



# Parliamentary Joint Committee on Human Rights

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Human rights scrutiny report

Report 4 of 2022

28 September 2022

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# Membership of the committee

## Members

|                                  |                                    |
|----------------------------------|------------------------------------|
| Mr Josh Burns MP, Chair          | Macnamara, Victoria, ALP           |
| The Hon David Coleman MP         | Banks, New South Wales             |
| Senator Karen Grogan             | South Australia, ALP               |
| Mr Peter Khalil MP               | Wills, Victoria, ALP               |
| Senator Jacinta Nampijinpa-Price | Northern Territory, CLP            |
| Senator Matthew O'Sullivan       | Western Australia, LP              |
| Mr Graham Perrett MP             | Moreton, Queensland, ALP           |
| Senator Jana Stewart             | Victoria, ALP                      |
| Ms Kylea Tink MP                 | North Sydney, New South Wales, IND |
| Senator Lidia Thorpe             | Victoria, AG                       |

## Secretariat

Anita Coles, Committee Secretary  
Charlotte Fletcher, Principal Research Officer  
Rebecca Preston, Principal Research Officer  
Ingrid Zappe, Legislative Research Officer

## External legal adviser

Associate Professor Jacqueline Mowbray



# Table of contents

|   |            |
|---|------------|
| <b>Membership of the committee .....</b>  | <b>ii</b>  |
| <b>Committee information .....</b>  | <b>vii</b> |
| <b>Report snapshot .....</b>  | <b>1</b>   |
| <b>Chapter 1—New and continuing matters .....</b>   | <b>7</b>   |
| <b>Bills</b>  |            |
| Counter-Terrorism Legislation Amendment (AFP Powers and Other Matters)<br>Bill 2022 ..... | 7          |
| Treasury Laws Amendment (2022 Measures No. 3) Bill 2022 .....                             | 12         |



## Committee information

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

The committee assesses legislation for compatibility with the human rights set out in seven international treaties to which Australia is a party.<sup>1</sup> The committee's *Guide to Human Rights* provides a short and accessible overview of the key rights contained in these treaties which the committee commonly applies when assessing legislation.<sup>2</sup>

The establishment of the committee builds on Parliament's tradition of legislative scrutiny. The committee's scrutiny of legislation seeks to enhance understanding of, and respect for, human rights in Australia and ensure attention is given to human rights issues in legislative and policy development.

Some human rights obligations are absolute under international law. However, most rights may be limited as long as it meets certain standards. Accordingly, a focus of the committee's reports is to determine whether any limitation on rights is permissible. In general, any measure that limits a human right must comply with the following limitation criteria: be prescribed by law; be in pursuit of a legitimate objective; be rationally connected to (that is, effective to achieve) its stated objective; and be a proportionate way of achieving that objective.

Chapter 1 of the reports include new and continuing matters. Where the committee considers it requires further information to complete its human rights assessment it will seek a response from the relevant minister, or otherwise draw any human rights concerns to the attention of the relevant minister and the Parliament. Chapter 2 of the committee's reports examine responses received in relation to the committee's requests for information, on the basis of which the committee has concluded its examination of the legislation.

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1 International Covenant on Civil and Political Rights; International Covenant on Economic, Social and Cultural Rights; International Convention on the Elimination of All Forms of Racial Discrimination; Convention on the Elimination of Discrimination against Women; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; Convention on the Rights of the Child; and Convention on the Rights of Persons with Disabilities.

2 See the committee's [Guide to Human Rights](#). See also the committee's guidance notes, in particular [Guidance Note 1 – Drafting Statements of Compatibility](#).





## Report snapshot<sup>1</sup>

1.1 In this report the committee has examined the following bills and legislative instruments for compatibility with human rights. The committee's full consideration of legislation commented on in the report is set out at the page numbers indicated.

