

## Chapter 1

### New and continuing matters

1.1 The committee comments on the following bills.

#### Bills

#### National Anti-Corruption Commission Bill

#### National Anti-Corruption Commission (Consequential and Transitional Provisions) Bill 2022<sup>1</sup>

<b>Purpose</b>	<p>The National Anti-Corruption Commission Bill seeks to create a new Commonwealth anti-corruption agency: the National Anti-Corruption Commission (the Commission). The Commission is intended to serve as an independent agency to investigate and report on serious or systemic corruption in the Commonwealth public sector, refer evidence of criminal corrupt conduct for prosecution, and undertake education and prevention activities regarding corruption</p> <p>The National Anti-Corruption Commission (Consequential and Transitional Provisions) Bill 2022 seeks to make changes that would support the establishment of the NACC</p>
<b>Portfolio</b>	Attorney-General
<b>Introduced</b>	House of Representatives, 28 September 2022
<b>Rights</b>	Privacy; fair hearing; liberty; freedom of movement; freedom of expression; effective remedy; rights of persons with disabilities

#### Commission's investigative and reporting powers

1.2 The National Anti-Corruption Commission Bill (the bill) seeks to establish a National Anti-Corruption Commission (the Commission). The Commission would be vested with a range of powers in order to investigate 'corruption issues' where the Commissioner is of the opinion that the issue could involve corrupt conduct that is

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1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, National Anti-Corruption Commission Bill 2022 and National Anti-Corruption Commission (Consequential and Transitional Provisions) Bill 2022, *Report 5 of 2022*; [2022] AUPJCHR 36.

'serious or systemic',<sup>2</sup> and to report on those issues.<sup>3</sup> This would include the power to investigate conduct that took place before the commencement of the bill.<sup>4</sup> Corrupt conduct would include conduct of a public official that constitutes a breach of trust or abuse of the person's office, or any conduct of any person that adversely affects (or could adversely affect) either directly or indirectly the honest and impartial exercise of any public official's powers.<sup>5</sup> The words 'serious' and 'systemic' are stated to take their ordinary meaning, and the explanatory memorandum provides a series of examples of factors that may contribute to either the substance or result of conduct reaching those thresholds.<sup>6</sup>

1.3 To enable the Commission to exercise these powers, the bill would empower the Commission to: require the production of information, or a document or thing;<sup>7</sup> summon witnesses to attend hearings and answer questions under oath or affirmation;<sup>8</sup> apply for orders for the surrender of travel documents;<sup>9</sup> apply for an order to arrest a person;<sup>10</sup> require that information about a notice to produce or a private hearing summons must be kept secret for up to five years;<sup>11</sup> use and disclose investigation material in order to obtain derivative material (and disclose this to prosecutors in some cases);<sup>12</sup> conduct searches;<sup>13</sup> and report on the investigation.<sup>14</sup> Failure to comply with some of these powers would constitute a criminal offence and be punishable by periods of imprisonment between two and five years.<sup>15</sup>

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2 Clause 41.

3 Part 8.

4 Subclause 8(4).

5 Clause 8.

6 Explanatory memorandum, pp. 116–117.

7 Clause 58. See also clause 65.

8 Clause 63.

9 Clause 88.

10 Clause 90.

11 Clause 95.

12 Clauses 104-109.

13 Part 7, Division 7.

14 Part 8.

15 Clauses 60, 61, 68, 69, 70, 71, 72, and 81.

## International human rights legal advice

### *Multiple rights*

1.4 The Commissioner's proposed investigative and reporting powers engage and limit multiple human rights.<sup>16</sup> Most human 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.

### *Right to privacy and reputation*

1.5 Investigating people in relation to potential corrupt conduct—including conducting searches, compelling people to give evidence, disclosing evidence, and reporting on the investigation—engages and limits the right to privacy and reputation. The right to privacy includes the right to respect for private and confidential information, particularly the storing, use and sharing of such information.<sup>17</sup> It also includes the right to control the dissemination of information about one's private life, and protects against arbitrary and unlawful interferences with an individual's privacy and attacks on reputation.<sup>18</sup>

1.6 The statement of compatibility recognises that the right to privacy is engaged and limited by these measures. It states that the objectives of these provisions are to permit the detection and investigation of serious or systemic corrupt conduct, the making of findings and recommendations in relation to this, and the ability to prosecute or take other action in response to such conduct (including by enabling the Commission to report publicly on its findings in some circumstances). These would appear to constitute legitimate objectives for the purposes of international human rights law, and the inclusion of coercive powers enabling the Commission to investigate such matters would appear to be rationally connected to those objectives.

1.7 With respect to proportionality, the statement of compatibility sets out numerous safeguards in relation to the Commission's investigative and reporting powers (as provided in the main bill)<sup>19</sup> that appear to make the limitations on the right to privacy likely to be proportionate. These include: less obtrusive powers being

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16 The bill would also establish an Inspector of the National Anti-Corruption Commission who would have similar powers to investigate corruption issues within the Commission itself. See, Part 10.

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

18 There is international case law to indicate that this protection only extends to attacks which are unlawful. See *RLM v Trinidad and Tobago*, UN Human Rights Committee Communication No. 380/89 (1993); and *IP v Finland*, UN Human Rights Committee Communication No. 450/91 (1993).

19 In relation to the powers conferred on the Commission to use existing covert investigative powers, these are sought to be applied by the Consequential bill. For further detail, see paragraphs [1.53] to [1.69] below.

available for preliminary investigations and public inquiries;<sup>20</sup> hearings being held in private by default and only permitted to be public in limited circumstances;<sup>21</sup> a requirement that certain sensitive information must be heard in private (including information that would unreasonably disclose a person's personal affairs);<sup>22</sup> the power for the Commissioner to include a non-disclose notation on a notice to produce or a summons; restrictions on the use and disclosure of investigation material (including secrecy requirements) and public reporting on investigations.<sup>23</sup> These would appear to operate as important safeguards with respect to the right to privacy and reputation of persons required to engage with the Commission's processes (including those subject to investigation), and would appear to assist in making these limits on privacy in the bill proportionate.

### *Right to a fair trial*

1.8 In addition, the Commissioner would be empowered to: require that a person who has separately been charged with a relevant offence or been subject to relevant confiscation proceedings give information to the Commission;<sup>24</sup> and disclose certain investigation material (and material derived as a result of that material) to prosecutors by partially abrogating the privilege against self-incrimination and legal professional privilege.<sup>25</sup> As such, while the Commission itself could not find that a person has committed an offence,<sup>26</sup> its processes may nevertheless engage and limit the right to a fair trial, because it would permit the use of self-incriminatory investigation material and derivative material in certain criminal proceedings. The right to a fair trial and fair hearing applies to both criminal and civil proceedings, to cases before both courts and tribunals.<sup>27</sup> The right is concerned with procedural fairness, and encompasses notions of equality in proceedings, the right to a public hearing and the requirement that hearings are conducted by an independent and impartial body.<sup>28</sup> Specific guarantees

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20 Clause 42 and Part 9.

21 Clause 73.

22 Clauses 74 and 227.

23 The statement of compatibility steps comprehensively through the engagement of the right to privacy, including articulating why (in some instances) other, less rights restrictive alternatives would not be as effective to achieve the objective of the measure. See, pp. 30–43.

24 Clauses 58, 63 and 105.

25 Clauses 113–114.

26 Clause 150.

27 International Covenant on Civil and Political Rights, article 14.

28 UN Human Rights Committee, *General Comment No. 13: Article 14, administration of justice* (1984).

of the right to a fair trial in relation to a criminal charge include the presumption of innocence and the right not to incriminate oneself.

