Appendix 3

Correspondence

Senator the Hon Michaelia Cash
Minister for Employment
Minister for Women
Minister Assisting the Prime Minister for the Public Service

Reference: MC17-048307

Mr Ian Goodenough MP
Chair
Parliamentary Joint Committee on Human Rights
S1.111
Parliament House
CANBERRA ACT 2600

Dear Mr Goodenough

Code for the Tendering and Performance of Building Work 2016* and *Code for the Tendering and Performance of Building Work Amendment Instrument 2017

This letter is in response to your letter of 6 September 2017, on behalf of the Parliamentary Joint Committee on Human Rights (the Committee), concerning the *Code for the Tendering and Performance of Building Work 2016* (the 2016 Code) and the *Code for the Tendering and Performance of Building Work Amendment Instrument 2017* (the Amendment Instrument).

I note that the 2016 Code was issued in December 2016 and was the subject of an Opposition disallowance motion that was defeated in the Senate in August 2017. The 2016 Code sets out the Australian Government's expected standards of conduct for all building contractors and building industry participants that seek to be, or are, involved in Commonwealth funded building work.

The Amendment Instrument amended the 2016 Code to reflect amendments made to subsection 34(2E) of the *Building and Construction Industry (Improving Productivity) Act 2016* and to provide additional transitional exemptions to assist building contractors and building industry participants with the transition to compliance with the 2016 Code.

A response to the further questions raised by the Committee is enclosed and I trust that this response satisfies the Committee's remaining concerns. I note that both the Code and the Amendment Instrument is are no longer open to disallowance.

Yours sincerely

Senator the Hon Michaelia Cash
5 / 10 / 2017

Encl.

Code for the Tendering and Performance of Building Work 2016

Code for the Tendering and Performance of Building Work Amendment Instrument 2017

Please find below responses to each of the requests of the Parliamentary Joint Committee on Human Rights (the Committee) for further information.

Content of agreements and prohibited conduct – Right to collectively bargain and right to just and favourable conditions of work

The Committee has invited me to provide further information on sections 11 and 11A of the *Code for the Tendering and Performance of Building Work 2016* (the 2016 Code) in light of its analysis that the measures are likely to be incompatible with the right to collectively bargain.

My response to the Committee of 3 July 2017 explained in detail the rationale for sections 11 and 11A. The Government remains of the view that these provisions are of a reasonable and proportionate nature and believes that these measures are appropriate to our national conditions.

Prohibiting the display of particular signs and union logos, mottos or indicia – Right to freedom of expression, right to freedom of association and right to form and join trade unions

The Committee has sought my advice as to whether there are less rights restrictive approaches than those in paragraphs 13(2)(b), (c) and (j) of the 2016 Code to achieve the stated objective of protecting the ability of individuals to choose not to join a union (in particular providing education about the current protections contained in the *Fair Work Act 2009* (the Fair Work Act) or better monitoring or enforcement).

My response to the Committee of 3 July 2017 stated that these provisions of the 2016 Code are necessary to protect the right of individuals to join or not to join a union because of the pervasive culture that exists within the building and construction industry in which it is understood that there is such a thing as a 'union site' and on those sites all workers are expected to be members of a building association. It noted that evidence of the existence of this culture can be found in many decisions of the courts, and gave a number of examples that demonstrate that the Construction, Forestry, Mining and Energy Union (CFMEU) has repeatedly contravened laws that protect freedom of association and does not respect the right of individuals to choose whether or not to join a union.

Since my response of 3 July 2017, further decisions of the courts in relation to the CFMEU have been handed down which provide additional evidence of the persistent culture of the industry. These include:

- In September 2017, the Federal Court imposed fines totalling more than $2.4 million against the CFMEU national and NSW branches and nine officials over breaches at the Barangaroo site in 2014. The penalties included breaches for actions to coerce workers to take industrial action and actions designed to coerce Lend Lease to reinstate a union delegate after his dismissal for allegedly throwing a punch at the company's site manager and threatening to "*kill*" him. In finding that maximum penalties should be imposed on the CFMEU, Justice Flick stated that "*it is difficult to perceive how such conduct can be regarded as in the best interests of the bulk of its members and the workers it supposedly represents*"; "*the CFMEU is to be regarded as a recidivist offender*"; "*it is not possible to envisage worse union behaviour*"; and "*the CFMEU has long demonstrated by its conduct that it pays but little regard to compliance with the law and indeed has repeatedly sought to place itself above the law*" (*ABCC v Parker (No 2)* [2017] FCA 1082 (13 September 2017).
- Also in September 2017, the Federal Court found the CFMEU was knowingly concerned in adverse action and coercion engaged in by one of its Western Australian officials, when the official last year told Gorgon LNG project workers in a 10-minute tirade at the project site that he would put non-members' names on toilet doors and that if workers did not like the site being a "union site" they could *"f-ck off somewhere else"*. Justice Barker stated, amongst other things, *"I have little doubt that the threat had the effect, directly or indirectly, of prejudicing non-union employees in their employment,"* adding that the effect was *"real and substantial"*. He also stated the threats in this case *"including putting the names of the non-unionised workers on the backs of toilet doors, was a plainly intimidating statement"*. Justice

Barker was satisfied that the threats *"negated choice as to whether or not a presently un-unionised employees should, or should not, join the union"* and that *"[t]hat was an unconscionable threat to make"*. The Court is yet to consider the matter of penalties *(ABCC v Upton (The Gorgon Project Case)* [2017] FCA 847 (21 September 2017).

