Defence Legislation Amendment (Woomera Prohibited Area) Bill 2014

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Law and Bills Digest Section

Contents

The Bills Digest at a glance ................................................... 2
History of the Bill ................................................................. 2
Purpose of the Bill ............................................................... 2
Structure of the Bill ............................................................. 2
Background ......................................................................... 2
  Review process and outcome .............................................. 3
Committee consideration .................................................... 3
  Foreign Affairs, Defence and Trade Committee ................. 3
  Senate Standing Committee for the Scrutiny of Bills .......... 3
  Parliamentary Joint Committee on Human Rights .............. 4
Statement of Compatibility with Human Rights ................. 4
Policy position of non-government parties/independents..... 4
Position of major interest groups ........................................ 4
Financial implications .......................................................... 4
Key issues and provisions—Part 1 ........................................ 5
  Application of Part VIB ..................................................... 5
  The Rules ........................................................................... 5
  Zones in the Woomera Prohibited Area ......................... 6
  Permission to be in the WPA ............................................. 6
  Offences ............................................................................. 6
  Compensation .................................................................... 7
  Review of decisions ......................................................... 7
  Infringement notices and demerit points ........................ 7
Key issues and provisions—Part 2 ........................................ 7

Date introduced: 27 March 2014
House: Senate
Portfolio: Defence
Commencement: The day after Royal Assent

Links: The links to the Bill, its Explanatory Memorandum and second reading speech can be found on the Bill’s home page, or through http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation

When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the ComLaw website at http://www.comlaw.gov.au/.
The Bills Digest at a glance
The Defence Legislation Amendment (Woomera Prohibited Area) Bill 2013 (the current Bill) is a response to the recommendations of the final report of the Review of the Woomera Prohibited Area. The Bill:

• Provides for the making of the Woomera Prohibited Area Rules by the Minister which will include, amongst other things, zones which are to be demarcated within that Area
• Creates a permit system for access to, and use by, non-Defence users of the Woomera Prohibited Area
• Introduces offences and penalties for entering the Woomera Prohibited Area without permission and for failing to comply with a condition of a permit and
• Provides for compensation for an acquisition of property from a person otherwise than on just terms that results from the operation of the new Part VIB of the Defence Act 1903.1

History of the Bill
Two previous versions of the current Bill (the previous Bills) have been introduced. The first version was introduced by the former Australian Labor Party (ALP) Government on 30 May 2013.2 That Bill lapsed when the 43rd Parliament was prorogued on 5 August 2013.

The second version—which was in equivalent terms to the first version—was introduced by ALP Senator Don Farrell, as a Private Senator’s Bill on 12 December 2013.3 That version of the Bill does not appear to be proceeding.

The current Bill differs slightly from the earlier versions. As comprehensive Bills Digests were prepared for the earlier versions of the Bill, this Bills Digest will emphasise the points of difference between the Bills.4

Purpose of the Bill
The purpose of the current Bill is to amend the Defence Act to establish a framework to allow access to the Woomera Prohibited Area by non-Defence users on a conditional basis.

Structure of the Bill
The Bill has two Parts:

• Part 1 contains general amendments to the Defence Act and
• Part 2 contains amendments to the Defence Act and Defence Force Regulations 1952 (the Regulations)5 relating to the operation of Part VII of the Regulations.

Background
The 127,000 kilometre expanse of northern South Australia, known as the Woomera Prohibited Area (WPA), is the world’s largest overland long-range weapons testing facility and has been operational since 1947.6 However from the 1980s onwards, areas of the land were made increasingly available to non-Defence users, including the resources sector. Local Indigenous groups and pastoral leaseholders also have an enduring presence across much of the WPA.7

In order to assess the most effective use of the WPA for both Defence and non-Defence interests, on 17 May 2010 the then Minister for Defence, Senator John Faulkner, called for a review ‘to make recommendations about the best use of the WPA in the national interest’.  

**Review process and outcome**

Details of the review, which was led by Dr Allan Hawke (the Hawke Review), are set out in the Bills Digests for the previous Bills.  

The *Review of the Woomera Prohibited Area—Final Report* (the report) was published on 4 February 2011 and made 65 recommendations. Within its numerous recommendations, the Hawke Review outlines a ‘co-existence model’ whereby Defence maintains primacy of the WPA, but non-Defence users have clarity regarding their access to specified areas of operation, incorporating both the available location and time of use.  

