

Chapter 1¹

Human rights scrutiny of COVID-19 legislation

1.1 The mandate² of the Parliamentary Joint Committee on Human Rights (the committee) is to examine all Commonwealth bills and legislative instruments³ that come before either House of the Parliament for compatibility with human rights,⁴ and to report to both Houses of the Parliament on that issue. The committee undertakes its scrutiny function as a technical inquiry relating to Australia's international human rights obligations, and does not consider the broader policy merits of legislation. Its mandate is strictly limited to considering Commonwealth legislation, and as such, it does not review any state or territory legislation.

1.2 The COVID-19 pandemic has required governments across the globe to introduce legislative measures seeking to contain the outbreak and respond to its impacts. At the Commonwealth level, on 21 January 2020 the Director of Human Biosecurity first added 'human coronavirus with pandemic potential' to the list of human diseases, to allow measures to be taken under the *Biosecurity Act 2015* to manage and respond to risks to human health caused by the virus.⁵ Since then numerous legislative instruments and Acts have been made to respond to the impacts of COVID-19. As part of its legislative scrutiny functions, the committee has resolved to report on legislation that has been made in response to, or because of, the COVID-19 pandemic.

1.3 This report provides an assessment of the human rights compatibility of legislation made in response to the COVID-19 pandemic, specifically:

- bills introduced into the Parliament on 23 March 2020 and 8 April 2020;

1 This section can be cited as Parliamentary Joint Committee on Human Rights, Human rights scrutiny of COVID-19 legislation, *Report 5 of 2020*; [2020] AUPJCHR 64.

2 Under paragraph 7(a) of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

3 This includes instruments that are not subject to disallowance under section 42 of the *Legislation Act 2003*.

4 'Human rights' is defined in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* to mean the rights and freedoms recognised or declared by seven international instruments: International Convention on the Elimination of all Forms of Racial Discrimination; International Covenant on Economic, Social and Cultural Rights; International Covenant on Civil and Political Rights; Convention on the Elimination of All Forms of Discrimination Against Women; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; Convention on the Rights of the Child; and Convention on the Rights of Persons with Disabilities.

5 See Biosecurity (Listed Human Diseases) Amendment Determination 2020 [F2020L00037].

- legislative instruments registered on the Federal Register of Legislation between 21 January and 21 April 2020.

1.4 See Appendix 1 for a list of all legislation considered in this report, including legislation on which the committee makes no comment, on the basis that the legislation does not engage, or only marginally engages, human rights; promotes human rights; and/or permissibly limits human rights.

1.5 The committee considers that legislation taken to control the entry, establishment or spread of COVID-19 is likely to promote and protect the rights to life and health. The right to life requires the State to take positive measures to protect life.⁶ The United Nations Human Rights Committee has stated that the duty to protect life implies that State parties should take appropriate measures to address the conditions in society that may give rise to direct threats to life, including life threatening diseases.⁷

1.6 The right to health is the right to enjoy the highest attainable standard of physical and mental health.⁸ Article 12(2) of the International Covenant on Economic, Social and Cultural Rights requires that State parties shall take steps to prevent, treat and control epidemic diseases.⁹ The United Nations Committee on Economic, Social and Cultural Rights has stated that the control of diseases refers to efforts to:

make available relevant technologies, using and improving epidemiological surveillance and data collection on a disaggregated basis, the implementation or enhancement of immunization programmes and other strategies of infectious disease control.¹⁰

1.7 In addition, legislative responses to help manage the impact of the COVID-19 pandemic on jobs and the economy are likely to engage and promote a number of human rights, including rights to work, an adequate standard of living and social security.¹¹

1.8 While the committee considers the Australian government has obligations under international human rights law to take action to control the COVID-19 pandemic within Australia, it also recognises that legislation in response to this

6 International Covenant on Civil and Political Rights, article 6.

7 See United Nations Human Rights Committee, *General Comment No. 36, Article 6 (Right to Life)* (2019), [26].

8 International Covenant on Economic, Social and Cultural Rights, article 12(1).

9 International Covenant on Economic, Social and Cultural Rights, article 12(2)(c).

10 United Nations Committee on Economic, Social and Cultural Rights, *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12)* (2000), [16].

11 See International Covenant on Economic, Social and Cultural Rights, articles 6 and 7 (work); article 11 (adequate standard of living) and article 9 (social security).

pandemic may limit other human rights. In particular, the committee considers such legislation is likely to engage and may limit rights to freedom of movement and liberty, privacy, equality and non-discrimination, and freedom of assembly.

1.9 International human rights law recognises that reasonable limits may be placed on most rights and freedoms – there are very few absolute rights which can never be legitimately limited.¹² For all other rights, limitations may be imposed on the right provided certain standards are met. In general, any measure that limits a human right must comply with the following criteria:

- be prescribed by law (have a clear legal basis and be sufficiently accessible and precise);
- be in pursuit of a legitimate objective (one that is necessary and addresses an area of public and social concern that is pressing and substantial enough to warrant limiting the right);
- be rationally connected to (that is, likely to be effective to achieve) its stated objective; and
- be proportionate to the objective sought to be achieved (which includes considering if there are other less restrictive ways to achieve the same aim, if there are effective safeguards or controls over the measure and if it provides sufficient flexibility to consider individual circumstances).

1.10 This assessment applies even in times of emergency. While under international human rights law, certain treaties¹³ allow a State to suspend or restrict the exercise of certain rights in times of emergency that 'threatens the life of the nation', such restrictions can only be to the extent 'strictly required by the exigencies of the situation' and only when a state of emergency is officially proclaimed. Australia has not officially proclaimed an intention to derogate from its human rights obligations during this pandemic. In undertaking an analysis of legislation during this time the usual limitation criteria set out above continues to apply.

1.11 In undertaking its assessment of legislation, the committee's approach is to first consider the legislation proponent's assessment as to the compatibility of the legislation with Australia's human rights obligations, as set out in the statement of compatibility. Where further information is required to determine questions as to compatibility, the committee writes to the sponsor of the legislation seeking

12 Absolute rights include the right not to be subjected to torture, cruel, inhuman or degrading treatment; right not to be subjected to slavery; right not to be imprisoned for inability to fulfil a contract; right not to be subject to retrospective criminal laws; and the right to recognition as a person before the law.

13 Only some human rights treaties contain a derogation clause: see for example article 4 of the International Civil and Political Rights. In contrast, the Convention on the Rights of Persons with Disabilities includes a special clause on the obligation to comply with the Convention also during emergencies.

clarification and publishes its concerns in its report to the Parliament. The committee considers statements of compatibility are essential to the examination of human rights in the legislative process. While the committee assesses all legislative instruments for compatibility with human rights, the *Human Rights (Parliamentary Scrutiny) Act 2011* only requires statements of compatibility to be provided for legislative instruments that are subject to disallowance.¹⁴ However, given the potential impact on human rights of legislative instruments dealing with the COVID-19 pandemic, the committee considers it would be appropriate for all such legislative instruments to be accompanied by a detailed statement of compatibility.

Biosecurity Act 2015

1.12 Much of the response taken by the Australian government to control the entry, establishment or spread of COVID-19 has been taken under the powers set out in the *Biosecurity Act 2015* (Biosecurity Act). As such, in assessing that legislative response, it is useful to understand the powers available under this Act. The Biosecurity Act is the primary legislative means for the Australian government to manage the risk of diseases entering Australian territory and causing harm to human health. The Biosecurity Act sets out a number of powers that can be taken to prevent a listed human disease from entering, or establishing itself or spreading in, an Australian territory. These include empowering the making of legislative instruments that:

- prescribe entry and exit requirements to and from Australia;¹⁵
- determine preventative biosecurity measures, including banning or restricting, or requiring, a behaviour or practice;¹⁶
- specify an area as a human health response zone, that specifies any requirements for individuals entering or leaving the zone and/or that specifies classes of individuals that must not enter the zone;¹⁷ and
- specify certain zones to monitor whether a disease may pose an unacceptable level of biosecurity risk, or manage any such risks.¹⁸

1.13 In addition, section 475 provides that the Governor-General may declare that a human biosecurity emergency exists if the Health Minister is satisfied that a listed human disease is posing a severe and immediate threat, or is causing harm, to human health on a nationally significant scale and the declaration is necessary to prevent or control the entry of or emergence, establishment or spread of the listed

14 *Human Rights (Parliamentary Scrutiny) Act 2011*, section 9.

15 See *Biosecurity Act 2015*, sections 44-46.

16 See *Biosecurity Act 2015*, sections 51-52.

17 See *Biosecurity Act 2015*, sections 113-116.

18 See *Biosecurity Act 2015*, sections 365, 384 and 395.

human disease. Such an emergency was declared in Australia in relation to COVID-19 on 18 March 2020.¹⁹ Under section 477 of the *Biosecurity Act 2015* the Health Minister may determine emergency requirements during a human biosecurity emergency, that include requirements:

- that apply to persons, goods or conveyances when entering or leaving specified places;
- that restrict or prevent the movement of persons, goods or conveyances in or between specified places; and
- for specified places to be evacuated.

1.14 Before determining such requirements the Health Minister must be satisfied that the period during which the requirement is to apply is only as long as is necessary and that the requirement:

- is likely to be effective in, or contribute to, achieving the purpose for which it is to be given;
- is appropriate and adapted to achieve the purpose for which it is to be given; and
- is no more restrictive or intrusive than is required in the circumstances (and how it is to be applied is no more restrictive or intrusive than required in the circumstances).²⁰

1.15 During a human biosecurity emergency period the Health Minister may also give any direction to any person to comply with any requirements imposed under a determination made under section 477, or to close premises or prevent access to premises.²¹ It is an offence for a person to fail to comply with any such requirement or direction, subject to imprisonment of up to five years or 300 penalty units, or both.