### Bills

#### Chapter 1: New and continuing matters

|  |    |
|--|----|
| Bills introduced 5 to 8 September 2022 | 17 |
|--|----|

|   |   |
|---|---|
| Bills commented on in report <sup>2</sup> | 2 |
|---|---|

#### Chapter 2: Concluded

|  |   |
|--|---|
| Bills committee has concluded its examination of following receipt of ministerial response | 0 |
|--|---|

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#### Anti-Money Laundering and Counter-Terrorism Financing Amendment (Making Gambling Businesses Accountable) Bill 2022

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No comment

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#### Atomic Energy Amendment (Mine Rehabilitation and Closure) Bill 2022

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No comment

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1 This section can be cited as Parliamentary Joint Committee on Human Rights, Report snapshot, *Report 4 of 2022*; [2022] AUPJCHR 32.

2 The committee makes no comment on the remaining bills on the basis that they do not engage, or only marginally engage, human rights; promote human rights; and/permissibly limit human rights. This is based on an assessment of the bill and relevant information provided in the statement of compatibility accompanying the bill. The committee may have determined not to comment on a bill notwithstanding that the statement of compatibility accompanying the bill may be inadequate.

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**Counter-Terrorism Legislation Amendment (AFP Powers and Other Matters) Bill 2022**

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**Advice to Parliament**      **Extension of counter-terrorism powers***Multiple rights**pp. 7-11*

This bill seeks to extend by a further 12 months the operation of a number of counter-terrorism related provisions which are due to sunset on 7 December 2022, in particular the operation of the control order regime, the preventative detention order regime and stop, search and seizure powers relating to counter-terrorism.

These powers are intended to protect Australia's national security interests and protect against the possibility of terrorist acts in Australia, and if capable of assisting in achieving these objectives, extending these powers would promote the rights to life and security of the person. However, the extended powers also engage and limit numerous human rights.

The committee has previously considered the human rights compatibility of all of these provisions and has previously found that while all of the measures likely sought to achieve a legitimate objective (namely, that of seeking to prevent terrorist acts), there were questions whether the measures would be effective to achieve this and were necessary, and, in particular, the measures did not appear to be proportionate. As a result, the committee previously found the measures were likely to be incompatible with a range of human rights.

The committee notes that the Parliamentary Joint Committee on Intelligence and Security (PJCIS) conducted a statutory review of the provisions being extended by this bill and reported in October 2021. The committee also notes the Attorney-General's statement that extending the relevant sunset dates will provide sufficient time to consult on, and then implement, the government's response to the PJCIS report.

The committee notes its previous conclusion that these provisions do not contain sufficient safeguards to constitute a proportionate limit on rights, and that the legislation to be extended has not been relevantly amended since the committee previously examined it. Whilst the committee remains concerned as to the compatibility of extending these provisions for a further 12 months with a range of human rights, it supports the Attorney-General in using this extension to consider the recommendations of the PJCIS and undertake appropriate consultations with stakeholders.

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**Emergency Response Fund Amendment (Disaster Ready Fund) Bill 2022**

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No comment

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**Environment Protection and Biodiversity Conservation Amendment (Climate Trigger) Bill 2022**

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No comment

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**Environment Protection and Biodiversity Conservation Amendment (Climate Trigger) Bill 2022 [No. 2]**

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No comment

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**Financial Accountability Regime Bill 2022**

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No comment

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**Financial Sector Reform Bill 2022**

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No comment

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**Financial Services Compensation Scheme of Last Resort Levy Bill 2022**

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No comment

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**Financial Services Compensation Scheme of Last Resort Levy (Collection) Bill 2022**

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No comment

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**Foreign Acquisitions and Takeovers Fees Imposition Amendment Bill 2022**

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No comment

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**High Speed Rail Authority Bill 2022**

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No comment

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**Income Tax Amendment (Labour Mobility Program) Bill 2022**

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No comment

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**National Health Amendment (General Co-payment) Bill 2022**

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No comment

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**Parliamentary Privileges Amendment (Royal Commission Response) Bill 2022**

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No comment

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**Social Services and Other Legislation Amendment (Incentivising Pensioners to Downsize) Bill 2022**

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No comment

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**Treasury Laws Amendment (2022 Measures No. 3) Bill 2022**

