

IN THESE UNCERTAIN TIMES: (A LACK OF) OVERSIGHT OF THE *BIOSECURITY ACT 2015* (Cth)

I INTRODUCTION

In his second reading speech for the Biosecurity Bill 2014 (Cth) ('Bill'), Barnaby Joyce said that '[i]t is expected that the human health provisions contained in the bill will be seldom used. However it is important that legislative powers are available to manage serious communicable diseases should they occur'.¹ While the relevant provisions of the *Biosecurity Act 2015* (Cth) ('Act') have been used much sooner than anyone would have hoped, the latter part of the statement remains true. The first case of COVID-19² in Australia was confirmed on 25 January 2020.³ The World Health Organisation declared COVID-19 a public health emergency on 30 January 2020 and a pandemic on 11 March 2020.⁴ A human biosecurity emergency was declared under the Act on 18 March 2020,⁵ giving the Minister for Health ('Minister') incredibly broad powers to prevent and control COVID-19.⁶ At the time of writing in September 2020, the human biosecurity emergency period seems unlikely to end any time soon. Hence, it is worthwhile becoming acquainted with these 'strange and foreign' powers, as the Commonwealth Attorney-General Christian Porter put it.⁷ The actions taken under the Act appear to be responsible and proportionate, but that is a credit to the government, not the Act. Emergency situations need quick and decisive action, and the legislation that empowers that action necessarily has to be broad since the most appropriate response to an emergency, especially one as varied

* LLB (Hons) candidate; BEc (Adv); Student Editor, *Adelaide Law Review* (2020).

¹ Commonwealth, *Parliamentary Debates*, House of Representatives, 27 November 2014, 13429 (Barnaby Joyce, Minister for Agriculture).

² COVID-19 is also referred to as SARS-CoV-2, coronavirus, or novel coronavirus.

³ Department of Health (Cth), 'First Confirmed Case of Novel Coronavirus in Australia' (Media Release, 25 January 2020).

⁴ 'Events as They Happen', *World Health Organisation* (Web Page, 17 June 2020) <<https://www.who.int/emergencies/diseases/novel-coronavirus-2019/events-as-they-happen>>.

⁵ *Biosecurity Act 2015* (Cth) s 475 ('*Biosecurity Act*'); *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) Declaration 2020* (Cth) ('*Biosecurity Emergency Declaration*').

⁶ *Biosecurity Act* (n 5) ss 477(1), 478(1).

⁷ 'Biosecurity Control Orders Will Be "Strange and Foreign": Porter', *RN Breakfast with Fran Kelly* (ABC Radio National, 3 March 2020) 00:01:42 <<https://www.abc.net.au/radionational/programs/breakfast/biosecurity-control-orders-will-be-strange-and-foreign/12019658>>.

as a pandemic, is difficult to predict at the time of drafting. Oversight of the Act is provided by a patchwork of parliamentary committees, experts, and potentially judicial review. In these uncertain times, a more comprehensive and transparent accountability system would ensure the Australian public do not merely have to hope that the powers under the Act have been exercised responsibly.

II THE LEGISLATIVE SCHEME

A *Human Biosecurity Emergencies*

A human biosecurity emergency can only be declared in relation to a listed human disease.⁸ The power to do so is provided by s 42 of the Act:

42 Listing human diseases

- (1) The Director of Human Biosecurity may, in writing, determine that a human disease is a listed human disease if the Director considers that the disease may:
 - (a) be communicable; and
 - (b) cause significant harm to human health.

On 21 January 2020, the *Biosecurity (Listed Human Diseases) Determination 2016* (Cth) was amended to include the ‘human coronavirus with pandemic potential’ as a listed disease.⁹

Chapter 8 pt 2 of the Act deals with human biosecurity emergencies. Section 475 of the Act provides the power to declare that a human biosecurity emergency exists and specifies the criteria that must be satisfied in order to make that declaration:

475 Governor-General may declare that a human biosecurity emergency exists

- (1) The Governor-General may declare that a human biosecurity emergency exists if the Health Minister is satisfied that:
 - (a) a listed human disease is posing a severe and immediate threat, or is causing harm, to human health on a nationally significant scale; and
 - (b) the declaration is necessary to prevent or control:

⁸ *Biosecurity Act* (n 5) s 475(3)(a).

⁹ *Biosecurity (Listed Human Diseases) Determination 2016* (Cth) s 4(h).