1.16 In addition, under Chapter 2, Part 3 of the *Biosecurity Act*, a human biosecurity control order can be imposed on an individual if the individual may have a listed human disease. A human biosecurity control order that is in force in relation to an individual may require the individual to comply with certain biosecurity measures. Part 3 sets out what those measures are, and they include vaccination, restricting the individual's behaviour and ordering the individual to remain isolated.

19 See *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) Declaration 2020* [F2020L00266].

20 *Biosecurity Act 2015*, subsection 477(4).

21 *Biosecurity Act 2015*, section 478.

Response required

1.17 The committee seeks a response from the relevant minister with respect to the following bill and instruments.

Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements for Remote Communities) Determination 2020 [F2020L00324]

Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements for Remote Communities) Amendment (No. 1) Determination 2020 [F2020L00415]¹

Purpose	These instruments determine requirements to prevent or control the entry or spread of COVID-19 in designated remote communities in Australia, including establishing requirements for entry to these areas. The instruments commenced on 26 March 2020 and 8 April 2020 respectively, and remain in force for the duration of the human biosecurity emergency period
Portfolio	Health
Authorising legislation	<i>Biosecurity Act 2015</i>
Disallowance	These instruments are exempt from disallowance (see subsection 477(2) of the <i>Biosecurity Act 2015</i>)
Rights	Life; health; freedom of movement; equality and non-discrimination
Status	Seeking additional information

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements for Remote Communities) Determination 2020 [F2020L00324], *Report 5 of 2020*; [2020] AUPJCHR 65.

Controlling entry to certain remote communities

1.18 The Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements for Remote Communities) Determination 2020 (first instrument) designates a number of geographical areas in Western Australia, Queensland, South Australia and the Northern Territory for the purposes of the *Biosecurity Act 2015* (Biosecurity Act), and establishes that persons cannot enter these areas except in specified circumstances.

1.19 The Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements for Remote Communities) Amendment (No. 1) Determination 2020 amends the first instrument to amend the circumstances in which a person can enter.

1.20 These instruments are made under section 477(1) of the Biosecurity Act, which provides that during a human biosecurity emergency period, the Health Minister may determine emergency requirements, or give directions, that they are satisfied are necessary to prevent or control the entry, emergence, establishment or spread of the disease in Australian territory. Failure to comply with such a direction is a criminal offence punishable by five years' imprisonment, or a penalty of up to \$63,000.

Preliminary international human rights legal advice

Rights to life, health, freedom of movement and equality and non-discrimination

1.21 The explanatory statement notes that the purpose of designating these geographical areas for the purpose of the Biosecurity Act is to prevent or control the entry or spread of COVID-19 in these areas.² As the measure is intended to prevent the spread of COVID-19, which has the ability to cause high levels of morbidity and mortality, it would appear that the measure may promote the rights to life and health.³ However, by restricting entry to these locations the instrument may also limit the right to freedom of movement. Furthermore, the restrictions of entry would appear to apply to anyone who lives in the designated area, and would mean that they would need to be granted permission to re-enter their community subject to the requirements stipulated by the instruments, thereby potentially limiting their freedom of movement. It appears that these remote geographical areas may have a high proportion of Indigenous people living there, although this has not been specifically addressed in the explanatory materials. As such, the restrictions may have a disproportionate impact on Indigenous persons. Consequently, the measure

2 Explanatory statement, p. 1.

3 Right to life: International Covenant on Civil and Political Rights, article 6. Right to health: International Covenant on Economic, Social and Cultural Rights, article 12.

Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements for Remote Communities) Determination 2020 [F2020L00324]

Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements for Remote Communities) Amendment (No. 1) Determination 2020 [F2020L00415]

may also engage the right to equality and non-discrimination,⁴ which provides that everyone is entitled to enjoy their rights without distinction based on a personal attribute (for example, race).⁵

1.22 These rights may be subject to permissible limitations where the limitation pursues a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.

1.23 As there is no statement of compatibility accompanying the explanatory statement to this instrument,⁶ no assessment of the compatibility of this measure with any human rights has been provided. Further information is required as to the compatibility of these measures with human rights, particularly the rights to freedom of movement, and equality and non-discrimination.

Committee view

1.24 The committee notes that these instruments determine requirements to prevent or control the entry or spread of COVID-19 in designated remote communities in Australia, including establishing requirements for entry to these areas, for the duration of the period of emergency under the *Biosecurity Act 2015*.

1.25 The committee considers that the measure, which is designed to prevent the spread of COVID-19, is likely to promote and protect the rights to life and health, noting that the right to life requires Australia to take positive measures to protect life and the right to health requires Australia to take steps to prevent, treat and control epidemic diseases. The committee notes that the measure may also limit the rights to freedom of movement and equality and non-discrimination. These rights may be subject to permissible limitations if they are shown to be reasonable, necessary and proportionate.

4 International Covenant on Civil and Political Rights, articles 2 and 26. See also International Convention on the Elimination of All Forms of Racial Discrimination.

5 The prohibited grounds of discrimination are race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Under 'other status' the following have been held to qualify as prohibited grounds: age, nationality, marital status, disability, place of residence within a country and sexual orientation. The prohibited grounds of discrimination are often described as 'personal attributes'.

6 Noting that section 9 of the *Human Rights (Parliamentary Scrutiny) Act 2011* only requires rule-makers to prepare a statement of compatibility in relation to a legislative instrument that is subject to disallowance under section 42 of the *Legislation Act 2003*.

1.26 As no statement of compatibility has been provided, the committee seeks the minister's advice as to the compatibility of these measures with human rights, particularly the rights to freedom of movement and equality and non-discrimination.⁷

7 The committee's consideration of the compatibility of a measure which limits rights is assisted if the response addresses the limitation criteria set out in the committee's [Guidance Note 1](#), pp. 2-3.

Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements for Remote Communities) Determination 2020 [F2020L00324]

Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements for Remote Communities) Amendment (No. 1) Determination 2020 [F2020L00415]

Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements) Determination 2020 [F2020L00267]

Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements) Amendment Determination (No. 1) 2020 [F2020L00339]¹

Purpose	<p>The Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements) Determination 2020 prohibits international cruise ships from entering Australian ports. This instrument commenced on 18 March 2020</p> <p>The Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements) Amendment Determination (No. 1) 2020 prevents cruise ships from entering Australian territory and requires that foreign cruise ships leave Australian territory before 15 June 2020, subject to limited exceptions, to prevent or control the entry or spread of COVID-19 in Australian territory. This instrument commenced on 27 March 2020</p>
Portfolio	Health
Authorising legislation	<i>Biosecurity Act 2015</i>
Disallowance	These instruments are exempt from disallowance (see subsection 477(2) of the <i>Biosecurity Act 2015</i>)
Rights	Life; health; freedom of movement
Status	Seeking additional information

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements) Determination 2020 [F2020L00267] and Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements) Amendment Determination (No. 1) 2020 [F2020L00339], *Report 5 of 2020*; [2020] AUPJCHR 66.

Prohibiting entry to Australian ports and requiring exit from Australian territory

1.27 The Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements) Determination 2020 requires that international cruise ships with the capacity to carry 100 or more passengers, and which are on a voyage from a port outside Australian territory, must not enter an Australian port before 15 April 2020 except in limited circumstances.²

1.28 The Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements) Amendment Determination (No. 1) 2020 requires that cruise ships with the capacity to sleep 100 or more passengers, and which enter Australian territory before 15 June 2020 on an overnight voyage, must immediately leave Australian territory. Foreign cruise ships which are already in Australian territory before 15 June 2020 must cause the ship to leave Australian territory. The limited exceptions to these rules apply where permission has been given for the ship to remain in place or undertake travel, or for matters related to safety, performance of maintenance, or the exercise of the right to innocent passage.

1.29 These instruments are made under section 477(1) of the *Biosecurity Act 2015*, which provides that during a human biosecurity emergency period, the Health Minister may determine emergency requirements, or give directions, that they are satisfied are necessary to prevent or control the entry, emergence, establishment or spread of the disease in Australian territory. A person who fails to comply with a requirement or direction may commit a criminal offence (imprisonment for maximum 5 years, or 300 penalty units).³

Preliminary international human rights legal advice

Rights to life, health and freedom of movement

1.30 Preventing the entry of cruise ships into Australia ports or territory, including of their passengers, and requiring that foreign cruise ships leave Australian territory, may engage a number of human rights. As these measures are intended to prevent the spread of COVID-19, which has the ability to cause high levels of morbidity and mortality, it would appear that the measure may promote the rights to life and health.⁴

2 These are where permission has been given for such entry because the ships is in distress, extraordinary circumstances exist, or the ship departed a port outside Australian territory before the end of 15 March 2020 (by legal time in the Australian Capital Territory) and, when it departed that port, was bound directly for a port in Australian territory.

3 *Biosecurity Act 2015*, section 479.

4 Right to life: International Covenant on Civil and Political Rights, article 6. Right to health: International Covenant on Economic, Social and Cultural Rights, article 12(1).

Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements) Determination 2020 [F2020L00267]

Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements) Amendment Determination (No. 1) 2020 [F2020L00339]

1.31 However, these measures may also limit the right to freedom of movement of the passengers and crew on these ships. The right to freedom of movement includes the right to move freely within a country.⁵ Limitations on the right to freedom of movement may be permissible where the measure pursues a legitimate objective, is rationally connected to that objective and is proportionate to that objective.⁶

1.32 As there is no statement of compatibility accompanying the explanatory statements to these instruments,⁷ no assessment of the compatibility of these measures with any human rights has been provided. Further information is required as to the compatibility of these measures with human rights, particularly the right to freedom of movement.

Committee view

1.33 The committee notes that these instruments prohibit cruise ships from entering Australian ports and Australian territory, and require that foreign cruise ships leave Australian territory.

