Parliamentary Joint Committee on Human Rights

Human rights scrutiny report

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Committee information

Under the *Human Rights (Parliamentary Scrutiny) Act 2011* (the Act), the committee is required to examine bills, Acts and legislative instruments for compatibility with human rights, and report its findings to both Houses of the Parliament. The committee may also inquire into and report on any human rights matters referred to it by the Attorney-General.

The committee assesses legislation against the human rights contained in the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR); as well as five other treaties relating to particular groups and subject matter.[1] **Appendix 2** contains brief descriptions of the rights most commonly arising in legislation examined by the committee.

The establishment of the committee builds on Parliament's established tradition of legislative scrutiny. The committee's scrutiny of legislation is undertaken as an assessment against Australia's international human rights obligations, to enhance understanding of and respect for human rights in Australia and ensure attention is given to human rights issues in legislative and policy development.

Some human rights obligations are absolute under international law. However, in relation to most human rights, prescribed limitations on the enjoyment of a right may be justified under international law if certain requirements are met. Accordingly, a focus of the committee's reports is to determine whether any limitation of a human right identified in proposed legislation is justifiable. A measure that limits a right must be **prescribed by law**; be in pursuit of a **legitimate objective**; be **rationally connected** to its stated objective; and be a **proportionate** way to achieve that objective (the **limitation criteria**). These four criteria provide the analytical framework for the committee.

A **statement of compatibility** for a measure limiting a right must provide a **detailed and evidence-based assessment** of the measure against the limitation criteria.

Where legislation raises human rights concerns, the committee's usual approach is to seek a response from the legislation proponent, or else draw the matter to the attention of the proponent on an advice-only basis.

More information on the committee's analytical framework and approach to human rights scrutiny of legislation is contained in Guidance Note 1 (see **Appendix 4**).

1 These are the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD); the Convention on the Elimination of Discrimination against Women (CEDAW); the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT); the Convention on the Rights of the Child (CRC); and the Convention on the Rights of Persons with Disabilities (CRPD).

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Chapter 1

New and continuing matters

1.1 This chapter provides assessments of the human rights compatibility of:

- bills introduced into the Parliament between 16 October and 16 November (consideration of 3 bills from this period has been deferred);[1]
- legislative instruments received between 15 September and 12 October (consideration of 6 legislative instruments from this period has been deferred);[2] and
- bills and legislative instruments previously deferred.

1.2 The chapter also includes reports on matters previously raised, in relation to which the committee seeks further information following consideration of a response from the legislation proponent.

1.3 The committee has concluded its consideration of two legislative instruments that were previously deferred.[3]

Instruments not raising human rights concerns

1.4 The committee has examined the legislative instruments received in the relevant period, as listed in the *Journals of the Senate*.[4] Instruments raising human rights concerns are identified in this chapter.

1.5 The committee has concluded that the remaining instruments do not raise human rights concerns, either because they do not engage human rights, they contain only justifiable (or marginal) limitations on human rights or because they promote human rights and do not require additional comment.

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1 See Appendix 1 for a list of legislation in respect of which the committee has deferred its consideration. The committee generally takes an exceptions based approach to its substantive examination of legislation.

2 The committee examines legislative instruments received in the relevant period, as listed in the *Journals of the Senate*. See Parliament of Australia website, *Journals of the Senate*, http://www.aph.gov.au/Parliamentary_Business/Chamber_documents/Senate_chamber_documents/Journals_of_the_Senate.

3 These are: the Citizenship (Authorisation) Revocation and Authorisation Instrument 2017 [F2017L01044] and the Citizenship (Authorisation) Revocation and Authorisation Amendment Instrument 2017 [F2017L01074].

4 See Parliament of Australia website, *Journals of the Senate*, http://www.aph.gov.au/Parliamentary_Business/Chamber_documents/Senate_chamber_documents/Journals_of_the_Senate.

Response required

1.6 The committee seeks a response or further information from the relevant minister or legislation proponent with respect to the following bills and instruments.

ASIC Credit (Flexible Credit Cost Arrangements) Instrument 2017/780 [F2017L01141]

Purpose	Seeks to amend the *National Consumer Credit Protection Act 2009* to: prohibit holders of an Australian credit license and exempt special purpose funding entities from paying 'flex commissions' to individuals; prohibit the giving of benefits to persons party to a flexible credit cost arrangement where the person is to receive fees or charges at a higher rate than specified by the credit licensee or entity
Portfolio	Treasury
Authorising legislation	*National Consumer Credit Protection Act 2009*
Last day to disallow	15 sitting days after tabling (tabled House of Representatives, 7 September 2017; Senate, 11 September 2017). Notice of motion to disallow currently must be given by 30 November 2017 (Senate)
Rights	Criminal process rights (see **Appendix 2**)
Status	Seeking additional information

Civil penalty provisions

1.7 The ASIC Credit (Flexible Credit Cost Arrangements) Instrument 2017/780 [F2017L01141] (the instrument) seeks to amend the *National Consumer Credit Protection Act 2009* to introduce certain prohibitions under proposed new sections 53A and 53B applying to holders of an Australian credit licence (ACL) and some exempt special purpose funding entities[5] (collectively referred to as 'regulated persons').

1.8 Under proposed section 53A, regulated persons are prohibited from paying 'flex commissions' to intermediaries, such as car dealers, or associated persons. 'Flex

5 Special purpose funding entities are described in the explanatory statement as 'a vehicle established to raise or receive funds from investors or a securitisation entity that usually has no employees and acts through a servicing agreement with a third party who must hold an ACL and who is required to meet the obligations of a credit provider under the agreement. A special purpose funding entity therefore does not need to hold an ACL if it operates under the exemption in the National Credit Regulations'. See ES 6.

commissions' refers to an arrangement in which an intermediary who sells a loan to a consumer earns a larger commission from his or her credit provider the higher the annual interest rate is above a base rate.[6] A breach of the prohibition applies to regulated persons and carries a civil penalty of up to 2,000 penalty units ($420,000) or a criminal penalty of up to 100 penalty units ($21,000) or 2 years imprisonment, or both.

1.9 Proposed section 53B also prohibits regulated persons who are party to a flexible credit cost arrangement from giving benefits to intermediaries or associated persons in circumstances where these persons are to be paid a fee or charges that exceed the amount specified by a regulated person. If a regulated person does not specify a fee, that fee is taken to be $0 (in other words, the intermediary or associated person cannot charge a fee). In addition, the instrument introduces related procedural requirements providing that the regulated person must not determine the amount of specified fees or charges by reference to the loss or potential loss of revenue as a result of the proposed prohibition on flex commissions[7] and must keep records relating to the basis for determining the specified fees or charges for a period of seven years.[8] A breach of this prohibition and associated requirements also carries a civil penalty of up to 2,000 penalty units ($420,000), a criminal penalty of up to 100 penalty units ($21,000) or 2 years imprisonment, or both.

Compatibility of the measure with criminal process rights

1.10 Civil penalty provisions are dealt with in accordance with the rules and procedures that apply in relation to civil matters, where the burden of proof is on the balance of probabilities. However, if a civil penalty provision is in substance regarded as 'criminal' for the purposes of international human rights law it therefore engages criminal process rights under articles 14 and 15 of the International Covenant on Civil and Political Rights (ICCPR). The classification of a penalty as 'criminal' under international human rights law does not mean that the penalty is illegitimate, but rather that criminal process rights, such as the right to be presumed innocent and the right not to be tried and punished twice, apply.

1.11 The statement of compatibility does not identify that any rights are engaged or limited by the measure and does not address whether the civil penalty provisions may be classified as 'criminal' for the purposes of international human rights law.

1.12 The committee's *Guidance Note 2* sets out some of the key human rights compatibility issues in relation to civil penalties. Applying *Guidance Note 2*, the first step in determining whether a penalty is 'criminal' is to look to its classification under

6 Explanatory Statement (ES) 1.

7 See subsection 53B(3).

8 See subsection 53B(4).

domestic law. Under the instrument, the pecuniary penalty of 2,000 penalty units is classified as 'civil'. However, this is not determinative of its status under international human rights law as a penalty or sanction may be 'criminal' for the purposes of the ICCPR even where it is classified as 'civil' under Australian law.

1.13 The second step is to consider the nature and purpose of the penalty. The penalty is likely to be considered to be criminal if the purpose of the penalty is to punish or deter, and the penalty applies to the public in general (rather than being restricted to people in a specific regulatory or disciplinary context). While the explanatory statement sets out the primary purpose of the instrument (addressing consumer harm arising from distortions in pricing that disproportionately affect vulnerable consumers),[9] no reasoning is provided in the explanatory materials as to the purpose of imposing civil penalties and the rationale for the amounts of those penalties. However, it is noted that the penalty applies to a particular regulatory context, namely to credit providers who are party to a flexible credit cost arrangement.

1.14 The third step is to consider the severity of the penalty. A penalty is likely to be considered 'criminal' where it carries a substantial pecuniary sanction. However, this must be assessed with due regard to regulatory context, including the nature of the industry or sector being regulated and the relative size of the pecuniary penalties being imposed. In this case, an individual or entity could be exposed to a penalty of up to $420,000. A significant sanction such as this raises the concern that the penalty may be 'criminal' for the purposes of international human rights law.

1.15 As set out above, if the civil penalty provisions in the instrument were considered to be 'criminal' for the purposes of international human rights law, they must be shown to be compatible with the criminal process guarantees set out in articles 14 and 15 of the ICCPR. For example, the application of a civil rather than a criminal standard of proof would raise concerns in relation to the right to be presumed innocent, which generally requires that the prosecution prove each element of the offence to the criminal standard of proof of beyond reasonable doubt. Accordingly, were the civil penalty provisions to be considered 'criminal' for the purpose of international human rights law, there would be questions about whether they are compatible with criminal process rights.

Committee comment

1.16 The committee draws the attention of the Treasurer to its *Guidance Note 2* and seeks the advice of the Treasurer as to whether:

- **the civil penalty provisions in the instrument may be considered to be 'criminal' in nature for the purposes of international human rights law (having regard to the committee's *Guidance Note 2*); and**

9 ES 2.

- **if the penalties could be considered 'criminal' for the purposes of international human rights law, how, and whether, the measures could be amended to accord with criminal process rights (including specific guarantees of the right to a fair trial in the determination of a criminal charge such as the presumption of innocence (article 14(2)), the right not to incriminate oneself (article 14(3)(g)), the right not to be tried and punished twice for an offence (article 14(7)) and a guarantee against retrospective criminal laws (article 15(1))).**

Australian Broadcasting Corporation Amendment (Fair and Balanced) Bill 2017

Purpose	Amends the *Australian Broadcasting Corporation Act 1983* to introduce a requirement in the Australian Broadcasting Corporation's (ABC) Charter that the ABC's news services be 'fair' and 'balanced'
Portfolio	Communications
Introduced	Senate, 18 October 2017
Right	Freedom of Expression (see **Appendix 2**)
Status	Seeking additional information

Addition of the words 'fair' and 'balanced' to the ABC Charter

1.17 The Australian Broadcasting Corporation Amendment (Fair and Balanced) Bill 2017 (the bill) seeks to insert the words 'fair, balanced' into the existing section 8(1)(c) of the *Australian Broadcasting Corporation Act 1983* (the ABC Act) requirement that news and information is 'accurate and impartial'. The effect of the amendment would therefore be to broaden the duties of the Board of the Australian Broadcasting Corporation (ABC) such that the Board has a duty 'to ensure that the gathering and presentation by the Corporation of news and information is fair, balanced, accurate and impartial according to the recognized standards of objective journalism'.[1] Neither of these terms is defined in the bill.

Compatibility of the measure with the right to freedom of expression

1.18 The right to freedom of expression requires states parties to the International Covenant on Civil and Political Rights (ICCPR) to ensure that broadcasting services operate in an independent manner and should guarantee their editorial freedom.[2] By introducing new duties on the ABC Board relating to the gathering and presentation of news and information, the bill engages and limits editorial freedom, and therefore may limit the freedom of expression.

1.19 The right to freedom of expression may be subject to limitations that are necessary to protect the rights or reputations of others, national security, public order, or public health or morals. In order for a limitation to be permissible under international human rights law, limitations must be prescribed by law, pursue a

1 Section 8(1)(c) of the ABC Act.

2 See Human Rights Committee, *General comment No 34 (Article 19: Freedoms of opinion and expression)*, CCPR/C/GC/34, para 16 (2011).

legitimate objective, be rationally connected to the achievement of that objective and be a proportionate means of achieving that objective.[3]

1.20 The statement of compatibility acknowledges that the right to freedom of expression is engaged, however, it further notes that to the extent the bill limits or restricts this freedom, it does so for a legitimate objective and is reasonable, necessary and proportionate.[4]

1.21 In relation to the objective of the measure, the statement of compatibility states:

> [Requiring] [t]he ABC to be fair and balanced according to the recognised standards of objective journalism is a necessary and legitimate objective. The Australian people expect a publicly funded broadcaster to canvass a broad range of issues, and report on those issues in a fair and balanced manner. There is also a strong public interest in ensuring that Australians have confidence that they can rely on the ABC as a source of information to inform their views on significant issues. A statutory requirement for fair and balanced reporting will promote such confidence by the Australian people.
>
> The fair and balanced requirement is also necessary to protect the rights and reputations of those who are the subject of ABC reporting. The Bill will require the ABC Board to ensure that any news or information relating to, for example, a particular person or group, is presented to the public in a fair and balanced manner, thereby ensuring that an impartial view, supported by evidence, is put forward in relation to that person or group. The fair and balanced requirement would not require every perspective of an issue to receive equal time, nor every facet of an argument to be explored. However, it will require openness and impartiality in relation to the pertinent issues.[5]

1.22 These objectives are capable of constituting legitimate objectives for the purposes of international human rights law. However, the statement of compatibility provides limited information as to the importance of these objectives in the context of the particular measure. To be capable of justifying a proposed limitation on human rights, a legitimate objective must address a pressing or substantial concern and not simply seek an outcome regarded as desirable or convenient.

1.23 A relevant factor in determining whether a limitation on the freedom of expression is proportionate is whether the law specifies the precise circumstances in which interferences may be permitted. The words 'fair' and 'balanced' are not defined in the bill and it is not clear from the explanatory memorandum the intended

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3 See, generally, Human Rights Committee, *General comment No 34 (Article 19: Freedoms of opinion and expression)*, CCPR/C/GC/34 (2011) [21-36].

4 Statement of Compatibility (SOC) 5.

5 SOC 5.

meaning of the proposed amendments, and how the words 'fair' and 'balanced' differ from the existing requirement that ABC reporting be 'accurate and impartial'.

1.24 It is noted that ABC's editorial policy on impartiality states that the concept of 'impartiality' includes the principles of 'fair treatment' and 'balance that follows the weight of the evidence'.[6] The editorial policy notes that requiring 'balance that follows the weight of the evidence' prevents 'false balance' that may occur if the ABC was required to provide equal time to every facet of every argument regardless of the weight of evidence attached to each argument.[7] The principle of 'fair treatment' under the editorial policy requires the ABC to be fair-minded in its treatment of people and ideas, including for example refraining from taking unfair advantage of a participant who is distressed or vulnerable.[8]

1.25 The statement of compatibility explains that the 'fair and balanced requirement in legislation would complement these current Editorial Policies',[9] and additionally notes that 'the fair and balanced requirement would not require every perspective of an issue to receive equal time, nor every facet of an argument to be explored'.[10] However, as the terms are not defined, it is unclear on the face of the legislation whether it is proposed that the words 'fair' and 'balanced' bear the same or a different meaning as the context in which they are used in the ABC editorial policies relating to impartiality.

1.26 If the words 'fair' and 'balanced' are taken to have the same meaning as the context in which they are used in the ABC editorial policy on impartiality, it is not clear why the measure is necessary or addresses a pressing or substantial concern. If the words have a different meaning, questions arise as to whether the law is sufficiently circumscribed to constitute a proportionate limitation on editorial freedom. For example, there is a risk that the concept of 'balance' could be construed to require differing viewpoints be presented in a way that is not consistent with the weight of evidence when it supports one perspective over another.

Committee comment

1.27 The preceding analysis raises questions as to whether the measure constitutes a permissible limitation on the freedom of expression.

1.28 The committee therefore seeks the advice of the minister as to:

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6 ABC Editorial Policies, *Editorial Guidance Note: Impartiality* (2014) https://edpols.abc.net.au/guidance/impartiality/.

7 ABC Editorial Policies, *Editorial Guidance Note: Impartiality* (2014) https://edpols.abc.net.au/guidance/impartiality/.

8 ABC Editorial Policies, *Editorial Guidance Note: Impartiality* (2014) https://edpols.abc.net.au/guidance/impartiality/.

9 SOC 5.

10 SOC 5.

- **whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective;**
- **how the measure is effective to achieve (that is, rationally connected to) that objective; and**
- **whether the limitation is proportionate, including information as to the meaning of the words 'fair' and 'balanced', and whether those words are intended to have the same meaning in the bill as those words used in the ABC's editorial policy on impartiality.**

Defence Legislation Amendment (Instrument Making) Bill 2017

Purpose	Amends the instrument making powers in the *Defence Act 1903,* including replacing a number of inquiry-specific regulation-making powers with a consolidated provision relating to inquiries concerning the Defence Force; enabling the minister to declare an area to be a defence aviation area in which buildings and objects can be regulated for the purposes of removing and reducing hazards to defence aviation; subject certain regulations to monitoring under the *Regulatory Powers (Standard Provisions) Act 2014*; establishing an infringement notice scheme in declared public areas
Portfolio	Defence
Introduced	House of Representatives, 14 September 2017
Rights	Multiple Rights (see **Appendix 2**)
Status	Seeking additional information

Amendment to the power to make regulations for inquiries

1.29 At present, the Defence (Inquiry) Regulations 1985 (the Inquiry Regulations) set out the different types of inquiries that can be undertaken in the Defence Force. These currently include General Courts of Inquiry, Boards of Inquiry, Combined Boards of Inquiry, Chief of the Defence Force Commissions of Inquiry, and Inquiry Officer Inquiries.

1.30 The power to make those regulations is presently set out in section 124(1)(gc) of the *Defence Act 1903* (Defence Act), which provides that the Governor-General may make regulations providing for and in relation to 'the appointment, procedures and powers of courts of inquiry, boards of inquiry, Chief of the Defence Force commissions of inquiry, inquiry officers and inquiry assistants'. The Defence Legislation Amendment (Instrument Making) Bill 2017 (the bill) amends this provision of the Defence Act and replaces it with a general power to make regulations relating to 'inquiries concerning the defence force'.[1]

1.31 The bill also amends several provisions that deal with the other powers included within the power to make regulations for inquiries, so as to replace the

1 See item 2 of the Bill. Proposed section 124(1)(gc) goes on to note several exceptions to this regulation-making power in relation to certain inquiries, namely inquiries conducted by the Defence Force Remuneration Tribunal under Part IIIA of the Act; or the Inspector-General ADF under Part VIIIB; or the Defence Honours and Awards Appeals Tribunal under Part VIIIC.

references to specific types of inquiry with a more general reference to 'an inquiry'. This includes amendments to the use and derivative use immunity provisions in the Defence Act.[2]

1.32 The bill passed in the House of Representatives on 17 October 2017 and in the Senate on 16 November 2017.

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

1.33 The right to a fair trial and fair hearing is protected by article 14 of the International Covenant on Civil and Political Rights (ICCPR). The right applies to both criminal and civil proceedings and to cases before both courts and tribunals, whether ordinary or specialised, civilian or military.[3] The right is concerned with procedural fairness, and encompasses notions of equality in proceedings, the right to a public hearing and the requirement that hearings are conducted by an independent and impartial body.

1.34 The statement of compatibility states that the amendment allows greater flexibility in naming inquiries in the regulations, but does not change the substance of the regulation-making power. However, it is noted that the power to make regulations in relation to inquiries remains very broad, extending to the 'appointment, procedures and powers' of inquiries. Matters currently dealt with by the Inquiry Regulations include the conduct of inquiries, the manner of taking evidence, and the duties of witnesses (including obligations to answer questions).[4] The committee has previously commented that the Inquiry Regulations engage fair trial and fair hearing rights.[5] It is likely therefore that any new regulations enacted pursuant to the broad regulation-making power proposed by the bill would also engage fair trial and fair hearing rights.

1.35 The committee has previously commented on some of the safeguards contained in the current Inquiry Regulations. In particular, the committee concluded that the use and derivative immunity provisions in the current Inquiry Regulations appear to be consistent with the right not to incriminate oneself under international human rights law.[6] However, it is not clear whether other safeguards will be in place to ensure that the inquiries established pursuant to the broader regulation-making

2 See sections 124(2A) and 124(2C) of the Defence Act.

3 UN Human Rights Council, *General Comment No.32: Article 14, Right to equality before courts and tribunals and to fair trial* (2006) [22].

4 See, *Defence (Inquiry) Regulations 1985.* See also Parliamentary Joint Committee on Human Rights, *Twenty-Third Report of the 44th Parliament* (18 June 2015) 18-21.

5 See also, Parliamentary Joint Committee on Human Rights, *Twenty-Third Report of the 44th Parliament* (18 June 2015) 18-21.

6 See, Parliamentary Joint Committee on Human Rights, *Twenty-Third Report of the 44th Parliament* (18 June 2015) 21.

power proposed by the bill are compatible with the right to a fair trial and fair hearing. International human rights law generally requires that states have sufficient safeguards in place to prevent violations of human rights occurring. Without adequate safeguards, it is possible that the broad regulation making power may be exercised in such a way as to be incompatible with the right to a fair trial and a fair hearing.[7]

1.36 Any proposed legislative instrument revising the Inquiry Regulations will need to ensure that the powers in relation to defence inquiries are applied in a manner compatible with human rights. This includes safeguards to ensure that, where the rights of individuals may arise from an inquiry, the inquiries are established to ensure the equitable, impartial and independent administration of justice so as to ensure that such an inquiry takes place under conditions that genuinely afford the guarantees stipulated in the ICCPR.[8]

Committee comment

1.37 The preceding analysis indicates that, noting the broad scope of the proposed power to make regulations for inquiries, there may be human rights concerns in relation to its operation. This is because its scope is such that it could be used in ways that may risk being incompatible with the right to a fair trial.

1.38 The committee will consider the human rights compatibility of any proposed regulations in relation to defence inquiries once they are received.

Use of force in executing warrants

1.39 The bill additionally seeks to incorporate the standard provisions in Part 2 of the *Regulatory Powers (Standard Provisions) Act 2014* (Regulatory Powers Act) for monitoring whether the regulations in relation to 'defence aviation areas' are being complied with.[9] This includes monitoring powers such as powers of entry and inspection,[10] and the requirement that a warrant may be issued if an issuing officer is satisfied, by information on oath or affirmation, that it is reasonably necessary that one or more authorised persons have access to a premises.[11]

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7 See, for example, Human Rights Committee, Freedom of movement (Art.12), UN DocCCPR/C/21/Rev.1/Add.9, General Comment No.27, *Pinkney v Canada* HRC Communication No. 27/1977, UN Doc CCPR/C/14/D/27/1977; *Hasan and Chaush v Bulgaria* ECHR 30985/96 (26 October 2000) [84].

8 UN Human Rights Council, *General Comment No.32: Article 14, Right to equality before courts and tribunals and to fair trial* (2006) [22].

9 Within defence aviation areas, buildings and objects can be regulated for the purposes of removing and reducing hazards to defence aviation.

10 See for example sections 18 and 19 of the *Regulatory Powers (Standard Provisions) Act 2014.*

11 Section 32(2) of the *Regulatory Powers (Standard Provisions) Act 2014*.

1.40 The bill would also introduce a new section setting out modifications to the application of the Regulatory Powers Act in relation to defence aviation areas, including powers for authorised persons to enter land to take action such as the removal, destruction or modification of a building, structure or objects within a defence aviation area, for the purpose of ensuring compliance with the regulations. The bill also introduces new section 117AF(3) which provides:

> (3) In executing a monitoring warrant for the purposes mentioned in paragraph (1)(a) [i.e. the purpose of ensuring compliance with the monitored provision]:
>
> (a) an authorised person may use such force against persons and things as is necessary and reasonable in the circumstances; and
>
> (b) a person assisting the authorised person may use such force against things as is necessary and reasonable in the circumstances.

1.41 An 'authorised person' is a 'defence aviation area inspector',[12] who is a person appointed as such by the Secretary or Chief of Defence Force and may include an APS employee in the Department and a member of the Defence Force.[13]

Compatibility with the right to life

1.42 The right to life is protected by article 6(1) of the ICCPR and article 1 of the Second Optional Protocol to the ICCPR. The right to life has three core elements to it:

- it prohibits the state from arbitrarily killing a person;
- it imposes an obligation on the state to protect people from being killed by others or identified risks; and
- it requires the state to undertake an effective and proper investigation into all deaths where the state is involved.

1.43 The statement of compatibility states that this aspect of the bill does not engage any applicable rights and freedoms.[14] However, empowering authorised persons to use force against persons may engage and limit the right to life, as force may be used in a manner that could lead to a loss of life.

1.44 A measure that limits the right to life may be justifiable if it is demonstrated that it addresses a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective. As no information has been provided in the statement of compatibility, it is not possible to determine the extent to which the right to life may be engaged and limited, and whether such a limitation is permissible.

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12 See proposed section 117AE(2)(b) of the bill.

13 See proposed section 117AG(1) of the bill.

14 SOC [6].

1.45 Questions arise because there is no definition of what constitutes 'force' (including whether it includes lethal force) and what safeguards are in place governing the use of force. It is noted that there is a requirement that a person not be appointed a defence aviation area inspector unless the appointer 'is satisfied that the person has the knowledge, training or experience necessary to properly exercise the powers of a defence aviation area inspector',[15] but there is no information as to whether that knowledge, training or experience includes specific training in relation to the use of force in the context of executing warrants. Further, while the use of force is limited to 'such force against persons as is necessary and reasonable in the circumstances',[16] no information is provided in the statement of compatibility as to whether there is any oversight over the exercise of that power, such as consideration of any particular vulnerabilities of the person who is subjected to the use of force, and any access to review to challenge the use of force.

Committee comment

1.46 The preceding analysis raises questions as to whether the proposed provision relating to the use of force in executing warrants is compatible with the right to life.

1.47 The committee therefore seeks the advice of the minister as to the compatibility of the measure with this right, including:

- **whether the measure is aimed at achieving a legitimate objective for the purposes of human rights law;**
- **how the measure is effective to achieve (that is, rationally connected to) that objective; and**
- **whether the limitation is a reasonable and proportionate measure to achieve the stated objective.**

Compatibility with the right to freedom from torture, cruel, inhuman and degrading treatment or punishment

1.48 Article 7 of the ICCPR and the Convention against Torture provide an absolute prohibition against torture, cruel, inhuman or degrading treatment or punishment. This means torture can never be justified under any circumstances, regardless of the objective sought to be achieved. The aim of the prohibition is to protect the dignity of the person and relates not only to acts causing physical pain but also those that cause mental suffering.

1.49 As noted earlier, the statement of compatibility states that this aspect of the bill does not engage any applicable rights and freedoms.[17] However, empowering

15 Proposed section 117AG(2) of the bill.

16 See proposed section 117AF(3) of the bill.

17 SOC, paragraph [6].

persons to use force against other persons may engage these rights, as force may be used in such a way that causes pain (physical or mental) in such a way that it amounts to a violation of Article 7.

1.50 There are concerns as to whether the breadth of the proposed powers may lead to an authorised person taking action that may constitute degrading treatment for the purposes of international human rights law. As set out above at [1.44] and [1.45], questions arise as to what constitutes 'force', whether there are adequate safeguards in place in relation to the use of force, and whether there is any monitoring or oversight over the exercise of the use of force, such as consideration of any particular vulnerabilities of the person who is subjected to the use of force, and any access to review to challenge the use of force.

Committee comment

1.51 The preceding analysis raises questions as to whether the proposed provision relating to the use of force in executing warrants is compatible with the right to freedom from torture, cruel, inhuman and degrading treatment or punishment

1.52 The committee therefore seeks the advice of the minister as to the compatibility of the measure with this right, including any safeguards in place governing the use of force, and any monitoring or oversight in relation to the use of force.

Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2017

Purpose	Amends the *Fair Work Act 2009* to: prohibit terms of a modern award or an enterprise agreement requiring or permitting contributions for the benefit of an employee to be made to any fund other than a superannuation fund, a registered worker entitlement fund or a registered charity; prohibit any term of a modern award, enterprise agreement or contract of employment permitting or requiring employee contributions to an election fund for an industrial association; and prohibit any action with the intent to coerce an employer to pay amounts to a particular worker entitlement fund, superannuation fund, training fund, welfare fund or employee insurance scheme. Amends the *Fair Work (Registered Organisations) Act 2009* to: require registered organisations to adopt, and periodically review, financial management policies; require registered organisations to keep credit card records and report certain loans, grants and donations; require specific disclosure by registered organisations and employers of the financial benefits obtained by them and persons linked to them in connection with employee insurance products, welfare fund arrangements and training fund arrangements; and introduce a range of new penalties relating to compliance with financial management, disclosure and reporting requirements
Portfolio	Employment
Introduced	House of Representatives, 19 October 2017
Rights	Freedom of association; collectively bargain (see **Appendix 2**)
Status	Seeking additional information

Prohibiting terms of industrial agreements requiring or permitting payments to worker entitlement funds

1.53 Schedule 2 of the Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2017 (the bill) would amend the *Fair Work Act 2009* (Fair Work Act) to prohibit any term of a modern award or an enterprise agreement requiring or permitting contributions for the benefit of an employee to be made to any fund other than a superannuation fund, a registered worker entitlement fund or a registered charity.[1]

1 Statement of Compatibility (SOC) xi.

Compatibility of the measure with the right to freedom of association and the right to just and favourable conditions at work

1.54 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 safe working conditions. 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]

1.55 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 principle of 'autonomy of bargaining' in the negotiation of collective agreements is an 'essential element' of Article 4 of ILO Convention No. 98 which envisages that parties will be free to reach their own settlement of a collective agreement without interference.[4]

1.56 Prohibiting the inclusion of particular terms in an enterprise agreement interferes with the outcomes of the bargaining process. Accordingly, the measure engages and limits the right to just and favourable conditions of work and the right to collectively bargain as an aspect of the right to freedom of association.

1.57 Measures limiting the right to freedom of association including the right to collectively bargain 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

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2 See, article 22 of the ICCPR and article 8 of the ICESCR.

3 The Freedom of Association and Protection of the Right to Organize (ILO Convention No. 87) is expressly referred to in the ICCPR and the ICESCR.

4 ILO, *General Survey by the Committee of Experts on the Application of Conventions and Recommendations on Freedom of Association and Collective Bargaining* (1994) [248]; ILO, *Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO*, Fifth Edition (2006) 182 (citing ILO Freedom of Association Committee 308th Report, Case No. 1897). See, also, ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR), Direct Request (CEACR) - adopted 2016, published 106th International Labour Conference (ILC) session (2017) Right to Organise and Collective Bargaining Convention, 1949 (No. 98) - Australia (Ratification: 1973) http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:13100:0::NO::P13100_COMMENT_ID:3299912; ILO's Committee on Freedom of Association (CFA Committee), Report in which the committee requests to be kept informed of development - Report No 338, November 2005 Case No 2326 (Australia) - Complaint date: 10 March 2004, http://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002_COMPLAINT_TEXT_ID:2908523.

proportionate way to achieve that objective.[5] Further, Article 22(3) of the ICCPR and article 8 of ICESCR expressly provide that no limitations are permissible on this right if they are inconsistent with the guarantees of freedom of association and the right to collectively organise contained in the ILO Convention No. 87.

1.58 The ILO's Committee on Freedom of Association (CFA Committee), which is a supervisory mechanism that examines complaints about violations of the right to freedom of association and the right to collectively bargain, has stated that 'measures taken unilaterally by the authorities to restrict the scope of negotiable issues are often incompatible with Convention No. 98'.[6] The CFA Committee has noted that there are some circumstances in which it might be legitimate for a government to limit the outcomes of a bargaining process, stating that 'any limitation on collective bargaining on the part of the authorities should be preceded by consultations with the workers' and employers' organizations in an effort to obtain their agreement'.[7]

1.59 Indeed, international supervisory mechanisms have previously raised specific concerns in relation to current restrictions imposed on bargaining outcomes under Australian domestic law.[8] In relation to restrictions on the scope of collective bargaining and bargaining outcomes, CFA Committee noted that:

> …the right to bargain freely with employers with respect to conditions of work constitutes an essential element in freedom of association, and trade unions should have the right, through collective bargaining or other lawful means, to seek to improve the living and working conditions of those whom the trade unions represent. The public authorities should refrain from any interference, which would restrict this right or impede the lawful exercise thereof. Any such interference would appear to infringe the

5 See ICCPR article 22.

6 See ILO, *Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO*, Fifth Edition (2006) 182 (citing ILO Freedom of Association Committee 308th Report, Case No. 1897, [473]).

7 ILO, *Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO*, Fifth Edition (2006) 182 (citing ILO Freedom of Association Committee 330th Report, Case No. 2194, [791]; and 335th Report, Case No. 2293, [1237]).

8 See, for example, ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR), Direct Request - adopted 2016, published 106th ILC session (2017), Right to Organise and Collective Bargaining Convention, 1949 (No. 98) - Australia http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID,P11110_COUNTRY_ID,P11110_COUNTRY_NAME,P11110_COMMENT_YEAR:3299912,102544,Australia,2016.

> principle that workers' and employers' organizations should have the right to organize their activities and to formulate their programmes.[9]

1.60 In this respect the statement of compatibility acknowledges that the measure engages the right to freedom of association, the right to voluntarily reach bargaining outcomes, and the right to just and favourable conditions at work. However, the statement of compatibility indicates that the limitation on these rights is permissible. It states that the measure pursues the legitimate objectives of addressing 'the potential for misappropriation of funds and avoid conflicts of interest and possible coercion.'[10] It points to the Final Report of the Royal Commission into Trade Union Governance and Corruption (Heydon Royal Commission) in support of this objective.[11] While the stated objectives may be capable of constituting a legitimate objective for the purposes of international human rights law, it would have been useful if the statement of compatibility had more fully explained how any findings from the Heydon Royal Commission supported the importance of this objective as a substantial or pressing concern.

1.61 The statement of compatibility provides some information as to whether the measure is rationally connected to (that is, effective to achieve) its stated objectives. It notes that the measure does not prohibit contributions to worker entitlement funds but requires any contributions 'to be made to registered worker entitlement funds that are subject to basic governance and disclosure requirements designed to address potential conflicts of interest, breaches of fiduciary duty and the potential for coercion'.[12] As such the measure would appear to be rationally connected to its stated objective.

1.62 However, the statement of compatibility provides limited information as to whether the limitation is proportionate. In order to be a proportionate limitation on human rights a measure must be the least rights restrictive way of achieving its stated objective.

Committee comment

1.63 The preceding analysis identifies that the measure engages and limits the right to freedom of association, the right to collectively bargain, and the right to just and favourable conditions of work; and raises questions as to its compatibility

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9 ILO's Committee on Freedom of Association (CFA Committee), Report in which the committee requests to be kept informed of development - Report No 338, November 2005 Case No 2326 (Australia) - Complaint date: 10 March 2004 http://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002_COMPLAINT_TEXT_ID:2908523.

10 SOC xi.

11 SOC x.

12 SOC xi.

with these rights. Accordingly, the committee seeks the advice of the Minister for Employment as to:

- **whether the limitation is a reasonable and proportionate measure to achieve that objective (including findings by relevant international supervisory mechanisms about whether the limitation is permissible); and**
- **whether consultation has occurred with the relevant workers' and employers' organisations in relation to the measure.**

Regulation of worker's entitlement funds

1.64 Schedule 2 of the bill would require 'worker entitlement funds' to meet requirements for registration and meet certain conditions relating to financial management, board composition, disclosure and how money is spent. A 'worker entitlement fund' is defined in proposed section 329HC of the *Fair Work (Registered Organisations) Act 2009* (Registered Organisations Act) as a fund whose purposes include paying worker entitlements to members, dependents or legal representatives of fund members or a fund prescribed by the minister.

1.65 Under proposed new section 329LA a 'worker entitlement fund' will only be able to be operated by a corporation and cannot be operated by a registered organisation (that is, a trade union or employer organisation.) Under proposed sections 329JA-B of the Registered Organisation Act it will be an offence to operate an unregistered fund and a civil penalty provision for employers to contribute to such a fund.

Compatibility of the measure with the right to freedom of association and the right to just and favourable conditions at work

1.66 As described above, the interpretation of the right to freedom of association and the right to just and favourable conditions of work is informed by the ILO treaties.[13] ILO Convention 87 specifically protects the right of workers to autonomy of union processes, organising their administration and activities and formulating their own programs without interference.[14] Providing that registered organisations cannot administer 'worker entitlement funds' and limiting the purposes for which such money may be used would appear to engage and limit these rights. However, the statement of compatibility does not acknowledge this limitation so does not provide an assessment of whether the limitation is permissible as a matter of international human rights law.[15]

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13 See, article 22 of the ICCPR and article 8 of the ICESCR. The Freedom of Association and Protection of the Right to Organize (ILO Convention No. 87) is expressly referred to in the ICCPR and the ICESCR.

14 See ILO Convention N.87 article 3.

15 SOC x.

Committee comment

1.67 The preceding analysis raises questions as to whether the measure is compatible with the right to freedom of association and the right to just and favourable conditions at work.

1.68 The committee requests the further advice of the minister as to:

- **whether the measure is aimed at pursuing a legitimate objective for the purposes of international human rights law;**
- **how the measure is effective to achieve (that is, rationally connected to) its stated objective; and**
- **whether the limitation is a reasonable and proportionate measure to achieve the stated objective (including whether the measure is the least rights restrictive way of achieving its stated objective).**

Prohibiting terms of industrial instruments requiring payments to election funds

1.69 Schedule 3 of the bill would amend the Fair Work Act to prohibit any term of a modern award, enterprise agreement or contract of employment permitting or requiring employee contributions to an election fund.[16]

Compatibility of the measure with the right to freedom of association and the right to just and favourable conditions at work

1.70 As set out above, the right to freedom of association includes the right to collectively bargain without unreasonable and disproportionate interference from the state. Prohibiting the inclusion of particular terms in an enterprise agreement interferes with the outcomes of the bargaining process. Accordingly, the measure engages and limits the right to just and favourable conditions of work and the right to collectively bargain as an aspect of the right to freedom of association. The statement of compatibility acknowledges that the measure engages the right to negotiate terms and conditions of employment voluntarily.[17] However, the statement of compatibility appears to indicate that the limitation is permissible.

1.71 The statement of compatibility identifies one objective of the measure as being to 'remove any legal or practical compulsion on an employee to contribute to election funds'.[18] This appears to be a description of what the measure does rather than articulating the pressing or substantial concern the measure addresses as required to constitute a legitimate objective for the purposes of international human rights law. The statement of compatibility identifies a second objective as addressing

16 SOC x.

17 SOC x.

18 SOC x.

'the possibility of contributions made in accordance with a relevant instrument being used to avoid the intent of the prohibition on organisations using their resources to favour a particular candidate'. While this could be capable of constituting a legitimate objective limited explanation or reasoning is provided as to why this objective is important. Further, in relation to whether the measure is rationally connected (that is, effective to achieve) and proportionate to the stated objectives, the statement of compatibility provides no reasoning or evidence and only asserts that the measure 'is reasonable, necessary and proportionate'.[19]

Committee comment

1.72 The preceding analysis raises questions as to whether the measure is compatible with the right to freedom of association and the right to just and favourable conditions at work.

1.73 The committee requests the further advice of the minister as to:

- **whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective;**
- **how the measure is effective to achieve (that is, rationally connected to) its stated objective; and**
- **whether the limitation is a reasonable and proportionate measure to achieve the stated objective (including whether the measure is the least rights restrictive way of achieving its stated objective).**

Prohibiting any action with the intent to coerce a person to pay amounts to a particular fund

1.74 Schedule 4 of the bill would introduce a civil penalty into section 355A of the Fair Work Act prohibiting a person from organising, taking or threatening to take any action, other than protected industrial action, with the intent to coerce a person to pay amounts to a particular worker entitlement fund, super fund, training fund, welfare fund or employee insurance scheme.[20]

Compatibility of the measure with the right to freedom of association

1.75 The right to strike is protected as an aspect of the right to freedom of association and the right to form and join trade unions under article 22 of the ICCPR and article 8 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). The right to strike, however, is not absolute and may be limited in certain circumstances.

19 SOC x.

20 See, Schedule 4, item 355, proposed section 355A of the Fair Work Act.

1.76 By prohibiting action (other than protected industrial action) intended to coerce a person to pay amounts into a particular fund, the measure further engages and limits the right to strike. This is because it may impose an additional penalty or disincentive to taking unprotected industrial action with the intent of influencing the conduct of an employer. The existing restrictions on taking industrial action under Australian domestic law have been consistently criticised by international supervisory mechanisms as going beyond what is permissible.[21] While the statement of compatibility acknowledges that the measure engages work-related rights it does not expressly acknowledge that the right to strike as an aspect of the right to freedom of association.

1.77 Beyond providing a description of the measure, the statement of compatibility does not clearly identify the legitimate objective of the measure. While the statement of compatibility appears to argue that the measure in fact supports freedom of association and human rights, it provides no explanation of the reasoning for this.[22] The statement of compatibility therefore does not meet the standards outlined in the committee's *Guidance Note 1*, which require that where a limitation on a right is proposed the statement of compatibility provide a reasoned and evidence-based assessment of how the measure pursues a legitimate objective, is rationally connected to that objective, and is proportionate.

Committee comment

1.78 The preceding analysis raises questions as to whether the measure is compatible with the right to strike as an aspect of the right to freedom of association.

1.79 The committee requests the further advice of the minister as to:

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21 See, UN Committee on Economic Social and Cultural Rights (UNCESCR), *Concluding Observations on Australia*, E/C.12/AUS/CO/5 (23 June 2017) [29]-30]: 'The Committee is also concerned that the right to strike remains constrained in the State party (art. 8). The Committee recommends that the State party bring its legislation on trade union rights into line with article 8 of the Covenant and with the provisions of the relevant International Labour Organization (ILO) Conventions (nos. 87 and 98), particularly by removing penalties, including six months of incarceration, for industrial action, or the secret ballot requirements for workers who wish to take industrial action'. See, also, ILO CEACR, *Observation Concerning Freedom of Association and Protection of the Right to Organise Convention*, 1948 (No. 87), Australia, 103rd ILC session, 2013; ILO CEACR, *Observation Concerning Freedom of Association and Protection of the Right to Organise Convention*, 1948 (No. 87), Australia, 101st ILC session, 2013; ILO CEACR, *Observation Concerning Freedom of Association and Protection of the Right to Organise Convention*, 1948 (No. 87), Australia, 99th ILC session, 2009; ILO CEACR, *Individual Observation Concerning the Right to Organise and Collective Bargain Convention*, 1949, (No. 98), Australia, 99th session, 2009. See also, UNCESCR, *Concluding Observations on Australia*, E/C.12/AUS/CO/4 (12 June 2009) 5.

22 SOC xi.

- **whether the measure is aimed at achieving a legitimate objective for the purposes of international human rights law;**
- **how the measure is effective to achieve (that is, rationally connected to) that objective; and**
- **whether the limitation is a reasonable and proportionate measure to achieve the stated objective (including any relevant safeguards and whether the measure is the least rights restrictive way of achieving its stated objective).**

Compatibility of the measure with the right to freedom of assembly and expression

1.80 The right to freedom of assembly and the right to freedom of expression are protected by articles 19 and 21 of the ICCPR. The right to freedom of assembly and the right to freedom of expression may be limited for certain prescribed purposes. That is, that the limitation is necessary to respect the rights of others, to protect national security, public safety, public order, public health or morals. Additionally, such limitations must be prescribed by law, reasonable, necessary and proportionate to achieving the prescribed purpose.

1.81 It appears that the measure may extend to prohibiting forms of expression or assembly. As such it may engage and limit the right to freedom of expression and assembly. The prohibition on forms of protest action appears to be potentially quite broad. This issue was not addressed in the statement of compatibility and as such it is unclear whether the measure is compatible with these rights.

