Appendix 3

Correspondence

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

Reference: MC17-047773

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 15 June 2017, on behalf of the Parliamentary Joint Committee on Human Rights, 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).

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 detailed response to the questions raised by the Committee is enclosed. I trust that this comprehensive response assists the Joint Committee in its deliberations.

Yours sincerely

Senator the Hon Michaelia Cash

3 July 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

Sections 11 and 11A of the *Code for the Tendering and Performance of Building Work 2016* (the 2016 Code) prohibit a code covered entity from being covered by an enterprise agreement that includes certain types of clauses. The Statement of Compatibility with Human Rights for the 2016 Code states that this measure pursues the legitimate objective of seeking to ensure that enterprise agreements are not used to limit the ability of code covered entities to manage their business efficiently or restrict productivity improvements in the building and construction industry more generally.

Committee's request for advice

The committee has sought my advice as to:

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

Response

The building and construction industry is the second largest industry in Australia, accounting for around 8.1 per cent of gross domestic product and around 9 per cent employment.[1] An efficient and productive building and construction industry is crucial to promoting jobs, driving economic growth and ultimately lowering costs for the taxpayer and other consumers of building and construction services.

When the Australian Building and Construction Commission (ABCC) previously existed (October 2005 to June 2012), productivity in the construction sector grew by 20%.

In the four years prior to the establishment of the former ABCC the rate of industrial disputes was 5 times the average across all industries.

During the former ABCC's operation, disputes fell to just 2 times the average across all industries.

The former ABCC was abolished by the then Federal Labor Government in June 2012 and replaced with a new agency, Fair Work Building and Construction (FWBC), with weaker powers. During the operation of FWBC (June 2012 to December 2016) disputes in the construction industry increased to nearly 5 times the average across all industries.

Increase in costs or delays in completing projects has a negative impact on the growth and productivity of the building and construction industry.[2] The Productivity Commission has also stated that given the

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[1] Office of the Chief Economist, Department of Industry, Innovation and Science, *Australian Industry Report 2016* https://www.industry.gov.au/Office-of-the-Chief-Economist/Publications/AustralianIndustryReport/assets/Australian-Industry-Report-2016-Chapter-2.pdf

[2] The Productivity Commission noted that ABS data does not capture many aspects of industrial disputation such as go-slows, work-to-rule, and overtime bans meaning that the true costs of industrial relations disharmony in the

importance of the building and construction sector to many other industries, higher costs or delays in the provision of construction projects have widespread effects on the economy as a whole.[3]

Many inquiries into the building and construction industry have identified that the cost of building infrastructure in Australia is higher than other nations and have linked these high building costs with workplace relations issues. The inquiries have recommended that governments use their purchasing power to achieve reform in the industry and to increase efficiency, productiveness and johs growth. For example, in its 2014 report, *Public Infrastructure*, the Productivity Commission found that:

> *'the most promising policy approach is for Australian governments to use their substantial purchasing power as a countervailing measure against conduct that leads to high costs, 'sweetheart' deals, coercion, sham contracting and poor work health and safety practices.*
>
> *Governments could achieve this through adoption of guidelines modelled on those of the Victorian Government, which covers all of the above undesirable conduct.*[4]

There is a substantial concern that restrictive clauses in enterprise agreements, which are often forced onto subcontractors by head contractors that have made agreements with unions, are contributing to costs and delays of projects within the building and construction industry. For example:

- In a report published in June 2012 the Business Council of Australia reported that it costs considerably more to build a variety of infrastructure in Australia than it does in the United States of America. The worst cases cited were airports, which were 90 per cent more expensive, and hospitals, which were 62 per cent more expensive.[5] Other projects ranged from 26 per cent to 43 per cent more expensive. The report concluded that Australia is a high cost, low productivity environment for building infrastructure projects.[6]
- Infrastructure Australia has also found Australian projects to be 40 per cent more expensive than projects in the United States of America, requiring 30 to 35 per cent more labour input.[7]
- In 2014 Master Builders Association suggested that the cost of a building enterprise agreement can add up to a 30 per cent premium to construction costs.[8]