1.34 The committee considers that the measures, which are designed to prevent the spread of COVID-19, is likely to promote and protect the rights to life and health, noting that the right to life requires Australia to take positive measures to protect life and the right to health requires Australia to take steps to prevent, treat and control epidemic diseases. The committee notes that the measure may also limit the right to freedom of movement. This right may be subject to permissible limitations if it is shown to be reasonable, necessary and proportionate.

1.35 As no statements of compatibility have been provided, the committee seeks the minister's advice as to the compatibility of these measures with human rights, particularly the right to freedom of movement.⁸

5 International Covenant on Civil and Political Rights, article 12.

6 UN Human Rights Committee, *General Comment No. 27: Article 12 (Freedom of movement)* [21]. A person cannot be arbitrarily deprived of the right to enter their own country. There are few, if any, circumstances in which deprivation of the right to enter one's own country could be reasonable. A State party must not, by stripping a person of nationality or by expelling an individual to a third country, arbitrarily prevent this person from returning to his or her own country.

7 Noting that section 9 of the *Human Rights (Parliamentary Scrutiny) Act 2011* only requires rule-makers to prepare a statement of compatibility in relation to a legislative instrument that is subject to disallowance under section 42 of the *Legislation Act 2003*.

8 The committee's consideration of the compatibility of a measure which limits rights is assisted if the response addresses the limitation criteria set out in the committee's [Guidance Note 1](#), pp. 2-3.

Biosecurity (Human Health Response Zone) (Howard Springs Accommodation Village) Determination 2020 [F2020L00107]¹

Purpose	The instrument specifies the Howard Springs Accommodation Village as a human health response zone for the purposes of the <i>Biosecurity Act 2015</i> and sets requirements for individuals entering and leaving the zone. It operates for three months from 8 February 2020
Portfolio	Health
Authorising legislation	<i>Biosecurity Act 2015</i>
Disallowance	This instrument is exempt from disallowance (see subsection 113(7) of the <i>Biosecurity Act 2015</i>)
Rights	Life; health; freedom of movement; equality and non-discrimination
Status	Seeking additional information

Determining a human health response zone for the purposes of the *Biosecurity Act 2015*

1.36 The *Biosecurity Act 2015* (Biosecurity Act) enables the Director of Human Biosecurity to determine that a specified area is a human health response zone, if the Director is satisfied that it is necessary to do so for the purposes of preventing, or reducing the risk of, a listed human disease emerging, establishing itself or spreading in Australian territory or a part of Australian territory.² Such a determination must specify any requirement for individuals entering or leaving the zone and/or a requirement that specified classes of individuals must not enter the zone.

1.37 This instrument lists the Howard Springs Accommodation Village (Howard Springs) in the Northern Territory as a human health response zone, and specifies that only the following people can enter the zone: a person (including a person accompanying a child or incapable person) who has entered Australia on an aircraft carrying passengers being transported to Australia due to COVID-19; a biosecurity officer; and an individual who has authority from the person who has operational

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Biosecurity (Human Health Response Zone) (Howard Springs Accommodation Village) Determination 2020 [F2020L00107], *Report 5 of 2020*; [2020] AUPJCHR 67.

2 *Biosecurity Act 2015*, section 113.

control over Howard Springs to enter. It also provides that a person (other than a child or incapable person) who is in the zone after having entered Australia on an aircraft due to COVID-19 must, before leaving the zone, communicate, or attempt to communicate, their intention to leave the zone to the person who has operational control over Howard Springs.³ A civil penalty of 30 penalty units applies for failure to comply with a requirement under the Determination.⁴

Preliminary international human rights legal advice

Rights to life, health, freedom of movement, and equality and non-discrimination

1.38 The designation of Howard Springs as a human health response zone, and the corresponding limitation on persons who may enter the zone, engages a number of human rights. As the measure is intended to prevent the spread of COVID-19, which has the ability to cause high levels of morbidity and mortality, it would appear that the measure may promote the rights to life and health.⁵

1.39 The explanatory statement notes that Howard Springs will temporarily house individuals who requested repatriation from Wuhan city, China in isolation, with medical care and supervision, for approximately 14 days.⁶ By restricting entry to and exit from this location, this measure may limit the right to freedom of movement, which includes the right to move freely within a country for those who are lawfully within the country.⁷ Further, as this measure only applies to persons being repatriated from Wuhan in China, it may disproportionately impact on persons of a particular nationality. Consequently, the measure may also engage the right to equality and non-discrimination,⁸ which provides that everyone is entitled to enjoy their rights without distinction based on a personal attribute (for example, nationality).⁹

3 Note also that subsection 113(5) of the *Biosecurity Act 2015* provides that the determination does not specify as a requirement a biosecurity measure that may be included in a biosecurity control order applied to an individual. These biosecurity measures, set out at sections 85-97 of the *Biosecurity Act 2015*, may also include measures which restrict a person's behaviour.

4 *Biosecurity Act 2015*, section 116.

5 Right to life: International Covenant on Civil and Political Rights, article 6. Right to health: International Covenant on Economic, Social and Cultural Rights, article 12.

6 Explanatory statement, p. 1.

7 ICCPR, article 12.

8 Articles 2 and 26 of the International Covenant on Civil and Political Rights.

9 The prohibited grounds of discrimination are race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Under 'other status' the following have been held to qualify as prohibited grounds: age, nationality, marital status, disability, place of residence within a country and sexual orientation. The prohibited grounds of discrimination are often described as 'personal attributes'.

1.40 These rights may be subject to permissible limitations where the limitation pursues a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.

1.41 As there is no statement of compatibility accompanying the explanatory statement to this instrument,¹⁰ no assessment of the compatibility of this measure with any human rights has been provided. Further information is required as to the compatibility of this measure with human rights, particularly the rights to freedom of movement, and equality and non-discrimination.

Committee view

1.42 The committee notes that this instrument specifies the Howard Springs Accommodation Village in the Northern Territory as a human health response zone for the purposes of the *Biosecurity Act 2015*, which sets requirements for individuals entering and leaving the zone, and operates for three months from 8 February 2020.

1.43 The committee considers that the measure, which is designed to prevent the spread of COVID-19, is likely to promote and protect the rights to life and health, noting that the right to life requires Australia to take positive measures to protect life and the right to health requires Australia to take steps to prevent, treat and control epidemic diseases. The committee notes that the measure may also limit the rights to freedom of movement and equality and non-discrimination. These rights may be subject to permissible limitations if they are shown to be reasonable, necessary and proportionate.

1.44 As no statement of compatibility has been provided, the committee seeks the minister's advice as to the compatibility of this measure with human rights, particularly the rights to freedom of movement, and equality and non-discrimination.¹¹

10 Noting that section 9 of the *Human Rights (Parliamentary Scrutiny) Act 2011* only requires rule-makers to prepare a statement of compatibility in relation to a legislative instrument that is subject to disallowance under section 42 of the *Legislation Act 2003*.

11 The committee's consideration of the compatibility of a measure which limits rights is assisted if the response addresses the limitation criteria set out in the committee's [Guidance Note 1](#), pp. 2-3.

Biosecurity (Human Health Response Zone) (Swissotel Sydney) Determination 2020 [F2020L00313]¹

Purpose	The instrument specifies the Swissotel Sydney as a human health response zone for the purposes of the <i>Biosecurity Act 2015</i> and sets requirements for individuals entering and leaving the zone. The instrument commenced on 25 March 2020 and is in force for three months from that day
Portfolio	Health
Authorising legislation	<i>Biosecurity Act 2015</i>
Disallowance	This instrument is exempt from disallowance (see subsection 113(7) of the <i>Biosecurity Act 2015</i>)
Rights	Health; life; liberty; freedom of movement
Status	Seeking additional information

Determining a human health response zone for the purposes of the *Biosecurity Act 2015*

1.45 The *Biosecurity Act 2015* (Biosecurity Act) enables the Director of Human Biosecurity to determine that a specified area is a human health response zone, if the Director is satisfied that it is necessary to do so for the purposes of preventing, or reducing the risk of, a listed human disease emerging, establishing itself or spreading in Australian territory or a part of Australian territory.² Such a determination must specify any requirement for individuals entering or leaving the zone and/or a requirement that specified classes of individuals must not enter the zone.

1.46 This instrument designates the Swissotel at 68 Market Street, Sydney, New South Wales, as a human health response zone for three months. It specifies that only the following people can enter the zone: a person (including a person accompanying a child or incapable person) who has entered Australia on an aircraft carrying passengers being transported to Australia due to COVID-19; a biosecurity officer; a member of the New South Wales Police; and an individual who has authority from the person who has operational control over the zone. It also provides that a person (other than a child or incapable person) who is in the zone after having entered Australia due to COVID-19 must, before leaving the zone,

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Biosecurity (Human Health Response Zone) (Swissotel Sydney) Determination 2020 [F2020L00313], *Report 5 of 2020*; [2020] AUPJCHR 68.

2 *Biosecurity Act 2015*, section 113.

communicate, or attempt to communicate, their intention to leave the zone to the person who has operational control over the zone.³ A civil penalty of 30 penalty units applies for failure to comply with a requirement under the Determination.⁴

Preliminary international human rights legal advice

Rights to life, health, liberty and freedom of movement

1.47 The designation of the Swissotel as a human health response zone, and the corresponding limitation on persons who may enter and leave the zone, engages a number of human rights. As the measure is intended to prevent the spread of COVID-19, which has the ability to cause high levels of morbidity and mortality, it would appear that the measure may promote the rights to life and health.⁵

1.48 The explanatory statement notes that the Swissotel Sydney will temporarily house individuals who are returning to Australia by aircraft after having been passengers on the Norwegian Jewel cruise ship to undertake 14 days of isolation and that, subject to medical clearances, they will then be able to return to their homes in Australia.⁶ By providing for the compulsory isolation of these passengers within the Swissotel for 14 days, this measure engages and may limit the rights to liberty and freedom of movement. The right to liberty prohibits the arbitrary and unlawful deprivation of liberty.⁷ The notion of 'arbitrariness' includes elements of inappropriateness, injustice and lack of predictability. Any detention must not only be lawful, it must also be reasonable, necessary and proportionate in all of the circumstances. Regular review must be available to scrutinise whether the continued detention is lawful and non-arbitrary. The right to freedom of movement includes the right to move freely within a country for those who are lawfully within the country.⁸ The right may be subject to permissible limitations in particular circumstances, including where it is necessary and proportionate to achieve the objectives of protecting the rights and freedoms of others, national security, public health or morals, and public order. Measures that limit the right to freedom of movement must also be rationally connected and proportionate to these legitimate objectives.