Committee comment

1.82 The preceding analysis raises questions about whether the measure is compatible with the right to freedom of assembly and the right to freedom of expression. The committee therefore seeks the advice of the minister as to:

- **the scope of any restriction on the right to freedom of expression and assembly;**
- **whether the measure is aimed at achieving a legitimate objective for the purposes of international human rights law;**
- **how the measure is effective to achieve (that is, rationally connected to) its stated objective; and**
- **whether the limitation is a reasonable and proportionate measure to achieve the stated objective (including whether the measure is sufficiently circumscribed, any relevant safeguards and whether the measure is the least rights restrictive way of achieving its stated objective).**

Financial Sector Legislation Amendment (Crisis Resolution Powers and Other Measures) Bill 2017

Purpose	Amends the *Banking Act 1959*, *Insurance Act 1973*, *Life Insurance Act 1995* and five other Acts to give the Australian Prudential Regulation Authority additional powers for crisis resolution, and resolution planning, in relation to regulated entities
Portfolio	Treasury
Introduced	House of Representatives, 19 October 2017
Right	Right not to incriminate oneself; privacy (see **Appendix 2**)
Status	Seeking additional information

Information gathering powers of statutory managers

1.83 The Financial Sector Legislation Amendment (Crisis Resolution Powers and Other Measures) Bill 2017 (the bill) would insert a new section 62ZOD into the *Insurance Act 1973* (Insurance Act) and a new section 179AD into the *Life Insurance Act 1995* (Life Insurance Act) which set out the powers and functions of statutory managers under the Insurance Act and Life Insurance Act respectively.[1]

1.84 This includes a new power to require a person who has, at any time, been an officer of the body corporate to give the statutory manager information relating to the business of the body corporate that the statutory manager requires.[2] A person commits an offence punishable by 12 months imprisonment if the person fails to comply with this requirement to give information.[3] An individual is not excused from complying with the requirement to give information on the ground that doing so would tend to incriminate the individual or make the individual liable to a penalty.[4]

1 An Insurance Act and Life Insurance Act 'statutory manager' is either the Australian Prudential Regulation Authority (APRA) or an administrator appointed by APRA to control a body corporate's business: see Schedule 2, item 58, proposed section 62ZOA(8) to the Insurance Act; see Schedule 3, item 52, proposed section 179AA(8) to the Life Insurance Act.

2 Schedule 2, item 58, proposed section 62ZOD(2) to the Insurance Act; Schedule 3, item 52, proposed section 179AD(2) to the Life Insurance Act.

3 Schedule 2, item 58, proposed section 62ZOD(3) to the Insurance Act; Schedule 3, item 52, proposed section 179AD(3) to the Life Insurance Act.

4 Schedule 2, item 58, proposed section 62ZOD(4) to the Insurance Act; Schedule 3, item 52, proposed section 179AD(4) to the Life Insurance Act.

1.85 However, information given in compliance with the requirement is not admissible in evidence against the individual in a criminal proceeding or a proceeding for the imposition of a penalty, other than proceedings in respect of the falsity of the information, provided the person has claimed the privilege against self-incrimination before giving that information and that giving the information might in fact incriminate the individual.[5]

Compatibility of the measure with the right not to incriminate oneself

1.86 The specific guarantees of the right to a fair trial in the determination of a criminal charge guaranteed by article 14 of the ICCPR include the right not to incriminate oneself (article 14(3)(g)).

1.87 The right to a fair trial, and in particular the right not to incriminate oneself, is engaged where a person is required to give information to the Insurance Act or Life Insurance Act statutory manager which may incriminate them and that incriminating information can be used to investigate criminal charges. The statement of compatibility acknowledges the privilege against self-incrimination is engaged by the bill.[6]

1.88 The right not to incriminate oneself may be subject to permissible limitations where the limitation pursues a legitimate objective, is rationally connected to that objective and is a proportionate way of achieving that objective. The statement of compatibility states that the limitation on the right not to incriminate oneself is permissible on the basis that:

> Engaging the right against self-incrimination in this way is necessary and justified as only the key personnel of a relevant entity will have access to information and documents relating to that entity's financial condition. It is essential for APRA or a statutory manager to be able to obtain this information quickly to assist with the management and crisis resolution of an insurance or life insurance entity that is financially distressed.
>
> By compelling relevant officers to provide the required information and documents, APRA and other statutory managers will be able to maximise

5 Schedule 2, item 58, proposed section 62ZOD(5) to the Insurance Act; Schedule 3, item 52, proposed section 179AD(5) to the Life Insurance Act.

6 The statement of compatibility also addresses the privilege against self-incrimination in relation to the new information gathering powers to allow APRA to obtain information from current and past officers of an insurer and a life insurance entity that is under statutory management: see Statement of Compatibility (SOC), 224-225. The provisions relating to APRA's powers to obtain information include a use and a derivative use immunity provision and therefore do not raise human rights concerns: Schedule 2, item 58, proposed section 62ZOI(5) and (6) of the *Insurance Act 1973*; Schedule 3, item 52, proposed section 179AI(5) and (6) of the *Life Insurance Act 1995.*

> their ability to rehabilitate a distressed insurance or life insurance entity. This will benefit the entity's customers, creditors and other suppliers...[7]

1.89 A legitimate objective – that is, one that is capable of justifying a proposed limitation on human rights – must address a pressing or substantial concern and not simply seek an outcome regarded as desirable or convenient. The statement of compatibility does not provide any information or evidence as to the pressing or substantial need to be able to obtain information quickly to assist with the management and crisis resolution of an insurance or life insurance entity. The administrative convenience, in and of itself, is unlikely to be sufficient to constitute a legitimate objective for the purposes of international human rights law.

1.90 Further, the availability of 'use' and 'derivative use' immunities can be one important factor in determining whether the limit on the right not to incriminate oneself is proportionate. That is, they may act as a relevant safeguard. In this respect, the information gathering powers in proposed sections 62ZOD and 179AD relating to statutory managers include a 'use' immunity provision, such that incriminating information or documents provided cannot be directly used against a person in criminal proceedings or in proceedings where the person may be liable to a penalty.[8] However, no 'derivative use' immunity is provided for proposed sections 62ZOD and 179AD, which would prevent information or evidence indirectly obtained from being used in criminal proceedings against the person.

1.91 In contrast, it is noted that in relation to APRA's information gathering powers which are also introduced by this bill in proposed sections 62ZOI and 179AI, both a 'use' and a 'derivative' use immunity provision are included, such that information or documents obtained 'as a direct or indirect consequence' of providing information are not admissible against the person.[9]

1.92 The lack of derivative use immunity in relation to the information gathering powers of statutory managers raises questions about whether the measure is the least rights restrictive way of achieving its objective. It is acknowledged that a 'derivative use' immunity will not be appropriate in all cases because it is not reasonably available as a less rights restrictive alternative. For example, because it would undermine the purpose of the measure or be unworkable. In this respect, it is noted that the availability or lack of availability of a 'derivative use' immunity needs to be considered in the regulatory context of the proposed powers. The extent of interference that may be permissible as a matter of international human rights law

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7 SOC 224-225.

8 See, Schedule 2, item 58, proposed section 62ZOD(5) to the Insurance Act; Schedule 3, item 52, proposed section 179AD(5) to the Life Insurance Act.

9 Schedule 2, item 58, proposed section 62ZOI(5) and (6) of the *Insurance Act 1973*; Schedule 3, item 52, proposed section 179AI(5) and (6) of the *Life Insurance Act 1995.*

may be, for example, greater in contexts where there are difficulties regulating specific conduct, persons subject to the powers are not particularly vulnerable or powers are otherwise circumscribed with respect to the scope of information which may be sought. That is, there are a range of matters which influence whether the limitation is proportionate. However, no information is provided in the statement of compatibility to explain why a 'derivative use' immunity is provided in relation to persons who give information in compliance with APRA's information gathering powers, but not to persons who give information in compliance with statutory manager's information gathering powers.

Committee comment

1.93 Noting the preceding analysis, the committee seeks the advice of the Treasurer as to:

- **whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective for the purposes of international human rights law;**
- **how the measure is effective to achieve (that is, rationally connected to) that objective;**
- **whether the limitation is proportionate to achieve the stated objective;**
- **whether the persons who may be subject to examination and the scope of information that may be subject to compulsory disclosure is sufficiently circumscribed with respect to the stated objective of the measure;**
- **whether a derivative use immunity is reasonably available as a less rights restrictive alternative in sections 62ZOD of the *Insurance Act 1973* and 179AD of the *Life Insurance Act 1995* to ensure information or evidence indirectly obtained from a person compelled to give information or documents cannot be used in evidence against that person.**

Information sharing provisions

1.94 Schedule 4 of the bill includes a number of proposed amendments to the *Financial Sector (Business Transfer Group Restructure) Act 1999* (Transfer Act) to extend the scope of section 42 of the Transfer Act to allow APRA to provide information (including personal information) to a body that receives the shares of another body as part of a compulsory transfer of business.[10]

Compatibility of the measure with the right to privacy

1.95 The right to privacy encompasses respect for informational privacy, including the right to respect private information and private life, particularly the storing, use

10 Schedule 4, item 92, proposed section 42 of the Transfer Act.

and sharing of personal information. Schedule 4 of the bill engages and limits the right to privacy by enabling APRA to provide information, which includes personal information, to a receiving body.

1.96 The statement of compatibility acknowledges that the right to privacy is engaged and limited by the proposed amendment to section 42 of the Transfer Act. As to the objective of the proposed amendment, the statement of compatibility explains:

> The provision is necessary because under the compulsory transfer provisions a receiving body's board must consent to the transfer. In order to facilitate this it will be necessary and appropriate for APRA to provide information to the receiving body about the business, including confidential information and information relating to staff and executives of the body being transferred. It will also be necessary for APRA to share such information in the process of settling the detail of the transfer, including the schedule of assets and liabilities, and in documentation relating to transferred staff.[11]

1.97 As noted earlier in relation to the right against self-incrimination, a legitimate objective must address a pressing or substantial concern. While the statement of compatibility states that the provision is necessary, it is not clear from the information provided how this aspect of the bill addresses a pressing or substantial concern that would justify a limitation on the right to privacy.

1.98 The statement of compatibility then sets out safeguards that are contained in the bill to protect the right to privacy, namely that:

- the *Privacy Act 1998* (Privacy Act) would apply to the information;
- where information is provided to APRA, the existing APRA confidentiality provisions would apply; and
- where information is provided to other statutory managers, the statutory manager would be responsible for the relevant entity and as such their access to the information would be no different to the previous manager's access to the information.[12]

1.99 However, these safeguards do not demonstrate that the limitation on the right to privacy is proportionate to the objective sought to be achieved. For example, while the Privacy Act contains a range of general safeguards it is not a complete answer because the Privacy Act and the Australian Privacy Principles (APPs) contain a number of exceptions to the prohibition on disclosure of personal information. Relevantly, for example, an agency may disclose personal information or a government related identifier of an individual where its use or disclosure is required

11 SOC 226.

12 SOC 227.

or authorised by or under an Australian Law.[13] This means that the Privacy Act and the APPs may not operate as an effective safeguard of the right to privacy in these circumstances.

1.100 Further, no information is provided setting out the content of APRA's confidentiality provisions, and how these provisions would apply to safeguard personal information. It is not possible to determine at this stage whether the APRA confidentiality provisions provide an adequate safeguard. Similarly, while the amendments will place the statutory manager in no different position to the previous manager's access to information, it is not clear from the information provided the extent of the previous manager's access to information. Therefore, it is not possible to conclude based on the information provided whether the measure is sufficiently circumscribed to constitute a proportionate limitation on the right to privacy.

Committee Comment

1.101 The preceding analysis raises questions about whether the amendment to section 42 of the Transfer Act is compatible with the right to privacy.

1.102 The committee therefore seeks the advice of the Treasurer as to:

- **whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective for the purposes of international human rights law;**
- **how the measure is effective to achieve (that is, rationally connected to) that objective; and**
- **whether the limitation is proportionate to achieve the stated objective.**

13 APP 9; APP 6.2(b).

Health Insurance (General Medical Services Table) Amendment (Obstetrics) Regulations 2017 [F2017L01090]

Purpose	Amends the *Health Insurance (General Medical Services Table) Regulations 2017* to implement changes recommended by the Medical Benefits Schedule Review Taskforce, including a requirement that during the planning and management of a pregnancy a mental health assessment be performed by a medical practitioner or other qualified health professional, including screening for drug and alcohol use and domestic violence
Portfolio	Health
Authorising legislation	*Health Insurance Act 1973*
Last day to disallow	15 sitting days after tabling (tabled House of Representatives and Senate on 4 September 2017). Notice of motion to disallow currently must be given by 16 November 2017
Right	Privacy (see **Appendix 2**)
Status	Seeking additional information

Mental health assessments during pregnancy

1.103 The Health Insurance (General Medical Services Table) Amendment (Obstetrics) Regulations 2017 (the regulations) introduces changes to the Medicare Benefits Schedule (MBS). The MBS provides for the payment of Medicare benefits for professional services rendered to eligible persons, and for the calculation of Medicare benefits by reference to the fees for medical services which are set out in prescribed tables. The regulations include the introduction of a new requirement during the planning and management of a pregnancy for a mental health assessment to be performed by the medical practitioner or another suitably qualified health professional. The mental health assessment includes 'screening for drug and alcohol use and domestic violence of the patient'.[1] A mental health assessment (including screening for drug and alcohol use and domestic violence) is also required in postnatal consultations between 4 and 8 weeks after birth.[2]

Compatibility of the measure with the right to privacy

1.104 The right to privacy prohibits arbitrary or unlawful interferences with an individual's privacy, family, correspondence or home. The right to privacy includes

1 See item 24 of the Regulations, amendment to Schedule 1 (items 16590 and 16591).

2 See item 9 of the Regulations, amendment to Schedule 1 (item 16407).

the right to personal autonomy and physical and psychological integrity, including respect for reproductive autonomy and autonomy over one's own body (including in relation to medical testing). The statement of compatibility does not consider whether the right to privacy is engaged or limited by the bill.

1.105 It is not clear based on the information provided the extent to which the mental health assessment will be compulsory, and what 'screening' entails. If a patient may refuse to take the test, and if 'screening' is minimally invasive (such as being limited to asking questions), it may be that a patient's right to personal autonomy and physical and psychological integrity is not limited. However, if 'screening' includes more invasive procedures, such as a blood test to test for alcohol or drugs, the right to personal autonomy and physical and psychological integrity as an aspect of the right to privacy may be engaged and limited.

1.106 Limitations on the right to privacy will be permissible where they are not arbitrary, they pursue a legitimate objective, are rationally connected to that objective and are a proportionate means of achieving that objective. The explanatory statement and the statement of compatibility note that the objective of the regulations is to improve obstetrics care for patients and to implement the recommendations of the MBS Review Taskforce so as to reflect current best clinical practice in light of the latest evidence and to improve health outcomes. These are likely to be legitimate objectives for the purposes of international human rights law. Screening for mental health issues during and immediately following pregnancy appears also to be rationally connected to those objectives.

1.107 However, as noted earlier, it is unclear based on the information provided what 'screening' of a patient for drugs or alcohol or domestic violence entails, and whether the screening is mandatory for the patient. If the screening is mandatory or involves the collection of blood samples or other tests for drug or alcohol use, such that the measure places a limitation on the right to privacy, then it will need to be demonstrated that this is the least rights-restrictive approach to achieve the legitimate objective, and that adequate safeguards are in place in relation to the use of samples and test results.

Committee comment

1.108 The committee considers that the right to privacy may be engaged and limited by the bill, but no information is provided in the statement of compatibility addressing this right.

1.109 The committee therefore seeks the advice of the minister as to:

- **what is meant by 'screening for drug and alcohol use and domestic violence', including whether it includes taking a blood test or related procedures;**

- **whether it is compulsory for a patient to undertake a mental health assessment (including screening for drug and alcohol use and domestic violence);**
- **what are the consequences for a refusal to undertake such an assessment; and**
- **whether the screening for drug and alcohol use and domestic violence is proportionate, including whether the measure is the least rights-restrictive means reasonably available to achieve the stated objective, and the effectiveness of any safeguards to protect a patient's privacy.**

Proceeds of Crime Amendment (Proceeds and Other Matters) Bill 2017

Purpose	Seeks to amend the *Proceeds of Crime Act 2002*, including to align the unexplained wealth regime with other types of orders, so that it covers situations where wealth is 'derived or realised, directly or indirectly' from certain offences; clarifies that property becomes 'proceeds' or an 'instrument' of an offence under the Act when 'proceeds' or an 'instrument' are used to improve the property or discharge an encumbrance security or liability incurred in relation to the property; and clarifies that property or wealth will only be 'lawfully acquired' in situations where the property or wealth is not 'proceeds' or an 'instrument' of an offence
Portfolio	Justice
Introduced	House of Representatives, 18 October 2017
Rights	Right to a fair trial; right to a fair hearing; privacy (see **Appendix 2**)
Status	Seeking additional information

Changes to the definition of 'proceeds' and an 'instrument' in the Proceeds of Crime Act

1.110 The Proceeds of Crime Amendment (Proceeds and Other Matters) Bill 2017 (the bill) seeks to amend the definitions of 'proceeds' and 'instrument' in the *Proceeds of Crime Act 2002* (the POC Act). The bill seeks to provide that property will be considered to become 'proceeds' or an 'instrument' (and therefore be liable to being restrained or forfeited under the POC Act) where proceeds or instruments of crime are used to make improvements on property, service mortgage repayments on property and/or service loans taken out in relation to property.[1] It also introduces a definition of 'improvements' to clarify that where proceeds or instruments are used to renovate property, demolish structures, or repair or maintain assets, the property will become 'proceeds' or an 'instrument'.[2]

1.111 The bill also seeks to provide that wealth or property will only be 'lawfully acquired' (and therefore not liable to restraint, freezing or forfeiture) in situations where property or wealth is not 'proceeds' or an 'instrument' of an offence.[3]

1 Item 6 of the bill; Explanatory Memorandum (EM) [19].

2 Item 13 of the bill; EM [22].

3 Item 12 of the bill.

The explanatory memorandum explains that this amendment would ensure a court, when determining whether property is 'lawfully acquired', examines the origins of property or wealth used to discharge securities or encumbrances or to make improvements to property, as well as situations where property may be gifted to another person.[4]

Compatibility of the amendments with the right to a fair trial and the right to a fair hearing

1.112 The right to a fair trial and fair hearing is protected by articles 14 and 15 of the International Covenant on Civil and Political Rights (ICCPR). The rights are concerned with procedural fairness, and encompass notions of equality in proceedings, the right to a public hearing and the requirement that hearings are conducted by an independent and impartial body. Specific guarantees of the right to a fair trial in relation to a criminal charge include the presumption of innocence,[5] the right not to incriminate oneself,[6] and the guarantee against retrospective criminal laws.[7]

Previous committee comment on the Proceeds of Crime Act

1.113 The committee has previously raised concerns that the underlying regime established by the POC Act for the freezing, restraint or forfeiture of property may be considered 'criminal' for the purposes of international human rights law.[8] For example, a forfeiture order may be made against property where (relevantly) a court is satisfied that the property is 'proceeds' of an indictable offence or an 'instrument' of one or more serious offences.[9] The fact a person has been acquitted of an offence with which the person has been charged does not affect the court's power to make such a forfeiture order.[10] Further, a finding need not be based on a finding that a particular person committed any offence.[11] A finding that a court is satisfied that the property is 'proceeds' of an indictable offence or an 'instrument' of one or more serious offences appears to entail 'blameworthiness' or 'culpability' which the committee has previously considered would suggest that the provisions may be criminal in character, and therefore may engage criminal process rights

4 EM [37].

5 Article 14(2) of the ICCPR.

6 Article 14(3)(g) of the ICCPR.

7 Article 15(1) of the ICCPR.

8 Parliamentary Joint Committee on Human Rights, *Thirty-First Report of the 44th Parliament* (24 November 2015) 43-44; *Twenty-Sixth Report of the 44th Parliament Report 1 of 2017* (16 February 2017); *Report 2 of 2017* (21 March 2017) 6; *Report 4 of 2017* (9 May 2017) 92-93.

9 Section 49 of the POC Act.

10 Sections 51 and 80 of the POC Act.

11 Section 49(2)(a) of the POC Act.

which must be complied with in order for the measures to be compatible with fair trial and fair hearing rights.[12]

1.114 The committee has also previously noted:

> …the POC Act was introduced prior to the establishment of the committee and therefore before the requirement for bills to contain a statement of compatibility with human rights. It is clear that the POC Act provides law enforcement agencies important and necessary tools in the fight against crime in Australia. Assessing the forfeiture orders under the POC Act as involving the determination of a criminal charge does not suggest that such measures cannot be taken – rather, it requires that such measures are demonstrated to be consistent with the criminal process rights under articles 14 and 15 of the ICCPR.[13]

1.115 The committee has previously recommended that the Minister for Justice undertake a detailed assessment of the POC Act to determine its compatibility with the right to a fair trial and right to a fair hearing. It is noted that in his response to the committee's inquiries relating to the Law Enforcement Legislation Amendment (State Bodies and Other Measures) Bill 2016, the minister stated that he did not consider it necessary to conduct an assessment of the POC Act to determine its compatibility with the right to a fair trial and fair hearing as legislation enacted prior to the enactment of the *Human Rights (Parliamentary Scrutiny) Act 2011* is not required to be subject to a human rights compatibility assessment, and the government continually reviews the POC Act as it is amended. However, noting the concerns raised in relation to the POC Act, it would be of considerable assistance if the POC Act were subject to a foundational human rights assessment.

Compatibility of the amendments

1.116 The existing human rights concerns with the POC Act mean that any extensions of the provisions in that Act by this bill may raise similar concerns. In particular, applying a broader basis on which a person's assets may be frozen, restrained or forfeited to include property subject to a mortgage in which mortgage payments have been serviced by illicit funds, without a finding of criminal guilt beyond reasonable doubt, may limit the right to be presumed innocent and the prohibition against double punishment should the POC Act provision be criminal in nature. Further, several aspects of the bill operate retrospectively, which may

12 Parliamentary Joint Committee on Human Rights, *Thirty-First Report of the 44th Parliament* (24 November 2015) 43.

13 Parliamentary Joint Committee on Human Rights, *Thirty-First Report of the 44th Parliament* (24 November 2015) 43-44; *Twenty-Sixth Report of the 44th Parliament Report 1 of 2017* (16 February 2017); *Report 2 of 2017* (21 March 2017) 6; *Report 4 of 2017* (9 May 2017) 92-93.

engage the absolute prohibition against retrospective punishment in criminal proceedings.[14]

1.117 The statement of compatibility states that the POC Act is civil in character, and on this basis the criminal process rights do not apply.[15] However, as noted in the committee's *Guidance Note 2,* the term 'criminal' has an autonomous meaning in international human rights law, such that even if a penalty or other sanction is classified as civil in character domestically it may nevertheless be considered 'criminal' for the purposes of international human rights law.[16]

1.118 In addition to the domestic classification of the offence, the committee's *Guidance Note 2* explains that two other relevant factors in determining whether the provisions should be characterised as 'criminal' in character concern the nature and purpose of the measure and the severity of the penalty. The purpose of the bill is described in the statement of compatibility as to ensure that proceeds of crime authorities can restrain and confiscate property or wealth in certain circumstances, so that 'criminals are not able to deliberately restructure their affairs to avoid the operation of the Act and retain their ill-gotten gains'.[17] The broader purpose of the POC Act is outlined in section 5 of the Act and includes to punish and deter persons from breaching laws. This raises concerns that the freezing, restraint or forfeiture proceedings that are expanded by the bill may be characterised as a form of punishment.[18] As to the severity of the penalty, it is noted that the freezing, restraint or forfeiture orders can involve significant sums of money, which raises concerns that the cumulative effect of the purpose and severity of the measures would lead to the provisions being characterised as 'criminal'.

1.119 If the provisions were to be characterised as 'criminal' for the purposes of human rights law, this does not mean that the provisions are necessarily illegitimate, nor does it convert the provisions into a criminal offence in domestic law. Rather, it means that the provisions in question must be shown to be consistent with the criminal process guarantees set out in Articles 14 and 15 of the ICCPR, including any justifications for any limitations of these rights.

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14 See, in this respect, the report of the United Kingdom Parliamentary Joint Committee on Human Rights, *Joint Committee on Human Rights Third Report* (26 November 2001), [40]-[41] where similar concerns were raised in relation to the UK *Proceeds of Crime Bill*.

15 Statement of Compatibility (SOC) [21]-[23]. See section 315 of the POC Act which relevantly provides that '[p]roceedings on an application order or a confiscation order are not criminal proceedings', that the rules of construction applicable only in criminal law do not apply, and that rules of evidence applicable in civil proceedings do apply.

16 Parliamentary Joint Committee on Human Rights, *Guidance Note 2: Offence provisions, civil penalties and human rights* (December 2014) 3.

17 SOC [15].

18 See *R v Green* [1983] 9 CRR 78; *Johnston v British Columbia* [1987] 27 CRR 206.

Committee comment

1.120 The preceding analysis of the amended definitions of 'proceeds' and an 'instrument' for the purposes of the *Proceeds of Crime Act 2002* (POC Act) raises questions as to whether expanding the application of the POC Act is compatible with the right to a fair trial and the right to a fair hearing.

1.121 The committee therefore seeks the advice of the minister as to whether these amendments to the POC Act are compatible with these rights, including:

- **By reference to the committee's *Guidance Note 2,* whether the freezing, restraint or forfeiture powers that are broadened by the amendments to the definitions of 'proceedings' and an 'instrument' in the bill may be characterised as 'criminal' for the purposes of international human rights law, having regard to the nature, purpose and severity of those powers; and**
- **The extent to which the provisions are compatible with the criminal process guarantees set out in Articles 14 and 15, including any justification for any limitations of these rights where applicable.**

1.122 As the POC Act was introduced prior to the establishment of the committee and no statement of compatibility was provided for that legislation, the committee recommends that the minister undertake a detailed assessment of the POC Act to determine its compatibility with the right to a fair trial and right to a fair hearing. This would inform the committee's consideration of the compatibility of the amendments in the context of the legislative scheme as a whole.

Compatibility of the measure with the right to privacy

1.123 The right to privacy includes the right not to be subject to arbitrary or unlawful interference with a person's privacy, family, home or correspondence. As noted in the statement of compatibility, the amendments to the bill may engage and limit the right not to be subject to arbitrary or unlawful interference with a person's home, as the amendments affect orders that can be used to restrain and forfeit real property.[19]

1.124 The right to privacy may be subject to permissible limitations which are provided by law and are not arbitrary. In order for limitations not to be arbitrary, the measure must pursue a legitimate objective, and be rationally connected and proportionate to achieving that objective.

1.125 As noted earlier, the objective of the bill is stated to be to ensure that criminals are not able to restructure their affairs to avoid the operation of the

19 SOC [27].

proceeds of crime legislation.[20] This would appear to be a legitimate objective for the purposes of international human rights law, and the measures would appear to be rationally connected to that objective.

1.126 In relation to the proportionality of the measure, the statement of compatibility outlines several safeguards and protections in place to protect individuals whose property may be subject to other orders affected by the amendments in the bill. This includes, where a person's property is subject to a restraining order, a court may be able to make allowances for expenses to be met out of property covered by the restraining order,[21] or refuse to make an order where it is not in the public interest to do so.[22] Property will also cease to be 'proceeds' of an offence or an 'instrument' of an offence in certain circumstances, including if it is acquired by a third party for sufficient consideration without the third party knowing, and in circumstances that would not arouse reasonable suspicion, that the property was proceeds of an offence or an instrument of an offence.[23] A person may also seek a compensation order for the proportion of the value of the property they did not derive or realise from the commission of an offence.[24]

1.127 Notwithstanding these safeguards, it is noted that a person may still be liable for their property to be forfeited where a person has been acquitted of an offence, or where their conviction has been subsequently quashed.[25] This appears to leave open the possibility that a person may be acquitted of an offence, but nonetheless be liable to have their real property forfeited because they have made mortgage payments, or made improvements on that property, using funds that the court considers on the balance of probabilities are 'proceeds' from that offence.[26] There does not appear to be a safeguard in place to allow the court to revoke the forfeiture order upon an acquittal. This raises questions both as to whether there are adequate safeguards in place to protect a person's home as well as whether the amendments are the least rights-restrictive means of achieving the objective.

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20 The amendments were introduced following several court cases where doubts had been raised as to whether it was possible to consider the origins of payments made on property in order to determine whether the property could be forfeited: see *Commissioner of Australian Federal Police v Huang* [2016] WASC 5; *Commissioner of Australian Federal Police v Hart & Ors* [2016] QCA 215

21 Section 24 of the POC Act.

22 Sections 17(4) and 19(3) of the POC Act, and also sections 47(4), 48(2) and 49(4).

23 Section 330(4) of the Act.

24 Sections 77 and 94A.

25 Section 80 of the POC Act.

26 Section 48(1)(c) of the POC Act.

Committee comment

1.128 The preceding analysis of the amended definitions of 'proceeds' and an 'instrument' for the purposes of the POC Act raises questions as to whether expanding the application of the POC Act is compatible with the right to privacy.

1.129 The committee therefore seeks the advice of the minister as to whether the limitation on the right to privacy is proportionate to the objective of the measure (including whether there are adequate safeguards in place to protect persons' property from being forfeited where they have been acquitted of the offence, and whether there are other less-rights restrictive means of achieving the objective).

Amendments to the unexplained wealth regime

1.130 The POC Act also currently requires a court to make an 'unexplained wealth'[27] order where (relevantly) the court is not satisfied that the whole or any part of the person's wealth was not 'derived from' one or more relevant offences.[28] The bill seeks to amend the POC Act so that it additionally covers wealth that is 'derived or realised, directly or indirectly' from certain offences. In particular, the bill would amend section 179E of the POC Act to provide that an unexplained wealth order must be made where the court is not satisfied the whole or any part of a person's wealth is not 'derived or realised, directly or indirectly' from the commission of certain offences.[29] According to the statement of compatibility, this would align the unexplained wealth provisions with the revised definition of 'proceeds' and an 'instrument', discussed above. The burden of proving that a person's wealth is not derived or realised, directly or indirectly, from one or more of the relevant offences would lie on the person against which an order is being sought.[30]

Compatibility of the amendments to the unexplained wealth regime with the right to a fair trial and the right to a fair hearing

1.131 The committee has previously commented on the human rights compatibility of the unexplained wealth regime. In those reports, the committee raised concerns that the unexplained wealth provisions in the POC Act may involve the determination of a criminal charge, and that the operation of the reverse burden placed on a respondent effectively gives rise to a presumption of unlawful conduct, which may constitute a significant limitation on the right to be presumed innocent until proven guilty (if the POC Act were to be considered criminal for the purposes of

27 'Unexplained wealth' refers to an amount that is the difference between a person's total wealth and the wealth shown to have been derived lawfully: see section 179E(2) of the Act.

28 See section 179E(1) of the POC Act.

29 See proposed amendment to section 179E(1) of the POC Act.

30 See proposed amendment to section 179E(3) of the POC Act.

international human rights law).[31] Concerns have also been raised insofar as a preliminary unexplained wealth order may be made against a person who does not appear at hearing, and so may not have an opportunity to be heard.[32] The amendments to the unexplained wealth regime, which broadens the basis on which unexplained wealth orders may be made, means that those matters raised in previous analyses are of equal relevance here. It is also noted that these amendments are intended to operate retrospectively to a degree,[33] which additionally raises the issue of compatibility with the amendments with the absolute prohibition on retrospective criminal laws.

1.132 As discussed above in relation to the amendments to the definitions of 'proceeds' and an 'instrument', relevant factors in determining whether a measure is characterised as 'criminal' in nature are the domestic characterisation of the measure, the nature and purpose of the measure and the severity of the measure.[34] As the minister considers that the measures are not criminal in nature based on the domestic characterisation of the measure, no explanation is provided as to whether the measure is criminal by reference to the nature, purpose and severity of the measure, and further whether any potential limitations on fair trial and fair hearing rights are permissible.

Committee comment

1.133 The preceding analysis raises questions as to whether the proposed amendments to the unexplained wealth regime are compatible with the right to a fair trial and the right to a fair hearing.

1.134 The committee therefore seeks the advice of the minister as to whether these amendments are compatible with fair trial and fair hearing rights, including:

- **By reference to the committee's *Guidance Note 2,* whether the proposed amendments to the unexplained wealth regime in the bill may be characterised as 'criminal' for the purposes of international human rights law, having regard to the nature, purpose and severity of the measures; and**

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31 See, Parliamentary Joint Committee on Human Rights, *First Report of 2013,* 27; *Third Report of 2013,* 120; *Sixth Report of 2013,* 189; *Fourth Report of the 44th Parliament* (March 2014) 1; *Ninth Report of the 44th Parliament* (July 2014), 133.

32 See, Parliamentary Joint Committee on Human Rights, *Fourth Report of the 44th Parliament* (March 2014) 6.

33 The amendments apply after the commencement in relation to property derived or realised after commencement, from the commission of an offence occurring before or after that commencement: see item 14(1).

34 Parliamentary Joint Committee on Human Rights, *Guidance Note 2: Offence provisions, civil penalties and human rights* (December 2014) 3.

- **The extent to which the amendments are compatible with the criminal process guarantees set out in Articles 14 and 15, including any justification for any limitations of these rights where applicable.**

Social Services Amendment (Housing Affordability) Bill 2017

Purpose	Seeks to amend the *Social Security (Administration) Act 1999, Social Security Act 1999* and *A New Tax System (Family Assistance) (Administration) Act 1999* to incorporate a scheme for automatic deduction of rent and other household payments from social security or family tax benefit payments of tenants in social housing
Portfolio	Social Services
Introduced	House of Representatives, 14 September 2017
Rights	Multiple Rights (see **Appendix 2**)
Status	Seeking additional information

Automatic deduction of rent and housing payments from social security or family tax benefit payments

1.135 The Social Services Legislation Amendment (Housing Affordability) Bill 2017 (the bill) introduces amendments to the *Social Security (Administration) Act 1999, Social Security Act 1999* and *A New Tax System (Family Assistance) (Administration) Act 1999* to introduce an automatic rent deduction scheme (ARDS). ARDS is a scheme for tenants in social (public or community) housing for the automatic deduction of rent and other household payments from the tenants' social security or family tax benefit payments.

1.136 The bill provides that a social housing lessor (landlord) may request the Secretary deduct an amount from a social housing tenant's 'divertible welfare payment'[1] or family tax benefit to satisfy rent, household utilities or both that are payable by the tenant.[2] The request can be made by the lessor to the Secretary in the following circumstances:

(a) both of the following apply:

1 See proposed section 124QB of the *Social Security (Administration) Act 1999*, which defines 'divertible welfare payment' as a social security payment or a payment under the ABSTUDY scheme that is payable to a particular person and is not '(i) and Australian Victim of Terrorism Overseas Payment; or (ii) a Disaster Recovery Allowance; or (iii) a student start-up loan; or (iv) an ABSTUDY student start-up loan under the *Student Assistance Act 1973*; or (v) of a kind determined in an instrument [made by the Minister]'.

2 See proposed section 124QF(3) to the *Social Security (Administration) Act 1999* and proposed section 67D(3) to the *A New Tax System (Family Assistance) (Administration) Act 1999.*

(i) the tenant has an ongoing or outstanding obligation to pay an amount for rent, household utilities, or both, in relation to the tenant's occupancy of premises let by the lessor;

(ii) the tenant's agreement with the lessor for occupancy of the premises, or another written agreement with the lessor, authorises the lessor to make requests under this Part for deductions from divertible welfare payments payable to the tenant; or

(b) the tenant is to pay to the lessor an amount for loss of, or damage to, property, as a result of the tenant's occupancy of premises let by the lessor so as to comply with an order of a court, or of a tribunal or other body that has the power to make orders, and either:

(i) the period for appealing against the order ends without an appeal being made; or

(ii) if an appeal is made against the order—the appeal is finally determined or otherwise disposed of; or

(c) the tenant agrees, in writing, to pay to the lessor an amount for loss of, or damage to, property, as a result of the tenant's occupancy of premises let by the lessor.[3]

1.137 A 'social housing tenant' is defined as a person who is 18 years or older who pays, or is liable to pay, rent in relation to a premises let by a social housing lessor, whether or not the person is named in the agreement with the lessor for occupancy of the premises.[4] According to the explanatory memorandum, this definition will allow deductions to be sought from the welfare payment of any of the adult occupants of the house.[5]

Compatibility of the automatic rent deduction scheme with multiple rights

1.138 The measure engages and limits a range of human rights including the:

- right to social security;
- right to an adequate standard of living;
- right to privacy;
- right to protection of the family; and
- right to equality and non-discrimination (see **Appendix 2**)

3 Proposed section 124QF(1) to the *Social Security (Administration) Act 1999* and proposed section 67D(1) to the *A New Tax System (Family Assistance) (Administration) Act 1999.*

4 Proposed section 124QD to the *Social Security (Administration) Act 1999*.

5 Explanatory Memorandum (EM) 7.

1.139 The measures raise similar issues against each of these rights. (The measures raise distinct considerations in relation to the right to equality and non-discrimination, which are discussed in the following section).

1.140 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. The Committee on Economic, Social and Cultural Rights has noted that social security benefits must be adequate in amount and duration having regard to the principle of human dignity, so as to avoid any adverse effect on the levels of benefits and the form in which they are provided.[6] Additionally, the right to an adequate standard of living in Article 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) requires Australia to take steps to ensure the availability, adequacy and accessibility of food, clothing, water and housing for all people in Australia. Under the Convention on the Rights of the Child (CRC), children have the right to benefit from social security and to a standard of living adequate for a child's physical, mental, spiritual, moral and social development.[7] Additionally, Australia has obligations under Article 23 of the International Covenant on Civil and Political Rights (ICCPR) and Article 10 of the ICESCR to provide the widest possible protection and assistance to the family.

1.141 The right to privacy is linked to notions of personal autonomy and human dignity. It includes the idea that individuals should have an area of autonomous development; a 'private sphere' free from government intervention and excessive unsolicited intervention by others. The right to privacy requires that the state does not arbitrarily interfere with a person's private and home life.

1.142 The ARDS may limit these rights, as the scheme limits social housing tenants' freedom and autonomy to make decisions about the way in which their social security payments or family tax benefits are used. These rights are subject to permissible limitations if it can be shown that the measure addresses a legitimate objective, is rationally connected to that objective, and is a proportionate way to achieve that objective.

1.143 The minister acknowledges in the statement of compatibility that the right to social security, the right to an adequate standard of living, the right to privacy, the right to protection of the family and the rights of children are engaged and limited. However, in relation to the right to privacy, the minister only discusses the right to privacy insofar as it relates to the disclosure of personal information. The statement of compatibility does not otherwise address the right to privacy, including the extent to which the bill may interfere with a person's private and home life through limiting

6 UN Committee on Economic, Social and Cultural Rights, *General Comment No. 19: The Right to Social Security,* UN Doc E/C.12/GC/19 (2008), [22].

7 Article 26 and Article 27 of the Convention on the Rights of the Child.

affected persons' ability to choose the way in which their social security or family tax benefits are used.

1.144 As noted earlier, for a limitation on a human right to be permissible, it must pursue a legitimate objective. The statement of compatibility explains that the objective of ARDS is to prevent evictions due to arrears and debt which may force a person, and their children, into homelessness.[8] The statement of compatibility further states:

> ARDS aims to:
>
> 1. reduce the risk that social housing tenants will accumulate rental arrears and other housing debt risking their tenancies,
> 2. reduce the cost of managing social housing arrears and debt, and
> 3. better secure the income stream associated with housing assets.[9]

1.145 A legitimate objective is one that is necessary to address an area of public and social concern, not one that simply seeks an outcome that is regarded as desirable or convenient. The objective of reducing the risk of rental arrears, evictions and homelessness is capable of constituting a legitimate objective for the purposes of international human rights law.[10] However, where a measure may limit a human right the committee's usual expectation is that the accompanying statement of compatibility provides a reasoned and evidence-based explanation of how the measure supports a legitimate objective.[11] In this instance, no evidence is provided in the statement of compatibility as to the extent to which rental arrears in the social housing sector is a pressing issue.

1.146 The statement of compatibility notes that, in most jurisdictions, social housing tenants have a condition in their lease to use a voluntary rent deduction scheme to pay housing tenancy costs, and that tenancy tribunals may order defaulting tenants to use the voluntary rent deduction scheme. It states that under the present scheme tenants may 'bypass their social housing provider and cancel their authorised tenancy tribunal ordered voluntary rent deductions' due to social security payments and family tax benefits being 'absolutely inalienable' under the

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8 Statement of Compatibility (SOC) 2.

9 SOC 1.

10 The UN Special Rapporteur on adequate housing has recently emphasised the importance of the right to adequate housing and noted that it is a human right which is interdependent with other human rights, particularly the right to equality and non-discrimination and the right to life: *Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context,* A/HRC/34/51, (2017) [11].

11 Parliamentary Joint Committee on Human Rights, *Guidance Note 1—Drafting Statements of Compatibility* (December 2014).

existing law.[12] However, no evidence is provided as to the extent to which tenants have engaged in 'bypassing' of tribunal orders, and no evidence is provided to explain the extent to which the existing scheme of voluntary rent deduction is ineffective to address the stated objective of reducing the risk of rental arrears, evictions and homelessness.

1.147 Limitations on human rights must also be rationally connected to, and a proportionate way to achieve, the legitimate objective. The statement of compatibility states that people subject to the ARDS will benefit by way of a reduction in their liability to a social housing lessor, and that the scheme is designed to ensure persons continue to enjoy an adequate standard of living (including housing) by reducing the risk of arrears build-up which may lead to eviction and possible homelessness.[13] The statement of compatibility further states that by preventing rental arrears and possible eviction the bill will assist people's capacity to meet the basic needs of his or her family, and protects the rights of children.[14] On these bases, the statement of compatibility argues that the measures are compatible with the rights to social security, an adequate standard of living, protection of the family and the rights of children.

1.148 However, the application of the ARDS to persons with an 'ongoing *or* outstanding obligation'[15] to pay rent or housing utilities suggests that the scheme may apply to tenants with ongoing obligations to pay rent regardless of whether or not they are in rental arrears. This may result in tenants having limitations placed on their social security payments or family tax benefits, even in circumstances where they may not need assistance managing rental payments or payment of household utilities. It is not clear how applying the scheme to persons in such circumstances is rationally connected to the objective of reducing risk of evictions and homelessness, as such persons may not be at risk. On the contrary, there may be a risk that the imposition of the ARDS on persons who are not at risk could encourage welfare dependency by reducing a person's independent financial management capabilities.

1.149 Similarly, the application of the ARDS to persons with an ongoing (but not an outstanding) obligation to pay rent does not appear to be the least rights-restrictive means of achieving the objectives of reducing the risk of rental arrears, evictions and homelessness. There would appear to be other less rights-restrictive means of achieving these objectives, including limiting the scheme to persons who have an outstanding obligation to pay rent, or have a demonstrated risk of falling into rental

12 SOC 1.

13 SOC 2, 3.

14 SOC 2, 3.

15 Proposed section 124QF(1) to the *Social Security (Administration) Act 1999* and proposed section 67D(1) to the *A New Tax System (Family Assistance) (Administration) Act 1999.*

arrears that is determined by reasonable and objective criteria, for example because the person may have fallen into rental arrears on several previous occasions.

1.150 In its 2016 inquiry into the Stronger Futures Measures, the committee commented that income management is most effective when it is voluntary, or when it is applied to individuals after considering their particular circumstances – that is, when it is applied flexibly.[16] The committee also raised concerns that the compulsory income management provisions which operate inflexibly raise the risk that the regime would be applied to people who did not need assistance managing their budget.[17] The bill does not appear to include any requirement that a social housing lessor or the Secretary consider an individual's particular circumstances, beyond the requirement that a tenant has ongoing or outstanding obligation to pay rent and authority under the tenant's lease for the lessor to make the request. For example, there does not appear to be any requirement (discretionary or otherwise) for the Secretary to consider a tenant's personal circumstances, such as whether the imposition of the ARDS would cause hardship, in determining whether a deduction should be made following a request from a lessor.[18] This raises concerns that the measure may not provide sufficient flexibility to treat different cases differently having regard to the merits of an individual case.

1.151 The absence of any discretion to consider a tenant's personal circumstances raises particular concerns in relation to the right to protection of the family and the rights of children. If, for example, the timing of the automatic rent deduction was such that it made it difficult for a parent to pay for other necessities in circumstances of financial stress, this could affect the standard of living of children under the tenant's care. This raises additional questions about the proportionality of the measure to the protection of the family and the rights of the child.

Committee comment

1.152 The preceding analysis raises questions as to the compatibility of the bill with the right to social security, the right to an adequate standard of living, the right to privacy, the right to protection of the family and the rights of children that are not addressed in the statement of compatibility.