1.9 The statement of compatibility recognises that this right is engaged and limited.<sup>29</sup> It states that the authorised derivative use of self-incriminatory investigation material is necessary to achieve the objective of facilitating the investigation and prosecution of criminal offences, and notes the limitation on the ability to disclose derivative material to a prosecutor of a witness, and the powers of courts to make any orders necessary to ensure a witness's fair trial.<sup>30</sup> The explanatory memorandum also sets out why no derivative use immunity is included.<sup>31</sup> The involvement of the courts is an important safeguard, however compelling a person to give evidence where anything derived from it can be used against the person is a significant limit on the right to silence. It is noted that the Senate Standing Committee for the Scrutiny of Bills is likely to raise questions in relation this matter.<sup>32</sup> In the interests of providing human rights law advice in a timely manner,<sup>33</sup> noting this other scrutiny committee is likely to examine this matter in greater detail, no further comment is made here in relation to this human rights concern.

#### *Rights to liberty and freedom of movement*

1.10 The bill would also empower the Commission to: temporarily detain a person (for the purpose of bringing them before a court for contempt);<sup>34</sup> summon a person to give evidence;<sup>35</sup> and seek a court order to arrest a person,<sup>36</sup> or require the surrender of their travel documents.<sup>37</sup> These powers engage and limit the right to liberty and freedom of movement. The right to liberty prohibits the arbitrary and unlawful deprivation of liberty.<sup>38</sup> Any detention must not only be lawful, it must also be reasonable, necessary and proportionate in all of the circumstances. The right to

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29 Statement of compatibility, pp. 19–29.

30 Statement of compatibility, p. 27.

31 Explanatory memorandum, p. 173.

32 Standing Order 24(1)(a)(i) provides that the [Senate Standing Committee for the Scrutiny of Bills](#) to the Senate shall report on whether bills trespass unduly on personal rights and liberties.

33 It is noted that these two bills have been referred to the Joint Select Committee on National Anti-Corruption Commission Legislation for inquiry and report by 10 November 2022, and public hearings relating to this inquiry will be held from 18-21 October 2022.

34 Clause 85.

35 Clause 63.

36 Clause 90.

37 Clause 88

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

liberty applies to all forms of deprivation of liberty. The right to freedom of movement includes the right to move freely within a country for those who are lawfully within the country, the right to leave any country and the right to enter one's own country.<sup>39</sup>

1.11 The statement of compatibility recognises that these provisions engage and limit these rights.<sup>40</sup> With respect to the powers to detain or arrest, it states that these powers are to enable the Commission's overarching objective of detecting and investigating corruption and are critical aspects of the Commissioner's ability to effectively hold hearings and public inquiries.<sup>41</sup> This is likely to constitute a legitimate objective, and the powers appear to be rationally connected to it. With respect to proportionality, the statement of compatibility details in particular the judicial oversight of these powers,<sup>42</sup> which would operate as an important safeguard. With respect to the power to require the surrender of a travel document, the statement of compatibility notes that this power would ensure a person's attendance at a hearing and ensure they do not leave Australia (which is likely a legitimate objective). This requires an order of a superior court, which would serve as an important safeguard.<sup>43</sup>

#### *Right to freedom of expression and rights of persons with disability*

1.12 The bill would restrict the ability of people to disclose certain information, including where they have received a notice to produce information or a summons to a private hearing, which is subject to a non-disclosure notation.<sup>44</sup> This would have the effect that the person would be unable to disclose information about the notice or summons, or any matter about the relevant corruption investigation or Commission processes,<sup>45</sup> other than in specified circumstances.<sup>46</sup> This engages and limits the right to freedom of expression, which includes the freedom to seek, receive and impart

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39 International Covenant on Civil and Political Rights, article 12.

40 Statement of compatibility, pp. 9–15.

41 Statement of compatibility, pp. 9–10.

42 Statement of compatibility, pp. 10–11.

43 Statement of compatibility, pp. 13–14.

44 Clause 96 would provide that the Commissioner must include such a notation if they are satisfied that not including one on a notice to produce or a private hearing summons would reasonably be expected to prejudice a person's safety or reputation, a fair trial, or a Commission process or action taken as a result of a process. It would also provide the Commissioner with the discretion to include such a notation where they are satisfied that not doing so *might* prejudice those matters, or might otherwise be contrary to the public interest.

45 Clause 95.

46 Subclause 95(2) provides that a non-disclosure notation may permit disclosure of information in specified circumstances. Subclause 98(3) permits a person to disclose information about such a matter to a lawyer for the purposes of obtaining legal advice or representation.

information and ideas of all kinds.<sup>47</sup> This right may be permissibly limited for purposes including for national security and respect for the rights or reputations of others,<sup>48</sup> however any limitation must seek to achieve a legitimate objective, be rationally connected to that objective, and be proportionate.

1.13 The statement of compatibility recognises the limitation on this right. It states that permitting disclosure of information contained in a notice of summons could prejudice investigations and inquiries, or cause harm to a person's reputation or privacy.<sup>49</sup> It also states that further restrictions on the ability to refer and disclose certain information (and confidentiality requirements for Commission staff and associated persons) reflect that the Commission may obtain sensitive information that could prejudice Australia's national security and relationship with foreign governments, making it necessary for the Commission to be empowered to prohibit the disclosure of certain secret or sensitive information in its remit.<sup>50</sup> Protecting privacy and reputation as well as national security constitute legitimate objectives, and restricting disclosure of sensitive related information would appear capable of achieving these objectives. With respect to proportionality, the statement of compatibility notes that only sufficiently sensitive information may be restricted from being recorded, referred or disclosed.<sup>51</sup> In this regard, Division 4 of Part 7 of the bill restricts the circumstances in which a non-disclosure notation either may or must be included in a notice to produce or private hearing summons, and requires consideration of cancelling such a notation five years after service of the relevant document if it has not already been cancelled.<sup>52</sup> These measures would appear to constrain the powers limiting the right to freedom of expression. No information is provided, however, to explain why the Commissioner would be required to consider cancelling a non-disclosure notation only after a period of five years (and not some shorter period of time, such as two years).

1.14 It is noted that there may be circumstances in which a person who has received a summons or notice may have particular vulnerabilities, such as a mental or physical impairment that may mean they require additional assistance in order for them to understand the notice and to fairly engage in the Commission's process. Subjecting such witnesses to a non-disclosure notation would mean they would not be permitted to disclose the existence of such a notice or summons for the purposes of obtaining that assistance, for example, to a social worker, an intermediary, or other

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47 International Covenant on Civil and Political Rights, article 19(2).

48 International Covenant on Civil and Political Rights, article 19(3).

49 Statement of compatibility, p. 42.

50 Statement of compatibility, pp. 41–42.

51 Statement of compatibility, p. 43.

52 See, clause 97.

professional.<sup>53</sup> This would appear to leave open a risk that in such a scenario, a person with disability may be at risk of discrimination. While this may be addressed by the Commissioner in using their discretion not to impose a notation in such instances, there is nothing on the face of the bill or in the explanatory materials that addresses this issue.

### *Right to an effective remedy*

1.15 Lastly, the bill provides for immunity from civil liability for acts done by Commission staff (including the Commissioner) and the Inspector of the Commission in the performance of their functions or duties.<sup>54</sup> This engages the right to an effective remedy, which requires the availability of a remedy which is effective with respect to any violation of rights and freedoms recognised by the International Covenant on Civil and Political Rights.<sup>55</sup> The statement of compatibility does not identify the engagement of this right in this respect, and so no analysis of the compatibility of these provisions is provided. However, noting that these provisions do not appear to preclude a civil suit against the Commonwealth itself, it would appear that an effective remedy may be available for a violation of a person's rights and freedoms.

### **Committee view**

1.16 The committee notes that the proposed National Anti-Corruption Commissioner's investigative and reporting powers engage and limit multiple rights, including the rights to privacy, fair trial, freedom of expression, liberty and freedom of movement. These rights may be subject to permissible limitations if they are shown to be reasonable, necessary and proportionate

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53 Persons with disabilities have a right to be free from all forms of exploitation (Convention on the Rights of Persons with Disabilities, article 16). This refers to taking advantage of another person, and in the context of criminal investigations necessitates consideration of the power imbalance between the relevant agency and people with disability who are brought into contact with them. Persons with disabilities must be provided with necessary modifications and adjustments in order to obtain effective access to justice during their participation in the criminal justice system. The absence of such supports may give rise to a risk of discrimination against a person based on their disability. See, for example, Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *The Criminal Justice System: Issues Paper* (January 2020), p. 5.

