Chapter 1[1]

COVID-19 legislation

1.1 This chapter provides an assessment of the human rights compatibility of legislation made in response to the COVID-19 pandemic, specifically:

- bills introduced into the Parliament between 10 to 18 June 2020;
- legislative instruments registered on the Federal Register of Legislation between 6 to 24 June 2020; and
- one bill and two legislative instruments previously reported on.

1.2 Appendix 1 lists all new legislation considered in this chapter, including legislation on which the committee makes no comment, on the basis that the legislation does not engage, or only marginally engages, human rights; promotes human rights; and/or permissibly limits human rights.

1 This section can be cited as Parliamentary Joint Committee on Human Rights, COVID-19 legislation, *Report 8 of 2020*; [2020] AUPJCHR 104.

Concluded matters

1.3 The committee has concluded its examination of these matters on the basis of the responses received.

1.4 Correspondence relating to these matters is available on the committee's website.[1]

Coronavirus Economic Response Package (Payments and Benefits) Rules 2020 [F2020L00419][2]

Purpose	This instrument establishes the operation of the JobKeeper payment
Portfolio	Treasury
Authorising legislation	*Coronavirus Economic Response Package (Payments and Benefits) Act 2020*
Disallowance	15 sitting days after tabling (tabled in the House of Representatives and the Senate on 12 May 2020). Notice of motion to disallow must be given by 12 August 2020 in the House of Representatives and the Senate[3]
Rights	Adequate standard of living; work; equality and non-discrimination
Status	Concluded examination

1.5 The committee requested a response from the Treasurer in relation to the instrument in *Report 5 of 2020*.[4]

1 See https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports.

2 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Coronavirus Economic Response Package (Payments and Benefits) Rules 2020 [F2020L00419], *Report 8 of 2020*; [2020] AUPJCHR 105.

3 In the event of any change to the Senate or House's sitting days, the last day for the notice would change accordingly.

4 Parliamentary Joint Committee on Human Rights, *Report 5 of 2020* (29 April 2020), pp. 32-34.

JobKeeper subsidy for certain workers

1.6 This instrument establishes the operation of the JobKeeper payment. This is a subsidy of $1,500 per eligible employee per fortnight, which is administered by the Australian Taxation Office and provided directly to registered eligible businesses. Those businesses (or entities) are then required to pass on this subsidy to those eligible employees. An individual is defined as an 'eligible employee' if, on 1 March 2020, they were: aged 16 years or older; an employee (other than a casual employee) of the entity or a long term casual employee of the entity;[5] and were an Australian resident (which broadly captures Australian citizens and permanent residents)[6] or a New Zealand citizen living in Australia on a special category of visa.

Summary of initial assessment

Preliminary international human rights legal advice

Rights to an adequate standard of living, work, and equality and non-discrimination

1.7 By providing for the payment of a subsidy to certain registered businesses for eligible employees, this instrument appears to engage a number of human rights. The JobKeeper payment is a short-term emergency measure, which is intended to subsidise the wages of persons employed by businesses that have experienced a downturn in their business during the COVID-19 pandemic, and during circumstances in which people may otherwise be at risk of losing their job. As such, it would appear that this measure promotes the right to an adequate standard of living and the right to work with respect to eligible workers.[7]

1.8 However, the JobKeeper subsidy is broadly limited to employees who are employed by business which are eligible for the subsidy,[8] where those employees are either Australian citizens, permanent Australian residents, or specified New Zealand citizens living in Australia. As such, it appears that this measure engages and limits

5 A long term casual employee is defined in subsection 9(5) of the instrument as a casual employee who had been employed by the entity on a regular and systematic basis during the period of 12 months before 1 March 2020.

6 Paragraph 9(2)(c) of the instrument defines Australian resident as within the meaning of section 7 of the *Social Security Act 1991*, which defines it as a person who resides in Australia and is an Australian citizen, the holder of a permanent visa or holds a visa relating to whether the person had been in Australia before 26 February 2001.

7 International Covenant on Economic, Social and Cultural Rights, articles 11(1) and 6 and 7.

8 Coronavirus Economic Response Package (Payments and Benefits) Rules 2020, subsection 9(c). See also statement of compatibility. Relevantly, businesses with an aggregated turnover of $1 billion or less may be eligible for the Jobkeeper payment where the business has experienced a 30 per cent fall in turnover.

the right to equality and non-discrimination.[9] This right provides that everyone is entitled to enjoy their rights without discrimination of any kind, which encompasses both 'direct' discrimination (where measures have a discriminatory *intent*) and 'indirect' discrimination (where measures have a discriminatory *effect* on the enjoyment of rights).[10] This measure may have a disproportionate impact on those employees working in Australia who are foreign nationals (other than New Zealanders on a special category of visa).

1.9 The initial analysis considered that further information was required as to the compatibility of this measure with the right to equality and non-discrimination, including what is the legitimate objective for the differential treatment of eligible employees based on their nationality, and whether the measure is otherwise reasonable and proportionate.

1.10 The full initial legal analysis is set out in *Report 5 of 2020.*

Committee's initial view

1.11 The committee considered that this measure is likely to promote the rights to an adequate standard of living and work, as it is intended to replace a person's wage during the COVID-19 pandemic and during circumstances in which a person may otherwise be at risk of losing their job. The committee noted that the measure may also limit the right to equality and non-discrimination. This right may be subject to permissible limitations if it is shown to be reasonable, necessary and proportionate. The committee sought the Treasurer's advice as to the compatibility of this measure with the right to equality and non-discrimination.[11]

Treasurer's response[12]

1.12 The Treasurer advised:

> To the extent that the Rules result in differential treatment for particular groups of people, this treatment is based on reasonable and objective

9 Articles 2 and 26 of the International Covenant on Civil and Political Rights. The prohibited grounds of discrimination are race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Under 'other status' the following have been held to qualify as prohibited grounds: age, nationality, marital status, disability, place of residence within a country and sexual orientation. The prohibited grounds of discrimination are often described as 'personal attributes'.