1.153 The committee therefore seeks the advice of the minister as to:

- **whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective**

16 Parliamentary Joint Committee on Human Rights, *2016 Review of Stronger Futures Measures* (16 March 2016) 50-54.

17 Parliamentary Joint Committee on Human Rights, *2016 Review of Stronger Futures Measures* (16 March 2016) 61.

18 See section 124QG.

(including any evidence of the extent to which the existing scheme of voluntary rent deduction is ineffective);

- **how the automatic rent deduction scheme is effective to achieve (that is, rationally connected to) that objective (including its potential application to those who are not and have not been in rental arrears); and**
- **whether the automatic rent deduction scheme is a proportionate limitation on these rights, in particular whether applying the scheme described in paragraph [1.136] above to both ongoing and outstanding obligations to pay rent is the least rights-restrictive means of achieving the stated objective, and whether the scheme provides sufficient flexibility to treat different cases differently.**

The right to equality and non-discrimination

1.154 The right to equality and non-discrimination is protected by the ICCPR and the ICESCR. It provides that everyone is entitled to enjoy their rights without discrimination of any kind, and that all people are equal before the law and entitled without discrimination to the equal and non-discriminatory protection of the law.

1.155 'Discrimination' refers to a distinction based on a personal attribute (for example, race, sex, or religion) which has either the purpose (called 'direct' discrimination) or the effect (called 'indirect' discrimination) of adversely affecting human rights. The UN Human Rights Committee has explained indirect discrimination as 'a rule or measure that is neutral on its face or without intent to discriminate', which exclusively or disproportionately affects people with a particular personal attribute.[19]

1.156 Demographic information published by the Australian Institute of Health and Welfare in July 2017 states that in social housing households, the majority of tenants were female (62%) and that 43% reported a disability, although only 29% identified a disability support pension as their main source of income.[20] Similarly in state-owned and managed Indigenous housing, approximately three quarters of tenants were female (76%) and 34% of tenants reported having a disability. In community housing households, 57% of tenants were female with more than one-third (35%) reporting having a disability.[21]

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19 *Althammer v Austria*, HRC 998/01 [10.2].

20 Australian Institute of Health and Welfare, *Housing Assistance in Australia 2017* (13 July 2017) https://www.aihw.gov.au/reports/web/web-189/housing-assistance-in-australia-2017/contents/social-housing-tenants-1.

21 Australian Institute of Health and Welfare, *Housing Assistance in Australia 2017* (13 July 2017) https://www.aihw.gov.au/reports/web/web-189/housing-assistance-in-australia-2017/contents/social-housing-tenants-1.

1.157 The statement of compatibility does not acknowledge that the right to equality and non-discrimination is engaged or limited by the bill. However, the information in the preceding paragraph indicates that the ARDS may have a disproportionate impact on women and persons with a disability. Where a measure impacts on particular groups disproportionately it establishes *prima facie* that there may be indirect discrimination.[22]

1.158 Differential treatment (including the differential effect of a measure that is neutral on its face) 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 legitimate objective and is a proportionate means of achieving that objective. For the reasons stated earlier, no evidence is provided in the statement of compatibility as to whether the existing scheme is ineffective to address the stated objective of reducing the risk of rental arrears, evictions and homelessness. This raises questions as to whether the measure is based on reasonable and objective criteria to justify the disproportionate impact this measure may have on women and persons with a disability. Information to justify the rationale for the differential effect on women and persons with a disability will also be relevant to the proportionality analysis.

Committee comment

1.159 In relation to the right to equality and non-discrimination, the committee notes that the automatic rent deduction scheme appears to have a disproportionate negative impact on women and persons with a disability.

1.160 The committee therefore seeks the advice of the minister as to the compatibility of the automatic rent deduction scheme with the right to equality and non-discrimination.

Amendments to the trial of the cashless welfare arrangements

1.161 Part 3D of the *Social Security (Administration) Act 1999* provides for the trial of cashless welfare arrangements. The trial permits certain welfare payments to be divided into 'restricted' and 'unrestricted' portions, with recipients being unable to spend the restricted portions of such payments on alcohol or gambling.[23] Currently, section 124PM provides that a person who receives a 'restrictable payment'[24] may use the restricted portion of the payment to purchase goods or services other than alcohol beverages or gambling, and 'may use the unrestricted portion of the payment, as paid to the person, at the person's discretion'.

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22 *D.H. and Others v the Czech Republic* ECHR Application no. 57325/00 (13 November 2007) 49; *Hoogendijk v. the Netherlands* ECHR, Application no. 58641/00 (6 January 2005).

23 See section 124PB of the *Social Security (Administration) Act 1999*.

24 Which includes a number of payments, including specified social security payments and family tax benefits: see section 124PD(1) of the Social Security (Administration) Act 1999.

1.162 Item 7 of the bill proposes to repeal section 124PM and substitute it with the following provision:

> A person who received a restrictable payment may use the restricted portion of the payment, as paid under subsection 124PL(2), to purchase goods or services, other than alcoholic beverages or gambling.

1.163 The effect of this amendment, according to the explanatory memorandum, would be to allow for automatic rent deductions 'to be made from the unrestricted portion of a cashless debit card participant's welfare payment, if necessary'.[25]

Compatibility of the amendments to the cashless welfare arrangements with the right to equality and non-discrimination

1.164 The committee has previously commented on the human rights compatibility of the cashless welfare arrangements.[26] The committee has also examined the income management regime in its 2013 and 2016 Reviews of the Stronger Futures measures.[27] Those reports noted that the cashless welfare arrangements engage and limit several human rights, including the right to social security, the right to privacy and family and the right to equality and non-discrimination.

1.165 In allowing for automatic rent deductions to be made from the unrestricted portion of a cashless debit card participant's welfare payment, the bill appears to further restrict how a person subject to the cashless welfare regime may spend their social security payment or family tax benefit. It appears, for example, that a possible outcome of rent being automatically deducted from the unrestricted portion of a person's welfare payment is that a cashless welfare participant could have no amount of their unrestricted welfare payment remaining. That is, the amendment to section 124PM appears to leave open the possibility that no portion, or only a small portion, of a cashless welfare participant's welfare payment could be used at the person's discretion.

1.166 The issues raised in the previous section relating to the automatic rent deduction scheme apply equally to the amendments to the cashless welfare

25 EM 6.

26 See Parliamentary Joint Committee on Human Rights, *Report 11 of 2017* (17 October 2017) 126-137; *Report 9 of 2017* (5 September 2017) 34-40; *Report 7 of 2016* (11 October 2016) 58-61; *Twenty-seventh report of the 44th Parliament* (8 September 2015) 20-29; *Thirty-first report of the 44th Parliament* (24 November 2015) 21-36.

27 Parliamentary Joint Committee on Human Rights, *Eleventh Report of 2013: Stronger Futures in the Northern Territory Act 2012 and Related Legislation* (27 June 2013) and *2016 Review of Stronger Futures Measures* (16 March 2016).

arrangements.[28] Further, the amendments to the cashless welfare regime raise additional issues in relation to the right to equality and non-discrimination. This is because, as the committee has previously commented, while the cashless welfare scheme does not directly discriminate on the basis of race, Indigenous people are disproportionately affected by the cashless welfare regime in the locations where the scheme currently operates.[29]

1.167 As noted earlier, differential treatment (including the differential effect of a measure that is neutral on its face) 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 legitimate objective and is a proportionate means of achieving that objective.

1.168 The minister does not acknowledge that the amendments to the cashless welfare regime introduced by the bill engage and limit the right to equality and non-discrimination. However, as noted earlier, measures that disproportionately impact particular groups establish *prima facie* that there may be indirect discrimination. In addition to the concerns raised at [1.150] above in relation to the ARDS, the particular impact on participants in the cashless welfare scheme raises further questions as to the proportionality of the measure.

Committee comment

1.169 The amendments to the cashless welfare arrangements that would allow automatic rent deductions from the unrestricted portion of a person's welfare payment would appear to have a disproportionate negative effect on Indigenous people, raising questions about whether this disproportionate negative effect (which indicates prima facie indirect discrimination) amounts to unlawful discrimination.

1.170 Accordingly, the committee seeks the advice of the minister as to whether the amendments to the cashless welfare arrangements introduced by the bill are compatible with the right to equality and non-discrimination (including whether the measure pursues a legitimate objective, is rationally connected to that objective and is a proportionate limitation on the right).

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28 See also the previous comments of the committee: Parliamentary Joint Committee on Human Rights, *Report 11 of 2017* (17 October 2017) 126-137; *Report 9 of 2017* (5 September 2017) 34-40; *Report 7 of 2016* (11 October 2016) 58-61; *Twenty-seventh report of the 44th Parliament* (8 September 2015) 20-29; *Thirty-first report of the 44th Parliament* (24 November 2015) 21-36.

29 See, Parliamentary Joint Committee on Human Rights, *Thirty-first report of the 44th Parliament* (24 November 2015) 21-36.

Treasury Laws Amendment (Banking Executive Accountability and Related Measures) Bill 2017

Purpose	Seeks to amend the *Banking Act 1959* to establish the Banking Executive Accountability Regime and provide the Australian Prudential Regulation Authority with strengthened powers
Portfolio	Treasury
Introduced	House of Representatives, 19 October 2017
Rights	Privacy; not to incriminate oneself (see **Appendix 2**)
Status	Seeking additional information

Coercive examination and information gathering powers

1.171 Schedule 2 of the Treasury Laws Amendment (Banking Executive Accountability and Related Measures) Bill 2017 (the bill) seeks to amend the *Banking Act 1959* to provide the Australian Prudential Regulation Authority (APRA) with new examination and information gathering powers. The powers include enabling APRA to require a person to appear before an APRA-appointed investigator and 'provide all reasonable assistance in connection with the investigation' and to require a person to produce books, accounts, documents or sign a record that may be relevant to an investigator, regardless of whether the provision of such information may incriminate the person.[1] Failure to comply with these requirements would be an offence and carry a maximum penalty of 30 penalty units (currently $6,300).[2]

Compatibility of the measure with the right not to incriminate oneself

1.172 Specific guarantees of the right to a fair trial in the determination of a criminal charge guaranteed by article 14 of the International Covenant on Civil and Political Rights (ICCPR) include the right not to incriminate oneself (article 14(3)(g)).

1.173 Schedule 2 of the bill engages and limits this right by requiring a person to attend an examination, answer questions or provide books, accounts, documents or sign a record notwithstanding that to do so might tend to incriminate that person. The right not to incriminate oneself may be subject to permissible limitations where the limitation pursues a legitimate objective, is rationally connected to that objective and is a proportionate way of achieving that objective.

1 See Schedule 2, item 9, sections 61A and 61C. Under the bill, a person is required to appear before an investigator where the investigator 'reasonably believes or suspects that a person… can give information relevant to the investigator's investigation'. See proposed schedule 2, item 9, section 61C.

2 See Schedule 2, item 9, section 61G.

1.174 The statement of compatibility acknowledges that the right not to incriminate oneself is engaged by the bill, but states that the limitation on this right is permissible on the following bases:

> Engaging the right against self-incrimination in this way is necessary and justified as the public benefit in removing the liberty outweighs the loss to the individual. The information which would be obtained by APRA is critical in it performing its regulatory functions, specifically protecting depositors in an ADI [authorised deposit-taking institution], ensuring the stability of Australia's financial system including through investigating prudential matters.

1.175 While the broad objectives of protecting depositors and ensuring the stability of Australia's financial system may be capable of constituting legitimate objectives, the statement of compatibility provides no information about the importance of these objectives in the specific context of the measure. In order to demonstrate that the measure pursues a legitimate objective for the purposes of international human rights law, a reasoned and evidence-based explanation of why the measure addresses a substantial and pressing concern is required.

1.176 Questions also remain as to whether the limitation is rationally connected to and a proportionate means of achieving the objectives. In particular, the availability of use and derivative use immunities can be an important factor in determining whether the abrogation of the privilege against self-incrimination is proportionate. That is, they may act as a relevant safeguard. The statement of compatibility states that a 'use' immunity would be available.[3] This means that, where a person has been required to give incriminating evidence, that evidence cannot be used against the person in any civil or criminal proceeding, subject to exceptions,[4] but may be used to obtain further evidence against the person.

1.177 However, no 'derivative use' immunity is provided in the bill, which would prevent information or evidence indirectly obtained from being used in criminal proceedings against the person. It is acknowledged that a 'derivative use' immunity will not be appropriate in all cases because it is not reasonably available as a less rights restrictive alternative. For example, because it would undermine the purpose of the measure or be unworkable. However, the statement of compatibility does not substantively address why a 'derivative use' immunity would not be reasonably available in this case. This raises the question as to whether the measure is the least rights restrictive way of achieving the stated objective as required in order for the limitation to be proportionate.

1.178 Further, it is noted that the availability or lack of availability of a 'derivative use' immunity needs to be considered in the regulatory context of the proposed

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3 SOC 79.

4 This includes proceedings concerning the falsity of the information provided. See SOC 79.

powers. The extent of interference that may be permissible as a matter of international human rights law may be, for example, greater in contexts where there are difficulties regulating specific conduct, persons subject to the powers are not particularly vulnerable or powers are otherwise circumscribed with respect to the scope of information which may be sought. That is, there are a range of matters which influence whether the limitation is proportionate.

Committee comment

1.179 The preceding analysis raises questions about the compatibility of the coercive examination powers in the bill with the right not to incriminate oneself.

1.180 The committee therefore seeks the advice of the treasurer as to:

- **whether there is reasoning or evidence that establishes that one or more of the stated objectives addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective for the purposes of international human rights law;**
- **how the measure is effective to achieve (that is, rationally connected to) that objective;**
- **whether the limitation is a reasonable and proportionate measure to achieve the stated objective;**
- **whether the persons who may be subject to examination and the scope of information that may be subject to compulsory disclosure is sufficiently circumscribed with respect to the stated objective of the measure;**
- **whether a derivative use immunity is reasonably available as a less rights restrictive alternative in proposed schedule 2 to ensure information or evidence indirectly obtained from a person compelled by APRA to answer questions or provide information or documents cannot be used in evidence against that person.**

Compatibility of the measure with the right to privacy

1.181 The right to privacy includes respect for informational privacy, including the right to respect for private and confidential information, particularly the use and sharing of such information and the right to control the dissemination of information about one's private life.

1.182 By requiring a person to attend an examination, answer questions or provide books, accounts, documents or sign a record in connection with an APRA investigation, including in circumstances where the provision of such information may tend to incriminate the person, Schedule 2 of the bill engages and limits the right to privacy.

1.183 The right to privacy may be subject to permissible limitations where the limitation pursues a legitimate objective and is rationally connected and proportionate to achieving that objective.

1.184 The statement of compatibility does not acknowledge that the proposed examination and information gathering powers engage the right to privacy and therefore does not provide an assessment of the human rights compatibility in relation to this aspect of the measure.[5]

1.185 Assuming that the measure pursues the objectives outlined above in relation to the right not to incriminate oneself (that is, protecting depositors and ensuring the stability of Australia's financial system), for the reasons earlier stated, these may be capable of being legitimate objectives. However, questions remain as to whether the objectives address a pressing and substantial concern specifically in relation to this measure, and whether the measure is rationally connected to and a proportionate means of achieving the objectives in the context of limitations on the right to privacy.

1.186 In particular, to be proportionate, a limitation on the right to privacy should only be as extensive as is strictly necessary to achieve its legitimate objective and must be accompanied by appropriate safeguards. Information and evidence as to whether the measure is the least rights-restrictive way of achieving the stated objective of the measure, and of any safeguards in place to protect a person's informational privacy when providing information pursuant to APRA's examination and information gathering powers, would be of assistance in determining the proportionality of the measure.

Committee comment

1.187 The statement of compatibility has not identified or addressed the limitation on the right to privacy that arises from the proposed coercive examination and information gathering powers introduced by Schedule 2 of the bill.

1.188 The committee therefore seeks the advice of the treasurer as to:

- **whether the proposed coercive examination and information gathering powers pursue a legitimate objective (including reasoning or evidence that establishes that the stated objectives address a pressing or substantial concern);**
- **how the measure is effective to achieve (that is, rationally connected to) those objectives; and**
- **whether the limitation is reasonable and proportionate to achieve the stated objectives (including whether there are less rights restrictive ways of achieving that objective, whether the persons who may be subject to examination and the scope of information that may be subject to**

5 It is noted that the statement of compatibility does acknowledge that the right to privacy is engaged by another measure in the bill that requires authorised deposit-taking institutions (ADIs) to provide information to APRA, including personal information, on persons with senior executive responsibility within the ADI or its subsidiaries: See SOC 80.

compulsory disclosure is sufficiently circumscribed with respect to the stated objective of the measure; and whether there are adequate and effective safeguards in relation to the measure).

Further response required

1.189 The committee seeks a further response from the relevant minister or legislation proponent with respect to the following bills and instruments.

Code for the Tendering and Performance of Building Work 2016 [F2016L01859] and Code for the Tendering and Performance of Building Work Amendment Instrument 2017 [F2017L00132]

Purpose	Sets up a code of practice that is to be complied with by persons in respect of building work as permitted under section 34 of the *Building and Construction (Improving Productivity) Act 2016* (ABCC Act)
Portfolio	Employment
Authorising legislation	*Building and Construction (Improving Productivity) Act 2016*
Last day to disallow	15 sitting days after tabling (F2016L01859 tabled in the Senate 7 February 2017; F2017L00132 tabled in the Senate 20 March 2017)
Rights	Freedom of expression; freedom of association; collectively bargain; form and join trade unions; just and favourable conditions of work (see **Appendix 2**)
Previous reports	5 of 2017 and 9 of 2017
Status	Seeking further additional information

Background

1.190 The committee first reported on the Code for the Tendering and Performance of Building Work 2016 [F2016L01859] and the Code for the Tendering and Performance of Building Work Amendment Instrument 2017 [F2017L00132] (the instruments) in its *Report 5 of 2017* and requested a response from the Minister for Employment by 30 June 2017.[1]

1.191 The minister's response to the committee's inquiries was received on 3 July 2017 and discussed in *Report 9 of 2017*.[2] The committee requested a further response from the minister by 20 September 2017.

1 Parliamentary Joint Committee on Human Rights, *Report of 5 of 2017* (14 June 2017) 2-13.

2 Parliamentary Joint Committee on Human Rights, *Report of 9 of 2017* (5 September 2017) 45-63.

1.192 A further response from the minister was received on 5 October 2017. The response is discussed below and is reproduced in full at **Appendix 3**.

Code for tendering and performance of building work

1.193 The committee previously examined the *Building and Construction (Improving Productivity) Act 2016* (ABCC Act) which is the authorising legislation for the instruments in its *Second Report of the 44th Parliament*, *Tenth Report of the 44th Parliament*, *Fourteenth Report of the 44th Parliament* and *Thirty-fourth Report of the 44th Parliament* and *Report 7 of 2016*.[3]

1.194 Under section 34 of the ABCC Act the Minister for Employment is empowered to issue a code of practice that is required to be followed by persons in respect of building work. The instrument sets up a code of practice for all building industry participants that seek to be, or are, involved in Commonwealth funded building work (a code covered entity). As noted in the previous human rights analysis, the code of practice contains a number of requirements which engage and limit human rights and are discussed further below.

Content of agreements and prohibited conduct

1.195 Section 11(1) of the code of conduct provides that a code covered entity must not be covered by an enterprise agreement in respect of building work which includes clauses that:

- impose or purport to impose limits on the right of the code covered entity to manage its business or to improve productivity;
- discriminate, or have the effect of discriminating, against certain persons, classes of employees, or subcontractors; or
- are inconsistent with freedom of association requirements set out in section 13 of the code of practice.

3 The committee originally considered the Building and Construction Industry (Improving Productivity) Bill 2013 and Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013 in Parliamentary Joint Committee on Human Rights, *Second Report of the 44th Parliament* (11 February 2014) 1-30; *Tenth Report of the 44th Parliament* (26 August 2014) 43-77; and *Fourteenth Report of the 44th Parliament* (28 October 2014) 106-113. These bills were then reintroduced as the Building and Construction Industry (Improving Productivity) Bill 2013 [No. 2] and the Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013 [No. 2]; see *Thirty-fourth Report of the 44th Parliament* (23 February 2016) 2. The bills were reintroduced to the Senate on 31 August 2016, following the commencement of the 45th Parliament; see *Report 7 of 2016* (11 October 2016) 62-63. See also, International Labour Organization, Committee of Experts on the Application of Conventions and Recommendations, Direct Request, adopted 2016, published 106th ILC session (2017) Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) – Australia.

1.196 Section 11(3) further provides that clauses are not permitted to be included in the enterprise agreement in relation to a range of matters including the number of employees, consultation on particular matters, the engagement of particular classes of staff, contractors and subcontractors, casualisation and the type of contracts to be offered, redundancy, demobilisation and redeployment, loaded pay, allocation of work to particular employees, external monitoring of the agreement, encouraging, discouraging or supporting people being union members, when and where work can be performed, union access to the workplace beyond what is provided for in legislation, and granting of facilities to be used by union members, officers or delegates.

1.197 Section 11A additionally provides that code covered entities must not be covered by enterprise agreements that purport to remedy or render ineffective other clauses that are inconsistent with section 11.

1.198 The effect of a failure to meet the requirements of section 11 by a code covered entity is to render the entity ineligible to tender for, or be awarded, Commonwealth funded work.

Compatibility of the measure with the right to collectively bargain and the right to just and favourable conditions of work

1.199 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 safe working conditions. 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).[4]

1.200 As stated in the initial analysis, 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.[5] The principle of 'autonomy of bargaining' in the negotiation of collective agreements is an 'essential element' of Article 4 of ILO Convention No. 98 which envisages that

4 See, article 22 of the ICCPR and article 8 of the ICESCR.

5 The Freedom of Association and Protection of the Right to Organize (ILO Convention No. 87) is expressly referred to in the ICCPR and the ICESCR.

parties will be free to reach their own settlement of a collective agreement without interference.[6]

1.201 The initial analysis stated that excluding certain code covered entity employers from being awarded Commonwealth funded work if they are subject to an enterprise agreement containing specific terms is likely to act as a disincentive for the inclusion of such terms in enterprise agreements. The measure is likely to have a corresponding restrictive effect on the scope of negotiations on a broad range of matters including those that relate to terms and conditions of employment and how work is performed. As such, the initial analysis stated that the measure interferes with the outcome of the bargaining process and the inclusion of particular terms in enterprise agreements. Accordingly, the measure engages and limits the right to just and favourable conditions of work and the right to collectively bargain.

1.202 Measures limiting the right to freedom of association including the right to collectively bargain 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.[7] Further, Article 22(3) of the ICCPR and article 8 of the ICESCR expressly provide that no limitations are permissible on this right if they are inconsistent with the guarantees of freedom of association and the right to collectively organise contained in the ILO Convention No. 87.

1.203 In the initial analysis, it was noted that the ILO's Committee on Freedom of Association (CFA Committee), which is a supervisory mechanism that examines complaints about violations of the right to freedom of association and the right to collectively bargain, has stated that 'measures taken unilaterally by the authorities to restrict the scope of negotiable issues are often incompatible with Convention

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6 ILO, *General Survey by the Committee of Experts on the Application of Conventions and Recommendations on Freedom of Association and Collective Bargaining* (1994), [248]; ILO, *Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO*, Fifth Edition (2006) 182 (citing ILO Freedom of Association Committee 308th Report, Case No. 1897). See, also, ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR), Direct Request (CEACR) - adopted 2016, published 106th International Labour Conference (ILC) session (2017) Right to Organise and Collective Bargaining Convention, 1949 (No. 98) - Australia (Ratification: 1973) http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:13100:0::NO::P13100_COMMENT_ID:3299912; ILO's Committee on Freedom of Association (CFA Committee), Report in which the committee requests to be kept informed of development - Report No 338, November 2005 Case No 2326 (Australia) - Complaint date: 10 March 2004, http://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002_COMPLAINT_TEXT_ID:2908523.

7 See ICCPR article 22.

No. 98'.[8] The CFA Committee has noted that there are some circumstances in which it might be legitimate for a government to limit the outcomes of a bargaining process, stating that 'any limitation on collective bargaining on the part of the authorities should be preceded by consultations with the workers' and employers' organizations in an effort to obtain their agreement.'[9]

1.204 In relation to the limitation that section 11 imposes on the right to collectively bargain, the statement of compatibility argues:

> …the limitation is reasonable, necessary and proportionate in pursuit of the legitimate objective of seeking to ensure that enterprise agreements are not used to limit the ability of code covered entities to manage their businesses efficiently or restrict productivity improvements in the building and construction industry more generally.[10]

1.205 The initial human rights analysis stated that limited information is provided in the statement of compatibility as to whether the stated objective addresses a pressing and substantial concern such that it may be considered a legitimate objective for the purpose of international human rights law or whether the measure is rationally connected to (that is, effective to achieve) that stated objective.

1.206 Further, no information was provided about the proportionality of the measure. In this respect, it was noted that section 11 imposes practical restrictions on the inclusion of a very broad range of matters relating to terms and conditions of employment in enterprise agreements. It was also noted that section 11(1)(a) is particularly broad and provides a practical restriction on the inclusion of a clause in an enterprise agreement which imposes or purports to impose limits on the right of the code covered entity to manage its business or to improve productivity. This clause raises concerns for it may be understood to cover many matters that are usually the subject of enterprise agreements such as ordinary working hours, overtime, rates of pay and any types of work performed.

1.207 Additionally, the previous analysis noted that the ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR), another international supervisory mechanism, had recently reported on Australia's compliance with the right to collectively bargain in respect of matters which would also be covered by section 11. In relation to restrictions on the scope of collective bargaining and bargaining outcomes, the committee noted that 'parties should not

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8 See ILO, *Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO*, Fifth Edition (2006) 182 (citing ILO Freedom of Association Committee 308th Report, Case No. 1897, [473]).

9 ILO, *Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO*, Fifth Edition (2006) 182 (citing ILO Freedom of Association Committee 330th Report, Case No. 2194, [791]; and 335th Report, Case No. 2293, [1237]).

10 Code for the Tendering and Performance of Building Work 2016, Explanatory Statement (ES), statement of compatibility (SOC) 6.

be penalized for deciding to include these issues in their negotiations' and requested that Australia review such matters 'with a view to removing these restrictions on collective bargaining matters'.[11]

1.208 The CFA Committee has also raised concerns in relation to similar measures previously enacted by Australia under the *Building and Construction Industry Improvement Act 2005* and stated that:

> The Committee recalls that the right to bargain freely with employers with respect to conditions of work constitutes an essential element in freedom of association, and trade unions should have the right, through collective bargaining or other lawful means, to seek to improve the living and working conditions of those whom the trade unions represent. The public authorities should refrain from any interference, which would restrict this right or impede the lawful exercise thereof. Any such interference would appear to infringe the principle that workers' and employers' organizations should have the right to organize their activities and to formulate their programmes… The Committee considers that the matters which might be subject to collective bargaining include the type of agreement to be offered to employees or the type of industrial instrument to be negotiated in the future, as well as wages, benefits and allowances, working time, annual leave, selection criteria in case of redundancy, the coverage of the collective agreement, the granting of trade union facilities, including access to the workplace beyond what is provided for in legislation etc.; these matters should not be excluded from the scope of collective bargaining by law, or as in this case, by financial disincentives and considerable penalties applicable in case of non-implementation of the Code and Guidelines.[12]

1.209 As the initial analysis noted, concerns about restrictions Australia has imposed on the right to freedom of association and the right to collectively bargain have also been raised by the United Nations Committee on Economic, Social and Cultural Rights (UNCESCR) in its Concluding Observations on Australia.[13] Such

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11 ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR), Direct Request - adopted 2016, published 106th ILC session (2017), Right to Organise and Collective Bargaining Convention, 1949 (No. 98) - Australia http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID,P11110_COUNTRY_ID,P11110_COUNTRY_NAME,P11110_COMMENT_YEAR:3299912,102544,Australia,2016.

12 ILO's Committee on Freedom of Association (CFA Committee), Report in which the committee requests to be kept informed of development - Report No 338, November 2005 Case No 2326 (Australia) - Complaint date: 10 March 2004 http://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002_COMPLAINT_TEXT_ID:2908523.

13 UN Committee on Economic, Social and Cultural Rights, Concluding Observations, Australia, E/C.12/AUS/CO/4 (12 June 2009).

comments from supervisory mechanisms were not addressed in the statement of compatibility. The committee has also previously commented on other measures which engage and limit these rights and raised concerns.[14]

1.210 Accordingly, the committee sought the advice of the Minister for Employment as to:

- whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective;
- how the measure is effective to achieve (that is, rationally connected to) that objective;
- whether the limitation is a reasonable and proportionate measure to achieve that objective (including findings by relevant international supervisory mechanisms about whether the limitation is permissible);
- whether consultation has occurred with the relevant workers' and employers' organisations in relation to the measure; and
- the government's response to the previous comments and recommendations made by international supervisory mechanisms including whether the government agrees with these views.

Minister's initial response

1.211 The minister's initial response, discussed in *Report 9 of 2017*,[15] provided a range of detailed information about the importance of the construction industry citing its size and its role in 'driving economic growth'. The minister's response identified the objectives of the measure as improving 'efficiency, productiveness and jobs growth' in the construction industry and 'to ensure that enterprise agreements are not used to limit the ability of code covered entities to manage their businesses efficiently or restrict productivity improvement'. It also identified the further objectives of ensuring that 'subcontractors have the ability to genuinely bargain and not be subject to coercion through the imposition of particular types of agreements by head contractors and unions; and to ensure that freedom of association is not impinged upon'.

1.212 Information and reasoning was provided in relation to the importance of some, but not all, of these objectives. While the minister's initial response was not

14 See, for example, Parliamentary Joint Committee on Human Rights, *Second Report of the 44th Parliament* (11 February 2014) 1-30; *Tenth Report of the 44th Parliament* (26 August 2014) 55-56; *Report 7 of 2016* (11 October 2016) 21-24, 62-63; *Report 8 of 2016* (9 November 2016) 62-64.

15 Parliamentary Joint Committee on Human Rights, *Report of 9 of 2017* (5 September 2017) 45-63.

put in these terms, to the extent that the measure is aimed at addressing the rights and freedoms of others, this was noted in the previous analysis as capable of constituting a legitimate objective for the purposes of international human rights law.

1.213 The minister's response outlined specific concerns in relation to what she terms 'restrictive clauses' in enterprise agreements and their impact on productivity. With reference to some industry reports, the minister argued that these clauses 'are often forced onto subcontractors by head contractors that have made agreements with unions, are contributing to costs and delays of projects within the building and construction industry'. The minister's response stated that:

> Head contractors on building sites typically employ few workers yet they often enter into deals with unions that mandate the pay and conditions for all other workers on the site, preventing those workers from engaging in genuine collective bargaining with their respective employer. The 2016 Code therefore prohibits clauses that prescribe the terms and conditions on which subcontractors and their employees are engaged.

1.214 The minister's response also provided a number of examples of the kind of clauses in enterprise agreements which she considers are of concern in the building and construction industry.[16] In essence, the minister appeared to argue that these clauses restrict the freedoms of certain employers and subcontractors and should accordingly be prohibited on the basis of their impact on building industry costs. In broad terms, in this respect, the measure may be rationally connected to the rights and freedoms of others.

1.215 The minister further pointed to unlawful behaviour by members and representatives of the Construction, Forestry, Mining and Energy Union (CFMEU) as being of concern. Some of the behaviour referred to relates to taking industrial action. However, it was noted that current restrictions on industrial action under domestic law have been criticised by international supervisory mechanisms as going

16 These include clauses that provide subcontractors need to afford workers equivalent terms and conditions to those contained in the relevant enterprise agreement; that contain limitations on when and the ways in which employers can direct employees to perform work; paid union meetings on work time; and clauses requiring union consultation.

beyond what is permissible under international law.[17] Further, it was unclear how such suspected contraventions relate to the proposed measure or are rationally connected to the stated objective of this measure.

1.216 The minister's response argued that, in some respects, the code promotes collective bargaining as it requires terms and conditions of employment to be dealt with in enterprise agreements made under the *Fair Work Act 2009*. However, merely restating in the code (which is a form of subordinate legislation) the current legal framework that applies in primary legislation is unlikely to constitute the promotion of this right.

1.217 In relation to the proportionality of the limitation, the minister's response explained the scope of the code and what would and would not be restricted in terms of bargaining outcomes:

> The 2016 Code does not prohibit such matters as rostered days off or shift allowances, public holidays, or stable and agreed shift arrangements and rosters. Nor does it prohibit or restrict the right of workers and their representatives (including a union) to be consulted on redundancies and labour hire.
>
> The 2016 Code does prevent clauses in agreements that limit the ability of workers and their employers to determine their day-to-day work arrangements. For example, clauses in enterprise agreements that require the additional agreement of the union, such as where an employee wishes to substitute a different rostered day off and the employer agrees, would not be permitted.
>
> It is worth noting that the types of clauses described in sections 11 and 11A are not strictly prohibited from being included in enterprise

17 See, UN Committee on Economic Social and Cultural Rights (UNCESCR), Concluding Observations on Australia, E/C.12/AUS/CO/5 (23 June 2017) [29]-[30]: 'The Committee is also concerned that the right to strike remains constrained in the State party (art. 8). The Committee recommends that the State party bring its legislation on trade union rights into line with article 8 of the Covenant and with the provisions of the relevant International Labour Organization (ILO) Conventions (nos. 87 and 98), particularly by removing penalties, including six months of incarceration, for industrial action, or the secret ballot requirements for workers who wish to take industrial action.' See, also, CEACR, Direct Request - adopted 2016, published 106th ILC session (2017) Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) - Australia (Ratification: 1973) http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID,P11110_COUNTRY_ID,P11110_COUNTRY_NAME,P11110_COMMENT_YEAR:3298573,102544,Australia,2016; CEACR, Observation - adopted 2016, published 106th ILC session (2017) Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) - Australia (Ratification:1973) http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID,P11110_COUNTRY_ID,P11110_COUNTRY_NAME,P11110_COMMENT_YEAR:3298569,102544,Australia,2016.

agreements; being an "opt-in system", building contractors that do not wish to undertake Commonwealth-funded building work do not need to comply with the requirements of the Code.

1.218 Accordingly, the minister's response clarified that there are a number of clauses in enterprise agreements relating to terms and conditions of employment which will not be prohibited. However, the response did not fully address the breadth of restrictions that are imposed by the measure on the content of enterprise agreements and why those restrictions are justified limitations on the right to collectively bargain. Further, while it is true that compliance with the code is not mandatory for building contractors, as noted in the initial analysis, the significant commercial consequences of not complying with the code impose a disincentive for the inclusion of particular clauses in enterprise agreements.[18] In practice, this may have a far reaching effect in terms of enterprise agreements in the building industry, particularly given that once an entity becomes a code covered entity, it must comply with the code on all new projects, including those which are not Commonwealth funded.[19] On the information provided by the minister, it did not appear that the limitation on the right to collectively bargain was likely to be proportionate.

1.219 As noted in the initial analysis, international supervisory mechanisms have been critical of these restrictions on bargaining outcomes.[20] For example, in relation to a draft of the code, the ILO Committee of Experts (CEACR) has reported that 'parties should not be penalized for deciding to include these issues in their negotiations' and requested that Australia review such matters 'with a view to removing these restrictions on collective bargaining matters'.[21]

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18 See, for example, CEACR Observation - adopted 2009, published 99th ILC session (2010) Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) - Australia (Ratification: 1973) http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID,P11110_COUNTRY_ID,P11110_COUNTRY_NAME,P11110_COMMENT_YEAR:2314863,102544,Australia,2009.

19 Section 6(1) of the Code for the Tendering and Performance of Building Work 2016 provides that an entity becomes covered by the code from the first time they submit an expression of interest or tender for commonwealth funded building work.

20 ILO's Committee on Freedom of Association (CFA Committee), Report in which the committee requests to be kept informed of development - Report No 338, November 2005 Case No 2326 (Australia) - Complaint date: 10 March 2004 http://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002_COMPLAINT_TEXT_ID:2908523.

21 ILO, Committee of Experts on the Application of Conventions and Recommendations (CEACR), Direct Request - adopted 2016, published 106th ILC session (2017), Right to Organise and Collective Bargaining Convention, 1949 (No. 98) - Australia http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID,P11110_COUNTRY_ID,P11110_COUNTRY_NAME,P11110_COMMENT_YEAR:3299912,102544,Australia,2016.

1.220 UNCESCR has a specific role to monitor the compliance of state parties with the ICESCR. Since the committee previously reported on the measure in its *Report 5 of 2017*, UNCESCR has published its 2017 concluding observations on Australia which expressed specific concerns about the code:

> The [UNESCR] is concerned about the existence of legal restrictions to the exercise of trade union rights, including in the Fair Work Amendment Act of 2015, the Code for the Tendering and Performance of Building Work 2016, and The Building and Construction Industry (Improving Productivity) Act 2016.[22]

1.221 In response to the committee's question about whether consultation had occurred with the relevant workers' and employers' organisations regarding the measures, the minister's response outlined a number of examples of consultation which occurred with employer organisations and unions. Consultation processes are relevant to an assessment of the measure, and may assist in determining whether a limitation is the least rights restrictive means of pursuing a legitimate objective on the available evidence. However, the previous analysis stated that, the fact of consultation alone was not sufficient to address the human rights concerns in relation to the measure.

1.222 In relation to the committee's request that the minister address the concerns raised by international supervisory mechanisms, the minister's response did not provide further information other than to note that much of the previous UNESCR comments were focused around restrictions on industrial action.

1.223 The preceding analysis stated that the measure was likely to be incompatible with the right to collectively bargain, noting in particular recent concerns raised by the UNCESCR and the ILO Committee of Experts in relation to the code. However, the committee invited the minister to provide further information for the committee's consideration.

Minister's further response

1.224 The minister's further response did not provide additional information but restated that the government's view that 'these provisions are of a reasonable and proportionate nature' and 'appropriate to our national conditions'.

Committee response

1.225 The committee thanks the minister for her response.

1.226 The committee notes that the minister's response did not provide additional information in response to the committee's further inquiries.

22 UN Committee on Economic Social and Cultural Rights, Concluding Observations on Australia, E/C.12/AUS/CO/5 (23 June 2017) [29].

1.227 The committee considers that, in the absence of additional information addressing these concerns, the measure is likely to be incompatible with the right to collectively bargain.

1.228 The committee therefore seeks further advice from the minister in relation to the compatibility of the measure with the right to collectively bargain, in particular any information in light of the recent concerns raised by the UN Committee on Economic, Social and Cultural Rights and the ILO Committee of Experts on the Application of Conventions and Recommendations in relation to the code.

Prohibiting the display of particular signs and union logos, mottos or indicia

1.229 Section 13(2)(b)-(c) provides that the code covered entity must ensure that 'no ticket, no start' signs, or similar, are not displayed as well as signs that seek to 'vilify or harass employees who participate, or do not participate, in industrial activities are not displayed'.

1.230 Section 13(2)(j) provides that union logos, mottos or indicia are not applied to clothing, property or equipment supplied by, or which provision is made by, the employer or any other conduct which implies that membership of a building association is anything other than an individual choice for each employee.

Compatibility of the measure with the right to freedom of expression

1.231 The right to freedom of opinion and expression is protected by article 19 of the ICCPR. The right to freedom of expression extends to the communication of information or ideas through any medium, including written and oral communications, the media, public protest, broadcasting, artistic works and commercial advertising.[23]

1.232 The right to freedom of expression may be subject to limitations that are necessary to protect the rights or reputations of others, national security, public order, or public health or morals. In order for a limitation to be permissible under international human rights law, limitations must be prescribed by law, pursue a legitimate objective, be rationally connected to the achievement of that objective and be a proportionate means of achieving that objective.[24]

1.233 The initial analysis stated that, by providing that certain signs cannot be displayed and providing that union logos, insignias and mottos are not to be applied to certain clothing or equipment, the measures engage and limit the right to freedom

23 ICCPR, article 19(2).

24 See, generally, Human Rights Committee*, General comment No 34 (Article 19: Freedoms of opinion and expression)*, CCPR/C/GC/34 [21]-[36] (2011).

of expression.[25] The statement of compatibility acknowledges that the right to freedom of expression is engaged and identifies the following as the objective of the measures:

> The intimidation of employees to join or not join a building association is clearly an unacceptable infringement on their right to freedom of association…
>
> The right to freedom of association can also be infringed by the presence of building association logos, mottos or indicia on clothing, property or equipment that is supplied by, or which provision is made for by, the code covered entity…
>
> …pursuing the legitimate policy objective of protecting the rights and freedoms of employees in the building and construction industry to choose to become, or not become, a member of a building association and ensuring that this choice does not impact on an employee's ability to work on a particular site.[26]

1.234 As the initial analysis stated, the statement of compatibility provides limited information about the importance of these objectives. However, to be capable of justifying a proposed limitation on human rights, a legitimate objective must address a pressing or substantial concern and not simply seek an outcome regarded as desirable or convenient.[27]

1.235 Furthermore, the reasoning articulated in the statement of compatibility does not accurately reflect the scope of freedom of association under international law. The scope of the right to freedom of association in a workplace under international law focuses on a positive right to associate rather than a right not to associate.[28] ILO supervisory mechanisms have found that under Convention 87 it is a matter for each nation state to decide whether it is appropriate to guarantee the ability of workers *not* to join a union.[29] It was stated in the previous analysis that, as a

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25 See, ILO, *Freedom of Association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO*, Fifth revised edition (2006) [154]-[173].

26 ES, SOC 8.

27 See Attorney-General's Department, *Template 2: Statement of compatibility for a bill or legislative instrument that raises human rights issues*, at https://www.ag.gov.au/RightsAndProtections/HumanRights/Human-rights-scrutiny/Documents/Template2.pdf.

28 See, ILO, *Freedom of Association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO*, Fifth revised edition (2006) [161]-[163].

29 See, ILO, *Freedom of Association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO*, Fifth revised edition (2006) [365]-[367].

matter of international human rights law, the display of particular union signs, union logos, mottos or indicia on clothing did not appear to 'infringe' the right to freedom of association but rather constitutes an element of this right.[30]

1.236 The statement of compatibility provides the following information on whether the measure prohibiting certain signs (contained in section 13(2)(b)-(c)) is effective to achieve the stated objective:

> …intimidation can take the form of signs implying that employees who are not members of a building association cannot work on the building site or, where such employees are present, seek to intimidate, harass or vilify such employees…

1.237 However, as the initial analysis stated, the statement of compatibility does not address how the display of specific signs rises to the level of intimidation, harassment or vilification. Without further information it is unclear how the removal of such signs would be effective in achieving the stated objective of protecting the choice to become, or not become, a member of a union.

1.238 The statement of compatibility further provides the following information on whether the measure prohibiting union logos, mottos or indicia on certain clothing, property or equipment (contained in section 13(2)(j)) is effective to achieve the stated objective:

> … [union] signage on clothing or equipment that is supplied by a code covered entity carries a strong implication that membership of the building association in question is being actively encouraged or endorsed by the relevant employer and is against the principle that employees should be free to choose whether to become or not become a member of a building association.[31]

1.239 In the initial human rights analysis, it was acknowledged that the explanatory statement outlines the findings of the final report of the Royal Commission into Trade Union Governance and Corruption (the Heydon Royal Commission) including general issues of intimidation in the building and construction industry.[32] However, it is not evident how merely viewing, for example, a union logo on clothing or equipment would prevent an employee who did not wish to join the relevant union from their choice to do so or from working on a particular site. Nor was it evident that such signs and logos would necessarily be seen as an employer endorsement of joining the union, and even if so, that this would affect an employee's freedom of choice or ability to decide not to join the union.

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30 See, ILO, *Freedom of Association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO*, Fifth revised edition (2006) [161]-[163].

31 ES, SOC 8.

32 ES 3.

1.240 In relation to the proportionality of the measure prohibiting union logos, mottos or indicia on certain clothing, property or equipment (contained in section 13(2)(j)), the statement of compatibility provides that:

> This prohibition only applies to clothing, property or equipment that is supplied by, or which provision is made for by, the code covered entity. Section 13 would not prevent these items from being applied to clothing, property or equipment that was supplied by other individuals at the site or by the relevant building association.[33]

1.241 No further information is provided in the statement of compatibility about the proportionality of the measures including any relevant safeguards in relation to the right to freedom of expression.