- (i) the entry of the listed human disease into Australian territory or a part of Australian territory; or
- (ii) the emergence, establishment or spread of the listed human disease in Australian territory or a part of Australian territory.

...

Requirements for human biosecurity emergency declaration

- (3) A human biosecurity emergency declaration must specify:
 - (a) the listed human disease to which the declaration relates; and
 - (b) the nature of the human biosecurity emergency and the conditions that gave rise to it; and
 - (c) the period during which the declaration is in force.
- ...
- (4) A human biosecurity emergency period:
 - (a) must not be longer than the period that the Health Minister considers necessary to prevent or control:
 - (i) the entry of the declaration listed human disease into Australian territory or a part of Australian territory; or
 - (ii) the emergence, establishment or spread of the declaration listed human disease in Australian territory or a part of Australian territory; and
 - (b) in any case, must not be longer than 3 months.

On 18 March 2020, the Governor-General made the *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) Declaration 2020* (Cth) ('Declaration').¹⁰ It declared that a human biosecurity emergency existed and would be in force for three months,¹¹ ending on 17 June 2020.¹²

¹⁰ *Biosecurity Emergency Declaration* (n 5) ss 3, 4, 7.

¹¹ *Ibid* s 7(b).

¹² Explanatory Statement, *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) Variation (Extension) Instrument 2020* (Cth) 1 ('Variation Explanatory Statement').

The Governor-General is also given the power to ‘vary a human biosecurity emergency declaration to extend the human biosecurity emergency period for a period of up to 3 months’,¹³ more than once if necessary.¹⁴ Section 476(1) of the Act requires the Minister to be satisfied of the same conditions as in s 475(1), with the minor change that s 476(1)(a) instead refers to the *continuing* threat and harm. On 15 May 2020, the Governor-General made the *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) Variation (Extension) Instrument 2020* (Cth) (‘Variation’), which varied the Declaration and extended the emergency period until 17 September 2020.¹⁵ While this is more than three months from the date the extension was made, it is three months from the original end date. The wording of s 476 is ambiguous as to whether the extension operates from the date of the variation or the original end date. The Explanatory Memorandum for the Bill says that whether the period should be varied should be assessed ‘at the end of the human biosecurity emergency period’, which seems to suggest the former interpretation is correct.¹⁶ It therefore stands to reason that the Variation may have been improperly made.

Once a human biosecurity emergency has been declared, the Minister can determine requirements (‘determinations’) and give directions during that period under ss 477 and 478 of the Act, respectively. Both determinations and directions have the same foundation. The Minister must be satisfied that the determination or direction is necessary

- (a) to prevent or control:
 - (i) the entry of the declaration listed human disease into Australian territory or a part of Australian territory; or
 - (ii) the emergence, establishment or spread of the declaration listed human disease in Australian territory or a part of Australian territory; or
- (b) to prevent or control the spread of the declaration listed human disease to another country; or
- (c) if a recommendation has been made to the Health Minister by the World Health Organization under Part III of the International Health Regulations in relation to the declaration listed human disease — to give effect to the recommendation.¹⁷

¹³ *Biosecurity Act* (n 5) s 476.

¹⁴ *Ibid* s 476(3).

¹⁵ *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) Variation (Extension) Instrument 2020* (Cth) sch 1.

¹⁶ Explanatory Memorandum, *Biosecurity Bill 2014* (Cth) 293 (‘Explanatory Memorandum’).

¹⁷ *Biosecurity Act* (n 5) ss 477(1), 478(1).

Before giving a determination or a direction, the Minister must also be satisfied that:

- it is likely to be effective in, or to contribute to, achieving the purpose for which it is to be made;
- it is appropriate and adapted to achieve the purpose for which it is to be made;
- it is no more restrictive or intrusive than is required in the circumstances; and
- the period during which it is to apply is only as long as is necessary.¹⁸

For determinations, the Minister must also be satisfied ‘that the manner in which the requirement is to be applied is no more restrictive or intrusive than is required in the circumstances’.¹⁹ Both determinations and directions may be made ‘despite any provision of any other Australian law’.²⁰

Neither determinations nor directions are defined in the Act. However, the relevant sections do give examples of what the Minister may do for each. The examples for determinations include:

- (a) requirements that apply to persons, goods or conveyances when entering or leaving specified places;
- (b) requirements that restrict or prevent the movement of persons, goods or conveyances in or between specified places;
- (c) requirements for specified places to be evacuated;
- (d) if a recommendation has been made as referred to in paragraph (1)(c) — requirements for the purposes of giving effect to the recommendation.²¹

At the time of writing, seven determinations have been made under s 477(1). They demonstrate the breadth of the Minister’s powers. They regulate: entering remote communities;²² increasing public confidence and uptake in the COVIDSafe app;²³

¹⁸ Ibid ss 477(4), 478(3).