Restrictive clauses commonly found in building and construction industry enterprise agreements include:

- 'jump up' clauses which provide that subcontractors cannot be engaged unless they apply wages and conditions at least at the same level as the enterprise agreement that applies to the head contractor. In its final report on the workplace relations framework, the Productivity Commission found 70 per cent of a random sample of construction agreements contained a jump up clause.[9] The direct effect of this clause is an increase in labour costs and therefore overall costs on a project.
- clauses that constrain the ability of the employer to direct its employees to work in order to meet operational requirements or to maximise employee productivity. The effect of these clauses can result in sites shutting down for days, delaying completion of a project and therefore increasing costs. In early 2017, the Construction, Forestry, Mining and Energy Union (CFMEU) set its calendar so that no work was to be performed between Easter and ANZAC day, resulting in a 12 day shutdown of major building sites.[10]

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construction industry and its resulting impact on the economy is not known: Productivity Commission (2014), *Public Infrastructure*, Inquiry Report No. 7, Canberra, published 27 May 2014, page 540.

[3] Ibid page 539.

[4] Ibid page 547

[5] Business Council of Australia, *Pipeline or Pipe Dream? Securing Australia's Investment Future: Overview and Full Study*, page 29

[6] Ibid, page 38

[7] Infrastructure Australia, *National Infrastructure Plan June 2013*, page 25

[8] Daily Telegraph *Ransoming our future ... union managers push construction costs sky high* 6 February 2014 http://www.dailytelegraph.com.au/news/ransoming-our-future-unions-managers-push-construction-costs-sky-high/news-story/9e91755054faf0bb059f7368d301ad90

[9] Productivity Commission 2015, *Workplace Relations Framework*, Final Report, Canberra p 817

[10] CFMEU Construction, *2017 RDOs* http://www.cfmeunsw.asn.au/sites/cfmeunsw.asn.au/files/downloads/rdo/rdocalendar2017.pdf ;

- clauses that provide the union with the right to hold a paid meeting with workers for up to two hours per shift. This clause has been misused, for example at the Commonwealth Games site in Queensland, in a rolling fashion for key trades (i.e. with one trade after another taking a two hour paid meeting) effectively giving the union standing rights to disrupt the project and leverage demands. It was reported that the meetings forced construction to largely grind to a halt at the Games venue and cost head contractor Hansen Yuncken $700,000, and also threatened to delay the finish date of the sports complex[11].

- clauses that allow unions to veto the use of subcontractors, or, if the union allows them to be engaged, then dictates the terms and conditions of engagement (CFMEU Queensland pattern agreement).

- clauses that give the unions the power to veto any employer measures to improve productivity by prohibiting the introduction of productivity schemes unless written agreement has been reached with all parties to the agreement (CFMEU Queensland pattern agreement).

Moreover, these restrictive practices, that are imposed by deals done by head contractors and unions, substantially inhibit the right of subcontractors to freely engage in collective bargaining. For many subcontractors in the Australian building industry, there is no such thing as free bargaining, as acceptance of such agreements, imposed by others, is a condition of being able to perform work on certain types of building projects.

The high level of unlawful behaviour in the industry impacts its productivity and that in turn impacts the national economy. There are around 95 CFMEU representatives currently before the courts for more than 976 suspected contraventions. The courts have imposed more than $9.6 million in fines on the CFMEU, in cases brought by the ABCC, Fair Work Building and Construction, and their predecessors.

Despite the imposition of substantial fines, judicial commentary provides concerning evidence of the CFMEU's record of disregard for the law:

> *"[The CFMEU is] an organisation with a long and sorry history of industrial disputation in which its willingness to disregard the industrial laws of this country seems to know no bounds".*
>
> *"The CFMEU does have an egregious record of repeated and wilful contraventions of all manner of industrial laws..."*[12]
>
> *"What is notable is not only the sheer number of contraventions, but the frequency of them [featuring] abuse of industrial power and the use of whatever means the individuals involved considered likely to achieve outcomes favourable to the interests of the CFMEU..."*[13]
>
> *"The CFMEU's record of non-compliance with legislation of this kind has now become notorious ... That record ought to be an embarrassment to the trade union movement."*[14]
>
> *"Has there ever been a worse recidivist in the history of the common law?"* [15]
>
> *"(the officials' behaviour) bespeak a deplorable attitude, on the part of the CFMEU, to its legal obligations and the statutory process which govern relations between unions and employers in this country".*[16]