1.242 The initial analysis therefore raised questions as to the compatibility of the measures with the right to freedom of expression. Accordingly, the committee sought the advice of the Minister for Employment as to:

- whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective;
- how the measure is effective to achieve (that is, rationally connected to) that objective;
- whether the limitation is a reasonable and proportionate measure to achieve that objective (including findings by relevant international supervisory mechanisms about whether the limitation is permissible); and
- whether consultation has occurred with the relevant workers' and employers' organisations in relation to the measure.

Minister's initial response

1.243 In relation to the objective of the measure, the minister's response stated:

> The Statement of Compatibility with Human Rights for the 2016 Code states that these measures are reasonable, necessary and proportionate in pursuit of the legitimate policy objective of protecting the rights and freedoms of employees in the building and construction industry to choose to become, or not become, a member of a building association and ensure that this choice does not impact on an employee's ability to work on a particular site.

1.244 The minister's response responded to the analysis in the initial report which noted that the reasoning articulated in the statement of compatibility does not accurately reflect the scope of freedom of association under international law which focuses on a right to associate:

33 ES, SOC 8.

> With regard to the stated objective, the Committee has noted that the ILO supervisory mechanisms have found that under the Freedom of Association and Protection of the Right to Organise Convention 1948 (No. 87) it is a matter for each nation state to decide whether it is appropriate to guarantee the right not to join a union. It is clear from the provisions of Part 3-1 of the *Fair Work Act 2009* – as implemented by the then Federal Labor Government – that Australia has decided it is appropriate to also guarantee the right not to join a union.

1.245 As stated in the initial analysis, Australia is entitled as a matter of domestic law to decide it is appropriate to regulate the right not to join a union. This does not mean that steps taken to enable persons not join a union are automatically human rights compatible. Rather, Australia must ensure that any such steps taken only impose limitations on the right to freedom of association that are permissible under international law. Accordingly, the committee is required to examine the measure against Australia's obligations under human rights law.

1.246 In relation to whether the objective of guaranteeing the ability not to join a union addresses a pressing and substantial concern, the minister's initial response stated:

> These measures are necessary to protect the right to join or not to join a union because of the pervasive culture that exists within the building and construction industry in Australia in which it is understood that there is such a thing as a 'union site' and on those sites all workers are expected to be members of a building association. Evidence of the existence of this culture can be found in many decisions of the courts, including most recently:
>
> - In *Australian Building and Construction Commissioner v Barker & Anor* [2017] FCCA 1143 the Federal Circuit Court was satisfied that two workers had been deprived of their right to work and earn income for two days when, on 28 January 2016, they were told by Mr Barker, a CFMEU official in the role of shop steward/delegate, that they could not work on the project unless they paid union fees. When a site manager informed Mr Barker that the workers had a right not to be in a union, Mr Barker replied 'No, everybody's got to be in the union, this is an EBA site, it's in your EBA that they all have to be on site in the union and have an EBA.'
> - In *Australian Building and Construction Commissioner v Moses & Ors* (2017] FCCA 738 the Federal Circuit Court was satisfied that CFMEU organiser Mr Moses, accompanied by a CFMEU delegate, threatened workers at Queensland's Gladstone Broadwalk [sic] project to the effect that if they did not join the CFMEU then no work would occur by the workers that day and they would be removed from the project. He told the workers that if they wanted to work on the project, which was a union site, they would have to join the CFMEU.

- In *Director of the Fair Work Building Industry Inspectorate v Vink & Anor* [2016] FCCA 488 a CFMEU official was found to have entered a construction site and, in an incident described as "sheer thuggery" by the Court, removed workers' belongings from the site shed, including lunches from the refrigerator. The Court concluded the conduct on site was intended "to give a clear message to all employees that benefits on the work site would only be afforded to members of the union."

1.247 The minister's response argued that contraventions show that stronger measures beyond those contained in the *Fair Work Act 2009* are needed. Based on the information provided, protecting the ability not to join a union would appear to be a legitimate objective for the purposes of international human rights law.

1.248 The minister's response further explained the need for the measures:

> The display of signs asserting that non-union members will not be permitted to work on a particular site, or that seek to vilify or harass employees who do not participate in industrial activities, along with the presence of union logos, mottos or indicia on clothing, property or equipment issued or provided for by the employer gives workers a strong impression that not only is union membership compulsory for anyone that wishes to work on the particular site, but that relevant employers support this position.
>
> In addition, in relation to signs that seek to vilify or harass employees who participate, or do not participate, in industrial activities I note that the ILO supervisory mechanisms have recognised that trade union organisations should respect the limits of propriety and not use insulting language in their communications.

1.249 In this respect, it was noted that prohibiting insulting language or communication for the purpose of protecting the right of employees not to join a union still constitutes a limitation on the right to freedom of expression that needs to be justifiable.

1.250 The minister further advised, in relation to the proportionality of the limitation on the right to freedom of expression, that the:

> …limitation is clearly reasonable and proportionate in pursuit of the legitimate objective explained given the culture of the building industry and the ongoing threats to freedom of association by certain building unions. For example, they do not prevent posters and signs that merely encourage or convey the benefits of union membership or communicate other union information from being displayed on a site, nor do they prevent workers from applying union logos, mottos or indicia to their own personal clothing, property or equipment.

1.251 However, the minister's response did not demonstrate that there are no less rights restrictive approaches reasonably available to achieve the stated objective of protecting the ability of individuals to choose not to join a union. For example, the

minister's response did not address whether providing education about the current protections contained in the *Fair Work Act 2009*, or better monitoring or enforcement against existing measures in the *Fair Work Act 2009* had been considered as alternatives, or whether the measure was sufficiently circumscribed so as to be a proportionate rights limitation.

1.252 Finally, as noted above, the minister's response outlined a number of examples of consultation which occurred with employer organisations and unions. Consultation processes are relevant to an assessment of the measure, and may assist in determining whether a limitation is the least rights restrictive means of pursuing a legitimate objective on the available evidence. However, the previous analysis stated that, the fact of consultation alone was not sufficient to address the human rights concerns in relation to the measure.

1.253 In light of the ongoing questions regarding the proportionality of the measure, the committee sought the minister's further advice as to whether there are less rights restrictive approaches to achieve the stated objective of protecting the ability of individuals to choose not to join a union (in particular, providing education about the current protections contained in the Fair Work Act, or better monitoring or enforcement).

Compatibility of the measure with the right to freedom of association and the right to form and join trade unions

1.254 Article 22 of the ICCPR guarantees the right to freedom of association generally, and also explicitly guarantees everyone 'the right to form trade unions for the protection of [their] interests.' Article 8 of the ICESCR also guarantees the right of everyone to form trade unions. As set out above, the right to freedom of association may only be subject to limitations that are necessary to protect the rights or reputations of others, national security, public order, or public health or morals. 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.[34] Further, no limitations on this right are permissible if they are inconsistent with the rights contained in ILO Convention No. 87.[35]

1.255 As noted above, the understanding of the right to freedom of association expressed in the statement of compatibility and the code of conduct does not fully reflect the content of this right as a matter of international human rights law. The ILO supervisory mechanisms have noted, for example, that 'the prohibition of the placing of posters stating the point of view of a central trade union organization is an

34 See ICCPR article 22.

35 See ICESCR article 8, ICCPR article 22.

unacceptable restriction on trade union activities'.[36] As the measures restrict communication about union membership, including joining a union, the measures engage and may limit the right to freedom of association. This potential limitation was not addressed in the statement of compatibility.

1.256 Noting that the measure engages and may limit the right to freedom of association, the committee therefore sought the advice of the minister as to:

- whether the measure is aimed at achieving a legitimate objective for the purposes of human rights law;
- how the measure is effective to achieve (that is, rationally connected to) that objective; and
- whether the limitation is a reasonable and proportionate measure to achieve the stated objective.

Minister's initial response

1.257 In relation to the compatibility of the measure with the right to freedom of association under international human rights law, the minister's response relied upon the information set out above at [1.246], relating to court findings against union conduct, as indicative of building industry practice.

1.258 The minister's response did not substantially address this issue with respect to the right to freedom of association as it is understood in international law. In order to justify limiting this right, which relevantly includes the right to engage in communication about union membership, it is necessary to identify why the existing law is insufficient to address the type of conduct with which the minister is concerned, such that the proposed measure is necessary. Further, as set out above at [1.251], while the measure may pursue the legitimate objective of protecting the ability not to join a trade union, less rights restrictive alternatives appear available to pursue this objective. Further, as noted above, the UNCESCR has recently raised specific human rights concerns in relation to the code.

1.259 The committee therefore sought the minister's further advice as to whether there are less rights restrictive approaches to achieve the stated objective of protecting the ability of individuals to choose not to join a union (in particular, providing education about the current protections contained in the Fair Work Act, or better monitoring or enforcement).

36 See, ILO, *Freedom of Association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO*, Fifth revised edition (2006) [161]-[163].

Minister's further response

1.260 The minister's further response collectively addresses the committee's questions as to the human rights compatibility of the measure with the right to freedom of expression and the right to freedom of association.

1.261 In relation to the compatibility of the measure with these rights the minister's further response relies upon information previously provided as to the 'culture' of the building and construction industry, court findings and examples which the response argues 'demonstrate that the Construction, Forestry, Mining and Energy Union (CFMEU) has repeatedly contravened laws that protect freedom of association and does not respect the right of individuals to choose whether or not to join a union'. The minister also provides additional information about further court decisions since her initial response which she argues 'provide additional evidence of the persistent culture of the [construction] industry'. As acknowledged above, based on the information provided, protecting the ability not to join a union would appear to be a legitimate objective for the purposes of international human rights law.

1.262 In relation to the proportionality of the limitation on the right to freedom of association and the right to freedom of expression and whether there are less rights restrictive approaches to achieve the stated objective, the minister's response states:

> Other approaches, such as education and better monitoring and enforcement, are also useful and are encouraged. In fact, the Australian Building and Construction Commission (the ABCC), and its predecessors have long recognised the important role education plays in increasing rates of compliance and self-regulation. They have assisted building industry participants to understand how the relevant workplace laws protect the right of individuals to join or not join a union. They have also published details about the outcome of litigation commenced against unions and employers for alleged breaches of freedom of association protections.
>
> Since 2005 there has been a building industry specific regulator with functions that include monitoring and investigating compliance with relevant workplace laws and pursuing enforcement activities in relation to alleged contraventions. From late 2013 the ABCC's predecessor, Fair Work Building and Construction (FWBC), renewed its focus on identifying, investigating and pursuing particular types of unlawful conduct, including alleged breaches of freedom of association protections. However, despite the concerted effort by FWBC to enforce the freedom of association protections in the Fair Work Act (which has been continued by the ABCC), these protections continue to be breached by unions and employers, as evidenced in my response to the Committee of 3 July 2017. It is therefore clear that education, monitoring and enforcement activities alone are insufficient to bring about the cultural change required to protect the right of individuals to choose whether or not to join a union.

> That is why it is considered necessary to complement these activities with provisions that require code covered entities to ensure that 'no ticket, no start' signs or signs that seek to vilify or harass employees who do not participate in industrial activities are not displayed on their sites, and that union logos, mottos and insignia aren't applied to clothing, property or equipment issued or provided for by employers. These provisions seek to eliminate visual cues on sites that give a strong impression that union membership is compulsory or is being actively encouraged or endorsed by the employer and to challenge the custom and practice ingrained in the industry.

1.263 Accordingly, the minister's response indicates that education and better monitoring or enforcement have an important role to play, but have been insufficient to address the type of conduct referred to in the minister's response.

1.264 In considering the proportionality of the measure, it is relevant that the display of posters conveying the benefits of union membership will not be prohibited and that workers will still be able to display union logos on their own personal clothing. Despite these exceptions, it remains the case that the limitation on freedom of expression is extensive. Signs which challenge non-union members, for example, for breaking a strike or not taking part in industrial action, may be uncomfortable or harassing but nonetheless be the expression of genuinely held views. The prohibition on expressing these views in the relevant workplace appears an overbroad limitation on the ability of individuals to exercise their freedoms of expression and association, in pursuit of the stated objective of protecting the ability of individuals to choose not to join a union. Prohibiting the application of union logos to employer supplied or required clothing also risks being overbroad, noting that in some workplaces this may include a significant portion of existing clothing and equipment. As stated in the previous analysis, as a matter of international human rights law, the display of particular union signs, union logos, mottos or indicia on clothing does not 'infringe' the right to freedom of association but rather constitutes an element of this right.[37] Relevantly, international supervisory bodies have expressed concerns, from the perspective of the right to freedom of expression and the right to freedom of association, regarding measures which restrict the display of union posters or signs in the workplace.[38]

Committee response

1.265 The committee thanks the minister for her response.

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37 See, ILO, *Freedom of Association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO*, Fifth revised edition (2006) [161]-[163].

38 See, ILO, *Freedom of Association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO*, Fifth revised edition (2006) [162]-[163].

1.266 The committee notes that the minister's further response does not provide sufficient information to conclude that the measure is a proportionate limitation on human rights.

1.267 The committee considers that, in the absence of additional information addressing the proportionality of the measures, the measures are likely to be incompatible with the right to freedom of association and the right to freedom of expression under international law.

1.268 In light of the analysis outlined in relation to the measures concerning freedom of expression and the right to freedom of association, the committee seeks the minister's further advice as to whether there are less rights restrictive approaches to achieve the stated objective of protecting the ability of individuals to choose not to join a union.

Advice only

1.269 The committee draws the following bills and instruments to the attention of the relevant minister or legislation proponent on an advice only basis. The committee does not require a response to these comments.

Autonomous Sanctions (Designated Persons and Entities – Democratic People's Republic of Korea) Amendment List 2017 (No 2) [F2017L01063];

Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Syria) List 2017 [F2017L01080];

Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Ukraine) Amendment List 2017 (No. 2) [F2017L01118]

Purpose	To apply the operation of the sanctions regime under the Autonomous Sanctions Regulations 2011 by designating or declaring that a person is subject to the sanctions regime
Portfolio	Foreign Affairs
Authorising legislation	*Autonomous Sanctions Act 2011* and *Charter of the United Nations Act 1945*
Last day to disallow	15 sitting days after tabling ([F2017L01063]; [F2017L01080]; [F2017L01118] tabled House of Representatives and Senate 4 September 2017)
Rights	Privacy; fair hearing; protection of the family; equality and non-discrimination; adequate standard of living; freedom of movement; non-refoulement (see **Appendix 2**)
Status	Advice only

Background

1.270 The Autonomous Sanctions (Designated Persons and Entities – Democratic People's Republic of Korea) Amendment List 2017 (No 2) [F2017L01063]; Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Syria) List 2017 [F2017L01080]; and Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Ukraine) Amendment List 2017 (No. 2) [F2017L01118] are made under the *Autonomous Sanctions Act 2011*. This Act (in conjunction with the Autonomous Sanctions Regulations 2011 and various instruments made under those regulations) provides the power for the government

to impose broad sanctions to facilitate the conduct of Australia's external affairs (the autonomous sanctions regime).

1.271 An initial human rights analysis of various instruments made under the autonomous sanctions regime is contained in the *Sixth report of 2013* and *Tenth report of 2013*.[1] A further detailed analysis of various instruments made under the autonomous sanctions regime is contained in the *Twenty-eighth report of the 44th Parliament* and *Thirty-third report of the 44th Parliament.*[2] This analysis stated that, as the instruments under consideration expanded or applied the operation of the sanctions regime by designating or declaring that a person is subject to the sanctions regime, or by amending the regime itself, it was necessary to assess the human rights compatibility of the autonomous sanctions regime as a whole when considering instruments which expand its operation. A further response was therefore sought from the minister, which was considered in the committee's *Report 9 of 2016*.[3] The committee concluded its examination of various instruments and made a number of recommendations to ensure the compatibility of the autonomous sanctions regime with human rights.[4]

'Freezing' of designated person's assets and prohibition on travel

1.272 The Autonomous Sanctions (Designated Persons and Entities – Democratic People's Republic of Korea) Amendment List 2017 (No 2) [F2017L01063] designates and declares persons and entities for the purposes of the Autonomous Sanctions Regulations 2011 on the basis that the minister is satisfied that a person or entity is:

- associated with the Democratic People's Republic of Korea's weapons of mass-destruction program or missiles program; or
- is assisting, or has assisted, in the violation, or evasion, by the DPRK of various UN Security Council Resolutions.

1.273 The Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Syria) List 2017 [F2017L01080] designates and declares persons and entities for the purposes of the Autonomous Sanctions Regulations 2011 on the basis that the minister is satisfied that a person or entity is:

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1 See Parliamentary Joint Committee on Human Rights, *Sixth report of 2013* (15 May 2013) 135-137; and *Tenth report of 2013* (26 June 2013) 13-19 and 20-22.

2 See Parliamentary Joint Committee on Human Rights, *Twenty-eighth report of the 44th Parliament* (17 September 2015) 15-38; and *Thirty-third report of the 44th Parliament* (2 February 2016) 17-25.

3 Parliamentary Joint Committee on Human Rights, *Report 9 of 2016* (22 November 2016) 41-55.

4 Parliamentary Joint Committee on Human Rights, *Report 9 of 2016* (22 November 2016) 41-55, 53. See also, Parliamentary Joint Committee on Human Rights, *Report 2 of 2017* (21 March 2017) 54-56; *Report 10 of 2017* (12 September 2017) 27-30 where the committee has made comments on subsequent regulations on an advice only basis.

- providing support to the Syrian regime; or
- responsible for human rights abuses in Syria.

1.274 Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Ukraine) Amendment List 2017 (No. 2) [F2017L01118] designates and declares persons and entities for the purposes of the Autonomous Sanctions Regulations 2011 on the basis that the minister is satisfied that a person or entity is responsible for, or complicit in, the threat to the sovereignty and territorial integrity of Ukraine.

1.275 The effect of a person or entity being listed as designated or declared is that this person or entity is subject to financial sanctions, and cannot travel to, enter, or remain in Australia.[5]

Compatibility of the measure with multiple human rights

1.276 As set out in the committee's previous consideration of the sanctions regimes, the measures in these instruments engage and limit multiple human rights. The statements of compatibility for these instruments do not identify the relevant human rights engaged or provide any analysis in relation to the issues identified in the committee's previous reports.

1.277 The committee has previously recognised that applying pressure to regimes and individuals with a view to ending the repression of human rights internationally is a legitimate objective that may support limitations on human rights. However, in relation to the decision to designate or declare a person under the autonomous sanctions regime, the committee's *Report 9 of 2016* set out in detail how each of the identified safeguards in the regime is insufficient, and why the regime is thereby not a proportionate limitation on human rights.[6]

1.278 The committee therefore made a number of recommendations to the minister in respect of the regime.[7]

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5 Section 6(1) of the Autonomous Sanctions Regulations 2011 provides that for the purposes of paragraph 10(1)(a) of the *Autonomous Sanctions Act 2011*, which empowers the minister to make regulations for the purpose of imposing sanctions, the minister may, by legislative instrument: (a) designate a person or entity mentioned in an item of the table as a designated person or entity for the country mentioned in the item; (b) declare a person mentioned in an item of the table for the purpose of preventing the person from travelling to, entering or remaining in Australia.

6 See Parliamentary Joint Committee on Human Rights, *Twenty-eighth report of the 44th Parliament* (17 September 2015) 15-38.

7 Parliamentary Joint Committee on Human Rights, *Report 9 of 2016* (22 November 2016) 53.

Committee comment

1.279 The committee draws the human rights implications of the autonomous sanctions regime, and the expansion of this regime by the instruments under consideration, to the attention of the parliament.

1.280 The committee refers to its previous consideration of the autonomous sanctions regime, and in particular, the recommendations made by the committee in its *Report 9 of 2016.*

Investigation and Prosecution Measures Bill 2017

Purpose	Seeks to amend the *Telecommunications (Interception and Access) Act 1979* and the *Surveillance Devices Act 2004* to reflect a restructuring of the Independent Commission Against Corruption of New South Wales. Also seeks to amend the *Director of Public Prosecutions Act 1983* to extend the functions, powers and duties of the Commonwealth Director of Public Prosecutions to the laws of Norfolk Island
Portfolio	Attorney-General
Introduced	House of Representatives, 13 September 2017
Right	Privacy (see **Appendix 2**)
Status	Advice only

Background

1.281 The committee has previously considered proposed amendments to the *Telecommunications (Interception and Access) Act 1979* (TIA Act).[1] The committee has also previously considered proposed amendments to the *Surveillance Devices Act 2004* (SD Act).[2]

1.282 As both Acts were legislated prior to the establishment of the committee, neither has been subject to a foundational human rights compatibility assessment in accordance with the *Human Rights (Parliamentary Scrutiny) Act 2011*. As the committee has previously noted in relation to the TIA Act,[3] it is difficult to assess the

1 See, Parliamentary Joint Committee on Human Rights, Law Enforcement Integrity Legislation Amendment Bill 2012, *Fifth Report of 2012* (October 2012) 21-21; Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014, *Fifteenth Report of the 44th Parliament* (14 November 2014) 10-22; *Twentieth report of the 44th Parliament* (18 March 2015) 39-74; and *Thirtieth report of the 44th Parliament* (10 November 2015) 133-139; the Counter-Terrorism Legislation Amendment Bill (No. 1) 2015, *Thirty-second report of the 44th Parliament* (1 December 2015) 3-37 and *Thirty-sixth report of the 44th Parliament* (16 March 2016) 85-136; the Law Enforcement Legislation Amendment (State Bodies and Other Measures) Bill 2016, *Report 9 of 2016* (22 November 2016) 2-8 and *Report 1 of 2017* (16 February 2017) 35-44; and the Telecommunications (Interception and Access - Law Enforcement Conduct Commission of New South Wales) Declaration 2017 [F2017L00533], *Report 7 of 2017* (8 August 2017) 30-33.

2 See, Parliamentary Joint Committee on Human Rights, Counter-Terrorism Legislation Amendment Bill (No. 1) 2015; *Thirty-second report of the 44th Parliament* (1 December 2015) 3-37 and *Thirty-sixth report of the 44th Parliament* (16 March 2016) 85-136.

3 Parliamentary Joint Committee on Human Rights, Law Enforcement Legislation Amendment (State Bodies and Other Measures) Bill 2016, *Report 9 of 2017* (22 November 2016) 2-8.

human rights compatibility of measures which extend or amend existing legislation without the benefit of a foundational human rights assessment.

Access to communications and telecommunications data and surveillance device warrants by the NSW Independent Commission Against Corruption

1.283 The TIA Act provides a legislative framework that criminalises the interception and accessing of telecommunications. However, the TIA Act sets out exceptions that enable defined or declared agencies to apply for access to communications[4] and telecommunications data.[5] Chapters 2 and 3 of the TIA Act provide for warranted access by an agency to the content of communications, including both communications passing across telecommunications services[6] and stored communications content. Chapter 4 of the TIA Act provides for warrantless access to telecommunications data (metadata) by a defined or declared 'interception agency'. The TIA Act vests certain positions within these agencies with specific authority.

1.284 The SD Act governs the use of optical surveillance devices, listening devices, data surveillance devices and tracking devices by law enforcement agencies. The SD Act permits certain law enforcement agencies to obtain surveillance device warrants. The SD Act also vests certain positions within these agencies specific authority when undertaking functions under the SD Act.[7]

1.285 The Independent Commission Against Corruption of New South Wales (the ICAC) has previously been declared as an 'interception agency' for the purposes of the TIA Act and is also included in the definition of 'criminal law enforcement agency' under the TIA Act. This means that the ICAC can apply for interception warrants and access telecommunications data under the TIA Act.

1.286 The bill seeks to amend the TIA Act to reflect a restructuring of the ICAC under the *Independent Commission Against Corruption Amendment Act 2016* (NSW).[8] That is, it amends which positions within the ICAC are vested with specific authority and powers under the TIA Act. Specifically, the bill amends the definition of

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4 'Communication' is defined in section 5 of the TIA Act as including: 'conversation and a message, and any part of a conversation or message, whether: (a) in the form of: (i) speech, music or other sounds; (ii) data; (iii) text; (iv) visual images, whether or not animated; or (v) signals; or (b) in any other form or in any combination of forms'.

5 'Telecommunications data' refers to metadata rather than information that is the content or substance of a communication: see section 172 of the TIA Act.

6 That is, the interception of live communications.

7 Explanatory Memorandum (EM) 3.

8 The restructured commission consists of a chief commissioner, two commissioners and, as required, assistant commissioners, replacing the former structure of a commissioner and assistant commissioners. See EM 2.

'certifying officer' as it relates to the ICAC under the TIA Act to refer to the ICAC's current structure of a 'chief commissioner', a 'commissioner' or an 'assistant commissioner'. The bill also seeks to replace references in the TIA Act to the ICAC's 'commissioner' with the 'chief commissioner', including as it relates to the definition of 'chief officer' under the TIA Act.[9] For example, the 'chief officer' has the authority to empower members of the ICAC to receive information obtained under warrants and communicate intercepted information to other agencies in specific circumstances.[10]

1.287 Similarly, the bill seeks to amend the definition of 'chief officer' as it relates to the ICAC under the SD Act to refer to the 'chief commissioner' of a 'law enforcement agency'. The bill also seeks to amend the definition of 'authorising officer' under the SD Act to refer to the ICAC's 'chief commissioner', a 'commissioner' or an 'assistant commissioner'. 'Authorising officers' will for example have the power to issue emergency authorisations for the use of a surveillance device and authorise the use and retrieval of tracking devices without warrant in certain circumstances.[11]

Compatibility of the measure with the right to privacy

1.288 The right to privacy includes the right to respect for private and confidential information, particularly the storing, use and sharing of such information and the right to control the dissemination of information about one's private life. As the bill relates to the ICAC's powers to access an individual's private communications and telecommunications data as well as obtaining surveillance of an individual's private life through the use of devices the bill engages and limits the right to privacy.

1.289 A limitation on the right to privacy will be permissible under international human rights law where it addresses a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.

1.290 The statement of compatibility acknowledges that the bill engages the right to privacy and identifies the broader objective of the measures as preventing criminal activity 'by ensuring that law enforcement and intelligence agencies have access to communications and associated information central to virtually every organised crime, counter espionage, cyber security and counter-terrorism investigation'.[12] In general terms these may be capable of constituting a legitimate objective for the purposes of international human rights law. Vesting particular positions within the ICAC with specific authority when undertaking functions under the SD Act and the TIA Act and enabling access to telecommunications and communications data would also appear to be rationally connected to this objective.

9 See subsection 5(1) (paragraph (e), TIA Act.

10 See EM 3.

11 EM 3.

12 EM, statement of compatibility (SOC) 7.

1.291 As to the proportionality of accessing certain communications content, the statement of compatibility explains the operation of warrants as a relevant safeguard:

> Interception of telecommunications and access to stored communications may only occur subject to a warrant issued by an independent issuing authority (a judge or member of the Administrative Appeals Tribunal). When deciding whether a warrant should be issued the issuing authority must have regard to several factors, including: the privacy impacts; the gravity of the offence; the extent to which other investigative methods are available, and the likely usefulness of the information to the relevant investigation...[13]

1.292 As the committee has previously noted in its consideration of measures enabling agencies to access powers under the TIA Act,[14] although access to private communications is via a warrant regime which itself may be sufficiently circumscribed, the use of warrants does not provide a complete answer as to whether chapters 2 and 3 of the TIA Act constitute a proportionate limit on the right to privacy. The committee has previously noted that, as it had not previously considered chapters 2 and 3 of the TIA Act in detail, further information from the Attorney-General in relation to the human rights compatibility of the TIA Act would assist a human rights assessment of proposed measures that amend or extend the Act.

1.293 In relation to the proportionality of authorised officers permitting access to telecommunications data (metadata), the statement of compatibility argues:

> Authorised officers are required to consider similar factors before authorising the disclosure of telecommunications data. Authorised officers must be satisfied that the disclosure of telecommunications data is reasonably necessary for the enforcement of the criminal law, protection of the public revenue or for the enforcement of a law imposing a pecuniary penalty and that any interference with the privacy of any person is justifiable and proportionate.[15]

1.294 The committee has also previously raised concerns in relation to this warrantless access to telecommunications data (metadata) under chapter 4 of the TIA Act. This included: whether the internal self-authorisation process for access to

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13 EM, SOC 6.

14 See, Parliamentary Joint Committee on Human Rights, Telecommunications (Interception and Access - Law Enforcement Conduct Commission of New South Wales) Declaration 2017 [F2017L00533], *Report 7 of 2017* (8 August 2017) 30-33. This instrument declared the Law Enforcement Conduct Commission of New South Wales an interception agency for the purposes of the TIA Act. Also see: Law Enforcement Legislation Amendment (State Bodies and Other Measures) Bill 2016, *Report 1 of 2017* (16 February 2017) 35-44.

15 EM, SOC 6.

telecommunications data by prescribed agencies contains sufficient safeguards; accessed data subsequently being used for an unrelated purpose; and safeguards in relation to the period of retention of such data.[16] In its examination of legislation declaring the Law Enforcement Conduct Commission of New South Wales an 'interception agency' and a 'criminal law enforcement agency' under the TIA Act — the same standing under the TIA Act as the Independent Commission Against Corruption of New South Wales — the committee determined that while there were certain internal and external safeguards in place in respect of the access to and subsequent use of telecommunications data, these were insufficient to protect the right to privacy for the purposes of international human rights law.[17]

1.295 As these concerns in relation to the powers vested in declared and defined agencies under the TIA Act remain unresolved, it cannot be determined that the limitation on the right to privacy in the bill is proportionate to the stated objective. The absence of a foundational assessment of the SD Act may also raise similar concerns.

Committee comment

1.296 Consistent with its previous reports in relation to the powers granted to particular agencies to access communications and telecommunications data under the *Telecommunications (Interception and Access) Act 1979*, the committee is unable to conclude that the bill justifiably limits the right to privacy.

1.297 The committee considers that the *Telecommunications (Interception and Access) Act 1979* and the *Surveillance Devices Act 2004* would benefit from a full review of their compatibility with the right to privacy, including the sufficiency of safeguards.

1.298 Noting the human rights concerns regarding the right to privacy identified in its previous reports, the committee draws the human rights implications of the bill to the attention of the parliament.

16 Parliamentary Joint Committee on Human Rights, Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014, Fifteenth Report of the 44th Parliament (November 2014) 10 – 22; *Twentieth report of the 44th Parliament* (18 March 2015) 39-74 and Law Enforcement Legislation Amendment (State Bodies and Other Measures) Bill 2016, *Report 1 of 2017* (16 February 2017) 36.

17 Parliamentary Joint Committee on Human Rights, *Report 1 of 2017* (16 February 2017) 41.

Migration (IMMI 17/015: Person who is a Fast Track Applicant) Instrument 2017 [F2017L01042]

Purpose	Operates to include in the definition of a fast track applicant those persons specified by reference to their Department of Immigration and Border Protection Person Identification Digit
Portfolio	Immigration and Border Protection
Authorising legislation	*Migration Act 1958*
Last day to disallow	15 sitting days after tabling (tabled in the House of Representatives on 17 August 2017 and Senate on 4 September 2017)
Rights	Non-refoulement; effective remedy; fair hearing; not to be expelled without due process; (see **Appendix 2**)
Status	Advice only

Background

1.299 The committee previously commented on the human rights implications of fast-track assessment processes in its examination of the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 in its *Fourteenth Report of the 44th Parliament* and *Thirty-sixth report of the 44th Parliament*.[1] The bill passed both Houses of Parliament on 5 December 2014 and received Royal Assent on 15 December 2014, and became the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (the Migration and Maritime Powers Act).

1.300 The Migration and Maritime Powers Act established a new fast-track assessment process for 'fast track applicants', defined as protection visa applicants who entered Australia as unauthorised maritime arrivals on or after 13 August 2012. The minister also has the power to extend this process to other groups of asylum seekers. The committee previously concluded that the fast-track process may be incompatible with a range of human rights.[2]

1 Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament* (28 October 2014) 70-92; *Thirty-sixth report of the 44th Parliament* (16 March 2016) 174-187.

2 Parliamentary Joint Committee on Human Rights, *Thirty-sixth report of the 44th Parliament* (16 March 2016) 174-187. See, also Parliamentary Joint Committee on Human Rights, *Report 4 of 2017* (9 May 2017) 99-106.

Defining individuals as fast-track applicants and limited merits review

1.301 The Migration (IMMI 17/015: Person who is a Fast Track Applicant) Instrument 2017 [F2017L01042] operates to define particular individuals as fast-track applicants and accordingly applies the fast-track assessment processes to them.

1.302 These asylum seekers would no longer have access to the Refugee Review Tribunal (RRT). Instead, under the 'fast-track' assessment process they will have access to the Immigration Assessment Authority (IAA), to review the protection visa claims. Reviews of decisions under the 'fast-track' system are conducted on the papers rather than at a hearing before the IAA. The IAA is unable to consider new information at the review stage unless there are exceptional circumstances.

Compatibility of the measure with the obligation of non-refoulement and the right to an effective remedy

1.303 Australia has non-refoulement obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol (the Refugee Convention), and under both the International Covenant on Civil and Political Rights (ICCPR) and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) for people who are found not to be refugees.[3] This means that Australia must not return any person to a country where there is a real risk that they would face persecution, torture or other serious forms of harm, such as the death penalty; arbitrary deprivation of life; or cruel, inhuman or degrading treatment or punishment.[4]

1.304 Non-refoulement obligations are absolute and may not be subject to any limitations.

1.305 Effective, independent and impartial review by a court or tribunal of decisions to deport or remove a person (including merits review in the Australian context), is integral to giving effect to non-refoulement obligations.[5]

1.306 The measure engages the obligation of non-refoulement and the right to an effective remedy in relation to whether it includes sufficient procedural and substantive safeguards to ensure a person is not removed in contravention of the

3 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), article 3(1); International Covenant on Civil and Political Rights (ICCPR), articles 6(1) and 7; and Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty.

4 See Refugee Convention, article 33. The non-refoulement obligations under the CAT and ICCPR are known as 'complementary protection' as they are protection obligations available both to refugees and to people who are not covered by the Refugee Convention, and so are 'complementary' to the Refugee Convention.

5 ICCPR, article 2. See Parliamentary Joint Committee on Human Rights, *Second Report of the 44th Parliament* (11 February 2014) 45; *Fourth Report of the 44th Parliament* (18 March 2014) 51; *Thirty-sixth report of the 44th Parliament* (16 March 2016) 174-187.

obligation of non-refoulement, given the irreversible nature of the harm that may result.[6]

1.307 The committee has previously expressed the view that judicial review is not sufficient to fulfil the international standard required of 'effective review' in the context of non-refoulement decisions. In the Australian context, the requirement for independent, effective and impartial review of non refoulement decisions is not met when effective merits review of the decision to grant or cancel a protection visa is not available.[7]

1.308 As noted in the previous analysis, the merits review conducted by the IAA will be limited as it will be conducted on the information provided by the applicant to the department and will not involve an interview. Further, the IAA will only be able to reaffirm the decision or remit it to the department (rather than substitute the decision for the correct or preferable decision).

1.309 As the fast track merits review is only conducted on the papers and without the affected person being able to make further representations or be present, there are significant questions as to the effectiveness of the processes. The previous analysis noted that the features of the system place it substantially apart from other forms of merits review in Australia, where a tribunal member generally considers any additional material an applicant may wish to provide, comes to their own decision about the facts of the case and may substitute their own decision for the decision originally made.[8] As such, the fast-track assessment process only provides a very limited form of merits review of non-refoulement decisions. Accordingly, the committee previously concluded that the fast-track assessment process is therefore likely to be incompatible with Australia's obligations under the ICCPR and the CAT of ensuring independent, effective and impartial review, including merits review, of non-refoulement decisions.[9]

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6 See *Agiza v Sweden*, Communication No. 233/2003, UN Doc. CAT/C/34/D/233/2003 (2005), para 13.7. See also *Arkauz Arana v France*, Communication No. 63/1997, CAT/C/23/D/63/1997 (2000) [11.5], [12] and comments on the initial report of Djibouti (CAT/C/DJI/1) (2011), A/67/44, p 38, para 56(14), see also: Concluding Observations of the Human Rights Committee, Portugal, UN Doc. CCPR/CO/78/PRT (2003) [12]. Treaty monitoring bodies have found that the provision of effective and impartial review of non-refoulement decisions by a court or tribunal is integral to complying with the obligation of non-refoulement under the ICCPR and CAT.

7 See, also Parliamentary Joint Committee on Human Rights, *Report 4 of 2017* (9 May 2017) 99-106.

8 Parliamentary Joint Committee on Human Rights, *Thirty-sixth report of the 44th Parliament* (16 March 2016) 174-187.

9 Parliamentary Joint Committee on Human Rights, *Thirty-sixth report of the 44th Parliament* (16 March 2016) 174-187. See, also Parliamentary Joint Committee on Human Rights, *Report 4 of 2017* (9 May 2017) 99-106.

Committee comment

1.310 The obligation of non-refoulement is absolute and may not be subject to any limitations.

1.311 The instrument, by applying the fast-track assessment process to particular applicants, provides for a very limited form of merits review of non-refoulement decisions.

1.312 Accordingly, consistent with the committee's previous conclusions, the preceding analysis indicates that the measure is likely to be incompatible with Australia's obligations under the International Covenant on Civil and Political Rights and the Convention Against Torture of ensuring independent, effective and impartial review, including merits review, of non-refoulement decisions.

Compatibility of the measure with the right to a fair hearing and the right not to be expelled without due process

1.313 The previous human rights analysis noted that the review process provided by the IAA is quite limited and may not ensure the right to a fair hearing. This is because nothing expressly requires the IAA to give a referred applicant any material that was before the primary decision maker. There is also no right for an applicant to comment on the material before the IAA. These provisions therefore diminish procedural fairness and the applicant's prospects of correcting factual errors or wrong assumptions in the primary decision at the review stage.

1.314 In addition, the previous analysis noted that reviewers are not statutory appointments but employees under the *Public Service Act 1999.* This affects the independence of such a review and therefore the impartiality of such a review. While judicial review is still available in the Australian context, judicial review is limited to the lawfulness of a decision and does not consider its merit (that is, whether the decision was the correct or preferable decision). Accordingly, the committee previously concluded that the fast-track assessment process may be incompatible with the right to a fair hearing.[10]

Committee comment

1.315 Consistent with the committee's previous conclusions, the preceding analysis indicates that the measure may be incompatible with the right to a fair hearing.

10 Parliamentary Joint Committee on Human Rights, *Thirty-sixth report of the 44th Parliament* (16 March 2016) 174-187.

National Integrity Commission Bill 2017

Purpose	Establishes a National Integrity Commission to investigate corruption in relation to public officials and Commonwealth agencies, Australian Federal Police and the Australian Crimes Commission
Sponsor	Adam Bandt MP
Introduced	House of Representatives, 23 October 2017
Rights	Reputation; freedom of expression and assembly; not to incriminate oneself (see **Appendix 2**)
Status	Advice only

Background

1.316 The National Integrity Commission Bill 2017 (2017 bill) reintroduces a range of measures from the National Integrity Commission Bill 2013 (2013 bill) and is in substantially similar terms to the 2013 bill.

1.317 The committee previously examined the National Integrity Commission Bill 2013 (the 2013 bill) in its *First Report of the 44th Parliament.* It further reported on the 2013 bill in its *Report 8 of 2016* following the commencement of the 45th Parliament after the 2013 bill was restored to the Senate Notice Paper.[1]

Compatibility of the bill with human rights

1.318 The previous human rights analysis found that a number of measures in the 2013 bill raised human rights concerns.[2] These measures are reintroduced in the 2017 bill. The previous human rights assessment of measures is summarised further below.

Right to reputation

1.319 The bill would create and confer wide-ranging powers on the National Integrity Commissioner (the commissioner) to inquire into and report on matters relating to alleged or suspected corruption in a range of government agencies. The statement of compatibility acknowledges that investigation of, and reporting on, individuals may impact on right to privacy and reputation of these individuals.[3] The

1 See Parliamentary Joint Committee on Human Rights, *First Report of the 44th Parliament* (10 December 2013) 41-47; *Report 8 of 2016* (9 November 2016) 45-49.

2 See Parliamentary Joint Committee on Human Rights, *First Report of the 44th Parliament* (10 December 2013) 41-47; *Report 8 of 2016* (9 November 2016) 45-49.

3 Statement of compatibility (SOC) [1].

right to reputation may be subject to permissible limitations where the measure pursues a legitimate objective, is rationally connected to (that is, effective to achieve), and proportionate to that objective.

1.320 The statement of compatibility further notes the 'right to due process and procedural fairness are also incorporated into the bill to ensure that no opinions or findings that are critical of a person or agency are publicly released unless they have been given an opportunity to appear and make submissions to the Commission.'[4] However, it also acknowledges that the commissioner does not have to provide a person with an opportunity to be heard where they are satisfied that the person may have committed a criminal offence, contravened a civil penalty provision, engaged in conduct that could be the subject of disciplinary proceedings or grounds for termination of the person's employment, and that giving the person the opportunity to be heard would compromise an investigation or related action.[5]

1.321 As such, the previous human rights analysis noted that it was unclear whether the National Integrity Commission (the commission) would have the ability to make findings critical of a person without the person first having had the opportunity to respond to the issue. If this were the case, this raises questions as to whether the limitation on a person's right to reputation is permissible. This issue was not fully addressed in the statement of compatibility.

Right to freedom of expression and assembly

1.322 Proposed section 63(1) of the bill provides that a person commits an offence if they knowingly insult, disturb or use insulting language towards the commissioner during the exercise of his or her powers. This measure engages and limits the right to freedom of expression.

1.323 Proposed section 63(2) provides that a person commits an offence if they knowingly create a disturbance in or near a place where a hearing is being held for the purpose of investigating a corruption issue or conducting a public inquiry. This proposed offence may limit both the right to freedom of expression and the right to freedom of assembly.

1.324 While the right to freedom of expression and assembly may be subject to permissible limitations, the statement of compatibility did not address this issue. As outlined in its *Guidance Note 1*, the committee's usual expectation where a measure limits a human right is that the accompanying statement of compatibility provide a reasoned and evidence-based explanation of how the measure supports a legitimate objective, is rationally connected to that objective and is a proportionate way to achieve that objective.

4 SOC [3]. See, proposed section 163, item 163.

5 SOC [3]. See, proposed section 31, item 31.

1.325 The previous human rights analysis noted that as currently drafted, there may be a danger that the provisions may limit legitimate criticism of or objection to the commission and its activities. Accordingly it is unclear whether the provisions impose a proportionate limitation on these rights.

Right to privacy and right not to incriminate oneself

1.326 The bill would confer power on the commissioner to order the provision of information or the production of documents or things. Failure to provide such documents would constitute an offence which is punishable by up to two years' imprisonment. A similar punishment would also apply to a person who has been summoned to attend a hearing before the commissioner and fails to answer a question that the commissioner requires them to answer. A person will be required to answer a question or provide a document regardless of whether this information would tend to incriminate them. By compelling the provision of information without the privilege against self-incrimination, the measure engages and limits the right to privacy and the right not to incriminate oneself.

1.327 The existence of immunities is one relevant factor in relation to whether such measures impose a proportionate limitation on the right not to incriminate oneself. In this case, partial 'use immunity' would be provided for these offences, meaning that no information or documents provided are admissible as evidence against the person in criminal proceedings or any other proceedings for the imposition or recovery of a penalty. However, no 'derivative use immunity' would be provided.[6] The previous human rights analysis considered that the statement of compatibility had not sufficiently addressed whether the limitations imposed by the measure were permissible as a matter of international human rights law.

Committee comment

1.328 The preceding analysis indicates that the bill engages and limits the right to reputation; the right to freedom of expression and assembly; the right not to incriminate oneself; and the right to privacy.

1.329 Noting the human rights concerns raised by the bill, the committee draws the human rights implications of the bill to the attention of the legislation proponent and the parliament.

1.330 The committee draws the legislation proponent's attention to its *Guidance Note 1*. If the bill proceeds to further stages of debate, the committee may request further information from the legislation proponent.

6 Derivative use immunity is where any evidence obtained as an indirect consequence of the compelled statement or disclosure is not admissible in evidence against the witness.

