

Chapter 2 - Concluded matters

This chapter lists matters previously raised by the committee and considered at its meeting on 27 October 2014. The committee has concluded its examination of these matters on the basis of responses received by the proponents of the bill or relevant instrument makers.

Building and Construction Industry (Improving Productivity) Bill 2013

Portfolio: Employment

Introduced: House of Representatives, 14 November 2013

Purpose

2.1 The Building and Construction Industry (Improving Productivity) Bill 2013 (the bill) was introduced with the Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013. The bill seeks to:

- re-establish the Australian Building and Construction Commissioner (ABC Commissioner) and the Australian Building and Construction Commission;
- enable the minister to issue a Building Code;
- provide for the appointment and functions of the Federal Safety Commissioner;
- prohibit certain unlawful industrial action;
- prohibit coercion, discrimination and unenforceable agreements;
- provide the ABC Commissioner with powers to obtain information;
- provide for orders for contraventions of civil remedy provisions and other enforcement powers; and
- make miscellaneous amendments in relation to self-incrimination, protection of liability against officials, admissible records and documents, protection and disclosure of information, powers of the Commissioner in certain proceedings, and jurisdiction of courts.

Background

2.2 The committee reported on the bill in its *Second Report of the 44th Parliament*, and considered the Minister for Employment's response in its *Tenth Report of the 44th Parliament*.

Committee view on compatibility

Right to freedom of association and right to form and join trade unions

Proposed prohibition on picketing and restrictions on industrial action

2.3 The committee sought the further advice of the minister as to whether the proposed prohibition on picketing and further restrictions on industrial action are compatible with the right to freedom of association, and particularly:

- whether the proposed changes are aimed at achieving a legitimate objective;
- whether there is a rational connection between the limitation and that objective; and
- whether the limitation is a reasonable and proportionate measure for the achievement of that objective.

Right to freedom of assembly and freedom of expression

2.4 The committee sought the further advice of the minister as to whether the proposed prohibition on picketing is compatible with the right to freedom of assembly and freedom of expression, and particularly:

- whether the proposed changes are aimed at achieving a legitimate objective;
- whether there is a rational connection between the limitation and that objective; and
- whether the limitation is a reasonable and proportionate measure for the achievement of that objective.

Minister's response

The Committee has sought my further advice on the proposed prohibition on picketing and restrictions on industrial action and whether these measures are compatible with the right to freedom of assembly and expression and the right to freedom of expression. The Bill will not prevent lawful peaceful assembly.

The Bill's statement of compatibility with human rights and my previous response to the Committee clearly explains the over-arching objective of the Bill - to restore respect for the rule of law in the building and construction industry - and thoroughly sets out the rational connection between the limitations contained in the Bill and this objective.

Existing laws do not adequately regulate the appalling unlawful behaviour that takes place in this industry. The proposed picketing provision will provide a statutory basis for the Australian Building and Construction Commission or directly affected persons to make application to a Court of competent jurisdiction in respect of those engaging in unlawful action, as defined in the Bill; action like that of the CFMEU at the Myer Emporium site in August 2012 which went far beyond an exercise of a right to peaceful assembly and proactively restricted the right of persons to access or leave certain building sites.

In that case, the affected party (Grocon Pty Ltd) took strong and decisive action to seek to enforce and protect its rights. Despite obtaining interlocutory injunctive relief from the Supreme Court of Victoria, the CFMEU-organised conduct continued and ultimately resulted in findings of criminal contempt against the CFMEU. Note, however, that the affected party's underlying substantive claim for compensation for the economic harm inflicted by the conduct is yet to be considered or determined by the Court. There are industry participants who are not able to withstand the economic harm caused by this type of action and do not have the resources to seek and pursue legal remedies to which they are entitled. Some industry participants are also particularly vulnerable to threats of further picketing action should they seek to exercise their rights. Related to the example given above, are allegations made by a contractor to Grocon Pty Ltd that it has suffered retribution from the CFMEU because it sought to protect its interests and exercise its lawful rights (the contractor, Boral Limited, has since commenced its own civil proceedings and its Chief Executive Officer was separately called to give evidence in respect of this circumstance to the Royal Commission into Trade Union Corruption). Whilst noting these matters are still before the Courts and the Royal Commission, if proven, this case is a powerful illustrative example of the practical realities facing the building and construction industry.