10 UN Human Rights Committee, *General Comment 18: Non-discrimination* (1989).

11 The committee's consideration of the compatibility of a measure which limits rights is assisted if the response addresses the limitation criteria set out in the committee's Guidance Note 1, pp. 2-3.

12 The Treasurer's response to the committee's inquiries was received on 29 May 2020. This is an extract of the response. The response is available in full on the committee's website at: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports.

criteria. To access the JobKeeper scheme as an eligible employee or an individual who is self-employed (for example, a sole trader), you must be an Australian citizen, permanent residence visa holder, or New Zealand citizen on a Special Category (Subclass 444) visa at 1 March 2020.

To the extent that differentiation of treatment on the basis of national origin is applied to this cohort, it is reasonable and proportionate as it reaffirms the important role of the bilateral relationship between Australia and New Zealand.

Other temporary visa holders are unable to receive the JobKeeper payment. To the extent that differentiation of treatment on the basis of national origin is applied to this cohort, it is reasonable and proportionate as it reflects the temporary nature of their connection to Australia. The legitimate objective of the temporary JobKeeper scheme is to support employers to maintain their connection to their employees. Given the substantial cost of the scheme, focusing the payment to those who have a permanent connection to Australia is important to ensure the Government's fiscal strategy can include the broader economic response and any support that is required in the future for Australia's economic recovery.

The treatment of temporary visa holders is consistent with the general operation of the social security system, under which most temporary visa holders do not have access to income support. Further, the eligibility criteria for the JobKeeper Payment also reflect the general expectation that to obtain a temporary visa these individuals are able to demonstrate that they can support themselves financially while in Australia.

Other measures intended to respond to the economic hardship caused by the Coronavirus may be available to visa holders. For example, temporary visa holders may, where eligible, seek early access to up to $10,000 of their superannuation in the 2019-20 financial year. In addition, emergency relief is also available to people, including temporary visa holders, experiencing financial hardship. The Government has announced an additional $200 million as part of a new Community Support Package. This includes more than $37 million for existing Commonwealth funded Emergency Relief providers and $7 million for the Australian Red Cross to deliver Emergency Relief and some counselling support to temporary visa holders facing significant vulnerabilities.

For these reasons, the Rules do not restrict the rights of equality and non-discrimination based on national origin beyond what is permissible on the basis of being reasonable, necessary and proportionate to achieve a legitimate objective.

Concluding comments

International human rights legal advice

1.13 As noted in the initial analysis, the JobKeeper subsidy appears to promote the right to an adequate standard of living and the right to work with respect to

eligible workers.[13] However, again as noted in the initial analysis, as the JobKeeper subsidy is broadly limited to employees of eligible businesses who are either Australian citizens, permanent Australian residents, or specified New Zealand citizens living in Australia, it appears that this measure also engages and limits the right to equality and non-discrimination.[14] This right provides that everyone is entitled to enjoy their rights without discrimination of any kind, which encompasses both 'direct' discrimination (where measures have a discriminatory intent) and 'indirect' discrimination (where measures have a discriminatory effect on the enjoyment of rights, including where measures have a disproportionate impact on particular groups).[15] In this case, this measure may have a disproportionate impact on those employees working in Australia who are foreign nationals: of all the employees working for eligible businesses who otherwise meet the eligibility criteria for JobKeeper, only those who are foreign nationals may be rendered ineligible for JobKeeper.[16] Of course, non-Australians may be eligible for the wage subsidy where they have permanent residency or are New Zealand citizens on certain visas. However, only persons who are not Australian nationals will be ineligible for the wage subsidy where they otherwise meet all the eligibility criteria. As such this would appear to have a disproportionate impact on non-nationals, and therefore constitute differential treatment which may limit the right to equality and non-discrimination. Differential treatment (including the differential effect of a measure that is neutral on its face) will not constitute unlawful discrimination, however, if the differential treatment 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.[17]

1.14 Before applying this test to the current measure in light of the Treasurer's response, it is important to note a number of points about the circumstances in which this measure was introduced and takes effect. The first is that this is a temporary measure that was introduced in an unprecedented time of crisis, to help alleviate the economic impact of the COVID-19 pandemic. International human rights

13 International Covenant on Economic, Social and Cultural Rights, articles 11(1) and 6 and 7.

14 Articles 2 and 26 of the International Covenant on Civil and Political Rights. The prohibited grounds of discrimination are race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Under 'other status' the following have been held to qualify as prohibited grounds: age, nationality, marital status, disability, place of residence within a country and sexual orientation. The prohibited grounds of discrimination are often described as 'personal attributes'.

15 UN Human Rights Committee, *General Comment 18: Non-discrimination* (1989).

16 Under Coronavirus Economic Response Package (Payments and Benefits) Rules 2020, subsection 9(2)(c).

17 UN Human Rights Committee, *General Comment 18: Non-Discrimination* (1989) [13]; see also *Althammer v Austria*, UN Human Rights Committee Communication No. 998/01 (2003) [10.2].

law acknowledges that some human rights may need to be derogated from in times of emergency. Certain treaties allow a State to suspend or restrict the exercise of certain rights in 'time of public emergency which threatens the life of the nation'.[18] However, such restrictions can only be to the extent 'strictly required by the exigencies of the situation' and only when a state of emergency is officially proclaimed and intention to derogate from human rights notified to relevant international bodies, including the Secretary General of the United Nations. Australia has not officially proclaimed an intention to derogate from its human rights obligations during this pandemic. As a result, in undertaking an analysis of legislation during this time, as a matter of international human rights law, the usual limitation criteria set out above continues to apply.