¹⁹ Ibid s 477(4)(d).

²⁰ Ibid ss 477(5), 478(4).

²¹ Ibid s 477(3).

²² *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements for Remote Communities) Determination 2020 (Cth)* (‘Remote Communities Determination’).

²³ *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements — Public Health Contact Information) Determination 2020 (Cth)* (‘COVIDSafe Determination’). The COVIDSafe app logs close contact with other phones that have the app installed to aid in tracking the spread of COVID-19: ‘COVIDSafe App’, *Australian Government Department of Health*

preventing Australian citizens and permanent residents from leaving Australia;²⁴ restricting trading for retail outlets at international airports;²⁵ preventing price gouging of essential goods;²⁶ and requiring cruise ships not to enter Australian waters and requiring those in Australian waters to leave.²⁷

The examples of what directions the Minister can give include:

- (a) a direction to a person who is in a position to close premises, or prevent access to premises, to do so;
- (b) a direction for the purposes of giving effect to or enforcing a requirement determined under section 477;
- (c) if a recommendation has been made as referred to in paragraph (1)(c) — a direction for the purposes of giving effect to the recommendation.²⁸

Directions, unlike determinations, do not have to be in writing,²⁹ and if they are not in writing, they are not a legislative instrument.³⁰ As such, there is no publicly available collection of all of the directions the Minister has given. This makes it difficult to determine what the Minister is using directions for and how many have been given, or if the Minister is using this power at all.

The Explanatory Statement for the Declaration undertakes that ‘[t]he Australian Government has established protocols for the exercise of emergency powers under the Act to ensure that the emergency powers are used only where necessary to protect

(Web Page, 24 August 2020) <<https://www.health.gov.au/resources/apps-and-tools/covidsafe-app>>; Josh Taylor, ‘Covidsafe App: How Australia’s Coronavirus Contact Tracing App Works, What it Does, Downloads and Problems’, *The Guardian* (online, 15 May 2020) <<https://www.theguardian.com/australia-news/2020/may/15/covid-safe-app-australia-how-download-does-it-work-australian-government-covidsafe-covid19-tracking-downloads>>.

²⁴ *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Overseas Travel Ban Emergency Requirements) Determination 2020* (Cth) (‘*Overseas Travel Ban Determination*’).

²⁵ *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements — Retail Outlets at International Airports) Determination 2020* (Cth).

²⁶ *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Essential Goods) Determination 2020* (Cth).

²⁷ *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements for Cruise Ships) Determination 2020* (Cth) (‘*Cruise Ships Determination*’).

²⁸ *Biosecurity Act* (n 5) s 478(2).

²⁹ *Ibid* s 572(1).

³⁰ *Ibid* s 572(2).

the health of Australians'.³¹ However, those protocols do not seem to be publicly available.

Contravening a determination or direction that applies to a person is an offence.³² The maximum penalty is imprisonment for five years, 300 penalty units (presently \$66,600),³³ or both.³⁴ The Explanatory Memorandum for the Bill acknowledged that the penalty is higher than the Commonwealth guide stipulates,³⁵ but says it is justified because of the need for determinations and directions to be followed.³⁶

B *Human Biosecurity Control Orders*

Chapter 8 pt 2 is meant to be for 'the large scale direction of people during an emergency, rather than for the management of individuals'.³⁷ Managing individuals is done using ch 2, primarily through the imposition of human biosecurity control orders.³⁸ Apart from the power to list human diseases being located in ch 2,³⁹ chs 2 and 8 are separate. Both ss 477 and 478 specifically prohibit using determinations or directions to impose some of the most extreme parts of human biosecurity control orders,⁴⁰ including orders requiring decontamination,⁴¹ medical examination,⁴² and vaccination or treatment.⁴³ Those powers can only be used against individuals who meet the more stringent test for a human biosecurity control order.⁴⁴ However, there are still some very serious orders in ch 2 that are not excluded, including detention.⁴⁵

³¹ Explanatory Statement, *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) Declaration 2020* (Cth) 3 ('Declaration Explanatory Statement').