3 Note also that subsection 113(5) of the *Biosecurity Act 2015* provides that the determination does not specify as a requirement a biosecurity measure that may be included in a biosecurity control order applied to an individual. These biosecurity measures, set out at sections 85-97 of the *Biosecurity Act 2015*, may also include measures which restrict a person's behaviour.

4 *Biosecurity Act 2015*, section 116.

5 Right to life: International Covenant on Civil and Political Rights, article 6. Right to health: International Covenant on Economic, Social and Cultural Rights, article 12.

6 Explanatory statement, p. 1.

7 International Covenant on Civil and Political Rights, article 9.

8 International Covenant on Civil and Political Rights, article 12.

1.49 As there is no statement of compatibility accompanying the explanatory statement to this instrument,⁹ no assessment of the compatibility of this measure with any human rights has been provided. Further information is required as to the compatibility of this measure with human rights, particularly the rights to liberty and freedom of movement.

Committee view

1.50 The committee notes that this instrument specifies the Swissotel Sydney as a human health response zone for the purposes of the *Biosecurity Act 2015*, which sets requirements for individuals entering and leaving the zone, and is in force for three months from 25 March 2020.

1.51 The committee considers that the measure, which is designed to prevent the spread of COVID-19, is likely to promote and protect the rights to life and health, noting that the right to life requires Australia to take positive measures to protect life and the right to health requires Australia to take steps to prevent, treat and control epidemic diseases. The committee notes that the measure may also limit the rights to liberty and freedom of movement. These rights may be subject to permissible limitations if they are shown to be reasonable, necessary and proportionate.

1.52 As no statement of compatibility has been provided, the committee seeks the minister's advice as to the compatibility of this measure with human rights, particularly the rights to liberty and freedom of movement.¹⁰

9 Noting that section 9 of the *Human Rights (Parliamentary Scrutiny) Act 2011* only requires rule-makers to prepare a statement of compatibility in relation to a legislative instrument that is subject to disallowance under section 42 of the *Legislation Act 2003*.

10 The committee's consideration of the compatibility of a measure which limits rights is assisted if the response addresses the limitation criteria set out in the committee's [Guidance Note 1](#), pp. 2-3.

Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Overseas Travel Ban Emergency Requirements) Determination 2020 [F2020L00306]¹

Purpose	This instrument prohibits an Australian citizen or permanent resident from travel outside Australia (by air or sea or as the operator of an outgoing aircraft or vessel), unless an exemption is granted to them. The instrument commenced at 12.00 pm on 25 March 2020 and is in force for an initial period of 4 weeks.
Portfolio	Health
Authorising legislation	<i>Biosecurity Act 2015</i>
Disallowance period	This instrument is exempt from disallowance (see subsection 477(2) of the <i>Biosecurity Act 2015</i>)
Rights	Health; freedom of movement
Status	Seeking additional information

Prohibiting travel outside Australia

1.53 This instrument prohibits an Australian citizen or permanent resident from travel outside Australia (by air or sea or as the operator of an outgoing aircraft or vessel), for an initial period of four weeks unless an exemption is granted to them. These exemptions include circumstances where a person is ordinarily resident in a country outside Australia or whose travel is associated with specific types of work.

1.54 This instrument is made under section 477 of the *Biosecurity Act 2015* (Biosecurity Act), which provides that during a human biosecurity emergency period, the Health Minister may determine emergency requirements, or give directions, that they are satisfied are necessary to prevent or control the entry, emergence, establishment or spread of the disease in Australian territory. A person who fails to comply with this determination may commit a criminal offence (punishable by imprisonment for a maximum of 5 years, or 300 penalty units).²

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Overseas Travel Ban Emergency Requirements) Determination 2020 [F2020L00306], *Report 5 of 2020*; [2020] AUPJCHR 69.

2 *Biosecurity Act 2015*, section 479.

Preliminary international human rights legal advice

Rights to life, health, freedom of movement, non-discrimination and private life

1.55 Restricting outbound travel for all Australian citizens and permanent residents in response to the COVID-19 pandemic engages a number of human rights. As the measure is intended to prevent the spread of COVID-19, which has the ability to cause high levels of morbidity and mortality, it would appear that the measure may promote the rights to life and health.³

1.56 However, preventing Australian citizens and permanent residents from travelling outside Australia also appears to limit the rights to freedom of movement, non-discrimination (as the travel restriction applies only to citizens and permanent residents) and the right to a private life. The right to freedom of movement includes the right to leave a country,⁴ encompassing both the legal right and practical ability to leave a country. It therefore applies not just to departure for permanent emigration but also for the purpose of travelling abroad. The measure also engages the right to equality and non-discrimination,⁵ which provides that everyone is entitled to enjoy their rights without distinction based on a personal attribute (for example, nationality).⁶ The right to privacy prohibits arbitrary and unlawful interferences with an individual's privacy, family, correspondence or home. This includes a requirement that the state does not arbitrarily interfere with a person's private and home life. These rights may be subject to permissible limitations where the limitation pursues a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.

1.57 As there is no statement of compatibility accompanying the explanatory statement to this instrument,⁷ no assessment of the compatibility of this measure with any human rights has been provided. Further information is required as to the compatibility of this measure with human rights, particularly the rights to freedom of movement, equality and non-discrimination and the right to a private life.

3 Right to life: International Covenant on Civil and Political Rights, article 6. Right to health: International Covenant on Economic, Social and Cultural Rights, article 12.

4 International Covenant on Civil and Political Rights, article 12.

5 Articles 2 and 26 of the International Covenant on Civil and Political Rights.

6 The prohibited grounds of discrimination are race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Under 'other status' the following have been held to qualify as prohibited grounds: age, nationality, marital status, disability, place of residence within a country and sexual orientation. The prohibited grounds of discrimination are often described as 'personal attributes'.

7 Noting that section 9 of the *Human Rights (Parliamentary Scrutiny) Act 2011* only requires rule-makers to prepare a statement of compatibility in relation to a legislative instrument that is subject to disallowance under section 42 of the *Legislation Act 2003*.

Committee view

1.58 The committee notes that this instrument prohibits an Australian citizen or permanent resident from travelling outside Australia between 25 March 2020 and 22 April 2020, unless an exemption is granted.

1.59 The committee considers that the measure, which is designed to prevent the spread of COVID-19, is likely to promote and protect the rights to life and health, noting that the right to life requires Australia to take positive measures to protect life and the right to health requires Australia to take steps to prevent, treat and control epidemic diseases. The committee notes that the measure may also limit the rights to freedom of movement, equality and non-discrimination and a private life. These rights may be subject to permissible limitations if they are shown to be reasonable, necessary and proportionate.

1.60 As no statement of compatibility has been provided, the committee seeks the minister's advice as to the compatibility of this measure with human rights, particularly the rights to freedom of movement, equality and non-discrimination, and a private life.⁸

8 The committee's consideration of the compatibility of a measure which limits rights is assisted if the response addresses the limitation criteria set out in the committee's [Guidance Note 1](#), pp. 2-3.

Biosecurity (Human Health Response Zone) (North West Point Immigration Detention Centre) Determination 2020 [F2020L00087]

Biosecurity (Human Health Response Zone) (Royal Australian Air Force Base Learmonth) Determination 2020 [F2020L00086]¹

Purpose	These instruments specify the Royal Australian Air Force Base Learmonth and the North West Point Immigration Detention Centre on Christmas Island as human health response zones for the purposes of the <i>Biosecurity Act 2015</i> and sets requirements for individuals entering the zone. These instruments are in force for three months from 3 February 2020.
Portfolio	Health
Authorising legislation	<i>Biosecurity Act 2015</i>
Disallowance	These instruments are exempt from disallowance (see subsection 113(7) of the <i>Biosecurity Act 2015</i>)
Rights	Health; life; freedom of movement; equality and non-discrimination
Status	Seeking additional information

Determining a human health response zone for the purposes of the *Biosecurity Act 2015*

1.61 The *Biosecurity Act 2015* (Biosecurity Act) enables the Director of Human Biosecurity to determine that a specified area is a human health response zone, if the Director is satisfied that it is necessary to do so for the purposes of preventing, or reducing the risk of, a listed human disease emerging, establishing itself or spreading in Australian territory or a part of Australian territory.² Such a determination must specify any requirement for individual entering or leaving the zone and/or a requirement that specified classes of individuals must not enter the zone.

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Biosecurity (Human Health Response Zone) (North West Point Immigration Detention Centre) Determination 2020 [F2020L00087] and Biosecurity (Human Health Response Zone) (Royal Australian Air Force Base Learmonth) Determination 2020 [F2020L00086], *Report 5 of 2020*; [2020] AUPJCHR 70.

2 *Biosecurity Act 2015*, section 113.