54 Clauses 196 and 269. 'Staff member of the NACC' is defined in clause 266.

55 International Covenant on Civil and Political Rights, article 2(3). See, *Kazantzis v Cyprus*, UN Human Rights Committee Communication No. 972/01 (2003) and *Faure v Australia*, UN Human Rights Committee Communication No. 1036/01 (2005). States parties must not only provide remedies for violations of the ICCPR but must also provide forums in which a person can pursue arguable if unsuccessful claims of violations of the ICCPR. Per *C v Australia* UN Human Rights Committee Communication No. 900/99 (2002), remedies sufficient for the purposes of article 5(2)(b) of the ICCPR must have a binding obligatory effect.



1.17 The committee notes that it will ordinarily write to proponents of legislation seeking a response to any questions it has about the compatibility of proposed legislation with human rights. However, in this instance, the committee notes that these two bills have been referred to the Joint Select Committee on National Anti-Corruption Commission Legislation for inquiry and report by 10 November 2022, and that public hearings relating to this inquiry will be held from 18-21 October 2022. For this reason, it is not possible for the committee in the timeframe available to seek a response from the Attorney-General in relation to the matters it has raised, and instead offers recommendations to improve the human rights compatibility of specified provisions, in order that these recommendations will be available to the Attorney-General and the Parliament for timely consideration. Absent this tight timeframe the committee would otherwise have written to the Attorney-General to seek further information.

1.18 The committee notes that the bill is accompanied by a lengthy and detailed statement of compatibility with human rights that identifies that the bill engages and limits human rights. The committee notes that (aside from the issue raised in relation to the right to an effective remedy) the statement sets out in helpful detail how each of the above rights are engaged, and where the bill limits a right, the statement explains the objective being sought, how the measure will be effective to achieve that objective, and how such a limitation may be seen to be proportionate to that objective. The committee thanks the Attorney-General for this comprehensive and well-reasoned statement of compatibility, which has greatly assisted the committee in undertaking its scrutiny role. The committee considers that, in general (excepting those issues specifically discussed), the limitations on human rights in the bill have been adequately explained in the statement of compatibility. However, the committee below makes some further comments and recommends some amendments to the bill and statement of compatibility to strengthen human rights.

1.19 The committee notes that investigating people in relation to potential corrupt conduct—including conducting searches, compelling people to give evidence, disclosing evidence, and reporting on the investigation—engages and limits the right to privacy and reputation. The committee notes that this right may be permissibly limited, and that such a limitation must be a proportionate means by which to achieve a legitimate objective. In this regard, the committee considers that facilitating the detection and investigation of serious or systemic corrupt conduct, the making of findings and recommendations in relation to this, and the ability to prosecute or take other action in response to such conduct are important and legitimate objectives, which may be achieved through the inclusion of coercive powers enabling the Commission to investigate such matters. The committee considers that with respect to proportionality, the statement of compatibility helpfully sets out numerous safeguards in relation to the Commission's investigative and reporting powers (as

provided in the main bill),<sup>56</sup> which appear to make the limitations on the right to privacy likely to be proportionate. The committee considers that of particular safeguard value are: the requirement that hearings be held in private (by default) and would only be permitted to be public in exceptional circumstances; that certain sensitive information must be heard in private (including information that would unreasonably disclose a person's personal affairs); and that the Commissioner is empowered to include a non-disclosure notation on a notice to produce or a summons. The committee considers that these would appear to operate as important safeguards with respect to the right to privacy and reputation of persons required to engage with the Commission's processes (including those subject to investigation), and would appear to assist in making these limits on privacy in the bill proportionate.

1.20 With respect to the right to a fair trial, the committee notes the lack of derivative use immunity in the bill. However, the committee notes the explanation for this in the explanatory materials, and that this is a matter which may be further raised by the Senate Standing Committee for the Scrutiny of Bills. The committee also notes that the bill does not appear to contemplate circumstances in which a person who has received a summons or notice that is subject to a non-disclosure notation, and who is a person with disability that may necessitate additional assistance in order for them to understand the notice and to fairly engage in the Commission's process, would be permitted to disclose such a notice or summons for the purposes of obtaining that assistance (for example, to a social worker, an intermediary, or other professional). The committee considers that amending the bill to establish appropriate safeguards in this respect would be prudent, in order to ensure that the proposed framework enables persons with disability to fairly engage with the Commission's processes.

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56 In relation to the powers conferred on the Commission to use existing covert surveillance powers, these are sought to be applied by the Consequential bill. For further detail, see paragraphs [1.53] to [1.69] below.

### Suggested action

1.21 The committee considers that the compatibility of the measure may be assisted were the bill amended to require that if the Commissioner is considering making a non-disclosure notation on a notice to produce or summons and the Commissioner is aware that a person has a disability or other vulnerability that may impact their ability to comply with a non-disclosure notation, they must consider making exceptions to allow the person to obtain any necessary assistance in order that they may engage fairly with the Commission's processes.

1.22 The committee recommends that the statement of compatibility with human rights be updated to:

- (a) set out the compatibility of provisions providing for immunity from civil proceedings (clauses 196 and 269) with the right to an effective remedy; and
- (b) explain why clause 97 would only require the Commissioner to consider cancelling a non-disclosure notation after a period of five years has passed (and not some shorter period of time).

1.23 The committee draws these comments to the attention of the Attorney-General and the Parliament.

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### Contempt of Commission for using insulting language or creating a disturbance

1.24 The bill would provide that a person is in contempt of the Commission where they engage in certain conduct, including if they:

- insult, disturb or use insulting language towards a Commissioner holding a hearing (paragraph 82(d));
- create a disturbance, or take part in creating or continuing a disturbance, in or near a place that the person knows is being used to hold a hearing (paragraph 82(e));
- obstruct or hinder a staff member of the Commission in the performance of their powers or duties in connection with a hearing (paragraph 82(f)); or
- disrupt a hearing (paragraph 82(g)).<sup>57</sup>

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57 Clause 82.

1.25 If the Commissioner considers a person to be in contempt of the Commission they may apply to a superior court for the person to be dealt with for contempt.<sup>58</sup> The explanatory memorandum states that the court could find that the person was in contempt of the Commission, and deal with them as if their conduct had constituted contempt of that court.<sup>59</sup> The Commissioner may direct that the person be detained so as to be brought before a court to hear that application.<sup>60</sup> Disruption of a hearing would also be an offence punishable by imprisonment for two years.<sup>61</sup>

## **International human rights legal advice**

### ***Rights to freedom of expression, freedom of assembly and liberty***

1.26 Prohibiting anyone from using insulting language or creating a disturbance or disruption of a hearing of the Commission engages and may limit the right to freedom of assembly and the right to freedom of expression. The right to freedom of assembly provides that all people have the right to peaceful assembly.<sup>62</sup> This is the right of people to gather as a group for a specific purpose. It is strongly linked to the right to freedom of expression, as it is a means for people together to express their views. Further, as set out above, providing that a person who is found to be in contempt may be detained engages and limits the right to liberty. These rights may be subject to permissible limitations that are necessary to protect the rights or reputations of others, national security, public order, or public health or morals. Limitations must be prescribed by law, pursue a legitimate objective, and be rationally connected and proportionate to that objective.

1.27 The statement of compatibility identifies that the power to detain a person for contempt of the Commission engages the right to liberty,<sup>63</sup> and states that the nature of contempt, in this context, 'is focused on conduct that would prevent, hinder or disrupt the effective conduct of a hearing'.<sup>64</sup> However, it does not identify that these provisions engage and limit the rights to freedom of expression and assembly, and so no assessment of these limitations is provided. The explanatory memorandum states that the ability to bring contempt proceedings is important, including because contempt provisions 'motivate an uncooperative witness to reconsider their position and comply with the requirements of a hearing, as the witness is immediately subject

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58 Clause 82.

