Chapter 1 – New and continuing matters

This chapter lists new matters identified by the committee at its meeting on 1 September 2014, and continuing matters in relation to which the committee has received recent correspondence. The committee will write to the relevant proponent of the bill or instrument maker in relation to substantive matters seeking further information.

Matters which the committee draws to the attention of the proponent of the bill or instrument maker are raised on an advice-only basis and do not require a response.

This chapter includes the committee's consideration of one bill introduced between 26 and 28 August 2014, one Act previously identified as potentially giving rise to human rights concerns, and legislative instruments received between 26 July and 1 August 2014.

Mining Subsidies Legislation Amendment (Raising Revenue) Bill 2014

Sponsor: Senator Christine Milne
Introduced: Senate, 27 August 2014

1.1 The Mining Subsidies Legislation Amendment (Raising Revenue) Bill 2014 (the bill) seeks to abolish the following fossil fuel subsidies for the mining industry from 1 January 2015:

- the diesel fuel rebate;
- accelerated asset depreciation for aircraft, the oil and gas industry and vehicles; and
- immediate deduction for exploration and prospecting expenses for the mining industry.

1.2 **The committee considers that the bill is compatible with human rights and has concluded its examination of the bill.**

Commonwealth Places (Application of Laws) Act 1970

Portfolio: Justice

Purpose

1.3 The application of state laws to Commonwealth places is generally governed by the *Commonwealth Places (Application of Laws) Act 1970* (the CP Act), which was enacted in response to a decision of the High Court in 1970.[1] That case found section 52(i) of the Constitution excludes the direct application of state laws to Commonwealth places.[2]

1.4 The effect of the CP Act is that the provisions of an applied state law generally take effect as a Commonwealth law in relation to the Commonwealth place.[3]

Background

1.5 The committee looked at the CP Act in the context of its examination of the *G20 (Safety and Security) Complementary Act 2014* in the *Sixth Report of the 44th Parliament*, *Ninth Report of the 44th Parliament* and *Tenth Report of the 44th Parliament.*

1.6 The committee determined that, as the CP Act effectively provides for the enactment of Commonwealth laws without the requirement for a human rights assessment under the *Human Rights (Parliamentary Scrutiny) Act 2011*,[4] it would undertake an assessment of the CP Act for compatibility with human rights (as provided for by section 7(b) of the *Human Rights (Parliamentary Scrutiny) Act 2011*). The committee therefore requested that the Minister provide a statement of compatibility for the CP Act to assist in the committee's assessment of the human rights compatibility of the CP Act. The committee also indicated that 'identification of particular state laws that impact on the assessment, as well as the number and area of Commonwealth places would be particularly relevant to the human rights

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1 *Worthing v Rowell and Muston Pty Ltd* (1970) 123 CLR 89. See also *Attorney-General (NSW) v Stocks and Holdings (Constructors) Pty Ltd* [1970] HCA 58; (1970) 124 CLR 262; and *R v Phillips* [1970] HCA 50; (1970) 125 CLR 93).

2 Section 52(i) of the Constitution provides: The Parliament shall, subject to this Constitution, have exclusive power to make laws for the peace, order, and good government of the Commonwealth with respect to: (i) the seat of government of the Commonwealth, and all places acquired by the Commonwealth for public purposes.

3 See *Pinkstone v R* [2004] HCA 23; 219 CLR 444 at [34], where McHugh and Gummow JJ described the applied state law as operating as 'a surrogate federal law'. See also McHugh J in *Cameron v R* [2002] HCA 6; 209 CLR 339, at [46].

4 See *R v Porter* [2001] NSWCCA 441; 165 FLR 301; 53 NSWLR 354; [41] (Spigelman CJ, with whom Studdert J and Ireland AJ agreed).

assessment.'[5] As no statement of compatibility was provided, the committee's assessment of the compatibility of the CP Act with human rights has been conducted on the basis of information publicly available.

Committee view on compatibility

Multiple rights

1.7 The CP Act effectively provides for the enactment of Commonwealth laws without the requirement for a human rights assessment under the *Human Rights (Parliamentary Scrutiny) Act 2011*. Therefore, to the extent that applied state laws engage and limit human rights, the CP Act has the potential to engage and limit multiple human rights.

