Appendix 1

Correspondence

The Hon. Barnaby Joyce MP

Minister for Agriculture
Federal Member for New England

Ref: MNMC2014-05777

Senator Dean Smith
Chair
Parliamentary Joint Committee On Human Rights
Parliament House
CANBERRA ACT 2600

Dear Senator Smith Dean

Thank you for your letter of 24 June 2014 about the Parliamentary Joint Committee on Human Rights' consideration of the Agricultural and Veterinary Chemicals Legislation Amendment (Removing Re-approval and Re-registration) Bill 2014 (the Bill). As you would be aware the Bill passed parliament on 14 July 2014 and is now the *Agricultural and Veterinary Chemicals Legislation Amendment (Removing Re-approval and Re-registration) Act 2014* (the 2014 Act).

The committee sought clarification on whether the removal of the re-registration requirement for agricultural chemicals and veterinary medicines (agvet chemicals) is compatible with the right to health and a healthy environment.

The committee sought my advice:

1.13 ....as to whether the removal of the re-registration requirement for agvet chemical is compatible with the right to health and a healthy environment and in particular how the measures are:

- **aimed at achieving a legitimate objective;**
- **there is a rational connection between the measures and the objective; and**
- **the measures are proportionate to that objective.**

Agvet chemicals, broadly, are designed to destroy pests and weeds and prevent or cure diseases. They may be dangerous and are typically poisonous substances that may have deleterious consequences for human health and the environment when employed in a manner inconsistent with the instructions for its safe use or where the quality of the chemical differs from that considered as part of the scientific assessment allowing market access.

It is appropriate that the regulator, the Australian Pesticides and Veterinary Medicines Authority (APVMA), has the appropriate tools to be able to respond when the hazards of, and exposure to, an agvet chemical (together, the risk of using the chemical) may no longer be managed by instructions for its safe use (risk mitigation strategies). Risks of chemical use may not be effectively managed in circumstances when new scientifically robust, information exists about the risks of using the chemical come to light, or where the agvet chemical differs in quality from that assessed.

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The committee notes that:

1.11... the measure in the Bill to remove re-registration 'may be considered a limitation on the right to health, to the extent that the reduced opportunity for evaluation of substances that may be unsafe or unhealthy may lead to adverse health impacts or environmental conditions.

I do not consider that the 2014 Act reduces the APVMA's ability to examine agvet chemicals currently used to safeguard health and healthy environments.

The 2014 Act ensures that the tools available to the APVMA are effective, proportionate and efficient in ensuring that chemical risks are appropriately managed to ensure the community's right to health and a healthy environment is protected. This, then, is the objective of the 2014 Act – to ensure the burden imposed by regulation on the regulated community, and specifically the burden imposed by a re-registration scheme for agvet chemicals, is proportionate to the risk being managed. I consider that the re-registration scheme was an unnecessary imposition on the regulated community that did not operationally provide for a reduction in risk proportional to the impost. To the contrary, by removing re-registration the 2014 Act allows the APVMA to focus its resources on responding to newly identified risks of a chemical as they arise rather than delaying action because of a timeline imposed for monitoring by the re-registration scheme.

In operation, the re-registration scheme had a two-fold purpose. Re-registration allowed the APVMA to confirm that the supplied chemical product was the same as the product registered by the APVMA. The APVMA may also, at any time, use section 159 of the Agvet Code to require a holder of registration to give it information about the product in order to decide whether to suspend or cancel the registration. Additionally, the APVMA has monitoring and investigation tools in Part 9 of the Agvet Code available to it that would allow the APVMA to examine chemicals to determine if an offence under the Code has been committed. For this purpose, re-registration does not add to the APVMA's toolbox.

Re-registration also required APVMA to periodically consider global advances in scientific knowledge about agvet chemicals, reports of adverse experiences with chemicals and other information available to it and decide if a reconsideration of the product registration under Part 2 of Division 4 (known as a chemical review) should be commenced. However, the APVMA already has strong, established systems to trigger reconsideration if potential risks to the safety and performance of a chemical have been identified. The APVMA and its partner agencies in the Departments of Health and Environment routinely consider advances in scientific knowledge about, or adverse experiences with agvet chemicals.

The APVMA also receives submissions from other interested parties proposing a reconsideration of a particular agvet chemical. Where these proposals are supported by reliable grounds the APVMA will reconsider chemical registrations to determine if the newly identified risks are adequately managed. The APVMA also has strong powers to recall unsafe chemical products or suspend or cancel the registration of a chemical product if it no longer meets the stringent criteria for registration.

The committee can see, then, that both of the purposes of re-registration are addressed through the existing tools the APVMA has to manage chemical risk. These existing tools were improved by both the *Agricultural and Veterinary Chemicals Legislation Amendment Act 2013* (the 2013 Act) that introduced re-registration and by the 2014 Act.

The 2013 Act, that introduced re-registration, introduced measures to improve the efficiency and timeliness of chemical reconsiderations and to encourage participation by stakeholders. Reconsiderations must now be completed within statutory timeframes. Participation in the reconsideration process is encouraged through longer data protection periods for information given to support a chemical. The 2013 Act included particular requirements around consultation of stakeholders in a reconsideration. The 2013 Act also strengthened the ability for the APVMA to respond to agvet chemicals in the market that posed potential risks to health.

The 2014 Act builds on these foundations. It recognises the strong relationship that was to exist between re-registration and the APVMA's ability to respond where the right to health or a healthy environment may be compromised. Through amendments to section 99 the 2014 Act enhances the APVMA's ability to require a person who supplies an agvet chemical product in Australia to provide information (for example, a chemical analysis) about the product they are supplying. This additional monitoring option, with its limitations to protect the human rights of the individual, coupled with monitoring provisions enhanced in the 2013 Act provide a proportionate mechanism to focus regulatory efforts, rather than apply a uniform approach indiscriminately.

The committee notes that:

1.11 A detailed justification for this limitation [right to health, to the extent that the reduced opportunity for evaluation of substances that may be unsafe or unhealthy] is not provided in the statement of compatibility.

While the 2014 Act removes re-registration the additional measures in the 2014 Act coupled with the existing (and improved) provisions of the Agvet Code do not limit opportunity to health or a healthy environment. The scheme did not, by itself, present an additional opportunity to address new risks of using the chemical. As re-registration is unnecessary, measures to remove it in the 2014 Act were necessary and proportionate to remove the regulatory costs imposed on chemical companies in applying for re-registration.

I consider that the 2014 Act is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*. The 2014 Act retains, and in parts strengthens, the regulatory responses available to government to ensure the right to health and a healthy environment is not negatively impacted.

The contact officer in the department for any further information on this matter is Marc Kelly. Mr Kelly may be contacted on 02 6272 5485 or marc.kelly@agriculture.gov.au.

Thank you for seeking clarification of these matters. I look forward to receiving the committee's final views.

Yours sincerely

Barnaby Joyce MP

05 AUG 2014

SENATOR THE HON. ERIC ABETZ
LEADER OF THE GOVERNMENT IN THE SENATE
MINISTER FOR EMPLOYMENT
MINISTER ASSISTING THE PRIME MINISTER FOR THE PUBLIC SERVICE
LIBERAL SENATOR FOR TASMANIA

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

- 2 MAY 2014

Dear Senator Dean,

Thank you for your letter of 11 February 2014, on behalf of the Parliamentary Joint Committee on Human Rights, concerning the Building and Construction Industry (Improving Productivity) Bill 2013. I apologise for the delay in responding.

The Building and Construction Industry (Improving Productivity) Bill 2013 seeks to deliver on a key election commitment of the Coalition Government. Further, the re-establishment of the Australian Building and Construction Commission was a publicly stated election commitment at the 2010 election and was repeatedly emphasised as a key policy initiative.

I contend that the Building and Construction Industry (Improving Productivity) Bill 2013 has strong support in the community and should be progressed through the Parliament as a matter of the highest priority. This need has become more pressing in light of the numerous recent reports alleging multiple examples of serious unlawful conduct in relation to the building and construction industry which are undermining investor confidence nationally and internationally. The Government is strongly of the view that any continued frustration of these reforms by opposition parties no longer has any credible basis.

A detailed response to the questions posed by the Parliamentary Joint Committee on Human Rights is enclosed, and I trust that this comprehensive response assists the Parliamentary Joint Committee on Human Rights in its deliberations.

Should the Parliamentary Joint Committee on Human Rights require further information, please contact my adviser Mr Josh Manuatu on (02) 6277 7320 or at josh.manuatu@employment.gov.au.

Once again, thank you for taking the time to write to me.

Yours sincerely

ERIC ABETZ

Encl.

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Our Ref MC14-001894

Building and Construction Industry (Improving Productivity) Bill 2013

Please find below responses to each of the Committee's requests for further information.

Distinctiveness and the need for certain specific measures

The Committee sought further information on the basis on which the Minister has concluded that the problems identified by the Cole Royal Commission continue to persist on a scale that justifies the adoption of a separate legislative regime for the building and construction industry. In particular, the Committee has sought empirical data comparing the nature and incidence of unlawful behaviour in other industries to permit it to objectively assess whether there is a case to be made for industry specific regulation.

History of lawlessness in the building and construction industry

For many years, the building and construction sector provided the worst examples of industrial relations lawlessness. Projects were delayed, costs blew out and investment in our economy and infrastructure was jeopardised.

In response to ongoing issues raised by the media and within the sector, the then government established a Royal Commission led by the Hon. Terence Cole QC. Its terms of reference were to conduct the first national review of the conduct and practices in the building and construction industry. The Royal Commission collected evidence and deliberated for 18 months and reported in February 2003.

The Final Report of the Cole Royal Commission found that the industry was characterised by unlawful conduct and concluded that:

> *These findings demonstrate an industry which departs from the standards of commercial and industrial conduct exhibited in the rest of the Australian economy. They mark the industry as singular.*[1]

The Cole Royal Commission recommended an industry-specific regulator with the power to compel evidence on the grounds that industry participants were discouraged from reporting unlawful behaviour due to threats and intimidation. At the time it was noted that such powers were by no means unique and were already granted to other Commonwealth regulators.

The Cole Royal Commission recommended that penalties for breaches of workplace laws in the building and construction industry be higher than in other industries, due to the prevalence of such conduct.

Government response

In response to the recommendations of the Cole Royal Commission, the Howard Government established the Office of the Australian Building and Construction Commissioner (ABCC) in 2005. As recommended by Justice Cole, the ABCC's underpinning legislation gave the ABC Commissioner the powers to compel witnesses to attend an examination or produce documents where the Commissioner reasonably believed that the person had information or documents relevant to an investigation into a suspected contravention of workplace laws. The legislation also enabled the courts to impose tough penalties that acted as a deterrent to unlawful behaviour.

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[1] *Royal Commission into the Building and Construction Industry* (2003), Volume 1, Page 6

Abolition of the ABCC by the Labor Government

In 2012, Labor abolished the ABCC. It was replaced with the Fair Work Building Industry Inspectorate (or Fair Work Building and Construction), which exercised significantly weakened powers and its budget was slashed by one-third. Fines for unlawful industrial action were reduced by two-thirds and industry specific laws were repealed.

It did this despite the fact that productivity in building and construction has significantly increased and industrial action had significantly decreased.

Economic and Industrial Performance of the Industry

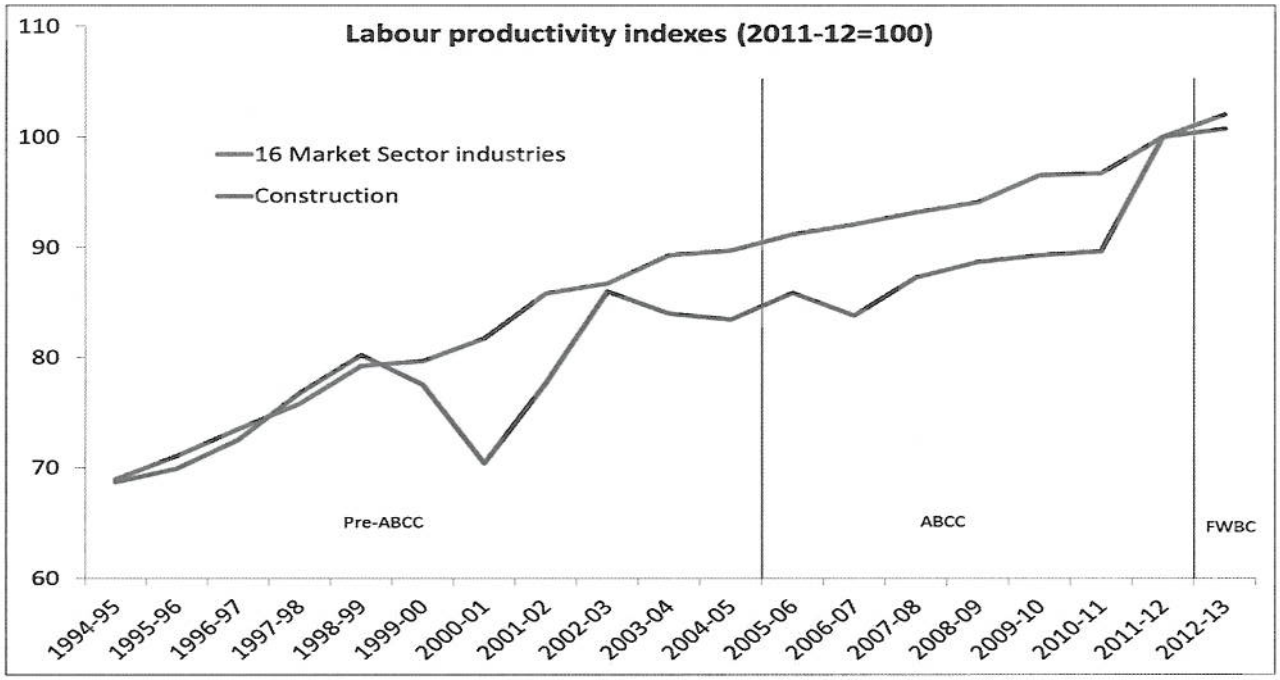
When the ABCC existed, the economic and industrial performance of the building and construction sector significantly improved. During its period of operation, the ABCC provided economic benefits for consumers, higher levels of productivity, and significantly less days lost to industrial action.

Productivity

Australian Bureau of Statistics (ABS) 2013 data[2] show that from 2004-05 (the year before the ABCC started) to 2011-12 (its final year of operation):

- the labour productivity index for the construction industry rose from 83 to 100, which represents a 20 per cent increase;
    - in contrast, the 16 Market Sector industries index rose from 90 to 100, an increase of 11 per cent.
- the multifactor productivity index for the construction industry rose from 89 to 100, which represents a 12 per cent increase;
    - in contrast, the 16 Market Sector industries index fell from 102 to 100.

The same data show that, following the abolition of the ABCC, both labour productivity and multifactor productivity in the construction industry were flat.



[2] Australian Bureau of Statistics (2013), *Estimates of Industry Multifactor Productivity*, Cat No 5260.0.55.002

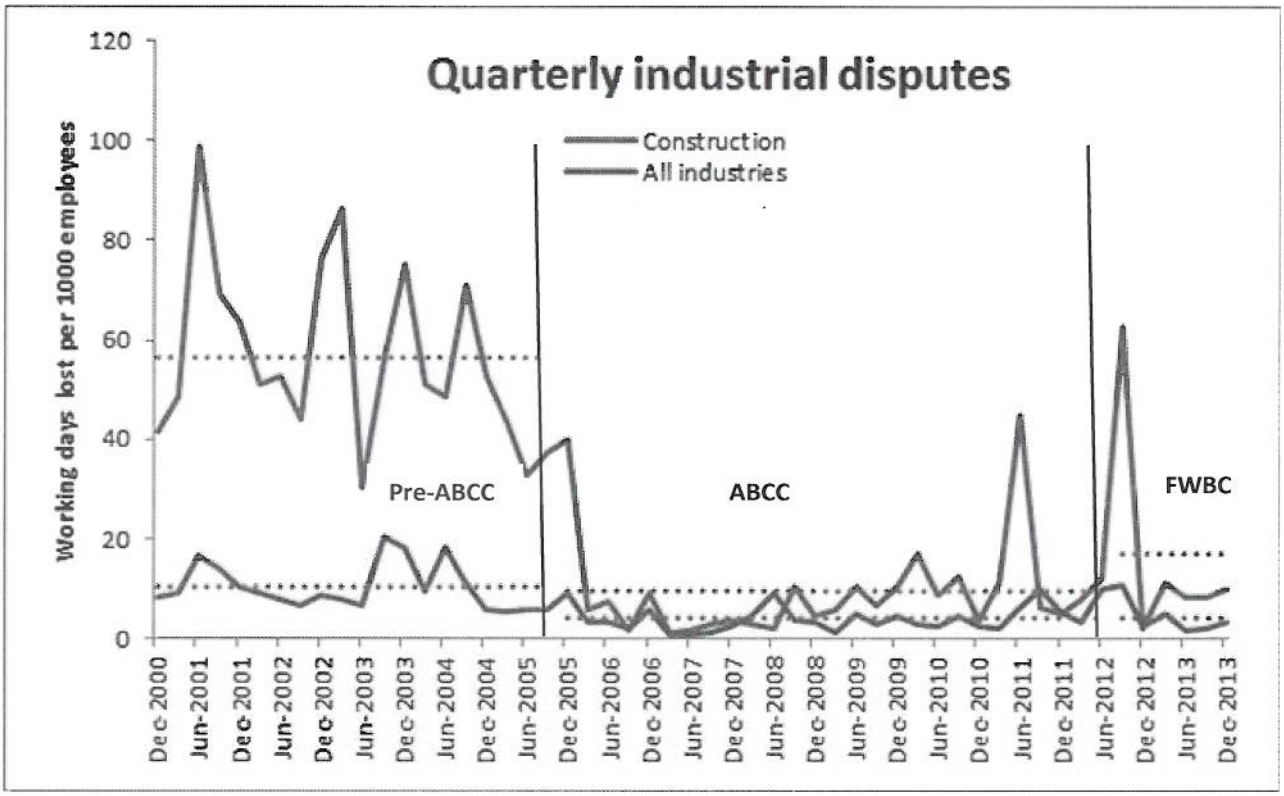
Industrial Disputes

As shown in the ABS 2014 graph below[3], during the period when the Australian Building and Construction Commission was in operation (1 October 2005 to 31 May 2012), the quarterly average industrial dispute rate in the construction industry was 9.6 working days lost per 1000 employees (WDL/000E), and this is around double the dispute rate for all industries (4.2 WDL/000E) over the same period.

However, for the periods before the Australian Building and Construction Commission commencement and after its abolition, the quarterly average industrial dispute rate in the construction industry was not only much higher than the quarterly average in the industry when the regulator was in operation, it was also much higher than the quarterly average of all industries for the same period.

For the five years before the Australian Building and Construction Commission commencement (i.e. December quarter 2000 to September quarter 2005), the quarterly average industrial dispute rate in the construction industry was 56.7 working days lost per 1000 employees. This was five times the all industries figure of 10.4 working days lost per 1000 employees over the same period.

Since the abolition of the Australian Building and Construction Commission (1 June 2012), the quarterly average industrial dispute rate in construction is 17.2 working days lost per 1000 employees, which is four times the all industries quarterly average of 4.3 working days lost per 1000 employees over the same period.



In its submission of January 2014 to the Productivity Commission *Public Infrastructure* inquiry, the Victorian Government stated that productivity is negatively impacted by industrial disputes and that unlawful behaviour continues to beset the construction industry, including illegal picketing, with the

[3] Australian Bureau of Statistics (2014), *Industrial Disputes, Australia*, December quarter 2013, Cat. No. 6321.0.55.001

industry regularly losing more working days to industrial disputes than the average of all other private sector industries.[4]

It should be noted that the ABS industrial dispute figures do not include community pickets that can disrupt building and construction projects.

The construction industry continues to be plagued by instances of unlawful industrial action. More recently, there have been widespread allegations of corruption and potentially criminal behaviour in the building and construction industry. The allegations include death threats being made against a former CFMEU official for raising concerns about his union colleagues helping a notorious Sydney crime figure win work on construction sites. Examples of recent unlawful action in the sector that further justify the need for the Australian Building and Construction Commission, together with recent allegations of corruption, are summarised at Attachment A.