59 Explanatory memorandum, p. 150.

60 Clause 85.

61 Clause 72.

62 International Covenant on Civil and Political Rights, article 21.

63 Statement of compatibility, pp. 11–12.

64 Statement of compatibility, p. 12.

to the possibility of being taken into custody before a superior court'.<sup>65</sup> It states that the conduct which would constitute contempt 'would significantly impede' the Commissioner's ability to conduct investigations and frustrate the objects of the bill.<sup>66</sup>

1.28 While ensuring that the Commissioner can effectively perform their functions may constitute a legitimate objective, it is not clear whether the terms 'insults, disturbs or uses insulting language' towards the Commissioner are drawn so broadly that they may limit legitimate criticism of, or objection to, the Commission and its activities. Further, it is unclear whether and how a person who 'insults, disturbs or uses insulting language' would prevent the Commissioner from undertaking their functions.

1.29 It would also be a contempt for a person (even someone unconnected to a hearing before the Commission) to knowingly create a disturbance in or near a place where a hearing is being held. This provision is also drafted broadly, meaning that it could capture legitimate protests around buildings within which a hearing was being held, including those which do not prevent the Commissioner from carrying out their functions, and those which are unrelated to the operation of the Commission.

1.30 It is also not clear that paragraphs 82(d) and (e), in prohibiting the use of insulting language or behaviour that could disturb a proceeding, are necessary in light of proposed paragraphs 82(f) and (g) of the bill. These paragraphs provide that it is a contempt to obstruct or hinder a Commission staff member (including the Commissioner) in the performance or exercise of their functions, powers or duties in connection with a hearing or to disrupt a hearing. It is therefore not clear why these provisions alone are not sufficient to address conduct that may disrupt the Commission and the conduct of hearings. As drafted, clause 82 does not appear to be the least rights restrictive way to achieve the stated objectives, and therefore risks disproportionately limiting the rights to freedom of expression and assembly.

### **Committee view**

1.31 The committee notes that prohibiting anyone from using insulting language or creating a disturbance or disruption of a hearing of the Commission engages and may limit the right to freedom of expression and the right to freedom of assembly.

1.32 The committee notes that the statement of compatibility does not identify the engagement of these rights by these provisions. In this regard, though the committee recognises the importance of ensuring that the Commission can undertake its functions, the committee notes that it has historically raised repeated concerns regarding the compatibility of similar contempt provisions relating to Royal

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65 Explanatory memorandum, p. 148.

66 Explanatory memorandum, p. 149.

Commissions (and other bodies invested with the powers of Royal Commissions),<sup>67</sup> and has recommended their amendment.<sup>68</sup>

1.33 The committee considers that paragraphs 82(d) and (e), in classifying the use of insulting language or creating a disturbance near a Commission hearing, is overly broad. The committee considers the objective of ensuring the Commission's important work is not disrupted could be achieved by other provisions already in the bill that provide that it is a contempt to obstruct or hinder a Commission staff member (including the Commissioner) in the performance or exercise of their functions, powers or duties in connection with a hearing or to disrupt a hearing. The committee considers that, as drafted, clause 82 is not the least rights restrictive way to achieve the stated objectives, and therefore risks disproportionately limiting the rights to freedom of expression and assembly.

#### Suggested action

1.34 The committee considers that the compatibility of the measure with the rights to freedom of expression and peaceful assembly may be assisted were clause 82 of the bill amended to remove paragraphs (d) and (e) (which make it a contempt to use insulting language or creating a disturbance near a Commission hearing).

1.35 The committee recommends that the statement of compatibility with human rights be updated to set out the compatibility of clause 82 with the rights to freedom of expression and assembly.

1.36 The committee draws these comments to the attention of the Attorney-General and the Parliament.

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67 See Parliamentary Joint Committee on Human Rights, Royal Commissions Amendment Regulation 2016 (No. 1) [F2016L00113], [Thirty-Eighth Report of the 44th Parliament](#) (3 May 2016) pp. 21-26; Prime Minister and Cabinet Legislation Amendment (2017 Measures No. 1) Bill 2017, [Report 6 of 2017](#) (20 June 2017) pp. 35-49; Banking and Financial Services Commission of Inquiry Bill 2017, [Report 4 of 2017](#) (9 May 2017) pp. 42-45; Commission of Inquiry (Coal Seam Gas) Bill 2017, [Report 11 of 2017](#) (17 October 2017) pp. 51-52; Murray-Darling Basin Commission of Inquiry Bill 2019, [Report 2 of 2019](#) (12 February 2019) pp. 131-135; National Integrity Commission Bill 2018, National Integrity Commission Bill 2018 (No. 2) and National Integrity (Parliamentary Standards) Bill 2018, [Report 2 of 2019](#) (12 February 2019), pp. 136-145; National Integrity Commission Bill 2018 (No. 2) and National Integrity Commission Bill 2019, [Report 6 of 2019](#) (5 December 2019), pp. 99-116.

68 Parliamentary Joint Committee on Human Rights, National Integrity Commission Bill 2018 (No. 2), [Report 6 of 2019](#) (5 December 2019), pp. 99-116.

## Accessing information provided to journalists

1.37 The bill establishes that if a person has given information (directly or indirectly) to a journalist, and the journalist reasonably believes that the person providing the information did not want their identity to be disclosed, neither the journalist nor their employer is required to do anything under the bill that would disclose the person's identity or enable it to be ascertained.<sup>69</sup> However, this would not prevent an authorised officer from searching premises, persons, or conveyances (such as cars), using modified search powers under Part IAA of the *Crimes Act 1914*.<sup>70</sup> If the evidentiary material being sought related to an alleged offence against a secrecy provision by a person other than the journalist, when issuing a search warrant the issuing officer would be required to weigh the public interest in issuing the warrant against the public interest in protecting the confidentiality of the identity of the journalist's source, and in facilitating the exchange of information between journalists and the public so as to facilitate reporting of matters in the public interest.<sup>71</sup>

1.38 A document, copy or thing seized or made (including seized electronic equipment) could then be made available to another constable or Commonwealth officer (including one conducting a Commission process), and for other purposes including preventing, investigating or prosecuting an offence.<sup>72</sup>

## International human rights legal advice

### *Freedom of expression*

1.39 These provisions would provide that, although a journalist or their employer may not be required to provide information that would identify their source themselves, a search warrant may be issued, and neither the journalist nor their employer could lawfully refuse the seizure of material under the warrant on the basis that it could disclose an informant's identity.<sup>73</sup>

1.40 These provisions may therefore limit the right to freedom of expression insofar as they may discourage persons from disclosing information about suspected corruption to journalists in the public interest. The right to freedom of expression

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69 Clause 31.

70 Subclause 31(4). See also clauses 119 and 124. Noting, however, that subclause 117(2) would not permit the exercise of a search warrant in relation to premises occurred by the Australian Broadcasting Corporation (ABC) or Special Broadcasting Service Corporation (SBS).

71 Clause 124(2A)–(2B).

72 *Crimes Act 1914*, section 3ZQU. Note, item 40 of the National Anti-Corruption Commission (Consequential and Transitional Provisions) Bill 2022 would amend section 3ZQU (purposes for which things and documents may be used and shared) to authorise use of such materials by the Commission.

73 See, explanatory memorandum, pp. 102–103.

extends to the communication of information or ideas through any medium, including written and oral communications, the media, public protest, broadcasting, artistic works and commercial advertising.<sup>74</sup> The United Nations (UN) Human Rights Committee has commented that a free, uncensored and unhindered press is essential to ensure freedom of opinion and expression, and the enjoyment of other civil and political rights.<sup>75</sup> The right may be subject to limitations that are necessary to protect the rights or reputations of others, national security, public order, or public health or morals. Additionally, such limitations must be prescribed by law, be rationally connected to the objective of the measures and be proportionate.<sup>76</sup>

1.41 The statement of compatibility does not identify that these provisions engage and limit this right, and so no assessment of their compatibility is provided.