State laws applied by Commonwealth Places (Application of Laws) Act 1970

1.8 As noted above, the CP Act allows provisions of a state law to take effect as a Commonwealth law in relation to the Commonwealth place.[6] Such Commonwealth laws are 'facilitative' of state laws regardless of whether or not applied state laws comply with Australia's international human rights obligations. As acknowledged by the Minister:

> The Commonwealth Places Act does not modify or augment State laws in any substantive way, but merely applies those laws to very small areas within each State. Consequently, the Commonwealth Places Act has no greater impact on human rights than the State laws being applied.[7]

1.9 This statement confirms that the CP Act permits the application of state laws to Commonwealth places irrespective of whether they engage or limit human rights, and the committee is concerned that there may be numerous state laws applying to Commonwealth places that engage and significantly limit human rights.[8] The Minister has stated that the CP Act applies state laws to 'very small areas within each State.' The committee notes the Minister did not provide the committee with a list of Commonwealth places within the meaning of the CP Act, and there appears to be no

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5 Parliamentary Joint Committee on Human Rights, *Ninth Report of the 44th Parliament*, para 1.524.

6 State laws which are applied are subject to express or implied limitations on the legislative power of the Commonwealth Parliament. Those state laws that are inoperative by virtue of inconsistency with a Commonwealth law and thus invalid to the extent of the inconsistency pursuant to section 109 of the Constitution, are not applied by the CP Act.

7 See Parliamentary Joint Committee on Human Rights, *Tenth Report of the 44th Parliament*, Appendix 1, Letter from the Hon Michael Keenan MP, Minister for Justice, to Senator Dean Smith, dated 13/08/2014, p. 1.

8 See, for example, *Law Enforcement (Powers and Responsibilities) Act* 2002 (NSW), part 6A; *Summary Offences and Sentencing Amendment* (Vic); *Vicious Lawless Association Disestablishment Act* 2013 *(VLAD)* (Qld) *Criminal Law (Criminal Organisations Disruption) Amendment Act* 2013 *(Qld).*

publicly available list of such places. The committee further notes that the category of Commonwealth places appears to include Australia's major airports, certain military installations located in the states, and other places.[9] The committee considers that the human rights implications of the application of state laws to these areas is of significance, and is concerned that it has not yet been provided with details as to number and nature of Commonwealth places to which the CP Act applies.

1.10 The committee notes that the CP Act was enacted in 1970, prior to the development of parliamentary human rights scrutiny mechanisms. The committee acknowledges that the human rights implications of the CP Act may have been less apparent to Parliament or the executive in that context. However, with the enactment of the *Human Rights (Parliamentary Scrutiny) Act 2011*, which is intended to ensure human rights assessment of (generally) all new and proposed Commonwealth legislation, the operation of the CP Act effectively reduces the intended scope of human rights assessment of Commonwealth legislation.

1.11 The committee notes that the federal government possesses relevant powers to ensure compliance with Australia's international obligations.[10] The committee further notes that the division of federal-state responsibilities does not negate Australia's obligations under international human rights law.[11]

1.12 In light of the scheme of the CP Act and the Commonwealth's obligations and powers in respect of human rights, the committee is of the view that the application of state laws via the CP act should be subject to requirements for any such state laws to be assessed for compatibility with human rights. While the committee acknowledges the Minister's advice regarding the practical difficulty of assessing all state laws of general application, the committee considers that a reasonable starting point would be to subject newly applied state laws to an assessment of human rights compatibility.

1.13 **The committee requests the Minister for Justice to provide it with categories of Commonwealth places to which the *Commonwealth Places (Application of Laws) Act 1970* applies.**

1.14 **The committee recommends that newly applied state laws be subject to an assessment of human rights compatibility.**

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9 For example, the Googong Dam Area outside Canberra: *Canberra Water Supply (Googong Dam) Act 1974*, s 27.

10 See Australian Constitution, sections 51(xxix), 52(i), 109.

11 See, for example, Vienna Convention on the Law of Treaties, 1969, article 27; International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, articles 1 – 3, http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf (accessed 27 August 2014).