Recommendation 14 suggests the division of the WPA into three zones; a ‘red’ zone for exclusive Defence use, an ‘amber’ zone for regular Defence use, and a ‘green’ zone for occasional Defence use. By implementing a zonal ‘time-share’ arrangement, Defence is allocated ‘exclusion windows’ throughout the year limiting the non-Defence use of the WPA. This ranges from new non-Defence users’ total exclusion within the red zone, to up to 56 exclusion days in the green zone, pending notice. The excluded red zone comprises approximately eight per cent of the WPA, while the vast majority—some 75 per cent of the WPA area—is designated as the most accessible green zone. Importantly, the Hawke Review recommended:

> ... that existing mining operations, environmental organisations, Indigenous groups and pastoralists with an extant presence on the WPA, should continue to operate under their current access arrangements unless they choose to be administered under the proposed coexistence model.

The provisions of the current Bill give effect to that recommendation.  

**Committee consideration**

**Foreign Affairs, Defence and Trade Committee**

On 27 March 2014, the Bill was referred to the Foreign Affairs, Defence and Trade Legislation Committee (the Committee) for inquiry and report by 13 May 2014. At the time of writing this Bills Digest, the Committee had not published a report.

However, during the 43rd Parliament, the Committee conducted an inquiry into the first version of the Bill. Whilst the Committee did not prepare a final report at that time, it appears that this Bill responds to a number of the submissions which were made at that time. Those submissions are canvassed under the heading Key issues and provisions below.

**Senate Standing Committee for the Scrutiny of Bills**

At the time of writing this Bills Digest, the Scrutiny of Bills Committee had not commented on the current Bill. However the Scrutiny of Bills Committee reported on the content of the previous Bills noting that **proposed subsection 7ZTG(2)** created an offence of strict liability and may be a trespass on personal rights and freedoms. That being the case the Scrutiny of Bills Committee sought further information about the appropriateness of the
use of strict liability in relation to the offence. Whilst the Scrutiny of Bills Committee had not received a formal response to its inquiry at the time of writing this Bills Digest, the Explanatory Memorandum to this Bill provides greater detail. This issue is canvassed under the heading Key issues and provisions below.

**Parliamentary Joint Committee on Human Rights**

At this time of writing this Bills Digest, the Parliamentary Joint Committee on Human Rights (Human Rights Committee) had not commented on the current Bill.

However, the Human Rights Committee considered the previous version of the Bill which was introduced as a Private Senator’s Bill and noted that it engaged a number of human rights including the right to life, the right to liberty (including the prohibition against arbitrary detention), the right to freedom of movement, the right to be presumed innocent, the right to privacy and the right to culture. It was the view of the Human Rights Committee that the Bill did not appear to give rise to human rights concerns, except in relation to the following:

- powers exercisable without consent at defence access control points
- the seizure powers
- the power to arrest a person on defence premises without warrant and
- the potential impact on the rights of Indigenous persons of increased economic activity, including increased exploratory and mining activity, in the WPA.

The Committee sought further information on these issues from Senator Farrell. At the time of writing this Bills Digest, a response from the Senator had not been published by the Committee.

**Statement of Compatibility with Human Rights**

As required under Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth), the Government has assessed the Bill’s compatibility with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of that Act. Whilst the Government acknowledges that the Bill engages a number of human rights, it considers that the Bill is compatible.

**Policy position of non-government parties/independents**

The policy positions non-government parties have been canvassed in the Bills Digests to the previous Bills.

**Position of major interest groups**

The positions of all stakeholders have been canvassed in the Bills Digests to the previous Bills. Comments in relation to the differences between this Bill and the previous Bills are canvassed under the heading Key issues and provisions below.

**Financial implications**

According to the Explanatory Memorandum to the current Bill:

This Bill creates a system for the administration of access to the WPA including a permit system for the different types of non-Defence users of the WPA. It is anticipated that there will be increased non-Defence access to the WPA as a result of the introduction of new access arrangements which will require increased management and coordination by Defence.

The Bill provides that the Woomera Prohibited Area Rules may provide for the introduction of a cost recovery model, at some point in the future, to recover the expenses Defence incurs in managing non-Defence access to the WPA.

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20. The Statement of Compatibility with Human Rights can be found at pages 13–19 of the Explanatory Memorandum to the Bill.
22. Ibid.
The estimated $5.0 million annual costs associated with the new administrative arrangements required through implementing these amendments to enable access to the WPA will continue to be met from within the existing appropriation to the Department of Defence.  

**Key issues and provisions—Part 1**

Item 3 of Part 1 of the Bill inserts proposed Part VIB—The Woomera Prohibited Area into the Defence Act. The operation of proposed Part VIB is set out below.