1.42 The explanatory memorandum states that these provisions are appropriate because the power to issue a search warrant involving a journalist is modified by clause 124, which requires consideration of the public interest in protecting journalists' sources and the free exchange of information between journalists and members of the public, thereby balancing 'the importance of ensuring the [Commission] can conduct corruption investigations and public inquiries with the importance of preserving freedom of expression by maintaining the confidentiality of journalists' sources'.<sup>77</sup> However, the explanatory memorandum then later qualifies this, stating:

The purpose for this additional threshold, being the protection of public interests associated with source confidentiality and the freedom of the press, is reflected in the stipulation that this additional threshold only applies where the evidential material relates to an alleged offence against a secrecy provision by a person other than a journalist. This stipulation would ensure that the additional threshold:

- would apply where an authorised officer is seeking a search warrant in relation to a journalist as part of a corruption investigation relating to the alleged unauthorised disclosure of information by a public official—which would be the kind of investigation that could directly engage with source confidentiality and the freedom of the press; but
- would not apply where the authorised officer is seeking a search warrant in relation to a journalist as part of a corruption investigation relating to other corruption issues—for example, an attempt by a person who happens to work as a journalist who is alleged to have used their contacts with public

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74 International Covenant on Civil and Political Rights, article 19(2).

75 UN Human Rights Committee, *General Comment No. 34, Article 19: Freedoms of opinion and expression* (2011) [13].

76 UN Human Rights Committee, *General Comment No.34: Article 19: Freedoms of Opinion and Expression* (2011) [21]-[36].

77 Explanatory memorandum, p. 102.



officials and business figures to engage in a conspiracy to defraud the Commonwealth.<sup>78</sup>

1.43 However, the example provided would not appear to encapsulate all the circumstances in which information may have been provided confidentially (or anonymously) to a journalist—an act which may not itself be alleged to have contravened a secrecy provision—but in relation to which the informant may nevertheless wish to remain anonymous. A 'secrecy provision' refers, among other things, to a provision of a law of the Commonwealth that prohibits the use or disclosure of information or a document or thing.<sup>79</sup> As such, it would not encapsulate the covert provision of information (not subject to such a legal secrecy requirement) to a journalist by a public servant, although that conduct may breach the Australian Public Service Code of Conduct and so expose the person to certain sanctions.<sup>80</sup> It would appear, therefore, that information or things seized in the course of a search warrant, which could then be provided to the Commission for the purposes of conducting a corruption investigation, could result in the person who provided information confidentially to the journalist being (for example) summoned to give evidence, or required to provide further information to the Commission. In such instances, no weighing of the public interest in protecting the journalist's sources and facilitating the exchange of information in this manner would be required. By contrast, under the *Telecommunications (Interception and Access) Act 1979*, the Attorney-General must not issue a journalist information warrant unless they are satisfied that the public interest in issuing the warrant outweighs the public interest in protecting the confidentiality of the identity of the source in connection with whom authorisations would be made under the authority of the warrant.<sup>81</sup>

1.44 This raises questions as to whether the provisions relating to protections for journalists' informants, as currently drafted, may potentially act as a disincentive to persons from disclosing matters to journalists in the public interest, resulting in a possible 'chilling effect' on freedom of expression. In this regard, international human rights law has recognised the importance of anonymous expression, particularly in the context of public debate concerning political and public institutions.<sup>82</sup> The UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression has, in a number of reports, highlighted the value of anonymous expression

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78 Explanatory memorandum, p. 186.

79 Clause 7.

80 See, *Public Service Act 1999*.

81 *Telecommunications (Interception and Access) Act 1979*, section 180L.

82 See, eg, UN Human Rights Committee, *General comment No. 34: Article 19: Freedoms of opinion and expression* [38]; *Standard Verlagsgesellschaft MBH v Austria (No. 3)*, European Court of Human Rights, Application No. 39378/15 (2021); *Delfi AS v Estonia*, European Court of Human Rights (Grand Chamber), Application No. 64569/09 (2015).

in protecting the rights to freedom of expression and privacy.<sup>83</sup> In a 2015 report, the Special Rapporteur stated:

Anonymity has been recognized for the important role it plays in safeguarding and advancing privacy, free expression, political accountability, public participation and debate...Encryption and anonymity, and the security concepts behind them, provide the privacy and security necessary for the exercise of the right to freedom of opinion and expression in the digital age. Such security may be essential for the exercise of other rights, including economic rights, privacy, due process, freedom of peaceful assembly and association, and the right to life and bodily integrity.<sup>84</sup>

1.45 Noting the significant ways anonymity facilitates opinion and expression online, the Special Rapporteur has stated that 'States should protect it and generally not restrict the technologies that provide it'.<sup>85</sup> In another report, the Special Rapporteur noted that:

restrictions on anonymity have a chilling effect, dissuading the free expression of information and ideas. They can also result in individuals' de facto exclusion from vital social spheres, undermining their rights to expression and information, and exacerbating social inequalities.<sup>86</sup>

1.46 Consequently, there is a risk that providing that a search warrant may be issued in respect of a journalist, in circumstances that do not require an issuing officer to consider the public interest in protecting the journalist's sources and facilitating the exchange of information, may impermissibly limit the right to freedom of expression. The invocation of other covert investigation powers pursuant to the National Anti-Corruption Commission (Consequential and Transitional Provisions) Bill 2022 are considered separately below.

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83 See, eg, UN Human Rights Council, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, David Kaye*, A/HRC/29/32 (2015) [12]–[17], [47]–[60]; A/HRC/32/38 (2016) [62], [85]; A/HRC/35/22 (2017) [21], [78]; UN Human Rights Council, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue*, A/HRC/23/40 (2013) [47]–[49].

84 UN Human Rights Council, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, David Kaye*, A/HRC/29/32 (2015) [47], [56].

85 UN Human Rights Council, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, David Kaye*, A/HRC/29/32 (2015) [47].

86 UN Human Rights Council, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue*, A/HRC/23/40 (2013) [49].

## Committee view

1.47 The committee notes that, although a journalist or their employer may not be required to provide information that would identify their source themselves, a search warrant may be issued, and neither the journalist nor their employer could lawfully refuse the seizure of material under the warrant on the basis that it could disclose an informant's identity. The committee notes that this may limit the right to freedom of expression.

1.48 The committee notes that the statement of compatibility does not identify that these provisions engage and may limit the right to freedom of expression, and so no assessment of their compatibility with the right is available. The committee notes that the explanatory memorandum explains the rationale behind the limited public interest threshold set out in subclause 124(2A). However, the committee considers that the brief example provided does not adequately address the full range of circumstances in which a source may wish to remain confidential (even though they may not have breached a secrecy provision by providing information to the journalist).

1.49 The committee considers that protecting the confidentiality of journalists' sources is a generally important objective, and one which must be weighed against the bill's overarching objective of addressing serious and systemic corruption. In this regard, the committee considers that, when a search warrant is being sought in relation to a journalist, a requirement to always consider the public interest in protecting the confidentiality of the identity of a journalist's source, and in facilitating the exchange of information between journalists and members of the public so as to facilitate reporting of matters in the public interest, would better protect the right to freedom of expression.

### Suggested action

1.50 The committee considers that the compatibility of the measure with the right to freedom of expression may be assisted were the bill amended to remove paragraph 124(2A)(b), with the effect that where an issuing officer is considering whether to issue a search warrant to search a journalist or their employer or premises, they must always be required to have regard to the public interest, as set out in subclause 124(2B).

1.51 The committee recommends that the statement of compatibility with human rights be updated to set out the compatibility of these provisions with the right to freedom of expression.

1.52 The committee draws these concerns to the attention of the Attorney-General and the Parliament.

## Conferral of covert investigative powers on the Commission

1.53 The National Anti-Corruption Commission (Consequential and Transitional Provisions) Bill 2022 (the Consequential bill) seeks to repeal legislation<sup>87</sup> establishing the Australian Commission for Law Enforcement Integrity, and to transition its functions to the Commission and thereby grant existing covert investigative powers to the Commission (with some amendments and exceptions).