³² *Biosecurity Act* (n 5) ss 479(3)–(4).

³³ *Crimes Act 1914* (Cth) s 4AA ('*Crimes Act*').

³⁴ *Biosecurity Act* (n 5) ss 479(3)–(4). If a body corporate contravenes a determination or direction, the court may impose a maximum pecuniary penalty of 1,500 penalty units (presently \$333,000): *Crimes Act* (n 33) s 4B(3).

³⁵ Attorney-General's Department (Cth), *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (Guide, 9 January 2013).

³⁶ Explanatory Memorandum (n 16) 295–6.

³⁷ *Ibid.*

³⁸ *Biosecurity Act* (n 5) ss 60–7.

³⁹ *Ibid* s 42.

⁴⁰ *Ibid* ss 477(6), 478(6).

⁴¹ *Ibid* s 89.

⁴² *Ibid* s 90.

⁴³ *Ibid* s 92.

⁴⁴ *Ibid* s 60. A human biosecurity control order can only be imposed on an individual if: they have 'one or more signs or symptoms of a listed human disease'; or the individual has been exposed to either 'a listed human disease' or 'another individual who has one or more signs or symptoms of a listed human disease'; or the individual has failed to comply with entry requirements: at s 60(2).

⁴⁵ *Ibid* s 103.

III NO END IN SIGHT

The human biosecurity emergency period can only go for three months at a time⁴⁶ but there is no limit to the number of times it can be extended.⁴⁷ While every extension needs to fulfil the criteria in s 476(1) of the Act, it does not seem like COVID-19 will ever have trouble meeting them. The Explanatory Statement for the Variation said that three months is an appropriate amount of time to extend the human biosecurity emergency period ‘to manage the medium and longer term response to prevent or control the entry, emergence, establishment or spread of COVID-19 in Australia’.⁴⁸ As long as COVID-19 is still out in the world, it is very easy to say there is a risk of emergence, establishment or spread. In the Explanatory Statements for the Declaration and Variation, one of the main reasons given for why the criteria are satisfied is that there is currently no vaccine for COVID-19.⁴⁹ While there are many vaccines in development at the time of writing, with some claiming to be potentially ready in the near future,⁵⁰ others are sceptical about the ability for a vaccine to be developed any time soon, or at all.⁵¹ Therefore, it seems like the human biosecurity emergency period will keep being extended for some time yet. None of this is to say that the Variation was a bad thing. Nor is it a bad idea to take a long-term view in limiting COVID-19. At the time of writing, in September 2020, Australia has had a surge of cases,⁵² and the worldwide number of daily new cases continues to grow.⁵³ It is therefore important to acknowledge that these powers will be around for a while.

IV SOME CHECKED POWER

With powers this broad, which will be used for some time yet, you would hope they are subject to some oversight. A recurring phrase in ch 8 is that ‘[a] determination

⁴⁶ Ibid s 475(4)(b).

⁴⁷ Ibid s 476(3).

⁴⁸ Variation Explanatory Statement (n 12) 3.

⁴⁹ Ibid 1; Declaration Explanatory Statement (n 31) 1.

⁵⁰ Fergus Walsh, ‘Coronavirus: Encouraging Results in Vaccine Trials’, *BBC* (online, 16 July 2020) <<https://www.bbc.com/news/health-53426367>>.

⁵¹ Byram W Bridle and Shayan Sharif, ‘Fast COVID-19 Vaccine Timelines Are Unrealistic and Put the Integrity of Scientists at Risk’, *The Conversation* (online, 16 June 2020) <<https://theconversation.com/fast-covid-19-vaccine-timelines-are-unrealistic-and-put-the-integrity-of-scientists-at-risk-139824>>.

⁵² Nick Evershed et al, ‘Covid Map Australia: Tracking New Cases, Coronavirus Stats and Live Data by State’, *The Guardian* (online, 15 September 2020) <<https://www.theguardian.com/australia-news/datablog/ng-interactive/2020/sep/15/coronavirus-australia-map-cases-covid-19-tracking-stats-live-data-update-by-state-suburb-postcode-how-many-new-active-case-numbers-today-statistics-corona-deaths-death-toll>>.