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|                             |  |
|-----------------------------|--|
| <i>Advice to Parliament</i> | <b>Doubling financial penalties relating to foreign ownership of property</b><br><i>Criminal process rights, right to equality and non-discrimination, and housing</i>   |
| <i>pp. 12-15</i>            | <p>Schedule 1 of the bill seeks to amend the <i>Foreign Acquisitions and Takeovers Act 1975</i> to double the maximum civil penalties for contraventions of provisions relating to the acquisition of residential land by foreign persons. This is to regulate some investments in the interests of national security, and to protect the affordability of Australian residential housing.</p> <p>Civil penalties may be construed as criminal penalties for the purposes of international human rights law, depending on their potential severity. The statement of compatibility states that these penalties are to be considered 'criminal' for the purposes of international human rights law. As such, they engage the criminal process rights, including the right to be presumed innocent until proven guilty according to law. This right requires that the case be demonstrated to the criminal standard of proof (beyond all reasonable doubt). The committee considers that because the standard of proof applicable in civil penalty proceedings requires proof only on the balance of probabilities, there is a risk that increasing the civil penalties may not be consistent with this criminal process right.</p> <p>Further, as these provisions would primarily apply to non-citizens, they engage the right to equality and non-discrimination. The committee considers that whether the measures would constitute a proportionate limit on this right would depend on whether (and to what extent) there is a current problem with non-compliance with the Act, and whether there are sufficient safeguards in the Act in practice as regards the treatment of non-nationals.</p> <p>The committee considers that to the extent that this measure could protect Australia's housing stock and the affordability of Australian residential housing this would promote the right to an adequate standard of living in respect of housing.</p> <p>The committee draws these human rights concerns to the attention of the Assistant Treasurer and Minister for Financial Services and the Parliament.</p> |

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## Legislative instruments

### Chapter 1: New and continuing matters

Legislative instruments registered on the [Federal Register of Legislation](#) between 25 August and 1 September 2022<sup>3</sup> 48

Legislative instruments commented on in report<sup>4</sup> 0

### Chapter 2: Concluded

Legislative instruments committee has concluded its examination of following receipt of ministerial response 0

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- 3 The committee examines all legislative instruments registered in the relevant period, as listed on the Federal Register of Legislation. To identify all of the legislative instruments scrutinised by the committee during this period, select 'legislative instruments' as the relevant type of legislation, select the event as 'assent/making', and input the relevant registration date range in the Federal Register of Legislation's advanced search function, available at: <https://www.legislation.gov.au/AdvancedSearch>.
  - 4 The committee makes no comment on the remaining legislative instruments on the basis that they do not engage, or only marginally engage, human rights; promote human rights; and/permissibly limit human rights. This is based on an assessment of the instrument and relevant information provided in the statement of compatibility (where applicable). The committee may have determined not to comment on an instrument notwithstanding that the statement of compatibility accompanying the instrument may be inadequate.



## Chapter 1

### New and continuing matters

1.1 The committee comments on the following bills and draws these concerns to the attention of the the relevant minister and the Parliament.

#### Bills

### Counter-Terrorism Legislation Amendment (AFP Powers and Other Matters) Bill 2022<sup>1</sup>

|                   |  |
|-------------------|--|
| <b>Purpose</b>    | This bill seeks to extend for 12 months the following Australian Federal Police counter-terrorism powers that are scheduled to sunset on 7 December 2022: <ul style="list-style-type: none"> <li>• the control order regime in Division 104 of the <i>Criminal Code Act 1995</i>;</li> <li>• the preventative detention order regime in Division 105 of the <i>Criminal Code Act 1995</i>; and</li> <li>• the stop, search and seizure powers in Division 3A of Part IAA of the <i>Crimes Act 1914</i>.</li> </ul> |
| <b>Portfolio</b>  | Attorney-General   |
| <b>Introduced</b> | House of Representatives, 8 September 2022   |
| <b>Rights</b>     | Liberty; freedom of movement; fair trial and fair hearing; privacy; freedom of expression; freedom of association; equality and non-discrimination; right to be treated with humanity and dignity; protection of the family; work; social security; an adequate standard of living; and rights of the child  |

#### Extension of counter-terrorism powers

1.2 This bill seeks to extend by a further 12 months the operation of a number of counter-terrorism related provisions which are due to sunset on 7 December 2022, in particular the operation of:

<sup>1</sup> This entry can be cited as: Parliamentary Joint Committee on Human Rights, Counter-Terrorism Legislation Amendment (AFP Powers and Other Matters) Bill 2022, *Report 4 of 2022*; [2022] AUPJCHR 33.