1.54 As such, the Consequential bill seeks to confer on the Commission (among other powers):

- surveillance devices and computer access powers under the *Surveillance Devices Act 2004*;<sup>88</sup>
- access to telecommunications interceptions, stored communications (for example emails, SMS or voice messages stored on equipment), telecommunications data (metadata) and international production orders under the *Telecommunications (Interception and Access) Act 1979* (TIA Act);<sup>89</sup>
- access to the industry assistance framework under Part 15 of the *Telecommunications Act 1997* to obtain reasonable assistance from communications providers to access encrypted information stored on devices to support the Commission's powers;<sup>90</sup>
- the power to authorise and conduct controlled operations under Division 4 Part IAB of the *Crimes Act 1914*;<sup>91</sup>
- the power under Part IABA of the *Crimes Act 1914* to conduct operations designed to test the integrity of staff members of the Australian Criminal Intelligence Commission, the Australian Federal Police and the Department of Home Affairs, using controlled or simulated situations;<sup>92</sup>
- the power to seek information about accounts held by a person of interest to a corruption investigation and to search for and seize tainted property (such as proceeds of an offence) and evidential material (such as benefits derived from commission of an offence), and apply for freezing orders under the *Proceeds of Crime Act 2002*;<sup>93</sup> and

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87 *Law Enforcement Integrity Commissioner Act 2006*.

88 See Schedule 1, Part 1, items 188-204.

89 See Schedule 1, Part 1, items 206-260.

90 See Schedule 1, Part 1, item 263-270.

91 See Schedule 1, Part 1, items 35-39, 42-46, 48-54 and 56-62.

92 See Schedule 1, Part 1, items 63-88.

93 See Schedule 1, Part 1, items 158-162.

- reciprocal information sharing powers between the Commissioner and relevant agencies.<sup>94</sup>

## International human rights legal advice

### *Multiple rights*

1.55 In seeking to grant the Commission a number of existing covert investigative powers, the Consequential bill engages and limits a number of human rights, most particularly the right to privacy, the right to freedom of expression and the right to an effective remedy.

1.56 Many of these existing powers were enacted prior to the enactment of the *Human Rights (Parliamentary Scrutiny) Act 2011* and the establishment of this committee, and the requirement for legislation to be accompanied by a statement of compatibility. As such, many of these covert investigatory powers, such as intercepting communications and the use of surveillance devices, have not been subject to a foundational human rights assessment. For example, the committee has, on a number of previous occasions, recommended that the TIA Act would benefit from a foundational review of its human rights compatibility.<sup>95</sup>

1.57 While the statement of compatibility acknowledges how the application of these powers to the Commission engages human rights, without a foundational assessment of legislation such as the TIA Act and the *Surveillance Devices Act 2004*, and the sufficiency of the safeguards provided therein, it is difficult to assess the full human rights implications of the Consequential bill in conferring these powers.

1.58 Some of the powers to be conferred have previously been considered by the committee and the committee has previously raised concerns that such powers may not constitute a proportionate limit on human rights.

1.59 For example, the committee has considered the computer access scheme under the *Surveillance Devices Act 2004*, which allows officers (under a warrant) to search a computer remotely or physically and access content on that computer. The committee previously held that there is a risk that the computer access warrant scheme may be incompatible with the right to privacy, due to the extent of the impact on privacy, though much would depend on how the computer access warrant scheme operates in practice. It recommended that the scheme be monitored to ensure that

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94 See for example, information sharing powers in Schedule 1, Part 1 between the Commissioner (and other staff members of the Commission) and other bodies under the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (items 4-10), *Australian Federal Police Act 1979* (items 20 to 33), *Inspector-General of Intelligence and Security Act 1986* (items 117 to 121), *Data Availability and Transparency Act 2021* (items 108 to 111), and *Taxation Administration Act 1953* (items 201-204).

95 See for example, Parliamentary Joint Committee on Human Rights, *Telecommunications (Interception and Access) Regulations 2017*, [Report 3 of 2018](#) (27 March 2018) pp. 129–137.

any limitation on the right to privacy is only as extensive as is strictly necessary. Further, it stated that emergency authorisations to obtain access to data held on a computer are likely to be incompatible with the right to privacy. The committee also previously held that powers relating to the concealment of the use of these computer access powers were likely to be incompatible with the right to privacy.<sup>96</sup>

1.60 The committee has also previously considered the provisions requiring the retention of, and giving access to, telecommunications data (metadata).<sup>97</sup> It previously held that the types of data to be retained for the purposes of the scheme may be so broad as to risk leading to an arbitrary (and therefore impermissible) interference with the right to privacy.<sup>98</sup> It also raised concerns regarding the breadth of circumstances in which information intercepted under the scheme could be disclosed, the potential uses of such data, and the blanket two-year data retention period. The committee also considered that the mandatory retention of some data may limit the right to freedom of expression, insofar as the scheme may have an inhibiting or 'chilling' effect on people's freedom and willingness to communicate via telecommunication services.<sup>99</sup> It made a series of recommendations to amend the TIA Act in order to avoid any arbitrary interference with the right to privacy occasioned by this scheme.<sup>100</sup>

1.61 The committee has also previously considered the industry assistance framework under Part 15 of the *Telecommunications Act 1997*. This framework would allow the Commission to obtain reasonable assistance from communications providers to access encrypted information stored on devices to support the Commission's powers. When this power was introduced in 2018, the committee considered this framework was unlikely to constitute a proportionate limitation on the rights to

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96 Parliamentary Joint Committee on Human Rights, Telecommunications and Other Legislation Amendment (Assistance and Access) Bill 2018, [Report 13 of 2018](#) (4 December 2018) pp. 71-81 and 89-92.

97 Parliamentary Joint Committee on Human Rights, Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014, [15<sup>th</sup> Report of the 44<sup>th</sup> Parliament](#) (14 November 2014) pp. 10–22 and [20<sup>th</sup> Report of the 44<sup>th</sup> Parliament](#) (18 March 2015) p. 47–48.

98 Parliamentary Joint Committee on Human Rights, Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014, [20<sup>th</sup> Report of the 44<sup>th</sup> Parliament](#) (18 March 2015) p. 47–48.

99 Parliamentary Joint Committee on Human Rights, Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014, [20<sup>th</sup> Report of the 44<sup>th</sup> Parliament](#) (18 March 2015) pp. 53-60 and p. 72.

100 Parliamentary Joint Committee on Human Rights, Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014, [15<sup>th</sup> Report of the 44<sup>th</sup> Parliament](#) (14 November 2014) pp. 10–22 and [20<sup>th</sup> Report of the 44<sup>th</sup> Parliament](#) (18 March 2015) pp. 39-74.

privacy and freedom of expression, and was unable to conclude that the measure was compatible with the right to an effective remedy.<sup>101</sup>

1.62 The committee has also previously considered the international production order framework, which permits Australian agencies to access overseas communications data (and to allow foreign governments to access private communications data) under the TIA Act. When these powers were introduced in 2020, the committee considered that this framework may not be sufficiently circumscribed or contain sufficient safeguards to ensure that the measures do not arbitrarily limit the right to privacy, and recommended several amendments.<sup>102</sup>

1.63 In addition, the committee has previously considered the power to seek information relating to suspected proceeds of crime under the *Proceeds of Crime Act 2002*.<sup>103</sup> The committee has concluded that it is not clear that the safeguards contained in the Act, many of which are discretionary, would be sufficient in all circumstances to ensure that any limitation on the rights to a fair trial and privacy is proportionate.<sup>104</sup>

1.64 Finally, the committee has previously examined legislation that sought to invest the NSW Law Enforcement Conduct Commission with the powers of an interception agency under the TIA Act, thereby permitting it to apply for warrants to access stored communications content and self-authorising access to metadata.<sup>105</sup> In this instance, the committee was unable to conclude that extending access to those coercive powers to a further body constituted a justifiable limit on the right to privacy, including having regard to the absence of a foundational human rights assessment for this Act.<sup>106</sup>

1.65 Noting that significant privacy concerns have been raised by this committee regarding certain aspects of the covert surveillance powers sought to be conferred on

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101 Parliamentary Joint Committee on Human Rights, Telecommunications and Other Legislation Amendment (Assistance and Access) Bill 2018, [Report 13 of 2018](#) (4 December 2018) pp. 51-71.