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[11] The Australian *Commonwealth Games site hostage to union 'ploy'* 26 July 2016
[12] Judge Jarrett, ABCC v CFMEU & Anor [2016] FCCA 3265
[13] Justice Mortimer, Director, Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union (No. 2) [2016] FCA 436
[14] Justice Jessup, Director, Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union [2016] FCA 772
[15] Justice Jessup, Director, Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union (No. 2) [2015] FCA 1462
[16] Justice Tracey, Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union (No 2) [2015] FCA 407

The Committee has also sought my advice as to whether consultation has occurred with the relevant workers' and employers' organisations in relation to the measure.

Extensive consultation with a range of parties was undertaken before the 2016 Code was made, the details of which are set out in Attachment C of the Explanatory Statement to the 2016 Code. In particular:

- The Coalition Task Force on re-establishing the Australian Building and Construction Commission (ABCC) undertook consultation with industry and unions prior to the 2013 election.
- On 30 October 2013 the Department of Employment consulted with relevant employer organisations and unions in relation to the re-establishment of the ABCC and circulated detailed proposed provisions for inclusion in a new building code for discussion.
- The Government also consulted with state and territory ministers through the Select Council on Workplace Relations on 1 November 2013 and with employer organisations and unions through the National Workplace Relations Consultative Council on 8 November 2013.
- On 9 December 2013, the Department of Employment consulted further with relevant employer associations, unions and state government representatives on a draft building code. Feedback from this consultation was taken into consideration and the draft building code was amended as appropriate. The organisations consulted included Master Builders Australia, Australian Chamber of Commerce and Industry, Australian Industry Group, Housing Industry Association, Australian Council of Trade Unions and construction unions.
- An advance release of the draft building code was then made available on the Department of Employment's website in April 2014 and updated in November 2014 as a result of further feedback from interested parties.

Finally, the Committee has noted that a number of international supervisory mechanisms have previously made comments and recommendations in relation to restrictions Australia has imposed on the right to freedom of association and the right to collectively bargain and has sought the Government's response, including whether the Government agrees with these views.

As to those observations from international bodies, I refer to my comments above as to why the requirements in sections 11 and 11A are a reasonable and proportionate measure in pursuit of the legitimate objective of seeking to ensure that enterprise agreements are not used to limit the ability of subcontractors from freely engaging in bargaining and being free to manage their own affairs in the most appropriate manner. In particular, I note that sections 11 and 11A do not prevent parties bargaining freely on a broad range of matters that relate to their terms and conditions of employment including wages, benefits, allowances ordinary working hours and the like.

As such the Government considers that these measures appropriately balance the right of employees to negotiate with respect to their terms and conditions of employment with the need to ensure that employers, particularly small subcontractors, are not subject to coercion in relation to the content of agreements and able to manage their businesses efficiently and productively.

The Committee has also referred to the concluding observations of the United Nations Committee on Economic, Social and Cultural Rights published in May 2009. Those concluding observations primarily concerned restrictions on the right to strike in the *Building and Construction Industry Improvement Act 2005* and the *Fair Work Act 200.9* In 2010 the then Federal Labor Government responded to these observations, stating that it was the Government's view that the *Fair Work Act 2009* balances the right of employees to participate in collective bargaining, including taking protected industrial action in support of claims in pursuit of an enterprise agreement, with the need for economic stability and business certainty.

Conclusion - reasonable and proportionate measures to achieve the stated objective

As a major procurer of building and construction services, the Australian Government takes seriously its responsibility to ensure that taxpayer funds are spent appropriately so to achieve maximum benefit and value for money and generate productivity benefits to the Australian economy. The 2016 Code applies solely to employers and ensures that workplace relations practices are productive and fair.