Other approaches, such as education and better monitoring and enforcement, are also useful and are encouraged. In fact, the Australian Building and Construction Commission (the ABCC), and its predecessors have long recognised the important role education plays in increasing rates of compliance and self-regulation[1]. They have assisted building industry participants to understand how the relevant workplace laws protect the right of individuals to join or not join a union. They have also published details about the outcome of litigation commenced against unions and employers for alleged breaches of freedom of association protections.

Since 2005 there has been a building industry specific regulator with functions that include monitoring and investigating compliance with relevant workplace laws and pursuing enforcement activities in relation to alleged contraventions. From late 2013 the ABCC's predecessor, Fair Work Building and Construction (FWBC), renewed its focus on identifying, investigating and pursuing particular types of unlawful conduct, including alleged breaches of freedom of association protections.[2] However, despite the concerted effort by FWBC to enforce the freedom of association protections in the Fair Work Act (which has been continued by the ABCC), these protections continue to be breached by unions and employers, as evidenced in my response to the Committee of 3 July 2017. It is therefore clear that education, monitoring and enforcement activities alone are insufficient to bring about the cultural change required to protect the right of individuals to choose whether or not to join a union.

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

[1] See for example Annual Reports of FWBC 2011–12 to 2015–16 which outline educational activities undertaken in those financial years. See also ABCC's Corporate Plan which lists education, assistance and advice as one of its three core activities https://www.abcc.gov.au/about/accountability-and-reporting/corporate-plan/corporate-plan-2017-18-html-version

[2] FWBC Annual Report 2013–14, *FWBC Director's Foreword* https://www.abcc.gov.au/about/accountability-and-reporting/fwbc-annual-report-2013-14/fwbc-directors-foreword

TREASURER

Mr Ian Goodenough MP
Chair
Parliamentary Joint Committee on Human Rights
S1.111
Parliament House
CANBERRA ACT 2600

Dear Chair

I am writing in response to your letter of 6 September 2017 seeking information about the Competition and Consumer Amendment (Competition Policy Review) Bill 2017 (the Bill), as requested by the Parliamentary Joint Committee on Human Rights in its Report 9 of 2017.

As you know, the Bill amends section 155 of the *Competition and Consumer Act 2010* (CCA) to give the ACCC the power to issue section 155 notices in relation to two new matters and to increase the penalty for non-compliance with a section 155 notice. These amendments do not change the basic elements of an offence against section 155, nor do they change the existing safeguards contained within the CCA and elsewhere, such as in the *Privacy Act 1988*.

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

I therefore respectfully consider that these measures do not negatively impact human rights.

Yours sincerely

The Hon Scott Morrison MP
6 / 10 / 2017

Parliament House Canberra ACT 2600 Australia
Telephone: 61 2 6277 7340 | Facsimile: 61 2 6273 3420

SENATOR THE HON SCOTT RYAN
Special Minister of State
Minister Assisting the Prime Minister for Cabinet
Senator for Victoria

REF: MC17-045032

Mr Ian Goodenough MP
Chair
Parliamentary Joint Committee on Human Rights
S1.111 Parliament House
CANBERRA ACT 2600

Dear Chair, Ian

Thank you for your letter of 18 October 2017, concerning information requested in relation to the human rights compatibility of the *Electoral and Referendum Amendment (ASADA) Regulations 2017* [F2017L00967] (the Regulation), which was raised in the Parliamentary Joint Committee on Human Rights *Report 11 of 2017*. As this instrument relates to electoral matters, your questions have been referred to me for reply.

This response includes input from the Australian Sports Anti-Doping Authority (ASADA). I have also copied this letter to the Minister for Health and Minister for Sport, the Hon Greg Hunt MP, as this falls within his portfolio responsibilities.

Thank you for bringing the Committee's comments to the Government's attention. Please find responses to the Committee's comments below.

The Regulation

The Regulation amended the *Electoral Referendum Regulation 2016* to include the Australian Sports Anti-Doping Authority (ASADA) on the list of prescribed authorities for the purposes of the *Commonwealth Electoral Act 1918* (Electoral Act). As a prescribed authority listed in Schedule 1, the Electoral Commission may give ASADA Commonwealth electoral Roll information for the purposes as described in the table in clause 1 to Schedule 1 to the Regulation, namely for the purposes of the administration of the National Anti-Doping Scheme (within the meaning of the *Australian Sports Anti-Doping Authority Act 2006*).

Doping is a form of cheating in sport and undermines public confidence in sport itself and the various values of sport, such as cooperation, honesty, fair play, dedication, and the health, economic, cultural and social benefits sport provides. Use of substances prohibited from sport also risks significant harm to health of those consuming such products.

The measure in the Regulation constitutes a legitimate objective for the purposes of the international human rights law and addresses a substantial and pressing concern

Australia's anti-doping program operates in an international context. Australia is a State Party to the UNESCO International Convention against Doping in Sport (UNESCO Convention). Chiefly, the UNESCO Convention requires States Parties to implement arrangements that are consistent with the principles of the World Anti-Doping Code (Code). The Code is an internationally-accepted arrangement, which provides the framework for harmonised anti-doping policies, rules and regulations across both the global sporting movement and Governments.

The health risks associated with doping are well documented and are referenced as reasons for establishing the UNESCO Convention.

ASADA is established under Australian Government legislation to fulfil obligations under the UNESCO Convention and to operate in accordance with the Code.

In Australia, the illicit status of many performance and image enhancing drugs (PIEDs) mean they are at high risk of being supplied through unregulated markets, giving rise to the risk that they are counterfeit, or produced in underground laboratories. The abuse of pharmaceutical grade substances to improve sporting performance also carries inherent health risks. Furthermore, there is a need to counter the trafficking of PIEDS produced outside of controlled environments as they create additional public safety risks.

