

Chapter 2

Concluded matters

2.1 This chapter considers the responses of legislation proponents to matters raised previously by the committee. The committee has concluded its examination of these matters on the basis of the responses received.

2.2 Correspondence relating to these matters is included at Appendix 1.

Environment Protection and Biodiversity Conservation Amendment (Standing) Bill 2015

Portfolio: Environment

Introduced: House of Representatives, 20 August 2015

Purpose

2.3 The Environment Protection and Biodiversity Conservation Amendment (Standing) Bill 2015 (the bill) seeks to amend the *Environment Protection and Biodiversity Conservation Act 1999* (the Environment Act) to remove section 487 of the Environment Act. Currently, section 487 expands the meaning of 'person aggrieved' in the *Administrative Decisions (Judicial Review) Act 1977*.

2.4 Measures raising human rights concerns or issues are set out below.

Background

2.5 The committee first commented on the bill in its *Twenty-seventh Report of the 44th Parliament* (first report), and requested further information from the Minister for the Environment as to whether the bill was compatible with the right to health and a healthy environment.¹

2.6 The committee considered the minister's response in its *Thirty-fifth Report of the 44th Parliament* (previous report), and sought further information from the minister in order to conclude its examination of the bill.²

Removal of extended standing to seek judicial review of decisions or conduct under the Environment Act

2.7 Currently, section 487 of the Environment Act gives standing rights (the right to bring an action before the courts) to individuals and organisations who, at any time in the preceding two years, have engaged in a series of activities for the protection or conservation of, or research into, the Australian environment. This

1 Parliamentary Joint Committee on Human Rights, *Twenty-seventh Report of the 44th Parliament* (8 September 2015) 4-7.

2 Parliamentary Joint Committee on Human Rights, *Thirty-fifth Report of the 44th Parliament* (25 February 2016) 7-12.

means that currently those individuals and organisations can bring an action to seek judicial review of actions taken, or not taken, under the Environment Act. The bill would remove the right of these individuals and organisations to bring judicial review in relation to decisions made (or failed to be made) under the Environment Act or conduct engaged under that Act (or regulations).

2.8 The objectives of the Environment Act include protecting the environment and ecosystems and promoting ecologically sustainable development, which includes principles of inter-generational equity; that the present generation should ensure the health, diversity and productivity of the environment for the benefit of future generations.³

2.9 In its first report, the committee considered that removing the extended standing provisions could result in a failure to properly enforce the protections under the Environment Act, and as a result may engage and limit the right to health and a healthy environment.

Right to health and a healthy environment

2.10 The right to health is guaranteed by article 12(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR), and is fundamental to the exercise of other human rights. The right to health is understood as the right to enjoy the highest attainable standard of physical and mental health, and to have access to adequate health care and live in conditions that promote a healthy life (including, for example, safe and healthy working conditions; access to safe drinking water; adequate sanitation; adequate supply of safe food, nutrition and housing; healthy occupational and environmental conditions; and access to health-related education and information).

Compatibility of the measure with the right to health and a healthy environment

2.11 The statement of compatibility did not consider whether the right to health and a healthy environment was engaged by this measure. The committee therefore sought the advice of the Minister for the Environment as to whether the bill limits the right to a healthy environment and, if so, further information as to the legitimate objective, rational connection and proportionality of the measures. The minister's response explained that while there is no standalone right to a healthy environment, the right to health embraces a wide range of socio-economic factors that promote conditions in which people can lead a healthy life.

2.12 The minister agreed that the existing extended standing provisions under the Environment Act may facilitate judicial review that ensures that environmental law is correctly applied, thereby protecting public health.

2.13 The minister's response noted the existence of an emerging risk that the extended standing provisions are being used to deliberately disrupt and delay key

3 See section 3 of the *Environment Protection and Biodiversity Conservation Act 1999*.

projects and infrastructure development. The committee considered that this may be a legitimate objective to justify the limitation on the right to health for the purposes of international human rights law, however, further evidence as to the nature and extent of the emerging risk was required.