In its draft report on the *Public Infrastructure* inquiry, the Productivity Commission found cases prosecuted by the Australian Building and Construction Commission and Fair Working Building and Construction indicate widespread unlawful conduct and adverse industrial relations cultures in the industry.[5]

The Productivity Commission also highlighted how the threat of industrial action, which may not be reflected in the ABS disputes figures, may result in work practices and other conduct inimical to productivity, costs and business performance.[6]

The report also highlighted how the ABS statistics on industrial disputes exclude many aspects of worksite industrial disputation, such as work-to-rules, go-slows and overtime bans. Nor does the ABS data measure the effects of disputes in locations other than where the stoppages occur, such as stand-downs due to lack of materials, pickets, disruption of transport services and power cuts, despite these having effects on the utilisation of labour and capital.

The Productivity Commission concludes in its draft report that, in relation to this sector, "the available industrial dispute data are likely to underestimate the prevalence and severity of industrial relations disharmony".[7]

The Master Builders Association, in its 2013 supplementary submission to the Senate Education and Employment Legislation Committee Inquiry on the Australian Building and Construction Commission Bills, has also detailed the significant direct and indirect costs of industrial action in the construction industry, whether protected or unprotected. It stated that the economic damage of a day lost "is not in the hundreds of dollars but tens of thousands for the less critical projects, to hundreds of thousands of dollars for complex or critical phases of construction. These would be the direct costs…the other costs that need to be also taken into account..are liquidated damages imposed by the client for not completing the project on time".[8]

High rates of industrial action, whether protected or unprotected, are evidence of a lack of cooperation between industry parties. Australia's building and construction industry workforce was rated as the most "adversarial" and uncooperative in terms of workplace culture when compared with other international construction industries by AECOM in 2012.[9]

The ongoing lawlessness in the building and construction sector over many years in Australia provides important context for the measures in the Bill. An independent regulator with strong and

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[4] Victorian Government submission (2014) - Productivity Commission *Public Infrastructure* Inquiry, page 48.
[5] Productivity Commission (2014), Draft Report: *Public Infrastructure*, Page 405.
[6] ibid, p 405.
[7] ibid, p 442.
[8] Master Builders Association (2013), *Supplementary Submission to Senate Education and Employment Legislation Committee Inquiry on ABCC Bills*, Pages 5-6.
[9] AECOM (2013), *The Blue Book*, Page 6.

effective powers is essential to address these issues. To the extent that the Bill engages fundamental rights and freedoms, those limitations are reasonable, necessary and proportionate to achieving the legitimate objectives of the Bill.

Right to freedom of association and right to form and join trade unions

The Committee has requested further information about relevant issues that have been considered by ILO supervisory bodies. The Committee has requested a summary of those views, details of any former government's formal response to those views, and the current government's position on whether it agrees or not with the ILO bodies' expert assessment.

In 2005, the ILO Committee on Freedom of Association (the ILO Committee) made a number of observations as part of its consideration of the *Building and Construction Industry Improvement Act 2005*.[10] The Howard Government provided a comprehensive response to the ILO Committee's report, and the Coalition Government supports the content of this response, noting the changes to the workplace relations legislative framework since then.

First, the ILO Committee requested that the former government take steps to modify the unlawful industrial action provisions of the *Building and Construction Industry Improvement Act 2005* so as to ensure its compliance with the principles of freedom of association. In its response, the former government submitted that the provisions of the *Building and Construction Improvement Act 2005* (sections 36, 37 and 38) reflected Australia's ILO obligations, including freedom of association principles. The former government's response noted that these provisions had to be read in the context of the *Workplace Relations Act 1996* and that protected industrial action taken in accordance with that Act would not be subject to these sections. The response also noted that the *Building and Construction Industry Improvement Act 2005* supported freedom of association principles by prohibiting discrimination on the basis that employees were covered by, or had proposed to be covered by, a particular kind of industrial instrument.

The ILO Committee also requested that the former government adopt measures to eliminate any excessive impediments, penalties and sanctions against industrial action in the building and construction industry. The former government's response highlighted the Cole Royal Commission's findings that an entrenched culture of lawlessness existed in the building and construction industry and that higher penalties were required to address that culture. The response also noted that the quantum of any penalty would be determined by the courts and that the level of penalties to be applied would be made without regard to a person's status as a union member.

Second, the ILO Committee requested that the former government take steps with a view to revising section 64 (project agreements not enforceable) of the *Building and Construction Industry Improvement Act 2005* to ensure that the determination of the level of bargaining be left to the discretion of the parties. The former government submitted that section 64 supported the right of parties to negotiate at an enterprise level by preventing project agreements that were designed to deny employers and their employees the right to develop terms and conditions that suited their circumstances through trying to secure 'pattern' outcomes. Furthermore, the former government's response noted that the existing workplace relations framework provided avenues for multi-business agreements, such as through the multiple business and greenfields provisions of the *Workplace Relations Act 1996*.

Third, the ILO Committee requested that the former government take steps with a view to promoting collective bargaining as provided in ILO Convention No 98. In particular, the ILO Committee requested that the former government 'review…the provisions of the Building Code and the Guidelines so as to ensure that they are in conformity with freedom of association principles'.[11] The

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[10] ILO Committee on Freedom of Association, *Case No 2326 (Australia), Report in which the committee requests to be kept informed of developments – Report No 338*, November 2005.
[11] ILO Committee on Freedom of Association, *Case No 2326 (Australia), Report in which the committee requests to be kept informed of developments – Report No 338*, November 2005 at para 452.

former government's response noted that a Building Code had yet to be issued under the *Building and Construction Industry Improvement Act 2005* so it was not able to comment on the proposed content of such a code, and that the National Code and Guidelines were consistent with Australia's ILO obligations and freedom of association principles.

Finally, the ILO Committee requested that the former government implement safeguards into the *Building and Construction Industry Improvement Act 2005* to ensure that the functioning of the ABC Commissioner and inspectors did not lead to interference in the internal affairs of trade unions. The former government's response noted that the Act established criteria which the ABCC must satisfy before exercising its power to obtain information and that these provided important protections and safeguards. Furthermore, the response noted that the Act placed strong safeguards around what a person may do with protected information that was obtained during the course of official employment, including a maximum penalty of 12 months imprisonment for unauthorised recording or disclosure of such information. Finally, the former government's response noted that a right of appeal to the Courts before handing over documents did exist and had been utilised multiple times. In light of these considerations, the former government considered that the existing safeguards in the *Building and Construction Industry Improvement Act 2005* were comprehensive and appropriate.

Right to organise and bargain collectively

The Committee has sought an explanation as to how clause 59 (project agreements not enforceable) can be viewed as consistent with the right to freedom of association and to bargain collectively in light of reservations expressed by relevant ILO Committees about the comparable provision in the Building and Construction Industry Improvement Act 2005.

As noted by the Committee, the ILO Committee requested that the former government revise section 64 of the *Building and Construction Industry Improvement Act 2005* (replicated in clause 59 in the current Bill) to ensure that the determination of the bargaining that takes place is left to the discretion of the parties as is required by Article 4 of ILO Convention No. 98 – Right to Organise and Collective Bargaining Convention.

It is the Government's view that clause 59 supports the right of parties to determine that bargaining takes place without undue interference. It is a unique characteristic of the building and construction industry that a wide array of employers, employees and contractors will often be operating together at a single site. Project agreements, which are commonly used on building sites, can deny employers and their employees the freedom to negotiate and implement agreements that best suit their own circumstances by trying to secure site-wide outcomes. This is not appropriate in light of the wide variety of work that is undertaken at building sites.

Most importantly, clause 59 will only prohibit project agreements that are not Commonwealth industrial instruments. This leaves scope for site-wide agreements that are made under the *Fair Work Act 2009* (the Fair Work Act), such as multi-enterprise agreements and greenfields agreements. The Government considers that these mechanisms provide sufficient flexibility to parties in the building and construction industry to implement site-wide agreements while reflecting the primacy of enterprise-level agreement-making in the federal workplace relations system.

Right to freedom of assembly and freedom of expression

The Committee has sought clarification as to how the provisions relating to unlawful picketing are compliant with the article 2(1) of the International Covenant of Civil and Political Rights (ICCPR) which calls on states to guarantee the rights contained in the ICCPR for all citizens without discrimination. The Committee has expressed concern that persons engaged in the building industry may have their rights to freedom of assembly, freedom of expression and freedom of association, including the right to join a trade union restricted by the provisions.

Clause 47 of the Bill provides that a person must not organise or engage in an unlawful picket. The term unlawful picket is defined to include action:

(a) that:

(i) has the purpose of preventing or restricting a person from accessing or leaving a building site or an ancillary site; or

(ii) directly prevents or restricts a person accessing or leaving a building site or an ancillary site; or

(iii) would reasonably be expected to intimidate a person accessing or leaving a building site or an ancillary site; and

(b) that:

(i) is motivated for the purpose of supporting or advancing claims against a building industry participant in respect of the employment of employees or the engagement of contractors by the building industry participant; or

(ii) is motivated for the purpose of advancing industrial objectives of a building association; or

(iii) is unlawful (apart from this section).

The prohibition on unlawful picketing is not restricted to building industry participants. Instead, clause 47 prohibits pickets which attempt to prevent persons entering or leaving a building site or ancillary site where that action is motivated by an industrial purpose or is otherwise unlawful. In practice, the people undertaking this action for one of the specified purposes are most likely to be building industry participants, but the prohibition is also intended to cover situations where industrially motivated action is being undertaken under the guise of unrelated community protests.

The Committee has noted that the building and construction industry is not the only industry that faces picketing action. It is the Government's view that the greater prevalence of picketing action in the building and construction industry combined with the disproportionately significant impact that picketing of a building site has on workers and their employers warrants differential treatment.

The legitimate objective of differential treatment through the adoption of industry specific laws is justified as construction sites are greatly impacted by picketing action, because even minor delays in the carrying out of critical tasks (e.g. concrete pouring) can have major effects on the timing and financial viability of projects. The approach taken in clause 47 of the Bill is logically connected to that aim as it will ensure that fast and effective remedies are available to both the regulator and to those in the building industry affected by unlawful picketing action. Finally, the approach taken in clause 47 is a proportionate response as it is restricted to actions which actually prevent access to or egress from a building site by workers and management, or aim to intimidate a person accessing or leaving a building site. Furthermore, to the extent that clause 47 covers picketing that is 'otherwise unlawful', the prohibition is proportionate as it simply allows for an easier enforcement of an occupier's rights and the imposition of a civil penalty in relation to action that may otherwise be tortious in character.

Fair Work Act

The Committee has also sought clarification as to whether the unlawful picketing addressed by the Bill would fall within prohibitions contained in the Fair Work Act. Industrial action is dealt with in Part 3-3 of the Fair Work Act, which provides among other things that the Fair Work Commission may make an order stopping industrial action that is not 'protected industrial action'. Section 408 of the Fair Work Act defines 'protected industrial action' for a proposed enterprise agreement to include employee claim action for the agreement, employee response action for the agreement and employer response action for the agreement.

The issue of whether picketing could constitute industrial action (and thus be 'protected industrial action' for the purposes of the Fair Work Act) is considered in Breen Creighton and Andrew Stewart's *Labour Law: Fifth Edition*, which notes that in *Davids Distribution Pty Ltd v NUW* (1999) FCR 463 the Full Court of the Federal Court held that picketing does not constitute industrial action

within the meaning of the Act.[12] In reaching this decision, the Full Court of the Federal Court considered that parliament could not have intended to "authorise interference with the rights, not only of the employer, but also of other affected persons who, but for the immunity, would have a right of action at common law".[13] As stated by Creighton and Stewart:

> *What the Full Court appears to have had in mind was that, if such picketing constituted 'industrial action', it could in turn be regarded as protected action if the appropriate procedures were followed, at least in the context of negotiating an agreement under the Act. But the decision should also mean picketing cannot be made the subject of a s 418 order; although of course that would not prevent employers or other parties seeking relief at common law, or under other provisions...that do not hinge on the presence of 'industrial action'.*

The application of the Fair Work Act to picketing activity in the building and construction industry is limited by the requirement that 'industrial action' be undertaken by 'employees'. This limitation provides scope for members of unions to undertake picketing action with an intention to disrupt work at a construction site with impunity as long as they are not employees at the site in question. It is this behaviour in particular that the Bill is seeking to address.

A recent example of action that falls within this category was the blockading of the Myer Emporium site in Melbourne in August and September 2012 by members of the CFMEU. The blockade resulted in violence in the streets of Melbourne, with militant protestors intimidating the community and confrontations between picketers and police, including attacks on police horses. The blockade resulted in serious disruptions to the community and employees were unable to enter or leave the site without the presence of a contingent of police. The dispute also disrupted three other Grocon sites in Melbourne (including the Comprehensive Cancer Centre project in Parkville). The blockade was not lifted until 7 September 2012. On 24 May 2013, the Supreme Court found the CFMEU guilty on all five charges of contempt of court orders following proceedings initiated by Grocon. On 31 March 2014, the CFMEU was penalised $1.25 million for its contempts and was ordered to pay costs. The blockade did not involve the actual employees who were engaged to work on the site, which meant that while the action breached a range of laws, it did not constitute 'industrial action' for the purposes of the Fair Work Act.

Right to privacy – coercive information-gathering powers

As part of its consideration of the right to privacy in relation to the Bill's coercive examination powers, the Committee did not consider that the explanatory materials provided established a rational connection between the coercive information-gathering powers contained in the Bill to the achievement of its stated goals, nor did it consider that the measure has been shown to be reasonable and proportionate. The Committee has requested further clarification as to why a more stringent enforcement regime is necessary for the building and construction industry as differential treatment may result in the provisions being considered discriminatory and incompatible with article 2(1) of the ICCPR in conjunction with article 17 of the ICCPR, and article 2(2) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) in conjunction with article 8 of the ICESCR.

The role of examination notice powers in enforcement activities

The ability of the ABC Commissioner to exercise coercive examination powers was a central recommendation arising from the 2003 Cole Royal Commission. As noted by the Committee, this recommendation was made on the basis that it is necessary to 'penetrate the veil of silence behind which many decisions to take unlawful industrial action are hidden.'[14] This power has been used

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[12] Creighton, W. B., & Stewart, A. (2010). *Labour law: Fifth Edition.* Annandale, NSW: Federation Press at [22.30].
[13] *Davids Distribution Pty Ltd v NUW* (1999) FCR 463 at 491.
[14] *Royal Commission into the Building and Construction Industry* (2003), Volume 11, Page 38.

effectively by the ABCC and, to a lesser extent, the Fair Work Building Industry Inspectorate with a total of 210 examinations having been conducted as at 27 February 2014. Of these:

- 102 examinations relate to 43 matters in which penalty proceedings have been instituted in a court;
- 5 examinations relate to a section 67 (ABC Commissioner to publish non-compliance) report published by the ABCC;
- 101 examinations relate to other closed matters (no court proceedings or section 67 report); and
- 2 examinations relate to one ongoing investigation.

The information obtained through examination notices allows the regulator to determine whether breaches of the law have occurred and to make an informed judgement about whether to commence proceedings or take other steps to ensure compliance with the law. The Fair Work Building Industry Inspectorate has advised that information obtained through the examination notice process has been important in around a quarter of its decisions to initiate proceedings. In other cases, the information obtained through the notice has led to a decision not to proceed with court action, thereby sparing the proposed respondent from the burden of court proceedings and avoiding unnecessary use of the regulator's and the court's resources.

The Committee has also questioned whether the coercive examination powers contained in the Bill are reasonable and proportionate measures.

As has been noted, the Cole Royal Commission initially recommended these powers following an extensive investigation of both the lawlessness facing the industry and the challenges that would face the ABCC upon its establishment. A practical example of this was provided in a case study in the former Building Industry Taskforce's report entitled 'Upholding the Law – Findings of the Building Industry Taskforce'. In October 2002, a picket was formed at the Patricia Baleen Gas Plan in Morwell as a result of 'frustrated negotiations' between a head contractor and a number of employee organisations. Despite return-to-work orders from the Australian Industrial Relations Commission and the Federal Court, some employees chose to continue the strike. The Taskforce found that:

> *"...key parties and witnesses in this dispute would not provide any information. In the absence of powers to compel people to provide information, the Taskforce had to refer the matter to the Australian Competition and Consumer Commission...by using the coercive powers under section 155 of the [Trade Practices Act 1974], the ACCC was able to...develop a Brief of Evidence for action before the Federal Court".*[15]

The ongoing necessity of the power to issue examination notices was recognised by Justice Murray Wilcox in his 2009 report entitled *Transition to Fair Work Australia for the Building and Construction Industry,* where he stated that:

> *"It is understandable that workers in the building industry resent being subjected to an interrogation process, that does not apply to other workers, designed to extract from them information for use in penalty proceedings against their workmates and/or union. I sympathise with that feeling and would gladly recommend against grant of the power. However, that would not be a responsible course. I am satisfied there is still such a level of industrial unlawfulness in the building and construction industry, especially in Victoria and Western Australia, that it would be inadvisable not to empower the [FWBC] to undertake compulsory interrogation. The reality is that, without such a power, some types of contravention would be almost impossible to prove."*[16]

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[15] Building Industry Taskforce, *Upholding the Law – Findings of the Building Industry Taskforce* 2005, Page 5.
[16] Justice Murray Wilcox (2009), *Transition to Fair Work Australia for the Building and Construction Industry Report*, Page 3.

While recognising the necessity of the coercive examination powers, Justice Wilcox recommended that a range of safeguards be adopted. In making this recommendation, Justice Wilcox noted that none of his proposed safeguards "need delay an investigation" and that their adoption would ensure that the power is not used unnecessarily and that the interrogated person is treated fairly and courteously.[17] The Bill has adopted a number of safeguards around the examination notice process, with the exception of Justice Wilcox's recommendation that the examination notices be issued by an independent person, namely an Administrative Appeals Tribunal Presidential Member.

This is because the requirement for the Director of the Fair Work Building Industry Inspectorate to apply to an Administrative Appeals Tribunal Presidential Member has substantially reduced the use and effectiveness of the examination notice process. In light of this practical experience, it is the Government's view that Justice Wilcox's goal of ensuring the power is not used unnecessarily and that the interrogated person is treated fairly and courteously can be met through the safeguards in the Bill.

A range of oversight measures ensure that persons on whom an examination notice is served are treated fairly and courteously and that there is strong and effective oversight of the process. This includes the use/limited use immunity that applies in respect of the information, record or document produced or answer given under an examination notice by the person the subject of the notice. Note also the proposed protection from liability arising from compliance with an examination notice in the Bill.

Further, the Commonwealth Ombudsman will have a continuing oversight of the examination process. Transparency will be assured by the legislative requirement that the Commonwealth Ombudsman be given a report, a video recording and a transcript of all examinations. The Commissioner's power to give a written notice to a person can only be delegated to a Deputy Commissioner (or to a Senior Executive Service employee if no Deputy Commissioners are appointed), ensuring that the application of this power is only undertaken by the people most accountable for its use.

Importantly, the issuing of examination notices by the Australian Building and Construction Commission will continue to be subject to external judicial oversight.

Any person questioned by the Australian Building and Construction Commission using the powers:

- will have the right to have a lawyer present;
- will have at least 14 days notice that they will need to appear; and
- will have reasonable travel expenses paid to appear at examinations.

It is therefore the Government's view that the approach adopted by the Bill is both reasonable and proportionate in light of its legitimate objectives and that effective and appropriate safeguards are included.

Differential treatment for the building and construction industry

More broadly, the Committee has sought clarification as to why a more stringent enforcement regime is required for the building and construction industry and why this distinction should not be considered discriminatory.

Commonwealth legislation that relates to workplaces (such as the Fair Work Act and the *Work Health and Safety Act* 2011) is designed to have general application to all workplaces within Australia. Within this legislative framework, however, it is important to recognise that particular sectors have unique characteristics that are not fully catered for in legislation that is of general application. In these circumstances it is appropriate to apply differential treatment to these particular groups. The Fair

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[17] Ibid.