1.15 Secondly, it is not clear how many foreign nationals will be affected by being ineligible for Jobkeeper on the basis of not being Australian citizens or permanent residents or specified New Zealand citizens. Some temporary visa holders may still be employed. Others may be ineligible for JobKeeper on other bases, for example, because they do not work for an eligible business. And some Australians may be ineligible for JobKeeper, for example because they are short term casual employees, or do not work for an eligible business. Nonetheless, it remains the case that if an eligible business has two employees, both of whom meet all other eligibility criteria, but one is an Australian citizen and the other is a temporary visa holder from a country other than New Zealand, the Australian citizen will be eligible for JobKeeper and the temporary visa holder will not. As such, the legislation provides a basis for differential treatment and must therefore be scrutinised according to the limitation criteria set out above.

1.16 The Treasurer's response acknowledges that the rules may result in differential treatment for particular groups of people, but notes that the objective of the temporary JobKeeper scheme is to support employers to maintain their connection to their employees. The Treasurer has advised that to the extent that there is any differentiation of treatment on the basis of national origin, it is reasonable and proportionate as it reflects the temporary nature of the connection to Australia of people without permanent residency or citizenship.[19] As such, the payment is focused on those who have a permanent connection to Australia. Seeking to support employers to maintain their connection with their employees during the COVID-19 pandemic, which is the purpose of the JobKeeper scheme itself, is likely to constitute a legitimate objective for the purposes of international human rights law. It appears that the differential treatment of employees, to focus on those with a permanent connection to Australia, may also be based on reasonable and objective criteria.

18 See article 4 of the International Covenant on Civil and Political Rights.

19 Or New Zealand citizens on a Special Category (Subclass 444) visa.

1.17 However, it is not clear that excluding all temporary visa holders from the JobKeeper scheme (except certain New Zealand citizens), would, in all instances, be effective to achieve the objective of focusing on those with a permanent connection to Australia, and supporting employers to maintain their connection with employees. Some temporary visa holders will have a long-term connection to Australia and intend to seek permanent residence in the country. While it is not clear how many of those worked for an eligible business and may have lost their job due to the pandemic, and how many had a more permanent connection with their employer, it appears there would be some persons who fit within that category. Were that business to terminate such a person's employment due to COVID-19, but wished to retain a connection to them, they would be unable to retain that connection under the JobKeeper scheme. Consequently, excluding such people from eligibility for the scheme may not be rationally connected to the stated objective.

1.18 In assessing proportionality it is necessary to consider whether the measure provides sufficient flexibility to treat different cases differently or whether it imposes a blanket policy without regard to the merits of an individual case. The measure may be more likely to be proportionate if it allowed the employers of temporary visa holders, or the visa holders themselves, to apply for exceptions to the eligibility requirements where they could demonstrate an ongoing connection to the employer (for example, if they were awaiting the outcome of an application for permanent residency). As the measure currently applies, it is not clear that the eligibility requirement for the JobKeeper scheme, which excludes most non-citizens on temporary visas, is consistent with the right to equality and non-discrimination.

Committee view

1.19 The committee thanks the Treasurer for this response. The committee notes that this instrument establishes the eligibility requirements for the JobKeeper payment. The committee notes that the payment is broadly restricted to employees of eligible businesses who are Australian citizens, permanent Australian residents or New Zealand citizens[20] working in Australia.

1.20 The committee considers that the JobKeeper scheme, which was developed with great urgency and immediacy in order to protect the livelihoods of Australians during the economic crisis caused by the coronavirus pandemic, constitutes an extraordinary amount of government support designed to protect jobs and businesses and which promotes the rights to an adequate standard of living and work.

1.21 The committee notes that as a matter of international human rights law, the obligation of equality and non-discrimination continues to apply during this time of emergency, and the eligibility requirements which restrict some visa-holders from accessing the payment may also engage the right to equality and non-

20 On a Special Category (Subclass 444) visa.

discrimination. The committee considers that seeking to support employers to maintain their connection with their employees during the COVID-19 pandemic is an important and legitimate objective, and the differential treatment of employees, to focus on those with a permanent connection to Australia, is based on reasonable and objective criteria, particularly noting the temporary nature of this measure.

1.22 The committee accepts there is some difference in treatment as to who is eligible for the payment, but notes that this difference does not affect all temporary visa holders (as many would not have lost their jobs or would not work for businesses which are eligible for the subsidy) and this is a short-term emergency measure, rather than a permanent subsidy.

1.23 The committee thanks the minister and has now concluded its examination of this legislative instrument.

Fair Work Amendment (Variation of Enterprise Agreements) Regulations 2020 [F2020L00432][1]

Purpose	This instrument temporarily reduces the period of time during which employees must have access to a copy of a proposed variation of an enterprise agreement, and before which employees must be notified of the details of the vote on the variation, from seven calendar days to one calendar day. The instrument commenced on 17 April 2020 and is repealed at the end of six months (unless a later time is prescribed)
Portfolio	Industrial Relations
Authorising legislation	*Fair Work Act 2009*
Disallowance	15 sitting days after tabling (tabled in the House of Representatives and the Senate on 12 May 2020). Notice of motion to disallow must be given by 12 August 2020 in the House of Representatives and the Senate[2]
Right	Work, freedom of association
Status	Concluded examination

1.24 The committee requested a response from the minister in relation to the instrument in *Report 5 of 2020*.[3]

Reduction in access period for variation of an enterprise agreement

1.25 This instrument reduces the period of time during which employees must have access to a copy of a proposed variation of an enterprise agreement, and before which employees must be notified of the details of the vote on the variation, from seven calendar days to one calendar day before the vote. This amendment will be effective for six months after commencement (or for a later time if otherwise prescribed).

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Fair Work Amendment (Variation of Enterprise Agreements) Regulations 2020 [F2020L00432], *Report 8 of 2020*; [2020] AUPJCHR 106.

2 In the event of any change to the Senate or House's sitting days, the last day for the notice would change accordingly.