⁵³ The Visual and Data Journalism Team, ‘Coronavirus: Six Months After Pandemic Declared, Where Are the Global Hotspots?’, *BBC* (online, 15 September 2020) <<https://www.bbc.com/news/world-51235105>>.

made under this section is a legislative instrument, but section 42 (disallowance) of the *Legislation Act 2003* does not apply'.⁵⁴ The Explanatory Statement for the Declaration says that the Act 'provides for the Declaration to be non-disallowable to ensure that the Commonwealth is able to take the urgent action necessary to manage a nationally significant threat or harm to Australia's human health'.⁵⁵ Non-disallowance is also meant to ensure that the length of the human biosecurity emergency period is dictated by science, not politics.⁵⁶ Both of these justifications are reasonable: a quick response to the pandemic is one of the key factors of success for countries that have flattened the curve;⁵⁷ and making COVID-19 a political issue is one of the reasons why the United States currently leads the world in COVID-19 cases.⁵⁸ However, even if the determinations cannot be disallowed, there is still a place and a need for scrutiny.

A Human Rights Scrutiny

The Parliamentary Joint Committee on Human Rights ('PJCHR') examines all bills and legislative instruments for human rights compatibility.⁵⁹ Legislative instruments that are not subject to disallowance do not need to produce a human rights statement of compatibility.⁶⁰ As a result, none of the determinations have one. However, the PJCHR noted that since these determinations can have a significant impact on human

⁵⁴ *Biosecurity Act* (n 5) s 42(3). See also at ss 475(2), 476(2), 477(2). Disallowance is a process through which either House of Parliament can repeal a legislative instrument: *Legislation Act 2003* (Cth) s 42. Legislative instruments are not subject to disallowance if an Act declares that s 42 does not apply in relation to any instrument made under that Act or section: at s 44.

⁵⁵ Declaration Explanatory Statement (n 31) 3.

⁵⁶ Explanatory Memorandum (n 16) 293.

⁵⁷ See, eg, Ali Younes, 'How Jordan Is Flattening Its COVID-19 Curve', *Al Jazeera* (online, 23 April 2020) <<https://www.aljazeera.com/news/2020/04/jordan-flattening-covid-19-curve-200422112212466.html>>; Linda Hsieh and John Child, 'What Coronavirus Success of Taiwan and Iceland Has in Common', *The Conversation* (online, 29 June 2020) <<https://theconversation.com/what-coronavirus-success-of-taiwan-and-iceland-has-in-common-140455>>; 'Coronavirus: How New Zealand Relied on Science and Empathy', *BBC* (online, 20 April 2020) <<https://www.bbc.com/news/world-asia-52344299>>.

⁵⁸ Tasha Wibawa, 'Wearing a Mask in the United States Is Political, but Republicans Are Speaking Out as Coronavirus Cases Grow', *ABC News* (online, 1 July 2020) <<https://www.abc.net.au/news/2020-07-01/coronavirus-masks-are-political-in-us-donald-trump-rejects-them/12403962>>; Pew Research Center, *Republicans, Democrats Move Even Further Apart in Coronavirus Concerns* (Report, 25 June 2020); 'Coronavirus Pandemic: Tracking the Global Outbreak', *BBC* (online, 15 July 2020) <<https://www.bbc.com/news/world-51235105>>.

⁵⁹ 'Parliamentary Joint Committee on Human Rights', *Parliament of Australia* (Web Page) <https://www.aph.gov.au/joint_humanrights>.

⁶⁰ *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) s 9(1).

rights, they should be accompanied by statements of compatibility, regardless of the lack of legal obligation.⁶¹

In light of this, the PJCHR sought a response from the Minister for four of the determinations made under s 477 which it identified as limiting certain human rights, such as the freedom of movement.⁶² The PJCHR emphasised that rights can be limited, as long as the limitation is proportionate to the countervailing right the determination affects, and requested that the Minister explain how the determinations achieve this.⁶³ The Minister gave one response which was intended to cover all of the determinations made under s 477.⁶⁴ The PJCHR observed that the Minister's response was somewhat lacking, with the Minister not addressing several of the concerns the PJCHR had raised in its earlier reports, such as the potentially disproportionate impact the remote communities determination would have on Aboriginal and Torres Strait Islander peoples.⁶⁵ The PJCHR also said that the Minister did not substantially address the balancing of conflicting human rights.⁶⁶ Despite these issues, the PJCHR accepted that the determinations were in accordance with human rights law.⁶⁷ In his statement, the Minister assured the PJCHR that human rights compatibility was an important consideration when making the determinations.⁶⁸ The PJCHR thanked the Minister for that statement but asked that all future determinations be 'accompanied by a detailed statement of compatibility'.⁶⁹ For the two determinations amended since that report was made, neither had human rights statements of compatibility.⁷⁰ The PJCHR is right to insist that the effect of the determinations on human rights

⁶¹ Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Human Rights Scrutiny Report of COVID-19 Legislation* (Report No 5, 29 April 2020) 4 ('PJCHR Report No 5').