Work Act contains provisions that relate specifically to workers in the textile, clothing and footwear industry in order to enhance existing protections for vulnerable workers in this sector.

The *Work Health and Safety Act 2011* provides similar examples of differential industry approaches. While that Act contains a general duty of care that all persons conducting a business or undertaking are required to comply with, it is recognised that particular activities and particular industries are faced with unique risks that require differential treatment. This has resulted in a range of more stringent requirements around the licensing of major hazard facilities, for example, in recognition of the risks posed by these facilities and the potential harm that they could cause to workers and the community at large. Such differential treatment is reasonable and necessary to support the over-arching policy objectives of the workplace relations and work health and safety regimes.

The objective of the Bill is to restore the application of the rule of law in the building and construction industry in the form of a more stringent enforcement regime. As has already been noted, the Bill is based on the former *Building and Construction Industry Improvement Act 2005* which gave effect to the recommendations of the Cole Royal Commission.

As outlined in more detail above, the Cole Royal Commission established that building sites and construction projects were marked by intimidation, lawlessness, thuggery and violence. The Cole Royal Commission recommended differential treatment for the industry on the grounds that "widespread disregard for the laws of the Commonwealth Parliament should not be tolerated. The solution is to provide an incentive for participants in the industry to comply with the law, and penalties that deter those who would be disposed to contravene it."[18] The necessity of differential enforcement for the building and construction industry is evidenced by the improved performance of the sector. ABS data show that the *Building and Construction Industry Improvement Act 2005* improved industry productivity and there was a significant reduction in days lost through industrial action.

The need for differential treatment of parties in relation to penalty levels is an established aspect of Commonwealth legislation, with the 2011 *Guide to Frame Commonwealth Offences* stating that "each offence should have its own single maximum penalty that is adequate to deter and punish a worst case offence, including repeat offences".[19] In its discussion on this point, the Guide states that:

> *"A maximum penalty should aim to provide an effective deterrent to the commission of the offence...[a] higher maximum penalty will be justified where there are strong incentives to commit the offence..."*[20]

In light of this evidence, and the unique characteristics of the building industry that are outlined in the introduction to this response, it is the Government's view that the more stringent enforcement regime that is being implemented in the proposed Bill is appropriate, reasonable and proportionate in the circumstances.

Right to privacy – disclosure of information

The Committee considers the limitations on the right to privacy proposed by clause 61(7) of the Bill have not been demonstrated to be a proportionate measure.

Clause 61(7) provides that the ABC Commissioner's ability to give examination notices that may require the disclosure of information or documents is not limited by any provision of any other law that prohibits the disclosure of information, except to the extent that the provision expressly excludes the operation of clause 61(7).

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[18] *Royal Commission into the Building and Construction Industry* (2003), Volume 9, Page 237.
[19] *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011 Edition, Attorney-General's Department, Commonwealth Government, Page 37.
[20] Ibid, Page 38.

The Government's view is that the proportionality of this measure must be considered in light of the unique challenges posed by the building and construction industry. As has been demonstrated above, the ability of the ABC Commissioner to exercise compulsory information gathering powers was a central recommendation arising from the 2003 Cole Royal Commission. In particular, the Cole Royal Commission found that the building and construction industry presents a particular regulatory challenge due to the persistence of intimidation and violence within the industry and a culture of secrecy that made it extremely difficult for regulators to enforce the rule of law. The ability of the regulator to obtain all information or documents relevant to an investigation, including those the disclosure of which may otherwise be limited by other laws, is critical to bringing respect for the rule of law to the building and construction industry.

In recognition of the broad scope of this power, clause 106 of the Bill sets out what a person may do with information that has been obtained through the use of the examination notice power in clause 61. In particular, clause 106 provides that it is a criminal penalty for a person to make a record of information obtained as a result of an examination notice or disclosure such information except in a narrow range of circumstances. This is an important safeguard that supports the proportionality of the examination notice process generally and the operation of clause 61(7) specifically.

Finally, information obtained under an examination notice is subject to use and derivative use immunity in relation to both criminal and civil proceedings (discussed in more detail below). As such, it is the Government's view that the limitation on the right to privacy proposed by clause 61(7) is proportionate due to the unique challenges posed by the building and construction industry and the strong safeguards that have been adopted around the use of this information.

The Committee also considers the limitations on the right to privacy proposed by clause 105 of the Bill have not been demonstrated to be a proportionate measure. In raising this issue, the Committee has expressed particular concern that clause 105 also permits disclosure of information that may have been obtained by a specified range of persons and does not limit the circumstances within which information may be disclosed to assist in administration or the enforcement of a law.

The ABC Commissioner and the Federal Safety Commissioner will be responsible for deciding whether the disclosure is appropriate, providing a significant safeguard around the potential disclosure of information obtained by a person prescribed by clause 105. Information may be disclosed to the Minister or the Department in a limited range of circumstances, or to another person if the ABC Commissioner or the Federal Safety Commissioner reasonably believes that it is necessary and appropriate to do so for the purposes of the performance of their functions or the exercise of their powers, or where the disclosure is likely to assist in the administration or enforcement of a law of the Commonwealth, a State or Territory.

As discussed above, it is important that the ABC Commissioner and the Federal Safety Commissioner are able to disclose information to a wide range of law enforcement officials. In practice, information is likely to be disclosed to:

- the Australian Securities and Investments Commission;
- the Australian Competition and Consumer Commission;
- the Australian Crime Commission;
- Comcare, and state and territory work health and safety regulators;
- the Fair Work Ombudsman;
- the Federal Police; and
- State and Territory police.

It is not appropriate to provide a list of particular laws because of the complexity of the building industry and the wide range of laws that are relevant to its operation. The disclosure provisions are reasonable and proportionate measures in pursuit of the Bill's objective to increase respect for the rule of law in the building and construction industry and to facilitate law enforcement activities of other relevant agencies.

Right to privacy – powers of entry into premises

The Committee has sought further information about why consent or a warrant is not required before inspectors are able to enter premises and why procedural safeguards for the exercise of entry powers have not been included in the Bill.

The powers of inspectors to enter premises in the Bill are primarily based on the provisions of the Fair Work Act, with some minor amendments to reflect the approach taken in the *Building and Construction Industry Improvement Act 2005*. The approach in the Bill is therefore consistent with a long history of inspector powers in workplace relations legislation, going as far back as the *Conciliation and Arbitration Act 1904*.[21] Similar powers are also found in other industrial legislation such as the *Work Health and Safety Act 2011*.

It is the Government's view that entry of premises only by consent or warrant is inappropriate in an industrial relations context where inspectors will primarily use their entry powers to follow up on confidential unofficial complaints or formal claims, to make inquiries, to provide information and deal with claims and complaints, generally through voluntary compliance. If a warrant requirement were to be introduced, it would significantly impair the ability of inspectors to efficiently and effectively investigate and resolve claims. Furthermore, limited resources would have to be diverted from investigation and compliance work to the task of obtaining warrants.

The Committee has noted that the Senate Scrutiny of Bills Committee sought advice on whether senior executive authorisation for the exercise of the powers had been considered. While this would provide an additional safeguard for the use of these powers by inspectors such a requirement would also significantly impair the ability of inspectors to efficiently and effectively utilise their powers to investigate claims. In particular, the unpredictable nature of industrial action in the building and construction industry means that inspectors may be called upon to utilise their powers and exercise functions at very short notice and any administrative constraints upon their ability to do this would severely hamper their effectiveness.

The Senate Scrutiny of Bills Committee also sought views on whether consideration had been given to developing guidelines for the implementation of inspector powers, especially given the persons who exercise these powers need not be trained law enforcement officers. The transitional arrangements contained in the Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013 provide for the continuity of appointment of Fair Work Building Industry Inspectors and Federal Safety Officers. As such, ABC Inspectors and Federal Safety Officers will continue to be well trained, highly professional individuals who undergo extensive professional development to ensure they exercise their powers and perform their functions in an appropriate manner. The level of responsibility and the powers they can exercise, however, are not comparable to those of law enforcement officers. It is therefore not considered necessary to adopt such formal guidelines.

Where the ABC Commissioner or the Federal Safety Commissioner is of the view that parameters need to be placed around the use of these powers or exercise of these functions the Bill provides that he or she will be able to give directions of both general application or in relation to particular cases. The Commissioners will also be able to adopt administrative guidelines to inform inspectors on the use of their powers and exercise of their functions. Any such document would be designed to provide practical, up-to-date advice to inspectors which would only be possible if the document is able to be updated easily to best reflect the issues facing the inspectorate. This would not be possible if the document was a legislative instrument.

On the basis of the above careful analysis and consideration, the Government is satisfied that the inclusion of entry powers for inspectors without warrant or consent serve the legitimate objective of ensuring that participants in the building and construction industry observe the workplace relations laws that apply to that industry. These entry powers will contribute to the achievement of that

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[21] *Conciliation and Arbitration Act 1904*, section 41.

objective by ensuring that inspectors are able to respond to issues as they arise in a timely and effective manner without undue obstruction or burden. This is a reasonable and proportionate measure as it represents a continuation of long-standing inspector powers in industrial legislation, such powers can be subject to directions from the Commissioners and the use of these powers will be subject to oversight by the courts.

Right to a fair hearing – imposition of a burden of proof on the defendant

The Committee has sought further information about the practical operation of existing provisions in the Fair Work Act that are similar to the proposed new section 57 ('reasons for action to be presumed unless proved otherwise'), and in particular whether any difficulties have arisen for defendants on whom a legal burden has been placed that have affected their right to a fair hearing under article 14(1) of the ICCPR.

A recent example of the operation of section 361 of the Fair Work Act is provided by the case of *State of Victoria v Construction, Forestry, Mining and Energy Union [2013] FCAFC 160*. One of the primary considerations facing the Federal Court when hearing this appeal was whether the state of Victoria had attempted to coerce a building industry contractor in contravention of section 343 of the Fair Work Act.

In relation to a breach of section 343 of the Fair Work Act, section 361 of the Fair Work Act provides that:

> *(1) If:*
>
> *(a) in an application in relation to a contravention of this Part, it is alleged that a person took, or is taking, action for a particular reason or with a particular intent; and*
>
> *(b) taking that action for that reason or with that intent would constitute a contravention of this Part;*
>
> *it is presumed, in proceedings arising from the application, that the action was, or is being, taken for that reason or with that intent, unless the person proves otherwise.*

In this case, the defendant (the State of Victoria) sought to rebut the presumption in section 361 of the Fair Work Act through the testimony of Ms Catherine Cato as to her actual intentions as the person responsible for liaising with Eco Recyclers (the party it was alleged that Victoria was attempting to coerce). The State of Victoria was able to collect and present this evidence before the Court and, in considering the presumption in section 361 of the Fair Work Act in light of the evidence led by the defendant, Justices Buchanan and Griffiths found that:

> *"When the evidence is considered as a whole, it seems clear that there was no evidence of any direct statement by Ms Cato to the effect that she wished Eco to vary the Eco Agreement, much less that she set out to achieve that result by prevailing over Eco to achieve it."*[22]

Furthermore, the Full Bench's decision in this matter clarified the operation of the reverse onus by stating that Victoria was required to prove, on the balance of probabilities, the non-proscribed reason that it alleged was the operative reason for its actions rather than disprove the various alternative reasons that may be alleged. In particular, Justices Buchanan and Griffiths stated that:

> *"The primary judge also reasoned (at [243]-[246]) that Ms Cato must be taken to have intended Eco would take steps to vary the Eco Agreement because she should be taken to have intended the likely consequences of her actions. In our respectful view, this*

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[22] *State of Victoria v Construction, Forestry, Mining and Energy Union [2013] FCAFC 160* at para 84.

approach to the ascertainment of Ms Cato's motivation, and the attribution to her of an intent thereby to coerce Eco and its employees, was also erroneous. The search was for Ms Cato's real or actual intent or intents... [t]he State bore the onus of displacing the presumption put in place by s 361 of the FW Act, but it was not required to displace an attributed intent derived from presumptions of a different kind."

This example has been provided to assist the Committee in its consideration of clause 57 because it can be expected that courts will take a similar approach in relation to clause 57. This will ensure that the clause will not operate unfairly or present practical difficulties for defendants.

Prohibition against self-incrimination

The Committee has sought further information about the use that has been made of the compulsory evidence gathering powers under the Building and Construction Industry Improvement Act 2005 and the Fair Work Act, as well as further explanation of how the abrogation of the privilege is justifiable.

In relation to examination notices issued under the *Building and Construction Industry Improvement Act 2005* and subsequently under the *Fair Work (Building Industry) Act 2012*, a total of 210 examinations have been conducted as at 27 February 2014. Of these:

- 102 examinations relate to 43 matters in which penalty proceedings have been instituted in a court;
- 5 examinations relate to a section 67 (ABC Commissioner to publish non-compliance) report published by the ABCC;
- 101 examinations relate to other closed matters (no court proceedings or section 67 report); and
- 2 examinations relate to one ongoing investigation.

The number of examinations per financial year are as follows:

Year	**No. of examinations**
2005-2006	27
2006-2007	21
2007-2008	54
2008-2009	59
2009-2010	37
2010-2011	6
2011-2012	4
2012-2013	0
2013-2014	2
Total	**210**

Aside from the examination notice power, clause 77 provides that both Federal Safety Officers and ABC inspectors are able to require a person, by notice, to produce a record or document as part of their day-to-day investigative and compliance functions. This is consistent with the power of

inspectors to require persons to produce records or documents contained in section 712 of the Fair Work Act. The use of evidence gathering powers by inspectors under both the *Building and Construction Industry 2005* and the Fair Work Act are not reported as they are used as part of the day-to-day operations of the inspectorate.

The Committee has also sought views on provisions of the Bill that abrogate the privilege against self-incrimination.

As highlighted by the Committee, the Cole Royal Commission considered that the abrogation of the privilege against self-incrimination was necessary on the grounds that the regulator would otherwise not be able to adequately perform its functions due to the closed culture of the industry. Although more than a decade has passed since the final report of the Cole Royal Commission was tabled in Parliament in March 2003, the findings of the Cole Royal Commission are as relevant today as they were at the time of their initial publication. Industrial action still remains significantly higher than in other sectors of the Australia economy with the current rate of construction disputes at four times the all industries average as outlined in detail at pp3-4 of this submission.

The privilege against self-incrimination is clearly capable of limiting the information that may be available to inspectors or the regulator, compromising their ability to monitor and enforce compliance with the law. The gathering of information will be a key method of allowing inspectors to effectively investigate whether the Bill or a designated building law is being complied with and to collect evidence to bring enforcement proceedings. It means that all relevant information is available to them. If the ABCC is constrained in its ability to collect evidence, the entire regulatory scheme for the industry may be undermined. Finally, the approach adopted in the Bill is also consistent with the approach in section 713 of the Fair Work Act, as well as the *Work Health and Safety Act 2011* and the *Competition and Consumer Act 2010*.

Right to a fair hearing

The Committee has advised that it considers the pecuniary penalty for Grade A civil penalties might be characterised as criminal for the purposes of human rights law. This would require proceedings for their enforcement to comply with articles 14 and 15 of the ICCPR.

The Government reiterates the view expressed in the Statement of Compatibility with Human Rights that the Bill's civil penalties should not be considered criminal penalties for the purposes of international human rights law. This position is based on an assessment of the penalties in the Bill against the criteria that have been promulgated by the Committee in its *Practice Note 2 (Interim)*.[23]

That said, it is the Government's view that the Bill complies with the requirements of articles 14 and 15 of the ICCPR. In particular:

- All persons against whom a contravention of a civil penalty provision is alleged under the Bill are equal before the courts, and all persons are entitled to a fair and public hearing by a competent, independent and impartial tribunal in the form of the Federal Court, the Federal Circuit Court, a Supreme Court of a State or Territory and a District Court, or Country Court, of a State.
- Anyone alleged to have contravened a provision of the Bill will be presumed innocent until proven guilty according to the law. While the Bill does impose a burden of proof on defendants in some situations, as discussed above it is the Government's view that this is an appropriate and proportionate measure in support of a legitimate objective.
- Persons alleged to have contravened a provision of the Bill will:
  - be informed promptly and in detail of the allegations against them in accordance with the applicable rules of court;
  - have adequate time and facilities to prepare their defence;

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[23] *Building and Construction Industry (Improving Productivity) Bill 2013*, Statement of Compatibility with Human Rights, Pages 56-58.

- be tried without undue delay;
- be tried in their presence and with legal representation if they so choose;
- be free to examine, or have examined, witnesses and to bring witnesses of their own;
- to have the assistance of an interpreter if he or she cannot speak the language used in the court; and
- not be compelled to testify against himself or herself or to confess guilt, subject to the abrogation of the privilege against self-incrimination discussed above that, in the government's view, is a proportionate measure in support of a legitimate objective.

- Anyone found by a court to have contravened a provision of the Bill will have the right to have their conviction appealed by a higher court.
- No one shall be liable to be tried or punished again for an offence for which he or she has already been finally convicted or acquitted in accordance with the law. Clause 89 of the Bill provides that criminal proceedings may be commenced against a person for conduct that is the same, or substantially the same, as conduct that would constitute a contravention of a civil remedy provision regardless of whether an order has been made under the bill in relation to the contravention. This is a standard provision of Commonwealth legislation, with comparable provisions existing in both the Fair Work Act and the *Work Health and Safety Act 2011*. This recognises the importance of criminal proceedings and criminal penalties in dissuading and sanctioning contraventions and ensures that criminal remedies are not precluded by earlier civil action.

Examples of Unlawful Conduct in the Building and Construction Industry

Brookfield Multiplex FSH Contractor Pty Limited v Joseph McDonald and others (WAD44/2013)

- On 10 March 2014, Justice North restrained CFMEU Construction and General Division WA Branch Assistant Secretary Joe McDonald from entering the premises of four named Brookfield Multiplex companies, in addition to related entities, in the Federal Court of Australia.
- The consent orders declared that the union, Mr McDonald and the branch's other assistant secretary, Graham Pallot, had breached s348 of the Fair Work Act when they coerced Brookfield Multiplex — the head contractor on the Fiona Stanley Hospital project in Perth — to force subcontractor G&N Formwork to pay for the 24/7 accident cover for a worker who fell off his motorbike and went into a coma
- The orders also declared that Mr McDonald, Mr Pallot and the union had breached s417 (1)(a) by organising industrial action at the site.
- Mr McDonald was also liable under s550 (2)(a), (b) and (c) as an accessory to the CFMEU's breach of s417(1)(a).
- Justice North ordered the union to pay $250,000 in damages to Brookfield Multiplex.
- He also indicated that the parties had agreed, subject to the court's approval, on a penalty range of $9,000 to $10,500 for Mr McDonald, $3,000 to $4,500 for Mr Pallot, and $45,000 to $52,000 for the union.

Brookfield Engineering and Infrastructure v Joseph McDonald and others (WAD170/2013)

- On 10 March 2013, Justice North of the Federal Court of Australia made similar findings to his earlier order of the same day about Joe McDonald's activity at Brookfield Multiplex Engineering and Infrastructure's Mundaring water treatment plant project, accepting the parties' agreed statement of facts that said he organised a strike in March 2013 to coerce the company to stop work on the site and continue paying the workforce until it investigated a water tanker crash.
- Organiser Vinnie Molina and the union had also engaged in the same unlawful conduct, he found, and Mr McDonald and Mr Molina were liable as accessories under s550(1)(a).
- He ordered the CFMEU to pay $250,000 in compensation for those contraventions.
- The parties agreed that, subject to court approval, Mr McDonald would be fined $18,000 to $21,000 for the Mundaring contraventions, Molina $6000 to $9000 and the union $90,000 to $105,000.