1.15 **The committee considers that the *Commonwealth Places (Application of Laws) Act 1970* is likely to be incompatible with human rights.**

1.16 **The committee recommends that the *Commonwealth Places (Application of Laws) Act 1970* be amended to provide that state laws apply only insofar as they are compatible with Australia's obligations under international human rights law.**

Social Security Legislation Amendment (Stronger Penalties for Serious Failures) Bill 2014

Portfolio: Employment
Introduced: House of Representatives, 4 June 2014

Purpose

1.17 The Social Security Legislation Amendment (Stronger Penalties for Serious Failures) Bill 2014 (the bill) seeks to amend the *Social Security (Administration) Act 1999* to provide that:

- jobseekers who incur an eight-week non-payment penalty for refusing suitable work will no longer be able to have the penalty waived; and
- jobseekers who persistently fail to comply with participation obligations will only be able to have the penalty waived once while in receipt of an activity tested income support payment.

Background

1.18 The committee reported on the bill in its *Ninth Report of the 44th Parliament.*

Committee view on compatibility

Right to social security and an adequate standard of living

Removal or limitation of the ability to waive the non-payment penalty for refusal of suitable work, or for persistent non-compliance

1.19 The committee sought the advice of the Assistant Minister for Employment as to whether the removal or limitation of the ability to have the non-payment penalty waived is compatible with the right to social security, and particularly:

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

Assistant Minister's response

> *Are the proposed changes aimed at achieving a legitimate objective?*
>
> The Bill addresses a number of legitimate objectives. The proposed changes will help to ensure the integrity of the income support system and ensure more job seekers are employed and experiencing the financial and social benefits of work. The amendments are intended to encourage job seekers to take active steps to meet their participation requirements, such as accepting a suitable job, and thereby increase their chances of moving from welfare to work.

The Bill does not take away a job seeker's entitlement to social security income support payments and does not impact on job seekers who cannot get work despite their best efforts. It is important to note that penalties will not be applied where a person who refuses a job has a reasonable excuse and that the existing safeguards and protections for vulnerable job seekers will remain in place.

There is a pressing and substantial need for the measures in the Bill. Since the introduction of the provisions allowing waivers of eight week non-payment penalties for refusing suitable work, the number of such penalties being imposed has almost trebled-from 644 penalties in 2008-09 to 1,718 in 2012-13, of which 68 per cent were waived. This difference cannot be attributed to any comparable change in the size of the activity-tested job seeker caseload or increase in the number of jobs being offered (as evidenced by the fact that the total job seeker population and vacancy rate changed very little between these years). In other words, many more job seekers are refusing suitable work and this has coincided with the introduction of the waiver provisions.

Australia's income support system is designed to act as a safety net for people who are unemployed and job seekers are required to do all they can to find and keep a job. Job seekers who incur penalties for refusing suitable work without a reasonable excuse are clearly employable and are expected to accept work rather than remain in receipt of income support at the taxpayer's expense. Job seekers who have a reasonable excuse for refusing the job, or are offered a job that is not suitable, are not affected by the changes.

Similarly, the number of instances of persistent non-compliance has almost trebled since the waiver provisions were introduced. In 2008-09 there were 8,850 eight week penalty periods imposed compared to 25,286 in 2012-2013 of which 73 per cent were waived. Of the percentage waived, 31 per cent were a second or subsequent waiver, indicating that the waiver provisions have undermined the deterrent effect of eight week non-payment periods.

The changes proposed will provide a stronger deterrent and, as evidence by the figures from 2008-09 outlined above, promote higher levels of job seeker compliance with their participation requirements.

Is there a rational connection between the limitation and the objective?

There is a rational connection between the measures in the Bill and the objective of the Bill, because the significant increase in the job seeker behaviour that can result in an eight week non-payment penalty being applied coincided with the introduction of the provisions permitting waiver of such penalties.

Data from the Australian Bureau of Statistics indicates that the number of jobs on offer has remained steady during this time. In 2008-09, there was an average of just under four unemployed people per vacancy, which

increased to just over four job seekers per vacancy in 2012-13. During this same period, the number of activity-tested job seekers dropped by approximately 5.8 per cent. The trebling of the number of serious failures applied for refusing work and persistent non-compliance has, therefore, occurred for no other apparent reason than job seekers are able to have the eight week non-payment penalty waived.

Is the limitation a reasonable and proportionate measure for the achievement of that objective?

The limitations on the availability of waivers are reasonable and proportionate to the above objectives. The majority of job seekers will not be impacted by this Bill as they meet mutual obligation requirements. During 2012-13, only 22 per cent of all activity-tested job seekers had a participation failure applied by the Department of Human Services. Less than two per cent of job seekers incurred penalties for refusing work or persistent non-compliance.