⁶² *Ibid* 6–12, 19–21; Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Human Rights Scrutiny Report* (Report No 6, 20 May 2020) 2–15 ('PJCHR Report No 6'). The four determinations were: *Remote Communities Determination* (n 22); *COVIDSafe Determination* (n 23); *Overseas Travel Ban Determination* (n 24); *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements) Amendment Determination (No 1) 2020* (Cth), later amended by *Cruise Ships Determination* (n 27).

⁶³ PJCHR Report No 5 (n 61) 9, 12, 21; PJCHR Report No 6 (n 62) 4.

⁶⁴ Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Human Rights Scrutiny Report* (Report No 7, 17 June 2020) 16 n 8.

⁶⁵ *Ibid* 17–18.

⁶⁶ *Ibid* 24.

⁶⁷ *Ibid* 18–19, 24.

⁶⁸ *Ibid* 17, 23.

⁶⁹ *Ibid* 24.

⁷⁰ Explanatory Statement, *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements — Retail Outlets at International Airports) Amendment (No 1) Determination 2020* (Cth); Explanatory Statement, *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements for Remote Communities) Repeal Determination 2020*.

should be stated publicly and that the Minister should take the lead. Even if the correct balance is struck between competing human rights in the determinations, it would still be beneficial for the determinations to be accompanied by statements of compatibility so that these considerations are discussed openly and honestly.

B *Technical Scrutiny*

Considering there is a question mark over the validity of the Variation, it would be beneficial if the more technical aspects of the determinations were scrutinised. The Senate Standing Committee for the Scrutiny of Delegated Legislation ('Scrutiny Committee') has not assessed any of the determinations because they are exempt from disallowance.⁷¹ This is not unique to COVID-19; the Scrutiny Committee's role is to examine legislative instruments that *are* subject to disallowance.⁷² However, the kinds of factors the Scrutiny Committee considers are all issues that should be assessed for the determinations. For example: whether the drafting is clear; whether the instrument is constitutionally valid; and, particularly relevant, whether the instrument was made in accordance with the Act.⁷³ Even if they cannot be disallowed, assessing them still promotes accountability, since that information can be used by other forms of oversight, like the media or potentially judicial review. These powers are too broad to be left unchecked. The Scrutiny Committee should follow the PJCHR's lead and scrutinise the determinations.

C *Expert Scrutiny*

These powers are subject to oversight in the form of consultation with experts, but even then, only barely. A disease can only be listed by the Director of Human Biosecurity,⁷⁴ defined as the person who occupies the position of Commonwealth Chief Medical Officer,⁷⁵ a position usually held by a medical doctor.⁷⁶ The Director of Human Biosecurity must consult with the chief health officers of each state and

⁷¹ 'Scrutiny of COVID-19 Instruments', *Parliament of Australia* (Web Page, 10 July 2020) <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Delegated_Legislation/Scrutiny_of_COVID-19_instruments>.

⁷² 'Role of the Committee', *Parliament of Australia* (Web Page) <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Delegated_Legislation/Role_of_the_Committee>.

⁷³ *Ibid.*

⁷⁴ *Biosecurity Act* (n 5) s 42(1).

⁷⁵ *Ibid* s 544(1).

⁷⁶ The last five Chief Medical Officers have been medical doctors: 'Top Job for Professor Brendan Murphy', *Health Victoria* (Web Page, August 2016) <<http://www.health.vic.gov.au/healthvictoria/aug16/prof.htm>>; 'Professor Chris Baggoley AO', *Flinders University* (Web Page) <<https://www.flinders.edu.au/alumni/our-alumni/alumni-stories/professor-chris-baggoley>>; 'Professor James Bishop AO', *The University of Melbourne* (Web Page) <<https://mdhs.unimelb.edu.au/engage/community/awards-and-honours/professor-james-bishop-ao>>; 'John Horvath', *Business News* (Web Page) <<https://www.businessnews.com.au/Person/John-Horvath>>; 'Professor