The *Australian Criminal Intelligence Commission 2015-16 Illicit Drug Report* reveals that in 2015-16, there were 6877 PIED detections at the Australian border. In 2015-16, the report reveals a record number of steroid arrests in Australia.

Highlighting the potential health and safety risks of doping, in November 2015, the Essendon Football Club pleaded guilty to two breaches of the Victorian *Occupational Health and Safety Act 2004*.

In its 2013 report, the Australian Crime Commission (ACC) examined the new generation of performance and image enhancing drugs in sport, namely peptides and hormones. In this report, the ACC identified organised crime involvement in the distribution of PIEDs and evidence of personal relationships of concern between professional athletes, support staff and organised criminal identities.

Having access to data held by the Australian Electoral Commission builds ASADA's detection capability and provides a mechanism to deter doping behaviours in sport (due to the greater possibility of getting caught). It supports ASADA's ability to detect and disrupt the activities of persons within its jurisdiction involved with the use, administration, possession or trafficking of doping substances, which is in the interest of the protection of public health. The amendment enhances ASADA's ability to support other agencies who share mutual interests in the disruption of the PIEDs market, which is in the interests of public safety.

Accessing information on the electoral Roll is necessary to achieve the stated objectives of public safety and protection of public health

As the science of doping becomes more technologically advanced, the identification of doping through the collection and analysis of samples (testing) alone has become less effective, and must now be combined with other forms of detection to allow for an effective anti-doping program to operate.

In the keynote address to the Australia New Zealand Sports Law Association conference in Melbourne in 2015, former Director General of the World Anti-Doping Agency, Mr David Howman acknowledged the fight against doping in sport had reached the stage where science alone would not eradicate doping or very often even detect it.

Mr Howman noted that the collection of evidence of an anti-doping rule violation had shifted from a model based on the collection and analysis of blood and urine to a model that incorporates the gathering of evidence through non-analytical means – intelligence gathering and investigations.

ASADA has the legislative authority to conduct investigations and intelligence gathering activities and is able to receive information from other Government agencies for the purposes of administering the National Anti-Doping scheme. ASADA however, does not possess the authority to conduct searches, undertake surveillance and initiate telecommunications intercepts or other intrusive means of information collection.

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

Establishing the identity of co-habitants and associations of interest is critical in linking PIEDs imports to intended recipients and thereby supporting investigations of possible anti-doping rule violations, including the possession, use and trafficking of PIEDs. Such activities may involve a range of persons as highlighted in the 2013 ACC report which determined doping programs were being facilitated by sports scientists, high performance coaches, sports staff, doctors, pharmacists and anti-ageing clinics. The ACC report highlighted the sophisticated nature of doping programs, noting a complex supply and distribution network exists to satisfy the high demand for anabolic steroids, peptides and hormones by sub-elite and recreational athletes, body builders and increasingly, ageing Australians. The ACC report also highlighted the involvement of criminal groups in the distribution of PIEDs and, in some cases, the direct associations between athletes and criminal identities.

Often the substances being used were not approved for human use, thereby increasing the risks to public health and public safety.

ASADA recently investigated two matters that, in part, involved the import of PIEDs via the mail system into Australia. In one case, the person used a range of different names and addresses, at least one of which was linked to a parent, to attempt to import the PIEDs successfully and without detection. In the other matter, one attempted PIEDs import was addressed to the co-habitant of an athlete. As the co-habitant was out of the country for a significant length of time at the point of the seizure, ASADA assessed that the intended recipient was the athlete. These matters highlight the importance of understanding who is linked to addresses associated with PIEDs seizures and the association's athletes and persons suspected of attempting to import PIEDs, and the propensity of persons within ASADA's jurisdiction to use subterfuge to thwart the detection of their misconduct.

The prescribed purpose imposes a reasonable and proportionate limitation on the right to privacy in the pursuit of the objective

Nothing in the *Australian Sports Anti-Doping Authority Act 2006* or the National Anti-Doping scheme limits the operation of the *Privacy Act 1988.* Individuals subject to ASADA's jurisdiction have rights under the *Privacy Act 1988* and the Australian Privacy Principles in

relation to their personal information, including remedies and rights of redress for any unlawful processing of their personal information. ASADA's legislation circumscribes the purposes for which the electoral Roll information may be accessed. The Act places bounds on ASADA's operations including jurisdictional limitations and has a number of checks and balances in place.

Adequate and effective safeguards with respect to the right of privacy

Anti-Doping arrangements have been established with due reference to the protection of the rights of individuals involved in sport. The UNESCO Convention explicitly refers to protecting the rights of individuals. In complying with the Code, anti-doping organisations around the world, including ASADA, are required to operate in accordance with the International Standard for the Protection of Privacy and Personal Information.

Under the *Australian Sports Anti-Doping Authority Act 2006*, protected information is defined as information that:

(a) was obtained under or for the purposes of this Act or a legislative instrument made under this Act; and
(b) relates to the affairs of a person (other than an entrusted person); and
(c) identifies, or is reasonably capable of being used to identify, the person.

Part 8 of the Act makes it an offence for the CEO, ASADA staff and certain other bodies/persons, to disclose protected information. However, it is not an offence if the disclosure is authorised by this Part or is in compliance with a requirement of certain other laws.

- Unauthorised disclosure of protected information can result in a 2 year custodial sentence.
- ASADA meets the PROTECTED level certification under the Commonwealth Protective Security Framework, and has mature systems to protect information;

Section 14 of the Act specifies the rights of athletes and support persons.