Code covered entities and their workers are free to bargain collectively at the enterprise level, as

provided under the *Fair Work Act 2009*. To the extent there is any limitation of the right to bargain collectively it is:

- in pursuit of the legitimate objective of seeking to ensure that enterprise agreements are not used to limit the ability of code covered entities to manage their businesses efficiently or restrict productivity improvements;
- to ensure that subcontractors have the ability to genuinely bargain and not be subject to coercion through the imposition of particular types of agreements by head contractors and unions; and
- to ensure that freedom of association is not impinged upon.

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

The 2016 Code also promotes collective bargaining because it requires terms and conditions of employment to be dealt with in enterprise agreements made under the *Fair Work Act 2009* and discourages the use of agreements outside this framework. This ensures transparency and guarantees oversight by the independent Fair Work Commission of agreements containing terms and conditions of employment.

The 2016 Code does not prohibit such matters as rostered days off or shift allowances, public holidays, or stable and agreed shift arrangements and rosters. Nor does it prohibit or restrict the right of workers and their representatives (including a union) to be consulted on redundancies and labour hire.

The 2016 Code does prevent clauses in agreements that limit the ability of workers and their employers to determine their day-to-day work arrangements. For example, clauses in enterprise agreements that require the additional agreement of the union, such as where an employee wishes to substitute a different rostered day off and the employer agrees, would not be permitted.

It is worth noting that the types of clauses described in sections 11 and 11A are not strictly prohibited from being included in enterprise agreements; being an "opt-in system", building contractors that do not wish to undertake Commonwealth-funded building work do not need to comply with the requirements of the Code.

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

Committee's request for advice

The committee has sought my advice as to:

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

Response

Paragraph 13(1) of the Code provides that employers must protect freedom of association by adopting and implementing policies and practices that ensure that persons are:

- free to become or not become members of building associations (which includes unions),
- free to be represented or not represented by building associations;
- free to participate or not participate, in lawful industrial activities; and
- are not discriminated against in respects of benefits in the workplace because they are, or are not, members of a building association.

In furtherance of that objective, paragraphs 13(2)(b) and (c) of the Code provide that, without limiting paragraph 13(1), code covered entities must ensure that 'no ticket, no start' signs, or similar, are not displayed and signs that seek to vilify or harass employees who participate, or do not participate, in industrial activities are not displayed. Whether a sign rises to the level of harassing or vilifying a person would depend on the particular subject matter of the sign and would be a question of fact to be determined in the particular circumstances.

Paragraph 13(2)(j) requires code covered entities to ensure that building association logos, mottos or indicia are not applied to clothing, property or equipment supplied or provided for by the employer, or any other conduct is engaged in which implies that membership of a building association is anything other than an individual choice for each employee.

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

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

These measures are necessary to protect the right to join or not to join a union because of the pervasive culture that exists within the building and construction industry in Australia in which it is understood that there is such a thing as a 'union site' and on those sites all workers are expected to be members of a building association. Evidence of the existence of this culture can be found in many decisions of the courts, including most recently:

- In *Australian Building and Construction Commissioner v Barker & Anor* [2017] FCCA 1143 the Federal Circuit Court was satisfied that two workers had been deprived of their right to work and earn income for two days when, on 28 January 2016, they were told by Mr Barker, a

CFMEU official in the role of shop steward/delegate, that they could not work on the project unless they paid union fees. When a site manager informed Mr Barker that the workers had a right not to be in a union, Mr Barker replied 'No, everybody's got to be in the union, this is an EBA site, it's in your EBA that they all have to be on site in the union and have an EBA.'[17]

- In *Australian Building and Construction Commissioner v Moses & Ors* [2017] FCCA 738 the Federal Circuit Court was satisfied that CFMEU organiser Mr Moses, accompanied by a CFMEU delegate, threatened workers at Queensland's Gladstone Broadwalk project to the effect that if they did not join the CFMEU then no work would occur by the workers that day and they would be removed from the project. He told the workers that if they wanted to work on the project, which was a union site, they would have to join the CFMEU.[18]
- In *Director of the Fair Work Building Industry Inspectorate v Vink & Anor* [2016] FCCA 488 a CFMEU official was found to have entered a construction site and, in an incident described as "sheer thuggery" by the Court, removed workers' belongings from the site shed, including lunches from the refrigerator. The Court concluded the conduct on site was intended "to give a clear message to all employees that benefits on the work site would only be afforded to members of the union."