3 Parliamentary Joint Committee on Human Rights, *Report 5 of 2020* (29 April 2020), pp. 38-41.

Summary of initial assessment

Preliminary international human rights legal advice

Rights to just and favourable conditions of work and freedom of association

1.26 By reducing the period of time during which employees must have access to, and be notified of a vote on, a proposed variation to an enterprise agreement, this instrument engages and may limit the right to freedom of association and just and favourable conditions of work.

1.27 The right to freedom of association includes the right to collectively bargain without unreasonable and disproportionate interference from the state. The right to just and favourable conditions of work includes the right to adequate and fair remuneration, reasonable working hours, leave, safe working conditions, and the right to join trade unions. These rights are protected by the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).[4]

1.28 As recognised in the statement of compatibility, the interpretation of these rights is informed by International Labour Organization (ILO) treaties, including the ILO Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize (ILO Convention No. 87) and the ILO Convention of 1949 concerning the Right to Organise and Collective Bargaining (ILO Convention No. 98), which protects the right of employees to collectively bargain for terms and conditions of employment.[5] The *Human Rights (Parliamentary Scrutiny) Act 2011* does not include the International Labour Organization (ILO) Constitution or ILO conventions on freedom of association and the right to bargain collectively in the list of treaties against which the human rights compatibility of legislation is to be assessed. Nonetheless, these ILO standards and jurisprudence are relevant to the mandate of the committee as they are the practice of the international organisation with recognised and long-established expertise in the interpretation and implementation of these rights. It is a specialised body of law which can inform the general guarantees set out in the human rights treaties. In the current case, ILO Convention No. 87 is directly relevant, in that both article 22(3) of the ICCPR and article 8(3) of the ICESCR expressly state that measures which are inconsistent with the guarantees provided for in ILO Convention No. 87 will not be consistent with the right to freedom of association. The UN Committee on Economic, Social and Cultural

4 International Covenant on Civil and Political Rights, article 22; International Covenant on Economic, Social and Cultural Rights, articles 7 and 8.

5 The Freedom of Association and Protection of the Right to Organize (ILO Convention No. 87) is expressly referred to in article 22(3) of the International Covenant on Civil and Political Rights and article 8(3) of the International Covenant on Economic, Social and Cultural Rights.

Rights has also considered ILO Conventions No.87 and 89 when assessing Australia's compliance with Article 8 of the ICESCR.[6]

1.29 The initial analysis considered that further information was required to assess the compatibility of this measure with the rights to freedom of association and just and favourable conditions of work.

Committee's initial view

1.30 The committee noted that this measure engages and may limit the right to freedom of association and just and favourable conditions of work. These rights may be subject to permissible limitations if they are shown to be reasonable, necessary and proportionate.

1.31 The committee sought the minister's advice as to the compatibility of this measure with the right to freedom of association and just and favourable conditions of work.

Minister's response[7]

1.32 The minister advised:

> In response to the Committee's concerns, I note that there are a range of safeguards in the *Fair Work Act 2009.* The Fair Work Commission must be satisfied when approving a variation that the employees have genuinely agreed to the variation and that other important safeguards have been observed, including that the employer has taken all reasonable steps to explain the terms of the variation and their effect to employees. This explanation must be provided in an appropriate manner taking into account the employees' particular circumstances and needs. These requirements operate alongside a number of other existing protections, including that a variation passes the Better Off Overall Test and does not contravene the National Employment Standards.
>
> When the economic effects of the pandemic became clear, urgent industry wide award changes were made by the Fair Work Commission within days of applications for variations being made. I considered it important that those covered by enterprise agreements should also not be subject to unnecessary delays.
>
> The Regulations recognise that the seven day access period before employees may vote on a proposed variation could present a barrier to employers and employees agreeing to implement changes quickly in

6 See, UN Committee on Economic Social and Cultural Rights (UNCESCR), *Concluding Observations on Australia*, E/C.12/AUS/CO/5 (2017), [29]-[30].

7 The minister's response to the committee's inquiries was received on 10 June 2020. This is an extract of the response. The response is available in full on the committee's website at: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports.

response to the impacts of the COVID-19 pandemic, with a view to preserving business viability and jobs.

The Regulations recognise that in the very challenging circumstances arising because of the pandemic, a lesser access period can suffice. I note in this regard that employees can continue to seek and receive advice from their union (or other representative) during the period which must include a minimum of one clear calendar day, disregarding the day of the notification and the vote. If notice is given on one day, the earliest a vote could be taken is the day following the next day, if only the minimum period is used.

I note also that agreement variations commonly arise out of prior discussions between employers and employees before commencement of the formal statutory process. Of course, employers must make the case for change, and employees must still vote to agree. In many instances periods of notice can, and have continued to, be given beyond one day, and voting has occurred over a period of days.

The reduced access period set by the Regulations operates as a *minimum* (so more than one day's notice can be provided), and this is a temporary, time-limited measure. To the extent that the Regulations may limit the right to right to freedom of association, or the right to just and favourable conditions of work, they are reasonable, necessary and proportionate to provide employers and employees with the flexibility to implement agreed workplace changes quickly for the purpose of the legitimate objective of keeping businesses operating and saving jobs in the context of the pandemic.

Arising from discussions with various stakeholders and the Senate cross bench I have indicated that changes to the regulation are appropriate, especially in relation to the length of time variations approved after a reduced access period can extend. I am also reviewing the operation of the regulation generally as I indicated I would when the regulation was made.

Concluding comments

International human rights legal advice

1.33 The minister has advised that the objective of reducing the minimum access period from seven days to one, is to provide employees and employers with the flexibility to implement agreed workplace changes quickly, in order to be able to keep businesses operating and to save jobs in the context of the pandemic. The minister has explained that the seven day access period could present a barrier to employers and employees agreeing to implement changes quickly. Preserving business viability and jobs is likely to constitute a legitimate objective for the purposes of international human rights law, and if the seven day period worked as a barrier to making swift changes that could affect business viability during this time, reducing this time may be rationally connected to that objective.