- the control order regime in Division 104 of the *Criminal Code Act 1995* (Criminal Code), which allows a court to impose on a person a number of obligations, prohibitions and restrictions;
- the preventative detention order regime in Division 105 of the Criminal Code, which allows a person to be taken into custody and detained if it is suspected, on reasonable grounds, that they are preparing to engage in a terrorist act; and
- the stop, search and seizure powers in Division 3A of Part IAA of the *Crimes Act 1914*, which provide a range of powers for the Australian Federal Police and state and territory police officers to exercise in a Commonwealth place (such as an airport) relating to counter-terrorism.

## International human rights legal advice

### **Multiple rights**

1.3 The powers extended by this measure are intended to protect Australia's national security interests and protect against the possibility of terrorist acts in Australia.<sup>2</sup> As such, if these powers were capable of assisting in achieving these objectives, it would appear that extending these powers would promote the rights to life and security of the person. The right to life<sup>3</sup> includes an obligation on the state to protect people from being killed by others or identified risks.<sup>4</sup> The right to security of the person requires the state to take steps to protect people against interference with personal integrity by others.<sup>5</sup>

1.4 However, the extended powers also engage and limit numerous human rights, including the:

- right to liberty;
- right to freedom of movement;
- right to a fair trial and fair hearing;
- right to privacy;
- right to freedom of expression;

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2 See statement of compatibility, pp. 6, 9, 16 and 20.

3 International Covenant on Civil and Political Rights, article 6(1) and Second Optional Protocol to the International Covenant on Civil and Political Rights, article 1.

4 UN Human Rights Committee, *General Comment No. 36: article 6 (right to life)* (2019) [3]: the right should not be interpreted narrowly and it 'concerns the entitlement of individuals to be free from acts and omissions that are intended or may be expected to cause their unnatural or premature death, as well as to enjoy a life with dignity'.

5 International Covenant on Civil and Political Rights, article 9.



- right to freedom of association;
- right to equality and non-discrimination;
- right to be treated with humanity and dignity;
- right to the protection of the family;
- right to work;
- rights to social security and an adequate standard of living; and
- rights of children.<sup>6</sup>

1.5 The committee has previously considered the human rights compatibility of all of the provisions that are extended by this measure. After detailed consideration of these provisions, the committee has previously found that while all of the measures likely sought to achieve a legitimate objective (namely, that of seeking to prevent terrorist acts), there were questions whether the measures would be effective to achieve this and were necessary, and, in particular, the measures did not appear to be proportionate. As a result, the committee previously found the measures were likely to be incompatible with a range of human rights.<sup>7</sup>

1.6 The same human rights concerns as were previously raised apply in relation to the further extension of these coercive powers. In addition, there are questions as to whether all of these powers remain necessary.

1.7 It is noted that all of these powers were due to sunset on 7 September 2021, but legislation to extend their operation for a further 15 months passed both Houses of Parliament on 23 August 2021.<sup>8</sup> When that legislation was introduced it was stated that the extension was necessary to provide time for the government to consider any recommendations of the Parliamentary Joint Committee on Intelligence and Security's (PJCIS) review into these powers.<sup>9</sup> It is noted that the PJCIS was required, under the *Intelligence Services Act 2001*, to review the operation, effectiveness and implications of these powers and report by 7 January 2021. However, the PJCIS did not report on

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6 See International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights and the Convention of the Rights of the Child.