Additionally, there are a number of mechanisms under the Electoral Act which protect against unintended use or on-disclosure to third parties. As noted in the Statement of Compatibility with Human Rights, the disclosure of such information is protected in the first instance by the discretion of the Electoral Commission who can decide when and how to give this information, to the prescribed authority.

In 2004 the Parliament enacted the *Electoral and Referendum Amendment (Access to Electoral Roll and Other Measures) Act 2004* (Act No. 78 of 2004) and inserted the then new sections 90A, 90B, 91A and 91B into the Electoral Act which specifically protect and restrict access to information from the Commonwealth electoral Roll. The Second Reading Speech to the Bill that became this Amending Act (see House of Representatives Hansard 1 April 2004 page 27929 particularly at page 27930) made it clear the new Bill was to cover the field in relation to access to the electoral Roll including access by *"Australian government agencies"*.

The then Minister went on to state that:

> *"The bill will amend the roll access provisions to improve clarity, remove contradictions and improve privacy protections. Access to roll information will be set out in a tabular form. The tables will include all information that is currently provided for in the Electoral Act. They list who is entitled to roll information, what information they are entitled to and how often they will receive it...."*

There are several further provisions contained in the Electoral Act that support the sensitivity of information that forms part of the Commonwealth electoral Roll. Section 390 of the Electoral Act creates absolute privilege in relation to claims for enrolment and transfers for enrolment being produced to a Court. Paragraph 390(1)(b) extends this absolute privilege to *"any matter or thing in relation to"* such claims. As the Commonwealth electoral Roll is the resultant database within the AEC that records these claims and details, it is apparent that the Roll itself will fall within the scope of this section together with any applications for enrolment and transfer of enrolment. Section 390A of the Electoral Act exempts these records from search warrants issued under the *Crimes Act 1914* (Cth).

Where Commonwealth electoral Roll information is lawfully disclosed by the AEC under section 90B of the Electoral Act, subsection 91A(1) of the Electoral Act continues to apply to the use and further disclosure of that information by the recipient and precludes any further use or disclosure of that protected information for other than a permitted purpose. This is enforceable by a criminal sanction of 100 penalty units. In addition, section 91B of the Electoral Act also continues to apply to prohibit any further disclosure or use for a commercial purpose. This is enforceable by a criminal sanction of 1,000 penalty units.

Section 47A of the *Freedom of Information Act 1982* (Cth) prevents any third person obtaining enrolment details of another person pursuant to an FOI request. Accordingly, any FOI request from a person (other than the elector themselves) seeking enrolment information (including copies of claims for enrolment) would be refused by the AEC as those records are exempt documents.

The existence of the above provisions further reinforces the clear Parliamentary intention that any access to the Commonwealth electoral Roll (including any information derived from the Roll such as historical information) is controlled by the provisions of the Electoral Act itself and that other government agencies are only able to lawfully gain access to information from the electoral Roll under the powers contained in the Electoral Act itself.

Item 4 of the table at subsection 90B of the Electoral Act provides the Electoral Commission with the discretionary power to give information from the electoral Roll to a *"prescribed authority"* in the circumstances *"authorised by the regulations"*. Subsection 90B(9) of the Electoral Act also applies to enable the AEC to impose a fee to cover the costs of the provision of that information. The information which can lawfully be provided under item 4 of the table in subsection 90B(4) of the Electoral Act is limited to any information on the public version of the Roll (i.e. the name and address of an elector – unless the person is a silent elector – see subsection 90B(6)) and the sex and date of birth of an elector.

The term *"prescribed authority"* is defined in subsection 4(1) of the Electoral Act and limits the term to agency heads under the *Public Service Act 1999* and the chief executive officers of an authority of the Commonwealth listed in the Regulations. This limits who the information will be disclosed to.

Under section 90A of the Electoral Act, the AEC provides access to a public version of the electoral Roll at premises occupied by the AEC. This version of the electoral Roll contains the name and in most cases the address (excluding silent electors) of all persons who have enrolled to vote in federal elections. Older copies of the Commonwealth electoral Roll are maintained by a number of public libraries, including the National Library of Australia. The public is able to access these versions of the Roll.

I trust that the above information is of assistance to the Committee in their consideration of these matters.

Yours sincerely

SCOTT RYAN

31 October 2017

Senator the Hon Michaelia Cash
Minister for Employment
Minister for Women
Minister Assisting the Prime Minister for the Public Service

Reference: MB17-003671

Mr Ian Goodenough MP
Chair
S1.111
Parliamentary Joint Committee on Human Rights
Parliament House
CANBERRA ACT 2600

Dear Mr Goodenough

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

This letter is in response to your letter of 6 September 2017 concerning issues raised in the Parliamentary Joint Committee on Human Rights' *Human Rights Scrutiny Report No.9 of 2017* in relation to the Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2017 (the Bill).

The Australian Government made an election commitment to implement the majority of the recommendations made in the Final Report of the Royal Commission into Trade Union Governance and Corruption. The Bill responds to recommendations 36–38 of the Royal Commission in relation to disqualification from office. The Government also made election commitments in relation to mergers of registered organisations and cancellation of registration of organisations and the Bill delivers on these commitments.

My detailed response to each of the issues raised in your correspondence is attached. I trust the Committee will find the information useful.

Yours sincerely

Senator the Hon Michaelia Cash
3 /10/ 2017

Encl.