territory and the Director of Biosecurity before listing a disease.⁷⁷ Consultation before listing the disease acts as a gatekeeping mechanism, since none of the powers in ch 8 can be accessed without it. However, while requiring a person with health qualifications to list the disease helps, the legislation only requires that certain people be consulted, not that they have to approve of the listing. Further, this is a kind of ‘one and done’ form of oversight. Once the disease has been listed, there is no further consultation required to assess whether it should remain listed. Lastly, the Governor-General and the Minister are not required to consult any other person before exercising any of the powers in ch 8. The Explanatory Statement for the Declaration lists the people who were consulted before the Declaration was made and states that the Minister will exercise the emergency powers based on the advice of the Director of Human Biosecurity or the Australian Health Protection Principal Committee.⁷⁸ However, there is no obligation to do so under the Act. Considering the Minister does not need to have any particular qualification related to health or science,⁷⁹ a requirement to consult with experts would help ensure the powers were exercised responsibly. While the Act was likely drafted on the assumption that the Minister would get advice from experts in their Department, given how broad these powers are, it would be better if the Act was amended to make that assumption an explicit requirement.

V MERITS AND JUDICIAL REVIEW

If neither the legislature nor the experts can fully ensure the powers of the Act are being used properly, then merits or judicial review might yet save us. None of the ch 8 powers are classified in the Act as ‘reviewable decisions’,⁸⁰ which can be subject to both internal and external merits review.⁸¹ However, reviewable decisions are all decisions that impact individuals or small groups, such as the decision ‘[t]o vary, or refuse to vary, a permit authorising goods to be brought or imported into Australian territory’.⁸² The Act requires the decision-maker to give written notice that a reviewable decision has been made to ‘the relevant person’,⁸³ a concept that would be very difficult to apply to determinations. Therefore, it is not necessarily a cause for concern that the broad ch 8 powers are excluded from this particular type of review.

Emeritus Richard Alan Smallwood AO, *The University of Melbourne* (Web Page) <<https://mdhs.unimelb.edu.au/engage/community/awards-and-honours/professor-emeritus-richard-alan-smallwood-ao>>.

⁷⁷ *Biosecurity Act* (n 5) s 42(2).

⁷⁸ Declaration Explanatory Statement (n 31) 3.

⁷⁹ See, eg, ‘Hon Greg Hunt MP’, *Parliament of Australia* (Web Page) <https://www.aph.gov.au/Senators_and_Members/Parliamentarian?MPID=00AMV>.

⁸⁰ *Biosecurity Act* (n 5) s 574.

⁸¹ *Ibid* ss 576, 578.

⁸² *Ibid* s 574 item 5.

⁸³ *Ibid* s 575.

The Explanatory Memorandum notes that a section not being listed as a reviewable decision does not prevent or limit it being subject to judicial review.⁸⁴ Delegated legislation can usually be judicially reviewed.⁸⁵ However, a potential obstacle is justiciability — the question of whether the subject matter of the dispute is appropriate to be resolved by a court in judicial review. Decisions for which many interlocking policy issues are considered, referred to as ‘polycentric’ decisions, are non-justiciable.⁸⁶ In *Minister for Arts, Heritage and Environment v Peko-Wallsend Ltd*, the Full Court of the Federal Court found that the Cabinet’s decision to nominate Kakadu National Park to be world heritage listed was non-justiciable since the Cabinet’s decision required balancing the competing interests of the environment, Aboriginal people, growing the economy by mining, and the private interests of the applicant.⁸⁷ Statutory-based powers are usually, but not always, considered justiciable.⁸⁸ The determinations seem like they might be considered polycentric, considering they balance factors like public health, freedom of movement, private business interests and privacy. However, individual determinations rarely engage all of these considerations and it is unclear whether only having two or three of these factors would make the decision non-justiciable. The scope of justiciability remains uncertain,⁸⁹ so whether judicial review would be available for the determinations is similarly unclear.

If the determinations are justiciable, then failing to comply with the formal requirements of the Act when making the delegated legislation can result in invalidity.⁹⁰ Hence, this may be another way of getting a more technical assessment of the determinations. However, the delegated legislation will only be found invalid if the requirements in the Act are mandatory, rather than directory.⁹¹ Further, courts have, in the past, been reluctant to find delegated legislation invalid for this reason.⁹² The requirement that the human biosecurity emergency period can only be extended for three months at a time seems like it would be classified as mandatory, as it is a substantial limitation rather than a procedural requirement. Therefore, if the court interprets s 476 differently to the Minister, the court would likely find the Variation invalid.