2.14 The committee therefore sought further advice from the Minister for the Environment as to whether the measure imposes a justified limitation on the right to health, including evidence as to the nature and extent of the emerging risk of the extended standing provisions being used to disrupt and delay key project and infrastructure development.

Minister's response

Thank you for your letter of 25 February 2016 in which the Parliamentary Joint Committee on Human Rights requested further advice regarding the human rights compatibility of the Environment Protection and Biodiversity Conservation Amendment (Standing) Bill 2015.

In particular, the Committee has requested further advice as to whether the repeal of the extended standing provisions of the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) imposes a justified limitation on the right to health. The Committee has also requested evidence as to the nature and extent of the emerging risk of the extended standing provisions being used to disrupt and delay key project and infrastructure development.

In response to the Committee's request, I refer the Committee to a campaign document titled *Stopping the Australian Coal Export Boom: Funding proposal for the Australian anti-coal movement* prepared in 2011 by a number of environmental organisations. As I mentioned in my second reading speech, the strategy outlined in the document is "to 'disrupt and delay' key projects and infrastructure while gradually eroding public and political support for the industry and continually building the power of the movement to win more."

In relation to litigation the document goes on to state that "legal challenges can stop projects outright, or can delay them, in order to buy time to build a much stronger movement and powerful public campaigns. They can also expose the impacts, increase costs, raise investor uncertainty, and create a powerful platform for public campaigns" (section 4.1).

The purpose of the Environment Protection and Biodiversity Conservation Amendment (Standing) Bill 2015 is to bring the arrangements for standing to make a judicial review application for a decision made under the EPBC Act in-line with the broad Commonwealth standing provisions. This will ensure that those people, organisations or community groups who have a genuine and direct interest in a matter are able to challenge EPBC Act administrative decisions as provided for under the *Administrative*

Decisions (Judicial Review) Act 1977 and the *Judiciary Act 1903*. This is consistent with the majority of Commonwealth legislation.⁴

Committee response

2.15 The committee thanks the Minister for the Environment for his response.

2.16 The committee notes the importance of ensuring that key projects and infrastructure development are not delayed where all applicable environmental standards have been met.

2.17 The committee notes the minister's advice regarding the prevalence of disruption campaigns as the justification for the measures in the bill. The committee considers that the minister's response has not fully explained the link between these campaign materials and the use of the extended standing provisions in the Environment Act so as to fully justify the provisions in the bill.

2.18 Nevertheless, the committee notes that the bill would not change existing environmental standards that seek to protect the right to health through the protection of the environment. The committee also notes that the bill preserves the ability of people with a genuine and direct interest in a matter to challenge decisions under the Environment Act.

2.19 Accordingly, given the existing environmental protections under the *Environment Protection and Biodiversity Conservation Act 1999*, which seek to protect the right to health, removing the extended standing provisions may be compatible with the right to health.

4 See Appendix 1, letter from the Hon Greg Hunt MP, Minister for the Environment, to the Hon Philip Ruddock MP (received 13 April 2016) 2.

Building Code (Fitness for Work/Alcohol and Other Drugs in the Workplace) Amendment Instrument 2015 [F2015L01462]

Portfolio: Employment

Authorising legislation: Fair Work (Building Industry) Act 2012

Last day to disallow: 3 December 2015 (Senate)

Purpose

2.20 The Building Code (Fitness for Work/Alcohol and Other Drugs in the Workplace) Amendment Instrument 2015 (the instrument) amends the Building Code 2013 (the code). The amendments require building contractors or building industry participants to show the ways in which they are managing drug and alcohol issues in the workplace in their work health safety and rehabilitation (WHS&R) management systems. For certain types of building work, to which the Commonwealth is making a significant contribution, building contractors and industry participants must also include a fitness for work policy to manage alcohol and other drugs in the workplace in their management plan for WHS&R.

2.21 Measures raising human rights concerns or issues are set out below.

Background

2.22 The committee first reported on the instrument in its *Thirtieth Report of the 44th Parliament* (first report) and requested further information from the Minister for Employment as to whether the instrument was compatible with the right to privacy.¹

2.23 The committee considered the minister's response in its *Thirty-fourth Report of the 44th Parliament* (previous report) and sought further information from the minister in order to conclude its examination of the instrument.²

Alcohol and drug testing of construction workers

2.24 Schedule 3 of the instrument sets out requirements relating to drug and alcohol testing that a fitness for work policy must address.