Attachment A

Detailed response to issues raised in *Human Rights Scrutiny Report No.9 of 2017*

FAIR WORK (REGISTERED ORGANISATIONS) AMENDMENT (ENSURING INTEGRITY) BILL 2017

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

Disqualification of individuals from holding office in a union

The Committee asks:

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

Current provisions

Under the current provisions of the *Fair Work (Registered Organisations) Act 2009* (RO Act),[1] a person can only be disqualified from office automatically where he or she has been convicted of:

- offences involving fraud, dishonesty, violence or property damage; or
- offences relating to the formation, registration or management of associations and elections within registered organisations (see Div 2, Part 4 of Ch 7 of the *Fair Work Act 2009* (Fair Work Act)).

In addition, the RO Act also includes a limited discretionary power for the Federal Court to order disqualification from office where a person has contravened a civil penalty provision and the Court is satisfied that the disqualification is justified.[2]

There are currently no penalties (and thus no disincentives) for a person who is disqualified from holding office to continue to act as an official whilst they are disqualified.

Changes proposed

The Bill will expand the categories of offences for which a person can be automatically disqualified from holding office to include conviction of a serious offence, that is, an offence against any law in Australia or another country carrying a penalty of five years' imprisonment or more.

On application, the Federal Court will also be given a broad discretionary power to disqualify a person from office for a period the Court considers appropriate, in circumstances where a ground for disqualification exists and the Court does not consider it would be unjust to disqualify the person.

The Bill also provides for a new offence of running for, holding or continuing to hold office, or acting as a 'shadow officer', whilst disqualified.

Objectives

The amendments to the disqualification provisions of the RO Act are made in response to the recommendations of the Royal Commission into Trade Union Governance and Corruption (Royal Commission) concerning the current disqualification regime. The Royal Commission identified that the current disqualification scheme provides no consequence for acting while disqualified or for committing serious criminal offences.

---

[1] Section 215 of the RO Act.
[2] Section 307A of the RO Act.

For example, the Royal Commission noted that a person against whom a civil penalty has been imposed for a contravention of the statutory officers' duties[3] cannot be disqualified from holding office under the current disqualification provisions.[4] This is the case even if the conduct that led to the imposition of a civil penalty clearly demonstrated the person was unable or unwilling to uphold the standards reasonably expected of a person holding office in an organisation.

Providing for the possibility of disqualification from office and restricting who can be elected to office, in circumstances where a ground for disqualification has been made out and the Federal Court considers disqualification just, is a rational means of ensuring greater compliance with the standards of conduct reasonably expected of officers, and a rational method for improving governance of organisations more generally.

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

Reasonableness and proportionality

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

These are reasonable and proportionate methods of ensuring that officials who deliberately disobey the law are restricted in their ability to be in charge of registered organisations. This will serve to protect the interest of members and guarantee public order by ensuring the leadership of registered organisations act lawfully.

Cancellation of registration of registered organisations

The Committee asks:

- **whether there is reasoning or evidence that establishes that one or more of the stated objectives addresses a pressing or substantial concern, or whether the proposed changes are otherwise aimed at achieving a legitimate objective;**
- **how the measure is effective to achieve (that is, rationally connected to) its stated objective;**
- **whether the limitation is a reasonable and proportionate measure to achieve the stated objective (in particular, whether the grounds for cancellation of registration are sufficiently circumscribed); and**
- **the extent of the limitation in respect of the right to strike noting previous concerns raised by international supervisory mechanisms.**

Current provisions

Under the current provisions of the RO Act,[5] the Federal Court may make an order cancelling the registration of an organisation in limited circumstances, including where the conduct of the organisation or a substantial number of its members has prevented or hindered the intention or objects of the Fair Work Act or the RO Act. Cancellation by the Fair Work Commission (Commission) may also be effected on technical grounds.[6]

---

[3] Set out in Division 2 of Part 2 of Chapter 9 of the RO Act.
[4] Royal Commission into Trade Union Governance and Corruption, Final Report, Vol 5, p 234 [188].
[5] Section 28 of the RO Act.
[6] Section 30 of the RO Act.

Changes proposed

The Bill expands the grounds for cancelling an organisation's registration to include:

- corruption by its officials and repeated law breaking by the organisation, its officials or its members;
- multiple breaches of a wider range of relevant laws by the organisation or by a substantial number of its members; and
- serious breaches of criminal laws by the organisation.

The Bill also streamlines and simplifies some of the existing grounds for cancellation, including:

- failure to comply with a court order or injunction by the organisation or a substantial number of its members; and
- the organisation or a substantial number of members taking or organising obstructive, unprotected industrial action.

The Bill provides that the Court must cancel an organisation's registration where a ground for cancellation exists and the Court considers that it would not be unjust to do so. In deciding whether it would be unjust to cancel an organisation's registration, the Court must consider the best interests of the organisation's members, the nature of the conduct that constitutes a cancellation ground, if other action has been taken to address the conduct and any other relevant matters.

The Court may make alternative orders that target a particular part of an organisation, where a ground for cancellation is established because of the behaviour of officers or members in a particular part of an organisation, for example, a branch or division.

Applications for alternative orders may be made to the Court directly without the need for there to be a concurrent application for the cancellation of an organisation's registration.

The alternative orders the Federal Court can make include:

- the disqualification of certain officers from holding office for a period of time,
- changes to an organisation's eligibility rules to exclude certain members from the organisation,
- the suspension of rights, privileges or capacities of a part of the organisation, such as rights to apply for entry permits under the Fair Work Act or restriction of the use of funds or property by a part of the organisation (Item 4, Schedule 2: new Division 5).

In response to the Committee's specific concern, the Bill does not contain provisions circumscribing the right to strike as protected by the right to freedom of association. The provisions of the Bill allowing for an application for cancellation of registration to be made on the basis that an organisation, part of the organisation or a class of members, have engaged in obstructive industrial action effectively replicate the existing provisions of the RO Act.[7]

Objectives

The amendments to the cancellation provisions of the RO Act have the sole objective of protecting the interests of members and guaranteeing the democratic functioning of organisations under the stewardship of officials and a membership that respects the law and thus maintains public order.