Bills not raising human rights concerns

1.331 Of the bills introduced into the Parliament between 16 October and 16 November, the following did not raise human rights concerns (this may be because the bill does not engage or promotes human rights, and/or permissibly limits human rights):

- Agricultural and Veterinary Chemicals Legislation Amendment (Operational Efficiency) Bill 2017;
- Australian Broadcasting Corporation Amendment (Rural and Regional Measures) Bill 2017;
- Bankruptcy Amendment (Enterprise Incentives) Bill 2017;
- Coal-Fired Power Funding Prohibition Bill 2017;
- Coal-Fired Power Funding Prohibition Bill 2017 [No. 2];
- Imported Food Control Amendment (Country of Origin) Bill 2017;
- Judiciary Amendment (Commonwealth Model Litigant Obligations) Bill 2017;
- Migration Amendment (Skilling Australians Fund) Bill 2017;
- Migration (Skilling Australians Fund) Charges Bill 2017;
- National Health Amendment (Pharmaceutical Benefits—Budget and Other Measures) Bill 2017;
- Nuclear Fuel Cycle (Facilitation) Bill 2017;
- Public Governance, Performance and Accountability Amendment (Executive Remuneration) Bill 2017;
- Renewable Energy Legislation Amendment (Supporting Renewable Communities) Bill 2017;
- Treasury Laws Amendment (Banking Measures No. 1) Bill 2017;
- Treasury Laws Amendment (Enterprise Tax Plan Base Rate Entities) Bill 2017;
- Treasury Laws Amendment (Junior Minerals Exploration Incentive) Bill 2017; and
- Treasury Laws Amendment (National Housing and Homelessness Agreement) Bill 2017.

Chapter 2

Concluded matters

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

2.2 Correspondence relating to these matters is included at **Appendix 3**.

Competition and Consumer Amendment (Competition Policy Review) Bill 2017

Purpose	Seeks to amend various provisions of the *Competition and Consumer Act 2010* including to increase the maximum penalty applying to breaches of the secondary boycott provisions; extend section 83 of the Act relating to admissions of fact and findings of fact made in certain proceedings; extend the Commission's power to obtain information, documents and evidence in section 155 of the Act; introduce a 'reasonable search' defence to the offence of refusing or failing to comply; and increase the penalties under section 155 of the Act
Portfolio	Treasury
Introduced	House of Representatives, 30 March 2017
Rights	Privacy; freedom of association; strike; fair trial; right to be presumed innocent (see **Appendix 2**)
Previous reports	6 of 2017 and 9 of 2017
Status	Concluded examination

Background

2.3 The committee first reported on the Competition and Consumer Amendment (Competition Policy Review) Bill 2017 (the bill) in its *Report 6 of 2017*, and requested a response from the treasurer by 14 July 2017.[1]

2.4 The treasurer's response to the committee's inquiries was received on 3 August 2017 and discussed in *Report 9 of 2017*.[2]

1 Parliamentary Joint Committee on Human Rights, *Report 6 of 2017* (20 June 2017) 2-7.

2 Parliamentary Joint Committee on Human Rights, *Report 9 of 2017* (5 September 2017) 64-77.

2.5 In *Report 9 of 2017* the committee concluded its examination of measures in the bill related to coercive information gathering powers including the proposed increased penalty for failure to furnish or produce information subject to a notice and expansion of matters subject to notice (right to privacy and the right not to incriminate oneself).[3]

2.6 The committee requested further information from the treasurer by 20 September 2017 in relation to the human rights issues identified in relation to increased penalties for secondary boycotts.

2.7 The treasurer's further response to the committee's inquiries was received on 9 October 2017. The response is discussed below and is reproduced in full at **Appendix 3**.

Increased penalties for secondary boycotts

2.8 Schedule 6 to the bill proposes to increase the maximum penalty applying to breaches of the secondary boycott provisions (sections 45D and 45DB of the Competition Act) from $750,000 to $10,000,000.

2.9 Currently, section 76(2) of the Competition Act provides that individuals cannot be fined for contravention of the boycott provisions. However, this is subject to section 45DC(5) which provides that where an organisation is not a body corporate, proceedings for damages can be taken against an officer of the union as a representative of union members. These damages can be enforced against the property of the union, or against any property that members of the union hold in their capacity as members.

Compatibility of the measure with the right to freedom of association

2.10 The right to strike is protected as an aspect of the right to freedom of association and the right to form and join trade unions under article 22 of the ICCPR and article 8 of the International Covenant on Economic Social and Cultural Rights

3 Parliamentary Joint Committee on Human Rights, *Report 9 of 2017* (5 September 2017) 72: "…the measures engage and limit the right not to incriminate oneself and the right to privacy. The measures expand the effect of coercive evidence gathering provisions which were legislated prior to the establishment of the committee and have never been required to be subject to a foundational human rights compatibility assessment in accordance with the terms of the *Human Rights (Parliamentary Scrutiny) Act 2011*. The preceding analysis identifies concerns that arise from increased penalties for non-compliance and the expansion of matters that may be subject to a section 155 notice. In relation to the increased penalty for non-compliance, while the measure seeks to implement a recommendation of the Harper Review with respect to penalties for corporations, it extends beyond corporations to apply to individuals. In relation to the expansion of matters that may be subject to a notice, questions arise as to the sufficiency of relevant safeguards provided by the Competition Act. The committee draws the human rights implications of the measure to the attention of parliament." The minister's further response at Appendix 3 provides some comment in response to that conclusion.

(ICESCR). The right to strike, however, is not absolute and may be limited in certain circumstances.

2.11 The statement of compatibility acknowledges that the measure may engage work-related rights:

> However, section 45DD makes it clear that boycotts are permitted under the competition law if the dominant purpose of the conduct relates substantially to employment matters, i.e. remuneration, conditions of employment, hours of work or working conditions.
>
> Consequently, the increased penalty in section 76 is only applicable to secondary boycotts with a dominant purpose that does not relate to employment matters.
>
> Where a secondary boycott has a dominant purpose not related to employment matters, but a non-dominant purpose that does relate to employment matters, the boycott may be prohibited under section 45D or 45DB.
>
> To this extent, sections 45D and 45DB may engage the rights described in Article 8 of the ICESCR.[4]

2.12 The statement of compatibility contends that the measure engages but does not further limit work-related rights. However, where a measure increases the penalties imposed in relation to provisions which limit human rights, this has consistently been considered to constitute a further limitation on the relevant right. The statement of compatibility does not explain the objective of the measures, nor engage in an assessment of proportionality against the limitation criteria.

2.13 The initial analysis noted that the scope of the right to strike under international human rights law is generally understood as also permitting 'sympathy strikes' or primary as well as secondary boycott activities.[5] The statement of compatibility does not explain what kinds of matters are not considered to have a 'dominant purpose' relating to employment, such that secondary boycott activities are prohibited and the increased penalty is to apply. The previous analysis stated that further information would assist the committee's assessment of the measure.

2.14 The committee therefore requested the advice of the treasurer as to:

- whether the measure is aimed at achieving a legitimate objective for the purposes of international human rights law;

4 SOC 151-152.

5 See ILO, *Committee of Experts on the Application of Conventions and Recommendations (CEACR)* - adopted 2013, published 103rd ILC session (2014); Observation (CEACR) - adopted 2011, published 101st ILC session (2012), Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) – Australia.

- how the measure is effective to achieve (that is, rationally connected to) that objective;
- whether the limitation is a reasonable and proportionate measure to achieve the stated objective (including any relevant safeguards); and
- what matters do or do not have a 'dominant purpose' related to employment.

Compatibility of the measure with the right to freedom of assembly and expression

2.15 The right to freedom of assembly and the right to freedom of expression are protected by articles 19 and 21 of the ICCPR. As noted in the initial human rights analysis, the right to freedom of assembly and the right to freedom of expression may be limited for certain prescribed purposes. That is, that the limitation is necessary to respect the rights of others, to protect national security, public safety, public order, public health or morals. Additionally, such limitations must be prescribed by law, reasonable, necessary and proportionate to achieving the prescribed purpose.

2.16 The initial analysis noted that as the increased penalty may have the effect of discouraging certain kinds of protest activities, it may engage and limit the right to freedom of assembly and expression. These rights were not addressed in the statement of compatibility.

2.17 The committee therefore requested the advice of the treasurer as to:

- whether the measure is aimed at achieving a legitimate objective for the purposes of international human rights law;
- how the measure is effective to achieve (that is, rationally connected to) that objective; and
- whether the limitation is a reasonable and proportionate measure to achieve the stated objective (including any relevant safeguards).

Treasurer's initial response

2.18 The treasurer's initial response provided the following information in relation to the proposal to increase penalties for secondary boycotts:

> Schedule 6 to the Bill proposes to increase the maximum penalty for a contravention of the secondary boycott provisions (section 45D and 45DA of the CCA), to align with the penalties applicable to other breaches of the competition law.
>
> This change was recommended by the Harper Review. Importantly, the Bill does not change the scope of what is and is not prohibited by the secondary boycott provisions.
>
> Broadly, secondary boycotts are boycotts which are engaged in for the purpose of causing substantial loss or damage to the business of a person (section 45D) or causing a substantial lessening of competition in a market

(section 45DB). Secondary boycotts have been prohibited since 1977 and the Harper Review found that a strong case remained for this prohibition. It is in the public interest to prevent this type of harm, particularly where it is not justified by the protection of other rights, as secondary boycotts can disrupt competitive markets, increase costs for businesses and consumers, and reduce productivity.

The CCA recognises the importance of workplace rights, and expressly permits secondary boycotts by employees and trade unions if the dominant purpose of the conduct is substantially related to employment matters (remuneration, conditions of employment, hours or work or working conditions).

2.19 In relation to the compatibility of this measure with the right to freedom of association and the right to freedom of assembly and expression, the treasurer's response stated:

Whether the measure is aimed at achieving a legitimate objective for the purposes of international human rights law:

The objective of the increased penalty is to provide an effective deterrent to engaging in secondary boycotts, of the type captured by sections 45D and 45DA, and thereby protect the rights and interests of businesses and consumers by ensuring such boycotts do not undermine the proper functioning of competitive markets.

How the measure is effective to achieve that objective:

The increased penalty is effective to achieve that objective as it ensures that secondary boycotts, as prohibited by sections 45D and 45DA, are more strongly deterred.

Whether the limitation is a reasonable and proportionate measure to achieve the stated objective:

The increased penalty is reasonable and proportionate, in light of the Harper Review finding that the current penalty for secondary boycotts was inadequate and its recommendation that the maximum penalty for secondary boycotts should be the same as that applying to other breaches of the competition law.

What matters do or do not have a 'dominant purpose' related to employment:

The 'dominant purpose related to employment' exemption, as contained in subsection 45DD(1), can be illustrated by the following two examples.

Example – secondary boycott without dominant purpose related to employment:

Company A and Company B both supply components to a factory. A new competitor, Company C, enters the market and starts supplying components to the factory. Companies A and B decide to boycott the factory (that is, they stop supplying the factory), until the factory ceases

dealing with C, so as to damage Company C's business and try to eliminate Company C as a competitor.

In this example, Company A and Company B have engaged in conduct which is unrelated to employment matters and which has the purpose of substantially damaging Company C's business. This has not only unfairly damaged Company C's business, but has also caused competitive harm to the market for the component by eliminating a new market entrant.

Example – secondary boycott with dominant purpose related to employment:

Company X owns a site which hosts a number of companies, including Company Z, a contractor which is in dispute with its employees over enterprise bargaining claims. Negotiations between Company Z and its employees have broken down, and so the employees of Company Z picket the site, which prevents customers accessing the site. The intention of Company Z's employees is to cause substantial losses to Company X, so that Company X pressures Company Z to resume negotiations with its employees. In this example, the dominant purpose of Company Z's employees is related to employment matters.

2.20 The previous analysis noted that the information provided in the treasurer's initial response usefully indicates that the measure pursues a legitimate objective and is rationally connected to that objective. It was further noted that the 'dominant purpose' of employment exception is an important and relevant exception to the prohibition on secondary boycotts in section 45D.[6]

2.21 However, the examples did not make clear to what extent the exemption would provide any protection to sympathy strikes or related assembly. It was noted that in a broad range of contexts such as outsourced employment models, conduct against entities that may not be a person's direct employer may be seen as an aspect of the right to strike, freedom of expression or assembly.

2.22 There is also an exemption from section 45D if the conduct is not 'industrial action' and it is engaged in for a dominant purpose substantially related to environmental or consumer protection. However, the measure may still have the effect of prohibiting campaigns and protest action that may use boycotts as a technique. It was noted that there is no exception provided on the grounds, for example, that the boycott action relates to human rights matters. Further, the previous analysis raised the possibility that the section 45DB may prohibit cross-border sympathy strikes or solidarity action including in relation to international

6 Under section 45D: a person (A) must not engage in conduct, in concert with another person (B) which: hinders or prevents a third person (C) either supplying goods or services to a fourth person (D) or acquiring goods or services from D; and is engaged in for the purpose and would have or be likely to have the effect of causing substantial loss or damage to the business of D. D must not be an employer of A or B for the purpose of the section.

supply chains or in support of Australian workers.[7] This means that the relevant sections may prohibit an aspect of the right to freedom of association, the right to freedom of expression and the right to freedom of assembly as understood in international law. The very substantial increase in penalty proposed by the measure makes these provisions less likely to be proportionate limitations on these rights.

2.23 Accordingly, the committee requested the advice of the treasurer as to whether:

- section 45D prohibits sympathy strikes or assembly against entities who are not the person's primary employer;
- section 45D prohibits any actions such as assembly or picketing against a person's primary employer;
- section 45D prohibits boycotts on human rights grounds; and
- section 45DB prohibits cross-border strikes or sympathy action, such that the increased penalty would apply to each of these types of action.

Treasurer's further response

2.24 The treasurer did not address the committee's specific questions in relation to the secondary boycott provisions. These questions were aimed at obtaining relevant information for the purpose of examining the human rights compatibility of the increased maximum penalty for secondary boycotts in the context of the existing regime. This included the extent of any limitation on the right to freedom of association, the right to freedom of expression and the right to freedom of assembly including the scope of relevant exceptions to secondary boycott provisions.

2.25 The treasurer's response stated:

> In relation to secondary boycotts, the Bill increases the maximum penalty for a breach of the secondary boycott provisions (sections 45D and 45DA of the CCA). The Bill does not change the types of boycotts which are and are not prohibited under sections 45D and 45DA. The secondary boycott prohibitions themselves, which have been in place for several decades, contain specific exemptions to support human rights (including an exemption for secondary boycotts with a dominant purpose related to employment matters).
>
> I therefore respectfully consider that these measures do not negatively impact human rights.

2.26 As set out in the initial human rights analysis where a measure increases the penalties imposed in relation to penalty provisions which limit human rights, this has

7 See, for example, Australian Competition and Consumer Commission, *Press Release ACCC/Maritime Union of Australia*, 28 May 1998, http://www.accc.gov.au/content/index.phtml/itemId/87308/fromItemId/378006.

consistently been considered to constitute a further limitation on the relevant right. The fact that what matters are subject to secondary boycott provisions have been in place for several decades does not address the question of whether these provisions are otherwise compatible with human rights. In this respect, international treaty monitoring bodies have raised specific human rights concerns in relation to Australia's secondary boycott provisions and called on Australia to amend these provisions.[8] The underlying question remains whether the relevant exceptions are broad enough to protect freedoms of association, expression and assembly, or nonetheless broad enough such that the limitations on these rights are proportionate, bearing in consideration the very substantial increase in penalties proposed by the measure. In light of these issues and the absence of information from the minister, it is not possible to conclude that the measure is compatible with human rights.

Committee response

2.27 The committee thanks the treasurer for his response and has concluded its examination of this issue.

2.28 In light of the information provided, the preceding analysis indicates that it is not possible to conclude that the measure is compatible with the right to freedom of association, the right to freedom of expression and the right to freedom of assembly.

8 Observation (CEACR) - adopted 2016, published 106th ILC session (2017) Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) - Australia (Ratification: 1973); Observation (CEACR) - adopted 2013, published 103rd ILC session (2014) Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) - Australia (Ratification: 1973).

Electoral and Referendum Amendment (ASADA) Regulations 2017 [F2017L00967]

Purpose	Seeks to amend the Electoral Referendum Regulation 2016 to include the Australian Sports Anti-Doping Authority (ASADA) on the list of prescribed authorities for the purposes of the *Commonwealth Electoral Act 1918,* so as to allow the electoral commission to give ASADA commonwealth electoral roll information
Portfolio	Finance
Authorising legislation	*Commonwealth Electoral Act 1918*
Last day to disallow	15 sitting days after tabling (tabled Senate 8 August 2017) The time to give a notice of motion to disallow expired on 16 October 2017
Right	Privacy (see **Appendix 2**)
Previous report	11 of 2017
Status	Concluded examination

Background

2.29 The committee first reported on the Electoral and Referendum Amendment (ASADA) Regulations 2017 (the ASADA regulations) in its *Report 11 of 2017*, and requested a response from the Minister for Finance by 1 November 2017.[9]

2.30 The Special Minister of State responded to the committee's inquiries. The response, which includes input from the Australian Sports Anti-Doping Authority (ASADA), was received on 1 November 2017. The response is discussed below and is reproduced in full at **Appendix 3**.

Providing electoral roll information to ASADA

2.31 The ASADA regulations amend the Electoral and Referendum Regulation 2016 (the electoral and referendum regulation) to include ASADA on the list of prescribed authorities for the purposes of the *Commonwealth Electoral Act 1918.* The effect of the amendment is that the Commonwealth Electoral Commission may give ASADA commonwealth electoral roll information for the purpose of the

9 Parliamentary Joint Committee on Human Rights, *Report 11 of 2017* (17 October 2017) 15-18.

administration of the National Anti-Doping Scheme within the meaning of the *Australian Sports Anti-Doping Authority Act 2006* (the ASADA Act).[10]

Compatibility of the measure with the right to privacy

2.32 The right to privacy includes respect for informational privacy, including the right to respect for private and confidential information, particularly the storing, use and sharing of such information; and the right to control the dissemination of information about one's private life.

2.33 The initial human rights analysis stated that the amendments engage and limit the right to privacy by providing for the disclosure of elector's information (which includes personal information such as a person's name and address) from the commonwealth electoral roll to ASADA.

2.34 The statement of compatibility acknowledges that the right to privacy is engaged, but explains the measure is a permissible limitation as it is reasonable, necessary and sufficiently precise to ensure that it addresses only those matters it is intended to capture under the ASADA Act.

2.35 The statement of compatibility explains the objective of the measure as being 'necessary in the interests of public safety and for the protection of public health'.[11] The statement of compatibility further explains that the measure will assist the work of ASADA in investigating violations under the National Anti-Doping scheme. The initial analysis noted that, while generally these matters are capable of constituting legitimate objectives for the purposes of international human rights law, the statement of compatibility provides no information about the importance of these objectives in the specific context of the measure. In order to show that the measure constitutes a legitimate objective for the purposes of international human rights law, a reasoned and evidence-based explanation of why the measure addresses a substantial and pressing concern is required. The statement of compatibility also does not provide any information as to how the measure is rationally connected to (that is, effective to achieve) the objectives.

2.36 As to the proportionality of the measure, limitations on the right to privacy must be no more extensive than what is strictly necessary to achieve the legitimate objective of the measure. The statement of compatibility explains that having access to the electoral roll will 'assist the work of ASADA in investigating violations under the National Anti-Doping scheme'.[12] The statement of compatibility continues:

10 Table Item 9A, Clause 1 of Schedule 1 to the *Electoral and Referendum Amendment (ASADA) Regulations 2017.*

11 Statement of Compatibility (SOC) 2.

12 SOC 2.

Providing access to the Commonwealth electoral Roll to ASADA for the purpose of administering the National Anti-Doping scheme, it would be particularly beneficial:

- for identifying persons who are subject to tip-offs;
- for locating athletes for testing purposes;
- for establishing additional information to facilitate additional records checks;
- for establishing the identity of co-habitants and associations of interest;
- for linking seizures of Performance and Imaging Enhancing Drugs to the occupants of the intended destination addresses; and
- for maintaining the confidentiality of ASADA enquiries.

2.37 The statement of compatibility does not provide further information as to whether these reasons for accessing information on the electoral roll are the least rights restrictive means of achieving the stated objectives. For example, based on the information provided it is unclear whether 'establishing the identity of co-habitants and associations of interest' is strictly necessary to achieve the stated objectives of public safety and protection of public health.

2.38 Further, whilst these reasons for access are specifically identified in the statement of compatibility, the amendment itself is drafted more broadly, stating that information can be accessed for 'the administration of the National Anti-Doping Scheme (within the meaning of the *Australian Sports Anti-Doping Authority Act 2006*)'.[13]

2.39 'Administration' appears to be broad in scope, particularly in contrast to the purposes identified for access to the electoral roll for other prescribed authorities. For example, the identified purposes for access to the electoral roll for the Australian Federal Police is detailed in Clause 7 of Schedule 1 to the electoral and amendment regulation, and is more prescriptive, as follows:

(a) identifying or locating offenders, suspects or witnesses; or

(b) deciding whether suspects can be eliminated from an investigation; or

(c) target development; or

(d) intelligence checks; or

(e) protecting the safety of officers, staff members, AFP employees and special members; or

(f) law enforcement; or

13 Table Item 9A, Clause 1 of Schedule 1 to the Electoral and Referendum Amendment (ASADA) Regulations 2017.

(g) surveillance; or

(h) identification or potential or actual disaster victims, and notification of victims' families; or

(i) security vetting of AFP officers or potential AFP officers.

2.40 The initial analysis stated that the broad wording of the amendment raises questions as to whether the measure as currently drafted is sufficiently circumscribed.

2.41 Another relevant factor in assessing the proportionality of a measure is whether there are adequate safeguards in place to protect the right to privacy. In this respect the statement of compatibility states:

> The disclosure of such information is protected in the first instance by the discretion of the Electoral Commission who can decide when and how to give this information, to the prescribed authority.[14]

2.42 No further information is provided in the statement of compatibility as to the scope of the discretion of the Electoral Commission, including any relevant safeguards. In any event, while the existence of a discretion is a relevant factor, it often is not, by itself, an effective human rights safeguard. No other information is provided about whether there are adequate and effective safeguards in place to protect against unintended use of information or on-disclosure to third parties.

2.43 The committee therefore sought the advice of the minister as to:

- whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective for the purposes of international human rights law;
- how the measure is effective to achieve (that is, rationally connected to) that objective; and
- whether the limitation is a reasonable and proportionate measure for the achievement of the stated objective (including whether the measure is sufficiently circumscribed and whether there are adequate and effective safeguards with respect to the right to privacy).

Minister's response

2.44 In relation to whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern, the minister's response outlines Australia's international obligations in relation to anti-doping in its capacity as a party to the UNESCO International Convention (UNESCO Convention) against doping in sport, in particular Australia's obligation to implement

14 SOC 2.

arrangements consistent with the principles of the World Anti-Doping Code. The minister further explains that:

> In Australia, the illicit status of many performance and image enhancing drugs (PIEDs) mean they are at high risk of being supplied through unregulated markets, giving rise to the risk that they are counterfeit, or produced in underground laboratories. The abuse of pharmaceutical grade substances to improve sporting performance also carries inherent health risks. Furthermore, there is a need to counter the trafficking of PIEDS produced outside of controlled environments as they create additional public safety risks.
>
> The *Australian Criminal Intelligence Commission 2015-16 Illicit Drug Report* reveals that in 2015-16, there were 6877 PIED detections at the Australian border. In 2015-16, the report reveals a record number of steroid arrests in Australia.
>
> Highlighting the potential health and safety risks of doping, in November 2015, the Essendon Football Club pleaded guilty to two breaches of the Victorian *Occupational Health and Safety Act 2004*.
>
> In its 2013 report, the Australian Crime Commission (ACC) examined the new generation of performance and image enhancing drugs in sport, namely peptides and hormones. In this report, the ACC identified organised crime involvement in the distribution of PIEDs and evidence of personal relationships of concern between professional athletes, support staff and organised criminal identities.
>
> Having access to data held by the Australian Electoral Commission builds ASADA's detection capability and provides a mechanism to deter doping behaviours in sport (due to the greater possibility of getting caught). It supports ASADA's ability to detect and disrupt the activities of persons within its jurisdiction involved with the use, administration, possession or trafficking of doping substances, which is in the interest of the protection of public health. The amendment enhances ASADA's ability to support other agencies who share mutual interests in the disruption of the PIEDs market, which is in the interests of public safety.

2.45 The further information provided in the minister's response as to compliance with Australia's international obligations in relation to anti-doping regimes and the risks to health and safety associated with anti-doping supports the conclusion that the stated objectives are likely to be considered legitimate objectives for the purposes of international human rights law.

2.46 In relation to how the measure is effective to achieve (that is, rationally connected to) its objectives, the minister's response explains that as the science of doping becomes more technologically advanced, the identification of doping through the collection and analysis of samples (testing) alone has become less effective. The minister explains that this makes it necessary to combine such testing with other

forms of detection to allow for an effective anti-doping program to operate. The minister further explains that:

> Accessing electoral information will allow ASADA to ensure its inquiries are appropriately targeted, in particular in relation to the identification of persons known or suspected to be involved in the receipt, use and distribution of PIEDS [performance enhancing drugs] to facilitate doping activities. It also minimises the need for ASADA to ask sporting organisations about individuals, thereby minimising the scope for the identity of a person under suspicion to be released by third parties.

2.47 Based on the information provided in the minister's response, it appears that collection of electoral role information is rationally connected to the stated objectives of the measure.

2.48 In relation to whether the limitation is proportionate to the stated objective, the minister also provided a detailed and relevant response. In response to the committee's query as to whether 'establishing the identity of co-habitants and associations of interest' is strictly necessary to achieve the stated objectives of public safety and protection of public health, the minister's response explains the rationale for the broadly-worded provision:

> Establishing the identity of co-habitants and associations of interest is critical in linking PIEDs imports to intended recipients and thereby supporting investigations of possible anti-doping rule violations, including the possession, use and trafficking of PIEDs. Such activities may involve a range of persons as highlighted in the 2013 ACC report which determined doping programs were being facilitated by sports scientists, high performance coaches, sports staff, doctors, pharmacists and anti-ageing clinics. The ACC report highlighted the sophisticated nature of doping programs, noting a complex supply and distribution network exists to satisfy the high demand for anabolic steroids, peptides and hormones by sub-elite and recreational athletes, body builders and increasingly, ageing Australians. The ACC report also highlighted the involvement of criminal groups in the distribution of PIEDs and, in some cases, the direct associations between athletes and criminal identities.
>
> Often the substances being used were not approved for human use, thereby increasing the risks to public health and public safety.
>
> ASADA recently investigated two matters that, in part, involved the import of PIEDs via the mail system into Australia. In one case, the person used a range of different names and addresses, at least one of which was linked to a parent, to attempt to import the PIEDs successfully and without detection. In the other matter, one attempted PIEDs import was addressed to the co-habitant of an athlete. As the co-habitant was out of the country for a significant length of time at the point of the seizure, ASADA assessed that the intended recipient was the athlete. These matters highlight the importance of understanding who is linked to addresses associated with PIEDs seizures and the association's athletes and persons suspected of

attempting to import PIEDs, and the propensity of persons within ASADA's jurisdiction to use subterfuge to thwart the detection of their misconduct.

2.49 As to the safeguards in place to protect the right to privacy, the minister's response provides detailed information as to the safeguards that are in place under the ASADA Act:

> Anti-Doping arrangements have been established with due reference to the protection of the rights of individuals involved in sport. The UNESCO Convention explicitly refers to protecting the rights of individuals. In complying with the Code, anti-doping organisations around the world, including ASADA, are required to operate in accordance with the International Standard for the Protection of Privacy and Personal Information.
>
> Under the *Australian Sports Anti-Doping Authority Act 2006*, protected information is defined as information that:
>
> (a) was obtained under or for the purposes of this Act or a legislative instrument made under this Act; and
>
> (b) relates to the affairs of a person (other than an entrusted person); and
>
> (c) identifies, or is reasonably capable of being used to identify, the person.
>
> Part 8 of the Act makes it an offence for the CEO, ASADA staff and certain other bodies/persons, to disclose protected information. However, it is not an offence if the disclosure is authorised by this Part or is in compliance with a requirement of certain other laws.
>
> - Unauthorised disclosure of protected information can result in a 2 year custodial sentence.
> - ASADA meets the PROTECTED level certification under the Commonwealth Protective Security Framework, and has mature systems to protect information;
>
> Section 14 of the Act specifies the rights of athletes and support persons.

2.50 The minister's response explains that these safeguards are complemented by the mechanisms under the Electoral Act which protect against unintended use or on-disclosure to third parties, including penalties for breaching non-disclosure provisions.

2.51 Noting the extensive range of safeguards in place to protect a person's right to privacy, it is likely that the measure would be considered proportionate to the stated objective for the purposes of international human rights law.

Committee response

2.52 The committee thanks the minister for his response and has concluded its examination of this issue.

2.53 Based on the information provided, it is likely the measures will be compatible with the right to privacy.

Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2017

Purpose	Seeks to amend the *Fair Work (Registered Organisations) Act 2009* to expand the grounds upon which a person can be disqualified from holding office in a union; expand the grounds upon which the registration of unions may be cancelled; or for a union to be placed into administration; and provide a public interest test for amalgamations
Portfolio	Employment
Introduced	House of Representatives, 16 September 2017
Rights	Freedom of association; to form and join trade unions; just and favourable conditions at work; presumption of innocence (see **Appendix 2**)
Previous report	9 of 2017
Status	Concluded examination

Background

2.54 The committee first reported on the Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2017 (the bill) in its *Report 9 of 2017*, and requested a response from the Minister for Employment by 20 September 2017.[1]

2.55 The minister's response to the committee's inquiries was received on 3 October 2017. The response is discussed below and is reproduced in full at **Appendix 3**.

The right to freedom of association and the right to form and join trade unions

2.56 The bill contains a number of schedules which impact on the internal functioning of trade unions.

2.57 The right to freedom of association includes the right to form and join trade unions. The right to just and favourable conditions of work also encompasses the right to form 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 Parliamentary Joint Committee on Human Rights, *Report 9 of 2017* (5 September 2017) 13-24.

2 See, article 22 of the ICCPR and article 8 of the ICESCR.

2.58 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).[3] ILO Convention 87 protects the right of workers to autonomy of union processes including electing their own representatives in full freedom, organising their administration and activities and formulating their own programs without interference.[4] Convention 87 also protects unions from being dissolved, suspended or de-registered and protects the right of workers to form organisations of their own choosing.[5]

2.59 The initial human rights analysis stated that a number of measures in this bill, by limiting the ability of unions to govern their internal processes, engage and limit these rights.

Disqualification of individuals from holding office in a union

2.60 Schedule 1 of the bill would expand the circumstances in which a person may be disqualified from holding office in a registered organisation (such as a trade union or employers association) and make it a criminal offence for a person who is disqualified from holding office in a registered organisation to continue to hold office or act in a manner that would significantly influence the organisation.[6]

2.61 Specifically, the Fair Work Commissioner, the minister or another person with sufficient interest may apply to the Federal Court for an order disqualifying a person from holding office in a union. The Federal court may disqualify a person if satisfied that a ground for disqualification applies and it would not be unjust to disqualify the person having regard to the nature of the ground, the circumstances and any other matters the court considers relevant. Under proposed section 223 the grounds for the disqualification include:

- a 'designated finding ' or contempt of court;
- a 'wider criminal finding' or contempt of court; or
- two or more failures to take reasonable steps to prevent such conduct by a union while the person was an officer of that union;
- corporate impropriety; or

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3 The Freedom of Association and Protection of the Right to Organize (ILO Convention No. 87) is expressly referred to in the ICCPR and the ICESCR.

4 See ILO Convention N.87 article 3.

5 See ILO Convention N.87 articles 2, 4. See, also, *ILO Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO*, Fifth Edition (2006) [292]-[308].

6 Explanatory Memorandum (EM) 2.

- a person is not a 'fit and proper' person having regard to a range of factors.[7]

2.62 Under proposed section 9C, a 'designated finding' is defined to include a finding that a person has contravened a civil penalty provision of industrial laws or committed particular criminal offences.[8] 'Wider criminal finding' is defined to include that the person has committed an offence against any law of the Commonwealth or a State or Territory.[9]

2.63 The bill would additionally expand the definition of 'prescribed offence' for the purposes of an automatic disqualification for five years to include an offence under a law of the Commonwealth, a State or Territory or another country, punishable on conviction by imprisonment for life or a period of five years or more.[10]

Compatibility of the measure with the right to freedom of association and the right to just and favourable conditions at work

2.64 The initial analysis stated that expanding the circumstances in which individuals can be disqualified from holding office in a union engages and limits the right to freedom of association, the right to just and favourable conditions at work and in particular the right of unions to elect their own leadership freely. International supervisory mechanisms have explained the scope of this right and noted that:

> The right of workers' organizations to elect their own representatives freely is an indispensable condition for them to be able to act in full freedom and to promote effectively the interests of their members. For this right to be fully acknowledged, it is essential that the public authorities refrain from any intervention which might impair the exercise of this right, whether it be in determining the conditions of eligibility of leaders or in the conduct of the elections themselves.[11]

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7 See proposed section 223, grounds for disqualification, item 9.

8 This includes contravening a civil penalty provision or committing a criminal offence under any of the following laws: *Fair Work Act 2009* (Fair Work Act); *Fair Work (Registered Organisations) Act 2009*; *Building and Construction Industry (Improving Productivity) Act 2016* (ABCC Act); Part IV of the *Competition and Consumer Act 2010; Work Health and Safety Act 2011;* each State or Territory OHS law Part 7.8 of the *Criminal Code* (causing harm to, and impersonation and obstruction of, Commonwealth public officials): See definition of designated law proposed section 9C(2), schedule 1, item 2.

9 Proposed section 9C(2).

10 Proposed section 212(aa), schedule 1, item 6. Currently, a 'prescribed offence' resulting in automatic disqualification is defined to include offences of fraud and dishonesty punishable by imprisonment for 3 month or more, certain offences related the conduct of elections or any other offence in relation to the formation, registration or management of an association or organisation: see sections 212-213A of the Registered Organisations Act.

11 ILO, *Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO*, Fifth Edition (2006) [391].

2.65 The right to freedom of association may be subject to permissible limitations providing certain conditions are met. Generally, to be capable of justifying a limitation 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. Further, article 22(3) of the ICCPR and article 8 of the ICESCR expressly provide that no limitations are permissible on this right if they are inconsistent with the guarantees of freedom of association and the right to collectively organise contained in the ILO Convention No. 87.

2.66 The statement of compatibility identifies the objective of the measure as 'improving the governance of registered organisations and protecting the interests of members'.[12] It points to evidence from the Final Report of the Royal Commission into Trade Union Governance and Corruption (Heydon Royal Commission) in support of this objective.[13] The statement of compatibility further explains that the measure, by ensuring the leadership of unions act lawfully, addresses these objectives.[14] The initial analysis stated that the objective identified is likely to constitute a legitimate objective for the purposes of international human rights law.

2.67 The statement of compatibility further provides that the measure is a proportionate limitation and notes that the Federal Court will supervise the disqualification process.[15] It was noted in the initial analysis that, while it is a relevant safeguard that disqualification orders are to be made by the Federal Court, it is unclear that this alone is sufficient to ensure that the measure constitutes a proportionate limitation. Relevantly, conduct that could result in disqualification is extremely broad and includes a 'designated finding', that is, a finding of a contravention of an industrial relations law (including contraventions that are less serious in nature). This would include taking unprotected industrial action.[16]

2.68 As noted previously, as an aspect of the right to freedom of association, the right to strike is protected and permitted under international law. The existing restrictions on taking industrial action under Australian domestic law have been consistently criticised by international supervisory mechanisms as going beyond

12 Statement of compatibility (SOC) viii.

13 SOC v, viii.

14 SOC viii.

15 SOC ix.

16 SOC vi.

what is permissible.[17] The previous analysis assessed that it appears that the proposed measure could lead to the disqualification of an individual for conduct that may be protected as a matter of international law. In this respect, the measure would appear to further limit the right to strike. Additionally, this aspect of the measures raises questions about its rational connection to the stated objective of protecting the interests of members, where members may be of the view that taking particular forms of industrial action are in their interests.

2.69 It was further noted that under the proposed measure, a person may be disqualified from holding office in a union on the basis of their failure to prevent two or more contraventions by their union that amount to a 'designated finding' or a 'wider criminal finding' or contempt of court. As noted above, 'designated findings' are defined to apply in relation to a broad range of contraventions of industrial law including taking unprotected industrial action. Where a union has engaged in two or more such contraventions, the effect of the measure could be that the entire elected union leadership could be subject to disqualification. This is regardless of whether or not union members agreed to participate in, for example, conduct which lead to 'designated findings' or contempt of court and whether they considered that this was in their best interests.

2.70 In this respect, the disqualification process may have a very extensive impact on freedom of association more broadly. It was unclear from the information provided in the statement of compatibility how the breadth and impact of this measure is rationally connected to the stated objective of 'improving the governance of registered organisations and protecting the interests of members' and whether the measure is the least rights restrictive way of achieving this objective as required in order to be a proportionate limitation on human rights.

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17 See, UN Committee on Economic Social and Cultural Rights (UNCESCR), *Concluding Observations on Australia*, E/C.12/AUS/CO/5 (23 June 2017) [29]-30]: 'The Committee is also concerned that the right to strike remains constrained in the State party (art. 8). The Committee recommends that the State party bring its legislation on trade union rights into line with article 8 of the Covenant and with the provisions of the relevant International Labour Organization (ILO) Conventions (nos. 87 and 98), particularly by removing penalties, including six months of incarceration, for industrial action, or the secret ballot requirements for workers who wish to take industrial action'. See, also, ILO CEACR, *Observation Concerning Freedom of Association and Protection of the Right to Organise Convention*, 1948 (No. 87), Australia, 103rd ILC session, 2013; ILO CEACR, *Observation Concerning Freedom of Association and Protection of the Right to Organise Convention*, 1948 (No. 87), Australia, 101st ILC session, 2013; ILO CEACR, *Observation Concerning Freedom of Association and Protection of the Right to Organise Convention*, 1948 (No. 87), Australia, 99th ILC session, 2009; ILO CEACR, *Individual Observation Concerning the Right to Organise and Collective Bargain Convention*, 1949, (No. 98), Australia, 99th session, 2009. See also, UNCESCR, *Concluding Observations on Australia*, E/C.12/AUS/CO/4 (12 June 2009) 5.

2.71 The committee therefore requested the further advice of the minister as to:

- how the measure is effective to achieve (that is, rationally connected to) its stated objective; and
- whether the limitation is a reasonable and proportionate measure to achieve the stated objective (in particular, whether the measure is the least rights restrictive way of achieving its stated objective; the extent of the limitation including in respect of the right to strike, noting previous concerns raised by international supervisory mechanisms; and the existence of relevant safeguards).

Minister's response

2.72 The minister's response explains the scope of the current law providing for automatic disqualification from office as well as the limited discretionary power for the Federal Court to order disqualification. The minister's response further explains that the bill would expand the categories of offence where a person may be subject to automatic disqualification as well as providing the Federal Court with broad discretionary power to disqualify a person in circumstances where a ground for disqualification exists. The minister's response further states that there is currently no penalty for a person who is disqualified from acting as a 'shadow officer'.

2.73 The minister's response provides some information in relation to whether the expansion of the grounds for disqualification is effective to achieve its stated objective:

> The amendments to the disqualification provisions of the RO Act are made in response to the recommendations of the Royal Commission into Trade Union Governance and Corruption (Royal Commission) concerning the current disqualification regime. The Royal Commission identified that the current disqualification scheme provides no consequence for acting while disqualified or for committing serious criminal offences.
>
> For example, the Royal Commission noted that a person against whom a civil penalty has been imposed for a contravention of the statutory officers' duties cannot be disqualified from holding office under the current disqualification provisions. This is the case even if the conduct that led to the imposition of a civil penalty clearly demonstrated the person was unable or unwilling to uphold the standards reasonably expected of a person holding office in an organisation.
>
> Providing for the possibility of disqualification from office and restricting who can be elected to office, in circumstances where a ground for disqualification has been made out and the Federal Court considers disqualification just, is a rational means of ensuring greater compliance with the standards of conduct reasonably expected of officers, and a rational method for improving governance of organisations more generally.

2.74 The minister's response highlights what are seen as gaps in current regulation. However, the response does not address whether the basis and breadth of the proposed grounds for disqualification are effective to achieve the previously stated objective of 'improving the governance of registered organisations and protecting the interests of members'.[18] As previously stated, the proposed grounds for disqualification are extremely broad. Relevantly, conduct that could result in disqualification includes a 'designated finding', that is, a finding of a contravention of an industrial relations law, including contraventions that are less serious in nature. This would include taking unprotected industrial action.

2.75 In relation to the impact of the bill on the right to strike as an aspect of the right to freedom of association, the minister's response states:

> In response to the Committee's specific concern, the Bill does not contain provisions circumscribing the right to strike as protected by the right to freedom of association. The Bill does not alter the circumstances in which industrial action will be considered protected industrial action, or the consequences provided for failures to comply with Part-3-3 of the Fair Work Act, dealing with industrial action.

2.76 It is acknowledged that the measure does not alter the requirements for taking protected industrial action in Part 3-3 of the Fair Work Act. However, what it does is render non-compliance with these provisions a ground for disqualification from holding office in a registered organisation. That is, the measure creates an additional sanction or disincentive for taking industrial action that does not or may not comply with the requirements of Part 3-3 of the Fair Work Act. As set out at [2.68] above, the existing restrictions on taking industrial action under Australian domestic law have been consistently criticised by international supervisory mechanisms as going beyond what is permissible under international human rights law. For these reasons the measure appears to further engage and limit the right to strike. Further, this aspect of the measure continues to raise concerns that it is not effective to achieve the stated objective of protecting the interests of members, where members may be of the view that taking particular forms of industrial action are in their interests.

2.77 In relation to whether the limitation is proportionate, the minister's response states:

> The Bill seeks to achieve its objectives by providing appropriate mechanisms to disqualify a person from holding office in circumstances where a person has failed to uphold the standards expected of a person acting as an officer in an organisation. These mechanisms are administered and supervised by the Federal Court. The Federal Court is an impartial and independent judicial body from which appeals to the full Federal Court and ultimately the High Court are available. Providing the Court with this

18 Statement of compatibility (SOC) viii.

> discretion avoids any risk of excessive or arbitrary interference in the free functioning of organisations.
>
> These are reasonable and proportionate methods of ensuring that officials who deliberately disobey the law are restricted in their ability to be in charge of registered organisations. This will serve to protect the interest of members and guarantee public order by ensuring the leadership of registered organisations act lawfully.

2.78 While it is a relevant safeguard that disqualification orders are to be made by the Federal Court, this alone is insufficient to ensure that the measure constitutes a proportionate limitation. The court's discretion in determining that a ground for disqualification exists and that it would not be unjust to make such an order does not address the breadth of the grounds for disqualification in the proposed legislation that the court will apply. The response does not address the specific concerns raised in the initial analysis regarding the breadth of the proposed powers of disqualification. As noted above, 'designated findings' are defined to apply in relation to a broad range of contraventions of industrial law including, for example, taking unprotected industrial action or a failure to comply with union right of entry provisions. Where a union has engaged in two or more such contraventions, the effect of the measure could be that the entire elected union leadership could be subject to disqualification. This is regardless of whether or not union members agreed to participate in, for example, conduct which lead to 'designated findings' or contempt of court and whether they considered that this was in their best interests.

2.79 The expanded basis for criminal offences to constitute a ground for either mandatory or discretionary disqualification also raises a concern that some of these offences may be unrelated to a person's capacity or suitability to perform functions in union office. In this respect, international supervisory mechanisms have cautioned that:

> Conviction on account of offences the nature of which is not such as to call into question the integrity of the person concerned and is not such as to be prejudicial to the exercise of trade union functions should not constitute grounds for disqualification from holding trade union office, and any legislation providing for disqualification on the basis of any offence is incompatible with the principles of freedom of association.[19]

2.80 More generally, the response also does not address the findings by international supervisory mechanisms which indicate that generally broad scope should be afforded to unions to choose their leadership freely.[20] Applying these findings by international supervisory mechanisms to the proposed measures, it

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19 ILO, *Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO*, Fifth Edition (2006) [422].

20 ILO, *Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO*, Fifth Edition (2006) [391].

appears that the scope and extent of the limitation on holding union office goes beyond what is permissible as a matter of international human rights law.[21] As such the measure appears likely to be incompatible with the right to freedom of association.

Committee response

2.81 The committee thanks the minister for her response and has concluded its examination of this issue.

2.82 The preceding analysis indicates that the measure is likely to be incompatible with the right to freedom of association.