2.25 The committee considered in its previous analysis that establishing a policy framework for testing workers for drugs and alcohol engages and limits the right to privacy.

1 Parliamentary Joint Committee on Human Rights, *Thirtieth Report of the 44th Parliament* (10 November 2015) 61-63.

2 Parliamentary Joint Committee on Human Rights, *Thirty-fourth Report of the 44th Parliament* (23 February 2016) 5-8.

Right to privacy

2.26 Article 17 of the International Covenant on Civil and Political Rights (ICCPR) prohibits arbitrary or unlawful interferences with an individual's privacy, family, correspondence or home. The right to privacy includes protection of our physical selves against invasive action, including:

- the right to personal autonomy and physical and psychological integrity, including respect for reproductive autonomy and autonomy over one's own body (including in relation to medical testing); and
- the prohibition on unlawful and arbitrary state surveillance.

Compatibility of the measure with the right to privacy

2.27 The statement of compatibility acknowledges that drug and alcohol testing implemented under the instrument engages the right to privacy.

2.28 The committee has previously considered that the objective, which is to ensure that building and construction workplaces are drug and alcohol-free, is important. The committee also considered that the objective is legitimate for the purposes of international human rights law, and that the measures are rationally connected to the objective.

2.29 However, the committee queried whether the instrument imposes a proportionate limitation on the right to privacy. On the face of the instrument, there is no requirement that the drug and alcohol policy have appropriate and necessary safeguards, or indeed any safeguards, to protect the privacy of individuals who are subject to testing.

2.30 The minister's first response did not explain the safeguards that would apply to drug and alcohol testing so as to ensure that the limitation on the right to privacy is a reasonable and proportionate measure to achieve the stated objective.

2.31 The minister stated that the measures do not prescribe the contents of a fitness for work policy, which would be decided at a workplace level subject to existing safety, privacy and industrial laws.

2.32 The committee considered that more information was required to establish that there were sufficient safeguards around drug and alcohol testing. The committee therefore requested further advice from the Minister for Employment as to the proportionality of the requirement that construction workers undergo drug and alcohol testing, in particular, whether there are sufficient safeguards in place to protect the right to privacy.

Minister's response

This letter is in response to your letter of 23 February 2016 concerning the *Building Code (Fitness for Work/Alcohol and Other Drugs in the Workplace) Amendment Instrument 2015*.

The Parliamentary Joint Committee on Human Rights (the Committee) sought my further advice about the human rights compatibility of this instrument. I consider the measures are proportional and it is in the public interest to take steps to ensure that construction workers are not affected by drugs or alcohol in the workplace.

Should the Committee require further information, please contact my office.³

Committee response

2.33 The committee thanks the Minister for Employment for her response.

2.34 The committee notes that the minister's response merely states that the measures are 'proportional' and in the public interest. The minister's response provides no evidence or reasoning to support this view.

2.35 The committee's usual expectation where a measure may limit a human right is that there is a reasoned and evidence-based explanation of how that limitation is justified. Such a justification must demonstrate that the measure is proportionate. This conforms with the committee's Guidance Note 1,⁴ and the Attorney-General's Department's guidance on the preparation of statements of compatibility and advice on justifying limitations.⁵

2.36 Alcohol and drug testing is common in law enforcement agencies and the committee has previously considered that such schemes are compatible with the right to privacy on the basis that these testing regimes include rigorous safeguards. For example, the Australian Border Force (Alcohol and Drug Tests) Rule 2015, which sets out the rules for alcohol and drug testing of officers of the Australian Border Force, includes a suite of safeguards including that:

- (a) the alcohol or drug test must be conducted in a respectful manner and in circumstances affording reasonable privacy;

3 See Appendix 1, letter from Senator the Hon Michaelia Cash, Minister for Employment, to the Hon Philip Ruddock MP (received 13 April 2016) 2.