Further, section 47 will provide a statutory remedy against defined unlawful picketing which can be pursued by an independent Commonwealth regulator on behalf of affected parties. Whilst directly affected parties are able to make application under the Bill, only very few have the economic resources to enforce their legal remedies and some parties may not seek to pursue legal remedies for fear of future reprisals. Allowing the independent government regulator in the Australian Building and Construction Commission to make application to a Court against parties who engage in unlawful picketing will act as a disincentive to those to who engage in unlawful behaviour and will change the culture of the industry for the better.¹

Committee's response

2.5 The committee thanks the minister for his response.

Right to freedom of association and right to form and join trade unions

2.6 The committee notes that the response does not directly address the committee's request as to whether the proposed measures are compatible with the right to freedom of association. The Minister's reference to 'lawful' 'peaceful assembly' is circular, as it is the way in which assembly is made lawful that is the focus of the committee's inquiry. Based on this response and on the information

1 See Appendix 1, Letter from Senator the Hon Eric Abetz, Minister for Employment, to Senator Dean Smith (dated 23 September 2014) 2.

previously provided, the committee does not consider that the prohibition on picketing has been sufficiently justified so as to be a permissible limit on the right to freedom of association in accordance with international human rights law. As noted previously in its *Tenth Report of the 44th Parliament*, the right to strike, including picketing activities, is protected under the right to freedom of association.² As noted by the committee in *Practice Note 1* international and comparative human rights jurisprudence can be useful sources for understanding the nature and scope of the human rights defined in *Human Rights (Parliamentary Scrutiny) Act 2011*. The Committee notes that ILO standards and jurisprudence are the practice of the international organisation with recognised and long-established expertise in the interpretation and implementation of these rights. ILO supervisory bodies have indicated that the right to strike may be limited on the basis of acute national emergencies, the provision of essential services or in the case of violence.³ The ILO Committee of Experts on the Application of Conventions and Recommendations has specifically stated that 'restrictions on strike pickets and workplace occupations should be limited to cases where the action ceases to be peaceful.'⁴ With respect to picketing, the committee notes that the proposed measures go substantially beyond this kind of limitation.

2.7 The committee further notes that Australia already has in place substantial regulation of industrial action under the *Fair Work Act 2009* and the *Competition and Consumer Act 2010* which goes beyond what UN supervisory bodies have considered permissible for the purposes of the right to freedom of association.⁵ In addition to the proposed prohibition on picketing activity, the committee notes that the bill also seeks to introduce other measures that may further limit the right to strike including those measures contained in proposed sections 8, 48 and 49.

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- 2 See Parliamentary Joint Committee on Human Rights, *Tenth Report of the 44th Parliament* (August 2014) 52; See, eg. ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR), Observation Concerning Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), Australia, 99th ILC session, 2009 http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:2314863 (accessed 5 August 2014).
 - 3 See, ILO, *Freedom of association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO*, fifth edition, 2006, [547]-[563], [570 – 594].
 - 4 ILO, *General Survey on freedom of association and collective bargaining*, 1994 [174].
 - 5 See Parliamentary Joint Committee on Human Rights, *Tenth Report of the 44th Parliament* (August 2014) p. 54; See, eg. ILO CEACR, Observation Concerning Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), Australia, 103rd ILC session, 2013 http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:314188 (accessed 5 August 2014).

2.8 The committee therefore considers, based on the information provided, that the prohibition on picketing, and the further restrictions on industrial action, are incompatible with the right to freedom of association and the right to form and join trade unions.