**Application of Part VIB**

Part VII of the Regulations sets out rules for access to, activities on and transport in, certain ‘defence areas’. Proposed section 72TB sets out the persons to whom Part VII of the Regulations will continue to apply, once proposed Part VIB commences. This section differs from the previous versions of the Bill by the addition of proposed paragraphs 72TB(1)(m)–(p). The changes take the following matters into account:

- concerns expressed by the South Australian Government about potential unintended consequences for its land management and economic objectives regarding pastoral leases in the Woomera Prohibited Area—in particular, that any new holder of an existing pastoral lease would be subject to the new legislation and Rules. This was especially relevant in the area designated as the ‘Red Zone’, in which the previous Bill stated no new permits would be granted. The effect of such a restriction would be that the sale or transfer of pastoral leases in the Red Zone would be precluded
- concerns expressed by the Northern Territory Government about the potential for long disruptions to the railway, and the impact of that for tourism and freight delivery to the Northern Territory and
- concerns expressed by the Tarcoola-Darwin railway owners and operator about their status as ‘existing users’ in the Woomera Prohibited Area under the Defence Force Regulations 1952 and that the scope of their existing use includes the railway and all associated infrastructure.

The current revised proposed section 72TB operates to address these concerns.

**The Rules**

Proposed section 72TP provides that the Minister may, by legislative instrument, and with the agreement of the Industry Minister, make the Woomera Prohibited Area Rules (the Rules). The former ALP Government released an exposure draft of proposed Rules. No other draft has been released and the content of any future Rules will be decided by the current Government.

The Rules will prescribe those matters that are required or permitted by Part VIB to be prescribed, or are necessary or convenient to be prescribed for carrying out or giving effect to Part VIB of the Defence Act. The Bills Digests which were prepared in relation to the previous versions of the Bill commented on the terms of those Bills in relation to the exposure draft of the proposed Rules which were available at that time.

Legislative instruments must be tabled in each House within six sitting days following registration on the Federal Register of Legislative Instruments, even in cases where the instrument is not disallowable. Unless laid before each House within this time limit, a legislative instrument ceases to have effect. In this case, the Rules (when

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finally drafted) will be a disallowable instrument. This means that a Senator or Member of the House of Representatives may move a motion of disallowance within 15 sitting days of the day that the legislative instrument is tabled. The motion to disallow must be resolved or withdrawn within a further 15 sitting days of the day that the notice of motion is given. If the motion to disallow has not been dealt with during that 15 day period, the legislative instrument is taken to have been disallowed and will cease to have effect.  

Zones in the Woomera Prohibited Area

Proposed section 72TA of the Defence Act provides that the Rules may prescribe an area as the Woomera Prohibited Area (WPA). That area must be intended for use for the purposes of testing war materiel and may be used for those purposes. This ensures that Defence is the primary user of the WPA. Item 1 of Part 1 of the Bill amends subsection 71A(1) of the Defence Act so that the WPA is included in the definition of defence premises. This means that the exercise of the powers in Part VIA of the Defence Act is authorised within the WPA. 33

The Rules may prescribe zones within the WPA and make provision for exclusion periods within those zones.

Permission to be in the WPA

Proposed subsection 72TC(3) of the Defence Act provides that a person has permission to be at a place in the WPA if:

- a standing permission provides permission for the person to be at the place
- a permit provides permission for the person to be at the place or
- the person has the Minister’s permission to be at the place.

According to proposed section 72TD of the Defence Act, the Rules may provide permission for a person to be at a place in the WPA and that the permission may be subject to certain conditions.

Under proposed section 72TE of the Defence Act, the Rules may make provision for the granting of permits which give permission for persons to be at places in the WPA. The Rules may include provisions about the purpose of a permit, how to apply for a permit and matters such as the issuing and renewal of permits, when permits may be suspended or cancelled and any conditions which apply to a permit.

Proposed subsection 72TF of the Defence Act provides that the Minister may, on request, give written permission for a person to be at a place in the WPA. That permission must include the person’s name and be given in accordance with the Rules. The permission may be subject to any conditions imposed by the Minister or by the Rules.