4 Appendix 2; see Parliamentary Joint Committee on Human Rights, *Guidance Note 1—Drafting Statements of Compatibility* (December 2014) http://www.aph.gov.au/~media/Committees/Senate/committee/humanrights_ctte/guidance_notes/guidance_note_1/guidance_note_1.pdf.

5 See Attorney-General's Department, Template 2: Statement of compatibility for a bill or legislative instrument that raises human rights issues at <http://www.ag.gov.au/RightsAndProtections/HumanRights/PublicSector/Pages/Statementofcompatibilitytemplates.aspx>.

- (b) the test must not be conducted in the presence or view of a person whose presence is not necessary and must not involve the removal of more clothing than is necessary for the conduct of the test;
- (c) if a hair sample is required, that it collected in the least painful manner and not from the genitals or buttocks;
- (d) a body sample collected for an alcohol or drug test must be kept in a secure location and destroyed after a prescribed period; and
- (e) that information revealed by the drug and alcohol test be shared only with individuals authorised by the legislative instrument.⁶

2.37 In this instance, the legislative instrument establishes a requirement that a fitness for work policy includes frequent and periodic drug and alcohol testing without providing for any safeguards as to how the information obtained from such testing is to be kept, used or shared.

2.38 In the absence of any further advice or reasoning from the Minister for Employment as to any safeguards which are in place, even recognising the important objective of ensuring construction workplaces are drug and alcohol-free, the committee can only conclude that the instrument provides insufficient safeguards to ensure that the requirement that construction workers undergo drug and alcohol testing is a proportionate limitation on the right to privacy.

6 Australian Border Force (Alcohol and Drug Tests) Rule 2015 (F2015L00973), sections 9-12.

Royal Commissions Amendment Regulation 2016 (No. 1) [F2016L00113]

Portfolio: Prime Minister and Cabinet

Authorising legislation: Royal Commissions Act 1902

Last day to disallow: 21 June 2016 (Senate)

Purpose

2.39 The Royal Commissions Amendment Regulation 2016 (No. 1) (the instrument) amends the Royal Commissions Regulations 2001 (the principal regulations) to enable information gathered by the Royal Commission into Trade Union Governance and Corruption (TURC) to be given, accessed and used by different persons and bodies.

2.40 Witnesses before Royal Commissions are afforded only a limited privilege against self-incrimination (as per section 6A of the *Royal Commissions Act 1902* (RC Act)), and the instrument dispenses with the requirement to individually notify the person or body who initially provided such information to the TURC, when information will be transferred to a different person or body.

2.41 Measures raising human rights concerns or issues are set out below.

Background

2.42 The committee previously considered the instrument in its *Thirty-sixth Report of the 44th Parliament* (previous report), and requested further information from the Assistant Minister to the Prime Minister as to whether the instrument was compatible with the right to a fair trial, fair hearing rights and the right to privacy.¹

Sharing of information in circumstances where the witness was not afforded the privilege against self-incrimination

2.43 The instrument enables information gathered by the TURC, in circumstances where the witness was not afforded the privilege from self-incrimination, to be given, accessed and used by different persons and bodies without notification to the person or body who initially provided it to the TURC.

2.44 The committee considered in its previous report that the measure engages the right to a fair trial, fair hearing rights and the right to privacy.

Right to a fair trial and fair hearing rights

2.45 The right to a fair trial and fair hearing rights are protected by article 14 of the International Covenant on Civil and Political Rights (ICCPR). The right applies to both criminal and civil proceedings, to cases before both courts and tribunals and to

1 Parliamentary Joint Committee on Human Rights, *Thirty-sixth Report of the 44th Parliament* (16 March 2016) 14-18.

military disciplinary hearings. The right guarantees to all persons a fair and public hearing by a competent, independent and impartial tribunal established by law.

2.46 Specific guarantees of the right to a fair trial in the determination of a criminal charge guaranteed by article 14(1) are set out in article 14(2) to (7). These include the presumption of innocence (article 14(2)) and minimum guarantees in criminal proceedings, such as the right not to incriminate oneself (article 14(3)(g)) and a guarantee against retrospective criminal laws (article 15(1)).