⁸⁴ Explanatory Memorandum (n 16) 338.

⁸⁵ *South Australia v Tanner* (1989) 166 CLR 161, 173.

⁸⁶ *Phosphate Resources Ltd v Commonwealth* (2003) 128 FCR 570, 577 [21] (French J). See also Lon L Fuller, ‘The Forms and Limits of Adjudication’ (1978) 92(2) *Harvard Law Review* 353, 394–5.

⁸⁷ *Minister for Arts, Heritage and Environment v Peko-Wallsend Ltd* (1987) 15 FCR 274, 278–9.

⁸⁸ *A-G (NSW) v Quin* (1990) 170 CLR 1, 33.

⁸⁹ Geoffrey Lindell, ‘Justiciability’ in Michael Coper, Tony Blackshield, and George Williams (eds), *The Oxford Companion to the High Court of Australia* (Oxford University Press, 2001) 392.

⁹⁰ *Watson v Lee* (1979) 144 CLR 374.

⁹¹ *Ibid* 377–8 (Barwick CJ), 384 (Gibbs J), 386 (Stephen J), 411 (Aicken J).

⁹² *Ibid* 381–2 (Barwick CJ), 385 (Gibbs J).

Where the primary Act requires consultation, a failure to consult prior to making the delegated legislation can result in invalidity, but consulting and then acting contrary to the advice likely will not.⁹³ Hence, judicial review cannot be used to make the Minister follow the advice he is given, but it can ensure the consultation was done.

If the determinations are justiciable, then judicial review may be an alternative way of ensuring the determinations were made in accordance with the Act. However, it is incredibly unlikely that this accountability mechanism will actually be used. Judicial review is notoriously expensive. There is also little benefit to any potential applicant; even if a court finds, for example, that the Variation is invalid, the Governor-General will almost certainly make a new, valid one within hours. In combination with the uncertainty of whether the determinations are even subject to judicial review, the practical aspects of judicial review make it a rather weak form of scrutiny for the determinations.

VI CONCLUSION

On 3 September 2020, the Governor-General made another variation, extending the human biosecurity emergency period until 17 December 2020.⁹⁴ In all likelihood, Australians will continue to live under a human biosecurity emergency period for a long time. The emergency powers under the Act, by all accounts, are needed and have been helpful in preventing and controlling the spread of COVID-19. The government needs broad powers that can be used quickly to stop the spread of something as fast moving as COVID-19. However, just because the powers are needed and seem to have been used responsibly does not mean that oversight is not still important. These determinations are subject to oversight for the most part, but only through a patchwork of legislative, expert, and judicial scrutiny, with the availability and effectiveness of each type varying significantly. A clearer and more comprehensive oversight system is needed.

First, the government should adopt the PJCHR's recommendation and include a statement of compatibility for all determinations going forward. Second, the Scrutiny Committee should, like the PJCHR, scrutinise these determinations, even if they are disallowable, for a much more cost-effective way of ensuring technical compliance. This will also strengthen the other method of assessing compliance with the Act — judicial review — since a potential applicant is more likely to bring an action if they have indirect confirmation from the Scrutiny Committee that their challenge is likely to be successful. Third, all directions the Minister makes under s 478 should be compiled and made publicly available. Fourth, the Minister and the Governor-General should be legislatively required to consult with experts before exercising the powers in ch 8. Last, the protocols that the Minister has promised to

⁹³ *Myer Queenstown Garden Plaza Pty Ltd v Corporation of the City of Port Adelaide* (1975) 11 SASR 504, 544–8.

⁹⁴ *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) Variation (Extension No 2) Instrument 2020* (Cth).

follow when making these determinations should be published so that the last form of potential scrutiny, the media, may have a chance to publicly pressure compliance if it is lacking.

The running theme of the Act is that there is a hope, but not a requirement, that the powers are used responsibly. It is hoped that determinations and directions are made correctly and responsibly so that there is no need for them to be disallowed. It is hoped that the Minister follows the established protocols and acts to protect the health of the Australian community. It is hoped that the Minister will exercise their power to create determinations and directions based on the advice of their departmental advisors and those they consult. But in these uncertain times, we need more than hope. We need effective oversight.