1.34 In relation to the proportionality of the measure, the minister has advised that this is a temporary change, operating only for six months, and the reduced access period operates only as a minimum, so a workplace can still choose to give more than one day's notice. The minister also notes that during the reduced access period employees can still continue to seek and receive advice from their unions or other representative. In addition, the minister advises that there are a range of safeguards in the *Fair Work Act 2009* (Fair Work Act) which requires that any variations made to an enterprise agreement must be approved by the Fair Work Commission. In approving a variation the Fair Work Commission needs to be satisfied of a number of matters, including that employees have genuinely agreed to the variation, the employer has taken reasonable steps to explain the terms of the variation and their effect to employees, and that the variation passes the Better Off Overall Test and does not contravene the National Employment Standards.

1.35 The existing protections in the Fair Work Act constitute important safeguards and assist in protecting the rights of employees to just and favourable conditions of work. Of particular importance is that the Fair Work Commission cannot generally agree to the variation of an enterprise agreement unless it passes the Better Off Overall Test, which requires that the changes must result in employees being better off than if the changes weren't applied.[8] However, the Fair Work Commission may still approve an agreement that does not pass the Better Off Overall Test if the Commission is satisfied 'that, because of exceptional circumstances, the approval of the agreement would not be contrary to the public interest'.[9] The Fair Work Act gives an example of this as being 'where the agreement is part of a reasonable strategy to deal with a short-term crisis in, and to assist in the revival of, the enterprise of an employer covered by the agreement'.[10] As such, it would appear that in the context of the COVID-19 pandemic, the Better Off Overall Test may not operate to specifically safeguard employees' rights.

1.36 In addition, while it is correct that the amendments only affect the *minimum* time required for the access period, and in many instances employers may choose to provide a longer period of time, in assessing the regulations for compatibility with human rights it is necessary to consider what they empower, noting that while many employers may choose to give a longer access period, the law now provides it is sufficient for the employer to give one calendar day's notice. It is relevant to proportionality that these changes are time-limited, applying only for six months (from 17 April 2020 to 17 October 2020). However, it would appear that any changes made to an enterprise agreement following these revised processes, would continue for the life of the agreement, which may last a number of years. As such, while these

8 *Fair Work Act 2009*, section 193.

9 *Fair Work Act 2009*, subsection 189(2).

10 *Fair Work Act 2009*, subsection 189(3).

amending regulations are temporary, any changes made as a result of them could have ongoing effects. In this respect, it is significant that the minister has indicated that changes may be made to the length of time variations approved after a reduced access period can extend. Such changes would assist with the proportionality of the measure.

1.37 In assessing proportionality it is also important to consider whether the measures are sufficiently circumscribed. In this respect, it is noted that the changes made by the regulations apply to all workplaces, including those which have not experienced a downturn in business as a result of the pandemic. Noting that the measure is designed to keep businesses operating and saving jobs in the context of the pandemic, it would appear that the measure as it currently applies may not be sufficiently circumscribed.

1.38 Finally, in relation to the impact of the measure on the ability of workers to collectively bargain (and therefore their right to freedom of association), the minister's response only states that during the reduced access period employees can still continue to seek and receive advice from their unions or other representative. However, it remains unclear that the provision of a minimum one calendar day for review and notification of a vote on a proposed variation to an enterprise agreement would constitute a sufficient period of time for employees to exercise their right to bargain collectively. It is noted that one calendar day would include weekends and public holidays, and could result in employees being required to vote on an agreement that affects their working conditions without having had an opportunity to fully understand the proposal, discuss it with other employees or their union, or to negotiate. For example, were an employee to be notified of a proposed variation on a Saturday evening and that a required vote is scheduled for the following Monday morning, it is unclear how they could seek advice from their union or discuss the matter with other employee during the intervening period, particularly if they were not working on the Sunday.

1.39 In conclusion, reducing the access period for employees from seven calendar days to one calendar day engages and limits the right to freedom of association and just and favourable conditions of work. The rights may be subject to permissible limitations where the limitation pursues a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective. In the context of the COVID-19 pandemic, the measure seeks to achieve the legitimate objective of keeping businesses operating and saving jobs. Giving employers and employees the flexibility to implement agreed workplace changes quickly may also be rationally connected (that is, effective to achieve) this objective. However, as the regulations are drafted, it is not clear that the measure is proportionate to the stated objective. This is on the basis of the potentially significant limitation on the right of employees to collectively bargain; the fact that the Fair Work Commission is not required to apply the Better Off Overall Test during short-term crises; the fact that any changes made to an enterprise agreement under

a reduced access period could last for longer than the changes made to the access period itself; and the fact that these changes apply in relation to all workplaces and not only those employers experiencing a downturn in their revenue as a result of the pandemic. Therefore, on the basis that the measure does not appear to be sufficiently circumscribed or contain sufficient safeguards, there is a risk that these amending regulations impermissibly limit the rights of employees to freedom of association and just and favourable conditions of work.

Committee view

1.40 The committee thanks the minister for this response. The committee notes that this instrument temporarily reduced the period of time during which employees must have access to a copy of a proposed variation of an enterprise agreement, and before which employees must be notified of the details of the vote on the variation, from seven calendar days to one calendar day.

1.41 The committee considers that this measure seeks to achieve the vitally important and legitimate objective of keeping businesses operating and saving jobs during the COVID-19 pandemic; giving employers and employees the flexibility to quickly implement agreed workplace changes. The committee also considers that important safeguards apply that assist with the proportionality of this measure, including that the measure is temporary and the existing protections in the *Fair Work Act 2009* continue to apply. However, the committee notes that, as drafted, there would be some risk that the measure may not be sufficiently circumscribed or contain sufficient safeguards to adequately protect the right to freedom of association and just and favourable conditions of work.

1.42 However, the committee notes that this temporary measure was repealed on 12 June 2020, with the registration of the Fair Work Amendment (Variation of Enterprise Agreements No. 2) Regulations 2020 [F2020L00702], meaning that the seven-day variation access period has now been restored. As such, the committee makes no further comment.