Compatibility of the measure with the right to a fair trial and fair hearing rights

2.47 The statement of compatibility explains that the provision of access and use of information gathered by the TURC is for the purposes of expediting the prosecution of criminal and civil wrongdoing and the committee previously acknowledged that this is a legitimate objective. The committee also considered that the measures are rationally connected to this legitimate objective.

2.48 However, the committee considered that the statement of compatibility had not demonstrated that the instrument imposes a proportionate limitation on the right to a fair trial and fair hearing rights in pursuit of that legitimate objective.

2.49 The committee considered that sharing information gathered by the TURC, in circumstances where the witness was not afforded the privilege from self-incrimination, to be given, accessed and used by different persons and bodies for purposes as broad as 'the administration of a law' engages and limits the right to a fair trial and fair hearing rights. The committee therefore sought the advice of the Assistant Minister to the Prime Minister as to whether the measure is a proportionate means of achieving the stated objective.

Right to privacy

2.50 Article 17 of the ICCPR prohibits arbitrary or unlawful interferences with an individual's privacy, family, correspondence or home. The right to privacy includes respect for informational privacy, including:

- the right to respect for private and confidential information, particularly the storing, use and sharing of such information; and
- the right to control the dissemination of information about one's private life.

Compatibility of the measure with the right to privacy

2.51 Under the RC Act, it is an offence to fail to give evidence or produce documents to a Royal Commission if a person is summonsed to appear or produce documents.² When giving evidence, which may be on oath or affirmation, a person is not excused from answering a question on the grounds of self-incrimination, or other grounds of confidentiality.³

2 RC Act, sections 3 and 6B.

3 RC Act, section 6A.

2.52 The statement of compatibility acknowledged that this engages the right to privacy. As noted above at paragraph [2.47], the committee accepted that the measure pursues a legitimate objective, and that it is rationally connected to this legitimate objective. The committee had concerns regarding the proportionality of the measure.

2.53 The statement of compatibility did not explain why it is necessary to permit the provision of access and use of all information gathered by the TURC. For example, it is unclear, whether the regulation could result in the provision of confidential information to another person or body without consent.

2.54 The committee also considered that the statement of compatibility did not sufficiently explain why it is necessary to share information gathered by the TURC to a person or body 'responsible for advising a Minister... about the administration of a law,' if the intention is that the records be used to expedite the prosecution of criminal and civil wrongdoing.

2.55 The committee therefore sought the advice of the Assistant Minister to the Prime Minister as to whether the measure is a proportionate means of achieving the stated objective.

Assistant Minister's response

I note the Committee considers that this transfer of information engages the right to privacy and the rights to a fair trial and fair hearing. These rights are said to be engaged because when a witness gives evidence to a Royal Commission they are not able to invoke the privilege against self-incrimination (unless there are offence charges on foot). The Committee acknowledges that the information transfer is 'rationally connected' to the legitimate objective of expediting the prosecution of criminal and civil wrongdoing. However, the Committee has requested more information to support that the transfer of information authorised by the Regulation is a proportionate limitation on the right to a fair trial and fair hearing rights in pursuit of that legitimate objective.

The partial abrogation of the privilege against self-incrimination in the *Royal Commissions Act 1901* supports a Commissioner's function to inquire into matters of public importance. To the extent any records contain incriminating evidence given by a witness, the Royal Commission Act also gives some protection to the witness through the engagement of 'use' immunity (section 6DD). In this way, the evidence cannot be used against the person in any civil or criminal proceeding but may be used to obtain further evidence against the person. The Regulation does not abrogate that protection.

The Letters Patent expressly commissioned Commissioner John Dyson Heydon AC QC to inquire, in part, into any conduct which may amount to a breach of any law, regulation or professional standard by any officers of an employee association, in relation to that entity.

When the Royal Commission was operating, the Commissioner had power to communicate information that may relate to a contravention of a law to certain persons and bodies, including to Attorneys-General, the Director of Public Prosecutions, police and a person or authority responsible for the administration or enforcement of the law. Now that the Commission has ceased, the Regulation appropriately complements that power by enabling the Secretary to continue to give records, upon request, to a person or body that has law enforcement functions or a responsibility to advise a Minister about the administration of a law. The records would need to be relevant to the performance of those functions.