Cancellation of registration of registered organisations

2.83 The registration of a registered organisation (union or employer association) under the *Fair Work (Registered Organisations) Act 2009* (Registered Organisations Act) grants the organisation a range of rights and responsibilities including representing the interests of its members.[22] The bill seeks to expand the grounds for the cancellation of the registration of registered organisations under the Registered Organisations Act. Under proposed section 28, the Fair Work Commissioner, the minister or another person with sufficient interest can apply to the Federal Court for an order cancelling registration of an organisation, if the person considers there are grounds for such cancellation. These grounds include:

- A substantial number of officers or two or more senior officers have engaged in conduct abusing their position, perverted the course of justice, engaged in corruption, acted in their own interests rather than the interests of the members of the whole, conducted affairs of the organisation in a manner that is oppressive or prejudicial to a class of members or contrary to the interests of the members as a whole;[23]

21 ILO, *Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO*, Fifth Edition (2006) [388]-[391], [421]-[424].

22 See, *Fair Work (Registered Organisations) Act 2009* (including the right to represent members.)

23 See proposed section 28C.

- 2 or more 'designated findings' or 'wider criminal findings' have been made against the organisation;[24]
- The organisation is found to have committed a serious criminal offence (defined as an offence punishable by at least 1,500 penalty units);[25]
- That there have been multiple 'designated findings' against members;[26]
- That the organisation has failed to comply with an order or injunction; or
- That the organisation or a substantial number of members have organised or engaged in 'obstructive industrial action'.[27]

2.84 Under proposed section 28K, if the court finds that a ground is established it must cancel the organisation's registration unless the organisation can satisfy the court that it would be unjust to cancel its registration (having regard to the nature of the matters constituting that ground; the action (if any) that has been taken by or against the organisation; the best interests of the members of the organisation as a whole and any other matters the court considers relevant).

2.85 The Federal Court would also be empowered to make a range of alternative orders including the disqualification of certain officers, the exclusion of certain members or the suspension of the rights of the organisation.[28]

Compatibility of the measure with the right to freedom of association and the right to just and favourable conditions at work

2.86 By expanding the grounds upon which unions can be de-registered or suspended, as the previous analysis stated, the measure engages and limits the right to freedom of association and the right to just and favourable conditions at work. In this respect, it was noted that international supervisory mechanisms have recognised

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24 Under proposed section 9C a 'designated finding' is defined to include a finding that a person has contravened a civil penalty provision or committed a criminal offence under any of the following laws: *Fair Work Act 2009* (Fair Work Act); *Fair Work (Registered Organisations) Act 2009*; *Building and Construction Industry (Improving Productivity) Act 2016* (ABCC Act); Part IV of the *Competition and Consumer Act 2010; Work Health and Safety Act 2011;* each State or Territory OHS law; or Part 7.8 of the *Criminal Code* (causing harm to, and impersonation and obstruction of, Commonwealth public officials): See definition of 'designated law' in proposed section 9C(2), schedule 1, item 2. 'Wider criminal finding' is defined to include that the person has committed an offence against any law of the Commonwealth or a State or Territory.

25 See proposed section 28E.

26 See proposed section 28F.

27 See proposed section 28H. The section covers industrial action other than protected industrial action that prevented, hindered or interfered with a federal system employer or the provision of any public service and that had or is having a substantial adverse impact on the safety, health or welfare of the community or part of the community.

28 Proposed sections 28N-28Q.

the importance of registration as 'an essential facet of the right to organize since that is the first step that workers' or employers' organizations must take in order to be able to function efficiently, and represent their members adequately'.[29] They have further noted that 'the dissolution of trade union organizations is a measure which should only occur in extremely serious cases' noting the serious consequences for the representation of workers.[30]

2.87 Although the statement of compatibility contends that this measure does not limit the ability of individuals to form and join trade unions, it nevertheless provides some information as to whether the limitation on the right to freedom of association is permissible.[31] It states that the measure has the:

> …sole objective of protecting the interests of members and guaranteeing the democratic functioning of organisations under the stewardship of officials and a membership that respects the law and thus maintains public order.[32]

2.88 However, this statement appears to identify multiple objectives and does not provide evidence as to which, if any, of these objectives addresses a substantial and pressing concern.

2.89 Even if the protection of the interests of members and/or the democratic functioning of unions and/or the maintenance of public order are to be considered legitimate objectives, it must be shown that the limitation imposed by the measure is effective to achieve (rationally connected to) and proportionate to these stated objectives.

2.90 The statement of compatibility argues that the measure addresses the costly and lengthy deregistration process and will 'facilitate the continued existence and functioning of an organisation or some of its component parts in circumstances in which one part of the organisation is affected by maladministration or dysfunction associated with a culture of lawlessness'.[33] The initial analysis noted that, while the measures may undoubtedly make the deregistration of unions easier, many of the grounds for cancellation could relate to less serious contraventions of industrial law or to taking unprotected industrial action such that it is unclear how the cancellation of union registration would necessarily be in the interests of members or would guarantee the democratic functioning of the organisation. For example, union

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29 ILO Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO, Fifth Edition (2006) [295].

30 ILO Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO, Fifth Edition (2006) [696], [699].

31 SOC ix.

32 SOC ix.

33 SOC ix.

members may have democratically decided to take unprotected industrial action and hold the view it is in their best interests to do so.

2.91 As set out above at [2.68], restrictions on taking industrial action in Australian domestic law have been subject to serious criticisms by international treaty monitoring bodies as going beyond permissible limitations on the right to strike as an aspect of the right to freedom of association. Cancelling the registration of unions for undertaking such conduct further limits the right to freedom of association. It was further noted that the court would be empowered to exclude particular members from union membership in a way that would appear to undermine their capacity to be part of a union of their choosing. The breadth of the proposed power to cancel union registration raises specific questions about whether it is sufficiently circumscribed with respect to its stated objectives.

2.92 The statement of compatibility provides some arguments about the proportionality of the measure and in particular notes the availability of certain safeguards. These include that orders for cancellation may be limited to part of an organisation that has been undertaking the conduct and that workers will still be entitled to be represented by a union. The preceding analysis raised the concern that these safeguards appeared insufficient to ensure that the limitation is the least rights restrictive way to achieving its stated objectives, in view of the breadth of the grounds for cancellation of union registration set out above.

2.93 The committee therefore requested the further advice of the minister as to:

- whether there is reasoning or evidence that establishes that one or more of the stated objectives addresses a pressing or substantial concern, or whether the proposed changes are otherwise aimed at achieving a legitimate objective;
- how the measure is effective to achieve (that is, rationally connected to) its stated objective;
- whether the limitation is a reasonable and proportionate measure to achieve the stated objective (in particular, whether the grounds for cancellation of registration are sufficiently circumscribed); and
- the extent of the limitation in respect of the right to strike noting previous concerns raised by international supervisory mechanisms.

Minister's response

2.94 The minister's response provides a description of provisions under the current law for cancelling the registration of registered organisations. It also provides a description of the proposed expansion of the grounds for cancelling the registration or de-registration and the ability of the court to make alternative orders instead of cancelling registration.

2.95 The minister's response also states that she does not consider that the measure engages or further limits the right to strike. However, as set out at [2.68]

above, restrictions on taking industrial action in Australian domestic law have been subject to serious criticisms by international treaty monitoring bodies as going beyond permissible limitations on the right to strike as an aspect of the right to freedom of association. It is the possibility of cancelling the registration of unions for taking industrial action or engaging in strikes that do not comply with Part 3-3 of the Fair Work Act which further limits this right.

2.96 The minister's response further states that the provisions of the bill 'allowing for an application for cancellation of registration to be made on the basis that an organisation, part of the organisation or a class of members, have engaged in obstructive industrial action' effectively replicates the existing provisions of the Registered Organisations Act. However, this does not necessarily make the measure compatible with the right to freedom of association. The response does not acknowledge that the grounds for cancellation under the bill would extend beyond conduct that meets the definition of 'obstructive industrial action' and may apply to minor contraventions of industrial relations law.

2.97 As to whether the proposed measures are aimed at achieving a legitimate objective, the minister's response states:

> The amendments to the cancellation provisions of the RO Act have the sole objective of protecting the interests of members and guaranteeing the democratic functioning of organisations under the stewardship of officials and a membership that respects the law and thus maintains public order.

2.98 These multiple objectives are the same as were identified in the statement of compatibility. The minister's response provides some information as to whether any of these objectives addresses a substantial and pressing concern:

> Extensive evidence was presented to the Royal Commission of some organisations, branches or parts of organisations, where a culture of little or no regard for the legislation regulating registered organisations, and even criminal law, persists. The existence of such a culture demonstrates the need for new mechanisms designed to ensure compliance with the existing standards reasonably expected of organisations and their officers. It has become clear that, in addition to the changes to industrial relations legislation recommended by the Royal Commission, there is a pressing need to ensure greater compliance with the existing legislative regime and relevant criminal laws.

2.99 In relation to whether the measures are rationally connected to these objectives, the minister's response states:

> These amendments address the legitimate objective by providing a clearer and more streamlined scheme for the cancellation of registration of an organisation and expanding the grounds on which an application for cancellation can be made. The new cancellation provisions make it obvious to organisations, their officers and members, that the types of conduct

> forming grounds for an application may result in the cancellation of registration, and that misconduct and unlawful behaviour cannot ever be considered an 'acceptable' method of achieving a desired outcome.

2.100 The minister's response further states that registration under the Registered Organisations Act is a 'privilege' and that there should be effective 'sanctions' and consequences for non-compliance with the law. It is acknowledged that ensuring compliance with the law may be an important mechanism to achieve a particular objective. However, it is not an end in itself, and there needs to be consideration of the nature of the laws being enforced and whether the enforcement of those laws are effective to achieve the stated objectives of the measure as a matter of international human rights law. In this case, it would have been useful if the minister had provided information as to how further 'sanctioning' non-compliance with particular laws including industrial relations laws would achieve the stated objectives of 'protecting the interests of members' or 'guaranteeing the democratic functioning of organisations'.

2.101 The minister's response further notes that article 8(1) of ILO Convention 87 provides 'that, in exercising the rights provided for in the Convention, workers, employers and their respective organisations shall respect the law of the land'. However, this does not mean that existing Australian domestic law or 'the law of the land' does not engage and limit the right to freedom of association including the right to strike. In this respect, article 8(2) of ILO Convention 87 specifically states that 'The law of the land shall not be such as to impair, nor shall it be so applied as to impair, the guarantees provided for in this Convention.' It follows that Australia has an obligation to ensure that Australian domestic law or 'the law of the land' is compatible with the right to freedom of association.[34]

2.102 As set out above, international supervisory mechanisms have recognised the importance of registration as 'an essential facet of the right to organize'[35] and that 'the dissolution of trade union organizations is a measure which should only occur in extremely serious cases' noting the serious consequences for the representation of workers.[36]

2.103 In relation to whether the limitation on human rights is proportionate, the minister's response states:

> The grounds for cancellation of registration proposed by the Bill are reasonable and proportionate as, even where a ground for cancellation

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34 See, ILO General Survey by the Committee of Experts on the Application of Conventions and Recommendations on Freedom of Association and Collective Bargaining (1994), [181].

35 ILO Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO, Fifth Edition (2006) [295].

36 ILO Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO, Fifth Edition (2006) [696], [699].

> exists, the Federal Court still has a discretion not to cancel the registration of an organisation in circumstances where that disqualification would be unjust. This ensures that cancellation remains a measure of last resort. The Court is required to take into account the best interests of the members of the organisation as a whole in determining whether the cancellation of registration would be unjust.
>
> In addition, the availability of alternative orders provides the Federal Court with appropriate means of limiting the effect on members who have not been involved in activity that would ground an order for cancellation.

2.104 It is acknowledged that the role provided to the Federal Court in determining it would not be unjust to cancel registration would appear to operate as an important safeguard in relation to the proposed measure. However, it is unclear from the face of the legislation that this necessarily means that cancellation will be a measure of last resort. In this respect, as currently drafted, there is no express requirement in the legislation that the court *only* cancel registration as a last resort. Rather once a ground for cancellation is established the court *must* cancel registration unless it would be unjust to do so. While the court is required to consider the interests of members in considering whether it would be unjust to cancel registration, this is only one factor it must take into account.

2.105 Concerns remain that the role of the court may not be sufficient to ensure that the limitation is the least rights restrictive way to achieving its stated objectives, in view of the breadth of the grounds for cancellation of union registration set out above. It is noted that the possible grounds for cancelation could include two or more relevantly minor breaches of industrial laws. Depending on the approach taken by the courts to their discretion not to cancel registration, the cancellation powers may operate in a manner that is not a proportionate limitation on the right to freedom of association, given in particular that cancellation of registration is not stated in the proposed legislation to be a measure of last resort.

Committee response

2.106 The committee thanks the minister for her response and has concluded its examination of this issue.

2.107 The preceding analysis indicates that the measure may be incompatible with the right to freedom of association.

2.108 In order to improve the human rights compatibility of the measure, the committee recommends that the court's proposed powers of cancellation be amended so as only to be available to be exercised as a matter of last resort where it is in the best interests of the members.

Placing unions into administration

2.109 The bill seeks to expand the grounds for a remedial scheme to be approved by the Federal Court including through the appointment of an administrator.[37]

2.110 Proposed new section 323 enables the Federal Court to make a declaration on a number of bases including that 'an organisation or part of an organisation has ceased to exist or function effectively'.

2.111 New subsection 323(4) provides that an organisation will have ceased to function effectively if the Court is satisfied that officers of the organisation or a part of an organisation have: 'on multiple occasions, contravened designated laws; or misappropriated funds of the organisation or part; or otherwise repeatedly failed to fulfil their duties as officers of the organisation or part of the organisation'.[38]

2.112 If a court makes a declaration under section 324 then it may order a scheme to resolve the circumstances of the declaration including providing for the appointment of an administrator; reports to be given to a court; when the scheme begins and ends and when elections (if any) are to be held.[39]

Compatibility of the measure with the right to freedom of association and the right to just and favourable conditions at work

2.113 The initial assessment stated that, by allowing for unions to be placed into administration, the measure engages and limits the right to freedom of association and in particular the right of unions to organise their internal administration and activities and to formulate their own programs without interference. International supervisory mechanisms noted that '[t]he placing of trade union organizations under control involves a serious danger of restricting the rights of workers' organizations to elect their representatives in full freedom and to organize their administration and activities'.[40]

2.114 The statement of compatibility states that the measure has:

> …the sole objective of protecting the interests of members and guaranteeing the democratic functioning of organisations under the stewardship of officials and a membership that respects the law and thus maintains public order.[41]

2.115 This is the same objective which was identified above. As noted above, the statement of compatibility appears to identify multiple objectives and it is unclear

37 SOC x.

38 Proposed section 323.

39 Proposed section 323A.

40 ILO Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO, Fifth Edition (2006) [450].

41 SOC x.

from the information provided whether each of these objectives addresses a substantial and pressing concern as required under international human rights law.

2.116 In relation to the proportionality of the measure, the statement of compatibility identifies a range of matters which do not address the proportionality of the measure but rather address the aims or goals of the regime.[42] The test of proportionality is concerned with whether a measure is sufficiently circumscribed in relation to its stated objective, including the existence of effective safeguards. In this respect, concerns arise regarding the scope of conduct that may lead a union to be placed into administration. Given the potential breadth of the definition of 'designated laws',[43] the initial analysis stated that the proposed measure makes it possible for a declaration to be made in relation to less serious breaches of industrial law or for taking unprotected industrial action. The consequences of placing a union under administration may have significant consequences in terms of the representational rights of employees and any current campaigns or disputes.

2.117 The committee therefore requested the further advice of the minister as to:

- whether there is reasoning or evidence that establishes that one or more of the stated objectives addresses a pressing or substantial concern, or whether the proposed changes are otherwise aimed at achieving a legitimate objective;
- how the measure is effective to achieve (that is, rationally connected to) its stated objective; and
- whether the limitation is a reasonable and proportionate measure to achieve the stated objective (in particular, whether the grounds for placing unions under administration are sufficiently circumscribed).

Minister's response

2.118 The minister's response provides a description of the current framework in the Registered Organisations Act for placing a registered organisation into administration as well as providing a description of proposed changes to declare an organisation has ceased to function effectively.

2.119 In response to whether the measure pursues a legitimate objective for the purposes of international law, the minister's response states:

> These measures have the sole objective of protecting the interests of members and guaranteeing the democratic functioning of organisations under the stewardship of officials and a membership that respects the law and thus maintains public order.

42 SOC x.

43 'Designated law' has the meaning given in proposed section 9C(a) and includes industrial laws.

2.120 These multiple objectives are the same as were identified in the statement of compatibility. The minister's response provides some information as to whether any of these objectives addresses a substantial and pressing concern:

> The Final Report of the Royal Commission identified numerous examples of organisations no longer serving the interests of their members because of pervasive breaches of duties by officers and widespread and repeated law-breaking by union officials. The proposed changes will improve the effectiveness of the administration provisions by allowing the Federal Court to take appropriate remedial and facilitative action to overcome such maladministration or dysfunction associated with a culture of lawlessness or financial maladministration.
>
> The proposed changes pursue the legitimate objective of ensuring that organisations are functioning effectively to be able to serve the interests of their members.

2.121 The minister's response further argues that the measure is rationally connected to the objective of ensuring that organisations are functioning effectively to be able to serve the interests of their members 'because the new grounds for a declaration are all instances of an organisation not acting in the interests of their members and therefore not functioning effectively'. While ensuring that registered organisations act in the interests of their members may constitute a legitimate objective, it is unclear from the minister's response the basis for this claim that the new grounds for a declaration are *all* instances of an organisation not acting in the interests of members. No reasoning or evidence is provided in this respect.

2.122 It is noted that some of the proposed grounds for a declaration would appear to be rationally connected to the stated objective. However, there are also concerns that the proposed grounds for a declaration may capture conduct that does not run contrary to the interests of members. A registered organisation's repeated non-compliance with 'designated laws' as ground for determining that an organisation has ceased to function effectively is potentially of concern in this respect. This is because designated laws are defined broadly to include breaches of industrial relations laws (including minor or less serious breaches) or conduct related to taking unprotected industrial action. It is unclear whether minor, less serious or technical breaches are necessarily, in all cases, contrary to the interests of members. Further, it may also be that members have decided on a democratic basis to engage in conduct such as, for example, taking unprotected industrial action precisely because they consider it is in their interests to do so. This raises concerns that the measure as formulated does not appear to be rationally connected in all respects to ensuring that registered organisations act in the interests of members.

2.123 As to whether the limitation is reasonable and proportionate to achieve the stated objective, the minister's response states:

> The measures are reasonable and proportionate for the following reasons:

- The new grounds under which the Federal Court may make a declaration are clearly set out and if present, indicate that an organisation is not serving the interests of their members and is not functioning effectively.
- Limit the effect on members who have not been involved in maladministration or unlawful activity by providing for orders to be limited to the part of the organisation that has conducted those activities.
- Relief is discretionary and the Federal Court may find that no action is necessary or justified.
- Consistent with the current administration provisions, the Court must be satisfied that an order (should it choose to make one) would not do substantial injustice to the organisation or any member of the organisation.

2.124 These appear to be relevant safeguards in relation to the operation of the measure. However, given the scope of the grounds for a declaration there are questions that remain about whether the measure is the least rights restrictive approach in all circumstances. Accordingly, at least in relation to some proposed grounds for placing a union into administration, the measure would not appear to be a proportionate limitation on the right to freedom of association.

Committee response

2.125 The committee thanks the minister for her response and has concluded its examination of this issue.

2.126 The preceding analysis indicates that the measure may be incompatible with the right to freedom of association.

2.127 In order to improve the human rights compatibility of the measure, the committee recommends that the measure be amended so that prior to placing a registered organisation into administration the court must be satisfied that it is in the best interests of the members.

Introduction of a public interest test for amalgamations of unions

2.128 Under proposed section 72A, before fixing a date for an amalgamation of unions, the Fair Work Commission must decide that the amalgamation is in the 'public interest'.[44] In determining whether an amalgamation is in the 'public interest' the Fair Work Commission must have regard to a range of factors including record of compliance with the law, the impact of the amalgamation on employees and employers in the industry and any other matters. In relation to compliance with the

44 See proposed section 72A.

law, the Fair Work Commission must decide that the amalgamation is not in the public interest if the organisation has a record of not complying with the law.[45]

Compatibility of the measure with the right to freedom of association and the right to just and favourable conditions at work

2.129 As the previous analysis noted, by inserting a public interest test in relation to the amalgamations the measure engages and limits the right to freedom of association, and particularly the right to form associations of one's own choosing. International supervisory mechanisms have noted concerns with measures that limit the ability of unions to amalgamate stating that '[t]rade union unity voluntarily achieved should not be prohibited and should be respected by the public authorities'.[46]

2.130 The statement of compatibility identifies the objective of the measure as 'enhancing relations within workplaces and to reduce the adverse effects of industrial disputation'.[47] No information is provided as to whether this addresses a pressing and substantial concern as required to constitute a legitimate objective for the purposes of international human rights law. The initial analysis stated that it cannot be assumed that industrial disputes necessarily have adverse effects given that the right to take industrial action is protected as a matter of international law. In this respect, international treaty monitoring bodies have consistently viewed this right 'by workers and their organizations as a legitimate means of defending their economic and social interests'.[48]

2.131 The committee therefore requested the further advice of the minister as to:

- whether the measure pursues a legitimate objective for the purposes of international human rights law;
- how the measure is effective to achieve (that is, rationally connected to) its stated objective; and
- whether the limitation is a reasonable and proportionate measure to achieve the stated objective (in particular, whether the measure is the least rights restrictive way of achieving its stated objective, whether the measure is sufficiently circumscribed, the extent of the limitation including in respect of the right to strike noting previous concerns raised

45 See proposed section 72D.

46 ILO, Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO, Fifth Edition (2006) [332].

47 SOC x.

48 ILO, Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO, Fifth Edition (2006) [521].

by international supervisory mechanisms and the existence of relevant safeguards).

Minister's response

2.132 The minister's response describes the current arrangements for amalgamation. It notes that under the current provisions, once an application for amalgamation of organisations is lodged with the Fair Work Commission (FWC), it must set a hearing date to approve the 'scheme of amalgamation'. Unless an exemption is granted, the FWC will then direct the Australian Electoral Commission to conduct a secret postal ballot of members of each of the organisations. Providing certain preconditions are satisfied (the ballot has no irregularities; the FWC is satisfied that there are no relevant pending proceedings against the existing organisations; and the newly amalgamated organisation will be bound by the obligations of the existing organisations), the FWC fixes an amalgamation day on which the new organisation will become the only registered organisation, and the amalgamated organisations will be de-registered.

2.133 The minister's response describes the proposed amendments to amalgamations to introduce a public interest test:

> The [FWC], in determining the public interest, will take into account:
>
> - the impact on employees and employers in the industries concerned,
> - any history the organisations may have in breaking the law, taking into account the age and incidence of such contraventions, and
> - other relevant matters which could include the impact of a merger on the Australian economy.
>
> The existing organisations concerned will be able to be [sic] make submissions about the public interest, as will organisations and bodies that represent industries potentially affected by the merger and those who represent employees and employers in those industries.
>
> The Registered Organisations Commissioner, the Minister for Employment and a Minister who has responsibility for workplace relations in a referring state will also be able to make submissions. Submissions can also be made by any person with sufficient interest in the proposed amalgamation, that is, those whose rights, interests or legitimate expectations would be affected.
>
> Current section 73 of the RO Act provides for the Commission to set an amalgamation day where certain preconditions are met. This provision will be amended to clarify what pending proceedings are relevant to the decision as to whether to fix an amalgamation day. These will include some criminal and some civil proceedings.

2.134 As to whether the measure pursues a legitimate objective for the purposes of international law, the minister's response states:

> The public interest test for amalgamations will improve organisational governance, protect the interests of members, ensure that organisations meet the minimum standards set out in the RO Act and address community concerns by creating a disincentive for a culture of 'contempt for the rule of law' that has been identified amongst some registered organisations. It is a pressing and substantial concern, such as is required to constitute a legitimate objective for the purposes of international human rights law, that this culture is present in some registered organisations seeking to amalgamate.

2.135 In relation to whether the measure is rationally connected to (that is, effective to achieve) that objective, the minister's response states:

> The introduction of a public interest test will be effective in meeting this objective as it will reduce the risk of an adverse effect of an amalgamation of existing organisations. This is because a culture of lawlessness in one or more amalgamating organisations will be prevented from pervading into the other organisations involved in an amalgamation…
>
> When organisations or their officers deliberately breach relevant laws then there must be an effective sanction if the system of registration is to remain meaningful. In the case of a registered organisation, the sanction could include losing the right to act as an officer, losing the right to expand through amalgamation, being placed into administration, or losing registration.
>
> If an organisation obeys the law and complies with its rules then its activities will not be limited by the provisions in the Bill. For example, two organisations that comply with the law would be highly likely to satisfy the public interest test for amalgamations.

2.136 It is acknowledged that ensuring compliance with the law may be an important mechanism to achieve a particular objective. However, as noted above, it is not an end in itself, and there needs to be consideration of the nature of the laws being enforced and whether the enforcement of those laws are effective to achieve a legitimate objective as a matter of international human rights law. Further, it is unclear that each aspect of the proposed 'public interest' test is rationally connected to this stated objective. This is because the FWC will also need to consider issues such as 'impact on employers' and the impact on the Australian economy.

2.137 The minister's response additionally notes that article 8(1) of ILO Convention provides 'that, in exercising the rights provided for in the Convention, workers, employers and their respective organisations shall respect the law of the land'. However, as set out above, this article needs to be understood in the context of article 8(2) of ILO Convention 87 which specifically states that 'The law of the land shall not be such as to impair, nor shall it be so applied as to impair, the guarantees

provided for in this Convention.'[49] As such, article 8(1) does not provide a basis for the proposed measure.

2.138 The minister's response provides information as to whether the limitation imposed is reasonable and proportionate. It states that the limitation is sufficiently circumscribed as 'it does not impact on the rights of workers to continue to be represented by a registered organisation and takes the likely benefit to members of the existing organisations proposing to enter into an amalgamation into account.' However, while members may still be able to be represented by their existing union, the measure does limit choices as to the form of representation including joining together with another union. While the likely benefit to members in an amalgamation is one factor to be taken into account, the FWC is required to consider other factors including the 'impact on employers' and the 'impact on the economy'. These factors may in fact run contrary to the interests of members. For example, the amalgamation of unions may lead to greater campaigning capacity which by its nature may be in the interests of members but not employers in a particular industry. The scope of the measure as currently formulated would appear to potentially operate to prevent unions amalgamating on the basis of concerns that they could have too much bargaining or campaigning power against employers. As noted above, the measure runs contrary to jurisprudence from international monitoring bodies which states '[t]rade union unity voluntarily achieved should not be prohibited and should be respected by the public authorities'.[50] Even if it were accepted that the measures pursued a legitimate objective for the purposes of international human rights law, the measure appears to be overly broad with respect to a number of the objectives identified. For example, it does not appear to be the least rights restrictive approach to protecting the interests of members or even ensuring greater compliance with the law. In order for a limitation on human rights to be proportionate it must be the least rights restrictive way of achieving its objective.

2.139 In addition, the minister's response argues that the measure does not further limit the right to strike. No explanation is provided as to the basis for this claim. Indeed, the objective of the measure initially identified in the statement of compatibility was 'to reduce the adverse effects of industrial disputation' a further objective identified in the response is to provide an effective 'sanction' for non-compliance with the law. In this respect, one of the objectives of the measure may extend to 'sanctioning' industrial action which does not comply with Part 3-3 of the Fair Work Act. As such, by providing that the FWC must decide that the amalgamation is not in the public interest if the organisation has a record of not

49 See, ILO General Survey by the Committee of Experts on the Application of Conventions and Recommendations on Freedom of Association and Collective Bargaining (1994), [181].

50 ILO, Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO, Fifth Edition (2006) [332].

complying with the law, the measure appears to further limit the right to strike in circumstances where non-compliance relates to taking unprotected industrial action. As set out above, international supervisory mechanisms have consistently raised concerns about the current restrictions on taking industrial action under Australian domestic law.

2.140 The minister's response further argues that the measure is a proportionate limitation on the basis that the 'measure is properly supervised by a full bench of the [FWC] to ensure rigorous and robust consideration of merger applications, with appropriate limitations on the [FWC's] discretion in place'. While it is a relevant safeguard that the decision as to whether an amalgamation is in the 'public interest' is to be made by the FWC, this alone appears to be insufficient to ensure that the measure constitutes a proportionate limitation. As outlined above, the measure appears to be overly broad such that it does not appear to be the least rights restrictive approach.

Committee response

2.141 The committee thanks the minister for her response and has concluded its examination of this issue.

2.142 The preceding analysis indicates that the measure is likely to be incompatible with the right to freedom of association.

Treasury Laws Amendment (Housing Tax Integrity) Bill 2017; Foreign Acquisitions and Takeovers Fees Imposition Amendment (Vacancy Fees) Bill 2017

Purpose	The bills seek to introduce a range of measures including amendments to the *Foreign Acquisitions and Takeovers Act 1975* to implement an annual vacancy charge on foreign owners of residential real estate where the property is not occupied or genuinely available on the rental market for at least six months in a 12 month period
Portfolio	Treasury
Introduced	House of Representatives, 7 September 2017
Rights	Equality and non-discrimination; criminal process rights (see **Appendix 2**)
Previous report	11 of 2017
Status	Concluded examination

Background

2.143 The committee first reported on the Treasury Laws Amendment (Housing Tax Integrity) Bill 2017 and the Foreign Acquisitions and Takeovers Fees Imposition Amendment (Vacancy Fees) Bill 2017 in its *Report 11 of 2017*, and requested a response from the treasurer by 1 November 2017.[1]

2.144 The bills passed the House of Representatives on 18 October 2017 and passed in the Senate on 15 November 2017.

2.145 The treasurer's response to the committee's inquiries was received on 9 November 2017. The response is discussed below and is reproduced in full at **Appendix 3**.

Introduction of an annual vacancy charge on foreign owners of residential real estate

2.146 The Treasury Laws Amendment (Housing Tax Integrity) Bill 2017 amends the *Foreign Acquisitions and Takeovers Act 1975* to implement an annual vacancy fee

1 Parliamentary Joint Committee on Human Rights, *Report 11 of 2017* (17 October 2017) 35-41.

payable by 'foreign persons'[2] who own residential property where the property is not occupied or genuinely available on the rental market for at least six months in a 12 month period. The Foreign Acquisitions and Takeovers Fees Imposition Amendment (Vacancy Fees) Bill 2017 amends the *Foreign Acquisitions and Takeovers Fees Imposition Act 2015* to set the level of vacancy fee payable.

Compatibility of the measure with the right to equality and non-discrimination

2.147 The right to equality and non-discrimination provides that everyone is entitled to enjoy their rights without discrimination of any kind, and that all people are equal before the law and entitled without discrimination to equal and non-discriminatory protection of the law.

2.148 'Discrimination' under articles 2 and 26 of the International Covenant on Civil and Political Rights (ICCPR) includes both measures that have a discriminatory intent (direct discrimination) and measures that have a discriminatory effect on the enjoyment of rights (indirect discrimination).[3] The UN Human Rights Committee has explained indirect discrimination as 'a rule or measure that is neutral at face value or without intent to discriminate', but which exclusively or disproportionality affects people with a particular personal attribute.[4]

2.149 Residency is not a personal attribute protected under article 26. However, Australia does have obligations not to discriminate on grounds of nationality or national origin, except to the extent of the discretion recognised under international law with respect to the treatment of non-nationals.[5]

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2 "foreign person" is defined in section 4 of the *Foreign Acquisitions and Takeovers Act 1975* to mean: (a) an individual not ordinarily resident in Australia; or (b) a corporation in which an individual not ordinarily resident in Australia, a foreign corporation or a foreign government holds a substantial interest; or (c) a corporation in which 2 or more persons, each of whom is an individual not ordinarily resident in Australia, a foreign corporation or a foreign government, hold an aggregate substantial interest; or (d) the trustee of a trust in which an individual not ordinarily resident in Australia, a foreign corporation or a foreign government holds a substantial interest; or (e) the trustee of a trust in which 2 or more persons, each of whom is an individual not ordinarily resident in Australia, a foreign corporation or a foreign government, hold an aggregate substantial interest; or (f) a foreign government; or (g) any other person, or any other person that meets the conditions, prescribed by the regulations.

3 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'.

4 *Althammer v Austria,* Human Rights Committee Communication no. 998/01 [10.2].

5 See UN Committee on the Elimination of Racial Discrimination, *General Recommendation 30: Discrimination against non-citizens* (2004).

2.150 The statement of compatibility acknowledges that, while an Australian citizen who is not ordinarily resident in Australia may be a 'foreign person', the majority of individuals directly affected by the bill will not be Australian citizens.[6] Insofar as the operation of the scheme will introduce a fee that will primarily affect non-citizens, Australia's obligations in relation to non-discrimination on grounds of nationality and national origin may be engaged. Where a measure impacts on particular groups disproportionately, it establishes prima facie that there may be indirect discrimination, in this case, indirect discrimination against persons who are not Australian citizens.[7]

2.151 The statement of compatibility acknowledges that the right to equality and non-discrimination is engaged and limited, stating:

> The Bill limits Article 26 of the ICCPR and Articles 2 and 5 of International Convention on the Elimination of All Forms of Racial Discrimination because the core obligations imposed by the Bill only apply to a 'foreign person'. While an Australian citizen who is not ordinarily resident in Australia may be a 'foreign person' for the purposes of this Act, it is anticipated that the majority of individuals who are directly affected by this Bill will not be Australian citizens.[8]

2.152 The statement of compatibility identifies the objective of the measure as follows:

> This Schedule aims to create a larger stock of available housing in Australia by creating an incentive for foreign persons who own residential property to either occupy that property or make it available for rent on the rental market through the creation of a vacancy fee…[9]

2.153 The explanatory memorandum further explains that the measure is part of a number of initiatives to address housing affordability.[10]

2.154 The right to an adequate standard of living is guaranteed by article 11(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) and

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6 Statement of Compatibility (SOC) [3.109]-[3.110].

7 See, *D.H. and Others v the Czech Republic* ECHR Application no. 57325/00 (13 November 2007) 49; *Hoogendijk v the Netherlands* ECHR, Application no. 58641/00 (6 January 2005). The initial analysis noted by way of example that in 2015, the Victorian Scrutiny of Acts and Regulations Committee referred to the Victorian Parliament for its consideration whether a law which imposed higher property taxes on foreign citizens than on Australian and New Zealand citizens for the purpose of ensuring that a larger number of local homebuyers remain competitive in the housing market was a reasonable limitation on the right against discrimination on the basis of nationality: Victorian Scrutiny of Acts and Regulations Committee, *Alert Digest No.5 of 2015* (2015) pages 4-6.

8 SOC [3.109].

9 SOC [3.99].

10 Explanatory Memorandum [3.8].

requires that the state take steps to ensure the availability, adequacy and accessibility of food, clothing, water and housing for all people in Australia. In this respect, the UN Special Rapporteur on adequate housing has recently emphasised the importance of the right to adequate housing and noted that it is a human right which is interdependent with other human rights, particularly the right to equality and non-discrimination and the right to life.[11] Therefore, as noted in the initial analysis, the stated objectives of creating more available housing in Australia and addressing housing affordability are likely to be legitimate objectives for the purposes of international human rights law. Introducing a vacancy fee to encourage occupying residential property or making property available on the rental market appears to be rationally connected to these objectives.

2.155 In relation to the proportionality of the measure, the statement of compatibility states that the limitation on the right to non-discrimination is justified:

> While the bill, if enacted, will primarily affect individuals who are citizens of countries other than Australia, there is no less restrictive way of achieving the objectives of the Bill. Accordingly those limitations are reasonable, necessary and proportionate.[12]

2.156 The statement of compatibility does not address why it is necessary to impose the vacancy fee only on foreign persons, as opposed to all persons who may own residential property which is left vacant. Further, while the statement of compatibility states that the measure is the least restrictive means of achieving the stated objectives, there is no further information provided to support this statement, including any information to explain the rationale for differential treatment between foreign persons (the majority of whom will be non-nationals) and residents. The initial analysis stated that information regarding the number of foreign persons who leave properties vacant in contrast with Australian residents is likely to be relevant to the proportionality analysis.

2.157 The committee therefore sought the advice of the treasurer as to whether the measure is reasonable and proportionate for the achievement of the stated objectives (including how it is based on reasonable and objective criteria; any evidence regarding the number of foreign persons who leave properties vacant in contrast with Australian residents; or any other information to explain the rationale for the differential treatment between nationals and non-nationals; and whether there are other less rights restrictive ways to achieve the stated objective).

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11 *Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context,* A/HRC/34/51, (2017), [11].

12 SOC [3.110].

Treasurer's response

2.158 The treasurer's response states that the charge is proposed to provide a financial incentive for a foreign owner to make their property available on the rental market and that it is expected that the measure will increase the number of homes available to Australians wishing to rent. The response further explains that the charge will only apply to 'foreign persons'[13] who are required to apply and subsequently receive from the Foreign Investment Review Board approval for a residential real estate acquisition, and that the vacancy charge forms part of and is consistent with Australia's foreign investment framework under the *Foreign Acquisitions and Takeovers Act* 1975. The treasurer's response also emphasises the limited scope of the measure, namely that the charge is only payable when a property is not occupied or genuinely available on the rental market for at least six months in a 12 month period, and is subject to a number of exceptions, including that the charge will not be payable where the property could not be reasonably occupied (for example, where the property is undergoing substantial renovations, or has been damaged).

2.159 The treasurer's response otherwise did not respond to the committee's specific inquiries as to any evidence regarding the number of foreign persons who leave properties vacant in contrast with Australian residents who leave properties vacant, or any other information to explain the rationale for the differential treatment between nationals and non-nationals.

2.160 The 2016 Census revealed that 11.2% of dwellings in Australia were unoccupied on the night of the census.[14] It is not clear from this data how much of that amount comprises foreign owners of residential property who have left the property vacant. A previous parliamentary inquiry into foreign investment in residential real estate also did not have data on this point, however it was noted that the issue was one of concern but that it was difficult to obtain information or evidence that foreign owned properties were being left vacant.[15] A subsequent Senate inquiry into housing affordability in Australia similarly noted the lack of accurate or timely data tracking foreign investment in residential real estate.[16] That inquiry also concluded that 'a significant number of Australians are not enjoying the

13 As defined in the *Foreign and Acquisitions Takeovers Act 1975*.

14 SGS Economics and Planning, *Why was no one home on Census night?* (24 July 2017) http://www.sgsep.com.au/publications/why-was-no-one-home-census-night.

15 House of Representatives Standing Committee on Economics, *Report on Foreign Investment in Residential Real Estate* (November 2014) 96.

16 Senate Economics References Committee, *Out of Reach? The Australian housing affordability challenge* (May 2015) 42-43.

security and comfort of affordable and appropriate housing' and that 'currently Australia's housing market is not meeting the needs of all Australians'.[17]

2.161 As noted in the initial analysis, the objectives of the measure of increasing housing availability and reducing pressure on housing affordability are likely to be legitimate objectives for the purposes of human rights law. The statistical evidence as to unoccupied premises in Australia further demonstrates that the measure is aimed at addressing a pressing and substantial concern. It is also noted that the measure is limited in its scope such that it will only apply when a property is not occupied or genuinely available on the rental market for at least six months in a 12 month period, and the government expects that the measure will increase the number of homes available to Australians wishing to rent. In light of this information and having regard to Australia's obligations under the ICESCR to take steps to ensure the availability, adequacy and accessibility of housing for all people in Australia, it appears on balance that the measure would constitute a permissible limitation on the right to equality and non-discrimination. However, it is noted that specific information is not available regarding the extent to which vacancies arise in foreign-owned properties rather than properties owned by Australian residents or citizens.

Committee response

2.162 The committee thanks the treasurer for his response and has concluded its examination of this issue.

2.163 The committee considers that on balance the measure is likely to be a permissible limitation on the right to equality and non-discrimination.

Civil penalty provisions

2.164 Schedule 3 of the bill provides that a civil penalty may apply where a foreign person fails to submit a 'vacancy fee return'[18] or keep the required records.[19] The civil penalty for failing to submit a vacancy fee return and for failing to keep required records is 250 penalty units (currently $52,500).[20]

17 Senate Economics References Committee, *Out of Reach? The Australian housing affordability challenge* (May 2015), xvii.

18 The return must be in the approved form within the meaning of section 388-50 in Schedule 1 to the *Taxation Administration Act 1953*. The amount of the vacancy fee is in Part 2 of the *Foreign Acquisitions and Takeovers Fees Imposition Act 2015*.

19 See proposed section 115D(1) of Schedule 3 (vacancy fee return), and proposed section 115G(1) of Schedule 3 (requirement to keep records).

20 See section 4AA of the *Crimes Act 1914*.

Compatibility of the measure with criminal process rights

2.165 Civil penalty provisions are dealt with in accordance with the rules and procedures that apply in relation to civil matters (the burden of proof is on the balance of probabilities).

2.166 However, civil penalty provisions engage the criminal process rights under articles 14 and 15 of the ICCPR where the penalty is regarded as 'criminal' for the purposes of international human rights law. The term 'criminal' has an 'autonomous' meaning in human rights law. In other words, a penalty or other sanction may be 'criminal' for the purposes of the ICCPR even though it is described as 'civil' under Australian domestic law.

2.167 The committee's *Guidance Note 2* sets out some of the key human rights compatibility issues in relation to provisions that create offences and civil penalties.

2.168 The initial analysis identified that the statement of compatibility does not discuss whether the civil penalty provisions engage human rights and has not addressed whether they may be classified as 'criminal' for the purposes of international human rights law.

2.169 Applying the tests set out in the committee's *Guidance Note 2*, the first step in determining whether a penalty is 'criminal' is to look to its classification under domestic law. In this instance, the penalty is classified as 'civil' in the bill, however as stated above, this is not determinative of its status under international human rights law.

2.170 The second step is to consider the nature and purpose of the penalty. The penalty is likely to be considered to be criminal if the purpose of the penalty is to punish or deter, and the penalty applies to the public in general (rather than being restricted to people in a specific regulatory or disciplinary context). No information addressing the nature and purpose of the penalty is provided in the statement of compatibility. The purpose of the penalty appears to be to punish and deter non-compliance. However, the penalty applies only to those foreign persons who fail to submit a vacancy fee return or keep the required records.

2.171 The third step is to consider the severity of the penalty. In this case an individual could be exposed to a significant penalty of up to $52,500. A penalty is likely to be considered 'criminal' where it carries a penalty of a substantial pecuniary sanction. This must be assessed with due regard to regulatory context, including the nature of the industry or sector being regulated and the relative size of the pecuniary penalties being imposed. The severity of the penalty in this particular regulatory context is unclear due to the lack of information in the statement of compatibility.

2.172 If the penalty is considered to be 'criminal' for the purposes of international human rights law, the 'civil penalty' provisions in the bill must be shown to be compatible with the criminal process guarantees set out in articles 14 and 15 of the

ICCPR. In this case, the initial analysis stated that the measure does not appear to be consistent with criminal process guarantees.

2.173 The committee therefore drew the attention of the treasurer to its *Guidance Note 2* and sought advice as to whether:

- the civil penalty in the bill is 'criminal' in nature for the purposes of international human rights law (having regard to the committee's *Guidance Note 2*); and
- if the penalty is considered 'criminal' for the purposes of international human rights law, whether the measures could be amended to accord with criminal process rights.

Treasurer's response

2.174 In his response, the treasurer provides the following information:

> […]
>
> The civil penalty provisions in the Bill should not be considered 'criminal' for the purposes of international human rights law. While the civil penalty provisions included in the Bill are intended to deter people from not complying with the obligations imposed by the Act, none of the civil penalty provisions carry a penalty of imprisonment and there is no sanction of imprisonment for non payment of any penalty. In addition, the maximum pecuniary penalty that may be imposed on an individual for contravening a civil penalty provision is generally lower than [the] maximum pecuniary penalty that may be imposed for the corresponding criminal offence. The statement of compatibility therefore proceeds on the basis that the civil penalty provisions in the Bill do not create criminal offences for the purposes of Articles 14 and 15 of the ICCPR.

2.175 The treasurer's response acknowledges that the purpose of the penalty is to operate as a deterrent. However, as summarised above at [2.158], the penalty operates in a particular context, namely Australia's foreign investment regime. The measure also applies only to particular persons, namely 'foreign persons' (as defined) who are required to apply and subsequently receive from the Foreign Investment Review Board approval for a residential real estate acquisition. The treasurer also explains that the relative size of the pecuniary penalty is smaller than any corresponding criminal penalty. Having regard to the regulatory context and the particular context in which the penalty applies, it is likely that the penalty would not be considered 'criminal' for the purposes of international human rights law.