Extensive evidence was presented to the Royal Commission of some organisations, branches or parts of organisations, where a culture of little or no regard for the legislation regulating registered organisations, and even criminal law, persists. The existence of such a culture demonstrates the need for new mechanisms designed to ensure compliance with the existing standards reasonably expected of organisations and their officers. It has become clear that, in addition to the changes to industrial relations legislation recommended by the Royal Commission, there is a pressing need to ensure greater compliance with the existing legislative regime and relevant criminal laws.

These amendments address the legitimate objective by providing a clearer and more streamlined scheme for the cancellation of registration of an organisation and expanding the grounds on which an application for cancellation can be made. The new cancellation provisions make it obvious to

[7] Paragraphs 28(1)(b) and (c) of the *Fair Work (Registered Organisations) Act 2009*

organisations, their officers and members, that the types of conduct forming grounds for an application may result in the cancellation of registration, and that misconduct and unlawful behaviour cannot ever be considered an 'acceptable' method of achieving a desired outcome.

Article 8 of the Freedom of Association and Protection of the Right to Organise Convention (C87) provides that, in exercising the rights provided for in the Convention, workers, employers and their respective organisations shall respect the law of the land. Choosing to register under the RO Act is a privilege governed by the existing RO Act. Organisations registered under the RO Act do not currently have freedom to conduct their affairs in any way they see fit but are bound by that Act. For example, the rules of every organisation must be approved by the Fair Work Commission and cannot be set by the organisation without limit.

When organisations or their officers deliberately breach the RO Act then there must be an effective sanction if the system of registration is to remain meaningful. In the case of a registered organisation, the sanction could include losing the right to act as an officer, losing the right to expand through amalgamation, being placed into administration, or losing registration.

Consistent with the existing structure for the registration of industrial associations, the Bill makes clear that there is a framework within which registered organisations must operate. The Bill makes clear that failing to comply with the RO Act has consequences consistent with the purpose of that Act.

Reasonableness and proportionality

The grounds for cancellation of registration proposed by the Bill are reasonable and proportionate as, even where a ground for cancellation exists, the Federal Court still has a discretion not to cancel the registration of an organisation in circumstances where that disqualification would be unjust. This ensures that cancellation remains a measure of last resort. The Court is required to take into account the best interests of the members of the organisation as a whole in determining whether the cancellation of registration would be unjust,

In addition, the availability of alternative orders provides the Federal Court with appropriate means of limiting the effect on members who have not been involved in activity that would ground an order for cancellation.

Placing unions into administration

The Committee asks:

- **whether there is reasoning or evidence that establishes that one or more of the stated objectives addresses a pressing or substantial concern, or whether the proposed changes are otherwise aimed at achieving a legitimate objective;**
- **how the measure is effective to achieve (that is, rationally connected to) its stated objective; and**
- **whether the limitation is a reasonable and proportionate measure to achieve the stated objective (in particular, whether the grounds for placing unions under administration are sufficiently circumscribed).**

Current provisions

Section 323 of the RO Act contains the current framework for dealing with organisational dysfunction and provides for applications to be made to the Federal Court for a declaration in relation to an organisation or any part of it. If a declaration is made, the Federal Court may approve a scheme for the taking of action to resolve the matters to which the declaration relates. The provision, as currently drafted, does not provide for remedial action to be taken if officers act in their own interests, break the law, or breach their duties under the RO Act. The RO Act does not expressly provide for the appointment of an administrator.

Changes proposed

The Bill expands the categories of declaration for a remedial scheme in relation to an organisation to be approved by the Federal Court to include:

- That one or more officers of an organisation or part of an organisation have engaged in financial misconduct in relation to carrying out of their functions or in relation to the organisation or part. An inclusive definition of financial misconduct is included in the Bill.

- That a substantial number of the officers of the organisation or part of an organisation have, in the affairs of the organisation or part, acted in their own interests rather than in the interests of members of the organisation or part as a whole.
- That affairs of an organisation or part of an organisation are being conducted in a manner that is oppressive or unfairly prejudicial to, or unfairly discriminatory against a member or members in a manner that is contrary to the interests of the members of the organisation or part as a whole.

The Bill also amends the Federal Court's power to approve a scheme consequent to the making of a declaration to expressly permit the appointment of an administrator, and the functions of the administrator will be clearly set out. The administrator will control and may manage the property and affairs of the organisation, or perform any functions or powers that the organisation or its officers would typically perform. Officers and employees must assist administrators and there are criminal penalties for failing to do so.

Objectives

These measures have the sole objective of protecting the interests of members and guaranteeing the democratic functioning of organisations under the stewardship of officials and a membership that respects the law and thus maintains public order.

The Final Report of the Royal Commission identified numerous examples of organisations no longer serving the interests of their members because of pervasive breaches of duties by officers and widespread and repeated law-breaking by union officials. The proposed changes will improve the effectiveness of the administration provisions by allowing the Federal Court to take appropriate remedial and facilitative action to overcome such maladministration or dysfunction associated with a culture of lawlessness or financial maladministration.

The proposed changes pursue the legitimate objective of ensuring that organisations are functioning effectively to be able to serve the interests of their members. The amendments are rationally connected to this objective because the new grounds for a declaration are all instances of an organisation not acting in the interests of their members and therefore not functioning effectively.