7 See most recently Parliamentary Joint Committee on Human Rights, *Report 10 of 2018* (18 September 2018) pp. 25-53. Note in relation to the stop, search and seizure powers the committee concluded that in circumstances where a police officer believes on reasonable grounds that the person might have just committed, might be committing or might be about to commit a terrorist act, these powers might be a proportionate limit on human rights, however, the scope of the other powers are likely to be incompatible with human rights, see *Report 10 of 2018* (18 September 2018) pp. 45-53.

8 *Counter-Terrorism Legislation Amendment (Sunsetting Review and Other Measures) Act 2021*.

9 See *Intelligence Services Act 2001*, paragraph 29(1)(bb).

these powers until October 2021.<sup>10</sup> The stated aim of the current bill is to ensure there 'is sufficient time to consult on, and then implement, the government's response' to the PJCIS's recommendations,<sup>11</sup> which were made almost one year ago. As such these coercive powers appear to be proposed to be extended by over two years in order to consider the PJCIS's report.

1.8 The PJCIS's October 2021 report recommended a number of changes to the stop, search and seizure powers and the control order regime, to provide some safeguards over the use of these powers, but otherwise recommended their further continuation. The statement of compatibility states that the current terrorism threat level remains 'probable', which means 'there is credible intelligence assessed by Australia's security agencies indicating that individuals and groups have the intent and capability to conduct a terrorist act in Australia'. It states that all the powers being extended by the bill 'are critical to support Australia's counter-terrorism framework, ensuring there are appropriate tools to protect the community from terrorism risk'.<sup>12</sup> However, the Attorney-General in his second reading speech for this bill stated that the stop, search and seizure powers, and the preventative detention order powers, have never been used since their introduction. In relation to control orders, as of 25 August 2022, 23 control orders have been made since September 2014 (including one control order against a child).<sup>13</sup> No specific information has been provided to demonstrate the continuing need for all of these powers, particularly those that have never been used, including in light of the additional legislative powers that have been enacted since these powers originally commenced.

1.9 As such, noting the committee's previous conclusion that these provisions do not contain sufficient safeguards to constitute a proportionate limit on rights, and noting the government has not demonstrated the continued necessity of all these powers, it has not been demonstrated that the extension of the control order, preventative detention order and stop, search and seizure provisions for a further 12 months is compatible with human rights.

### Committee view

1.10 The committee notes it has previously found that while all of the measures sought to be extended by this bill likely sought to achieve a legitimate objective (namely, that of seeking to prevent terrorist acts), there were questions whether the

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10 Parliamentary Joint Committee on Intelligence and Security, [Review of police powers in relation to terrorism, the control order regime, the preventative detention order regime and the continuing detention order regime](#), October 2021.

11 See the Hon Mark Dreyfus MP, Attorney General, Second Reading Speech, *House of Representatives Hansard*, 8 September 2022, p. 3.

12 Statement of compatibility, p. 3.

13 See the Hon Mark Dreyfus MP, Attorney General, Second Reading speech, *House of Representatives Hansard*, 8 September 2022, p. 3.

measures would be effective to achieve this and were necessary, and, in particular, the measures did not appear to be proportionate, and therefore were likely to be incompatible with a range of human rights.

1.11 The committee notes that the PJCIS conducted a statutory review of the provisions being extended by this bill and presented its report in October 2021. The committee notes the Attorney-General's statement in his second reading speech that due to the complexity of the PJCIS's proposed amendments, and the need to consult with states and territories in relation to these amendments, there is insufficient time before the end of the year to finalise the government's response to the PJCIS report; draft legislation to implement the government's response; consult with, and obtain the agreement of, state and territory governments; and introduce and secure passage of legislation through the Parliament. The committee notes that the Attorney-General stated that extending the relevant sunset dates of the provisions by 12 months will provide sufficient time to consult on, and then implement, the government's response to the PJCIS report.

1.12 The committee notes its previous conclusion that these provisions do not contain sufficient safeguards to constitute a proportionate limit on rights, and that the legislation to be extended has not been relevantly amended since the committee previously examined it. Whilst the committee remains concerned as to the compatibility of extending these provisions for a further 12 months with a range of human rights, it supports the Attorney-General in using this extension to consider the recommendations of the PJCIS and undertake appropriate consultations with stakeholders.