Privacy Amendment (Public Health Contact Information) Bill 2020[1]

Purpose	The bill seeks to provide stronger privacy protections for users of the Commonwealth's COVIDSafe app and data collected through the COVIDSafe app than that which would otherwise apply in the *Privacy Act 1988*
Portfolio	Health
Introduced	House of Representatives, 12 May 2020 *Received Royal Assent on 15 May 2020*
Rights	Health, privacy
Status	Concluded examination

1.43 The committee requested a response from the minister in relation to the bill in *Report 6 of 2020*.[2]

COVIDSafe application

1.44 The COVIDSafe application (COVIDSafe app), which can be voluntarily downloaded and operated on Android and iOS personal devices, has been developed by the Commonwealth Government in response to the COVID-19 pandemic. The COVIDSafe app is designed to help find close contacts of persons who have tested positive for COVID-19.[3]

1.45 The Privacy Amendment (Public Health Contact Information) Bill 2020 (the bill), which received Royal Assent on 15 May 2020, amends the *Privacy Act 1988* (Privacy Act) to establish a series of offences for misuse of data from the COVIDSafe app, or coercion relating to the use of the COVIDSafe app; sets out specific requirements regarding COVIDSafe app data and COVIDSafe; and includes the application of general privacy measures. All offences are punishable by imprisonment for 5 years, or 300 penalty units, or both. Extended geographical jurisdiction applies to all offences,[4] which has the effect that persons may be

1 This entry can be cited as: Parliamentary Joint Committee on Human rights, Privacy Amendment (Public Health Contact Information) Bill 2020, *Report 8 of 2020*; [2020] AUPJCHR 107.

2 Parliamentary Joint Committee on Human Rights, *Report 6 of 2020* (20 May 2020), pp. 5-15.

3 Explanatory memorandum, p. 2.

4 Privacy Amendment (Public Health Contact Information) Bill 2020, section 94J.

prosecuted for an offence even where the relevant conduct took place outside Australia.[5]

Summary of initial assessment

Preliminary international human rights legal advice

Rights to health and privacy

1.46 The initial analysis noted that this legislation does not authorise or require the use of the COVIDSafe app, rather it seeks to protect the privacy interests associated with the voluntary use of the COVIDSafe app. As such, in assessing the bill for compatibility with human rights, this analysis does not focus on any privacy implications that may emanate from the COVIDSafe app itself; the efficacy of such technology in achieving the goal of contact tracing; or the policy merits of the COVIDSafe app. Rather, its focus is on whether the legislation under consideration may promote or limit human rights.

1.47 As this is a measure designed to help prevent the establishment and spread of COVID-19, which has the ability to cause high levels of morbidity and mortality, it would appear that it may promote the right to health. The right to health is the right to enjoy the highest attainable standard of physical and mental health.[6] Article 12(2) of the International Covenant on Economic, Social and Cultural Rights requires that State parties shall take steps to prevent, treat and control epidemic diseases.[7] The United Nations Committee on Economic, Social and Cultural Rights has stated that the control of diseases refers to efforts to:

> make available relevant technologies, using and improving epidemiological surveillance and data collection on a disaggregated basis, the implementation or enhancement of immunization programmes and other strategies of infectious disease control.[8]

1.48 Prohibiting unauthorised collection, use and disclosure of COVIDSafe app data is also likely to promote the right to privacy. As noted in the statement of compatibility, the bill provides stronger provisions than existing protections for personal information collected by the COVIDSafe app, thereby promoting the right to privacy.[9] However, regulating the collection, use and disclosure of such data is also likely to limit the right to privacy, as such data contains personal information about the user of the COVIDSafe app. The right to privacy includes respect for informational

5 *Criminal Code Act 1995*, section 15.1.

6 International Covenant on Economic, Social and Cultural Rights, article 12(1).

7 International Covenant on Economic, Social and Cultural Rights, article 12(2)(c).

8 United Nations Committee on Economic, Social and Cultural Rights, *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12)* (2000), [16].

9 Statement of compatibility, p. 5.

privacy, including the right to respect for private and confidential information, particularly the storing, use and sharing of such information.[10] It also includes the right to control the dissemination of information about one's private life. The right to privacy may be subject to permissible limitations which are provided by law and are not arbitrary. Limitations on the right to privacy will be permissible where the limitation pursues a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.

1.49 The initial analysis considered that in order to fully assess the proportionality of this proposed measure, further information was required as to:

(a) what is the nature and type of data that is collected or generated through the operation of the COVIDSafe app, what information falls under the definition of 'COVIDSafe app data', and why does the bill not specify such matters;

(b) whether the COVIDSafe app data uploaded to the National COVIDSafe Data Store will include all 'digital handshakes' between two users, regardless of the length of time the users are in proximity and what 'proximity' means in this context; and if so, why is it necessary to include all such data in the National COVIDSafe Data Store;

(c) whether the de-identification process will sufficiently protect the privacy of personal information;

(d) why is it necessary to retain data uploaded to the National COVIDSafe Data Store for the duration of the COVIDSafe data period, rather than requiring data to be deleted once it has been transferred to state and territory health authorities for the purposes of contact tracing; and

(e) how long will state and territory health authorities be empowered to retain the data transferred to them by the data store administrator.

1.50 The full initial legal analysis is set out in *Report 6 of 2020*.

Committee's initial view

1.51 The committee considered that the bill, which is designed to encourage more people to download the COVIDSafe app in order to enable faster and more effective contact tracing of anyone who may have been exposed to COVID-19, is likely to promote and protect the right to health, noting that the right to health requires Australia to take steps to prevent, treat and control epidemic diseases. The committee also considers that as the bill provides stronger privacy protections for personal information collected by the COVIDSafe app, it is likely to promote the right to privacy.