102 Parliamentary Joint Committee on Human Rights, Telecommunications Legislation Amendment (International Production Orders) Bill 2020, [Report 7 of 2020](#) (17 June 2020) pp. 87-129.

103 See Schedule 1, Part 1, items 158-162.

104 See most recently, Parliamentary Joint Committee on Human Rights, Crimes Legislation Amendment (Economic Disruption) Regulations 2021 [F2021L00541], [Report 10 of 2021](#) (25 August 2021) pp. 91-102.

105 Parliamentary Joint Committee on Human Rights, Law Enforcement Legislation Amendment (State Bodies and Other Measures) Bill 2016, [Report 1 of 2017](#) (16 February 2017) pp. 35-44.

106 Parliamentary Joint Committee on Human Rights, [Report 1 of 2017](#) (16 February 2017) p. 36.

the Commission, there is a risk that the Consequential bill, in conferring such powers, would not be compatible with a number of human rights, particularly the right to privacy. Further, as no foundational human rights assessment has been made of other significant powers sought to be conferred, particularly the interception and surveillance powers, it is not possible to conclude that the conferral of these powers on the Commission would be compatible with human rights.

### Committee view

1.66 The committee notes that granting existing covert investigative powers to the Commission (with some amendments and exceptions), engages and limits multiple human rights, most particularly the right to privacy. The committee notes that the statement of compatibility accompanying this bill acknowledges how the application of these powers to the Commission engages human rights. However, the committee notes that many of the powers stemming from this suite of legislation were enacted prior to the establishment of the committee, and so have not been reviewed by the committee for compliance with Australia's human rights obligations. Of those powers that have been reviewed by the committee, the committee notes it has previously raised concerns as to the compatibility of a number of these powers with human rights, particularly the right to privacy. As such, the committee considers conferring such powers on the Commission raises similar privacy concerns to those previously raised.

1.67 Further, the committee considers that without a foundational assessment of legislation such as the TIA Act, the *Surveillance Devices Act 2004* and the *Proceeds of Crime Act 2002*, and the sufficiency of the safeguards provided therein, it is difficult to assess the full human rights implications of the Consequential bill in conferring those powers. In this regard, the committee notes that a recent review of Australia's surveillance powers noted that a foundational principle for the legislative framework for Australia's six intelligence agencies is that these agencies must operate in a manner that respects human rights and fundamental freedoms.<sup>107</sup> The committee considers that the completion of a foundational assessment of the human rights compatibility of these complex pieces of legislation would appropriately reflect the importance of this principle.

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107 Mr Dennis Richardson AC, *Comprehensive Review of the Legal Framework of the National Intelligence Community* (2020), volume 1, p. 36.



**Suggested action**

1.68 The committee recommends that a foundational human rights assessment of existing covert surveillance powers be undertaken, in particular of the powers in the *Telecommunications (Interception and Access) Act 1979*, the *Surveillance Devices Act 2004*, the *Proceeds of Crime Act 2002* and the *Crimes Act 1914* to assess their compatibility with human rights, in particular the right to privacy.

1.69 The committee draws these concerns to the attention of the Attorney-General and the Parliament.

## Treasury Laws Amendment (More Competition, Better Prices) Bill 2022<sup>1</sup>

<b>Purpose</b>	<p>This bill seeks to increase penalties for breaches of competition and consumer laws and to provide greater protections for small business from unfair contract terms</p> <p>Schedule 1 of the bill seeks to increase the maximum penalty applicable to certain breaches of competition and consumer law</p> <p>Schedule 2 of the bill seeks to clarify existing unfair contract terms provisions, reduce the prevalence of unfair contract terms in consumer and small business standard form contracts, and introduce a civil penalty regime prohibiting the use of and reliance on unfair contract terms in standard form contracts</p>
<b>Portfolio</b>	Treasury
<b>Introduced</b>	House of Representatives, 28 September 2022
<b>Right</b>	Right to a fair hearing

### Increasing civil penalties

1.70 This bill seeks to increase the maximum financial penalties for contravention of various civil penalty provisions under the *Competition and Consumer Act 2010* (the Act) to \$2.5 million for individuals.<sup>2</sup> In most cases, this is a 400 per cent increase in the penalty amount (from \$500,000 to \$2,500,000).

### International human rights legal advice

#### *Right to a fair hearing*

1.71 The significant increase in civil penalties to \$2.5 million for individuals who are found to have contravened the Act raises the risk that these penalties may be considered criminal in nature under international human rights law. Under Australian law, civil penalty provisions are dealt with in accordance with the rules and procedures that apply in relation to civil matters (the burden of proof is on the balance of

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Treasury Laws Amendment (More Competition, Better Prices) Bill 2022, *Report 5 of 2022*; [2022] AUPJCHR 37.

2 Schedule 1, items 25, 36, 39, 42, 45, 48, 51, 54, 57, 60, 63, 66, 69, 72, 75, 78, 81, 84, 87, 90, 93, 96, 99, 102 and 103; Schedule 2, item 12. The civil penalty provisions to which these increased penalties relate are held in Parts IV, IVBA, X, XIB and XICA and Schedule 2, section 224 of the Australian Consumer Law in the *Competition and Consumer Act 2010*. See Statement of Compatibility, p. 52.

probabilities). However, if the new civil penalties are regarded as 'criminal' for the purposes of international human rights law, they will engage the criminal process rights under articles 14 and 15 of the International Covenant on Civil and Political Rights, including the right not to be tried or punished twice<sup>3</sup> and the right to be presumed innocent until proven guilty according to law,<sup>4</sup> which requires that the case against the person be demonstrated on the criminal standard of proof of beyond reasonable doubt. The statement of compatibility acknowledges that the measure engages the criminal process rights under articles 14 and 15 and states that the increased civil penalties may be viewed as 'criminal' for the purposes of human rights law.<sup>5</sup>

1.72 The test for whether a civil penalty should be characterised as 'criminal' for the purposes of international human rights law relies on three criteria:

- (a) the domestic classification of the offence as civil or criminal;
- (b) the nature of the penalty; and
- (c) the severity of the penalty.<sup>6</sup>

1.73 In relation to (a), the penalties would be classified as 'civil' not criminal penalties. However, the term 'criminal' has an autonomous meaning in international human rights law, such that a penalty or other sanction may be 'criminal' for the purposes of the International Covenant on Civil and Political Rights even though it is considered 'civil' under Australian domestic law. Consequently, the domestic classification of the penalties as 'civil', while relevant, is not determinative.

1.74 In relation to (b), a civil penalty is more likely to be considered 'criminal' in nature if it applies to the public in general rather than a specific regulatory or disciplinary context, and where there is an intention to punish or deter, irrespective of the severity of the penalty. The statement of compatibility states that the penalties do not apply to the general public, but to a sector or class of people, such as individuals who hold positions of high responsibility in corporations, who should reasonably be aware of their obligations under the Act.<sup>7</sup> However, having regard to the nature of offences to which these civil penalties apply, it appears that the provisions may apply to a broad range of people, some of whom may not necessarily be aware of their legal obligations or hold positions of high responsibility in large corporations. For example,

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3 International Covenant on Civil and Political Rights, article 14(7)

4 International Covenant on Civil and Political Rights, article 14(2).

5 Statement of compatibility, p. 53.

6 For further detail, see the Parliamentary Joint Committee on Human Rights, *Guidance Note 2: Offence provisions, civil penalties and human rights* (December 2014).