In this context, the measures prescribed in the Code are clearly necessary to ensure that freedom of association is protected. It is clear from the CFMEU's repeated record of contraventions of this right that it does not respect freedom of association and that it is therefore necessary that an instrument such as the Code include stronger protections of this right than those already contained in the *Fair Work Act 2009*.

The CFMEU's misrepresentation of a worker's choice to become or not become a member of a union has been ongoing with contraventions dating back a number of years.[19]

There is also evidence that the idea that a worker must be a member of a building association has become so ingrained in the building and construction industry that even employers are making misrepresentations about freedom of association in fear of the CFMEU.

For example, in *Director of the Fair Work Building Industry Inspectorate v Construction Forestry, Mining and Energy Union (Quest Apartments and Greek Community Centre)* [2016] FCA 1262 the director of Arteam, Mr Hanna, was found to have sent a text message to workers on 11 March 2014 stating they must have union membership before starting work at two Melbourne projects. Despite a worker informing Mr Hanna of his right to choose whether or not he joined a union Mr Hanna told the worker that the CFMEU could close the site and prevent others from working if the employee refused to pay union membership fees. As a result, the worker left the site and did not perform any work. In handing down penalties Justice Tracey of the Federal Court stated:

> *Mr Hanna had become immersed in the culture of at least some commercial construction sites on which compulsory union membership was accepted by both employers and employees...*
>
> *There are thousands of small contractors involved in the construction industry. Many are, potentially, susceptible to pressure to require employees to join a union, fearing that if they do not do so they will not be engaged to work on commercial construction sites.*[20]

The display of signs asserting that non-union members will not be permitted to work on a particular site, or that seek to vilify or harass employees who do not participate in industrial activities, along with the presence of union logos, mottos or indicia on clothing, property or equipment issued or provided for by the employer gives workers a strong impression that not only is union membership compulsory for anyone that wishes to work on the particular site, but that relevant employers support this position.

In addition, in relation to signs that seek to vilify or harass employees who participate, or do not participate, in industrial activities I note that the ILO supervisory mechanisms have recognised that trade union organisations should respect the limits of propriety and not use insulting language in their

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[17] at [17]
[18] at [1] and [149]
[19] For example see *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union (No 2)* [2015] FCA 199; *Hadgkiss v Blevin* [2004] FCA 697
[20] at [30], [37]

communications.[21]

The Committee has also sought my advice as to whether consultation has occurred with the relevant workers' and employers' organisations in relation to the measure. As stated above, extensive consultation took place before the 2016 Code was made.

The Committee has noted that the Statement of Compatibility with Human Rights for the 2016 Code does not address the fact that ILO supervisory mechanisms have indicated that 'the prohibition of the placing of posters stating the point of view of a central trade union organization is an unacceptable restriction on trade union activities.' As such, the Committee considers that measures that restrict communication about union membership may limit the right to freedom of association.

In this context, the Committee's professed concern is misplaced and it is disappointing that the Committee has failed to take in the many findings by the courts over a number of years of the pervasive culture of building unions that does not respect freedom of association. The Committee's efforts would be better focussed on considering actual evidence of the manner in which the building industry operates in practice, rather than the self-serving and misleading assertions of a trade union organisation that seeks to defend the culture of building unions.

Conclusion - reasonable and proportionate measures to achieve the stated objective

To the extent that the right to freedom of expression is limited by these measures (noting the protection of freedom of association provided by paragraph 13(1) of the Code), that limitation is clearly reasonable and proportionate in pursuit of the legitimate objective explained given the culture of the building industry and the ongoing threats to freedom of association by certain building unions. For example, they do not prevent posters and signs that merely encourage or convey the benefits of union membership or communicate other union information from being displayed on a site, nor do they prevent workers from applying union logos, mottos or indicia to their own personal clothing, property or equipment.