1.62 The Biosecurity (Human Health Response Zone) (North West Point Immigration Detention Centre) Determination 2020 lists the North West Point Immigration Detention Centre (the Centre) on Christmas Island as a human health response zone. The Biosecurity (Human Health Response Zone) (Royal Australian Air Force Base Learmonth) Determination 2020 lists the Royal Australian Air Force Base Learmonth (the Base) as a human health response zone. The Base has been listed as it is necessary for individuals travelling to Christmas Island to change airplanes in transit at the Base in order to land at the Christmas Island airport.³

1.63 The determinations specify that only the following people can enter the zones: a person (including a person accompanying a child or incapable person) who has entered Australia on an aircraft carrying passengers being transported to Australia due to COVID-19; a biosecurity officer; and an individual who has authority to enter from the person who has operational control over the Centre or Base.⁴ A civil penalty of 30 penalty units applies for failure to comply with a requirement under the Determination.⁵

Preliminary international human rights legal advice

Rights to life, health, freedom of movement, and equality and non-discrimination

1.64 The designation of the Centre and Base as human health response zones, and the corresponding limitation on persons who may enter the zones, engages a number of human rights. As the measure is intended to prevent the spread of COVID-19, which has the ability to cause high levels of morbidity and mortality, it would appear that the measure may promote the rights to life and health.⁶

1.65 While requirements which may be specified in a biosecurity control order (such as, restrictions on a person's movement inside the Centre and Base) are not included in this instrument, the instruments prohibit individuals from entering the zone, and it appears likely that individuals inside the zone would be prevented from leaving the Centre or Base. By restricting entry to and exit from this location, this measure may limit the right to freedom of movement, which includes the right to move freely within a country.⁷ Further, as this measure only applies to persons being repatriated from Wuhan in China, it may disproportionately impact on persons of a

3 Explanatory statement to the Biosecurity (Human Health Response Zone) (Royal Australian Air Force Base Learmonth) Determination 2020 [F2020L00086].

4 Note also that subsection 113(5) of the *Biosecurity Act 2015* provides that the determination does not specify as a requirement a biosecurity measure that may be included in a biosecurity control order applied to an individual. These biosecurity measures, set out at sections 85-97 of the *Biosecurity Act 2015*, may also include measures which restrict a person's behaviour.

5 *Biosecurity Act 2015*, section 116.

6 Right to life: International Covenant on Civil and Political Rights, article 6. Right to health: International Covenant on Economic, Social and Cultural Rights, article 12.

7 International Covenant on Civil and Political Rights, article 12.

particular nationality. Consequently, the measure may also engage the right to equality and non-discrimination,⁸ which provides that everyone is entitled to enjoy their rights without distinction based on a personal attribute (for example, nationality).⁹

1.66 These rights may be subject to permissible limitations where the limitation pursues a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.

1.67 As there is no statement of compatibility accompanying the explanatory statement to this instrument,¹⁰ no assessment of the compatibility of this measure with any human rights has been provided. Further information is required as to the compatibility of this measure with human rights, particularly the rights to freedom of movement, and equality and non-discrimination.

Committee view

1.68 The committee notes that these instruments specify the Royal Australian Air Force Base Learmonth and the North West Point Immigration Detention Centre on Christmas Island as human health response zones for the purposes of the *Biosecurity Act 2015*, which sets requirements for individuals entering the zone for three months from 3 February 2020.

1.69 The committee considers that the measures, which are designed to prevent the spread of COVID-19, are likely to promote and protect the rights to life and health, noting that the right to life requires Australia to take positive measures to protect life and the right to health requires Australia to take steps to prevent, treat and control epidemic diseases. The committee notes that the measures may also limit the rights to freedom of movement, and equality and non-discrimination. These rights may be subject to permissible limitations if they are shown to be reasonable, necessary and proportionate.

8 International Covenant on Civil and Political Rights, articles 2 and 26.

9 The prohibited grounds of discrimination are race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Under 'other status' the following have been held to qualify as prohibited grounds: age, nationality, marital status, disability, place of residence within a country and sexual orientation. The prohibited grounds of discrimination are often described as 'personal attributes'.

10 Noting that section 9 of the *Human Rights (Parliamentary Scrutiny) Act 2011* only requires rule-makers to prepare a statement of compatibility in relation to a legislative instrument that is subject to disallowance under section 42 of the *Legislation Act 2003*.

1.70 As no statement of compatibility has been provided, the committee seeks the minister's advice as to the compatibility of these measures with human rights, particularly the rights to freedom of movement, and equality and non-discrimination.¹¹

11 The committee's consideration of the compatibility of a measure which limits rights is assisted if the response addresses the limitation criteria set out in the committee's [Guidance Note 1](#), pp. 2-3.

Biosecurity (Exit Requirements) Determination 2020 [F2020L00323]

Biosecurity (Exit Requirements) Amendment (Nauru) Determination 2020 [F2020L00388]¹

Purpose	<p>The Biosecurity (Exit Requirements) Determination 2020 requires persons who are departing from prescribed airports and arriving in prescribed countries to be screened by a biosecurity officer or human biosecurity officer for the purposes of establishing whether the individual may be, or may have been, infected with human coronavirus with pandemic potential. Screening may be by equipment or by being required to answer questions or provide information in writing. This instrument commenced on 26 March 2020</p> <p>The Biosecurity (Exit Requirements) Amendment (Nauru) Determination 2020 adds Nauru to the list of countries for which exit screening of individuals applies. This instrument commenced on 2 April 2020</p>
Portfolio	Health
Authorising legislation	<i>Biosecurity Act 2015</i>
Disallowance	This instrument is exempt from disallowance (see subsection 45(3) of the <i>Biosecurity Act 2015</i>)
Rights	Life; health; and privacy
Status	Seeking additional information

Establishing exit requirements when leaving Australia

1.71 The Biosecurity (Exit Requirements) Determination 2020 (principal determination) provides that where a person is leaving a designated Australian international airport and is bound for the Cook Islands; Fiji; New Caledonia; Papua New Guinea; Samoa, Solomon Islands; Timor-Leste; Tonga or Vanuatu, they must be screened by a biosecurity officer or a human biosecurity officer (whether by equipment or by being required to answer questions or provide information in writing) for the purpose of establishing whether the individual may be, or may have

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights Biosecurity (Exit Requirements) Determination 2020 [F2020L00323], *Report 5 of 2020*; [2020] AUPJCHR 71.

been, infected with COVID-19. Failure to comply is subject to a civil penalty of 30 penalty units (currently \$6,300).²

1.72 The Biosecurity (Exit Requirements) Amendment (Nauru) Determination 2020 adds Nauru to the list of countries for which exit screening of individuals applies.

1.73 These instruments are made under section 45(2) of the *Biosecurity Act 2015* (Biosecurity Act), which enables the Minister for Health to establish exit requirements in order to prevent a listed human disease from spreading to another country.

Preliminary international human rights legal advice

Rights to life, health and privacy

1.74 The screening of a person who is leaving a designated Australian international airport for the purpose of establishing whether the individual may be, or may have been, infected with COVID-19, engages a number of human rights. The explanatory statement notes that this instrument seeks to protect the public health in Pacific Island Countries and Timor-Leste through the prescription of requirements for individuals or any class of individuals leaving Australian territory, to prevent a listed human disease from entering, or establishing itself or spreading in those neighbouring countries. As these measures are intended to prevent the spread to neighbouring countries of COVID-19, which has the ability to cause high levels of morbidity and mortality, it would appear that the measure is likely to promote the rights to life and health in those countries.³

1.75 However, requiring persons to answer questions, provide information in writing, or undergo some other form of testing engages and may limit the right to privacy. 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.⁴ The right to privacy includes the right to personal autonomy and physical and psychological integrity, and extends to protecting a person's bodily integrity against compulsory procedures.⁵ The right to privacy may be subject to permissible limitations where the limitation pursues a legitimate objective,

2 *Biosecurity Act 2015*, subsection 46(1).

3 Right to life: International Covenant on Civil and Political Rights, article 6. Right to health: International Covenant on Economic, Social and Cultural Rights, article 12(1).

4 Every person should be able to ascertain which public authorities or private individuals or bodies control or may control their files and, if such files contain incorrect personal data or have been processed contrary to legal provisions, every person should be able to request rectification or elimination. UN Human Rights Committee, *General Comment No. 16: Article 17* (1988) [10]. See also, *General Comment No. 34 (Freedom of opinion and expression)* (2011), [18].

5 See, *MG v Germany*, UN Human Rights Committee Communication No. 1428/06 (2008), [10.1].

is rationally connected to that objective and is a proportionate means of achieving that objective.

1.76 The statement of compatibility to the principal determination notes that this measure promotes the right to health; however, it does not recognise that the right to privacy is engaged. Further information is required as to the compatibility of this measure with the right to privacy, in particular what safeguards apply to protect the use and disclosure of any information collected as a result of this determination. In assessing the compatibility of this measure, it also does not appear that the measure is limited to only applying during the COVID-19 pandemic. Further information is required as to whether the instruments are time limited and, if not, why they have not been time limited.

Committee view

1.77 The committee notes that these instruments require persons who are departing from prescribed airports and arriving in 10 prescribed countries to be screened to establish if they may be, or may have been, infected with COVID-19. Screening may be by equipment or by being required to answer questions or provide information in writing.

1.78 The committee considers that the measure, which is designed to prevent the spread of COVID-19, is likely to promote and protect the rights to life and health, noting that the right to life requires Australia to take positive measures to protect life and the right to health requires Australia to take steps to prevent, treat and control epidemic diseases. The committee notes that the measure may also limit the right to privacy. This right may be subject to permissible limitations if it is shown to be reasonable, necessary and proportionate.

1.79 As this has not been addressed in the statement of compatibility, the committee seeks the minister's advice as to the compatibility of this measure with the right to privacy.