10 International Covenant on Civil and Political Rights, article 17.

1.52 However, regulating the collection, use and disclosure of such data is also likely to engage the right to privacy, as such data contains personal information about the user of the COVIDSafe app. The right to privacy may be subject to permissible limitations if it is shown to be reasonable, necessary and proportionate. In order to fully assess the compatibility of these measures with the right to privacy, the committee sought the minister's advice as to the matters set out at paragraph [1.49].

Attorney-General's response[11]

1.53 The Attorney-General advised:

> ***(a) What is the nature and type of data that is collected or generated through the operation of the COVIDSafe app, what information falls under the definition of 'COVIDSafe app data', and why does the bill not specify such matters?***
>
> The following data is collected or generated through the operation of the COVIDSafe app:
>
> - **Registration data:** this is data collected from a COVIDSafe user when they register for the app, and includes their mobile phone number, name (which can include a partial name or pseudonym), age range and postcode. Based on this information an encrypted reference code is then generated for the app on that device.
> - **Data generated through use of COVIDSafe:** this is data generated through an individual's use of COVIDSafe when they come into contact with another COVIDSafe user, and includes the other user's encrypted reference code, the date and time of contact, the Bluetooth signal strength of the other COVIDSafe user and the other user's device model. This information is securely encrypted and stored locally on the user's device.
>
> The definition of 'COVID app data' in subsection 94D(5) is intended to capture all of the above data, by referring to data relating to a person that has been collected or generated (including before the commencement of the Act).
>
> Importantly, the effect of paragraph 94D(2)(b) of the Act is that the National COVIDSafe Data Store administrator is only allowed to collect, use or disclose information through the COVIDSafe App to the extent required to enable State and Territory contact tracing, or to maintain COVIDSafe and the National COVIDSafe Data Store.

11 The minister's response to the committee's inquiries was received on 10 June 2020. This is an extract of the response. The response is available in full on the committee's website at: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports.

(b) Whether the COVIDSafe app data uploaded to the National COVIDSafe Data Store will include all 'digital handshakes' between two users, regardless of the length of time the users are in proximity and what 'proximity' means in this context; and if so, why is it necessary to include all such data in the National COVIDSafe Data Store.

The COVIDSafe app collects 'digital handshake' data that is exchanged between users of the app at regular intervals. This contact information is stored on the user's phone/device. Contact information older than 21 days on the phone/device is automatically deleted. It is not technologically feasible to ignore other users' Bluetooth signals beyond 1.5 metres or to limit the collection of Bluetooth signals to 15 minutes contact. This is because the nature of Bluetooth technology means signals can be detected within about 10 metres and the COVIDSafe app detects the strength of Bluetooth signals not the distance.

When a user is diagnosed with COVID-19 and consents to their data being uploaded, contact information on the phone is stored in the National COVIDSafe Data Store. This includes the unique identifier of the contact, date/time the contact occurred and the proximity based on what has been detected via Bluetooth. However, the Government has put in place access restrictions to 'digital handshake' data uploaded to the National COVIDSafe Data Store such that, when a state or territory health official accesses the system, they are only presented with the user's close contacts, defined as contact between users for at least 15 minutes at a proximity approximately within 1.5 metres.

(c) Whether the de-identification process will sufficiently protect the privacy of personal information.

The Act has been designed to allow only very limited de-identification of COVID app data. Specifically, under paragraph 94D(2)(f), the only de-identified information that can be produced from COVID app data is de-identified statistical information about the total number of COVIDSafe registrations, and this can only be produced by the National COVIDSafe Data Store administrator. This minimises any potential risk of flaws in the de-identification process, or the publication of de-identified information that could be later re-identified.

(d) Why is it necessary to retain data uploaded to the National COVIDSafe Data Store for the duration of the COVIDSafe data period, rather than requiring data to be deleted once it has been transferred to state and territory health authorities for the purposes of contact tracing?

Data uploaded to the National COVIDSafe Data Store will be accessed by State and Territory health officials to support contact tracing activities. This data is retained for the duration of the COVIDSafe data period to provide a record of any data accessed and by whom through use of the system. This includes investigations where authorised under the *Privacy Act 1988* (the Privacy Act).

Retaining data in the National COVIDSafe Data Store for the duration of the COVIDSafe data period will allow the Information Commissioner to effectively perform the oversight role provided for in the Act by enhancing the Commissioner's ability to investigate complaints about breaches of the legislation and undertake assessments of compliance with privacy obligations under the legislation. The retention of COVID app data for this period will also support law enforcement unde1taking investigations into breaches of the legislation.

The National COVIDSafe Data Store administrator will automatically delete all data from the National COVIDSafe Data Store at the conclusion of the COVIDSafe data period. Individuals can also request deletion of their registration data at any time under section 94L of the Act. Once a deletion request is actioned, State and Territory health officials will not be able to contact the user if they are a close contact of another user who is diagnosed with COVID-19.

(e) How long will state and territory health authorities be empowered to retain the data transferred to them by the data store administrator?

One effect of sections 94R and 94X of the Act is that State and Territory health authorities are subject to the Privacy Act when handling COVID app data, and that COVID app data is treated as 'personal information' under the Privacy Act. This in tum means that the existing provisions of the Privacy Act apply to State and Territory health authorities handling COVID app data (except where those existing provisions are overridden by the stricter protections contained in the Act).

Consequently, Australian Privacy Principle (APP) 11 is expected to apply to COVID app data that State and Territory health authorities hold. This would include APP 11.2, which requires entities to destroy personal information that is no longer required for a legally-permissible purpose (i.e. for contact tracing purposes).

Concluding comments

International human rights legal advice

1.54 The Attorney-General has advised that, where a COVIDSafe app user comes into contact with another user, the app will generate data detailing the date and time of contact, as well as the other user's: encrypted reference code; Bluetooth signal strength; and device model. The Attorney-General has stated that the term 'COVIDSafe app data', which is undefined in the bill, is intended to capture all of this data, in addition to the registration data which a user provides on registering for the COVIDSafe app. This is useful information as to the data that will be potentially uploaded onto the National Data Safe Store, however, it remains unclear why the term 'COVIDSafe app data' is not defined in the bill itself, noting that the data to which it relates appears to be clearly identifiable. Leaving this detail to policy means that what constitutes 'COVIDSafe app data' can change over time.