The Code requires building employers to comply with all laws of the Commonwealth and the relevant state and territory that give a right of entry permit holder a right to enter premises where building work is performed.

The Code does not impose any additional restrictions on right of entry for officers of unions, rather it places an obligation on employers to comply with existing right of entry requirements and to ensure, so far as is reasonably practicable, that officers of unions seeking to enter their building sites also comply with these requirements.

This measure is reasonable, necessary and proportionate in light of evidence that the right of entry is being abused in this industry to disrupt work and cause economic loss to businesses. The misuse and abuse of right of entry by union officials in the building industry has been well documented by two Royal Commissions and the Courts.

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

TREASURER

Ref: MC17-005192

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 21 June 2017 seeking information about the Competition and Consumer Amendment (Competition Policy Review) Bill 2017, as requested by the Parliamentary Joint Committee on Human Rights in its Report 6 of 2017.

My response to the Committee's request is attached.

I trust this information will be of assistance to you.

Yours sincerely

The Hon Scott Morrison MP
3 / 8 / 2017

Cc: human.rights@aph.gov.au

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

ATTACHMENT

COMPETITION AND CONSUMER AMENDMENT (COMPETITION POLICY REVIEW) BILL 2017

RESPONSE TO PARLIAMENTARY JOINT COMMITTEE ON HUMAN RIGHTS

Coercive information gathering powers – increased penalty for failure to furnish or produce information and expansion of matters subject to notice

Section 155 of the *Competition and Consumer Act 2010* (the CCA) contains the primary investigative power of the Australian Competition and Consumer Commission (the ACCC), the competition regulator, and is crucial to the ACCC's effective administration and enforcement of the CCA.

Schedule 11 to the Competition and Consumer Amendment (Competition Policy Review) Bill 2017 (the Bill) proposes to:

- extend the ACCC's power under section 155 to cover investigations of court-enforceable undertakings and merger authorisation determinations;
- introduce a 'reasonable search' defence to the offence of refusing or failing to comply with section 155; and
- increase the penalty for non-compliance with section 155.

Increased penalty for failure to furnish or produce information – compatibility of the measure with the right not to incriminate oneself

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

The legitimate objective of the increased penalty is to strengthen the effectiveness, and ensure the integrity, of the ACCC's primary investigative power. The ACCC relies heavily on this power to compel parties to provide information, documents and evidence, in order to investigate anti-competitive conduct, which often occurs secretively.

2) How the measure is effective to achieve that objective:

The current penalty for non-compliance with section 155 was considered by the independent Competition Policy Review (the Harper Review) to be inadequate. Given that compliance with compulsory investigative powers is integral to the ACCC's investigation of competition concerns and a necessary part of the ACCC's enforcement of the CCA, the proposed increase in the penalty for non-compliance would more effectively deter non-compliance.

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

The increased penalty is reasonable and proportionate as it is consistent with the penalty applicable to directly comparable provisions, such as a similar power under the *Australian Securities and Investments Commission Act 2001* (as recommended by the Harper Review). It is important to note that the increase is to a *maximum* possible penalty, and the court has discretion to set a penalty lower than the maximum.

4) Whether the increased penalty is necessary to achieve that objective:

The compulsory information-gathering power in section 155 needs to be supported by an effective penalty to deter non-compliance with the power. The Harper Review found that the current penalty is inadequate and recommended that it be increased in line with similar powers under the *Australian Securities and Investments Commission Act 2001*. The Bill implements this recommendation and will ensure that the penalty better serves its deterrent purpose.

5) Whether there are less rights-restrictive ways of achieving that objective:

Where a penalty is found to be inadequate, the only way to increase its effectiveness is to increase the penalty itself. As noted above, the proposed increase is reasonable and proportionate.

6) Whether a derivative use immunity would be reasonably available:

The Government currently has no plans to introduce a 'derivative use immunity' to section 155. Such a change was not recommended by the Harper Review.

Increased penalty for failure to furnish or produce information – compatibility of the measure with the right to privacy

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

See answer 1 above.

8) How the measure is effective to achieve that objective:

See answer 2 above.

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

See answer 3 above.

10) Whether the increased penalty is necessary to achieve that objective:

See answer 4 above.