CASA EX57/20 — Licensing, and Operator Training and Checking (Extensions of Time Due to COVID-19) Exemptions Instrument 2020 [F2020L00337]

CASA EX63/20 — Licensing, and Operator Training and Checking (Extensions of Time Due to COVID-19) Exemptions Amendment Instrument 2020 (No. 1) [F2020L00412]¹

Purpose	These instruments exempt some pilots, air traffic controllers, air operator certificate holders and air traffic service providers from certain regulatory requirements related to medical certification, continued operational proficiency and training. These instruments commenced on 1 April 2020 and 7 April 2020 respectively and are in force until 31 March 2021
Portfolio	Infrastructure, Transport, Regional Development and Communications
Authorising legislation	<i>Civil Aviation Safety Regulations 1998</i>
Disallowance	15 sitting days after tabling
Rights	Life; health; rights at work
Status	Seeking additional information

Temporary exemption from certain regulatory requirements

1.80 The CASA EX57/20 — Licensing, and Operator Training and Checking (Extensions of Time Due to COVID-19) Exemptions Instrument 2020 temporarily provides pilots with an extension to complete proficiency checks and undertake flight reviews related to their licence and rating, and temporarily exempts cabin crews from the requirement to complete a test of their emergency procedure proficiency. It also authorises licence holders and other aviation authorisation holders to continue to use their existing medical certificates for the exercise of the privileges of their licences or other aviation authorisation, for a period of 6 months beyond the

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, CASA EX57/20 — Licensing, and Operator Training and Checking (Extensions of Time Due to COVID-19) Exemptions Instrument 2020 [F2020L00337] and CASA EX63/20 — Licensing, and Operator Training and Checking (Extensions of Time Due to COVID-19) Exemptions Amendment Instrument 2020 (No. 1) [F2020L00412], *Report 5 of 2020*; [2020] AUPJCHR 72.

CASA EX57/20 — Licensing, and Operator Training and Checking (Extensions of Time Due to COVID-19) Exemptions Instrument 2020 [F2020L00337]

CASA EX63/20 — Licensing, and Operator Training and Checking (Extensions of Time Due to COVID-19) Exemptions Amendment Instrument 2020 (No. 1) [F2020L00412]

certificates' current expiry dates. Further, the instrument temporarily relieves from the compliance obligations an operator who has an approved safety plan.

1.81 The CASA EX63/20 — Licensing, and Operator Training and Checking (Extensions of Time Due to COVID-19) Exemptions Amendment Instrument 2020 (No. 1) extends some of the emergency exemptions relating to medical certificates required to be held by certain pilots, and some operator proficiency check requirements.

Preliminary international human rights legal advice

Rights to life, health, rights at work

1.82 By temporarily exempting pilots and other air traffic staff from certain regulatory requirements related to medical certification and continued operational proficiency and training, this instrument may engage a number of human rights. The explanatory statement notes that action to comply with the former regulatory requirements could 'break, weaken or undermine the social distancing rules'.² As these measures are intended to prevent the spread of COVID-19, which has the ability to cause high levels of morbidity and mortality, it would appear that these measures may promote the rights to life and health.³

1.83 However, because the instruments provide temporary exemptions from several regulatory requirements which appear to be related to flight safety, they may potentially limit the right to life. Furthermore, as these exemptions deal with regulatory requirements related to employment as pilots and air traffic staff, they may also potentially limit rights at work, including the right to safe working conditions.⁴

1.84 The statements of compatibility accompanying these instruments do not identify that any human rights are engaged. Further information is required as to the compatibility of this instrument with the rights to life and work.

Committee view

1.85 The committee notes that these instruments exempt some pilots, air traffic controllers, air operator certificate holders and air traffic service providers from certain regulatory requirements related to medical certification, continued operational proficiency and training.

1.86 The committee considers that the measure, which is designed to prevent the spread of COVID-19, is likely to promote and protect the rights to life and

2 Explanatory statement, p. 1.

3 Right to life: International Covenant on Civil and Political Rights, article 6. Right to health: International Covenant on Economic, Social and Cultural Rights, article 12(1).

4 International Covenant on Economic, Social and Cultural Rights, articles 6-7.

CASA EX57/20 — Licensing, and Operator Training and Checking (Extensions of Time Due to COVID-19) Exemptions Instrument 2020 [F2020L00337]

CASA EX63/20 — Licensing, and Operator Training and Checking (Extensions of Time Due to COVID-19) Exemptions Amendment Instrument 2020 (No. 1) [F2020L00412]

health, noting that the right to life requires Australia to take positive measures to protect life and the right to health requires Australia to take steps to prevent, treat and control epidemic diseases. The committee notes that the measure may also limit rights at work and the right to life, if aviation safety were affected by the measure. These rights may be subject to permissible limitations if they are shown to be reasonable, necessary and proportionate.

1.87 As this has not been addressed in the statement of compatibility, the committee seeks the minister's advice as to the compatibility of this measure with human rights, particularly the rights to life and at work.⁵

5 The committee's consideration of the compatibility of a measure which limits rights is assisted if the response addresses the limitation criteria set out in the committee's [Guidance Note 1](#), pp. 2-3.

Coronavirus Economic Response Package (Payments and Benefits) Rules 2020 [F2020L00419]¹

Purpose	This instrument establishes the operation of the JobKeeper payment
Portfolio	Treasury
Authorising legislation	<i>Coronavirus Economic Response Package (Payments and Benefits) Act (2020)</i>
Disallowance	15 sitting days after tabling
Rights	Adequate standard of living; equality and non-discrimination
Status	Seeking additional information

JobKeeper subsidy for certain workers

1.88 This instrument establishes the operation of the JobKeeper payment. This is a subsidy of \$1,500 per eligible employee per fortnight, which is administered by the Australian Taxation Office and provided directly to registered eligible businesses. Those businesses (or entities) are then required to pass on this subsidy to those eligible employees. An individual is defined as an 'eligible employee' if, on 1 March 2020, they were: aged 16 years or older; an employee (other than a casual employee) of the entity or a long term casual employee of the entity;² and were an Australian resident (which broadly captures Australian citizens and permanent residents)³ or a New Zealand citizen living in Australia on a special category of visa.

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Coronavirus Economic Response Package (Payments and Benefits) Rules 2020 [F2020L00419], *Report 5 of 2020*; [2020] AUPJCHR 73.

2 A long term casual employee is defined in subsection 9(5) of the instrument as a casual employee who had been employed by the entity on a regular and systematic basis during the period of 12 months before 1 March 2020.

3 Paragraph 9(2)(c) of the instrument defines Australian resident as within the meaning of section 7 of the *Social Security Act 1991*, which defines it as a person who resides in Australia and is an Australian citizen, the holder of a permanent visa or holds a visa relating to whether the person had been in Australia before 26 February 2001.

Preliminary international human rights legal advice

Rights to an adequate standard of living, work, and equality and non-discrimination

1.89 By providing for the payment of a subsidy to certain registered businesses for eligible employees, this instrument appears to engage a number of human rights. As the JobKeeper payment is intended to replace a person's wage during the COVID-19 pandemic and during circumstances in which people may otherwise be at risk of losing their job, it would appear that this measure promotes the right to an adequate standard of living and the right to work with respect to eligible workers.⁴

1.90 However, the JobKeeper subsidy is broadly limited to employees who are either Australian citizens, permanent Australian residents, or specified New Zealand citizens living in Australia.⁵ As such, it appears that this measure engages and limits the right to equality and non-discrimination.⁶ This right provides that everyone is entitled to enjoy their rights without discrimination of any kind, which encompasses both 'direct' discrimination (where measures have a discriminatory *intent*) and 'indirect' discrimination (where measures have a discriminatory *effect* on the enjoyment of rights).⁷ This measure may have a disproportionate impact on those employees working in Australia who are foreign nationals (other than New Zealanders on a special category of visa).

1.91 Differential treatment will not constitute unlawful discrimination if the differential treatment is based on reasonable and objective criteria such that it serves a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.⁸ The statement of compatibility does not explain the reason for the differential treatment of foreign nationals who are not permanent residents or New Zealanders. It appears to only explain why New Zealand citizens are eligible for the JobKeeper payment, stating that this 'supports the unique arrangements and bilateral relationship between Australia and New Zealand under the Trans-Tasman Travel Arrangement'.⁹ However, it is not clear that

4 International Covenant on Economic, Social and Cultural Rights, articles 11(1) and 6 and 7.

5 Coronavirus Economic Response Package (Payments and Benefits) Rules 2020, subsection 9(c). See also statement of compatibility.

6 Articles 2 and 26 of the International Covenant on Civil and Political Rights. The prohibited grounds of discrimination are race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Under 'other status' the following have been held to qualify as prohibited grounds: age, nationality, marital status, disability, place of residence within a country and sexual orientation. The prohibited grounds of discrimination are often described as 'personal attributes'.

7 UN Human Rights Committee, *General Comment 18: Non-discrimination* (1989).

8 UN Human Rights Committee, *General Comment 18: Non-discrimination* (1989), [13]; see also *Althammer v Austria*, UN Human Rights Committee Communication No. 998/01 (2003), [10.2].

9 Statement of compatibility, p. 32.

supporting a unique travel arrangement and bilateral relationship between Australia and New Zealand constitutes a legitimate objective for treating citizens from other countries differently. As such, further information is required as to the compatibility of this measure with the right to equality and non-discrimination, including what is the legitimate objective for the differential treatment of eligible employees based on their nationality, and whether the measure is otherwise reasonable and proportionate.

Committee view

1.92 The committee notes that this instrument establishes the JobKeeper payment to be administered by the Australian Taxation Office. The committee notes that the payment is broadly restricted to apply to employees who are Australian citizens, permanent Australian residents or New Zealand citizens working in Australia.

1.93 The committee considers that this measure is likely to promote the rights to an adequate standard of living and work, as it is intended to replace a person's wage during the COVID-19 pandemic and during circumstances in which a person may otherwise be at risk of losing their job. The committee notes that the measure may also limit the right to equality and non-discrimination. This right may be subject to permissible limitations if it is shown to be reasonable, necessary and proportionate.

