity between aspects of the bill and the Quarantine Act, there is insufficient information in the statement of compatibility to allow an assessment of whether preclusion of merits review is consistent with the right to a fair hearing in this case. The committee notes that the fact that a particular approach is or is not taken in a primary Act or elsewhere is not in and of itself a sufficient reason for justifying limitations on rights.

1.80 The committee intends to write to the Minister for Agriculture to seek further information on the compatibility of the bill with the right to a fair hearing, particularly the justification for the non-availability of merits review for a decision under proposed section 14, including:

- **why it is necessary to preclude merits review for such decisions; and**
- **how preclusion of merits review in relation to such decisions is proportionate to achieving a legitimate objective, including all relevant procedural and other safeguards, and details of any less restrictive policy measures that may have been available or were considered in the development of the bill.**

Right to a fair trial – presumption of innocence

1.81 Article 14(2) of the 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. An offence provision which requires the defendant to carry an evidential or legal burden of proof with regard to the existence of some fact will engage the presumption of innocence because a defendant's failure to discharge the burden of proof may permit their conviction despite reasonable doubt as to their guilt.

13 Article 14 of the ICCPR.

14 Explanatory memorandum, p 13.

1.82 However, reverse burden 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.

1.83 The committee notes that the bill proposes to introduce two new offences for moving or interfering with withheld goods¹⁵ and moving or interfering with a detained vessel.¹⁶ Both of these offences set out an exception for where a person is authorised to engage in the conduct under the proposed new Act, the Quarantine Act or under another Australian law. In both cases, the defendant bears an evidential burden in relation to whether their conduct is authorised.¹⁷

1.84 The committee considers that the use of reverse burdens as proposed by the bill is unlikely to raise issues of incompatibility with the presumption of innocence. In particular, the burdens placed on the defendant are evidential burdens only (as opposed to a legal burden) and relate to matters that appear to be likely to be within the defendant's knowledge.

1.85 However, the committee emphasises its expectation that statements of compatibility should include sufficient detail of relevant provisions in a bill which impact on human rights to enable it to assess their compatibility. This includes identifying and providing justification where a reverse burden of proof is imposed.

15 See proposed new section 19 of the bill.

16 See proposed new section 25 of the bill.

17 See proposed new section 19(2) and proposed new section 25(2).