Right to freedom of assembly and freedom of expression

2.9 The committee does not consider that the minister's response demonstrates that the limitations on the right to freedom of assembly and freedom of expression have been sufficiently justified as reasonable, necessary and proportionate in pursuit of a legitimate objective.

2.10 The committee notes that the minister's response makes a general reference to the need for the measure due to 'appalling unlawful behaviour that takes place in this [the construction] industry.' Such statements of a generalised nature do not substantially assist the committee in providing a reasoned and evidence based assessment of the human rights compatibility of the measure. It is not a sufficient justification of a limitation on human rights to merely refer to the unlawfulness of conduct (including industrial action or strikes)⁶ under Australian domestic law;⁷ evidence and detailed analysis is required, to show why the limitation is necessary.

2.11 The committee notes that the minister's response identifies another objective of the legislation as being to prevent economic loss. However, there is no consideration by the minister of whether less restrictive measures would support this aim. The committee is concerned that proposed section 47 has potentially very broad application and therefore may lack the requisite degree of proportionality. The committee notes that the section may capture protest activities which incorporate pickets as a form of action, and that to do so goes beyond the legitimate aim of the

6 See, for example, UN Committee on Economic Social and Cultural Rights, Concluding Observations on Australia, E/C.12/AUS/CO/4, 12 June 2009, p. 5: 'The Committee is also concerned that before workers can lawfully take industrial action at least 50 per cent of employees must vote in a secret ballot and a majority must vote in favour of taking the industrial action which unduly restricts the right to strike, as laid down in article 8 of the Covenant and ILO Convention No. 87 (1948) concerning Freedom of Association and Protection of the Right to Organise.(art. 8). The Committee recommends that the State party continue its efforts to improve the realization of workers rights under the Covenant. It should remove, in law and in practice, obstacles and restrictions to the right to strike, which are inconsistent with the provisions of article 8 of the Covenant and ILO Convention No. 87 . In particular, the Committee recommends that the State party abrogate the provisions of the Building and Construction Industry Improvement Act 2005 that imposes penalties, including six months of incarceration, for industrial action and consider amending the Fair Work Act. 2009.'

7 See Vienna Convention on the Law of Treaties of 1969, article 27 (a state cannot use the provisions of its own law or deficiencies in that law to answer a claim against it for breaching its obligations under international law).

legislation.⁸ As previously noted by the committee in its *Tenth Report of the 44th Parliament*, protest activities are already regulated under civil and criminal laws relating to protest actions.⁹

2.12 The committee therefore considers, based on the information provided, that the prohibition on picketing is likely to be incompatible with the right to freedom of assembly and the right to freedom of expression.

Right to privacy

Disclosure of information

2.13 The committee sought the further advice of the Minister as to whether the proposed override provisions in proposed sections 61(7) and 105 are compatible with the right to privacy, and particularly:

- whether there is a rational connection between the limitation and a legitimate objective; and
- whether the limitation is a reasonable and proportionate measure for the achievement of that objective.

Minister's response

In relation to sections 61(7) and 105 of the Bill, the Committee has sought additional information on whether there is a rational connection between the limitation and the legitimate objective, and whether the limitation is a reasonable and proportionate measure for the achievement of that objective. The Committee has indicated that it is not satisfied that my response in respect of section 61(7) and 105 demonstrated the need for these provisions.

The legitimate objective of these sections is to grant the Australian Building and Construction Commission sufficient powers and functions to effectively regulate those aspects of the building and construction industry in respect of which the Bill makes the Australian Building and Construction Commission responsible.

Regarding the rational connection between the limitation and the legitimate objective, these provisions (along with the majority of the Bill) are based on the findings of the Cole Royal Commission. This Commission

8 For example, the 'green bans' was an environmental campaign initiated by the Builders' and Labourers' Federation (BLF) that is now credited with saving large parts of Sydney from overdevelopment including areas such as the Rocks and Centennial Park. The builders labourers refused to work on projects in this campaign which they considered were environmentally or socially undesirable.

