

## 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

<b>Purpose</b>	Seeks to amend various provisions of the <i>Competition and Consumer Act 2010</i> 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
<b>Portfolio</b>	Treasury
<b>Introduced</b>	House of Representatives, 30 March 2017
<b>Rights</b>	Privacy; freedom of association; strike; fair trial; right to be presumed innocent (see <b>Appendix 2</b> )
<b>Previous reports</b>	6 of 2017 and 9 of 2017
<b>Status</b>	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.<sup>1</sup>

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

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).<sup>3</sup>

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

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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.<sup>4</sup>

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.<sup>5</sup> 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;

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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.<sup>6</sup>

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

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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.<sup>7</sup> 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

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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.<sup>8</sup> 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.**

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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]

<b>Purpose</b>	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 <i>Commonwealth Electoral Act 1918</i> , so as to allow the electoral commission to give ASADA commonwealth electoral roll information
<b>Portfolio</b>	Finance
<b>Authorising legislation</b>	<i>Commonwealth Electoral Act 1918</i>
<b>Last day to disallow</b>	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
<b>Right</b>	Privacy (see <b>Appendix 2</b> )
<b>Previous report</b>	11 of 2017
<b>Status</b>	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.<sup>9</sup>

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).<sup>10</sup>

***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'.<sup>11</sup> 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'.<sup>12</sup> The statement of compatibility continues:

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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.

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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*)'.<sup>13</sup>

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

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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.<sup>14</sup>

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

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

<b>Purpose</b>	Seeks to amend the <i>Fair Work (Registered Organisations) Act 2009</i> 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
<b>Portfolio</b>	Employment
<b>Introduced</b>	House of Representatives, 16 September 2017
<b>Rights</b>	Freedom of association; to form and join trade unions; just and favourable conditions at work; presumption of innocence (see <b>Appendix 2</b> )
<b>Previous report</b>	9 of 2017
<b>Status</b>	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.<sup>1</sup>

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).<sup>2</sup>

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).<sup>3</sup> 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.<sup>4</sup> 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.<sup>5</sup>

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.<sup>6</sup>

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.<sup>7</sup>

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.<sup>8</sup> '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.<sup>9</sup>

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.<sup>10</sup>

***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.<sup>11</sup>

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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'.<sup>12</sup> 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.<sup>13</sup> The statement of compatibility further explains that the measure, by ensuring the leadership of unions act lawfully, addresses these objectives.<sup>14</sup> 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.<sup>15</sup> 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.<sup>16</sup>

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

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12 Statement of compatibility (SOC) viii.

13 SOC v, viii.

14 SOC viii.

15 SOC ix.

16 SOC vi.

what is permissible.<sup>17</sup> 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, 101<sup>st</sup> 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'.<sup>18</sup> 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

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.<sup>19</sup>

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.<sup>20</sup> 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.<sup>21</sup> 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.<sup>22</sup> 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;<sup>23</sup>

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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;<sup>24</sup>
- The organisation is found to have committed a serious criminal offence (defined as an offence punishable by at least 1,500 penalty units);<sup>25</sup>
- That there have been multiple 'designated findings' against members;<sup>26</sup>
- 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'.<sup>27</sup>

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.<sup>28</sup>

***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'.<sup>29</sup> 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.<sup>30</sup>

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.<sup>31</sup> 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.<sup>32</sup>

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'.<sup>33</sup> 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.<sup>34</sup>

2.102 As set out above, international supervisory mechanisms have recognised the importance of registration as 'an essential facet of the right to organize'<sup>35</sup> 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.<sup>36</sup>

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 cancellation 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.<sup>37</sup>

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'.<sup>38</sup>

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.<sup>39</sup>

### ***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'.<sup>40</sup>

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.<sup>41</sup>

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

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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.<sup>42</sup> 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',<sup>43</sup> 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.

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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:

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- 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'.<sup>44</sup> 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

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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.<sup>45</sup>

***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'.<sup>46</sup>

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'.<sup>47</sup> 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'.<sup>48</sup>

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

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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].

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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.<sup>49</sup> 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'.<sup>50</sup> 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

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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

<b>Purpose</b>	The bills seek to introduce a range of measures including amendments to the <i>Foreign Acquisitions and Takeovers Act 1975</i> 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
<b>Portfolio</b>	Treasury
<b>Introduced</b>	House of Representatives, 7 September 2017
<b>Rights</b>	Equality and non-discrimination; criminal process rights (see <b>Appendix 2</b> )
<b>Previous report</b>	11 of 2017
<b>Status</b>	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.<sup>1</sup>

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'<sup>2</sup> 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).<sup>3</sup> 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.<sup>4</sup>

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.<sup>5</sup>

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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.<sup>6</sup> 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.<sup>7</sup>

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.<sup>8</sup>

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...<sup>9</sup>

2.153 The explanatory memorandum further explains that the measure is part of a number of initiatives to address housing affordability.<sup>10</sup>

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.<sup>11</sup> 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.<sup>12</sup>

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'<sup>13</sup> 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.<sup>14</sup> 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.<sup>15</sup> 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.<sup>16</sup> That inquiry also concluded that 'a significant number of Australians are not enjoying the

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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'.<sup>17</sup>

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'<sup>18</sup> or keep the required records.<sup>19</sup> 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).<sup>20</sup>

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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*.

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**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**