

### **Question of Senator Thorpe:**

International law and the AHRC submission accept that most human rights are not absolute, and circumstances may require that different rights be balanced against public interests. How do we ensure that a proportionality test on a statutory restriction on human rights through a limitations clause does not allow those rights to be exploited for, say, the purpose of profit?

### **My response:**

Thank you for the question.

International human rights law accepts that most human rights, in general, are not absolute, but may justifiably be limited in particular cases in order to reconcile the competing rights of individuals and the interests of the general community.

The way that human rights may be justifiably limited in statutory human rights instruments is through a general limitations test that assesses the proportionality of a limitation on a right with these other purposes. Each of the existing Australian statutory human rights Acts contains such a test.

A proportionality test that permits human rights to be subject under law to reasonable limitations that can be demonstrably justified in a free and democratic society necessitates that limitations on human rights are reasonable, lawful and proportionate. A general limitations test that contains all of these elements protects against the likelihood that rights will be ‘exploited’ in a manner that is not justified in a number of ways. *First*, the legislative purpose is an important factor that falls for assessment. It must have a sufficiently important objective. An interference with rights that has a legislative purpose of commercial profit may not constitute a reasonable limit on rights. *Second*, the proportionality test requires an assessment of whether the statutory provision has a ‘rational connection’ between the limitation and the objective sought to be achieved. The extent of the limitation is then considered. Sometimes this is referred to as the ‘minimum impairment’ requirement. Additionally, there needs to be overall proportionality between the effect of the limitation on human rights and the advancement of the objective sought to be achieved. Sometimes this is referred to as assessing whether the limitation strikes a ‘fair balance’.

There are many features of the proportionality test that apply to ensure that if rights are limited, the limitation will be properly scrutinised. While the existing Australian statutory human rights Acts do not confer rights on corporations, the same is not true in other jurisdictions. An example of a case decided by the Supreme Court of Canada concerning commercial advertising of cigarette packaging found that legislation enacted by the federal government did not proportionately limit the right to freedom of expression: *RJR-MacDonald Inc v Canada (Attorney-General)* [1995] 3 SCR 199. It is an example of an application of the proportionality test which led to the protection of a corporation’s right to freedom of expression through a proportionality test. Accordingly, it may be of interest to the Committee.