Director of the Fair Work Building Industry Inspectorate v Myles & Ors

- On 28 February 2014, the now Builders Labourers Federation Assistant Secretary Kane Pearson and official Joseph Myles were each penalised $4950, another official Shane Treadaway was fined $2200 and the CFMEU was penalised $26 400 for their conduct at a $350 million Laing office and retail building project at 123 Albert Street, Brisbane.
- The officials entered the site to investigate alleged safety concerns. In handing down the liability decision on 20 December 2013, Judge Burnett of the Federal Circuit court of Australia said: "Plainly, these experienced industrial organisers were more interested in grandstanding by engaging in provocative behaviour in the presence of workers on the site, notwithstanding their presence onsite purportedly being in respect of safety issues. Undoubtedly their behaviour was directed more to recruitment and membership retention than any other object."
- The Court found that Mr Pearson acted in an improper manner by being rude and offensive, including by swearing at and insulting a site foreman, "you're a d***head, I'm not dealing with you I want to talk to the [project manager]" and by calling the site foreman a "f***wit", "deadbeat" or "d***head".
- Mr Pearson was also found to have intentionally hindered or obstructed or acted in an improper manner by causing the disruption to the work scheduled to take place at the site, soliciting business, and contributed in a substantial way to the disruption on the site by imploring workers to down tools.

- When Mr Myles was reminded about protective clothing he should have been wearing, he replied: "I don't have to answer to you, you f***ing little grub". Mr Myles said to workers, urging them not to return to work: "One in all in, we're not going back to work."
- Mr Treadaway walked around the site with an EFTPOS machine.
- When delivering his penalty judgment, Judge Burnett said words to the effect that the union's lack of corrective action showed a gross failure of corporate governance and that if a large company did this, there would be gross public outcry.

Director of the Fair Work Building Industry Inspectorate v Joseph McDonald, the CFMEU and the CFMEUW

- On 20 December 2013, the CFMEU, its official Joseph McDonald and the CFMEUW, were penalised a total $193,600 for their role in unlawful industrial action at Citic Pacific's Sino Iron Ore Pilbara site. The proceedings were instigated by the Director of Fair Work Building and Construction (FWBC), Mr Nigel Hadgkiss.
- Mr McDonald, the CFMEU's Assistant Secretary attended and entered the site on 21 February 2012. On multiple occasions an industrial relations consultant asked Mr McDonald to leave the site because he did not have a right of entry permit or permission to be there. Mr McDonald ignored requests to leave the site and at one time responded "I haven't had one for seven years and that hasn't f***ing stopped me".
- He addressed an unauthorised meeting of 87 site employees and after his speech 77 workers walked off the job. The workers were reportedly concerned about moves by subcontractors to lengthen shifts, and claims that Chinese workers were being paid less than their Australian counterparts.
- In the penalty decision handed down in the Federal Court, Justice Barker said: "Mr McDonald's conduct involves a calculated and careless attitude to the law governing the employment of persons by employers. It was calculated to cause disruption to employers carrying out building and construction work on the site and it was careless in that McDonald was aware of the legal consequences of his actions and pursued them nonetheless".
- In a statement issued after the judgment, the FWBC Director said, "Since 2005, Mr McDonald and the CFMEU have been collectively penalised more than $1 million for action Mr McDonald has been involved in. This does not include legal costs Mr McDonald and the CFMEU have been ordered to pay".

Brookfield Multiplex FSH Contractor Pty Ltd v McDonald

- On 17 December, CFMEU official Joseph McDonald was fined $40,000 for breaching an order issued in February 2013 forbidding him from coming within 100 metres of Brookfield Multiplex's Fiona Stanley Hospital site in Murdoch, Western Australia.
- The contempt penalty followed a $50,000 Federal Court fine issued in September 2012 to Mr McDonald for breaching orders not to take industrial action against Diploma Construction.
- Justice Gilmour said Mr McDonald had demonstrated a "pattern of indifference" to court orders and stated, "McDonald seems to have learned nothing following the imposition of penalties in *Diploma*".
- Referring to the earlier fines, Justice Gilmour described Mr McDonald's "careless attitude to his obligations to the Court" and failure to abide by the injunctions as "significant manifestations" of his contempt.
- Mr McDonald responded by saying, "the CFMEU is a militant union and our members expect me to fight for them. I will continue to fight to bring important matters to the attention of the public and to resolve issues for our members. I will not apologise for the work I do".

Cozadinos v CFMEU

- On 21 November 2013 the CFMEU was fined $20,000 and agreed to pay the applicant's legal costs in the sum of $42,500 after they were found to have attempted to coerce Bendigo Scaffolding to enter into an enterprise bargaining agreement with the union and to ensure all of its employees were members of the CFMEU if they wished to commence work on a Becon Construction site.

- In handing down the penalty Justice Tracey stated, "(The CFMEU) has, as I have already outlined, a deplorable record of contraventions of the BCII Act and similar legislation. The union has not displayed any contrition or remorse for its conduct. The contravention is serious. It involved a successful attempt, on the part of the CFMEU, using threats, to prevent a company, which was otherwise able and willing to do so, to perform work without first entering into an enterprise bargaining agreement with it and unless all of the company's employees were members of the union."

Grocon

- In August 2012, the CFMEU dispute and blockade of the Myer Emporium site resulted in violence in the streets of Melbourne, with militant protestors intimidating the community and confrontations between picketers and police, including attacks on police horses. The dispute also disrupted three other Grocon sites in Melbourne (including the Comprehensive Cancer Centre project in Parkville).
- Grocon's employees were not involved in the dispute or blockade and its subcontractors were unwilling to enter the site because of fears for their personal safety and other potential repercussions. The blockade resulted in serious disruptions to the community and employees were unable to enter or leave the site without the presence of a contingent of police. The blockade was not lifted until 7 September 2012.

Grocon & Ors v CFMEU & Ors

- On 24 May 2013, the Supreme Court found the CFMEU guilty on all five charges of contempt of court orders following proceedings initiated by Grocon. On 31 March 2014, the CFMEU was penalised $1.25 million for its contempts and was ordered to pay costs. Fair Work Building and Construction initiated action in the Federal Court to recover damages incurred by Grocon's subcontractors.
- Court evidence, submitted by a witness of the events and which Justice Cavanough noted he was satisfied beyond reasonable doubt to have occurred, states CFMEU official John Setka was, "running and directing his people in and around the police line". The same witness also saw "the police horses getting pushed backwards as a largish group of people surged towards them".
- CFMEU official John Setka was also cited in evidence as calling Grocon workers who refused to join the blockade as "rats and "dogs". He allegedly said to a crowd of Grocon staff and employees standing on the north east corner of Swanston Street, "You f$%cking dogs. You should be over with us".

Boral

- In February 2013, it was alleged that the CFMEU had threatened a 'black ban' on Boral and other concrete related sub-contractors if they worked on Grocon sites in Victoria.
- On 27 February 2013, Justice Hollingworth of the Victorian Supreme Court granted an injunction against the CFMEU for an alleged black ban it had organised against Boral supplying concrete on any Victorian construction site.
- On 4 March 2013 orders were handed down by Justice Cavanough of the Victorian Supreme Court restraining the CFMEU from preventing, hindering or threatening to prevent or hinder the supply or probable supply of services to five Grocon Victorian sites: Myer Emporium, 150 Collins Street, VCCC site in Parkville, McNab Avenue in Footscray and the Box Hill ATO site.
- These orders were in addition to injunctions that apply to three of the four sites that restrain the CFMEU from picketing and blocking the site.
- On 5 April 2013 Justice Hollingworth broadened her previous injunction against the CFMEU after Boral argued that the CFMEU had been circumventing her earlier order by hindering supply of Boral supplies, such as quarrying materials. Justice Hollingworth ordered that the supply of all Boral products to any Victorian building site must not be hindered or interfered with by the union.
- In August 2013, Boral filed contempt proceedings in the Victorian Supreme Court alleging breaches of the Supreme Court orders. Each of these matters was brought under industrial tort and not under any workplace law.

- The alleged 'black bans' have been linked to the broader campaign by the CFMEU against Grocon and as part of a 'Plan B' strategy to follow on from the blockade at the Myer Emporium site in 2012.
- Boral has asked the court to find that the union's alleged blockade of the Regional Rail Link site in Melbourne's western suburbs on 16 May was in contempt of orders made by Justice Elizabeth Hollingworth on 7 March 2013 and 5 April 2013.
- On 28 October 2013, the Victorian Attorney-General joined Boral's contempt proceedings.

Little Creatures

- In November 2012, the Little Creatures brewery site in Geelong experienced a violent dispute where picketers were accused in court documents of making throat-cutting gestures, threats to stomp heads in, workers being told they were dead, and motor vehicles were kicked and damaged. On social media, a threat was also made to boycott a local store for providing food to the workers on site. The picket line was led by Mr Tim Gooden of the Victorian Trades Hall Council. 'Community activists' and members of various unions were also present at the picket.
- Workers required the assistance of police to enter the site and to be escorted off the site. On 16 November 2012, despite Supreme Court Orders, the front gates of the site were padlocked shut by protestors and some damage was reportedly done to the site. Picket activity ceased on 17 November 2012.

City West Water

- In February 2013, the $40 million City West Water project in Werribee experienced a dispute in which protestors threatened people with 'Columbian neckties'. The dispute became so heated that workers had to be flown in by helicopter and the protestors had to eventually be dispersed by the Police.
- Central to the dispute were four Filipino workers hired on 457 visas to work on the site by one of the subcontractors. Protestors argued that the work should be done by locals and that these labourers were working in unsafe conditions.
- Fair Work Building and Construction (FWBC) initiated proceedings in the Federal Court of Australia seeking an injunction against union involvement in the picket line. On 14 February 2013 Justice Marshall granted an interlocutory injunction ordering the AMWU and their organiser Tony Mavromatis be restrained from preventing or hindering access to the project until the matter was settled by the court.
- In evidence submitted to the court on 14 February 2014 the AMWU was accused of breaching s355(a) of the *Fair Work Act 2009* by attempting to coerce the contractor to sack the Filipino workers and replace them with 'locals'.
- The parties agreed to settle the matter on the basis that the AMWU agreed to pay $62,000 compensation to the contractor in charge of the site with no admission of wrongdoing by the AMWU. The matter was subsequently discontinued by the FWBC.

Queensland Children's Hospital

- The $1.4b Queensland Childrens Hospital project in Brisbane was affected by unprotected industrial action since February 2012, which escalated from 6 August 2012. A picket line was in place at the site until work resumed. The CFMEU did not claim responsibility for organising the picket; instead, it was referred to as a 'community picket'.
- The dispute resulted in delays to the project and work did not resume on the site until 3 October 2012. The key issues in the longstanding dispute were job security, site rates and Abigroup's non-union agreement.
- The dispute was reported to have cost Abigroup $300,000 a day, or more than $16 million over the duration of the dispute, as a result of delays caused by the picketing.

Lend Lease Adelaide

- The Fair Work Commission found that visits by CFMEU officials to four Lend Lease sites on 30 October 2013 in Adelaide "constituted a planned and resource intensive series of visits involving intimidatory tactics in breach of right of entry requirements" and found that officials – at the

union's direction - engaged in "serious, deliberate and sustained misuse of entry rights" at several South Australian projects.

- The Fair Work Commission also found that a CFMEU official had threatened unprotected industrial action at the Tonsley Park Flinders University building site unless Lend Lease moved a CFMEU flag to a more prominent position.
- In response Senior Deputy President Matthew O'Callaghan instigated a review under s508 (*FWA may restrict rights if organisation or official has misused rights*) of the *Fair Work Act 2009* of entry by South Australian and interstate CFMEU officials at four of the company's projects in Adelaide. The review has been suspended pending the hearing of union appeals.

John Holland Brisbane

- John Holland and the CFMEU are in dispute at the projects at Gallipoli Barracks and Creative Industries Precinct at QUT Kelvin Grove over the employer's refusal to enter into a union agreement.
- On 9 November 2013, the Federal Court issued an interlocutory injunction binding the CFMEU and four of its organisers from engaging in industrial action.
- There appeared to be an informal picket line at the gates of each site. It is understood that none of the subcontractors' workers were willing to cross the lines.
- Fair Work Building and Construction has commenced an investigation in relation to alleged breaches of a Fair Work Commission order issued on 29 October 2013 to stop unprotected industrial action at the Gallipoli Barracks site.

John Holland Melbourne

- In February 2009 a dispute emerged when John Holland refused to recognise a wage deal struck by the CFMEU and AMWU with labour hire company Civil Pacific Services, a subcontractor on the Westgate Bridge project in Melbourne. The agreement contained an hourly wage rate of $36.97, nearly $10 an hour more than the one negotiated by John Holland with the AWU, the union that had site coverage.
- In a bid to force John Holland to negotiate, the CFMEU and AMWU set up a picket on 6 February 2009, which began what ended up being a three month long industrial dispute. On 27 February 2009 Civil Pacific Services then withdrew from its contract with John Holland.
- Holland responded by seeking a series of Federal Court injunctions demanding the action cease so work on the project by the remaining contractors could continue unhampered. The Court granted an initial injunction on February 6, charging the CFMEU and AMWU with coercing Civil Pacific Services and John Holland into making an agreement and ordering industrial action to end. The strikers defied the order.
- The regulator at the time, the Australian Building and Construction Commission (ABCC), brought charges against the unions and the workers involving 100 breaches of the *Building and Construction Industry Act 2005* and the *Trade Practices Act 1974*. During the dispute, ABCC inspectors followed strikers, took photos and made recordings of picketers.
- On 30 April 2009 picketing was suspended and negotiations commenced between the unions and John Holland. On 17 May 2009 an agreement was reach such that the unions agreed to a no-strike clause to be included in the agreement in return for shared coverage of the site with the AWU.
- The clause stated the unions would not "threaten, organise, encourage, procure or engage in any industrial action" including picketing and protests or actions to discourage people from working on John Holland construction company projects. The agreement included a provision that should the clause be breached, the unions would be liable to pay thousands of dollars to a charity organisation (up to $400,000 for the AMWU and up to $250,000 for the CFMEU).
- On 28 July 2010 the Federal Court of Australia issued fines totalling $1.3 million against the CFMEU and AMWU and several union officials for their role in the dispute.
- In evidence submitted to the court by Gary Marshall the General Superintendent, Southern Region, John Holland he stated:
  - *"Based on my experience in the civil construction industry, it is a well-known and well accepted position within this industry that given the industrial strength of the CFMEU, if a sub-contractor that works in civil construction or any person that works in civil construction*

were to cross a CFMEU supported or endorsed picket line, the CFMEU would take steps to ensure that such sub-contractor or person did not in the future work in the civil construction industry."

- Video evidence considered by Justice Jessup, included footage showing CFMEU representative Gareth Stephenson addressing protestors by way of a megaphone during which he said:
  - *"Ok, it looks like we've got 250 of 'em and ah, I think they're expecting similar numbers today but this time we've got them outnumbered and I can tell you we've got around 100 people at the foot of the Westgate Bridge who are protesting there so we've got people all over the place including around the corner...[rest of sentence inaudible]...and there's also 150 riot police around the corner. Now, um, rather oddly, the police have asked us what our intentions are. Um, now I think it's pretty plain, we're expecting that they're going to try and get a bus load of scabs down here and through that gate into the compound down there and uh, we're going to try and stop 'em...."*.
- In presiding over the case, Justice Jessup, noted that the conduct of the protestors at the project head office was *"manifestly intended to intimidate"*. He also noted that conduct at the head office by the picketers *"included the application of direct physical force to prevent vehicles leaving the project head office and wilful damage to property. It was characterised by a readiness – indeed, a conspicuous intent – to overwhelm the attempts of the police to secure the passage of these vehicles and to deny the ability of fellow workers to engage in their lawful occupations"*.

Brookfield Multiplex – Southeast Queensland

- Brookfield Multiplex and the CFMEU are in dispute at three major Queensland construction sites in Brisbane and the Gold Coast.
- The dispute is centred around 'snap site walk-offs' by CFMEU members amid allegations of intimidation and bullying of non-union workers at a site at Indooroopilly.

- Employees and subcontractors engaged by Brookfield engaged in industrial action in the form of a stoppage of work at the Indooroopilly Redevelopment Project, Williams Street Project and Ho Bee Residential Project.

- On 28 February 2014, the Fair Work Commission issued an order under s418 to stop unprotected industrial action at the Indooroopilly Redevelopment Project. Fair Work Building and Construction is investigating.

Bikie Gangs and Criminal Links

- *The Age* reported on 22 May 2013 that three members of the outlawed Comanchero bikie club were involved in a suspected standover attempt to recover a disputed debt with the private company of Master Builders Australia Federal Vice President, Mr Trevor Evans. The attempt occurred in Mr Evan's private home and was caught on closed circuit television.

- The *Sunday Age* reported on 2 March 2014 that two members of the Comancheros Motorcycle gang and two members of the Hells Angels' Darkside chapter are linked to plastering firms in Melbourne. The same report alleges that hundreds of Chinese workers are being exploited by some of Australia's largest building firms in a lucrative rort that has seen criminal figures and motorcycle gangs infiltrate Victoria's plastering industry.

- A further report on 16 March 2014 alleges that cheap Chinese workers have been exploited to build the new Royal Children's Hospital and the Docklands headquarters of Medibank Private, which have received more than $1.4 billion in Government funding.

- It has also been alleged that both projects have engaged a rogue subcontractor who has failed to pay millions of dollars in tax after collapsing four times in the past five years.

Allegations of corruption and criminal figures in the building industry

- An investigation published in January and February 2014 by Fairfax newspapers and the ABC's *7.30* details allegations of widespread corruption, including standover tactics and kickbacks, and the presence of criminal elements and outlaw bikie gangs in the building and construction industry in New South Wales and Victoria.
- The allegations include death threats being made against a former CFMEU official for raising concerns about his union colleagues helping a notorious Sydney crime figure win work on construction sites.

Examples of allegations of unlawful and improper conduct

Kickbacks

- A senior site manager allowed a union delegate to influence which subcontractors won work. The delegate and his associates are understood to have received various inducements from the subcontractors in return (*Sydney Morning Herald*, 1 February 2014, Page 3).
- A supervisor used his influence to direct work to a subcontractor linked to the Hells Angels bikie gang in return for kickbacks (*the Age*, 1 February 2014, Page 1).
- A senior site supervisor getting between $5 and $10 an hour for every piece of machinery he placed on the $600 million Queensland Coal Connect project in 2008 (*Sydney Morning Herald*, 1 February 2014, Page 3).
- Building company employees receiving a kickback from subcontractors for every worker they employ on site (*Sydney Morning Herald*, 1 February 2014, Page 3).
- CFMEU Victorian Secretary, Jon Setka, has denied claims from Andrew Zaf that he received free roofing materials in return for peace on building sites (Herald Sun, 31 January 2014, Page 4). Mr Zaf was stabbed on 15 March 2014, with Police indicating that the attacker yelled "you're dead" before the attack (*Herald Sun*, 17 March 2014).
- CFMEU organiser Danny Berardi resigned after claims he received free work on his house in return for access to multi-million labour hire contracts (Herald Sun, 31 January 2014, Page 4).
- At least six people from the CFMEU Victorian division, including senior officials and shop stewards, have received kickbacks from corrupt companies that needed their support to win projects (*the Age*, 28 January 2014, Page 1)
- Union figures have also been given premium tickets to sporting events worth several thousand dollars and money to gamble at casinos by the owners of companies seeking their support (*the Age*, 28 January 2014, Page 1).
- Relatives of criminals and associates of CFMEU figures have also been employed by labour hire and traffic management companies in return for union support to win contracts (*the Age*, 28 January 2014, Page 1)
- A NSW CFMEU official and his family had accommodation on the Gold Coast paid for by the Lack Group in return for getting union support (*The Age*, 10 February 2014, Page 1)
- A senior manager from large civil construction firm Winslow received bribes worth at least $60,000, including cash payments and a vintage hot-rod, in return for rigging multi-million dollar contracts and leaking tender details to subcontractors (*the Age*, 10 February 2014, page 1)
- Former national president of the Plumbing Trades Employees Union sought kickbacks from several subcontractors in return for helping them win work on sites across Victoria, including the desalination plant (*the Age*, 10 February 2014, Page 1).
- A CFMEU official threatened to set up illegal picket lines outside the building sites of Sydney developer Ralan Group unless the company paid the bills of subcontractors of Steve Nolan Constructions. The builder has been placed in administration (*Australian Financial Review*, 14 February 2014, Page 5)
- The *Sydney Morning Herald* reported on 3 March 2014 that business identity Jim Byrnes helped to buy a racehorse for CFMEU NSW State Secretary, Brian Parker, and builder Denis Delic and then registered the horse in their wives' names to disguise Mr Parker's involvement in the racing venture. The report also claims that Mr Byrnes is planning to identify four senior serving or former CFMEU organisers who have allegedly been bribed by builders when he gives evidence to the Royal Commission into union corruption.