As further safeguards to privacy, fair trial and hearing rights, the receiving person or body will be obliged to ensure the 'use' immunity is not infringed, as well as to comply with any other obligations affecting a person's rights when discharging duties in connection with law enforcement or the administration of the law.

In so far as the statement of compatibility states that 'provision of access to the Commission's records is the only way by which criminal and civil offences can be further investigated and prosecuted', I also note that statement is intended to clarify that while a Royal Commission has strong information gathering powers it does not have power to enforce a law.⁴

Committee response

2.56 The committee thanks the Assistant Minister to the Prime Minister for his response.

2.57 Under the RC Act, it is an offence to fail to give evidence or produce documents to a Royal Commission if a person is summonsed to appear or produce documents.⁵ When giving evidence, which may be on oath or affirmation, a person is not excused from answering a question on the grounds of self-incrimination, or other grounds of confidentiality.⁶ These broad powers granted to a Royal Commission are not ordinarily available to other agencies of government.

2.58 The RC Act is designed to enable the establishment of royal commissions with significant information gathering powers but not law enforcement powers. Royal commissions have historically been established to inquire into often complex and systemic issues that have thwarted traditional law enforcement efforts.

2.59 The investigative functions of a royal commission sit, in part, outside the protections of the right to a fair trial as a royal commission is not determining a criminal charge but undertaking a broader examination of an issue.

4 See Appendix 1, letter from the Hon Dr Peter Hendy MP, Assistant Minister to the Prime Minister, to the Hon Philip Ruddock MP (received 18 April 2016) 1-2.

5 RC Act, sections 3 and 6B.

6 RC Act, section 6A.

2.60 However, article 14 and the right to a fair trial, is directly relevant where a person is required to give information to a royal commission which may incriminate themselves and that incriminating information can be used either directly or indirectly by law enforcement agencies to investigate criminal charges.

2.61 The assistant minister's response notes that the RC Act contains a 'use immunity; such that where a person has been required to give incriminating evidence, that evidence cannot be used against the person in any civil or criminal proceeding but may be used to obtain further evidence against the person.

2.62 Ordinarily, the committee looks to both a 'use' and a 'derivative use' immunity to justify limitations on the protections against self-incrimination. A 'derivative use' immunity provides that self-incriminatory information or documents provided by a person cannot be used to investigate unlawful conduct by that person but can be used to investigate third parties.

2.63 The need for both a 'use' and a 'derivative use' immunity where the privilege against self-incrimination is abrogated is consistent with the *Commonwealth Guide to Framing Offences*.⁷

2.64 The assistant minister's response does not explain the need to exclude 'derivative use' immunities from the RC Act and accordingly does not justify the limitation on the right to a fair trial (right not to incriminate oneself). Accordingly, the committee considers that the RC Act may warrant further scrutiny for compatibility with human rights.

2.65 Noting these concerns with the RC Act, the instrument itself does not expand the powers of the royal commission nor remove the 'use immunity' that attaches to the evidence that the commission collected in circumstances where an individual was required to provide self-incriminating evidence. Accordingly, the committee's primary concern is with the RC Act and not the instrument.

2.66 In relation to the right to privacy, records of the royal commission may only be given to a person or body that has law enforcement functions or a responsibility to advise a minister about the administration of a law. In addition, the records can only be requested when they are necessary for the performance of these functions. The committee considers that these restrictions are sufficient to ensure that the instrument only imposes a proportionate limitation on the right to privacy.

2.67 The committee's assessment of the sharing of information in circumstances where the witness was not afforded the privilege against self-incrimination against articles 14 and 17 of the International Covenant on Civil and Political Rights (right

7 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (September 2011) 27, available at <https://www.ag.gov.au/Publications/Documents/GuidetoFramingCommonwealthOffencesInfringementNoticesandEnforcementPowers/A%20Guide%20to%20Framing%20Cth%20Offences.pdf>.

to a fair trial, fair hearing rights and the right to privacy) is that the measure may be compatible with international human rights law.

The Hon Philip Ruddock MP

Chair