7 Statement of compatibility, p. 54.

the bill proposes new civil penalty provisions relating to unfair contract terms. A person contravenes these provisions if they:

- make a consumer or small business contract that is a standard form contract, and they propose and include an unfair term in the contract;
- apply or rely on, or purport to apply or rely on, an unfair term of a consumer or small business contract that is a standard form contract.<sup>8</sup>

1.75 Under existing Australian Consumer Law, a court may find that a person has contravened a civil penalty provision in a broader range of circumstances, including where a person has been in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by a person of such a provision.<sup>9</sup> Thus, an individual may have indirectly been a party to a contravention of the prohibition of unfair terms in consumer contracts and, as a result of the amendments in this bill, be liable for a maximum penalty of \$2.5 million.<sup>10</sup> In such circumstances, while the provision could be said to operate in a regulatory context, it appears it still may apply to a broad range of people.

1.76 As to the purpose of the penalties, the statement of compatibility states that the penalties are intended to be deterrent in nature and proceedings would be instituted by a public authority with statutory powers of enforcement.<sup>11</sup> It states that imposing civil penalties will enable an effective disciplinary response to non-compliance.<sup>12</sup> The statement of compatibility explains that increasing the severity of the penalties will ensure the price of misconduct is high enough to deter unfair activity and improve competition in Australia for the benefit of consumers and small businesses.<sup>13</sup> As deterrence is the stated primary objective of this measure, it would seem to meet the test that the penalty is intended to deter and punish.

1.77 In relation to (c), in determining whether a civil penalty is sufficiently severe as to amount to a 'criminal' penalty, the nature of the industry or sector being regulated and the relative size of the penalties in that regulatory context is relevant.<sup>14</sup> The penalty is more likely to be considered criminal for the purposes of international

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8 Schedule 2, item 1. A consumer contract and a small business contract are defined in section 23 of the *Competition and Consumer Act 2010*.

9 Schedule 2, section 224 of the Australian Consumer Law in the *Competition and Consumer Act 2010*.

10 Schedule 2, items 11 and 12.

11 Statement of compatibility, p. 53.

12 Statement of compatibility, p. 54.

13 Statement of compatibility, p. 52.

14 See Simon NM Young, 'Enforcing Criminal Law Through Civil Processes: How Does Human Rights Law Treat "Civil For Criminal Processes"?' , *Journal of International and Comparative Law*, vol. 2, no. 2, 2017, pp. 133-170.

human rights law if the penalty carries a term of imprisonment or a substantial pecuniary sanction. While the civil penalty provisions would not carry a term of imprisonment, the maximum penalty amount of \$2.5 million for individuals is a substantial pecuniary sanction. Indeed, the statement of compatibility acknowledges that the new penalties are intentionally significant, stating that the penalties must be high enough to achieve deterrence and protect consumers.<sup>15</sup> The statement of compatibility states that the large penalties are, however, appropriate for regulatory and disciplinary purposes, as individuals involved in contraventions of the Act may receive large financial benefits from their misconduct, and paying a penalty should not become a cost of doing business.<sup>16</sup> It also notes that the increased penalties are more comparable with international jurisdictions.<sup>17</sup> The statement of compatibility further notes that there is flexibility in the penalty amount, as the court has the discretion to consider the seriousness of the contravention and impose an appropriate penalty in the circumstances.<sup>18</sup> Where a civil penalty is imposed by the court, the individual may have that decision reviewed.

1.78 While some factors may support classifying the penalties as 'civil', namely the domestic classification, the regulatory context and the lack of a term of imprisonment, other factors indicate that the penalties could be regarded as 'criminal', including the fact that the penalties are intended to deter misconduct and may amount to a substantial pecuniary sanction. In cases where the maximum pecuniary order is made, there is a greater risk that the civil penalty may be considered so severe as to constitute a criminal sanction for the purposes of international human rights law.

1.79 While the civil penalty provisions may be characterised as 'criminal' for the purposes of international human rights law, this neither means that the relevant conduct must be turned into a criminal offence in domestic law nor that the civil penalty is illegitimate. Instead, it means that the civil penalty provisions must be shown to be consistent with the criminal process guarantees set out in articles 14 and 15 of the International Covenant on Civil and Political Rights, including the right to be presumed innocent until proven guilty according to law.<sup>19</sup> This right requires that the case against the person be demonstrated on the criminal standard of proof, that is, it must be proven beyond reasonable doubt. The standard of proof applicable in civil penalty proceedings is the civil standard of proof, requiring proof on the balance of probabilities. As the civil penalties in this bill appear to be characterised as 'criminal'

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15 Statement of compatibility, pp. 52, 54.

16 Statement of compatibility, p. 54.

17 Statement of compatibility, p. 52.

18 Statement of compatibility, p. 54.

19 International Covenant on Civil and Political Rights, article 14(2).

for the purposes of international human rights law, the lower standard of civil proof would not appear to comply with article 14.

1.80 Another criminal process guarantee is the right not to be tried and punished twice for an offence for which a person has already been finally convicted or acquitted (sometimes referred to as the principle of double jeopardy).<sup>20</sup> The statement of compatibility states that the related legislative scheme does not permit proceedings to be brought against the person for substantially the same conduct.<sup>21</sup> In particular, where a person contravenes one or more civil penalty provisions, they will not be liable to more than one pecuniary penalty in respect of the same conduct.<sup>22</sup> Additionally, a court must not order a pecuniary penalty in relation to a contravention of a civil penalty provision if the person has already been convicted of an offence for substantially the same conduct.<sup>23</sup>

1.81 However, in certain circumstances, the legislative scheme does allow a person to be subject to both criminal and civil law proceedings for conduct that is substantially the same. For example, after a pecuniary order has been made against a person for contravention of a civil penalty provision and regardless of the fact that this pecuniary order has been made, criminal proceedings can be started against that person for conduct that is substantially the same as the conduct giving rise to the civil penalty.<sup>24</sup> In other words, a person could be liable to pay a pecuniary penalty and then be subject to criminal proceedings for the same conduct. Alternatively, if a person was subject to criminal proceedings but not convicted, a civil penalty order could then be made against them in relation to conduct that is substantially the same as the conduct constituting the offence.<sup>25</sup> This therefore may limit the right to not be tried and punished twice for an offence for which the person has been finally convicted or acquitted.

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20 International Covenant on Civil and Political Rights, article 14(7)

21 Statement of compatibility, p. 54. See, eg, subsection 76(3) of the *Competition and Consumer Act 2010* and Schedule 2, section 224 of the Australian Consumer Law in the *Competition and Consumer Act 2010*.

22 Statement of compatibility, p. 54. See, eg, subsection 76(3) and Schedule 2, subsection 224(4) of the Australian Consumer Law in the *Competition and Consumer Act 2010*.

23 See eg Schedule 2, subsection 225(1) of the Australian Consumer Law in the *Competition and Consumer Act 2010*.

24 See eg Schedule 2, subsection 225(3) of the Australian Consumer Law in the *Competition and Consumer Act 2010*.

25 See eg Schedule 2, subsection 225(2) of the Australian Consumer Law in the *Competition and Consumer Act 2010*.

## Committee view

1.82 The committee considers that increasing the maximum penalty for contravention of civil penalty provisions in competition and consumer law is an important measure to deter serious misconduct and protect consumers against egregious conduct. However, noting the substantial pecuniary sanctions of up to \$2.5 million that would apply to individuals, there is a risk that the penalties may be so severe as to constitute a 'criminal' sanction under international human rights law. If the penalties were considered to be 'criminal', the committee notes that this does not mean the relevant conduct must be classified as a criminal offence or that the civil penalty is illegitimate. Rather, it must be shown that the provisions are consistent with the criminal process guarantees set out in article 14 of the International Covenant on Civil and Political Rights.

1.83 The committee notes the related legislative scheme applies a civil standard of proof and in certain circumstances allows a person to be subject to civil and criminal proceedings for substantially the same conduct. In light of this, the committee considers that, depending on the severity of the pecuniary penalty applied and whether a person is also subject to criminal proceedings, there may be a risk that the increased civil penalty provisions are not consistent with the criminal process guarantees.

### Suggested action

1.84 The committee recommends that when civil penalties are so severe such that there is a risk that they may be regarded as 'criminal' under international human rights law, consideration should be given to applying a higher standard of proof in the related civil penalty proceedings.

1.85 The committee draws these human rights concerns to the attention of the Assistant Minister and the Parliament.