Links to Organised Crime and Bikie Gangs

- A WA mining project has been infiltrated by a Hells Angels-linked subcontractor (*the Age*, 1 February 2014, Page 1).
- CFMEU NSW Secretary Brian Parker accused of giving favourable treatment to an associate George Alex and his Active Labour company. Mr Alex has business links to drug dealers and bikies. Mr Parker denied the allegation. (*Sydney Morning Herald*, 29 January 2014, Page 6).
- CFMEU official Shaun Reardon suspected of having ties with the Black Uhlans bikie gang (*Herald Sun*, 30 January 2014, Page 1).
- A convicted drug dealer with ties to slain gangster Lewis Moran retains a key role with the CFMEU (*Herald Sun*, 30 January 2014, Page 1)
- A major Sydney crime figure on bail for serious drug offences uses a construction company involved with the Bangaroo project to launder illicit profits (*Daily Telegraph*, 29 January 2014, Page 4)
- A former CFMEU official, Brian Fitzpatrick, says he received death threats from another union official after he tried to stop the union's dealings with Sydney crime figure, George Alex (*Sydney Morning Herald*, 29 January 2014, Page 6)
- Police in Queensland are probing links between the construction industry and bikies after a surge in tip-offs from the public following reports. (*Herald Sun*, 3 February 2014, Page 6)
- A murdered Hells Angel boss, Zeljko Mitrovic, won a workplace agreement with the Queensland CFMEU after muscling in on a steel fixing contractor that worked on major Queensland projects (*Courier Mail*, 17 February 2014, Page 6)

Criminal activity

- Building union official and delegate jailed for drug trafficking (*Courier Mail* [Page 8] and *Gold Coast Bulletin* [page 6] – 3 February 2014).
- CFMEU official sacked after being accused of taking $800 profits from vending machines at construction sites (*Herald Sun*, 31 January 2014, Page 4)
- A building union official and a delegate were both jailed for drug trafficking after a major undercover investigation there (Qld) (*Herald Sun*, 3 February 2014, Page 6)
- BLF organiser Wayne Joseph Carter was sentenced to eight years in jail after he and his brother joined (alleged drug ring organiser) Daniel Kalaja in trading in drugs, and BLF shop steward Spike Sinclair was sentenced to 7 years 9 months jail, also in September 2012 (*Gold Coast Bulletin*, 3 February 2014, Page 9)
- Kalaja also used "a friend from the BLF" to score a job on the $1.8 billion taxpayer-funded Gold Coast University Hospital project (*Gold Coast Bulletin*, 3 February 2014, Page 9)

THE HON STEVEN CIOBO MP

Parliamentary Secretary to the Treasurer

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

Dear Senator Smith

Thank you for your recent correspondence, originally directed to the Minister for Immigration and Border Protection, regarding the Customs Tariff Amendment Bill 2014 and the Excise Tariff Amendment Bill 2014. Your letter has been referred to me as I have portfolio responsibility for this matter.

In your letter, you sought information about whether the amendments in the Acts are compatible with the right to work and rights at work of employees. The Committee expressed a concern the increase to the rate of excise and excise-equivalent customs duty may have an adverse impact on the economic viability of businesses, and consequently, on the employment opportunities of workers in those industries.

The Acts increase the excise and excise-equivalent customs duty imposed on petroleum-based oils, greases and synthetic equivalents (oils) that are produced in Australia or imported for domestic consumption. This duty supports the Product Stewardship for Oil Scheme (PSO Scheme), which provides incentives to increase collection and recycling of used oil by providing "product stewardship benefits", or rebate payments. The revenue raised by the duty is used to fund these stewardship benefits, and the Acts ensure the financial sustainability and continuity of the PSO Scheme.

The PSO Scheme was designed to be self-financing but it has recently entered into deficit due to the expansion of the oil recycling industry. If this deficit is not addressed, the Scheme's viability is put at risk.

The Acts do not limit the right to work or rights at work. The Acts do not amend any workplace relations law, change the conditions at work or interfere with the right of everyone to form and join trade unions. The amendments are proportional to achieving their objective as they are unlikely to limit the right to work or the rights at work of any employee. The Acts provide environmental and financial benefits for the oil recycling industry and improvements to the right to work of employees in the recycled oil industry.

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I therefore consider the amendments to be reasonable, necessary and proportionate to achieving a legitimate objective.

I trust this information will be of assistance to you.

Yours sincerely

Steven Ciobo

31 JUL 2014

SENATOR THE HON. ERIC ABETZ
LEADER OF THE GOVERNMENT IN THE SENATE
MINISTER FOR EMPLOYMENT
MINISTER ASSISTING THE PRIME MINISTER FOR THE PUBLIC SERVICE
LIBERAL SENATOR FOR TASMANIA

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

12 AUG 2014

Dear Senator Dean,

Thank you for your letter of 18 June 2014, on behalf of the Parliamentary Joint Committee on Human Rights, concerning the Fair Work Amendment Bill 2014.

The Fair Work Amendment Bill 2014 seeks to deliver on a number of election commitments of the Australian Government that were released some 8 months before the 2013 election and many are recommendations from the Post Implementation Review of the Fair Work Laws conducted under the previous government.

The Report seeks to offer policy advice to Government on a range of matters that appear to be beyond the Committee's Terms of Reference as they pertain to human rights. For instance, suggesting at 1.51 that a review mechanism should be enacted for refusals to grant applications for unpaid parental leave and at 1.73 that the Government, instead of progressing its current policy, should adopt different recommendations of the Fair Work Act Review.

This Bill implements election commitments endorsed by the Australian people and has also been considered by the Senate Legislation Committee specialising in this portfolio area. The suggested policy changes which would potentially be seen as a breach of trust with the Australian people do not immediately spring to mind as matters exciting the application of human rights considerations.

Further, I note that for each Bill that my portfolio has introduced in this Parliament, the Committee has required extensive additional information to what is provided in the Statement on Human Rights in the Explanatory Memorandum. For example, the Fair Work Amendment Bill 2014 includes a 14 page Statement of Compatibility with Human Rights and now attached to this letter are a further 9 pages.

Should the Parliamentary Joint Committee on Human Rights require further information, please contact my adviser, Mr Josh Manuatu, on (02) 6277 7320 or at josh.manuatu@employment.gov.au.

Yours sincerely

ERIC ABETZ

Encl.

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Our Ref MC14-006560

Fair Work Amendment Bill 2014

Please find below responses to each of the Committee's requests for further information.

Right to just and favourable conditions of work

The Committee has requested advice on whether the proposed amendment regarding requests for extension of unpaid parental leave contained in the Fair Work Amendment Bill 2014 are compatible with the right to just and favourable conditions of work.

The proposed amendment seeks to ensure that due consideration is given by an employer to an employee's request for an extension of unpaid parental leave under section 76 of the *Fair Work Act 2009*. The amendment is aimed at achieving the commitment set out in *The Coalition's Policy to Improve the Fair Work Laws* which was published prior to the 2013 federal election and which committed to implementing recommendation three of the Fair Work Review Panel (which proposed this measure). Under the amendment, an employer must not refuse a request for extended unpaid parental leave unless the employee has been given a reasonable opportunity to discuss the request. The Fair Work Review Panel found that only around five per cent of such requests are refused.

A review mechanism is not considered necessary as the proposed amendment seeks to strengthen the existing process to ensure due consideration is given to an employee's request.

Providing a review mechanism will add an additional layer of regulatory burden and could be a disincentive for business to employ women of childbearing age. It is noted that the Fair Work Review Panel did not recommend that a review mechanism be included in the legislation and a review mechanism was not inserted when the previous government made amendments to section 65 of the *Fair Work Act 2009*—which deals with a similar right to request—following that review.

The proposed amendment is compatible with the right to just and favourable conditions of work as it ensures that the interests of the child—and an employee's family and caring responsibilities—are actively discussed in the context of a request to extend an employee's parental leave.

The Committee has requested advice as to whether the amendments providing that untaken accrued annual leave is paid out at the base rate of pay upon termination of employment are aimed at achieving a legitimate objective, whether there is a rational connection between the limitation and the objective and whether the limitation is reasonable and proportionate to achieve the objective.

The objective of this amendment is to restore the longstanding position in place prior to the commencement of the *Fair Work Act 2009* that employees are only entitled to annual leave loading on any annual leave owed to them when their employment ends if expressly provided for in their award or workplace instrument.

The amendment is aimed at achieving the commitment set out in *The Coalition's Policy to Improve the Fair Work Laws* which was published prior to the 2013 federal election and which committed to implementing recommendation six of the Fair Work Review Panel (which proposed this measure).

The current provisions of the *Fair Work Act 2009* have been open to misinterpretation by employees and employers creating uncertainty and confusion and upsetting longstanding arrangements in the federal system. For these reasons, the Fair Work Review Panel recommended that the provisions be clarified to restore the longstanding arrangements. The limitation has a legitimate objective in providing certainty in the treatment of the payment of untaken annual leave on termination of employment under the *Fair Work Act 2009*.

The limitation is reasonable and proportionate for achieving the objective, as those employees affected by this change will be entitled to payment upon termination of employment at the same rate as they were entitled prior to the commencement of the relevant provisions of the *Fair Work*

Act 2009. These employees will continue to be entitled to their base rate of pay for any untaken annual leave owed to them when their employment ends.

The Committee has requested advice as to whether the proposed amendment providing that an employee is not entitled to take or accrue any type of leave or absence under the Fair Work Act 2009 during a period in which an employee is receiving workers' compensation is aimed at achieving a legitimate objective, whether there is a rational connection between the limitation and the objective and whether the limitation is reasonable and proportionate to achieve the objective.

The objective of this amendment is to achieve clarity, uniformity and equality under the *Fair Work Act 2009* in the treatment of national system employees who are absent from work and in receipt of workers' compensation. The current arrangement has led to the inequitable treatment of employees across Australia and led to complexity for employees and employers due to differing entitlements under workers' compensation legislation.

The amendment is aimed at achieving the commitment set out in *The Coalition's Policy to Improve the Fair Work Laws* which was published prior to the 2013 federal election and which committed to implementing recommendation two of the Fair Work Review Panel (which proposed this measure). The amendment will only have an impact on employees in three jurisdictions who are absent from work and in receipt of workers' compensation. In the Government's view, the amendment is aimed at achieving a legitimate objective and is the only reasonable and proportionate way to achieve the objective of ensuring that all employees in the national system have the same entitlement to leave while off work and in receipt of workers' compensation.

The Committee has requested advice as to whether the proposed amendments in relation to individual flexibility arrangements are a reasonable and proportionate limitation on the right to just and favourable conditions of work.

The committee noted that individual flexibility arrangements can benefit both employees and employers but that a difference in relative bargaining power between employers and employees may 'in some cases give rise to a possibility that the provision of a non-monetary benefit in exchange for a monetary benefit may not be to the overall benefit of the employee' such that 'there might be a failure to guarantee' the right to just and favourable conditions of work.[1]

The Fair Work Amendment Bill 2014 would insert a legislative note to confirm that benefits other than an entitlement to a payment of money may be taken into account when determining whether an individual flexibility arrangement leaves an employee better off overall than he or she would be if no individual flexibility arrangement were agreed to. The Explanatory Memorandum to the Fair Work Bill 2008 makes it clear that this has been the intended operation of the better off overall requirement for individual flexibility arrangements since the introduction of these provisions.[2] The proposed amendment responds to recommendation nine of the Fair Work Review Panel. The objective of the proposed amendment is to provide clarity and certainty to employers and employees about the operation of the better off overall requirement for individual flexibility arrangements.

The Government does not agree that the proposed amendment could constitute a limitation on the right to just and favourable conditions of work. As the Committee has acknowledged, individual flexibility arrangements can benefit both employers and employees. For example, they can assist employees to better manage their personal, family and caring responsibilities, where that flexibility is not otherwise available in a modern award or enterprise agreement that applies to them. To the extent that there may be an imbalance in relative bargaining power between an employer and an employee, the Government notes that the Fair Work Amendment Bill 2014 does not amend provisions about employee protections in connection with individual flexibility arrangements, including the better off

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[1] Parliamentary Joint Committee on Human Rights, *Seventh Report of the 44th Parliament for Bills Introduced 13 – 29 May 2014*, at paragraph 1.63.

[2] See paragraphs 860 and 867–868 of the Explanatory Memorandum to the Fair Work Bill 2008.

overall requirement. These protections include that individual flexibility arrangements must be genuinely agreed and cannot be used to undercut the national minimum wage or base rate of pay provided for in a modern award (whichever applies) or the entitlements in the National Employment Standards. Employees are also protected against adverse action, coercion, undue influence and misrepresentation by their employer in respect of the making or terminating of an individual flexibility arrangement. Individual flexibility arrangements cannot be offered as a condition of employment. If an employee is not happy with his or her individual flexibility arrangement for any reason, he or she can terminate it.

The Committee noted that the proposed amendment does not implement recommendation nine of the Fair Work Review Panel in its entirety and that the statement of compatibility does not explain why recommendation ten of the Fair Work Review Panel has not been implemented.

In relation to recommendation nine, the Government considers that requiring valuation of benefits traded in an individual flexibility arrangement would introduce unnecessary red tape and place an unnecessary and unreasonable burden on employers and employees. Not all benefits traded in an individual flexibility arrangement are capable of being assigned an accurate or even meaningful monetary value, particularly if the benefits in question are not monetary. The value of monetary benefits is also likely to change over time, for example due to annual wage increases or promotions. Similarly, requirements that the monetary value foregone be 'relatively insignificant' and 'proportionate' are inherently arguable and uncertain and would add complexity without providing any further protection for employees.

In view of these issues, the Government considers that the genuine needs statement that is proposed by the Fair Work Amendment Bill 2014 is a more appropriate means of addressing the substance of recommendation nine. It requires the employee to turn his or her mind to the benefits that are being traded in order to explain why the individual flexibility arrangement meets his or her genuine needs and why he or she believes that the deal leaves him or her better off overall.

Recommendation 10 was that *Fair Work Act 2009* should be amended to require an employer to notify the Fair Work Ombudsman that an individual flexibility arrangement had been made, the name of the employee party and the instrument under which the arrangement was made. Recommendation 10 was not included in the Government's election policy: *The Coalition's Policy to Improve the Fair Work Laws*. Providing this information would increase red tape and do no more than alert the Fair Work Ombudsman that an individual flexibility arrangement was in place in relation to a particular employee. The Fair Work Ombudsman can already investigate individual flexibility arrangements on its own initiative or in response to a specific concern.

Freedom of association

The Committee requests advice as to whether the proposed amendments relating to greenfields agreements are a reasonable and proportionate limitation on the right to bargain collectively.

The Government was very clear in *The Coalition's Policy to Improve the Fair Work Laws* about how it proposed to amend the existing greenfields agreement framework in the *Fair Work Act 2009* to establish a new process for the efficient negotiation of those agreements. The proposed greenfields agreement amendments are intended to deliver on those election commitments.

To provide context for these proposed amendments: unlike other forms of agreement making under the *Fair Work Act 2009*, there is no requirement for employers and unions to comply with the good faith bargaining framework when negotiating a greenfields agreement. This means that parties can engage in bargaining practices that frustrate the making of a greenfields agreement in a timely way. The Fair Work Amendment Bill 2014 will extend the good faith bargaining framework to the negotiation of all single-enterprise greenfields agreements for the first time.

The Fair Work Amendment Bill 2014 will also introduce an optional three month negotiation timeframe for the making of greenfields agreements after which, if agreement has not been reached, the employer may take its proposed agreement to the Fair Work Commission for approval. The application for approval can only be made if the union (or unions) that the employer is bargaining with has first been given a reasonable opportunity to sign the agreement. The agreement will also have to satisfy not only the existing approval tests under the *Fair Work Act 2009* (such as the better off overall test and the public interest test) but also a new requirement that the agreement, considered on an overall basis, provides for pay and conditions that are consistent with the prevailing standards and conditions within the relevant industry for equivalent work. Consistent with the existing approach to approval of greenfields agreements, if the Fair Work Commission is not satisfied that a proposed agreement meets all the approval requirements, it can refuse to approve the agreement, or approve it with undertakings that address its concerns.

The Government reiterates that the new three month timeframe is an optional process. Employers and unions will continue to be able to make greenfields agreements as they do now, albeit within the good faith bargaining framework. It is expected that where negotiations are proceeding sensibly and productively, recourse to the three month process will not be necessary.

The Government notes that adopting a different recommendation of the Fair Work Review Panel was not part of its election commitments. The Government considers that its commitment to extend good faith bargaining and provide an optional three month negotiation process and an additional agreement approval requirement, more appropriately addresses the deficiencies with the existing greenfields agreement framework identified by the Fair Work Review Panel, than would the introduction of a third party arbitration process. These measures give negotiating parties the best opportunity to reach voluntary agreement, with the assistance of the Fair Work Commission as needed, within realistic timeframes that minimise the risk to future investments in major projects in Australia, while also ensuring that the terms and conditions that ultimately apply to prospective employees are consistent with those governing employees at similar workplaces. The Government considers that this approach will ultimately improve bargaining practices and minimise delay in making these agreements, such that the proposed amendments are a reasonable and proportionate limitation on the right to collectively bargain.

The Committee has requested advice on whether the changes to the criteria for entry for discussion purposes contained in the Fair Work Amendment Bill 2014 are compatible with the right to bargain collectively—which is an element of the right to freedom of association. Specifically, the Committee has requested advice as to whether the amendments are aimed at achieving a legitimate objective, whether there is a rational connection between the limitation and the objective and whether the limitation is reasonable and proportionate to achieve the objective.

The amendments to rules relating to entry to workplaces for discussion with workers are aimed at achieving the commitment to better balance the need of workers to be represented in the workplace if they wish, with the need for workplaces to run without unnecessary disruption, as set out in *The Coalition's Policy to Improve the Fair Work Laws*. This policy—which was published prior to the 2013 federal election—committed to achieving this aim by modelling right of entry rules on those in place before the *Fair Work Act 2009* commenced.

The issue of disruptive visits to workplaces was a key consideration of the Fair Work Review Panel. Stakeholder submissions received by the Fair Work Review Panel indicated that the right of entry provisions of the *Fair Work Act 2009* increased the frequency of right of entry visits for discussion purposes. According to these submissions, the broad criteria currently governing a union's right to enter for discussion purposes has led to increased costs for some employers (in part because of a marked increase in the frequency of visits by some unions and in part because of the occurrence of disputes between unions over the unions' eligibility to represent employees).

For example, the Fair Work Review Panel noted that during the construction phase of BHP Billiton's Worsley Alumina plant, visits by permit holders increased from zero in 2007, to 676 visits in 2010

alone.[3] The Australian Industry Group also submitted that 37 per cent of employers it surveyed in August 2011 had experienced more frequent right of entry visits since the *Fair Work Act 2009* commenced. In the Government's view, preventing disruptive behaviour by some unions is a legitimate objective of the amendments at Part 8 of Schedule 1 to the Fair Work Amendment Bill 2014.

Consistent with the object of Part 3-4 of the *Fair Work Act 2009*, the amendments to the rules allowing for entry for discussion purposes are designed to balance the right of unions to have discussions with employees in the workplace with the right of employers to go about their business without unnecessary inconvenience. The Fair Work Amendment Bill 2014 amends the right of entry provisions to require that permit holders can only enter a workplace for discussion purposes if the permit holder's union is covered by an enterprise agreement, or if the union is invited to send a representative to the workplace by an employee. The existing requirement that the union must be eligible to represent the industrial interests of the employees is retained under the amendments. The amendments will mean that the right of entry rules are largely unchanged for unions covered by an enterprise agreement. For unions not covered by an enterprise agreement, the effect of the amendment will simply be that at least one worker at the premises must request that the union meet with them in the workplace before a permit holder can enter for discussion purposes.