Reasonableness and proportionality

The measures are reasonable and proportionate for the following reasons:

- The new grounds under which the Federal Court may make a declaration are clearly set out and if present, indicate that an organisation is not serving the interests of their members and is not functioning effectively.
- Limit the effect on members who have not been involved in maladministration or unlawful activity by providing for orders to be limited to the part of the organisation that has conducted those activities.
- Relief is discretionary[8] and the Federal Court may find that no action is necessary or justified.
- Consistent with the current administration provisions, the Court must be satisfied that an order (should it choose to make one) would not do substantial injustice to the organisation or any member of the organisation.[9]

Introduction of a public interest test for amalgamations of unions

The Committee asks:

- **whether the measure pursues a legitimate objective for the purposes of international human rights law;**
- **how the measure is effective to achieve (that is, rationally connected to) its stated objective; and**
- **whether the limitation is a reasonable and proportionate measure to achieve the stated objective (in particular, whether the measure is the least rights restrictive way of achieving its stated objective, whether the measure is sufficiently circumscribed, the**

[8] Proposed subsection 323A(1).
[9] Proposed subsection 323A(3).

extent of the limitation including in respect of the right to strike noting previous concerns raised by international supervisory mechanisms and the existence of relevant safeguards).

Current provisions

Under the current provisions of the RO Act, once an application for amalgamation of organisations is lodged with the Commission, it must set a hearing date to approve the 'scheme of amalgamation'. Unless an exemption is granted, the Commission will then direct the Australian Electoral Commission to conduct a secret postal ballot of members of each of the organisations.

An amalgamation day will be fixed on which the new organisation will be the only registered organisation, and the amalgamated organisations will be de-registered, provided that: the ballot has no irregularities; the Commission is satisfied that there are no relevant pending proceedings against the existing organisations; and the newly amalgamated organisation will be bound by the obligations of the existing organisations.

Changes proposed

The Bill introduces a public interest test to be applied by the full bench of the Commission when registered organisations seek to merge. The Bill also clarifies whether an amalgamation day may be set.

The Commission, in determining the public interest, will take into account:

- the impact on employees and employers in the industries concerned,
- any history the organisations may have in breaking the law, taking into account the age and incidence of such contraventions, and
- other relevant matters which could include the impact of a merger on the Australian economy.

The existing organisations concerned will be able to be make submissions about the public interest, as will organisations and bodies that represent industries potentially affected by the merger and those who represent employees and employers in those industries.

The Registered Organisations Commissioner, the Minister for Employment and a Minister who has responsibility for workplace relations in a referring state will also be able to make submissions. Submissions can also be made by any person with sufficient interest in the proposed amalgamation, that is, those whose rights, interests or legitimate expectations would be affected.

Current section 73 of the RO Act provides for the Commission to set an amalgamation day where certain preconditions are met. This provision will be amended to clarify what pending proceedings are relevant to the decision as to whether to fix an amalgamation day. These will include some criminal and some civil proceedings.

Objectives

The public interest test for amalgamations will improve organisational governance, protect the interests of members, ensure that organisations meet the minimum standards set out in the RO Act and address community concerns by creating a disincentive for a culture of 'contempt for the rule of law' that has been identified amongst some registered organisations.[10] It is a pressing and substantial concern, such as is required to constitute a legitimate objective for the purposes of international human rights law, that this culture is present in some registered organisations seeking to amalgamate.

The introduction of a public interest test will be effective in meeting this objective as it will reduce the risk of an adverse effect of an amalgamation of existing organisations. This is because a culture of lawlessness in one or more amalgamating organisations will be prevented from pervading into the other organisations involved in an amalgamation.

As stated earlier, Article 8 of the Freedom of Association and Protection of the Right to Organise Convention (C87) provides that, in exercising the rights provided for in the Convention, workers, employers and their respective organisations shall respect the law of the land. Choosing to register under the RO Act is a privilege governed by the existing RO Act. Organisations registered under the RO Act do not currently have freedom to conduct their affairs in any way they see fit but are bound by

[10] Royal Commission into Trade Union Governance and Corruption, Final Report, Vol 5, p 401 [23].

that Act. For example, the rules of every organisation must be approved by the Fair Work Commission and cannot be set by the organisation without limit.

When organisations or their officers deliberately breach relevant laws then there must be an effective sanction if the system of registration is to remain meaningful. In the case of a registered organisation, the sanction could include losing the right to act as an officer, losing the right to expand through amalgamation, being placed into administration, or losing registration.

If an organisation obeys the law and complies with its rules then its activities will not be limited by the provisions in the Bill. For example, two organisations that comply with the law would be highly likely to satisfy the public interest test for amalgamations.

Reasonableness and proportionality

Applying a public interest test to the mergers of registered organisations is not a new concept. Under predecessor legislation, the Australian Industrial Relations Commission was required to have regard to the public interest in performing its functions under the registered organisations provisions.[11] The public interest test in this Bill is more limited and will only apply when the Commission considers applications for the amalgamation of registered organisations.

This measure is reasonable and proportionate. It is sufficiently circumscribed in that it does not impact on the rights of workers to continue to be represented by a registered organisation and takes the likely benefit to members of the existing organisations proposing to enter into an amalgamation into account. In addition, the measure does not limit the right to strike.

The measure is also a reasonable and proportionate means to limit the spread of a culture of lawlessness in some organisations. The measure is properly supervised by a full bench of the Commission to ensure rigorous and robust consideration of merger applications, with appropriate limitations on the Commission's discretion in place.

[11] The latest iteration of this provision was contained in subsection 103(2) of the *Workplace Relations Act 1996* and prior to 2005 it was contained in section 90 of that Act.