1.94 The committee seeks the Treasurer's advice as to the compatibility of this measure with the right to equality and non-discrimination.¹⁰

10 The committee's consideration of the compatibility of a measure which limits rights is assisted if the response addresses the limitation criteria set out in the committee's [Guidance Note 1](#), pp. 2-3.

Coronavirus Economic Response Package Omnibus Bill 2020¹

Purpose	This bill sought to amend a number of Acts to provide an economic response and deal with other matters relating to the coronavirus, and for related purposes
Portfolio	Treasury
Introduced	House of Representatives, 23 March 2020 <i>Received Royal Assent on 24 March 2020</i>
Right	Social security; equality and non-discrimination
Status	Seeking additional information

Additional support for income recipients

1.95 Schedule 11 of the bill amends a number of Acts to provide a fortnightly supplement of \$550 (or such other amount as determined by legislative instrument) for a period of six months beginning on 27 April 2020 for persons receiving certain social security payments, namely Jobseeker Payment; Youth Allowance (other); Sickness Allowance; Widow Allowance; Parenting Payment Single; Parenting Payment Partnered; Special Benefit; and Farm Household Allowance. The Minister for Families and Social Services may extend the supplement to other social security payments by legislative instrument.²

Preliminary international human rights legal advice

Rights to an adequate standard of living, social security and equality and non-discrimination

1.96 Increasing the amount of social security payments for a number of recipients would appear to engage and promote the rights to an adequate standard of living and social security. The right to social security recognises the importance of adequate social benefits in reducing the effects of poverty and plays an important role in realising many other economic, social and cultural rights, particularly the right to an adequate standard of living and the right to health.³ The right to an adequate

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Coronavirus Economic Response Package Omnibus Bill 2020, *Report 5 of 2020*; [2020] AUPJCHR 74.

2 Explanatory memorandum, p. 14 and statement of compatibility, p. 224.

3 International Covenant on Economic, Social and Cultural Rights, article 9; UN Committee on Economic, Social and Cultural Rights, *General Comment No. 19: The Right to Social Security* (2008).

standard of living requires state parties to take steps to ensure the availability, adequacy and accessibility of food, clothing, water and housing for all people in Australia, and also imposes on Australia the obligations listed above in relation to the right to social security.⁴

1.97 However, the supplement does not apply to all social security payments. In particular, those on the Disability Support Pension and the Aged Pension do not appear to be eligible for the supplement. Article 2(2) of the International Covenant on Economic, Social and Cultural Rights requires that the rights to an adequate standard of living and social security are able to be enjoyed without discrimination. The United Nations Committee on Economic, Social and Cultural Rights has stated that in the provision of social security,

States parties must also pay full respect to the principle of human dignity contained in the preamble of the Covenant, and the principle of non-discrimination, so as to avoid any adverse effect on the levels of benefits and the form in which they are provided.

[...]

Whereas everyone has the right to social security, States parties should give special attention to those individuals and groups who traditionally face difficulties in exercising this right, in particular [...] people with disabilities [and] older persons.⁵

1.98 The explanatory memorandum states that the fortnightly supplement for recipients of certain social security payments provides additional financial assistance to 'Australians financially impacted by the Coronavirus'. The statement of compatibility states that the measure promotes the right to social security and an adequate standard of living by providing a further payment 'for some of the most vulnerable groups in society'.⁶ It also states that the measure promotes human rights 'by supporting the Convention on the Rights of Persons with Disabilities'.⁷ However, it is not clear how the measure supports the rights of persons with disabilities when it does not appear to apply to those receiving the Disability Support Pension. Excluding recipients on this pension and those on the Aged Pension from receipt of this additional payment may result in discrimination with respect to the enjoyment of the rights to an adequate standard of living and social security by these groups.

1.99 Differential treatment (including the differential effect of a measure that is neutral on its face) will not constitute unlawful discrimination if the differential

4 International Covenant on Economic, Social and Cultural Rights, article 11.

5 United Nations Committee on Economic, Social and Cultural Rights, *General Comment No. 19: The right to social security*, (2008), [22] and [31]

6 Statement of compatibility, p. 225.

7 Statement of compatibility, p. 225.

treatment is based on reasonable and objective criteria such that it serves a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.⁸ However, the statement of compatibility does not provide any assessment as to any potential discriminatory application of the social security supplement. Further information is therefore required as to the compatibility of Schedule 11 with the rights to an adequate standard of living, social security and equality and non-discrimination.

Committee view

1.100 The committee notes that Schedule 11 of the bill provides a social security supplement for persons receiving certain social security payments.

1.101 The committee considers that the measure, which is designed to provide additional financial assistance to Australians financially impacted by COVID-19, promotes the rights to an adequate standard of living and social security. The committee notes that as the supplement does not apply to all social security payments this may engage the right to equality and non-discrimination, with respect to the enjoyment of these rights. Notwithstanding, it is important to note that there may be other social security benefits that may apply to these groups, but which are not the subject of this legislation. The rights to an adequate standard of living, social security, and equality and non-discrimination may be subject to permissible limitations if they are shown to be reasonable, necessary and proportionate.

1.102 As this has not been addressed in the statement of compatibility, the committee seeks the Treasurer's advice as to the compatibility of this measure with the rights to an adequate standard of living, social security and equality and non-discrimination.

8 UN Human Rights Committee, *General Comment 18: Non-Discrimination* (1989) [13]; see also *Althammer v Austria*, UN Human Rights Committee Communication No. 998/01 (2003) [10.2].

Fair Work Amendment (Variation of Enterprise Agreements) Regulations 2020 [F2020L00432]¹

Purpose	This instrument temporarily reduces the period of time during which employees must have access to a copy of a proposed variation of an enterprise agreement, and before which employees must be notified of the details of the vote on the variation, from seven calendar days to one calendar day. The instrument commenced on 17 April 2020 and is repealed at the end of six months (unless a later time is prescribed)
Portfolio	Industrial Relations
Authorising legislation	<i>Fair Work Act 2009</i>
Disallowance	15 sitting days after tabling
Right	Work, freedom of association
Status	Seeking additional information

Reduction in access period for variation of an enterprise agreement

1.103 This instrument reduces the period of time during which employees must have access to a copy of a proposed variation of an enterprise agreement, and before which employees must be notified of the details of the vote on the variation, from seven calendar days to one calendar day before the vote. This amendment will be effective for six months after commencement (or for a later time if otherwise prescribed).

Preliminary international human rights legal advice

Rights to just and favourable conditions of work

1.104 By reducing the period of time during which employees must have access to, and be notified of a vote on, a proposed variation to an enterprise agreement, this instrument engages and may limit the right to freedom of association and just and favourable conditions of work.

1.105 The right to freedom of association includes the right to collectively bargain without unreasonable and disproportionate interference from the state. The right to just and favourable conditions of work includes the right to adequate and fair remuneration, reasonable working hours, leave, safe working conditions, and the

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Fair Work Amendment (Variation of Enterprise Agreements) Regulations 2020 [F2020L00432], *Report 5 of 2020*; [2020] AUPJCHR 75.

right to join trade unions. These rights are protected by the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).²

1.106 As recognised in the statement of compatibility, the interpretation of these rights is informed by International Labour Organization (ILO) treaties, including the ILO Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize (ILO Convention No. 87) and the ILO Convention of 1949 concerning the Right to Organise and Collective Bargaining (ILO Convention No. 98), which protects the right of employees to collectively bargain for terms and conditions of employment.³ The *Human Rights (Parliamentary Scrutiny) Act 2011* does not include the International Labour Organization (ILO) Constitution or ILO conventions on freedom of association and the right to bargain collectively in the list of treaties against which the human rights compatibility of legislation is to be assessed. Nonetheless, these ILO standards and jurisprudence are relevant to the mandate of the committee as they are the practice of the international organisation with recognised and long-established expertise in the interpretation and implementation of these rights. It is a specialised body of law which can inform the general guarantees set out in the human rights treaties. In the current case, ILO Convention No. 87 is directly relevant, in that both article 22(3) of the ICCPR and article 8(3) of the ICESCR expressly state that measures which are inconsistent with the guarantees provided for in ILO Convention No. 87 will not be consistent with the right to freedom of association. The UN Committee on Economic, Social and Cultural Rights has also considered ILO Conventions No.87 and 89 when assessing Australia's compliance with Article 8 of the ICESCR.⁴

1.107 The statement of compatibility notes that this instrument engages the right to work and to just and favourable conditions of work, which includes the right to bargain on terms and conditions of employment.⁵ It states that the amendment will enable employees and employers to quickly agree to new terms and conditions of employment, and states that employees will still be required to genuinely agree to the variation of the agreement and employers may choose to provide a longer period

2 International Covenant on Civil and Political Rights, article 22; International Covenant on Economic, Social and Cultural Rights, articles 7 and 8.

3 The Freedom of Association and Protection of the Right to Organize (ILO Convention No. 87) is expressly referred to in article 22(3) of the International Covenant on Civil and Political Rights and article 8(3) of the International Covenant on Economic, Social and Cultural Rights.

4 See, UN Committee on Economic Social and Cultural Rights (UNCESCR), *Concluding Observations on Australia*, E/C.12/AUS/CO/5 (2017), [29]-[30].

5 The right to work is set out at articles 6-7 of the International Covenant on Economic, Social and Cultural Rights. It is further informed by the International Labour Organization Convention of 1949 concerning the Right to Organise and Collective Bargaining (ILO Convention No. 98), which protects the right of employees to collectively bargain for terms and conditions of employment.

of time.⁶ It also states that this is a temporary measure to support the expediting of variations of enterprise agreements during the COVID-19 pandemic.⁷

1.108 However, it is not clear that the provision of a minimum one calendar day for review and notification of a vote on a proposed variation to an enterprise agreement would constitute a sufficient period time for employees to review such proposed variations, and to exercise their right to bargain collectively. It is noted that one calendar day would include weekends and public holidays, and could result in employees being required to vote on an agreement that affects their working conditions without having had an opportunity to fully understand the proposal, discuss it with other employees or their union, or to negotiate.

