

Environment Protection and Biodiversity Conservation Amendment Bill 2013

Introduced into the House of Representatives on 13 March 2013

Portfolio: Sustainability, Environment, Water, Population and Communities

Summary of committee view

1.18 The committee seeks clarification as to whether the proposed civil penalty provisions in the bill could be considered to be 'criminal' charges' for the purposes of articles 14 and 15 of the International Covenant on Civil and Political Rights (ICCPR) given the significant penalties that may be imposed under them, and seeks information about how the imposition of an evidential burden on a defendant is justifiable.

Overview

1.19 This bill seeks to amend the *Environment Protection and Biodiversity Conservation Act 1999* to:

- establish a matter of National Environmental Significance in relation to protection of water resources from coal seam gas or large coal mining development, to require environmental impact assessment and approval processes for actions relating to this development that may significantly impact on a water resource; and
- to create civil penalty and offence provisions for taking actions involving coal seam gas or large coal mining development that may significantly impact on a water resource without approval (or without exemption from the need to obtain approval).

Compatibility with human rights

1.20 The bill is accompanied by a self-contained statement of compatibility that states that the proposed new criminal offences, extension of the scope of application of existing offences, and strict liability engages the right to be presumed innocent under article 14(2) of the ICCPR. It concludes that the bill is compatible with human rights:

because to the extent that it may limit human rights, those limitations are reasonable, necessary and proportionate to the objective of preventing people from taking actions involving coal seam gas development or large coal mining development that may have a significant impact on a water resource without an approval or exemption from obtaining an approval.¹¹

11 Statement of compatibility, p 3.

1.21 The statement of compatibility does not identify any specific limitations on rights or provide any analysis of them, so it is difficult to see how the conclusion that any limitations are justified was reached. The assessment of whether a limitation on a right is permissible requires a contextual analysis which involves identification of: the encroachment on the right, the objective being pursued and its legitimacy, and the reasonableness and proportionality of the measures adopted to the achieving that goal. A general assertion that any limitations are justified without such detailed analysis is not sufficient for the purposes of justifying restrictions on the enjoyment of human rights.

Right to respect for one's home/right to health/right to water

1.22 The bill may be viewed as promoting the enjoyment of a number of rights not mentioned in the statement of compatibility. The committee has already considered the issue of proposed regulation of coal seam gas mining and identified a number of rights that may be engaged,¹² including:

- the right of persons not to have their homes unlawfully or arbitrarily interfered with under article 17 of the ICCPR. International human rights law has accepted that this right can provide some protection against pollution that affects a person's quiet enjoyment of their home and also extends to any damage to residential property caused by subsidence that might result from such mining;
- the right of persons to the highest attainable standard of health guaranteed by article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), to the extent that the bill seeks to address concerns about pollution; and
- the right to an adequate standard of living (including the right to water) guaranteed by article 11 of the ICESCR, to the extent that it seeks to avoid contamination of water supplies.

Civil penalty provisions as involving 'criminal' charges

1.23 The bill proposes inserting a new Subdivision FB into Division 1 of Part 3 of the *Environment Protection and Biodiversity Conservation Act 1999*. The proposed new Subdivision creates a number of criminal offences and civil penalty provisions.¹³ Both relate to the same conduct.

1.24 The criminal offences created by proposed new section 24E are punishable by a maximum penalty of 7 years' imprisonment or 420 penalty units (currently

12 See PJCHR, *Third Report of 2013*, pp 75-76 (discussing the Environment Protection and Biodiversity Conservation Amendment (Moratorium on Aquifer Drilling Connected with Coal Seam Gas Extraction) Bill 2013)).

13 See proposed new sections 24E and 24D.

\$71,400), or both. The criminal offence provisions also impose an evidential burden on a defendant in relation to a number of issues.

1.25 The civil penalty provisions provide for different maximum penalties for individuals and corporations. These penalties are significant: the maximum penalties that may be imposed under the civil penalty provisions in the proposed new section 24D are 5,000 penalty units (currently \$850,000) for an individual and 50,000 penalty units for a body corporate (currently \$8.5 million).

1.26 While the civil penalty provisions are designated as ‘civil’ penalties for the purposes of Australian law, they may nonetheless qualify as ‘criminal’ offences for the purposes of human rights law, if they meet certain criteria. If so, they would attract the procedural and other protections guaranteed under articles 14 and 15 of the ICCPR in relation to the determination of criminal charges.

1.27 In determining whether the imposition of a penalty for particular conduct involves the determination of a ‘criminal charge’, international jurisprudence has identified the following factors to be taken into account: the classification of the act in domestic law, the nature of the offence, the purpose of the penalty, and the nature and the severity of the penalty. Classification as ‘civil’ under Australian law is not determinative. Where a prohibition is general in application, where the penalty is punitive and intended to deter (rather than award compensation for loss), and any financial penalty is significant, it may well be classified as involving a criminal charge and penalty for the purposes of article 14 of the ICCPR.

Right to be presumed innocent - evidential burden

1.28 The imposition of an evidential burden on a defendant in relation to the matters set out in proposed new section 24E(4), which provide a defence to the offences created by proposed section 24E, encroaches on the right to be presumed innocent guaranteed by article 14(2) of the ICCPR. A specific justification of this provision is required.

1.29 Proposed new section 24D(4) also imposes an evidential burden in relation to certain matters that constitute a defence to a proceeding alleging a violation of the civil penalty provisions contained in proposed new section 24D. If these civil penalties provisions are considered ‘criminal’ for the purposes of article 14 of the ICCPR, it is necessary to justify the encroachment on the right to be presumed innocent in article 14(2) of the ICCPR.

1.30 The committee intends to write to the Minister for Sustainability, Environment, Water, Population and Communities to:

- (a) seek clarification as to why the proposed civil penalty provisions in the bill should not be considered ‘criminal charges’ for the purposes of articles 14 and 15 of the ICCPR in light of the significant penalties that may be imposed for breach of those provisions; and**

- (b) ask how the imposition of an evidential burden on a defendant under proposed new sections 24D and 24E is justifiable.**