I would draw the Committee's attention to the protections for job seekers who refuse a suitable job. Before a penalty can be applied, an additional test (mandated by legislation) is required to establish that the job was suitable for the job seeker. This includes ensuring that it meets the applicable statutory conditions; that the job seeker is capable of doing the work (or appropriate training will be provided); that it will not aggravate a pre-existing illness, disability or injury; and that it would not involve more hours of work than the person's assessed capacity. Additionally, a penalty is not applied if the job seeker had a reasonable excuse for refusing the job.

Before a penalty can be applied for persistent non-compliance, the job seeker must first undergo a Comprehensive Compliance Assessment by a senior or specialist officer of the Department of Human Services (such as a social worker). The purpose of this assessment is to ensure a job seeker has no undisclosed barriers to participation. Before a penalty can be applied, it must additionally be established that the job seeker's prior failures constitute wilful and persistent non-compliance.

Job seekers who incur penalties for persistent non-compliance will still have one opportunity for a penalty to be waived. Therefore the Bill would only impact a job seeker if he or she had been deliberately non-compliant on numerous occasions without a good reason. This is a reasonable and proportionate response to the problem of increased non-compliance since the introduction of the waiver provisions. It is reasonable to expect the job seeker to take responsibility for avoiding penalties for persistent non-compliance after an initial warning.

Job seekers would be informed in person of the Bill's impact at routine contacts with employment service providers and with the Department of Human Services. A job seeker also has a right to internal and external review of decisions in relation to all eight week non-payment penalties.

> This helps ensure that such penalties are not imposed or served where that would not be appropriate.[1]

Committee response

1.20 **The committee thanks the Assistant Minister for Employment for his response.**

1.21 The committee considers that the response has provided a range of useful information to assist the committee in its assessment of the measure. The committee notes that this included useful information on whether the proposed measure was reasonable, necessary and proportionate in pursuit of a legitimate objective.

1.22 The committee notes that the response provides data regarding the increase in the number of penalties applied since the introduction of the waiver as well as the high percentage of cases in which a waiver has been granted. However, the response does not directly explain whether these increases were as a result of waivers being misused by the department or whether the use of waivers as a re-engagement tool was ineffective. Without such information the committee is unable to conclude that the measure is necessary in pursuit of a legitimate objective.

1.23 **The committee therefore requests the advice of the Assistant Minister for Employment as to whether the waiver was being misused or was ineffective.**

Committee view on compatibility

Right to equality and non-discrimination

Removal or limitation of the ability to waive the non-payment penalty for refusal of suitable work, or for persistent non-compliance

1.24 The committee sought the advice of the Assistant Minister for Employment as to whether the removal or limitation of the ability to have the non-payment penalty waived is compatible with the rights to equality and non-discrimination.

Assistant Minister's response

> The Bill does not directly target the behaviour of any category of job seeker other than the small group of job seekers who deliberately refuse suitable work or persistently avoid complying with mutual obligation requirements. Regarding the committee's concern that the Bill could discriminate indirectly, for example by having a disproportionately negative effect on women; data shows that, while women made up 49.7 per cent of the activity-tested caseload in 2012-13, they incurred only 23 per cent of the penalties that were applied for refusing work in that year

1 See Appendix 1, Letter from the Hon. Luke Hartsuyker MP, Assistant Minister for Employment, to Senator Dean Smith, dated 14 August 2014, pp 1-3.

and only 26 per cent of the penalties that were applied for persistent non-compliance.

Job seekers who do their best to find suitable work will be unaffected by this Bill regardless of age, gender or other attributes. The checks and balances outlined above will ensure that non-payment penalties are not imposed or served inappropriately.[2]

Committee response

1.25 **The committee thanks the Assistant Minister for Employment for his response and has concluded its examination of this aspect of the matter.**

2 See Appendix 1, Letter from the Hon. Luke Hartsuyker MP, Assistant Minister for Employment, to Senator Dean Smith, dated 14 August 2014, pp 3-4.

The committee has deferred its consideration of the following bills and instruments

Corporations Amendment (Streamlining of Future of Financial Advice) Bill 2014

Higher Education and Research Reform Amendment Bill 2014

National Security Legislation Amendment Bill (No. 1) 2014

Autonomous Sanctions (Designated and Declared Persons - Former Federal Republic of Yugoslavia) Amendment List 2014 (No. 2) [F2014L00970]

Criminal Code (Terrorist Organisation—Islamic State) Regulation 2014 [F2014L00979]