1.55 Further information was also sought as to data detailing 'digital handshakes' between two devices with the COVIDSafe app installed. The Attorney-General has advised that all digital handshakes of any length of time will be uploaded to the National COVIDSafe Data Store. However, the government has put in place restrictions to restrict access by state and territory health authorities to only those handshakes that identify contact between two users for at least 15 minutes and at a proximity within approximately 1.5 metres. The Attorney-General advises that this is because it is not technologically feasible to ignore other users' Bluetooth signals where a device is picking up the signal and registering the contact. The Attorney-General notes that, depending on the strength of a signal, a Bluetooth signal may be detected within a 10 metre range. The restriction on the ability of state and territory health authorities to access all information in the National COVIDSafe Data Store is significant, and assists with the proportionality of the limitation on the users' rights to privacy. However, noting that only digital handshake data which indicates a contact between two users of 15 minutes at a proximity of approximately 1.5 metres is useful for contact tracing purposes, it is not clear why all other data should not be deleted from the National COVIDSafe Data Store once uploaded, as it has no further utility with respect to facilitating contact tracing. It is also not clear why this restriction is not set out in the legislation itself. Where a measure limits a human right, discretionary or administrative safeguards alone may not be sufficient for the purpose of a permissible limitation under international human rights law.[12] This is because administrative and discretionary safeguards are less stringent than the protection of statutory processes and can be amended or removed at any time.

1.56 Clarification was also sought as to why it is necessary to retain data uploaded to the National COVIDSafe Data Store for the duration of the COVIDSafe data period, rather than requiring that data be deleted once it has been transferred to state and territory health authorities for the purposes of contact tracing. The Attorney-General advised that retaining such data for the duration of the COVIDSafe data period will provide a record of any data accessed through the use of the system. This will enable the Information Commissioner to effectively perform their oversight functions, and support both the Information Commissioner and law enforcement undertaking investigations into breaches of legislation. This assists with understanding the necessity of retaining this data during this period. However, it is noted that as soon as reasonably practicable after the COVIDSafe data period ends, the data store administrator is required to delete all COVIDSafe app data from the Data Store. If this is the case then it is unclear how the Information Commissioner and law enforcement can effectively perform their role in investigating any breaches that occur close to this end period, if it is necessary to retain this information for that

12 See, for example, Human Rights Committee, *General Comment 27, Freedom of movement (Art.12)* (1999).

purpose. It is relevant to the proportionality of the measure that a COVIDSafe app user can request the deletion of their data from the Data Store at any time.

1.57 Further information was also sought as to how long state and territory health authorities who have received COVIDSafe app data transferred to them by the data store administrator could retain that data. The Attorney-General advised that the *Privacy Act 1988* applies in relation to the data, and it is expected that Australian Privacy Principle 11 will apply to such data, requiring the states and territories to destroy personal information that is no longer required for a legally-permissible purpose (in this instance, for contact tracing purposes). However, it is noted that these obligations would be clearer if the Act specifically specified that states and territories must delete any COVIDSafe app data after any contact tracing has taken place.

1.58 In conclusion, as set out in the initial analysis, the bill contains a number of measures that are designed to provide privacy protections relating to COVIDSafe app data and the COVIDSafe app.[13] The Attorney-General has provided further information with respect to several safeguards which assist in an assessment of the proportionality of these measures with respect to the right to privacy. It is useful that states and territories have restricted access to the data which is uploaded to the National COVIDSafe Data Store, and that the de-identification of data only applies to statistical information regarding the total number of COVIDSafe app registrations. Given the extensive safeguards contained in the bill itself, the measure may constitute a permissible limitation on the right to privacy. However, the proportionality of this measure would be further assisted if the Act:

(a) defined the term 'COVIDSafe app data' as being the data which the minister has outlined in this response;

(b) provided that only data indicating a 'digital handshake' between two devices of at least 15 minutes duration within a proximity of approximately 1.5 metres may be retained on the National COVIDSafe Data Store, noting the advice that only this data is used for contact tracing purposes; and

(c) specifically provided that state and territory health authorities which have received COVIDSafe app data must delete that data as soon as reasonably practicable once the data is no longer required for contact tracing purposes.

Committee view

1.59 The committee thanks the Attorney-General for this response. The committee notes that this Act is designed to encourage more people to download the COVIDSafe app in order to enable faster and more effective contact tracing of

13 Parliamentary Joint Committee on Human Rights, *Report 6 of 2020* (20 May 2020), pp. 5-15.

anyone who may have been exposed to COVID-19, and provides stronger privacy protections for data collected through the COVIDSafe contact tracing application than would otherwise apply in the *Privacy Act 1988.* In this respect, the committee considers that the Act is likely to promote the rights to health and privacy.

1.60 The committee also notes that the Attorney-General has outlined several measures which limit access to COVIDSafe app data, and require its deletion where it is no longer required for a legally permissible purpose. The committee considers that given the extensive safeguards contained in the bill itself, the measure constitutes a permissible limitation on the right to privacy.

1.61 The committee considers that the stringent privacy protections in this Act could be further strengthened if the Act:

- **(a) defined the term 'COVIDSafe app data' as being the data which the minister has outlined in this response;**
- **(b) provided that only data indicating a 'digital handshake' between two devices of at least 15 minutes duration within a proximity of approximately 1.5 metres may be retained on the National COVIDSafe Data Store, noting the advice that only this data is used for contact tracing purposes; and**
- **(c) specifically provided that state and territory health authorities which have received COVIDSafe app data must delete that data as soon as reasonably practicable once the data is no longer required for contact tracing purposes.**