Offences

The Bill provides for two offences in relation to being in the WPA. First, proposed subsections 72TC(1) and (2) of the Defence Act create a criminal offence where a person who is not a member of the Defence Force, the Secretary or an APS employee of the Department is at a place in the WPA and does not have permission to be in that place. The maximum penalty for the offence is imprisonment for two years or 120 penalty units, or both. 34

Second, proposed section 72TG of the Defence Act creates an offence of strict liability (that is, state of mind is irrelevant) where a person is at a place in the WPA and the person does, or refuses or fails to do, an act or thing and as a result fails to comply with a condition of the permission. 35 The defence of honest and reasonable mistake of fact is available for strict liability offences. This means that the imposition of strict liability will not criminalise honest errors and no person can be held liable if he or she had an honest and reasonable belief that they were complying with relevant obligations. The maximum penalty for the offence is 60 penalty units. 36

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32. Legislative Instruments Act 2003, section 42.
33. See P Pyburne, Defence Legislation Amendment (Security of Defence Premises) Bill 2010, Bills digest, 29, 2010–11, Parliamentary Library, Canberra, 2010, accessed 4 April 2014, for information about the powers exercisable to maintain the security of defence premises—in particular the use of force which is reasonable and necessary including the use of lethal force.
34. Section 4AA of the Crimes Act 1914 provides that a penalty unit is equivalent to $170. This means that the maximum pecuniary penalty is $20,400.
35. For an offence of strict liability created under a law there are no fault elements for any physical elements of the offence and the defence of mistake of fact is available. See sections 6.1 and 9.2 of the Criminal Code Act 1995 (Cth).
36. This means that the maximum penalty is $10,200.
As noted above (under the heading Committee Consideration) the Scrutiny of Bills Committee commented on the appropriateness of the use of strict liability. The Explanatory Memorandum for the current Bill states that:

Permit holders are granted access to the Woomera Prohibited Area on a conditional basis. As the area is used for testing Defence materiel, including weapons, adherence to permit conditions by permit holders is essential to protect the security of Defence activities and to protect the safety of all users of the range. Access to the Woomera Prohibited Area is only possible on a conditional basis and for this reason it is considered reasonable that breaching a condition of a permission should attract a strict liability offence. A strict liability offence provides a solid deterrent to breaching permit conditions and ensures the integrity of the permit regime, which aims to allow access to the Woomera Prohibited Area by non-Defence users in a safe and secure manner.37

Compensation

Under proposed section 72TK of the Defence Act, the Commonwealth is liable to pay a reasonable amount of compensation to a person if the operation of proposed Part VIB of the Defence Act would result in an acquisition of property, other than on just terms. This is consistent with section 51(xxxi) of the Constitution.38

In addition, proposed section 72TL of the Defence Act provides that the Rules may limit amounts payable by the Commonwealth for loss or damage in the WPA arising from a breach of a duty of care (whether statutory or at common law) in relation to the use of the WPA for testing war materiel.

Review of decisions

Proposed section 72TM of the Defence Act provides for a two tiered review process. Proposed subsection 72TM(1) of the Defence Act allows a person whose interests are affected by certain decisions to apply to the Minister for a review. However this internal review only applies to:

- a decision under section 72TF to give, or not to give, written permission for a person to be at a place in the WPA
- a decision of the Minister to suspend a permission under section 72TH if the Minister considers it necessary for the purposes of the defence of Australia and
- a decision of the Minister to give a direction under section 72TJ if the Minister considers it necessary for the purposes of the defence of Australia or to protect human life.

Proposed subsection 72TM(4) of the Defence Act authorises an application to be made to the Administrative Appeals Tribunal (AAT) for a review of a decision by the Minister on the review of a decision under section 72TF to give, or not to give, written permission for a person to be at a place in the WPA.

Infringement notices and demerit points

Under proposed subsections 72TP(4) and (6) of the Defence Act, the Rules may provide for a regime of financial penalties as an alternative to prosecution and for a system of demerit points, respectively. The purpose of the demerit point system is that a permit may be suspended or cancelled if the holder of the permit accrues a prescribed number of demerit points.

Key issues and provisions—Part 2

The previous versions of the Bill did not contain either of the items which are located in Part 2 of this current Bill.

Item 4 of part 2 of the Bill inserts proposed section 121A into the Defence Act to validate any declaration or action taken under regulation 35 of the Regulations. According to the Explanatory Memorandum this is a technical provision ‘inserted to avoid any doubt on the past applicability of the Defence Force Regulations to the Woomera Prohibited Area which may arise as a result of the establishment of the new access regime by the Bill’.39

Item 5 of Part 2 of the Bill repeals and replaces regulation 36 of the Regulations to modernise the existing compensation provision.

39. Explanatory Memorandum, p. 11.
Defence Legislation Amendment (Woomera Prohibited Area) Bill 2014

Members, Senators and Parliamentary staff can obtain further information from the Parliamentary Library on (02) 6277 2500.