1.109 Measures limiting the right to freedom of association, including the right to collectively bargain, and the right to just and favourable conditions of work may be permissible providing certain criteria are satisfied. Generally, to be capable of justifying a limit on human rights, the measure must address a legitimate objective, be rationally connected to that objective and be a proportionate way to achieve that objective.⁸ Further, Article 22(3) of the ICCPR and article 8 of the ICESCR expressly provide that no limitations are permissible on the right to freedom of association if they are inconsistent with the guarantees of freedom of association and the right to collectively organise contained in ILO Convention No. 87.

1.110 As the statement of compatibility does not recognise that this instrument may limit these rights, it provides no assessment of whether such a limitation may be permissible. From the information available it is not clear that expediting the variation of enterprise agreements during the COVID-19 pandemic would, in itself, constitute a legitimate objective. Further, it seems that any changes to an enterprise agreement as a result of these regulations would continue for the life of the agreement and could therefore have ongoing effects. In addition, no information has been provided as to any safeguards that are in place to ensure that the proposed reduction in time would not result in the ability of workers to collectively bargain. As such, further information is required to assess the compatibility of this measure with the rights to freedom of association and just and favourable conditions of work.

Committee view

1.111 The committee notes that this instrument temporarily reduces the period of time during which employees must have access to a copy of a proposed variation of an enterprise agreement, and before which employees must be notified of the details of the vote on the variation, from seven calendar days to one calendar day.

6 Statement of compatibility, p. 3.

7 Statement of compatibility, p. 3.

8 See International Covenant on Civil and Political Rights, article 22(2).

1.112 The committee considers that this measure is designed to support employers and employees to expedite variation of enterprise agreements to suit their workplace during the COVID-19 pandemic. The committee notes that this engages and may limit the right to freedom of association and just and favourable conditions of work. These rights may be subject to permissible limitations if they are shown to be reasonable, necessary and proportionate.

1.113 The committee seeks the minister's advice as to the compatibility of this measure with the right to freedom of association and just and favourable conditions of work.

Foreign Acquisitions and Takeovers Amendment (Threshold Test) Regulations 2020 [F2020L00435]¹

Purpose	This instrument amends the monetary threshold above which certain investments in Australia by foreign persons may require notification to the Treasurer for approval
Portfolio	Treasury
Authorising legislation	<i>Foreign Acquisitions and Takeovers Act 1975</i>
Disallowance	15 sitting days after tabling
Right	Equality and non-discrimination
Status	Seeking additional information

Reducing the monetary threshold for reporting investments by foreign persons

1.114 This instrument provides for a nil monetary threshold for actions taken by foreign persons in relation to entities, businesses and agricultural lands, and prescribes all kinds of land other than agricultural land as being land without a threshold value. This has the effect that all proposed foreign investments in relation to these actions and investments in Australia must be notified to the Treasurer for prior approval. The instrument repeals and replaces Part 4 of the Foreign Acquisitions and Takeovers Regulations 2015, which previously set out a number of different monetary thresholds in relation to which a proposed investment had to be notified to the Treasurer. The lowest previous monetary threshold was \$15 million, in relation to agricultural land being acquired by a foreign person.²

Preliminary international human rights legal advice

Right to equality and non-discrimination

1.115 By reducing to nil the monetary threshold for notification to the Treasurer regarding proposed foreign investments in Australia, which only applies to proposed investments by foreign persons,³ this measure may engage and limit the right to

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Foreign Acquisitions and Takeovers Amendment (Threshold Test) Regulations 2020 [F2020L00435], *Report 5 of 2020*; [2020] AUPJCHR 76.

2 Foreign Acquisitions and Takeovers Regulations 2015, subsection 52(4).

3 'Foreign person' is defined in section 5 of the *Foreign Acquisitions and Takeovers Act 1975* to include an individual not ordinarily resident in Australia.

equality and non-discrimination.⁴ This right provides that everyone is entitled to enjoy their rights without discrimination of any kind, which encompasses both 'direct' discrimination (where measures have a discriminatory *intent*) and 'indirect' discrimination (where measures have a discriminatory *effect* on the enjoyment of rights).⁵ This measure may indirectly discriminate against persons based on their nationality, as it only applies to persons not ordinarily resident in Australia. Differential treatment will not constitute unlawful discrimination if the differential treatment is based on reasonable and objective criteria such that it serves a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.⁶

1.116 The explanatory statement notes that COVID-19 has had a significant impact on the Australian economy, and has increased the risk of foreign investment in Australia occurring in ways which are contrary to the national interest.⁷ It further notes that this instrument applies to agreements which were entered into on or after 10.30am AEDT on 29 March 2020, and is intended to apply for the duration of the COVID-19 pandemic.⁸ However, there does not appear to be anything in the instrument itself that would limit the duration of these amendments.

1.117 The statement of compatibility does not identify that this measure engages any human rights. As such, further information is required as to the compatibility of this measure with the right to equality and non-discrimination.

Committee view

1.118 The committee notes that this instrument amends the monetary threshold above which certain investments in Australia by foreign persons may require notification to the Treasurer for approval to nil.

1.119 The committee considers this measure is designed to safeguard the national interest by protecting vulnerable businesses as COVID-19 puts intense pressure on the Australian economy and Australian businesses. The committee notes that this may engage and limit the right to equality and non-discrimination.

4 Articles 2 and 26 of the International Covenant on Civil and Political Rights. The prohibited grounds of discrimination are race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Under 'other status' the following have been held to qualify as prohibited grounds: age, nationality, marital status, disability, place of residence within a country and sexual orientation. The prohibited grounds of discrimination are often described as 'personal attributes'.

5 UN Human Rights Committee, *General Comment 18: Non-discrimination* (1989).

6 UN Human Rights Committee, *General Comment 18: Non-discrimination* (1989) [13]; see also *Althammer v Austria*, UN Human Rights Committee Communication No. 998/01 (2003) [10.2].

7 Explanatory statement, p 1.

8 Explanatory statement, p 1.

This right may be subject to permissible limitations if it is shown to be reasonable, necessary and proportionate.

1.120 As the statement of compatibility does not identify that any human rights are engaged by this instrument, the committee seeks the advice of the Treasurer as to the compatibility of this measure with the right to equality and non-discrimination.⁹

9 The committee's consideration of the compatibility of a measure which limits rights is assisted if the response addresses the limitation criteria set out in the committee's [Guidance Note 1](#), pp. 2-3.

Public Service (Terms and Conditions of Employment) (General wage increase deferrals during the COVID-19 pandemic) Determination 2020 [F2020L00418]¹

Purpose	This instrument provides a six month delay to Australian Public Service wage increases occurring during a twelve month period
Portfolio	Prime Minister and Cabinet
Authorising legislation	<i>Public Service Act 1999</i>
Disallowance	This instrument is exempt from disallowance (see subsection 24(3) of the <i>Public Service Act 1999</i>)
Right	Just and favourable conditions of work
Status	Seeking additional information

Altering terms and conditions of employment

1.121 This instrument alters the terms and conditions of public service employment for non-SES (Senior Executive Service) Australian Public Service workers by delaying wage increases for six months. This relates to salary and salary-related allowances. It does not apply to increases in salary which take effect because of a variation in the rate of salary in an award, or an increase which takes effect because of a performance or training-based progression.

Preliminary international human rights legal advice

Right to just and favourable conditions of work

1.122 This instrument applies to the majority of non-SES Australian Public Service Employees (with some specific worker and salary type exclusions set out in sections 5 and 7). By delaying wage increases for Australian Public Service workers for six months, this measure may engage the right to just and favourable conditions of work. The right to just and favourable conditions in work protects the right of all persons to fair wages.² This is considered to be a minimum requirement in the protection of the right to work.³ The right to just and favourable conditions of work

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Public Service (Terms and Conditions of Employment) (General wage increase deferrals during the COVID-19 pandemic) Determination 2020 [F2020L00418], *Report 5 of 2020*; [2020] AUPJCHR 77.

2 International Covenant on Economic, Social and Cultural Rights, articles 6-7.

3 United Nations Committee on Economic, Social and Cultural Rights, General Comment No. 23 (2016) on the right to just and favourable conditions of work, [7].

may be subject to permissible limitations where the limitation pursues a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.

1.123 As there is no statement of compatibility accompanying the explanatory statement to this instrument,⁴ no assessment of the compatibility of this measure with any human rights has been provided. Further information is required as to the compatibility of this measure with human rights, particularly the right to just and favourable conditions of work.

Committee view

1.124 The committee notes that this instrument provides a six month delay to Australian Public Service wage increases occurring during a twelve month period. The committee notes the legal advice that this may engage and limit the right to just and favourable conditions of work. This right may be subject to permissible limitations if it is shown to be reasonable, necessary and proportionate.

1.125 As no statement of compatibility has been provided, the committee seeks the Prime Minister's advice as to the compatibility of this measure with human rights, particularly the right to just and favourable conditions of work.⁵

Senator the Hon Sarah Henderson
Chair

4 Noting that section 9 of the *Human Rights (Parliamentary Scrutiny) Act 2011* only requires rule-makers to prepare a statement of compatibility in relation to a legislative instrument that is subject to disallowance under section 42 of the *Legislation Act 2003*.

5 The committee's consideration of the compatibility of a measure which limits rights is assisted if the response addresses the limitation criteria set out in the committee's [Guidance Note 1](#), pp. 2-3.