11) Whether there are less rights-restrictive ways of achieving that objective:

See answer 5 above.

12) Whether there are adequate and effective safeguards in relation to the measure:

There are a number of important limitations and safeguards around the use of the section 155 power.

Before it can issue a section 155 notice, the ACCC must have 'reason to believe' that a person is capable of providing information, documents or evidence relating to certain limited matters (including a possible contravention of the Act, a merger authorisation determination or a possible contravention of a court-enforceable undertaking). That is, the ACCC cannot use the section 155 power merely for a 'fishing expedition'.

Further, subsection 155(2A) is clear that the ACCC cannot issue a section 155 notice merely because a person has refused or failed to comply with certain other information-gathering powers on the basis that compliance may incriminate that person.

Finally, the ACCC may only use and disclose such material in accordance with the provisions of section 155AAA of the CCA. Section 155AAA provides that an ACCC official must not disclose any protected information (which includes information obtained under section 155) to any person, except when performing duties or functions as an ACCC official or where the disclosure is required or permitted by law.

The ACCC is also subject to the *Privacy Act 1988* and the Australian Privacy Principles, which contain important requirements and safeguards around the collection, storage, use and disclosure of personal information.

Expansion of matters subject to notice – compatibility of the measure with the right not to incriminate oneself

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

The Bill introduces two new matters in relation to which a section 155 notice may be issued.

The first new matter is a merger authorisation determination of the ACCC. The objective of this addition is to support the ACCC in its new role as the first-instance decision-maker for merger authorisation determinations.

The second new matter is an actual or possible contravention of a court-enforceable undertaking given under section 87B. The objective of this addition is to ensure the integrity of court-enforceable undertakings.

14) How the measure is effective to achieve that objective:

In relation to the first new matter, section 155 already allows a notice to be issued in relation to decisions of the ACCC under the existing powers to grant general authorisations (such as section 91B, which deals with revocation of general authorisations) and merger clearances (such as 95AS, which deals with revocation of merger clearances). The addition of merger authorisation determinations to the list reflects the fact that the Bill repeals the merger clearance process and makes the ACCC the first-instance decision-maker for merger authorisations.

In relation to the second new matter, the expansion of section 155 to cover court-enforceable undertakings enables the ACCC to investigate possible non-compliance with such an undertaking. Generally, a section 87B undertaking will be given to the ACCC in order to address a competition concern, and enforcing the undertaking before the court relies on the ACCC being able to investigate possible non-compliance.

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

The reasonableness and proportionality of this measure must be judged against the harm which it is seeking to address.

In the case of merger authorisation determinations, the addition of this matter to section 155 reflects the fact that the ACCC (rather than the Tribunal) will now be the first-instance decision-maker. In order to properly assess an application for merger authorisation, the ACCC needs to be able to properly investigate to uncover all significant information which is relevant to its decision. If an anti-competitive merger were to be authorised on the basis of incomplete information, this could lead to significant competitive harm and substantial detriment to consumer welfare.

The extension of s155 to court-enforceable undertakings will significantly improve the ability of the ACCC to quickly gather relevant information where it has a reason to believe an undertaking has been contravened. Given that section 87B undertakings are often given to address a competition concern, the lack of an information-gathering power could result in competitive harm and detriment to consumer welfare.

In these circumstances, the expansion of the matters subject to a section 155 notice is both reasonable and proportionate.

16) Whether there are less rights-restrictive ways of achieving that objective:

There are no effective alternatives to extending the use of the information-gathering powers in s155 to support the ACCC's roles in assessing merger authorisation applications and investigating breaches of court-enforceable undertakings. Further, whether or not a section 155 notice can be issued in relation to a given matter is a binary question: either a matter (such as an actual or potential contravention of a court-enforceable undertaking) is subject to section 155, or it is not. Therefore, it is difficult to envisage a 'less rights-restrictive' way of bringing these new matters within the ACCC's compulsory investigative powers.

17) Whether a derivative use immunity would be reasonably available:

See answer 6 above.

Expansion of matters subject to notice – compatibility of the measure with the right to privacy

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

See answer 13 above.