9 See, for example, *Crimes Act 1900 (NSW) s 5445C* (which sets out the offence of unlawful assembly); *Summary Offences Act 1988 (NSW) s 6* (which sets out the offence of obstruction of people or traffic). See, also, *Competition and Consumer Act 2010, s45D*, *Maritime Union of Australia and oths v Patrick Stedores Operations Pty Ltd and Anor [1998] VICSC*.

undertook an exhaustive investigation into the conduct of parties in the building and construction industry. As a result of its investigations, the Cole Royal Commission produced 23 volumes of findings and 212 recommendations. Rarely has a more thorough investigation of a sector of the Australian economy been undertaken.

Volume II of the Cole Royal Commission gave extensive consideration to the steps that would be needed to achieve cultural change in the building and construction industry. One of the primary recommendations was for the establishment of the Australian Building and Construction Commission. This stemmed from the wide variety of laws and regulators that played a role in the building and construction industry but whose areas of responsibility did not allow for an adequate focus on the industry, or the regulators were hindered by their lack of expertise in dealing with industrial matters in the building and construction industry.¹⁰ Given the wide variety of actors in this field, it would be important for the regulator to operate cooperatively and constructively with other Commonwealth and state agencies.¹¹

In considering the role of an Australian Building and Construction Commission in achieving cultural change in the industry, the Cole Royal Commission noted that:

*The ABCC can be expected to become aware of contraventions of the law within the industry in various ways... Many of the submissions received by the Commissioner suggested that the ABCC should be a 'one stop shop' to which anyone complaining of misconduct in the industry could have resort. I consider that these submissions have merit. This does not necessarily mean that every complaint which is received must be dealt with by ABCC staff. It may be that, depending on the nature of the complaint, there is another agency which might more appropriately respond.*¹²

To do this, it is essential for the Australian Building and Construction Commission to have the ability to share information with other Commonwealth, state and territory agencies in carrying out the functions and powers provided to it by the Bill. It is also essential that the Australian Building and Construction Commission's ability to obtain and share information is not unnecessarily delayed or hindered by uncertainty about whether other laws dealing with secrecy or privacy provisions prevent the disclosure of relevant information when the Bill contains its own protections regarding the use and disclosure of such information.¹³

10 Volume 11, page 27.

11 Volume 11, page 30.

12 Volume 11, p. 31.

13 See Appendix 1, Letter from Senator the Hon Eric Abetz, Minister for Employment, to Senator Dean Smith (dated 23 September 2014) 2-3.

Committee's response

2.14 The committee thanks the minister for his response.

2.15 However, with respect to proposed section 61(7), the minister's response does not demonstrate that the coercive information gathering powers need to override *any* other law that prohibits the disclosure of information. While noting that the response refers to the general purposes of the ABCC, these general purposes do not provide sufficient justification of the specific need to override other Australian privacy laws. The committee further notes that no information is provided as to whether less restrictive measures would have been sufficient. It appears to the Committee, therefore, that section 61(7) is not a proportionate means of achieving the legislative aim, and so is an impermissible limit in human right terms on the right to privacy.

2.16 With respect to proposed section 105, which allows disclosure of information to third parties, the minister's response says only that it is 'essential' that the ABCC have the ability to share information without being 'unnecessarily delayed or hindered' by other privacy law. The committee considers that this general information with no specific and detailed analysis does not provide sufficient justification for the limitation on the right to privacy.

2.17 The committee therefore considers, based on the information provided, that proposed sections 61(7) and 105 are incompatible with the right to privacy.