The Committee expressed concern that the amendments may have the effect of restricting the right of individual workers to join a trade union.[4] The Government does not agree that the amendments give rise to such a risk. Rather, the amendments ensure that employees' rights to industrial representation are maintained—there is no restriction placed on a member's or prospective member's ability to invite his or her union representative to attend the member's or prospective member's workplace (new subsection 484(2)). The changes are expected, however, to reduce the burden facing employers under the current right of entry arrangements. Indeed, the Committee notes that the right to freedom of association (and its derivative right of union access to workplaces in order to consult with union members) is to be exercised 'in a manner which does not prejudice the ordinary functioning of the enterprise'.[5] In the Government's view, the amendments will achieve an appropriate balance between the need of unions to have appropriate access to their members at work and the need of enterprises to function without undue disruption. Accordingly, the amendments are necessary, reasonable and proportionate.

The Committee has sought clarification as to whether the proposed repeal of sections 521A to 521D of the Fair Work Act 2009 is compatible with the right to freedom of association and the right to bargain collectively.

As the Committee notes, protection of the right to collective bargaining in part requires that unions have adequate access to workplaces in which bargaining is taking place. In some circumstances, those workplaces may be located in remote areas of Australia and negotiation is required between unions and employers to come to an agreement about the practical issues surrounding how an entry is exercised.

The amendments repeal provisions of the *Fair Work Act 2009* that require employers to facilitate access to the remote location.

The Coalition's Policy to Improve the Fair Work Laws clearly sets out the Government's intention to repeal these provisions. In the Government's view, the introduction of those provisions was not adequately justified by the previous government. Those provisions were not introduced to implement

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[3] *Towards more productive and equitable workplaces – An evaluation of the Fair Work legislation*, page 193.
[4] Parliamentary Joint Committee on Human Rights, *Seventh Report of the 44th Parliament for Bills Introduced 13 – 29 May 2014*, at paragraph 1.77.
[5] Parliamentary Joint Committee on Human Rights, *Seventh Report of the 44th Parliament for Bills Introduced 13 – 29 May 2014*, at paragraph 1.67.

a recommendation of the Fair Work Review Panel and, in fact, were subject to extensive stakeholder criticism. Further, they were excused from the robust analysis of a Regulation Impact Statement.

As the Committee acknowledges, some costs incurred by union officials travelling to remote sites cannot be recovered by employers. But, far from being relatively small as the Committee asserts[6], evidence presented to the Senate Education, Employment and Workplace Relations Legislation Committee inquiry into the Fair Work Amendment Bill 2013 suggested that this provision could cost upwards of $40,000 for a specially scheduled flight for union officials.[7]

The repeal of sections 521A to 521D of the *Fair Work Act 2009* will mean that employers and unions will be free to negotiate independently transport and accommodation arrangements as they did previously. Moreover, the repeal of those provisions does not, as asserted by the Committee, 'in effect make it impossible for union officials to visit worksites'.[8] Rather, the repeal of the requirement for employers to facilitate such visits will ensure that the most appropriate arrangements can occur on a site-by-site basis—and return to the more appropriate position that existed prior to the introduction of the *Fair Work Amendment Act 2013*.

For those reasons, the Government considers the amendments are compatible with the right to freedom of association and the right to bargain collectively.

The Committee has requested advice on whether the proposed amendments to sections 494 and 492A of the Fair Work Act 2009, dealing with the default location in which discussions between members and union representatives are to be held in workplaces, are compatible with the right to collective bargaining. Specifically, the Committee has requested advice as to whether the amendments are aimed at achieving a legitimate objective, whether there is a rational connection between the limitation and the objective and whether the limitation is reasonable and proportionate to achieve the objective.

Amendments under the *Fair Work Amendment Act 2013* introduced by the previous government provide that, in circumstances where agreement between the union and occupier of premises cannot be reached on the location for discussions, the union has the right to hold discussions with employees in the meal or break room. Prior to the commencement of those provisions on 1 January 2014, an occupier was required to provide a reasonable room for a union official to use when exercising a right of entry to conduct interviews or hold discussions.

In the Government's view, these amendments were not necessary, nor were they justified by a recommendation made by the Fair Work Review Panel. Further, the amendments were granted an exemption from the requirement to provide a Regulation Impact Statement and many stakeholders indicated concern about the impact of the provisions in submissions to the House of Representatives Standing Committee on Education and Employment inquiry into the Fair Work Amendment Bill 2013. In particular, it was argued that the change would prevent employees from enjoying their breaks without disruption, noting that the majority of Australia's workforce are not union members.[9]

The Fair Work Amendment Bill 2014 restores the arrangements in place prior to 1 January 2014, which provided that a permit holder must comply with any reasonable request by the occupier to hold discussions in a particular room or area of the premises. The Fair Work Amendment Bill 2014 sets out a non-exhaustive list of circumstances where a request might be considered unreasonable, including if

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[6] Parliamentary Joint Committee on Human Rights, *Seventh Report of the 44th Parliament for Bills Introduced 13 – 29 May 2014*, at paragraph 1.83.

[7] Australian Mines and Metals Association (AMMA): submission to the Senate Education, Employment and Workplace Relations Committee inquiry into the Fair Work Amendment Bill 2013, at page 12.

[8] Parliamentary Joint Committee on Human Rights, *Seventh Report of the 44th Parliament for Bills Introduced 13 – 29 May 2014*, at paragraph 1.81.

[9] Available at: http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=ee/fairwork13/subs.htm.

it is made with the intention of intimidating or discouraging persons from participating in discussions, or if the room is not fit for purpose. The amendments will ensure that workers who wish to speak with a union may do so in an appropriate location while allowing other workers the capacity to avoid such discussions if that is their preference.

In the Government's view, these amendments do not amount to making the 'exercise of rights of trade unions to confer with its members and potential members…more difficult in practice' (sic), as asserted by the Committee.[10] Rather, the effect of the amendments is to make the right of entry provisions less prescriptive and return the power to negotiate—for appropriate accommodation of union discussions—to unions and occupiers. In practice, the Government is not aware of any widespread problems arising from the arrangements that existed prior to the commencement of the *Fair Work Amendment Act 2013*. The limited number of cases in which the Fair Work Commission has been required to arbitrate disputes about appropriate location for discussions demonstrates that the practical issues envisioned by the Committee rarely arose under the arrangements that the Government proposes to reinstate. In cases where a dispute did arise, those disputes were dealt with fairly and effectively by the independent tribunal. For these reasons, these amendments are compatible with the right to collectively bargain.

The Committee has requested advice on whether the proposed amendments to alter when the Fair Work Commission can deal with a dispute about frequency of entry are compatible with the right to collective bargaining. Specifically, the Committee has requested advice as to whether the amendments are aimed at achieving a legitimate objective, whether there is a rational connection between the limitation and the objective and whether the limitation is reasonable and proportionate to achieve the objective.

As detailed above, stakeholder submissions received by the Fair Work Review Panel indicated that the right of entry provisions of the *Fair Work Act 2009* increased the frequency of right of entry visits for discussion purposes. Recognising a growing trend of excessive numbers of union visits to some workplaces, the previous government provided the Fair Work Commission with powers to resolve frequency of visit disputes through changes under the *Fair Work Amendment Act 2013*. Under the provisions, the Fair Work Commission can make any order it considers appropriate to resolve a dispute, including to suspend, revoke or impose conditions on an entry permit. Those amendments, however, have had a limited impact on addressing excessive visits, because the Fair Work Commission can only exercise these powers if satisfied that the frequency of visits would require an unreasonable diversion of the employer's 'critical resources'. The majority of employers in the industries most impacted by frequency problems are unlikely to meet this threshold, due to the difficulty of large organisations in demonstrating a diversion of their 'critical resources'.

The Fair Work Amendment Bill 2014 provides the Fair Work Commission with capacity to effectively deal with disputes about excessive right of entry visits. It does this by removing the 'critical resources' limitation discussed above, while retaining the orders the Fair Work Commission can make to resolve a dispute where the diversion of resources is unreasonable. The changes also require the Fair Work Commission to take into account the cumulative impact of entries by considering all union visits to a workplace. The Fair Work Amendment Bill 2014 retains the requirement that the Fair Work Commission must have regard to fairness between the parties to the dispute.

The Committee notes that the amendments could result in access by some unions being limited if another union engages in disruptive behaviour by entering a particular workplace too frequently, thus precipitating a dispute.[11] It is not the Government's intention that, in the course of resolving disputes about the frequency of union visits to a workplace, the Fair Work Commission would make orders

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[10] Parliamentary Joint Committee on Human Rights, *Seventh Report of the 44th Parliament for Bills Introduced 13 – 29 May 2014*, at paragraph 1.86.

[11] Parliamentary Joint Committee on Human Rights, *Seventh Report of the 44th Parliament for Bills Introduced 13 – 29 May 2014*, at paragraph 1.92.

against unions that are not party to the dispute. It is highly unlikely that in resolving a dispute—and having regard to fairness between the parties—the Fair Work Commission would take such a step. Rather, the intention of the amendments is to ensure that in resolving a dispute about frequency of visits, the Fair Work Commission would be aware of (and take into account) the resources that an employer or occupier has been required to expend over a particular period to facilitate entry by each union that has conducted a visit under Part 3-4 of the *Fair Work Act 2009*. This would not, in the Government's view, be likely to impact the right of a union to access a workplace, if that union was not subject to orders arising from a Fair Work Commission decision.

In the Government's view, the amendments ensure that the Fair Work Commission can deal appropriately with excessive visits to workplaces, while balancing the right of unions to hold discussions with members or potential members. To the extent that the right to freedom of association and the right to engage in collective bargaining are limited by these amendments, the limitation is necessary, reasonable and proportionate.

The Committee has requested advice as to the compatibility of the protected action ballot amendments with the right to collectively bargain and in particular whether the proposed changes are aimed at achieving a legitimate objective, whether there is a rational connection between the limitation and that objective and whether the limitation is a reasonable and proportionate measure for the achievement of that objective.

The Government's clear position as set out in *The Coalition's Policy to Improve the Fair Work Laws*, is that it intended to remove the 'strike first, talk later' loop hole in the *Fair Work Act 2009,* consistent with recommendation 31 of the Fair Work Review Panel. The Fair Work Amendment Bill 2014 would implement recommendation 31 in its entirety. That is, an application for a protected action ballot order could only be made when bargaining for a proposed agreement has commenced, either voluntarily or because a majority support determination has been obtained. The Fair Work Amendment Bill 2014 also includes a legislative note that is intended to make clear that bargaining has commenced for this purpose despite any disagreement over the scope of the agreement.

The majority support determination framework is a formal mechanism established under the *Fair Work Act 2009* to compel an employer to bargain where a majority of the employees who would be covered by a proposed enterprise agreement want to do so but the employer has not so agreed. Significantly, the majority support determination provisions promote the right to collectively bargain because once a majority support determination is made the employer must commence bargaining in good faith with its employees and bargaining orders can be sought if the employer fails to do so.

As noted by both the Full Federal Court in *J.J. Richards & Sons Pty Ltd v Fair Work Australia* [2012] FCAFC 53 and the Fair Work Review Panel, the *Fair Work Act 2009* provides a detailed and carefully structured framework for making enterprise agreements and for maintaining the integrity of the system of collective bargaining. In light of this, the availability of protected industrial action as a means to oblige an employer to commence bargaining seems incongruous. This incongruity is particularly obvious in circumstances were a minority of employees can obtain a protected action ballot order and take industrial action in an attempt to compel an employer to bargain even where the majority of employees do not want to bargain. This outcome clearly undermines the operation of the majority support determination framework.

The Government considers that the availability of the majority support determination framework under the *Fair Work Act 2009* to compel an employer to bargain where a majority of employees want to do so appropriately safeguards an employee's right to collectively bargain such that requiring bargaining to have commenced before protected industrial action may be taken does not limit the right to collectively bargain.

The Government also considers that, to the extent that the proposed amendment limits the right to strike (as noted in the statement of compatibility), the limitation is reasonable, necessary and proportionate in order to maintain the integrity of the majority support determination provisions and

the broader bargaining framework. It reflects the Government's commitment to promote harmonious, sensible and productive enterprise bargaining.

THE HON MICHAEL KEENAN MP
Minister for Justice

MC14/15461

Senator Dean Smith
Chair
Parliamentary Joint Committee on Human Rights
PO Box 6100, Parliament House
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13 AUG 2014

Dear Senator Dean

Thank you for your letter of 15 July 2014 in relation to the comments in the report of the Parliamentary Joint Committee on Human Rights (the Committee), the *Ninth Report of the 44th Parliament*, concerning the *G20 (Safety and Security) Complementary Act 2014* (Commonwealth G20 Act).

The Committee again seeks my advice on the compatibility of the measures in Queensland's *G20 (Safety and Security) Act 2013* (Queensland G20 Act) with Australia's human rights obligations, insofar as they will be applied as Commonwealth laws. The Committee has also reiterated its request that I provide a statement of compatibility for the *Commonwealth Places (Application of Laws) Act 1970* (Commonwealth Places Act).

The Queensland G20 Act will automatically be applied at Brisbane airport for the period of the G20 Summit by the Commonwealth Places Act. The content of the Queensland G20 Act, and any other State legislation automatically applied to Commonwealth places within each State by the Commonwealth Places Act, is fundamentally a matter for State Parliaments.

As I outlined in my letter of 29 May 2014, the Commonwealth G20 Act merely clarifies any ambiguity between the Queensland G20 Act and Commonwealth aviation legislation. It does not create any additional powers, offences or security arrangements to the Queensland G20 Act, nor does it extend the operation of the Queensland G20 Act to any new areas. Accordingly, I am satisfied that the Commonwealth G20 Act does not engage human rights.

Given its general facilitative nature, an assessment of the human rights compatibility of the Commonwealth Places Act would require an assessment of the compatibility of all State laws of general application. I do not consider it appropriate or practicable to undertake such an assessment. The Commonwealth Places Act does not modify or augment State laws in any substantive way, but merely applies those laws to very small areas within each State. Consequently, the Commonwealth Places Act has no greater impact on human rights than the State laws being applied.

Thank you again for informing me of the Committee's views.

Yours sincerely

Michael Keenan

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THE HON JULIE BISHOP MP

Minister for Foreign Affairs

Senator Dean Smith
Chair
Parliamentary Joint Committee on Human Rights
S1.111
Parliament House
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Dear Senator Smith

Thank you for your letter of 15 July 2014 concerning the questions raised by the Parliamentary Joint Committee on Human Rights in relation to the *International Organisations (Privileges and Immunities) (International Committee of the Red Cross) Regulation 2013* in its Ninth Report of the 44th Parliament (July 2014).

I attach for the Committee's information a response prepared by the Department of Foreign Affairs and Trade regarding the Committee's questions about the compatibility of Australia's laws on granting privileges and immunities with Australia's obligations under the *Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* to prosecute or extradite an individual suspected of torture.

I trust that this information will be of assistance to the Committee in completing its review of the Regulation.

Julie Bishop
08 AUG 2014

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Compatibility of Australia's laws on granting privileges and immunities with its obligations to prosecute or extradite an individual suspected of torture under Articles 7(1) and (2)[1] of the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.

Australia is committed to its international legal obligations under the *Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)*, including the obligation to have in place laws which permit the investigation and prosecution or extradition of persons alleged to have committed torture. Australia is also committed to our international legal obligations in respect of privileges and immunities. Australia implements such immunities under its framework of domestic legislation, including the *Foreign States Immunities Act* 1985, the *Diplomatic Privileges and Immunities Act 1967*, the *Consular Privileges and Immunities Act 1972* and the *International Organisations (Privileges and Immunities) Act* 1963, along with the respective regulations for each Act.

The conferral of privileges and immunities

To facilitate the peaceful and efficient conduct of relations between States and their official representatives, certain privileges and immunities have long been recognised to exist under international law and have been given effect in Australian law.

Diplomats, persons on a special mission, high officials of some international organisations and representatives to those organisations are entitled to extensive immunity from criminal jurisdiction pursuant to various treaties and customary international law. The Parliamentary Joint Committee on Human Rights recognised in its earlier comments on the *International Organisations (Privileges and Immunities) Amendment Bill 2013* that 'Australia is bound under a number of multilateral and bilateral treaties to confer privileges and immunities on various international organisations and their officials, as well as on foreign States and their diplomatic and consular representatives.'[2]

The conferral of immunity provides benefits to the sending and receiving States. Diplomatic immunity, for example, helps to create the space for States to conduct discussions to 'promote comity and good relations between States through the respect of another State's sovereignty.'[3] The underlying concept is that foreign representatives can carry out their duties effectively only if they receive some protection from the application of the host country's law in carrying out their official functions. Australian diplomats benefit from similar protection in other countries.

As Sir Ian Brownlie has noted, the conferral of privileges and immunities to international organisations is a widely accepted feature of the international system:

> *in order to function effectively, international organisations require a certain minimum of freedom and legal security for their assets, headquarters and other establishments*

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[1] We note that the Committee's response refers to Articles 6(1) and (2) of the CAT. We assume this is a typographic error. The relevant provisions of the CAT are Articles 7(1) and (2).

[2] *Fourth Report of 2013: Bills introduced 12-14 March 2013; Select Legislative Instruments registered with the Federal Register of Legislative Instruments 17 - 20 December 2012*, at Paragraph 1.67.

[3] Application No 35763/97, Merits, 21 November 2001, 123 ILR 24, (2002) 34 EHRR 11, para 54, in Nevill, P. "Immunities and the Balance Between Diplomacy and Accountability" (2011), available at http://www.20essexst.com/member/penelope-nevill.

and for their personnel and representatives of member states accredited to the organisations.[4]

Conferring privileges and immunities, such as immunity from legal process, including the giving of evidence, can serve the important function of protecting the confidential work and communications of an international organisation. It can be vital to that organisation's ability to perform its mandate, including by ensuring the access required to perform important functions and ensuring the security of its personnel. The conferral by Australia of privileges and immunities to the International Committee of the Red Cross (ICRC), for example, recognises the ICRC's mandate and role as an important partner for Australia in our international humanitarian work. It will help the ICRC to continue its work protecting the lives and dignity of victims of armed conflict in line with its working principles of impartiality, independence and neutrality. It is through the recognition of privileges and immunities for the ICRC that States acknowledge their respect for those principles.

Consistency between laws conferring privileges and immunities and obligations to prosecute or extradite under the CAT

The question of whether the obligations to prosecute or extradite under article 7 of the CAT extend to persons who enjoy functional immunity for acts done in an official capacity remains unsettled at international law. The jurisprudence from foreign and international courts on this question is limited and is not determinative. The views of the Committee against Torture are a source of guidance for states, but are not binding and do not represent the views of states. It is clear that a person enjoying functional immunity, once leaving office, can be prosecuted for acts committed prior or subsequent to his or her term in office, and for acts committed in a private capacity during that term in office. Were functional immunity to be relied on during a person's term in office for acts performed in that capacity, its application would be a matter for the Australian courts to determine (as was the case with the UK courts in the Pinochet case[5], to which the Committee has previously referred). It would not be appropriate to speculate on how Australian courts would approach this issue should it arise for determination.

While the existence of functional immunity may, in some circumstances, limit Australia's ability to extradite or prosecute an individual alleged to have committed torture, it does not mean that a person subject to allegations of torture enjoys impunity. In addition to the limitations on functional immunity outlined above, it is open to the Australian Government to request the ICRC to waive a Delegate's immunity under the *International Organisations (Privileges and Immunities) (International Committee of the Red Cross) Regulation 2013*. A Delegate could also be prosecuted by a court in a jurisdiction where immunity is not enjoyed or by an international criminal tribunal with jurisdiction.

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4 Ian Brownlie, Principles of Public International Law, Seventh Ed, p.680. This principle is also reflected in Article 105 of the Charter of the United Nations which provides that 'the Organisation shall enjoy in the territory of each of its members such privileges and immunities as are necessary for the fulfilment of its purposes' and that 'representatives of the Members of the United Nations and officials of the Organisation shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organisation'.