1.13 The committee draws these human rights concerns to the attention of the Attorney-General and the Parliament.

## Treasury Laws Amendment (2022 Measures No. 3) Bill 2022<sup>1</sup>

|                   |  |
|-------------------|--|
| <b>Purpose</b>    | <p>This bill seeks to amend various Acts in relation to foreign investment and acquisitions, taxation, the coronavirus and superannuation</p> <p>Schedule 1 seeks to double financial penalties relating to foreign ownership of residential property in Australia</p> <p>Schedule 2 seeks to amend the taxation secrecy provisions to enable the Australian Taxation Office to share taxation information with an Australian government agency, including state and territory governments, for the purposes of administering major disaster support programs</p> <p>Schedule 3 seeks to extend the operation of a temporary mechanism operating during the COVID pandemic that allows arrangements for complying with information and documentary requirements under Commonwealth legislation to be altered</p> <p>Schedule 4 seeks to set out tax arrangements for foreign resident workers participating in the Pacific Australia Labour Mobility scheme</p> <p>Schedule 5 seeks to require the Australian Prudential Regulation Authority to take account of religious obligations when conducting the performance test on superannuation products</p> |
| <b>Portfolio</b>  | Treasury   |
| <b>Introduced</b> | House of Representatives, 8 September 2022   |
| <b>Rights</b>     | Criminal process rights; equality and non-discrimination; housing  |

### Doubling financial penalties relating to foreign ownership of property

1.14 Schedule 1 of the bill seeks to amend the *Foreign Acquisitions and Takeovers Act 1975* (the Act) to double the maximum civil penalties available for contraventions of provisions relating to the acquisition of residential land by foreign persons. For example, a foreign person is currently liable for a civil penalty of 250 penalty units (currently \$55,500)<sup>2</sup> if they fail to give notice to the Treasurer when they acquire or dispose of an interest in residential land in particular circumstances.<sup>3</sup> This bill proposes

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Treasury Laws Amendment (2022 Measures No. 3) Bill 2022, *Report 4 of 2022*; [2022] AUPJCHR 34.

2 *Crimes Act 1914*, section 4AA.

3 *Foreign Acquisitions and Takeovers Act 1975*, subsection 97(1).

to increase that potential penalty to 500 penalty units (currently \$110,000).<sup>4</sup> It would also increase other potential civil penalties where the penalty payable is a percentage of the consideration paid for, or the market value of, the interest in residential land (from 25 per cent to 50 per cent).<sup>5</sup>

## **International human rights legal advice**

### ***Criminal process rights, rights to equality and non-discrimination and housing***

1.15 In certain contexts, civil penalties may be construed as criminal penalties for the purposes of international human rights law, depending on their potential severity. In this regard, the statement of compatibility with human rights accompanying this bill states that these proposed amended civil penalty provisions may be considered criminal for the purposes of human rights law, noting that the penalties are significant.<sup>6</sup> If this is the case, these civil penalty provisions engage the criminal process rights under articles 14 and 15 of the International Covenant on Civil and Political Rights. This includes the right to be presumed innocent until proven guilty according to law, which includes that the case against the person be demonstrated to the criminal standard of proof (beyond all reasonable doubt).<sup>7</sup>

1.16 Under Australian law, civil penalty provisions are dealt with in accordance with the rules and procedures that apply in relation to civil matters, with the burden of proof being on the balance of probabilities. As the right to be presumed innocent requires that the case against a person be demonstrated beyond all reasonable doubt, but the standard of proof applicable in civil penalty proceedings requires proof only on the balance of probabilities, there is a risk that increasing the civil penalties, as sought by Schedule 1 of this bill may not be consistent with this criminal process right.

1.17 Further, these provisions would apply only to 'foreign persons', being individuals not ordinarily resident in Australia.<sup>8</sup> The statement of compatibility states that it is anticipated that most individuals who are directly affected by the amendments will not be Australian citizens.<sup>9</sup> As such, these provisions would appear to have a disproportionate impact on non-citizens, and so engage the right to equality and non-discrimination. This right provides that everyone is entitled to enjoy their

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4 Item 11.