19) How the measure is effective to achieve that objective:

See answer 14 above.

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

See answer 15 above.

21) Whether there are less rights-restrictive ways of achieving that objective:

See answer 16 above.

22) Whether there are adequate and effective safeguards in relation to the measure:

See answer 12 above.

Increased 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).

Compatibility of the measure with the right to freedom of association

23) 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.

24) 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.

25) 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.

26) 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.

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

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

See answer 23 above.

28) How the measure is effective to achieve that objective:

See answer 24 above.

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

See answer 25 above.

ASSISTANT MINISTER TO THE TREASURER

Chair
Parliamentary Joint Committee on Human Rights
S1.111
Parliament House
CANBERRA ACT 2600

Dear Mr Goodenough

Thank you for your letter of 9 August 2017 seeking the Treasurer's advice as to the human rights compatibility of Federal Financial Relations (National Partnership payments) Determinations Nos 116 to 119. The Treasurer has asked me to respond to you and the Parliamentary Joint Committee on Human Rights.

The instruments in question are monthly determinations for National Partnership payments (NPPs) made from February 2017 to May 2017 period. National Partnership payments are made by the Commonwealth to the States and Territories to support the delivery of specified services or projects and facilitate the undertaking of nationally-significant reforms. The *Federal Financial Relations Act 2009* requires the Minister to determine the amount to be credited to the COAG Reform Fund in order to make these payments. As payments are made on the 7th day of each month, in accordance with Schedule D of the Intergovernmental Agreement on Federal Financial Relations, a determination is generally made at least once per month.

The Committee has asked me to advise whether the setting of benchmarks for the provision of funds through National Partnership payments (NPP) is compatible with human rights. National Partnership agreements set out mutually-agreed objectives, outcomes, outputs and performance requirements for the specific services, project or reform to be delivered under that agreement. Each agreement is negotiated between the Commonwealth and the relevant States and Territories. Through the negotiation process, the States and Territories have input into the setting of benchmarks to be used to measure progress in delivering services, projects and reforms. As such, the benchmarks in National Partnership agreements are agreed by all parties as achievable and demonstrating the realisation of the mutually-agreed policy objectives.

The States and Territories meet the overwhelming majority of performance requirements in National Partnership agreements. The associated funding is then paid in accordance with the determinations for NPPs, consistent with the terms and conditions of the relevant agreement. The setting of performance requirements promotes the progressive realisation of human rights by creating an incentive for the efficient delivery of services, projects and reforms where National Partnership payments support human rights in sectors such as health, education, housing and community services.

The Committee also sought my advice on whether there have been any retrogressive trends over time indicating reductions in payments which may impact on human rights. National Partnerships are time-limited agreements and, as above, the overwhelming majority of funding available under National Partnerships is paid to the States and Territories. There is no evidence

Parliament House Canberra ACT 2600 Australia
Telephone: 61 2 6277 4847 | Facsimile: 61 2 6273 4862

to suggest that the setting of performance requirements leads to a situation where States and Territories frequently become ineligible for NPPs due to failure to meet those requirements. To the extent that payments cease under individual agreements, this is usually because the agreed project or reform is completed and no further funding is required. In such cases, localised decreases in payments are a direct result of the achievement of the agreement's stated objective.

At an aggregate level, total National Partnership payments vary from month to month and year to year for a variety of reasons. Different projects and reforms are delivered over different time periods, and annual funding allocations under individual agreements vary over the term of the agreement depending on the pace at which services, projects or reforms are expected to occur. Structural changes to the way that services are provided can also mean that funding arrangements change. For example, funding for the provision of disability services is currently experiencing significant change as the Commonwealth and the States and Territories transition to full implementation of the National Disability Insurance Scheme. As such, and more generally, trends in NPPs for sectors that support human rights do not necessarily reflect trends in overall payments to the States and Territories for service provision.

Finally, the Committee requested that the information I have provided in this letter be included in future statements of compatibility with human rights. From September 2017 onwards, the statements of compatibility that accompany determinations will be expanded to include this information.

Yours sincerely

The Hon Michael Sukkar MP

18/8/17