5 R *v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte* (No 3) [2000] 1 AC 147.

The Hon Scott Morrison MP
Minister for Immigration and Border Protection

Reference: 1406/1372

Senator Dean Smith
Chair
Parliamentary Joint Standing Committee on Human Rights
S1.111
Parliament House
CANBERRA ACT 2600

Dear Senator

Response to questions received from Parliamentary Joint Committee on Human Rights

Thank you for your letters of 18 June 2014 in which further information was requested on the following bills and legislative instruments:

- *Migration Legislation Amendment Bill (No. 1) 2014*;
- *Customs Tariff Amendment (Product Stewardship for Oil) Bill 2014*;
- *Excise Tariff Amendment (Product Stewardship for Oil) Bill 2014*; and
- *Migration Amendment (2014 Measures No. 1) Regulation 2014* [F2014L00286].

Thank you also for your letter of 24 June 2014 in which further information was requested on the *Australian Citizenship (Intercountry Adoption) Bill 2014*.

My responses in respect of the *Migration Legislation Amendment Bill (No. 1) 2014*, the *Migration Amendment (2014 Measures No. 1) Regulation 2014* and the *Australian Citizenship (Intercountry Adoption) Bill 2014* are attached.

Questions regarding the *Customs Tariff Amendment (Product Stewardship for Oil) Bill 2014* and the *Excise Tariff Amendment (Product Stewardship for Oil) Bill 2014* have been referred to the Treasurer, the Hon Joe Hockey MP, to provide responses to the Committee.

I trust the information provided is helpful.

Yours sincerely

The Hon Scott Morrison MP
Minister for Immigration and Border Protection
/ /2014

Migration Legislation Amendment Bill (No. 1) 2014 – Schedule 1

The Committee has raised a number of concerns in relation to the amendments included in this schedule.

Schedule 1 extends the current law

The amendments in Schedule 1 are not an extension of the provisions they seek to amend; rather, they aim to put the intended and longstanding operation of those provisions beyond doubt. This is in response to the Full Federal Court's decision in *MIBP v Kim* [2014] FCAFC 47, which is now the subject of an application for special leave to appeal in the High Court. This judgment was handed down since the Statement of Compatibility was prepared.

It has been successive governments' longstanding position, prior to the decision in *MIBP v Kim,* that the provisions in question operate to limit or prohibit further visa applications in circumstances where the applicant has previously been refused a visa. That is, provided the earlier visa application that was refused was in fact validly made, then the relevant application bar would apply as a matter of legal consequence.

At common law, a parent or a legal guardian has the power to make a decision on behalf of their child, provided the child does not have the capacity in their own right to make that decision. Whether a child has capacity depends upon the attainment of sufficient understanding and intelligence to understand fully what is proposed. In the migration context, an application for a visa can be made by a parent or legal guardian of a person under 18.

Similarly, where a person has an intellectual disability and is considered to not have the competence to make a decision, the discretion is vested in the person's legal guardian.

Therefore, if an application is made in the name of the child or the intellectually disabled person and signed by the child or the person's parent or guardian, it will be a valid application that is to be treated as having been made by the child or the person. So much was accepted by the Full Federal Court in *MIBP v Kim* in finding that the application made by the child applicant in that case was valid, notwithstanding that the Full Federal Court also found the applicant's lack of knowledge meant that she was not prevented from making another application in her own right.

"The committee therefore recommends that the bill be amended to provide for independent merits review of decisions to deny subsequent protection visa applications by minors and persons with a disability."

There is currently no general right of merits review of a determination that a Protection visa application is invalid because the applicant is affected by the application bar in section 48A.

If a person is determined to be affected by the application bar in section 48A and disagrees with that determination, it is open to the person or their parent or guardian acting on their behalf to seek judicial review of that determination.

There is no exercise of discretion. An officer under the Migration Act makes a finding regarding the facts and the application of s48A applies by operation of law.

"The committee therefore requests the Minister for Immigration and Border Protection's advice on the compatibility of Schedule 1 of the bill with the obligation to consider the best interests of the child and, particularly, how the measures are:

- **Aimed at achieving a legitimate objective;**
- **There is a rational connection between the measures and the objective; and**
- **The measures are proportionate to that objective."**

A legislative body is required to consider the best interests of the child as a primary consideration. The Australian Government is also required to determine if these interests are outweighed by other primary considerations such as the integrity of the migration programme and the effective and efficient use of government resources.

The proposed amendments will ensure that parents cannot exploit and use their children as a means of delaying their own departure from Australia following a visa refusal, by repeatedly making visa applications on behalf of their children.

"The committee therefore requests the Minister for Immigration and Border Protection's advice on the compatibility of Schedule 1 of the bill with the right of the child to be heard in judicial and administrative proceedings and, particularly, whether the measures are:

- **aimed at achieving a legitimate objective;**
- **there is a rational connection between the measures and the objective; and**
- **the measures are proportionate to that objective."**

The amendments in Schedule 1 are aimed at achieving the objectives as set out on page 1.

When sections 48, 48A and 501E were introduced into the *Migration Act 1958* (the Migration Act), the Parliament intended that they would be engaged in respect of a person in the migration zone if all of the following conditions are fulfilled:

- there was a visa application that was made;
- the application was valid; and
- the visa had been refused.

Whether or not a visa application that has been made is valid should be decided based on an assessment of the objectively determinable criteria that have been prescribed in the Migration Act and the *Migration Regulations 1994* (the Regulations), such as whether the application was made on a prescribed application form or whether the prescribed visa application charge has been paid. It was never intended to be based on a subjective inquiry into the applicant's state of mind or, in the case of a child, whether the child has capacity to decide whether to make the application, or knows the application is being made on their behalf.

The proposed amendments in Schedule 1 would mean that a child would be prevented from making a further visa application in their own right (whether that further application relates to a Protection visa or some other visa). However, this does not mean that the child would be denied the right to be heard in a judicial or an administrative proceeding. In the case of a child who has personal protection claims, I am able to intervene under section 48B of the

Migration Act to enable the person acting on the child's behalf to make a further Protection visa application so that the child's personal protection claims may be assessed and their best interests would be a primary consideration. In other cases where ministerial intervention is not available, the child may seek judicial review of the decision that the purported further application is invalid, if the child, or their parent or guardian, believes that decision is wrongly decided.

In relation to the Committee's concern that the amendments create an assumption about the validity of the visa application made by the child without consideration of the child's age, relationship with the person who made the application on their behalf, or the extent to which the application is consistent with the wish of the child, I believe this concern is unfounded.

Where doubt exists about whether the person making the application on behalf of the child is indeed the parent or the legal guardian of the child, my department's practice is to request evidence of the person's authority to make such an application; my department does not simply accept the application made on behalf of the child as valid without query when there is such a doubt. Further, it is standard in the visa application forms to request the signatures of all applicants who are 16 years of age or over (16 years being the age accepted by Australian courts, for example in the context of medical treatment, as the age when a child attains competence). Therefore, in circumstances where an older child is included in an application and that child has signed the application form acknowledging that they have read the application and confirm the information given therein, there is some assurance that the child is aware of and consents to being included in the visa application.

"The committee therefore requests the Minister for Immigration and Border Protection's advice on the compatibility of Schedule 1 of the bill with the requirement to take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity."

The Committee has requested information about:

- whether the term 'mental impairment' includes both mental and intellectual impairment;
- how many cases involve visa applications made on behalf of persons with intellectual or mental impairment; and
- what procedures are in place for determining whether a person has an intellectual or mental impairment which gives rise to the need for support for that person in making a decision in relation to a visa application, and the nature and the extent of any support necessary or provided to such persons.

'Mental impairment' as inserted in the proposed amendments is not defined. However, when read in their entirety, it is clear that the objective of the amendments is to ensure that a person who has been refused a visa while in Australia cannot make another application (for the same or a different visa), on the basis that they did not know about or understand the nature of the refused visa application that was made on their behalf. In this context, therefore, 'mental impairment' refers to a person's limited cognitive capacity or competence, to know and understand that they are making a visa application.

It is not possible to provide the number of cases involving applications made on behalf of persons with intellectual or mental impairment, without retrieving and physically examining

all past applications. Whether or not an application is made by an intellectually or mentally impaired person – either by themselves or on their behalf – may not be something that can be easily ascertained at the time of application.

In the majority of cases my department might only become aware of the intellectual or mental disability of a visa applicant post a medical assessment for the purposes of their visa application.

Given the positive identification of a person's intellectual or mental disability may not be possible until the conduct of health checks, it may not be possible for my department to provide support to an intellectually or mentally disabled person in order that they may make an informed decision about making the application. It is also difficult for my department to provide support to such a person in making a decision on whether to continue an application already made, as such a person is almost invariably a dependent applicant in an application made by a responsible family member or guardian. It is reasonable and appropriate to allow the responsible family member or guardian to exercise that responsibility, including making decisions about visa applications for the intellectually or mentally disabled person, without interference from my department.

As for the Committee's comment that persons with intellectual and mental impairment may be particularly vulnerable as asylum seekers and should be supported in making decisions about the lodgement of visa applications, including support to assist their understanding of the technical nature and the consequences of such an action, I can confirm that there is support in the form of government funded Immigration Advice and Application Assistance Scheme (IAAAS). Although the government has recently decided to cease the provision of IAAAS to asylum seekers who arrived in Australia illegally, many IAAAS providers continue to offer immigration assistance on a pro bono basis. In addition, the government is intending to assist a small number of vulnerable people with their primary application. The availability of IAAAS to asylum seekers who arrived in Australia legally remains unaffected. Applicants may arrange private application assistance from a registered migration agent. Applicants who have arrived lawfully and are disadvantaged and face financial hardship may be eligible for assistance with their primary application under the IAAAS.

Whilst no specific government funded support is available to intellectually or mentally disabled persons who are not asylum seekers, to the extent that support is available to such a person through their responsible family member or guardian and the department respects and allows for the exercise of this responsibility without unwarranted interference, there is no inconsistency with Article 12 of the Convention on the Rights of Persons with Disabilities (CRPD).

"The committee therefore requests the Minister for Immigration and Border Protection's advice on the compatibility of Schedule 1 of the bill with the rights to equality and non-discrimination and, in particular, whether these measures are:

- **aimed at achieving a legitimate objective;**
- **there is a rational connection between the measures and the objective; and**
- **the measures are proportionate to that objective."**

The amendments in Schedule 1 are compatible with the right to equality and non-discrimination. To the extent that the amendments will restore the intended operation of sections 48, 48A and 501E so that they will apply universally and equally to every non-citizen in the migration zone who has had a validly made visa application refused while in the migration zone, the proposed amendments are compatible with the right to equality before the law and non-discrimination.

Indeed, as I stated in the statement of compatibility, even if it could be said that the amendments give rise to a perception of discrimination against people who are mentally impaired, it is a perception only; the effect of the amendments are not inconsistent with Article 5(1) of the CRPD.

As there is no discrimination involved, the issue of legitimate objective, rational connection and proportionality are not relevant.

Migration Legislation Amendment Bill (No. 1) 2014 – Schedule 2

"The committee therefore requests the Minister for Immigration and Border Protection's advice on the compatibility of Schedule 2 of the bill with Australia's non-refoulement obligations under the ICCPR and CAT."

Non-refoulement obligations are provided for under the Convention Against Torture and Other Inhuman or Degrading Treatment or Punishment (CAT). An implied non-refoulement obligation is provided for under the International Covenant on Civil and Political Rights (ICCPR):

ICCPR article 7:
No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

CAT article 3(1):
No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

The changes in Schedule 2 modify the existing text of subsection 198(5) of the Migration Act to ensure that an application for a bridging visa in certain circumstances by a person in detention does not prevent removal. By doing so, this also prevents the possibility of those individuals remaining in detention indefinitely where they have no further immigration claims or avenues of appeal, but refuse voluntary removal and cannot currently be involuntarily removed due to an ongoing Bridging visa application.

Schedule 2 also creates subsection 198(5A), which complements subsection 198(5) and prevents an officer from removing an unlawful non-citizen from Australia if the non-citizen has made a valid application for a Protection visa (even if the application was made outside the time allowed under subsection 195(1) for these applications) and either the grant of the visa has not been refused, or the application has not been finally determined.

The government ensures compliance with its non-refoulement obligations through legislation and administrative practice.

Where certain risk factors are present, the department conducts a pre-removal clearance prior to removal. A pre-removal clearance is a risk management tool to help ensure that Australia acts consistently with its non-refoulement obligations arising under:

- the Convention and Protocol relating to the Status of Refugees (Refugees Convention);
- the ICCPR and its Second Optional Protocol; and
- the CAT.

Primarily the pre-removal clearance is used to identify whether the person has any protection claims that have not already been fully assessed. For persons who have previously had protection claims assessed by the department, the pre-removal clearance process includes consideration of any change in relevant country information or any change in the person's

circumstances prior to removal, to ensure that there are no protection obligations owed by Australia and to inform removal planning and case resolution.

If it is found that an individual is affected by non-refoulement issues, that individual would not be removed from Australia. For example, if, as a result of that assessment, it is determined that not all of an individual's protection claims have been assessed, their case may be referred for my consideration under section 48B of the Migration Act.

If it is determined that an individual has not previously made protection claims, the department would check whether the person has been made aware that they can pursue the department's protection processes. Even if the individual chooses not to submit their claims through the department's protection processes, an individual would not be removed from Australia.

These processes are not impacted by the introduction of Schedule 2, and consequently do not affect Australia's non-refoulement obligations under the ICCPR and CAT.

Migration Legislation Amendment Bill (No. 1) 2014 – Schedule 3

"The committee therefore requests the Minister for Immigration and Border Protection's advice on the compatibility of Schedule 3 of the bill with the rights to equality and non-discrimination and, in particular, whether these measures are:

- **aimed at achieving a legitimate objective;**
- **there is a rational connection between the measures and the objective; and**
- **the measures are proportionate to that objective."**

Article 26 of the ICCPR provides:

> *[a] all persons are equal before the law and are entitled without discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any grounds such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*

The United Nations Human Rights Committee has analysed Article 26 of the ICCPR in its General Comment 18 (HRI/GEN/1/Rev 1, page 26), and stated:

> *non-discrimination, together with equality before the law and equal protection of the law without any discrimination, constitute a basic general principle relating to the protection of human rights… Article 26 not only entitles all persons to equality before the law as well as equal protection of the law but also prohibits any discrimination under the law and guarantees to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*

The issue here is whether a law that imposed a liability to pay the costs of detention on, and only on, persons convicted of people smuggling or illegal foreign fishing, would amount to discrimination on the basis of 'other status'.

The equivalent article in the European Convention on Human Rights (Article 14) also prohibits discrimination on virtually identical grounds to those listed in Article 26 of the ICCPR, including 'other status'. In Kjeldsen v Denmark (1976) 1 EHRR 711, the European Court of Human Rights held that 'status' means a personal characteristic by which persons or groups of persons are distinguishable from each other. In R (Clift) v Home Secretary [2007] 1 AC 484, the House of Lords held that the claimant's classification as a prisoner, by reference to the length of his or her sentence, and which resulted in a difference of treatment, was not a 'status' within the meaning of Article 14: 'The real reason for the distinction is not a personal characteristic of the offender but what the offender has done.'

The legislation is not concerned with the personal characteristic or status of 'people smuggler' or 'illegal foreign fishers' but with the commission of an offence by a people smuggler or foreign fishers against a law in force in Australia. That would not be treating detainees differently on the basis of 'other status' within the meaning of Article 26 of the

ICCPR. The real reason for differential treatment would not be a personal characteristic of the person concerned, but what they have done.

"The committee therefore requests the Minister's advice as to whether Schedule 3 of the bill is compatible with the right to humane treatment in detention"

Article 7 of the ICCPR provides that:

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

Article 16(1) of the CAT provides that:

Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in articles 10, 11, 12 and 14 shall apply with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment.

The effect of the measures introduced by these amendments is to ensure that liability to pay the costs of detention, transportation and removal may be enforced even after a person has served the whole or part of the sentence imposed upon them for engaging in people smuggling or illegal fishing activities. The measures extend the liability to pay these costs, which is already enforceable under section 262 of the Migration Act, to people who are or have been detained under section 189 of the Migration Act, including because of subsection 250(2), or have been granted a Criminal Justice Stay visa or any other class of visa.

While differential treatment of persons in detention may in some cases amount to a limitation on the right to humane treatment in detention, to the extent that extending liability in these amendments amounts to differential treatment of persons in detention, it does not also amount to a limitation on the right to humane treatment in detention. All persons in immigration detention, including people convicted of people smuggling or illegal fishing activities who are detained under section 250 of the Migration Act, are treated with respect for human dignity and given fair and reasonable treatment within the law.

Migration Legislation Amendment Bill (No. 1) 2014 – Schedule 4

"The committee therefore requests the Minister for Immigration and Border Protection's advice on the compatibility of Schedule 4 of the bill with the right to a fair trial and fair hearing rights and, in particular, whether these measures are:

- **aimed at achieving a legitimate objective;**
- **there is a rational connection between the measures and the objective; and**
- **the measures are proportionate to that objective."**

The Committee has sought clarification and advice about the compatibility of Schedule 4 to the right to a fair trial and fair hearing as provided for in Article 14 of the ICCPR. This stems from the Committee's concern that the proposed amendments in Schedule 4 appear to allow the department to contact a visa applicant directly and circumvent the applicant's solicitor or a migration agent (as the applicant's authorised recipient), and that this would diminish the ability of the solicitor or the migration agent to effectively represent the visa applicant and adversely affect the applicant's right to a fair trial or a fair hearing.

The amendments in Schedule 4 do not engage any rights stated in the seven core human rights treaties. The role of an authorised recipient is separate to, and distinct from, the role of a solicitor or a migration agent. Whereas a solicitor or a migration agent can act for and on behalf of an applicant on matters that fall within the scope of their authority, the role of an authorised recipient is simply to receive documents on behalf of the applicant. Put differently, a solicitor or a migration agent steps into the shoes of the applicant and is authorised to deal directly with the department, but an authorised recipient acts only as a 'post box' of the applicant. An authorised recipient may, but need not, be a solicitor or a migration agent.

Therefore, in seeking to clarify the role of an authorised recipient, the proposed amendments in Schedule 4 do not in any way affect or diminish the authority of a solicitor or a migration agent to act on behalf of an applicant. Whilst the amendments do clarify that for a 'mere authorised recipient' there is no longer a need to inform them of any direct oral communications made with the applicant (in view of the fact that their role is confined to only receiving documents), for an authorised recipient who is also the applicant's solicitor or migration agent, consistent with normal practice, the department will continue to deal with the solicitor or the migration agent instead of the applicant. To avoid doubt, this means that the solicitor or the migration agent will receive all documents from my department on behalf of the applicant (in their capacity as the applicant's authorised recipient), and will receive oral communications from my department in respect of the applicant (in their capacity as the applicant's solicitor or migration agent).

In so far as the amendments clarifying, for example, that the Migration Review Tribunal (MRT) or the Refugee Review Tribunal (RRT) is obliged to give documents to the review applicant's authorised recipient even when the review application is subsequently found by the relevant Tribunal not to have been validly made, and clarifying that an authorised recipient may not unilaterally vary or withdraw the notice of their appointment other than to update their own address, the amendments should not raise any human rights concerns. The former will simply ensure that a (purported) review applicant's express wish that documents be given to their appointed authorised recipient is not vitiated by technicality (i.e. a finding that the review application was not properly made) and can be lawfully complied with by the MRT or the RRT. The latter will ensure that only the applicant can vary or withdraw the

notice appointing the authorised recipient, thus preventing an authorised recipient from abandoning their role by unilaterally withdrawing themselves.

The proposed amendments in Schedule 4 are technical amendments aimed only at clarifying the role of an authorised recipient, and for this reason do not engage or otherwise affect any of the rights stated in the seven core human rights treaties.

Migration Legislation Amendment Bill (No. 1) 2014 – Schedule 5

"The committee therefore requests the Minister for Immigration and Border Protection's advice on the compatibility of Schedule 5 of the bill with the right to privacy and in particular whether the measures in Schedule 5 are reasonable and proportionate."