Committee response

2.176 The committee thanks the treasurer for his response and has concluded its examination of this issue.

2.177 In light of the further information provided by the minister, the committee considers that the proposed civil penalty provisions in the bill are unlikely to be considered 'criminal' for the purposes of international human rights law.

Mr Ian Goodenough MP

Chair

Appendix 1

Deferred legislation

3.1 The committee has deferred its consideration of the following legislation for the reporting period:

- Appeals Rule 2017 [F2017L01197];
- ASIC Client Money Reporting Rules 2017 [F2017L01333];
- Commonwealth Redress Scheme for Institutional Child Sexual Abuse Bill 2017;
- Commonwealth Redress Scheme for Institutional Child Sexual Abuse (Consequential Amendments) Bill 2017;
- Corporations (Aboriginal and Torres Strait Islander) Regulations 2017 [F2017L01311];
- Discipline Rule 2017 [F2017L01196];
- Health Insurance (Approved Pathology Undertakings) Approval 2017 [F2017L01293];
- Marriage Amendment (Definition and Religious Freedoms) Bill 2017; and
- Torres Strait Regional Authority Election Rules 2017 [F2017L01279].

3.2 The committee continues to defer its consideration of the following legislation:

- Federal Financial Relations (National Partnership Payments) Determination No. 123 (August 2017) [F2017L01143]; and
- Federal Financial Relations (National Partnership Payments) Determination No. 122 (July 2017) [F2017L01148].

Appendix 2

Short guide to human rights

4.1 The following guide contains short descriptions of human rights regularly considered by the committee. State parties to the seven principal human rights treaties are under a binding obligation to respect, protect and promote each of these rights. For more detailed descriptions please refer to the committee's *Guide to human rights*.[1]

4.2 Some human rights obligations are absolute under international law, that is, a state cannot lawfully limit the enjoyment of an absolute right in any circumstances. The prohibition on slavery is an example. However, in relation to most human rights, a necessary and proportionate limitation on the enjoyment of a right may be justified under international law. For further information regarding when limitations on rights are permissible, please refer to the committee's *Guidance Note 1* (see Appendix 4).[2]

Right to life

*Article 6 of the International Covenant on Civil and Political Rights (**ICCPR**); and article 1 of the Second Optional Protocol to the ICCPR*

4.3 The right to life has three core elements:

- it prohibits the state from arbitrarily killing a person;
- it imposes an obligation on the state to protect people from being killed by others or identified risks; and
- it imposes on the state a duty to undertake an effective and proper investigation into all deaths where the state is involved (discussed below, [4.5]).

4.4 Australia is also prohibited from imposing the death penalty.

Duty to investigate

Articles 2 and 6 of the ICCPR

4.5 The right to life requires there to be an effective official investigation into deaths resulting from state use of force and where the state has failed to protect life. Such an investigation must:

- be brought by the state in good faith and on its own initiative;
- be carried out promptly;

1 Parliamentary Joint Committee on Human Rights, Guide to Human Rights (June 2015).

2 Parliamentary Joint Committee on Human Rights, Guidance Note 1 (December 2014).

- be independent and impartial; and
- involve the family of the deceased, and allow the family access to all information relevant to the investigation.

Prohibition against torture, cruel, inhuman or degrading treatment

*Article 7 of the ICCPR; and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (**CAT**)*

4.6 The prohibition against torture, cruel, inhuman or degrading treatment or punishment is absolute. This means that torture or cruel, inhuman or degrading treatment or punishment is not permissible under any circumstances.

4.7 The prohibition contains a number of elements:

- it prohibits the state from subjecting a person to torture or cruel, inhuman or degrading practices, particularly in places of detention;
- it precludes the use of evidence obtained through torture;
- it prevents the deportation or extradition of a person to a place where there is a substantial risk they will be tortured or treated inhumanely (see also non-refoulement obligations, [4.9] to [4.11]); and
- it requires an effective investigation into any allegations of such treatment and steps to prevent such treatment occurring.

4.8 The aim of the prohibition against torture, cruel, inhuman or degrading treatment is to protect the dignity of the person and relates not only to acts causing physical pain but also acts causing mental suffering. The prohibition is also an aspect of the right to humane treatment in detention (see below, [4.18]).

Non-refoulement obligations

Article 3 of the CAT; articles 2, 6(1) and 7 of the ICCPR; and Second Optional Protocol to the ICCPR

4.9 Non-refoulement obligations are absolute and may not be subject to any limitations.

4.10 Australia has non-refoulement obligations under both the ICCPR and the CAT, as well as under the Convention Relating to the Status of Refugees and its Protocol (**Refugee Convention**). This means that Australia must not under any circumstances return a person (including a person who is not a refugee) to a country where there is a real risk that they would face persecution, torture or other serious forms of harm, such as the death penalty; arbitrary deprivation of life; or cruel, inhuman or degrading treatment or punishment.

4.11 Effective and impartial review by a court or tribunal of decisions to deport or remove a person, including merits review in the Australian context, is integral to complying with non-refoulement obligations.

Prohibition against slavery and forced labour

Article 8 of the ICCPR

4.12 The prohibition against slavery, servitude and forced labour is a fundamental and absolute human right. This means that slavery and forced labour are not permissible under any circumstances.

4.13 The prohibition on slavery and servitude is a prohibition on 'owning' another person or exploiting or dominating another person and subjecting them to 'slavery-like' conditions.

4.14 The right to be free from forced or compulsory labour prohibits requiring a person to undertake work that they have not voluntarily consented to, but which they do because of either physical or psychological threats. The prohibition does not include lawful work required of prisoners or those in the military; work required during an emergency; or work or service that is a part of normal civic obligations (for example, jury service).

4.15 The state must not subject anyone to slavery or forced labour, and ensure adequate laws and measures are in place to prevent individuals or companies from subjecting people to such treatment (for example, laws and measures to prevent trafficking).

Right to liberty and security of the person

Article 9 of the ICCPR

Right to liberty

4.16 The right to liberty of the person is a procedural guarantee not to be arbitrarily and unlawfully deprived of liberty. It applies to all forms of deprivation of liberty, including detention in criminal cases, immigration detention, forced detention in hospital, detention for military discipline and detention to control the spread of contagious diseases. Core elements of this right are:

- the prohibition against arbitrary detention, which requires that detention must be lawful, reasonable, necessary and proportionate in all the circumstances, and be subject to regular review;
- the right to reasons for arrest or other deprivation of liberty, and to be informed of criminal charge;
- the rights of people detained on a criminal charge, including being promptly brought before a judicial officer to decide if they should continue to be detained, and being tried within a reasonable time or otherwise released (these rights are linked to criminal process rights, discussed below);
- the right to challenge the lawfulness of any form of detention in a court that has the power to order the release of the person, including a right to have

access to legal representation, and to be informed of that right in order to effectively challenge the detention; and

- the right to compensation for unlawful arrest or detention.

Right to security of the person

4.17 The right to security of the person requires the state to take steps to protect people from others interfering with their personal integrity. This includes protecting people who may be subject to violence, death threats, assassination attempts, harassment and intimidation (for example, protecting people from domestic violence).

Right to humane treatment in detention

Article 10 of the ICCPR

4.18 The right to humane treatment in detention provides that all people deprived of their liberty, in any form of state detention, must be treated with humanity and dignity. The right complements the prohibition on torture and cruel, inhuman or degrading treatment or punishment (see above, [4.6] to [4.8]). The obligations on the state include:

- a prohibition on subjecting a person in detention to inhumane treatment (for example, lengthy solitary confinement or unreasonable restrictions on contact with family and friends);
- monitoring and supervision of places of detention to ensure detainees are treated appropriately;
- instruction and training for officers with authority over people deprived of their liberty;
- complaint and review mechanisms for people deprived of their liberty; and
- adequate medical facilities and health care for people deprived of their liberty, particularly people with disability and pregnant women.

Freedom of movement

Article 12 of the ICCPR

4.19 The right to freedom of movement provides that:

- people lawfully within any country have the right to move freely within that country;
- people have the right to leave any country, including the right to obtain travel documents without unreasonable delay; and
- no one can be arbitrarily denied the right to enter or remain in his or her own country.

Right to a fair trial and fair hearing

Articles 14(1) (fair trial and fair hearing), 14(2) (presumption of innocence) and 14(3)-(7) (minimum guarantees) of the ICCPR

4.20 The right to a fair hearing is a fundamental part of the rule of law, procedural fairness and the proper administration of justice. The right provides that all persons are:

- equal before courts and tribunals; and
- entitled to a fair and public hearing before an independent and impartial court or tribunal established by law.

4.21 The right to a fair hearing applies in both criminal and civil proceedings, including whenever rights and obligations are to be determined.

Presumption of innocence

Article 14(2) of the ICCPR

4.22 This specific guarantee protects the right to be presumed innocent until proven guilty of a criminal offence according to law. Generally, consistency with the presumption of innocence requires the prosecution to prove each element of a criminal offence beyond reasonable doubt (the committee's *Guidance Note* 2 provides further information on offence provisions (see Appendix 4)).

Minimum guarantees in criminal proceedings

Article 14(2)-(7) of the ICCPR

4.23 These specific guarantees apply when a person has been charged with a criminal offence or are otherwise subject to a penalty which may be considered criminal, and include:

- the presumption of innocence (see above, [4.22]);
- the right not to incriminate oneself (the ill-treatment of a person to obtain a confession may also breach the prohibition on torture, cruel, inhuman or degrading treatment (see above, [4.6] to [4.8]);
- the right not to be tried or punished twice (double jeopardy);
- the right to appeal a conviction or sentence and the right to compensation for wrongful conviction; and
- other specific guarantees, including the right to be promptly informed of any charge, to have adequate time and facilities to prepare a defence, to be tried in person without undue delay, to examine witnesses, to choose and meet with a lawyer and to have access to effective legal aid.

Prohibition against retrospective criminal laws

Article 15 of the ICCPR

4.24 The prohibition against retrospective criminal laws provides that:

- no-one can be found guilty of a crime that was not a crime under the law at the time the act was committed;
- anyone found guilty of a criminal offence cannot be given a heavier penalty than one that applied at the time the offence was committed; and
- if, after an offence is committed, a lighter penalty is introduced into the law, the lighter penalty should apply to the offender. This includes a right to benefit from the retrospective decriminalisation of an offence (if the person is yet to be penalised).

4.25 The prohibition against retrospective criminal laws does not apply to conduct which, at the time it was committed, was recognised under international law as being criminal even if it was not a crime under Australian law (for example, genocide, war crimes and crimes against humanity).

Right to privacy

Article 17 of the ICCPR

4.26 The right to privacy prohibits unlawful or arbitrary interference with a person's private, family, home life or correspondence. It requires the state:

- not to arbitrarily or unlawfully invade a person's privacy; and
- to adopt legislative and other measures to protect people from arbitrary interference with their privacy by others (including corporations).

4.27 The right to privacy contains the following elements:

- respect for private life, including information privacy (for example, respect for private and confidential information and the right to control the storing, use and sharing of personal information);
- the right to personal autonomy and physical and psychological integrity, including respect for reproductive autonomy and autonomy over one's own body (for example, in relation to medical testing);
- the right to respect for individual sexuality (prohibiting regulation of private consensual adult sexual activity);
- the prohibition on unlawful and arbitrary state surveillance;
- respect for the home (prohibiting arbitrary interference with a person's home and workplace including by unlawful surveillance, unlawful entry or arbitrary evictions);

- respect for family life (prohibiting interference with personal family relationships);
- respect for correspondence (prohibiting arbitrary interception or censoring of a person's mail, email and web access), including respect for professional duties of confidentiality; and
- the right to reputation.

Right to protection of the family

*Articles 17 and 23 of the ICCPR; and article 10 of the International Covenant on Economic, Social and Cultural Rights (**ICESCR**)*

4.28 Under human rights law the family is recognised as the natural and fundamental group unit of society and is therefore entitled to protection. The right requires the state:

- not to arbitrarily or unlawfully interfere in family life; and
- to adopt measures to protect the family, including by funding or supporting bodies that protect the family.

4.29 The right also encompasses:

- the right to marry (with full and free consent) and found a family;
- the right to equality in marriage (for example, laws protecting spouses equally) and protection of any children on divorce;
- protection for new mothers, including maternity leave; and
- family unification.

Right to freedom of thought and religion

Article 18 of the ICCPR

4.30 The right to hold a religious or other belief or opinion is absolute and may not be subject to any limitations.

4.31 However, the right to exercise one's belief may be subject to limitations given its potential impact on others.

4.32 The right to freedom of thought, conscience and religion includes:

- the freedom to choose and change religion or belief;
- the freedom to exercise religion or belief publicly or privately, alone or with others (including through wearing religious dress);
- the freedom to exercise religion or belief in worship, teaching, practice and observance; and
- the right to have no religion and to have non-religious beliefs protected (for example, philosophical beliefs such as pacifism or veganism).

4.33 The right to freedom of thought and religion also includes the right of a person not to be coerced in any way that might impair their ability to have or adopt a religion or belief of their own choice. The right to freedom of religion prohibits the state from impairing, through legislative or other measures, a person's freedom of religion; and requires it to take steps to prevent others from coercing persons into following a particular religion or changing their religion.

Right to freedom of opinion and expression

*Articles 19 and 20 of the ICCPR; and article 21 of the Convention on the Rights of Persons with Disabilities (**CRPD**)*

4.34 The right to freedom of opinion is the right to hold opinions without interference. This right is absolute and may not be subject to any limitations.

4.35 The right to freedom of expression relates to the communication of information or ideas through any medium, including written and oral communications, the media, public protest, broadcasting, artistic works and commercial advertising. It may be subject to permissible limitations.

Right to freedom of assembly

Article 21 of the ICCPR

4.36 The right to peaceful assembly is the right of people to gather as a group for a specific purpose. The right prevents the state from imposing unreasonable and disproportionate restrictions on assemblies, including:

- unreasonable requirements for advance notification of a peaceful demonstration (although reasonable prior notification requirements are likely to be permissible);
- preventing a peaceful demonstration from going ahead or preventing people from joining a peaceful demonstration;
- stopping or disrupting a peaceful demonstration;
- punishing people for their involvement in a peaceful demonstration or storing personal information on a person simply because of their involvement in a peaceful demonstration; and
- failing to protect participants in a peaceful demonstration from disruption by others.

Right to freedom of association

Article 22 of the ICCPR; and article 8 of the ICESCR

4.37 The right to freedom of association with others is the right to join with others in a group to pursue common interests. This includes the right to join political parties, trade unions, professional and sporting clubs and non-governmental organisations.

4.38 The right prevents the state from imposing unreasonable and disproportionate restrictions on the right to form associations and trade unions, including:

- preventing people from forming or joining an association;
- imposing procedures for the formal recognition of associations that effectively prevent or discourage people from forming an association;
- punishing people for their membership of a group; and
- protecting the right to strike and collectively bargain.

4.39 Limitations on the right are not permissible if they are inconsistent with the guarantees of freedom of association and the right to organise as contained in the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize (ILO Convention No. 87).

Right to take part in public affairs

Article 25 of the ICCPR

4.40 The right to take part in public affairs includes guarantees of the right of Australian citizens to stand for public office, to vote in elections and to have access to positions in public service. Given the importance of free speech and protest to the conduct of public affairs in a free and open democracy, the realisation of the right to take part in public affairs depends on the protection of other key rights, such as freedom of expression, association and assembly.

4.41 The right to take part in public affairs is an essential part of democratic government that is accountable to the people. It applies to all levels of government, including local government.

Right to equality and non-discrimination

*Articles 2, 3 and 26 of the ICCPR; articles 2 and 3 of the ICESCR; International Convention on the Elimination of All Forms of Racial Discrimination (**CERD**); Convention on the Elimination of all Forms of Discrimination Against Women (**CEDAW**); CRPD; and article 2 of the Convention on the Rights of the Child (**CRC**)*

4.42 The right to equality and non-discrimination is a fundamental human right that is essential to the protection and respect of all human rights. The human rights treaties provide that everyone is entitled to enjoy their rights without discrimination of any kind, and that all people are equal before the law and entitled to the equal and non-discriminatory protection of the law.

4.43 'Discrimination' under the ICCPR encompasses both measures that have a discriminatory intent (direct discrimination) and measures which have a

discriminatory effect on the enjoyment of rights (indirect discrimination).[3] The UN Human Rights Committee has explained indirect discrimination as 'a rule or measure that is neutral on its face or without intent to discriminate', which exclusively or disproportionately affects people with a particular personal attribute.[4]

4.44 The right to equality and non-discrimination requires that the state:

- ensure all laws are non-discriminatory and are enforced in a non-discriminatory way;
- ensure all laws are applied in a non-discriminatory and non-arbitrary manner (equality before the law);
- have laws and measures in place to ensure that people are not subjected to discrimination by others (for example, in areas such as employment, education and the provision of goods and services); and
- take non-legal measures to tackle discrimination, including through education.

Rights of the child

CRC

4.45 Children have special rights under human rights law taking into account their particular vulnerabilities. Children's rights are protected under a number of treaties, particularly the CRC. All children under the age of 18 years are guaranteed these rights, which include:

- the right to develop to the fullest;
- the right to protection from harmful influences, abuse and exploitation;
- family rights; and
- the right to access health care, education and services that meet their needs.

Obligation to consider the best interests of the child

Articles 3 and 10 of the CRC

4.46 Under the CRC, states are required to ensure that, in all actions concerning children, the best interests of the child are a primary consideration. This requires active measures to protect children's rights and promote their survival, growth and wellbeing, as well as measures to support and assist parents and others who have

3 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'.

4 Althammer v Austria HRC 998/01, [10.2]. See above, for a list of 'personal attributes'.

day-to-day responsibility for ensuring recognition of children's rights. It requires legislative, administrative and judicial bodies and institutions to systematically consider how children's rights and interests are or will be affected directly or indirectly by their decisions and actions.

4.47 Australia is required to treat applications by minors for family reunification in a positive, humane and expeditious manner. This obligation is consistent with articles 17 and 23 of the ICCPR, which prohibit interference with the family and require family unity to be protected by society and the state (see above, [4.29]).

Right of the child to be heard in judicial and administrative proceedings

Article 12 of the CRC

4.48 The right of the child to be heard in judicial and administrative proceedings provides that states assure to a child capable of forming his or her own views the right to express those views freely in all matters affecting them. The views of the child must be given due weight in accordance with their age and maturity.

4.49 In particular, this right requires that the child is provided the opportunity to be heard in any judicial and administrative proceedings affecting them, either directly or through a representative or an appropriate body.

Right to nationality

Articles 7 and 8 of the CRC; and article 24(3) of the ICCPR

4.50 The right to nationality provides that every child has the right to acquire a nationality. Accordingly, Australia is required to adopt measures, both internally and in cooperation with other countries, to ensure that every child has a nationality when born. The CRC also provides that children have the right to preserve their identity, including their nationality, without unlawful interference.

4.51 This is consistent with Australia's obligations under the Convention on the Reduction of Statelessness 1961, which requires Australia to grant its nationality to a person born in its territory who would otherwise be stateless, and not to deprive a person of their nationality if it would render the person stateless.

Right to self-determination

Article 1 of the ICESCR; and article 1 of the ICCPR

4.52 The right to self-determination includes the entitlement of peoples to have control over their destiny and to be treated respectfully. The right is generally understood as accruing to 'peoples', and includes peoples being free to pursue their economic, social and cultural development. There are two aspects of the meaning of self-determination under international law:

- that the people of a country have the right not to be subjected to external domination and exploitation and have the right to determine their own political status (most commonly seen in relation to colonised states); and

- that groups within a country, such as those with a common racial or cultural identity, particularly Indigenous people, have the right to a level of internal self-determination.

4.53 Accordingly, it is important that individuals and groups, particularly Aboriginal and Torres Strait Islander peoples, should be consulted about decisions likely to affect them. This includes ensuring that they have the opportunity to participate in the making of such decisions through the processes of democratic government, and are able to exercise meaningful control over their affairs.

Rights to and at work

Articles 6(1), 7 and 8 of the ICESCR

Right to work

4.54 The right to work is the right of all people to have the opportunity to gain their living through decent work they freely choose, allowing them to live in dignity. It provides:

- that everyone must be able to freely accept or choose their work, including that a person must not be forced in any way to engage in employment;
- a right not to be unfairly deprived of work, including minimum due process rights if employment is to be terminated; and
- that there is a system of protection guaranteeing access to employment.

Right to just and favourable conditions of work

4.55 The right to just and favourable conditions of work provides that all workers have the right to just and favourable conditions of work, particularly adequate and fair remuneration, safe working conditions, and the right to join trade unions.

Right to social security

Article 9 of the ICESCR

4.56 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, in particular the right to an adequate standard of living and the right to health.

4.57 Access to social security is required when a person lacks access to other income and is left with insufficient means to access health care and support themselves and their dependents. Enjoyment of the right requires that sustainable social support schemes are:

- available to people in need;
- adequate to support an adequate standard of living and health care;

- accessible (providing universal coverage without discrimination; and qualifying and withdrawal conditions that are lawful, reasonable, proportionate and transparent); and
- affordable (where contributions are required).

Right to an adequate standard of living

Article 11 of the ICESCR

4.58 The right to an adequate standard of living requires that the state take steps to ensure the availability, adequacy and accessibility of food, clothing, water and housing for all people in its jurisdiction.

Right to health

Article 12 of the ICESCR

4.59 The right to health is the right to enjoy the highest attainable standard of physical and mental health. It is a right to have access to adequate health care (including reproductive and sexual healthcare) as well as to live in conditions that promote a healthy life (such as access to safe drinking water, housing, food and a healthy environment).

Right to education

Articles 13 and 14 of the ICESCR; and article 28 of the CRC

4.60 This right recognises the right of everyone to education. It recognises that education must be directed to the full development of the human personality and sense of dignity, and to strengthening respect for human rights and fundamental freedoms. It requires that primary education shall be compulsorily and freely available to all; and the progressive introduction of free secondary and higher education.

Right to culture

Article 15 of the ICESCR; and article 27 of the ICCPR

4.61 The right to culture provides that all people have the right to benefit from and take part in cultural life. The right also includes the right of everyone to benefit from scientific progress; and protection of the moral and material interests of the authors of scientific, literary or artistic productions.

4.62 Individuals belonging to minority groups have additional protections to enjoy their own culture, religion and language. The right applies to people who belong to minority groups in a state sharing a common culture, religion and/or language.

Right to an effective remedy

Article 2 of the ICCPR

4.63 The right to an effective remedy requires states to ensure access to an effective remedy for violations of human rights. States are required to establish

appropriate judicial and administrative mechanisms for addressing claims of human rights violations under domestic law. Where public officials have committed violations of rights, states may not relieve perpetrators from personal responsibility through amnesties or legal immunities and indemnities.

4.64 States are required to make reparation to individuals whose rights have been violated. Reparation can involve restitution, rehabilitation and measures of satisfaction—such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices—as well as bringing to justice the perpetrators of human rights violations. Effective remedies should be appropriately adapted to take account of the special vulnerability of certain categories of persons including, and particularly, children.

Appendix 3

Correspondence

Senator the Hon Michaelia Cash
Minister for Employment
Minister for Women
Minister Assisting the Prime Minister for the Public Service

Reference: MC17-048307

Mr Ian Goodenough MP
Chair
Parliamentary Joint Committee on Human Rights
S1.111
Parliament House
CANBERRA ACT 2600

Dear Mr Goodenough

Code for the Tendering and Performance of Building Work 2016* and *Code for the Tendering and Performance of Building Work Amendment Instrument 2017

This letter is in response to your letter of 6 September 2017, on behalf of the Parliamentary Joint Committee on Human Rights (the Committee), concerning the *Code for the Tendering and Performance of Building Work 2016* (the 2016 Code) and the *Code for the Tendering and Performance of Building Work Amendment Instrument 2017* (the Amendment Instrument).

I note that the 2016 Code was issued in December 2016 and was the subject of an Opposition disallowance motion that was defeated in the Senate in August 2017. The 2016 Code sets out the Australian Government's expected standards of conduct for all building contractors and building industry participants that seek to be, or are, involved in Commonwealth funded building work.

The Amendment Instrument amended the 2016 Code to reflect amendments made to subsection 34(2E) of the *Building and Construction Industry (Improving Productivity) Act 2016* and to provide additional transitional exemptions to assist building contractors and building industry participants with the transition to compliance with the 2016 Code.

A response to the further questions raised by the Committee is enclosed and I trust that this response satisfies the Committee's remaining concerns. I note that both the Code and the Amendment Instrument is are no longer open to disallowance.

Yours sincerely

Senator the Hon Michaelia Cash
5 / 10 / 2017

Encl.

Code for the Tendering and Performance of Building Work 2016

Code for the Tendering and Performance of Building Work Amendment Instrument 2017

Please find below responses to each of the requests of the Parliamentary Joint Committee on Human Rights (the Committee) for further information.

Content of agreements and prohibited conduct – Right to collectively bargain and right to just and favourable conditions of work

The Committee has invited me to provide further information on sections 11 and 11A of the *Code for the Tendering and Performance of Building Work 2016* (the 2016 Code) in light of its analysis that the measures are likely to be incompatible with the right to collectively bargain.

My response to the Committee of 3 July 2017 explained in detail the rationale for sections 11 and 11A. The Government remains of the view that these provisions are of a reasonable and proportionate nature and believes that these measures are appropriate to our national conditions.

Prohibiting the display of particular signs and union logos, mottos or indicia – Right to freedom of expression, right to freedom of association and right to form and join trade unions

The Committee has sought my advice as to whether there are less rights restrictive approaches than those in paragraphs 13(2)(b), (c) and (j) of the 2016 Code to achieve the stated objective of protecting the ability of individuals to choose not to join a union (in particular providing education about the current protections contained in the *Fair Work Act 2009* (the Fair Work Act) or better monitoring or enforcement).

My response to the Committee of 3 July 2017 stated that these provisions of the 2016 Code are necessary to protect the right of individuals to join or not to join a union because of the pervasive culture that exists within the building and construction industry in which it is understood that there is such a thing as a 'union site' and on those sites all workers are expected to be members of a building association. It noted that evidence of the existence of this culture can be found in many decisions of the courts, and gave a number of examples that demonstrate that the Construction, Forestry, Mining and Energy Union (CFMEU) has repeatedly contravened laws that protect freedom of association and does not respect the right of individuals to choose whether or not to join a union.

Since my response of 3 July 2017, further decisions of the courts in relation to the CFMEU have been handed down which provide additional evidence of the persistent culture of the industry. These include:

- In September 2017, the Federal Court imposed fines totalling more than $2.4 million against the CFMEU national and NSW branches and nine officials over breaches at the Barangaroo site in 2014. The penalties included breaches for actions to coerce workers to take industrial action and actions designed to coerce Lend Lease to reinstate a union delegate after his dismissal for allegedly throwing a punch at the company's site manager and threatening to "*kill*" him. In finding that maximum penalties should be imposed on the CFMEU, Justice Flick stated that "*it is difficult to perceive how such conduct can be regarded as in the best interests of the bulk of its members and the workers it supposedly represents*"; "*the CFMEU is to be regarded as a recidivist offender*"; "*it is not possible to envisage worse union behaviour*"; and "*the CFMEU has long demonstrated by its conduct that it pays but little regard to compliance with the law and indeed has repeatedly sought to place itself above the law*" (*ABCC v Parker (No 2)* [2017] FCA 1082 (13 September 2017).
- Also in September 2017, the Federal Court found the CFMEU was knowingly concerned in adverse action and coercion engaged in by one of its Western Australian officials, when the official last year told Gorgon LNG project workers in a 10-minute tirade at the project site that he would put non-members' names on toilet doors and that if workers did not like the site being a "union site" they could *"f-ck off somewhere else"*. Justice Barker stated, amongst other things, *"I have little doubt that the threat had the effect, directly or indirectly, of prejudicing non-union employees in their employment,"* adding that the effect was *"real and substantial"*. He also stated the threats in this case *"including putting the names of the non-unionised workers on the backs of toilet doors, was a plainly intimidating statement"*. Justice

Barker was satisfied that the threats *"negated choice as to whether or not a presently un-unionised employees should, or should not, join the union"* and that *"[t]hat was an unconscionable threat to make"*. The Court is yet to consider the matter of penalties *(ABCC v Upton (The Gorgon Project Case)* [2017] FCA 847 (21 September 2017).

Other approaches, such as education and better monitoring and enforcement, are also useful and are encouraged. In fact, the Australian Building and Construction Commission (the ABCC), and its predecessors have long recognised the important role education plays in increasing rates of compliance and self-regulation[1]. They have assisted building industry participants to understand how the relevant workplace laws protect the right of individuals to join or not join a union. They have also published details about the outcome of litigation commenced against unions and employers for alleged breaches of freedom of association protections.

Since 2005 there has been a building industry specific regulator with functions that include monitoring and investigating compliance with relevant workplace laws and pursuing enforcement activities in relation to alleged contraventions. From late 2013 the ABCC's predecessor, Fair Work Building and Construction (FWBC), renewed its focus on identifying, investigating and pursuing particular types of unlawful conduct, including alleged breaches of freedom of association protections.[2] However, despite the concerted effort by FWBC to enforce the freedom of association protections in the Fair Work Act (which has been continued by the ABCC), these protections continue to be breached by unions and employers, as evidenced in my response to the Committee of 3 July 2017. It is therefore clear that education, monitoring and enforcement activities alone are insufficient to bring about the cultural change required to protect the right of individuals to choose whether or not to join a union.

That is why it is considered necessary to complement these activities with provisions that require code covered entities to ensure that 'no ticket, no start' signs or signs that seek to vilify or harass employees who do not participate in industrial activities are not displayed on their sites, and that union logos, mottos and insignia aren't applied to clothing, property or equipment issued or provided for by employers. These provisions seek to eliminate visual cues on sites that give a strong impression that union membership is compulsory or is being actively encouraged or endorsed by the employer and to challenge the custom and practice ingrained in the industry.

[1] See for example Annual Reports of FWBC 2011–12 to 2015–16 which outline educational activities undertaken in those financial years. See also ABCC's Corporate Plan which lists education, assistance and advice as one of its three core activities https://www.abcc.gov.au/about/accountability-and-reporting/corporate-plan/corporate-plan-2017-18-html-version

[2] FWBC Annual Report 2013–14, *FWBC Director's Foreword* https://www.abcc.gov.au/about/accountability-and-reporting/fwbc-annual-report-2013-14/fwbc-directors-foreword

TREASURER

Mr Ian Goodenough MP
Chair
Parliamentary Joint Committee on Human Rights
S1.111
Parliament House
CANBERRA ACT 2600

Dear Chair

I am writing in response to your letter of 6 September 2017 seeking information about the Competition and Consumer Amendment (Competition Policy Review) Bill 2017 (the Bill), as requested by the Parliamentary Joint Committee on Human Rights in its Report 9 of 2017.

As you know, the Bill amends section 155 of the *Competition and Consumer Act 2010* (CCA) to give the ACCC the power to issue section 155 notices in relation to two new matters and to increase the penalty for non-compliance with a section 155 notice. These amendments do not change the basic elements of an offence against section 155, nor do they change the existing safeguards contained within the CCA and elsewhere, such as in the *Privacy Act 1988*.

In relation to secondary boycotts, the Bill increases the maximum penalty for a breach of the secondary boycott provisions (sections 45D and 45DA of the CCA). The Bill does not change the types of boycotts which are and are not prohibited under sections 45D and 45DA. The secondary boycott prohibitions themselves, which have been in place for several decades, contain specific exemptions to support human rights (including an exemption for secondary boycotts with a dominant purpose related to employment matters).

I therefore respectfully consider that these measures do not negatively impact human rights.

Yours sincerely

The Hon Scott Morrison MP
6 / 10 / 2017

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SENATOR THE HON SCOTT RYAN
Special Minister of State
Minister Assisting the Prime Minister for Cabinet
Senator for Victoria

REF: MC17-045032

Mr Ian Goodenough MP
Chair
Parliamentary Joint Committee on Human Rights
S1.111 Parliament House
CANBERRA ACT 2600

Dear Chair, Ian

Thank you for your letter of 18 October 2017, concerning information requested in relation to the human rights compatibility of the *Electoral and Referendum Amendment (ASADA) Regulations 2017* [F2017L00967] (the Regulation), which was raised in the Parliamentary Joint Committee on Human Rights *Report 11 of 2017*. As this instrument relates to electoral matters, your questions have been referred to me for reply.

This response includes input from the Australian Sports Anti-Doping Authority (ASADA). I have also copied this letter to the Minister for Health and Minister for Sport, the Hon Greg Hunt MP, as this falls within his portfolio responsibilities.

Thank you for bringing the Committee's comments to the Government's attention. Please find responses to the Committee's comments below.

The Regulation

The Regulation amended the *Electoral Referendum Regulation 2016* to include the Australian Sports Anti-Doping Authority (ASADA) on the list of prescribed authorities for the purposes of the *Commonwealth Electoral Act 1918* (Electoral Act). As a prescribed authority listed in Schedule 1, the Electoral Commission may give ASADA Commonwealth electoral Roll information for the purposes as described in the table in clause 1 to Schedule 1 to the Regulation, namely for the purposes of the administration of the National Anti-Doping Scheme (within the meaning of the *Australian Sports Anti-Doping Authority Act 2006*).

Doping is a form of cheating in sport and undermines public confidence in sport itself and the various values of sport, such as cooperation, honesty, fair play, dedication, and the health, economic, cultural and social benefits sport provides. Use of substances prohibited from sport also risks significant harm to health of those consuming such products.

The measure in the Regulation constitutes a legitimate objective for the purposes of the international human rights law and addresses a substantial and pressing concern

Australia's anti-doping program operates in an international context. Australia is a State Party to the UNESCO International Convention against Doping in Sport (UNESCO Convention). Chiefly, the UNESCO Convention requires States Parties to implement arrangements that are consistent with the principles of the World Anti-Doping Code (Code). The Code is an internationally-accepted arrangement, which provides the framework for harmonised anti-doping policies, rules and regulations across both the global sporting movement and Governments.

The health risks associated with doping are well documented and are referenced as reasons for establishing the UNESCO Convention.

ASADA is established under Australian Government legislation to fulfil obligations under the UNESCO Convention and to operate in accordance with the Code.

In Australia, the illicit status of many performance and image enhancing drugs (PIEDs) mean they are at high risk of being supplied through unregulated markets, giving rise to the risk that they are counterfeit, or produced in underground laboratories. The abuse of pharmaceutical grade substances to improve sporting performance also carries inherent health risks. Furthermore, there is a need to counter the trafficking of PIEDS produced outside of controlled environments as they create additional public safety risks.

The *Australian Criminal Intelligence Commission 2015-16 Illicit Drug Report* reveals that in 2015-16, there were 6877 PIED detections at the Australian border. In 2015-16, the report reveals a record number of steroid arrests in Australia.

Highlighting the potential health and safety risks of doping, in November 2015, the Essendon Football Club pleaded guilty to two breaches of the Victorian *Occupational Health and Safety Act 2004*.

In its 2013 report, the Australian Crime Commission (ACC) examined the new generation of performance and image enhancing drugs in sport, namely peptides and hormones. In this report, the ACC identified organised crime involvement in the distribution of PIEDs and evidence of personal relationships of concern between professional athletes, support staff and organised criminal identities.

Having access to data held by the Australian Electoral Commission builds ASADA's detection capability and provides a mechanism to deter doping behaviours in sport (due to the greater possibility of getting caught). It supports ASADA's ability to detect and disrupt the activities of persons within its jurisdiction involved with the use, administration, possession or trafficking of doping substances, which is in the interest of the protection of public health. The amendment enhances ASADA's ability to support other agencies who share mutual interests in the disruption of the PIEDs market, which is in the interests of public safety.

Accessing information on the electoral Roll is necessary to achieve the stated objectives of public safety and protection of public health

As the science of doping becomes more technologically advanced, the identification of doping through the collection and analysis of samples (testing) alone has become less effective, and must now be combined with other forms of detection to allow for an effective anti-doping program to operate.

In the keynote address to the Australia New Zealand Sports Law Association conference in Melbourne in 2015, former Director General of the World Anti-Doping Agency, Mr David Howman acknowledged the fight against doping in sport had reached the stage where science alone would not eradicate doping or very often even detect it.

Mr Howman noted that the collection of evidence of an anti-doping rule violation had shifted from a model based on the collection and analysis of blood and urine to a model that incorporates the gathering of evidence through non-analytical means – intelligence gathering and investigations.

ASADA has the legislative authority to conduct investigations and intelligence gathering activities and is able to receive information from other Government agencies for the purposes of administering the National Anti-Doping scheme. ASADA however, does not possess the authority to conduct searches, undertake surveillance and initiate telecommunications intercepts or other intrusive means of information collection.

Accessing electoral information will allow ASADA to ensure its inquiries are appropriately targeted, in particular in relation to the identification of persons known or suspected to be involved in the receipt, use and distribution of PIEDS to facilitate doping activities. It also minimises the need for ASADA to ask sporting organisations about individuals, thereby minimising the scope for the identity of a person under suspicion to be released by third parties.

Establishing the identity of co-habitants and associations of interest is critical in linking PIEDs imports to intended recipients and thereby supporting investigations of possible anti-doping rule violations, including the possession, use and trafficking of PIEDs. Such activities may involve a range of persons as highlighted in the 2013 ACC report which determined doping programs were being facilitated by sports scientists, high performance coaches, sports staff, doctors, pharmacists and anti-ageing clinics. The ACC report highlighted the sophisticated nature of doping programs, noting a complex supply and distribution network exists to satisfy the high demand for anabolic steroids, peptides and hormones by sub-elite and recreational athletes, body builders and increasingly, ageing Australians. The ACC report also highlighted the involvement of criminal groups in the distribution of PIEDs and, in some cases, the direct associations between athletes and criminal identities.

Often the substances being used were not approved for human use, thereby increasing the risks to public health and public safety.

ASADA recently investigated two matters that, in part, involved the import of PIEDs via the mail system into Australia. In one case, the person used a range of different names and addresses, at least one of which was linked to a parent, to attempt to import the PIEDs successfully and without detection. In the other matter, one attempted PIEDs import was addressed to the co-habitant of an athlete. As the co-habitant was out of the country for a significant length of time at the point of the seizure, ASADA assessed that the intended recipient was the athlete. These matters highlight the importance of understanding who is linked to addresses associated with PIEDs seizures and the association's athletes and persons suspected of attempting to import PIEDs, and the propensity of persons within ASADA's jurisdiction to use subterfuge to thwart the detection of their misconduct.

The prescribed purpose imposes a reasonable and proportionate limitation on the right to privacy in the pursuit of the objective

Nothing in the *Australian Sports Anti-Doping Authority Act 2006* or the National Anti-Doping scheme limits the operation of the *Privacy Act 1988.* Individuals subject to ASADA's jurisdiction have rights under the *Privacy Act 1988* and the Australian Privacy Principles in

relation to their personal information, including remedies and rights of redress for any unlawful processing of their personal information. ASADA's legislation circumscribes the purposes for which the electoral Roll information may be accessed. The Act places bounds on ASADA's operations including jurisdictional limitations and has a number of checks and balances in place.

Adequate and effective safeguards with respect to the right of privacy

Anti-Doping arrangements have been established with due reference to the protection of the rights of individuals involved in sport. The UNESCO Convention explicitly refers to protecting the rights of individuals. In complying with the Code, anti-doping organisations around the world, including ASADA, are required to operate in accordance with the International Standard for the Protection of Privacy and Personal Information.

Under the *Australian Sports Anti-Doping Authority Act 2006*, protected information is defined as information that:

(a) was obtained under or for the purposes of this Act or a legislative instrument made under this Act; and
(b) relates to the affairs of a person (other than an entrusted person); and
(c) identifies, or is reasonably capable of being used to identify, the person.

Part 8 of the Act makes it an offence for the CEO, ASADA staff and certain other bodies/persons, to disclose protected information. However, it is not an offence if the disclosure is authorised by this Part or is in compliance with a requirement of certain other laws.

- Unauthorised disclosure of protected information can result in a 2 year custodial sentence.
- ASADA meets the PROTECTED level certification under the Commonwealth Protective Security Framework, and has mature systems to protect information;

Section 14 of the Act specifies the rights of athletes and support persons.

Additionally, there are a number of mechanisms under the Electoral Act which protect against unintended use or on-disclosure to third parties. As noted in the Statement of Compatibility with Human Rights, the disclosure of such information is protected in the first instance by the discretion of the Electoral Commission who can decide when and how to give this information, to the prescribed authority.

In 2004 the Parliament enacted the *Electoral and Referendum Amendment (Access to Electoral Roll and Other Measures) Act 2004* (Act No. 78 of 2004) and inserted the then new sections 90A, 90B, 91A and 91B into the Electoral Act which specifically protect and restrict access to information from the Commonwealth electoral Roll. The Second Reading Speech to the Bill that became this Amending Act (see House of Representatives Hansard 1 April 2004 page 27929 particularly at page 27930) made it clear the new Bill was to cover the field in relation to access to the electoral Roll including access by *"Australian government agencies"*.

The then Minister went on to state that:

> *"The bill will amend the roll access provisions to improve clarity, remove contradictions and improve privacy protections. Access to roll information will be set out in a tabular form. The tables will include all information that is currently provided for in the Electoral Act. They list who is entitled to roll information, what information they are entitled to and how often they will receive it...."*

There are several further provisions contained in the Electoral Act that support the sensitivity of information that forms part of the Commonwealth electoral Roll. Section 390 of the Electoral Act creates absolute privilege in relation to claims for enrolment and transfers for enrolment being produced to a Court. Paragraph 390(1)(b) extends this absolute privilege to *"any matter or thing in relation to"* such claims. As the Commonwealth electoral Roll is the resultant database within the AEC that records these claims and details, it is apparent that the Roll itself will fall within the scope of this section together with any applications for enrolment and transfer of enrolment. Section 390A of the Electoral Act exempts these records from search warrants issued under the *Crimes Act 1914* (Cth).

Where Commonwealth electoral Roll information is lawfully disclosed by the AEC under section 90B of the Electoral Act, subsection 91A(1) of the Electoral Act continues to apply to the use and further disclosure of that information by the recipient and precludes any further use or disclosure of that protected information for other than a permitted purpose. This is enforceable by a criminal sanction of 100 penalty units. In addition, section 91B of the Electoral Act also continues to apply to prohibit any further disclosure or use for a commercial purpose. This is enforceable by a criminal sanction of 1,000 penalty units.

Section 47A of the *Freedom of Information Act 1982* (Cth) prevents any third person obtaining enrolment details of another person pursuant to an FOI request. Accordingly, any FOI request from a person (other than the elector themselves) seeking enrolment information (including copies of claims for enrolment) would be refused by the AEC as those records are exempt documents.

The existence of the above provisions further reinforces the clear Parliamentary intention that any access to the Commonwealth electoral Roll (including any information derived from the Roll such as historical information) is controlled by the provisions of the Electoral Act itself and that other government agencies are only able to lawfully gain access to information from the electoral Roll under the powers contained in the Electoral Act itself.

Item 4 of the table at subsection 90B of the Electoral Act provides the Electoral Commission with the discretionary power to give information from the electoral Roll to a *"prescribed authority"* in the circumstances *"authorised by the regulations"*. Subsection 90B(9) of the Electoral Act also applies to enable the AEC to impose a fee to cover the costs of the provision of that information. The information which can lawfully be provided under item 4 of the table in subsection 90B(4) of the Electoral Act is limited to any information on the public version of the Roll (i.e. the name and address of an elector – unless the person is a silent elector – see subsection 90B(6)) and the sex and date of birth of an elector.

The term *"prescribed authority"* is defined in subsection 4(1) of the Electoral Act and limits the term to agency heads under the *Public Service Act 1999* and the chief executive officers of an authority of the Commonwealth listed in the Regulations. This limits who the information will be disclosed to.

Under section 90A of the Electoral Act, the AEC provides access to a public version of the electoral Roll at premises occupied by the AEC. This version of the electoral Roll contains the name and in most cases the address (excluding silent electors) of all persons who have enrolled to vote in federal elections. Older copies of the Commonwealth electoral Roll are maintained by a number of public libraries, including the National Library of Australia. The public is able to access these versions of the Roll.

I trust that the above information is of assistance to the Committee in their consideration of these matters.