Migration Legislation Amendment Bill (No. 1) 2014

Portfolio: Immigration and Border Protection

Introduced: House of Representatives, 27 March 2014

Purpose

2.18 The Migration Legislation Amendment Bill (No.1) 2014 (the bill) consists of six Schedules of amendments to the *Migration Act 1958* (Migration Act) and the *Australian Citizenship Act 2007*. Key changes include:

- amending the existing limitations on applying for a further visa under sections 48, 48A and 501E of the Migration Act to include situations where the first visa applications was made on behalf of a non-citizen, even if the non-citizen did not know of, or did not understand, the nature of the application due to a mental impairment or because they were a minor (Schedule 1);
- providing that a bridging visa application is not an impediment to removal under subsection 198(5) (Schedule 2);
- extending debt recovery provisions for detention costs to all convicted people smugglers and illegal foreign fishers (Schedule 3);
- amending the role of authorised recipients for visa applicants; and the Migration Review Tribunal and Refugee Review Tribunal's obligation to give documents to authorised recipients (Schedule 4);
- providing access to, and use of, material and information obtained under a search warrant in migration and citizenship decisions (Schedule 5); and
- amending the procedural fairness provisions that apply to visa applicants (Schedule 6).¹

Background

2.19 The committee reported on the bill in its *Seventh Report of the 44th Parliament* (June 2014), and subsequently in its *Tenth Report of the 44th Parliament* (August 2014).

2.20 The bill passed both Houses of Parliament and received Royal Assent on 24 September 2014.

1 Explanatory memorandum (EM) 2.

Committee view on compatibility

Right to equality and non-discrimination

Extension of liability for detention and removal costs

2.21 The committee sought the Minister for Immigration and Border Protection's advice on the compatibility of Schedule 3 of the bill with the rights to equality and non-discrimination on the grounds of race or ethnicity.

Minister's response

As acknowledged in my response to the Committee's comments in its Seventh Report, the amendments to section 262 in the bill are concerned with the conviction of a people smuggler or foreign fisher of an offence against a law in force in Australia. They are not connected with a person's race or ethnicity, or with any other personal characteristic, but only with offences that they have been convicted of. This is evidenced by the fact that proposed paragraphs 262(1)(a), (b) and (ba) are worded specifically to apply to a person who is, or has been, detained under section 189, was on board a vessel (not being an aircraft) when it was used in connection with the commission of an offence against the Migration Act or against a prescribed law in force in the Commonwealth or in a State or Territory, being a law relating to the control of fishing, and is convicted of the offence. The amendments are not inconsistent with the rights to equality and non-discrimination on the grounds of race or ethnicity, and do not amount to either direct or indirect discrimination.²

Committee's response

2.22 **The committee thanks the minister for his response.**

2.23 The committee is concerned that the response indicates a misunderstanding of Australia's obligations under international human rights law with respect to equality and non-discrimination.

2.24 The committee notes that the UN Human Rights Committee has set out in General Comment No 18 more information on the interpretation of discrimination and equality including:

...the Committee believes that the term "discrimination" as used in the Covenant should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the **purpose or effect**

2 See Appendix 1, Letter from the Hon Scott Morrison, Minister for Immigration and Border Protection, to Senator Dean Smith (dated 19 September 2014) 3.

of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.³

2.25 Accordingly, discrimination may be either direct or indirect. Indirect discrimination may occur when a requirement or condition is neutral on its face but has a disproportionate or unintended negative impact on particular groups. Importantly:

not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.⁴

2.26 The committee notes the minister's advice that the measures are not connected with a person's race or ethnicity, or with any other personal characteristic, but only with offences on that they have been convicted. The committee agrees that the measures are not directly discriminatory.

2.27 Nevertheless, while the measures appear neutral on their face, the committee remains concerned that they may have a greater impact on particular groups based on their ethnicity.

2.28 Accordingly, based on the information provided, the committee considers the measures in Schedule 3 of the bill are incompatible with the rights to equality and non-discrimination.

3 UN Human Rights Committee, *General Comment No. 18: Non-discrimination*, adopted at the Thirty-seventh Session of the Human Rights Committee, on 10 November 1989, 3 (emphasis added).

4 UN Human Rights Committee, *General Comment No. 18: Non-discrimination*, adopted at the Thirty-seventh Session of the Human Rights Committee, on 10 November 1989, 3.