5 See, Item 4.

6 Statement of compatibility, pp. 42–43.

7 International Covenant on Civil and Political Rights, article 14(2). See UN Human Rights Committee, *General Comment 32: Article 14: Right to equality before courts and tribunals and to a fair trial* (2007) [30]: 'The presumption of innocence, which is fundamental to the protection of human rights... guarantees that no guilt can be presumed until the charge has been proved beyond reasonable doubt'.

8 *Foreign Acquisitions and Takeovers Act 1975*, section 4.

9 Statement of compatibility, pp. 43–44.

rights without discrimination of any kind and that all people are equal before the law and entitled to equal and non-discriminatory protection of the law.<sup>10</sup> Differential treatment will not be unlawful if it is based on reasonable and objective criteria such that it serves a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective (having regard to the effect of the measure).<sup>11</sup>

1.18 The statement of compatibility states that the purpose of Australia's foreign investment framework is to regulate certain kinds of foreign investment to ensure that the proposed investments are not contrary to Australia's national interest, and notes that all foreign residents are regulated in the same manner.<sup>12</sup> It also states that the proposed civil penalties increase is intended to adequately deter non-compliance with the residential property provisions in the Act to protect Australia's housing stock and the affordability of Australian residential property.<sup>13</sup> Increasing these penalties so as to address non-compliance with the Act would appear to constitute a legitimate objective. Further, to the extent that this assists in achieving the broader objective of protecting the affordability of residential property, the measure may also promote the right to an adequate standard of living in respect of housing. The right to an adequate standard of living requires that the State party take steps to ensure the availability, adequacy (including affordability) and accessibility of housing for all people in its jurisdiction.<sup>14</sup>

1.19 However, whether the measures would constitute a proportionate limit on the right to equality and non-discrimination would depend on whether (and to what extent) there is a current problem with non-compliance with the Act, and whether there are sufficient safeguards in the Act in practice as regards the treatment of non-nationals.

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10 International Covenant on Civil and Political Rights, articles 2 and 26. Article 2(2) of the International Covenant on Economic, Social and Cultural Rights also prohibits discrimination specifically in relation to the human rights contained in the International Covenant on Economic, Social and Cultural Rights.

11 UN Human Rights Committee, *General Comment 18: Non-Discrimination* (1989) [13]; UN Committee on Economic, Social and Cultural Rights, *General Comment No. 20: Non-discrimination in economic, social and cultural rights* (2009) [13]; see also *Althammer v Austria*, UN Human Rights Committee Communication No. 998/01 (2003) [10.2].

12 Statement of compatibility, p. 44.

13 Statement of compatibility, p. 44.

14 International Covenant on Economic, Social and Cultural Rights, article 11. See also UN Committee on Economic, Social and Cultural Rights, *General Comment No. 4: The right to adequate housing (art. 11 (1) of the Covenant)* (1990) [8].

**Committee view**

1.20 The committee notes the proposed civil penalty increase in Schedule 1 of the bill and the corresponding advice in the statement of compatibility that these penalties may be considered 'criminal' for the purposes of international human rights law. The committee considers that, as the right to be presumed innocent requires that the case against a person be demonstrated beyond all reasonable doubt, if these penalties are considered 'criminal', the application of the civil standard of proof means there is a risk that the proposed increase of civil penalties may not be consistent with this criminal process right.

1.21 The committee also notes that these provisions engage the right to equality and non-discrimination, as they disproportionately apply to non-nationals. The committee considers that these provisions are directed towards the legitimate objective of strengthening the existing regulatory scheme which is intended to protect the affordability of Australian housing. The committee considers that to the extent that this measure could protect Australia's housing stock and the affordability of Australian residential housing this would promote the right to an adequate standard of living in respect of housing. However, the committee notes the advice regarding the proportionality of the measure, noting that much depends on existing safeguards in the Act and how the measure is to operate in practice.

1.22 The committee draws these human rights concerns to the attention of the assistant minister and the Parliament.

**Mr Josh Burns MP**

**Chair**