Yours sincerely

SCOTT RYAN

31 October 2017

Senator the Hon Michaelia Cash
Minister for Employment
Minister for Women
Minister Assisting the Prime Minister for the Public Service

Reference: MB17-003671

Mr Ian Goodenough MP
Chair
S1.111
Parliamentary Joint Committee on Human Rights
Parliament House
CANBERRA ACT 2600

Dear Mr Goodenough

Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2017

This letter is in response to your letter of 6 September 2017 concerning issues raised in the Parliamentary Joint Committee on Human Rights' *Human Rights Scrutiny Report No.9 of 2017* in relation to the Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2017 (the Bill).

The Australian Government made an election commitment to implement the majority of the recommendations made in the Final Report of the Royal Commission into Trade Union Governance and Corruption. The Bill responds to recommendations 36–38 of the Royal Commission in relation to disqualification from office. The Government also made election commitments in relation to mergers of registered organisations and cancellation of registration of organisations and the Bill delivers on these commitments.

My detailed response to each of the issues raised in your correspondence is attached. I trust the Committee will find the information useful.

Yours sincerely

Senator the Hon Michaelia Cash
3 /10/ 2017

Encl.

Attachment A

Detailed response to issues raised in *Human Rights Scrutiny Report No.9 of 2017*

FAIR WORK (REGISTERED ORGANISATIONS) AMENDMENT (ENSURING INTEGRITY) BILL 2017

Compatibility with the right to freedom of association and the right to just and favourable conditions at work

Disqualification of individuals from holding office in a union

The Committee asks:

- **how the measure is effective to achieve (that is, rationally connected to) its stated objective; and**
- **whether the limitation is a reasonable and proportionate measure to achieve the stated objective (in particular, whether the measure is the least rights restrictive way of achieving its stated objective; the extent of the limitation including in respect of the right to strike, noting previous concerns raised by international supervisory mechanisms; and the existence of relevant safeguards).**

Current provisions

Under the current provisions of the *Fair Work (Registered Organisations) Act 2009* (RO Act),[1] a person can only be disqualified from office automatically where he or she has been convicted of:

- offences involving fraud, dishonesty, violence or property damage; or
- offences relating to the formation, registration or management of associations and elections within registered organisations (see Div 2, Part 4 of Ch 7 of the *Fair Work Act 2009* (Fair Work Act)).

In addition, the RO Act also includes a limited discretionary power for the Federal Court to order disqualification from office where a person has contravened a civil penalty provision and the Court is satisfied that the disqualification is justified.[2]

There are currently no penalties (and thus no disincentives) for a person who is disqualified from holding office to continue to act as an official whilst they are disqualified.

Changes proposed

The Bill will expand the categories of offences for which a person can be automatically disqualified from holding office to include conviction of a serious offence, that is, an offence against any law in Australia or another country carrying a penalty of five years' imprisonment or more.

On application, the Federal Court will also be given a broad discretionary power to disqualify a person from office for a period the Court considers appropriate, in circumstances where a ground for disqualification exists and the Court does not consider it would be unjust to disqualify the person.

The Bill also provides for a new offence of running for, holding or continuing to hold office, or acting as a 'shadow officer', whilst disqualified.

Objectives

The amendments to the disqualification provisions of the RO Act are made in response to the recommendations of the Royal Commission into Trade Union Governance and Corruption (Royal Commission) concerning the current disqualification regime. The Royal Commission identified that the current disqualification scheme provides no consequence for acting while disqualified or for committing serious criminal offences.

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[1] Section 215 of the RO Act.
[2] Section 307A of the RO Act.

For example, the Royal Commission noted that a person against whom a civil penalty has been imposed for a contravention of the statutory officers' duties[3] cannot be disqualified from holding office under the current disqualification provisions.[4] This is the case even if the conduct that led to the imposition of a civil penalty clearly demonstrated the person was unable or unwilling to uphold the standards reasonably expected of a person holding office in an organisation.

Providing for the possibility of disqualification from office and restricting who can be elected to office, in circumstances where a ground for disqualification has been made out and the Federal Court considers disqualification just, is a rational means of ensuring greater compliance with the standards of conduct reasonably expected of officers, and a rational method for improving governance of organisations more generally.

In response to the Committee's specific concern, the Bill does not contain provisions circumscribing the right to strike as protected by the right to freedom of association. The Bill does not alter the circumstances in which industrial action will be considered protected industrial action, or the consequences provided for failures to comply with Part-3-3 of the Fair Work Act, dealing with industrial action.

Reasonableness and proportionality

The Bill seeks to achieve its objectives by providing appropriate mechanisms to disqualify a person from holding office in circumstances where a person has failed to uphold the standards expected of a person acting as an officer in an organisation. These mechanisms are administered and supervised by the Federal Court. The Federal Court is an impartial and independent judicial body from which appeals to the full Federal Court and ultimately the High Court are available. Providing the Court with this discretion avoids any risk of excessive or arbitrary interference in the free functioning of organisations.

These are reasonable and proportionate methods of ensuring that officials who deliberately disobey the law are restricted in their ability to be in charge of registered organisations. This will serve to protect the interest of members and guarantee public order by ensuring the leadership of registered organisations act lawfully.

Cancellation of registration of registered organisations

The Committee asks:

- **whether there is reasoning or evidence that establishes that one or more of the stated objectives addresses a pressing or substantial concern, or whether the proposed changes are otherwise aimed at achieving a legitimate objective;**
- **how the measure is effective to achieve (that is, rationally connected to) its stated objective;**
- **whether the limitation is a reasonable and proportionate measure to achieve the stated objective (in particular, whether the grounds for cancellation of registration are sufficiently circumscribed); and**
- **the extent of the limitation in respect of the right to strike noting previous concerns raised by international supervisory mechanisms.**

Current provisions

Under the current provisions of the RO Act,[5] the Federal Court may make an order cancelling the registration of an organisation in limited circumstances, including where the conduct of the organisation or a substantial number of its members has prevented or hindered the intention or objects of the Fair Work Act or the RO Act. Cancellation by the Fair Work Commission (Commission) may also be effected on technical grounds.[6]

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[3] Set out in Division 2 of Part 2 of Chapter 9 of the RO Act.
[4] Royal Commission into Trade Union Governance and Corruption, Final Report, Vol 5, p 234 [188].
[5] Section 28 of the RO Act.
[6] Section 30 of the RO Act.

Changes proposed

The Bill expands the grounds for cancelling an organisation's registration to include:

- corruption by its officials and repeated law breaking by the organisation, its officials or its members;
- multiple breaches of a wider range of relevant laws by the organisation or by a substantial number of its members; and
- serious breaches of criminal laws by the organisation.

The Bill also streamlines and simplifies some of the existing grounds for cancellation, including:

- failure to comply with a court order or injunction by the organisation or a substantial number of its members; and
- the organisation or a substantial number of members taking or organising obstructive, unprotected industrial action.

The Bill provides that the Court must cancel an organisation's registration where a ground for cancellation exists and the Court considers that it would not be unjust to do so. In deciding whether it would be unjust to cancel an organisation's registration, the Court must consider the best interests of the organisation's members, the nature of the conduct that constitutes a cancellation ground, if other action has been taken to address the conduct and any other relevant matters.

The Court may make alternative orders that target a particular part of an organisation, where a ground for cancellation is established because of the behaviour of officers or members in a particular part of an organisation, for example, a branch or division.

Applications for alternative orders may be made to the Court directly without the need for there to be a concurrent application for the cancellation of an organisation's registration.

The alternative orders the Federal Court can make include:

- the disqualification of certain officers from holding office for a period of time,
- changes to an organisation's eligibility rules to exclude certain members from the organisation,
- the suspension of rights, privileges or capacities of a part of the organisation, such as rights to apply for entry permits under the Fair Work Act or restriction of the use of funds or property by a part of the organisation (Item 4, Schedule 2: new Division 5).

In response to the Committee's specific concern, the Bill does not contain provisions circumscribing the right to strike as protected by the right to freedom of association. The provisions of the Bill allowing for an application for cancellation of registration to be made on the basis that an organisation, part of the organisation or a class of members, have engaged in obstructive industrial action effectively replicate the existing provisions of the RO Act.[7]

Objectives

The amendments to the cancellation provisions of the RO Act have the sole objective of protecting the interests of members and guaranteeing the democratic functioning of organisations under the stewardship of officials and a membership that respects the law and thus maintains public order.

Extensive evidence was presented to the Royal Commission of some organisations, branches or parts of organisations, where a culture of little or no regard for the legislation regulating registered organisations, and even criminal law, persists. The existence of such a culture demonstrates the need for new mechanisms designed to ensure compliance with the existing standards reasonably expected of organisations and their officers. It has become clear that, in addition to the changes to industrial relations legislation recommended by the Royal Commission, there is a pressing need to ensure greater compliance with the existing legislative regime and relevant criminal laws.

These amendments address the legitimate objective by providing a clearer and more streamlined scheme for the cancellation of registration of an organisation and expanding the grounds on which an application for cancellation can be made. The new cancellation provisions make it obvious to

[7] Paragraphs 28(1)(b) and (c) of the *Fair Work (Registered Organisations) Act 2009*

organisations, their officers and members, that the types of conduct forming grounds for an application may result in the cancellation of registration, and that misconduct and unlawful behaviour cannot ever be considered an 'acceptable' method of achieving a desired outcome.

Article 8 of the Freedom of Association and Protection of the Right to Organise Convention (C87) provides that, in exercising the rights provided for in the Convention, workers, employers and their respective organisations shall respect the law of the land. Choosing to register under the RO Act is a privilege governed by the existing RO Act. Organisations registered under the RO Act do not currently have freedom to conduct their affairs in any way they see fit but are bound by that Act. For example, the rules of every organisation must be approved by the Fair Work Commission and cannot be set by the organisation without limit.

When organisations or their officers deliberately breach the RO Act then there must be an effective sanction if the system of registration is to remain meaningful. In the case of a registered organisation, the sanction could include losing the right to act as an officer, losing the right to expand through amalgamation, being placed into administration, or losing registration.

Consistent with the existing structure for the registration of industrial associations, the Bill makes clear that there is a framework within which registered organisations must operate. The Bill makes clear that failing to comply with the RO Act has consequences consistent with the purpose of that Act.

Reasonableness and proportionality

The grounds for cancellation of registration proposed by the Bill are reasonable and proportionate as, even where a ground for cancellation exists, the Federal Court still has a discretion not to cancel the registration of an organisation in circumstances where that disqualification would be unjust. This ensures that cancellation remains a measure of last resort. The Court is required to take into account the best interests of the members of the organisation as a whole in determining whether the cancellation of registration would be unjust,

In addition, the availability of alternative orders provides the Federal Court with appropriate means of limiting the effect on members who have not been involved in activity that would ground an order for cancellation.

Placing unions into administration

The Committee asks:

- **whether there is reasoning or evidence that establishes that one or more of the stated objectives addresses a pressing or substantial concern, or whether the proposed changes are otherwise aimed at achieving a legitimate objective;**
- **how the measure is effective to achieve (that is, rationally connected to) its stated objective; and**
- **whether the limitation is a reasonable and proportionate measure to achieve the stated objective (in particular, whether the grounds for placing unions under administration are sufficiently circumscribed).**

Current provisions

Section 323 of the RO Act contains the current framework for dealing with organisational dysfunction and provides for applications to be made to the Federal Court for a declaration in relation to an organisation or any part of it. If a declaration is made, the Federal Court may approve a scheme for the taking of action to resolve the matters to which the declaration relates. The provision, as currently drafted, does not provide for remedial action to be taken if officers act in their own interests, break the law, or breach their duties under the RO Act. The RO Act does not expressly provide for the appointment of an administrator.

Changes proposed

The Bill expands the categories of declaration for a remedial scheme in relation to an organisation to be approved by the Federal Court to include:

- That one or more officers of an organisation or part of an organisation have engaged in financial misconduct in relation to carrying out of their functions or in relation to the organisation or part. An inclusive definition of financial misconduct is included in the Bill.

- That a substantial number of the officers of the organisation or part of an organisation have, in the affairs of the organisation or part, acted in their own interests rather than in the interests of members of the organisation or part as a whole.
- That affairs of an organisation or part of an organisation are being conducted in a manner that is oppressive or unfairly prejudicial to, or unfairly discriminatory against a member or members in a manner that is contrary to the interests of the members of the organisation or part as a whole.

The Bill also amends the Federal Court's power to approve a scheme consequent to the making of a declaration to expressly permit the appointment of an administrator, and the functions of the administrator will be clearly set out. The administrator will control and may manage the property and affairs of the organisation, or perform any functions or powers that the organisation or its officers would typically perform. Officers and employees must assist administrators and there are criminal penalties for failing to do so.

Objectives

These measures have the sole objective of protecting the interests of members and guaranteeing the democratic functioning of organisations under the stewardship of officials and a membership that respects the law and thus maintains public order.

The Final Report of the Royal Commission identified numerous examples of organisations no longer serving the interests of their members because of pervasive breaches of duties by officers and widespread and repeated law-breaking by union officials. The proposed changes will improve the effectiveness of the administration provisions by allowing the Federal Court to take appropriate remedial and facilitative action to overcome such maladministration or dysfunction associated with a culture of lawlessness or financial maladministration.

The proposed changes pursue the legitimate objective of ensuring that organisations are functioning effectively to be able to serve the interests of their members. The amendments are rationally connected to this objective because the new grounds for a declaration are all instances of an organisation not acting in the interests of their members and therefore not functioning effectively.

Reasonableness and proportionality

The measures are reasonable and proportionate for the following reasons:

- The new grounds under which the Federal Court may make a declaration are clearly set out and if present, indicate that an organisation is not serving the interests of their members and is not functioning effectively.
- Limit the effect on members who have not been involved in maladministration or unlawful activity by providing for orders to be limited to the part of the organisation that has conducted those activities.
- Relief is discretionary[8] and the Federal Court may find that no action is necessary or justified.
- Consistent with the current administration provisions, the Court must be satisfied that an order (should it choose to make one) would not do substantial injustice to the organisation or any member of the organisation.[9]

Introduction of a public interest test for amalgamations of unions

The Committee asks:

- **whether the measure pursues a legitimate objective for the purposes of international human rights law;**
- **how the measure is effective to achieve (that is, rationally connected to) its stated objective; and**
- **whether the limitation is a reasonable and proportionate measure to achieve the stated objective (in particular, whether the measure is the least rights restrictive way of achieving its stated objective, whether the measure is sufficiently circumscribed, the**

[8] Proposed subsection 323A(1).
[9] Proposed subsection 323A(3).

extent of the limitation including in respect of the right to strike noting previous concerns raised by international supervisory mechanisms and the existence of relevant safeguards).

Current provisions

Under the current provisions of the RO Act, once an application for amalgamation of organisations is lodged with the Commission, it must set a hearing date to approve the 'scheme of amalgamation'. Unless an exemption is granted, the Commission will then direct the Australian Electoral Commission to conduct a secret postal ballot of members of each of the organisations.

An amalgamation day will be fixed on which the new organisation will be the only registered organisation, and the amalgamated organisations will be de-registered, provided that: the ballot has no irregularities; the Commission is satisfied that there are no relevant pending proceedings against the existing organisations; and the newly amalgamated organisation will be bound by the obligations of the existing organisations.

Changes proposed

The Bill introduces a public interest test to be applied by the full bench of the Commission when registered organisations seek to merge. The Bill also clarifies whether an amalgamation day may be set.

The Commission, in determining the public interest, will take into account:

- the impact on employees and employers in the industries concerned,
- any history the organisations may have in breaking the law, taking into account the age and incidence of such contraventions, and
- other relevant matters which could include the impact of a merger on the Australian economy.

The existing organisations concerned will be able to be make submissions about the public interest, as will organisations and bodies that represent industries potentially affected by the merger and those who represent employees and employers in those industries.

The Registered Organisations Commissioner, the Minister for Employment and a Minister who has responsibility for workplace relations in a referring state will also be able to make submissions. Submissions can also be made by any person with sufficient interest in the proposed amalgamation, that is, those whose rights, interests or legitimate expectations would be affected.

Current section 73 of the RO Act provides for the Commission to set an amalgamation day where certain preconditions are met. This provision will be amended to clarify what pending proceedings are relevant to the decision as to whether to fix an amalgamation day. These will include some criminal and some civil proceedings.

Objectives

The public interest test for amalgamations will improve organisational governance, protect the interests of members, ensure that organisations meet the minimum standards set out in the RO Act and address community concerns by creating a disincentive for a culture of 'contempt for the rule of law' that has been identified amongst some registered organisations.[10] It is a pressing and substantial concern, such as is required to constitute a legitimate objective for the purposes of international human rights law, that this culture is present in some registered organisations seeking to amalgamate.

The introduction of a public interest test will be effective in meeting this objective as it will reduce the risk of an adverse effect of an amalgamation of existing organisations. This is because a culture of lawlessness in one or more amalgamating organisations will be prevented from pervading into the other organisations involved in an amalgamation.

As stated earlier, Article 8 of the Freedom of Association and Protection of the Right to Organise Convention (C87) provides that, in exercising the rights provided for in the Convention, workers, employers and their respective organisations shall respect the law of the land. Choosing to register under the RO Act is a privilege governed by the existing RO Act. Organisations registered under the RO Act do not currently have freedom to conduct their affairs in any way they see fit but are bound by

[10] Royal Commission into Trade Union Governance and Corruption, Final Report, Vol 5, p 401 [23].

that Act. For example, the rules of every organisation must be approved by the Fair Work Commission and cannot be set by the organisation without limit.

When organisations or their officers deliberately breach relevant laws then there must be an effective sanction if the system of registration is to remain meaningful. In the case of a registered organisation, the sanction could include losing the right to act as an officer, losing the right to expand through amalgamation, being placed into administration, or losing registration.

If an organisation obeys the law and complies with its rules then its activities will not be limited by the provisions in the Bill. For example, two organisations that comply with the law would be highly likely to satisfy the public interest test for amalgamations.

Reasonableness and proportionality

Applying a public interest test to the mergers of registered organisations is not a new concept. Under predecessor legislation, the Australian Industrial Relations Commission was required to have regard to the public interest in performing its functions under the registered organisations provisions.[11] The public interest test in this Bill is more limited and will only apply when the Commission considers applications for the amalgamation of registered organisations.

This measure is reasonable and proportionate. It is sufficiently circumscribed in that it does not impact on the rights of workers to continue to be represented by a registered organisation and takes the likely benefit to members of the existing organisations proposing to enter into an amalgamation into account. In addition, the measure does not limit the right to strike.

The measure is also a reasonable and proportionate means to limit the spread of a culture of lawlessness in some organisations. The measure is properly supervised by a full bench of the Commission to ensure rigorous and robust consideration of merger applications, with appropriate limitations on the Commission's discretion in place.

[11] The latest iteration of this provision was contained in subsection 103(2) of the *Workplace Relations Act 1996* and prior to 2005 it was contained in section 90 of that Act.

TREASURER

Ref: MC17-008283

Mr Ian Goodenough MP
Chair
Parliamentary Joint Committee on Human Rights
S1.111
Parliament House
CANBERRA ACT 2600

Dear Chair

Thank you for your correspondence of 18 October 2017 concerning the assessment of the *Treasury Laws Amendment (Housing Tax Integrity) Bill 2017* and *Foreign Acquisitions and Takeovers Fees Imposition Amendment (Vacancy Fees) Bills 2017* in your Report 11 of 2017. My responses to the Committee's questions are set out below with further information at **Attachment 1**.

Compatibility of the measure with the right to equality and non-discrimination

The vacancy charge builds on the Government's existing foreign investment regime which seeks to increase the number of houses available for Australians to live in. The charge provides a financial incentive for the foreign owner to make their property available on the rental market and is expected to increase the number of homes available to Australians wishing to rent.

The foreign investment framework, including the *Foreign Acquisitions and Takeovers Act 1975* (the Act), imposes rules and screening requirements on foreign persons that are investing in Australia – the vacancy charge is consistent with the scope of the framework. The vacancy charge applies to foreign persons as defined under the Act who apply for and subsequently receive Foreign Investment Review Board approval and choose to leave their property vacant. The vacancy charge is only payable when a property is not occupied or genuinely available on the rental market for at least six months in a 12 month period.

The occupation of the property is not restricted to the foreign owner but is extended to their relative or permitted occupant under a lease or license. If genuine attempts are made to make the property available on the rental market then the vacancy charge will not apply.

Further, the impact of the vacancy charge will be narrowed by exemptions included in the regulations that cover circumstances where the property could not be reasonably occupied, such as where the property is undergoing substantial renovations or has been damaged or the person occupying the property is receiving medical care.

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Civil penalty provisions

The civil penalty provisions in the Bill should not be considered 'criminal' for the purposes of international human rights law. While the civil penalty provisions included in the Bill are intended to deter people from not complying with the obligations imposed by the Act, none of the civil penalty provisions carry a penalty of imprisonment and there is no sanction of imprisonment for non-payment of any penalty.

I trust this information will be of assistance to you.

Yours sincerely

The Hon Scott Morrison MP

7 / 11 / 2017

Attachment 1

Right to be free from discrimination on prohibited grounds

Article 26 of the International Covenant on Civil and Political Rights (ICCPR) recognises that all persons are equal before the law and are entitled without discrimination to the equal protection of the law. Article 26 further provides that 'the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as national origin. However, the Human Rights Committee has recognised that 'not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant'.

The Bill implements an annual vacancy charge that applies the same definition of 'foreign person' as stated in the *Foreign Acquisitions and Takeovers Act 1975*. The annual vacancy charge will only apply to those 'foreign persons' who are required to apply and subsequently receive from the Foreign Investment Review Board (FIRB) approval for a residential real estate acquisition.

The Bill also generally engages the rights protected by the International Convention on the Elimination of All Forms of Racial Discrimination. Paragraph 1 of Article 1 of International Convention on the Elimination of All Forms of Racial Discrimination defines the term 'racial discrimination' to mean 'any distinction, exclusion, restriction or preference based on race, colour descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural, or any other field of public life'.

Under Article 2(a)(a) of the International Convention on the Elimination of All Forms of Racial Discrimination, [E]ach State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local shall act in conformity with this obligation'. Under Article 5 of International Convention on the Elimination of All Forms of Racial Discrimination States Parties 'undertake to prohibit and eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to …national …origin, to equality before the law' in the enjoyment of civil, political, economic, social and cultural rights, including the 'right to own property alone as well as in association with others'.

The Bill limits Article 26 of the ICCPR and Articles 2 and 5 of International Convention on the Elimination of All Forms of Racial Discrimination because the core obligations imposed by the Bill only apply to a 'foreign person'. While an Australian citizen who is not ordinarily resident in Australia may be a 'foreign person' for the purposes of this Act, it is anticipated that the majority of individuals who are directly affected by this Bill will not be Australian citizens.

While the Bill, if enacted, will primarily affect individuals who are citizens of countries other than Australia, there is no less restrictive way of achieving the objectives of the Bill. Accordingly those limitations are reasonable, necessary and proportionate.

Conclusion

This Bill is compatible with human rights because to the extent that they may limit human rights, those limitations are reasonable, necessary and proportionate.

Assessment of civil penalties

Civil penalty provisions may engage criminal process rights under Articles 14 and 15 of the International Covenant on Civil and Political Rights (ICCPR), regardless of the distinction between criminal and civil penalties in domestic law. This is because the word 'criminal' has an autonomous meaning in international human rights law. When a provision imposes a civil penalty, an assessment is therefore required as to whether it amounts to a 'criminal' penalty for the purposes of the Articles 14 and 15 of the ICCPR.

The civil penalty provisions in the Bill should not be considered 'criminal' for the purposes of international human rights law. While the civil penalty provisions included in the Bill are intended to deter people from not complying with the obligations imposed by the Act, none of the civil penalty provisions carry a penalty of imprisonment and there is no sanction of imprisonment for non payment of any penalty. In addition, the maximum pecuniary penalty that may be imposed on an individual for contravening a civil penalty provision is generally lower than maximum pecuniary penalty that may be imposed for the corresponding criminal offence. The statement of compatibility therefore proceeds on the basis that the civil penalty provisions in the Bill do not create criminal offences for the purposes of Articles 14 and 15 of the ICCPR.

Conclusion

This civil penalty provisions contained in the Bill do not create criminal offences for the purposes of Article 14 and 15 of the ICCPR.

Appendix 4

Guidance Note 1 and Guidance Note 2

PARLIAMENTARY JOINT COMMITTEE ON HUMAN RIGHTS

GUIDANCE NOTE 1: Drafting statements of compatibility

December 2014

This note sets out the committee's approach to human rights assessments and its requirements for statements of compatibility. It is designed to assist legislation proponents in the preparation of statements of compatibility.

Background

Australia's human rights obligations

Human rights are defined in the *Human Rights (Parliamentary Scrutiny) Act 2011* as the rights and freedoms contained in the seven core human rights treaties to which Australia is a party. These treaties are:

- International Covenant on Civil and Political Rights
- International Covenant on Economic, Social and Cultural Rights
- International Convention on the Elimination of All Forms of Racial Discrimination
- 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
- Convention on the Rights of Persons with Disabilities

Australia has voluntarily accepted obligations under these seven core UN human rights treaties. Under international law it is the state that has an obligation to ensure that all persons enjoy human rights. Australia's obligations under international human rights law are threefold:

- **to respect** – requiring government not to interfere with or limit human rights;
- **to protect** – requiring government to take measures to prevent others (for example individuals or corporations) from interfering with human rights;
- **to fulfil** – requiring government to take positive measures to fully realise human rights.

Where a person's rights have been breached, there is an obligation to ensure accessible and effective remedies are available to that person.

Australia's human rights obligations apply to all people subject to Australia's jurisdiction, regardless of whether they are Australian citizens. This means Australia owes human rights obligations to everyone in Australia, as well as to persons outside Australia where Australia is exercising effective control over them, or they are otherwise under Australia’s jurisdiction.

The treaties confer rights on individuals and groups of individuals and not companies or other incorporated bodies.

Civil and political rights

Australia is under an obligation to respect, protect and fulfil its obligations in relation to all civil and political rights. It is generally accepted that most civil and political rights are capable of immediate realisation.

Economic, social and cultural rights

Australia is also under an obligation to respect, protect and fulfil economic, social and cultural rights. However, there is some flexibility allowed in the implementation of these rights. This is the obligation of progressive realisation, which recognises that the full realisation of economic, social and cultural rights may be achieved progressively. Nevertheless, there are some obligations in relation to economic, social and cultural rights which have immediate effect. These include the obligation to ensure that people enjoy economic, social and cultural rights without discrimination.

Limiting a human right

It is a general principle of international human rights law that the rights protected by the human rights treaties are to be interpreted generously and limitations narrowly. Nevertheless, 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.[1] For all other rights, rights may be limited as long as the limitation meets certain standards. In general, any measure that limits a human right has to comply with the following criteria (*The limitation criteria*) in order for the limitation to be considered justifiable.

Prescribed by law

Any limitation on a right must have a clear legal basis. This requires not only that the measure limiting the right be set out in legislation (or be permitted under an established rule of the common law); it must also be accessible and precise enough so that people know the legal consequences of their actions or the circumstances under which authorities may restrict the exercise of their rights.

Legitimate objective

Any limitation on a right must be shown to be necessary in pursuit of a legitimate objective. To demonstrate that a limitation is permissible, proponents of legislation must provide reasoned and evidence-based explanations of the legitimate objective being pursued. To be capable of justifying a proposed limitation on human rights, a legitimate objective must address a pressing or substantial concern, and not simply seek an outcome regarded as desirable or convenient. In addition, there are a number of rights that may only be limited for a number of prescribed purposes.[2]

Rational connection

It must also be demonstrated that any limitation on a right has a rational connection to the objective to be achieved. To demonstrate that a limitation is permissible, proponents of legislation must provide reasoned and evidence-based explanations as to how the measures are likely to be effective in achieving the objective being sought.

Proportionality

To demonstrate that a limitation is permissible, the limitation must be proportionate to the objective being sought. In considering whether a limitation on a right might be proportionate, key factors include:

- whether there are other less restrictive ways to achieve the same aim;
- whether there are effective safeguards or controls over the measures, including the possibility of monitoring and access to review;

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

2 For example, the right to association. For more detailed information on individual rights see Parliamentary Joint Committee on Human Rights, Guide to Human Rights (March 2014), available at http://www.aph.gov.au/~/media/Committees/Joint/PJCHR/Guide%20to%20Human%20Rights.pdf.

- the extent of any interference with human rights – the greater the interference the less likely it is to be considered proportionate;
- whether affected groups are particularly vulnerable; and
- whether the measure provides sufficient flexibility to treat different cases differently or whether it imposes a blanket policy without regard to the merits of an individual case.

Retrogressive measures

In respect of economic, social and cultural rights, as there is a duty to realise rights progressively there is also a corresponding duty to refrain from taking retrogressive measures. This means that the state cannot unjustifiably take deliberate steps backwards which negatively affect the enjoyment of economic, social and cultural rights. In assessing whether a retrogressive measure is justified the limitation criteria are a useful starting point.

The committee's approach to human rights scrutiny

The committee's mandate to examine all existing and proposed Commonwealth legislation for compatibility with Australia's human rights obligations, seeks to ensure that human rights are taken into account in the legislative process.

The committee views its human rights scrutiny tasks as primarily preventive in nature and directed at minimising risks of new legislation giving rise to breaches of human rights in practice. The committee also considers it has an educative role, which includes raising awareness of legislation that promotes human rights.

The committee considers that, where relevant and appropriate, the views of human rights treaty bodies and international and comparative human rights jurisprudence can be useful sources for understanding the nature and scope of the human rights referred to in the Human Rights (Parliamentary Scrutiny) Act 2011. Similarly, there are a number of other treaties and instruments to which Australia is a party, such as the International Labour Organization (ILO) Conventions and the Refugee Convention which, although not listed in the *Human Rights (Parliamentary Scrutiny) Act 2011,* may nonetheless be relevant to the interpretation of the human rights protected by the seven core human rights treaties. The committee has also referred to other non-treaty instruments, such as the United Nations Declaration on the Rights of Indigenous Peoples, where it considers that these are relevant to the interpretation of the human rights in the seven treaties that fall within its mandate. When the committee relies on regional or comparative jurisprudence to support its analysis of the rights in the treaties, it will acknowledge this where necessary.

The committee's expectations for statements of compatibility

The committee considers statements of compatibility as essential to the examination of human rights in the legislative process. The committee expects statements to read as stand-alone documents. The committee relies on the statement as the primary document that sets out the legislation proponent's analysis of the compatibility of the bill or instrument with Australia's international human rights obligations.

While there is no prescribed form for statements under the *Human Rights (Parliamentary Scrutiny) Act 2011*, the committee strongly recommends legislation proponents use the current templates provided by the Attorney-General's Department. [3]

The statement of compatibility should identify the rights engaged by the legislation. Not every possible right engaged needs to be identified in the statement of compatibility, only those that are substantially engaged. The committee does not expect analysis of rights consequentially or tangentially engaged in a minor way.

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[3] The Attorney-General's Department guidance may be found at https://www.ag.gov.au/RightsAndProtections/HumanRights/Human-rights-scrutiny/Pages/Statements-of-Compatibility.aspx.

Consistent with the approach set out in the guidance materials developed by the Attorney-General's department, where a bill or instrument limits a human right, the committee requires that the statement of compatibility provide a detailed and evidence-based assessment of the measures against the limitation criteria set out in this note. Statements of compatibility should provide analysis of the impact of the bill or instrument on vulnerable groups.

Where the committee's analysis suggests that a bill limits a right and the statement of compatibility does not include a reasoned and evidence-based assessment, the committee may seek additional/further information from the proponent of the legislation. Where further information is not provided and/or is inadequate, the committee will conclude its assessment based on its original analysis. This may include a conclusion that the bill or instrument (or specific measures within a bill or instrument) are incompatible with Australia's international human rights obligations.

This approach is consistent with international human rights law which requires that any limitation on a human right be justified as reasonable, necessary and proportionate in pursuit of a legitimate objective.

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PARLIAMENTARY JOINT COMMITTEE ON HUMAN RIGHTS

GUIDANCE NOTE 2: Offence provisions, civil penalties and human rights

December 2014

This guidance note sets out some of the key human rights compatibility issues in relation to provisions that create offences and civil penalties. It is not intended to be exhaustive but to provide guidance on the committee's approach and expectations in relation to assessing the human rights compatibility of such provisions.

Introduction

The right to a fair trial and fair hearing are protected by article 14(1) of the International Covenant on Civil and Political Rights (ICCPR). The right to a fair trial and fair hearing applies to both criminal and civil proceedings.

A range of protections are afforded to persons accused and convicted of criminal offences under article 14. These include the presumption of innocence (article 14(2)), the right to not incriminate oneself (article 14(3)(g)), the right to have a sentence reviewed by a higher tribunal (article 14(5)), the right not to be tried or punished twice for the same offence (article 14(7)), a guarantee against retrospective criminal laws (article 15(1)) and the right not to be arbitrarily detained (article 9(1)).[1]

Offence provisions need to be considered and assessed in the context of these standards. Where a criminal offence provision is introduced or amended, the statement of compatibility for the legislation will usually need to provide an assessment of whether human rights are engaged and limited.[2]

The *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* provides a range of guidance in relation to the framing of offence provisions.[3] However, legislation proponents should note that this government guide is neither binding nor conclusive of issues of human rights compatibility. The discussion below is intended to assist legislation proponents to identify matters that are likely to be relevant to the framing of offence provisions and the assessment of their human rights compatibility.

Reverse burden offences

Article 14(2) of the ICCPR protects the right to be presumed innocent until proven guilty according to law. Generally, consistency with the presumption of innocence requires the prosecution to prove each element of a criminal offence beyond reasonable doubt.

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1 For a more comprehensive description of these rights see Parliamentary Joint Committee on Human Rights, *Guide to Human Rights* (March 2014), available at http://www.aph.gov.au/~/media/Committees/Joint/PJCHR/Guide%20to%20Human%20Rights.pdf.

2 The requirements for assessing limitations on human rights are set out in *Guidance Note 1: Drafting statements of compatibility* (December 2014).

3 See *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers,* September 2011 edition, available at http://www.ag.gov.au/Publications/Documents/GuidetoFramingCommonwealthOffencesInfringementNoticesandEnforcementPowers/A%20Guide%20to%20Framing%20Cth%20Offences.pdf.

An offence provision which requires the defendant to carry an evidential or legal burden of proof, commonly referred to as 'a reverse burden', with regard to the existence of some fact engages and limits the presumption of innocence. This is because a defendant's failure to discharge the burden of proof may permit their conviction despite reasonable doubt as to their guilt. Where a statutory exception, defence or excuse to an offence is provided in proposed legislation, these defences or exceptions must be considered as part of a contextual and substantive assessment of potential limitations on the right to be presumed innocent in the context of an offence provision.

Reverse burden offences will be likely to be compatible with the presumption of innocence where they are shown by legislation proponents to be reasonable, necessary and proportionate in pursuit of a legitimate objective. Claims of greater convenience or ease for the prosecution in proving a case will be insufficient, in and of themselves, to justify a limitation on the defendant's right to be presumed innocent.

It is the committee's usual expectation that, where a reverse burden offence is introduced, legislation proponents provide a human rights assessment in the statement of compatibility, in accordance with Guidance Note 1.

Strict liability and absolute liability offences

Strict liability and absolute liability offences engage and limit the presumption of innocence. This is because they allow for the imposition of criminal liability without the need to prove fault.

The effect of applying strict liability to an element or elements of an offence therefore means that the prosecution does not need to prove fault. However, the defence of mistake of fact is available to the defendant. Similarly, the effect of applying absolute liability to an element or elements of an offence means that no fault element needs to be proved, but the defence of mistake of fact is not available.

Strict liability and absolute liability offences will not necessarily be inconsistent with the presumption of innocence where they are reasonable, necessary and proportionate in pursuit of a legitimate objective.

The committee notes that strict liability and absolute liability may apply to whole offences or to elements of offences. It is the committee's usual expectation that, where strict liability and absolute liability criminal offences or elements are introduced, legislation proponents should provide a human rights assessment of their compatibility with the presumption of innocence, in accordance with Guidance Note 1.

Mandatory minimum sentencing

Article 9 of the ICCPR protects the right to security of the person and freedom from arbitrary detention. An offence provision which requires mandatory minimum sentencing will engage and limit the right to be free from arbitrary detention. The notion of 'arbitrariness' under international human rights law includes elements of inappropriateness, injustice and lack of predictability. Detention may be considered arbitrary where it is disproportionate to the crime that has been committed (for example, as a result of a blanket policy).[4] Mandatory sentencing may lead to disproportionate or unduly harsh outcomes as it removes judicial discretion to take into account all of the relevant circumstances of a particular case in sentencing.

Mandatory sentencing is also likely to engage and limit article 14(5) of the ICCPR, which protects the right to have a sentence reviewed by a higher tribunal. This is because mandatory sentencing prevents judicial review of the severity or correctness of a minimum sentence.

The committee considers that mandatory minimum sentencing will be difficult to justify as compatible with human rights, given the substantial limitations it places on the right to freedom

[4] See, for example, A v Australia (1997) 560/1993, UN Doc. CCPR/C/59/D/560/1993, [9.4]; Concluding Observations on Australia in 2000 (2000) UN doc A/55/40, volume 1, [522] (in relation to mandatory sentencing in the Northern Territory and Western Australia).

from arbitrary detention and the right to have a sentence reviewed by a higher tribunal (due to the blanket nature of the measure). Where mandatory minimum sentencing does not require a minimum non-parole period, this will generally be insufficient, in and of itself, to preserve the requisite judicial discretion under international human rights law to take into account the particular circumstances of the offence and the offender.[5]

Civil penalty provisions

Many bills and existing statutes contain civil penalty provisions. These are generally prohibitions on particular forms of conduct that give rise to liability for a 'civil penalty' enforceable by a court. As these penalties are pecuniary and do not include the possibility of imprisonment, they are said to be 'civil' in nature and do not constitute criminal offences under Australian law.

Given their 'civil' character, applications for a civil penalty order are dealt with in accordance with the rules and procedures that apply in relation to civil matters. These rules and procedures often form part of a regulatory regime which provides for a graduated series of sanctions, including infringement notices, injunctions, enforceable undertakings, civil penalties and criminal offences.

However, civil penalty provisions may engage the criminal process rights under articles 14 and 15 of the ICCPR where the penalty may be regarded as 'criminal' for the purpose of international human rights law. The term 'criminal' has an 'autonomous' meaning in human rights law. In other words, a penalty or other sanction may be 'criminal' for the purposes of the ICCPR even though it is considered to be 'civil' under Australian domestic law.

There is a range of international and comparative jurisprudence on whether a 'civil' penalty is likely to be 'criminal' for the purpose of human rights law.[6] This criteria for assessing whether a penalty is 'criminal' for the purposes of human rights law is set out in further detail on page 4. The following steps (one to three) may assist legislation proponents in understanding whether a provision may be characterised as 'criminal' under international human rights law.

- **Step one:** *Is the penalty classified as criminal under Australian Law?*

  If so, the penalty will be considered 'criminal' for the purpose of human rights law. If not, proceed to step two.

- **Step two:** *What is the nature and purpose of the penalty?*

  The penalty is likely to be considered criminal for the purposes of human rights law if:

  a) the purpose of the penalty is to punish or deter; **and**

  b) the penalty applies to the public in general (rather than being restricted to people in a specific regulatory or disciplinary context.)

  If the penalty does not satisfy this test, proceed to step three.

- **Step three:** *What is the severity of the penalty?*

  The penalty is likely to be considered criminal for the purposes of human rights law if the civil penalty provision carries a penalty of imprisonment or a substantial pecuniary sanction.

Note: even if a penalty is not considered 'criminal' separately under steps two or three, it may still be considered 'criminal' where the nature and severity of the penalty are cumulatively considered.

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5 This is because the mandatory minimum sentence may be seen by courts as a 'sentencing guidepost' which specifies the appropriate penalty for the least serious case. Judges may feel constrained to impose, for example, what is considered the usual proportion for a non-parole period (approximately 2/3 of the head sentence).

6 The UN Human Rights Committee, while not providing further guidance, has determined that 'civil; penalties may be 'criminal' for the purpose of human rights law, see, for example, *Osiyuk v Belarus* (1311/04); Sayadi and *Vinck v Belgium* (1472/06).

When a civil penalty provision is 'criminal'

In light of the criteria described at pages 3-4 above, the committee will have regard to the following matters when assessing whether a particular civil penalty provision is 'criminal' for the purposes of human rights law.

a) Classification of the penalty under domestic law

The committee considers that in accordance with international human rights law, the classification of the penalty as 'civil' under domestic law will not be determinative. However, if the penalty is 'criminal' under domestic law it will also be 'criminal' under international law.

b) The nature of the penalty

The committee considers that a civil penalty provision is more likely to be considered 'criminal' in nature if it contains the following features:

- the penalty is intended to be punitive or deterrent in nature, irrespective of its severity;
- the proceedings are instituted by a public authority with statutory powers of enforcement;
- a finding of culpability precedes the imposition of a penalty; and
- the penalty applies to the public in general instead of being directed at people in a specific regulatory or disciplinary context (the latter being more likely to be viewed as 'disciplinary' or regulatory rather than as 'criminal').

c) The severity of the penalty

In assessing whether a pecuniary penalty is sufficiently severe to amount to a 'criminal' penalty, the committee will have regard to:

- the amount of the pecuniary penalty that may be imposed under the relevant legislation with reference to the regulatory context;
- the nature of the industry or sector being regulated and relative size of the pecuniary penalties and the fines that may be imposed (for example, large penalties may be less likely to be criminal in the corporate context);
- the maximum amount of the pecuniary penalty that may be imposed under the civil penalty provision relative to the penalty that may be imposed for a corresponding criminal offence; and
- whether the pecuniary penalty imposed by the civil penalty provision carries a sanction of imprisonment for non-payment, or other very serious implications for the individual in question.

The consequences of a conclusion that a civil penalty is 'criminal'

If a civil penalty is assessed to be 'criminal' for the purposes of human rights law, this does not mean that it must be turned into a criminal offence in domestic law. Human rights law does not stand in the way of decriminalisation. Instead, it simply means that the civil penalty provision in question must be shown to be consistent with the criminal process guarantees set out the articles 14 and 15 of the ICCPR.

By contrast, if a civil penalty is characterised as not being 'criminal', the specific criminal process guarantees in articles 14 and 15 will not apply. However, such provisions must still comply with the right to a fair hearing before a competent, independent and impartial tribunal contained in article 14(1) of the ICCPR. The Senate Standing Committee for the Scrutiny of Bills may also comment on whether such provisions comply with accountability standards.

As set out in Guidance Note 1, sufficiently detailed statements of compatibility are essential for the effective consideration of the human rights compatibility of bills and legislative instruments. Where

a civil penalty provision could potentially be considered 'criminal' the statement of compatibility should:

- explain whether the civil penalty provisions should be considered to be 'criminal' for the purposes of human rights law, taking into account the criteria set out above; and
- if so, explain whether the provisions are consistent with the criminal process rights in articles 14 and 15 of the ICCPR, including providing justifications for any limitations of these rights.

It will not be necessary to provide such an assessment in the statement of compatibility on every occasion where proposed legislation includes civil penalty provisions or draws on existing civil penalty regimes. For example, it will generally not be necessary to provide such an assessment where the civil penalty provision is in a corporate or consumer protection context and the penalties are small.

Criminal process rights and civil penalty provisions

The key criminal process rights that have arisen in the committee's scrutiny of civil penalty provisions include the right to be presumed innocent (article 14(2)) and the right not to be tried twice for the same offence (article 14 (7)). For example:

- article 14(2) of the International Covenant on Civil and Political Rights (ICCPR) protects the right to be presumed innocent until proven guilty according to law. This requires that the case against the person be demonstrated on the criminal standard of proof, that is, it must be proven beyond reasonable doubt. The standard of proof applicable in civil penalty proceedings is the civil standard of proof, requiring proof on the balance of probabilities. In cases where a civil penalty is considered 'criminal', the statement of compatibility should explain how the application of the civil standard of proof for such proceedings is compatible with article 14(2) of the ICCPR.
- article 14(7) of the ICCPR provides that no-one is to be liable to be tried or punished again for an offence of which she or he has already been finally convicted or acquitted. If a civil penalty provision is considered to be 'criminal' and the related legislative scheme permits criminal proceedings to be brought against the person for substantially the same conduct, the statement of compatibility should explain how this is consistent with article 14(7) of the ICCPR.

Other criminal process guarantees in articles 14 and 15 may also be relevant to civil penalties that are viewed as 'criminal', and should be addressed in the statement of compatibility where appropriate.

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