TREASURER

Ref: MC17-008283

Mr Ian Goodenough MP
Chair
Parliamentary Joint Committee on Human Rights
S1.111
Parliament House
CANBERRA ACT 2600

Dear Chair

Thank you for your correspondence of 18 October 2017 concerning the assessment of the *Treasury Laws Amendment (Housing Tax Integrity) Bill 2017* and *Foreign Acquisitions and Takeovers Fees Imposition Amendment (Vacancy Fees) Bills 2017* in your Report 11 of 2017. My responses to the Committee's questions are set out below with further information at **Attachment 1**.

Compatibility of the measure with the right to equality and non-discrimination

The vacancy charge builds on the Government's existing foreign investment regime which seeks to increase the number of houses available for Australians to live in. The charge provides a financial incentive for the foreign owner to make their property available on the rental market and is expected to increase the number of homes available to Australians wishing to rent.

The foreign investment framework, including the *Foreign Acquisitions and Takeovers Act 1975* (the Act), imposes rules and screening requirements on foreign persons that are investing in Australia – the vacancy charge is consistent with the scope of the framework. The vacancy charge applies to foreign persons as defined under the Act who apply for and subsequently receive Foreign Investment Review Board approval and choose to leave their property vacant. The vacancy charge is only payable when a property is not occupied or genuinely available on the rental market for at least six months in a 12 month period.

The occupation of the property is not restricted to the foreign owner but is extended to their relative or permitted occupant under a lease or license. If genuine attempts are made to make the property available on the rental market then the vacancy charge will not apply.

Further, the impact of the vacancy charge will be narrowed by exemptions included in the regulations that cover circumstances where the property could not be reasonably occupied, such as where the property is undergoing substantial renovations or has been damaged or the person occupying the property is receiving medical care.

Parliament House Canberra ACT 2600 Australia
Telephone: 61 2 6277 7340 | Facsimile: 61 2 6273 3420

Civil penalty provisions

The civil penalty provisions in the Bill should not be considered 'criminal' for the purposes of international human rights law. While the civil penalty provisions included in the Bill are intended to deter people from not complying with the obligations imposed by the Act, none of the civil penalty provisions carry a penalty of imprisonment and there is no sanction of imprisonment for non-payment of any penalty.

I trust this information will be of assistance to you.

Yours sincerely

The Hon Scott Morrison MP

7 / 11 / 2017

Attachment 1

Right to be free from discrimination on prohibited grounds

Article 26 of the International Covenant on Civil and Political Rights (ICCPR) recognises that all persons are equal before the law and are entitled without discrimination to the equal protection of the law. Article 26 further provides that 'the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as national origin. However, the Human Rights Committee has recognised that 'not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant'.

The Bill implements an annual vacancy charge that applies the same definition of 'foreign person' as stated in the *Foreign Acquisitions and Takeovers Act 1975*. The annual vacancy charge will only apply to those 'foreign persons' who are required to apply and subsequently receive from the Foreign Investment Review Board (FIRB) approval for a residential real estate acquisition.

The Bill also generally engages the rights protected by the International Convention on the Elimination of All Forms of Racial Discrimination. Paragraph 1 of Article 1 of International Convention on the Elimination of All Forms of Racial Discrimination defines the term 'racial discrimination' to mean 'any distinction, exclusion, restriction or preference based on race, colour descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural, or any other field of public life'.

Under Article 2(a)(a) of the International Convention on the Elimination of All Forms of Racial Discrimination, [E]ach State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local shall act in conformity with this obligation'. Under Article 5 of International Convention on the Elimination of All Forms of Racial Discrimination States Parties 'undertake to prohibit and eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to …national …origin, to equality before the law' in the enjoyment of civil, political, economic, social and cultural rights, including the 'right to own property alone as well as in association with others'.

The Bill limits Article 26 of the ICCPR and Articles 2 and 5 of International Convention on the Elimination of All Forms of Racial Discrimination because the core obligations imposed by the Bill only apply to a 'foreign person'. While an Australian citizen who is not ordinarily resident in Australia may be a 'foreign person' for the purposes of this Act, it is anticipated that the majority of individuals who are directly affected by this Bill will not be Australian citizens.

While the Bill, if enacted, will primarily affect individuals who are citizens of countries other than Australia, there is no less restrictive way of achieving the objectives of the Bill. Accordingly those limitations are reasonable, necessary and proportionate.

Conclusion

This Bill is compatible with human rights because to the extent that they may limit human rights, those limitations are reasonable, necessary and proportionate.

Assessment of civil penalties

Civil penalty provisions may engage criminal process rights under Articles 14 and 15 of the International Covenant on Civil and Political Rights (ICCPR), regardless of the distinction between criminal and civil penalties in domestic law. This is because the word 'criminal' has an autonomous meaning in international human rights law. When a provision imposes a civil penalty, an assessment is therefore required as to whether it amounts to a 'criminal' penalty for the purposes of the Articles 14 and 15 of the ICCPR.

The civil penalty provisions in the Bill should not be considered 'criminal' for the purposes of international human rights law. While the civil penalty provisions included in the Bill are intended to deter people from not complying with the obligations imposed by the Act, none of the civil penalty provisions carry a penalty of imprisonment and there is no sanction of imprisonment for non payment of any penalty. In addition, the maximum pecuniary penalty that may be imposed on an individual for contravening a civil penalty provision is generally lower than maximum pecuniary penalty that may be imposed for the corresponding criminal offence. The statement of compatibility therefore proceeds on the basis that the civil penalty provisions in the Bill do not create criminal offences for the purposes of Articles 14 and 15 of the ICCPR.

Conclusion

This civil penalty provisions contained in the Bill do not create criminal offences for the purposes of Article 14 and 15 of the ICCPR.