Schedule 5 of the Bill proposes to use the *Crimes Act 1914* (Crimes Act) search warrant material and information that is already in the possession of the Commonwealth to assess, and where appropriate, reassess, a person's visa or citizenship application. As noted in the statement of compatibility, the Schedule 5 amendments engage the right to privacy outlined in Article 17 of the ICCPR, however to the extent that these amendments limit this right, those limitations are reasonable, necessary and proportionate.

The Committee has provided comments regarding how it is 'unclear how decision making will be enhanced by the disclosure of information obtained under coercive powers'. As previously noted in the statement of compatibility, under the Commonwealth Fraud Control Guidelines, the department is currently responsible for the conduct of criminal investigations. Should a search warrant need to be executed in support of a criminal investigation, the department seeks agency assistance from the Australian Federal Police (AFP). Search warrant material and information gained under the search warrant is then transferred to the custody and control of departmental investigators under subsection 3ZQU(1) of the Crimes Act.

While the Crimes Act warrant material and/or information is in the custody or control of the department, without the proposed amendments in this Bill (section 51A(3) of the *Australian Citizenship Act 2007* or proposed section 488AA(3) of the Migration Act, the material and/or information cannot be used in relation to administrative decision-making.

This use of material and/or information from Crimes Act search warrants was expected, if legislated, to be used by other Commonwealth agencies as prescribed by subsection 3ZQU(2), (3) and (4) of the Crimes Act. This subsection provides that warrant material and/or information seized may be used or provided for any use that is required or authorised by or under another law of the Commonwealth. In order to maintain and enhance the integrity of the migration and citizenship programme, the government is of the view that search warrant material and/or information in the custody or control of my department should also be able to be used in administrative decisions made under the Migration Act and Regulations decision making. Should the information be relevant to a decision as outlined in the proposed amendments, it is both reasonable and proportionate to achieving the objective of enhancing the integrity of the migration and citizenship programmes.

There may be other situations where search warrant material and/or information collected, for example by the AFP without the involvement of the department, is disclosed to the department as the material and/or information is relevant to decisions outlined in the proposed amendments. As the AFP investigates serious and/or complex crime against Commonwealth laws, its revenue, expenditure and property, which can include both internal fraud and external fraud committed in relation to Commonwealth programmes, it is both reasonable and proportionate for the AFP or a Commonwealth officer to disclose search warrant material and/or information to the department for decision-making. It is also

pertinent that no agency or officer can be compelled to provide search warrant material and/or information to my department.

The proposed amendments under section 51A(3) of the *Australian Citizenship Act 2007* and section 488AA(3) of the Migration Act do not alter the processes in which decisions are made and have no effect on existing procedural fairness requirements or merits review mechanisms attached to any decisions.

The government takes the matter of fraud extremely seriously and recognises that the threat of fraud is becoming more complex and the department needs the requisite tools to respond to these threats. On this basis, the government is confident that to the extent that it may impact on the right to privacy, it is both reasonable and proportionate in achieving the objective of combating fraud for search warrant material and/or information that is already in the possession of the Commonwealth to be used to assess, and where appropriate, reassess a person's visa or citizenship application.

Migration Legislation Amendment Bill (No. 1) 2014 – Schedule 6

"The committee therefore requests the Minister for Immigration and Border Protection's advice on the compatibility of Schedule 6 to the bill with the right to a fair trial and fair hearing rights and, in particular, whether the measures are:

- **aimed at achieving a legitimate objective;**
- **there is a rational connection between the measures and the objective; and**
- **the measures are proportionate to that objective."**

Part 1 of Schedule 6 proposes to remove common law procedural requirements for 'offshore' visa applications and bring offshore visa applications within the scope of statutory procedural fairness requirements under section 57 of the Migration Act. An offshore visa application is one that can only be granted when the applicant is outside the migration zone and in relation to which there is no right of merits review under Part 5 or 7 of the Migration Act.

The Committee has queried my assessment that the proposed amendment is compatible with Article 13 of the ICCPR. Upon reflection, I do not believe that Article 13 of the ICCPR is engaged by this amendment. The amendment is in connection with applications for visas that can only be granted when the applicant is offshore, so the applicant cannot be lawfully onshore at the time of grant. Therefore, questions of expulsion of those lawfully onshore do not arise.

The objective of the proposed amendment is to provide for a consistent procedural fairness framework for visa decision making. Having both statutory procedural fairness and common law procedural fairness apply depending on the type and the nature of the visa application made, increases the risk of decisions being made that are affected by a jurisdictional error due to my delegate misconstruing the character of the information in question and applying the procedural fairness requirements incorrectly.

The Committee has expressed the view that the common law test of requiring adverse information that is 'relevant, credible and significant' to be put to an applicant is not more difficult or onerous to apply compared to the standards set out in section 57 of the Migration Act. It could be argued that the common law test is both more onerous and conceptually more difficult for delegates to grasp and apply correctly.

For example, under section 57 it is clear that adverse information needs to be put to the applicant for comment only if, inter alia, it would be the reason, or part of the reason, for refusing to grant the visa, and most delegates instinctively understand whether or not they would be relying on the adverse information as the reason or part of the reason for refusing the visa application. Under the common law, however, my delegate is obliged to put any adverse information that is 'relevant, credible and significant' to the applicant, even in circumstances where my delegate does not intend to rely on that information as the basis for making a decision to refuse. This creates administrative burden for no apparent gain.

In addition, the concept of 'relevant, credible and significant' is very fluid and it is not always obvious whether a piece of adverse information is relevant, credible and significant. The courts have explained that 'relevant, credible and significant' information includes any issue that is critical to the decision but that is not apparent from the nature of the decision or the terms of the Migration Act and the Regulations, and any adverse conclusion that would not obviously be open on the known material. Whilst this description may seem clear, in practice

many delegates struggle with this, particularly in situations where the information in question does not obviously fall within scope.

I see significant benefit in removing the distinction between 'onshore' and 'offshore' applications in so far as the application of procedural fairness is concerned. Having a single and clear set of procedural fairness requirements that is based on legislation provides greater certainty and clarity for delegates and applicants alike, promotes efficiency and consistency in the application of procedural fairness, and reduces the risk of decisions being made that are potentially affected by a jurisdictional error. This is a legitimate objective to which the proposed amendment is rationally connected.

The amendment does not purport to remove procedural fairness requirements from 'offshore' applications altogether in the way that subsection 57(3) of the Migration Act was thought to have done prior to the High Court's decision in *Saeed v Minister for Immigration and Citizenship* [2010] HCA 23. All the amendment seeks to do is to bring 'offshore' applications in line with 'onshore' applications so that all visa applications will be subject to the same statutory procedural fairness requirements. To that extent, the proposed amendment is proportionate to the stated objective and is compatible with the right to a fair trial and fair hearing.

Migration Amendment (2014 Measures No. 1) Regulation 2014 [F2014L00286] – Schedule 1

"The committee therefore requests the Minister for Immigration and Border Protection's advice on the compatibility of Schedule 1 to the regulation with human rights and, in particular:

- ☐ **whether the measures aimed at achieving a legitimate objective;**
- ☐ **whether there is a rational connection between the measures and their**
- ☐ **stated objective; and**
- ☐ **whether the measures are proportionate to that objective."**

The amendments made to Public Interest Criterion (PIC) 4020 in Schedule 1 to the *Migration Amendment (2014 Measures No. 1) Regulation 2014* require that:

- an applicant satisfy the Minister as to their identity; and
- the Minister be satisfied that during the period starting 10 years before the application was made and ending when the Minister makes a decision to grant or refuse the application, neither the applicant, nor any member of the family unit of the applicant, has been refused a visa because of a failure to satisfy the Minister as to their identity.

There is no human right to enter another country. In exercising the sovereign right to decide who may enter and remain in Australia by being granted a visa, the government has decided to strengthen requirements regarding identity. Issues regarding legitimate objectives, rational connection and proportionality do not apply as there is no impact on a human right. The aim is to strengthen the detection of non-genuine applicants and provide deterrence (being a 10 year exclusion period) to applicants considering identity fraud as a means to facilitate their entry into Australia. Identity fraud has consequences, not only for the department, by bringing the migration programme into disrepute, but for the Australian community. My department has a responsibility to ensure that visas are granted to genuine applicants who cooperate with the department to establish their identity. My department also has a legal responsibility, under the *Public Governance, Performance and Accountability Act 2013* (PGPA Act), to identify fraud risk and implement appropriate controls to mitigate that risk.

I note that PIC 4020 applies to all skilled migration, student, business skills, family and temporary visas, but not to Refugee and Humanitarian visas. In respect of people already onshore, Articles 3 and Articles 16(1) of the CRC may be relevant. In respect of Article 3, the best interests of the child are a primary consideration, however, these may be outweighed by other considerations, including the legitimate objective of maintaining integrity in Australia's visa system. As the ultimate aim is to keep families together, the amendments are consistent with Article 16(1) of the CRC.

"The committee therefore requests the Minister for Immigration and Border Protection's advice on whether the measure, as currently drafted, meets the standards of the quality of law test for human rights purposes"

The Committee has noted that interferences with rights must have a clear basis in law, and that laws must satisfy the 'quality of law' test, which means that any measures which

interfere with human rights must be sufficiently certain and accessible for people to understand when the interference with their rights will be justified.

For the reasons outlined above, the government does not consider that the amendments interfere with human rights and thus the quality of law test for human rights purposes is not relevant.

Migration Amendment (2014 Measures No. 1) Regulation 2014 [F2014L00286] – Schedule 1

"The committee therefore requests the Minister for Immigration and Border Protection's advice on the compatibility of Schedules 1 and 2 to the regulation with the obligation to consider the best interests of the child as a primary consideration and, in particular:

- ☐ **whether the measures aimed at achieving a legitimate objective;**
- ☐ **whether there is a rational connection between the measures and their**
- ☐ **stated objective; and**
- ☐ **whether the measures are proportionate to that objective."**

The amendments in Schedule 1 to the Regulation are aimed at achieving the legitimate objective of preventing the entry and stay in Australia of persons who commit identity fraud. The amendments require that an applicant satisfy me or my delegate as to their identity, and that I or my delegate are satisfied that in the 10 years before the application was made, neither the applicant, nor any member of the family unit of the applicant, has been refused a visa because of a failure to satisfy either me or my delegate as to their identity.

The reference to 'any member of the family unit' includes children of a person applying for a visa, and so the requirement for there to have been no refusal of a visa for failure to satisfy me or my delegate as to their identity over the past 10 years would apply to children of persons who commit identity fraud, as well as those persons themselves.

My department recognises that there may be circumstances where children may be adversely affected by the fraudulent actions of their parents through no fault of their own. The new identity requirement in PIC 4020 means that children of persons who commit identity fraud will have the same status as, and be able to stay with, their primary caregiver, which is considered to be in their best interests. If in certain circumstances this is not the case, the government is of the view that this would be outweighed by the legitimate objective of maintaining integrity in Australia's migration programme. As the impact on children/a family will be to keep the family together, in fact it is consistent with the principle set out in Article 16(1) of the Convention on the Rights of the Child (CRC).

Migration Amendment (2014 Measures No. 1) Regulation 2014 [F2014L00286] – Schedule 2

"The committee therefore requests the Minister for Immigration and Border Protection's advice on the compatibility of Schedules 1 and 2 to the regulation with the obligation to consider the best interests of the child as a primary consideration and, in particular:

- **whether the measures aimed at achieving a legitimate objective;**
- **whether there is a rational connection between the measures and their**
- **stated objective; and**
- **whether the measures are proportionate to that objective."**

The measures in Schedule 2 have as an objective reducing the number of unaccompanied humanitarian minors (UHMs) taking dangerous boat journeys to Australia. It is anticipated that the removal of a straightforward family reunification pathway for UHMs will reduce the likelihood of minors leaving their families and travelling to Australia alone in the hope of later being able to propose their parents and siblings relatively easily under the Humanitarian Programme. The measures help ensure that complete refugee families and others determined by the government in accordance with criteria set by the Parliament to be in need of resettlement, receive highest priority for visas. The measures also aim to reinforce public confidence in the fairness of our family reunion policies, ensuring that those who arrived legally are given first priority.

The obligation under Article 3 of the CRC is for a legislative body to treat the best interests of the child as a primary consideration in any actions concerning children. It is not in a child's best interests to undertake dangerous boat journeys to Australia in the hope of sponsoring a parent or sibling. It may be argued that for a child already in Australia reunification with their family is in their best interest. However the government has taken the view that the objective of discouraging such journeys in the first place outweighs the fact that re-unification may be in their best interests.

The measures affect a cohort of applicants whose applications are proposed by their children who arrived in Australia as unaccompanied minors and irregular maritime arrivals, and were aged under 18 at the time the applications were made. Close to 95 per cent of the minor proposers are now over 18 and beyond the scope of the CRC. As regards the small minority of proposers who are still under 18, where compelling reasons exist for giving special consideration to granting their families visas, those applications will be considered accordingly. My department has given generous extensions of time to allow affected applicants and their advisers to prepare additional information in support of their applications.

The amendments do not amount to arbitrary or unlawful interference with the family under article 17(1) of the ICCPR. The principle set out in article 23(1) of the ICCPR, that the family is entitled to protection by society and the State does not create a positive obligation to re-unite families that have chosen to separate themselves across countries.

Australian Citizenship (Intercountry Adoption) Bill 2014

"The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to whether the bill is compatible with the best interests of the child and the specific protections for intercountry adoptions provided for in article 21 of the CRC and the Hague Convention."

As a preliminary issue, the Department notes that it is not within the Committee's mandate to review the compatibility of bills with the Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption (Hague Convention). However, the fact that Australian intercountry adoption arrangements meet Hague Convention standards is relevant to Article 21 of the CRC.

Article 21 of the Convention on the Rights of the Child (CRC) places an obligation on States Parties that recognise and/or permit the system of adoption to promote the objectives of Article 21 by concluding bilateral or multilateral arrangements or agreements and endeavouring, within this framework, to ensure that the placement of a child in another country is carried out by competent authorities and organs.

Article 21 requires States Parties to, among other things:

- ensure that the best interests of the child shall be the paramount consideration
- ensure that the adoption of a child is authorised only by competent authorities
- ensure that the child concerned enjoys safeguards and standards equivalent to those existing in the case of national adoption, and
- take all appropriate measures to ensure that placement does not result in improper financial gain for those involved in it.

Australia is a party to the Hague Convention. As the Committee has identified, the Hague Convention establishes a common regime, including minimum standards and appropriate safeguards, for ensuring that intercountry adoptions are performed in the best interests of the child and with respect for the fundamental rights guaranteed by the CRC.

The Attorney-General's Department, as the Australian Central Authority for intercountry adoption under the Hague Convention, has overall responsibility for ensuring that Australia meets its obligations under the Hague Convention. There are also central authorities in each Australian state and territory that implement the practical requirements of the Hague Convention including (for both countries that are parties to the Hague Convention and those bilateral partners that are not a party to that Convention):

- Assessing applications from prospective adoptive parents (in terms of eligibility under the state or territory law, and whether they are suitable to adopt);
- Approving applications for adoption;
- Working with the licensed and authorised overseas authorities, to ensure that the appropriate consents for a child's adoption are obtained in accordance with the overseas country's laws and the Hague Convention standards; and

- Undertaking post placement supervision and reporting.

The Australian Government only establishes international adoption arrangements with countries which can apply the standards required by the Hague Convention, whether or not that country is a party to the Hague Convention.

Only where the country is found to be compliant with the standards of the Hague Convention and the Attorney-General's Department (in its capacity as the Australian Central Authority for intercountry adoption) is satisfied that intercountry adoptions will take place in an ethical and responsible way, will the country be approached to gauge the level of interest in establishing an intercountry adoption programme with Australia.

These standards include a determination by the country of origin that the intercountry adoption is in the child's best interests (Article 4 of the Hague Convention).

The Committee's concerns

With reference to the CRC, whilst noting that children outside Australia's territory are generally outside Australia's jurisdiction, the Department also notes the Committee's comments that adopted children granted Australian citizenship and Australian passports overseas would come within Australia's jurisdiction.

Given that all of the country programmes which the Australian Government has established must meet the standards of the Hague Convention, the government is of the view that Australia's intercountry adoption programme as a whole is consistent with Article 21 of the CRC.

The guiding principle of all intercountry adoptions undertaken by Australia, including through the bilateral arrangements with non-Hague countries, is that the best interests of the child shall be the paramount consideration. An application for Australian citizenship is simpler and quicker than an application for a subclass 102 Adoption visa and is certainly less expensive. A more efficacious means of an adopted child's entry into Australia where supported by a Hague Convention compliant programme is in the child's best interests because it means the child can begin their life with their adoptive family in Australia more quickly without compromise to their safety and well-being.

Therefore, the bill is consistent with Article 21 of the CRC.

The proposal is also in keeping with Articles 9 and 18 of the Hague Convention, which respectively encourage expediting adoption processes and taking the necessary steps to ensure an adopted child can reside permanently in Australia.

THE HON PETER DUTTON MP
MINISTER FOR HEALTH
MINISTER FOR SPORT

Ref No: MC14-008304

Senator Dean Smith
Chair
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S1.111
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Dear Chair Dean.

Thank you for your correspondence of 24 June 2014 on behalf of the Parliamentary Joint Committee on Human Rights regarding the National Health Amendment (Pharmaceutical Benefits) Bill 2014 (the Bill).

I note the Committee is seeking additional information regarding whether the increases in patient co-payments proposed in the Bill for medicines subsidised under the Pharmaceutical Benefits Scheme (PBS) and the Repatriation Pharmaceutical Benefits Scheme (RPBS) are compatible with the right to health.

Whether the Bill impinges on the right to health and a healthy environment

The provisions in the Bill reflect a decision announced by the Government as part of the 2014-15 Budget to implement a one-off increase in PBS and RPBS co-payments and incremental increases in safety net thresholds for general and concessional patients over four years. The changes are designed to reduce growth in the cost to Government for the PBS and RPBS by $1.3 billion over four years.

The Bill does not represent a change in the rights of the Australian population in relation access to prescribed medicines. The increase in the co-payments is rather about ensuring the maintenance of an equitable share in the increasing cost of the PBS. In the last ten years, the cost of the PBS has increased by 80 per cent. In 2012-13 alone, almost 200 million scripts were subsidised under the PBS. Over the longer term, PBS expenditure growth is expected to average between four and five percent annually, with expenditure increasing from $9.3 billion in 2013-14 to over $10 billion in 2017-18. This growth is driven primarily by a growing and ageing population, increasing incidence of chronic disease, the development of new and expensive medicines, and community expectations regarding access to those medicines.

This level of growth in expenditure is unsustainable and risks compromising the long term viability of the PBS, and therefore the access of the Australian population to new, innovative medicines. The Australian Government recently approved $436.2 million in new and amended PBS listings, with the Pharmaceutical Benefits Advisory Committee recommending a further $550 million of listings at its meeting in March 2014.

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The Committee also considered up to $3.6 billion in new listings at its July 2014 meeting. The Government has a responsibility to manage the level of growth in PBS spending in a way that does not discriminate against any particular sectors.

There have been a number of changes to the PBS since the reforms of 2007, with the majority aimed at finding efficiencies in the pharmaceutical and pharmacy sectors, including through price disclosure, which consumers have benefitted from. This modest increase to patient co-payments reflects a whole of community approach to improve the sustainability of the PBS into the future.

Previous PBS co-payment changes

Successive governments have recognised the need for PBS co-payments, and under successive governments other one-off increases have occurred in 1983, 1986, 1990, 1997 and 2005. This change represents a more modest proportional increase in real terms than most of these previous increases. In the most recent one-off increase in 2005, the general and concessional co-payments of $4.90 and 80 cents respectively represented an approximate 21 per cent increase on the previous co-payment amounts. The increase in the cost of subsidised PBS prescriptions proposed for 2015 (80 cents for concessional patients and $5 for general patients), is approximately 13 per cent.

Experience from the 2005 increase in co-payment suggests that while there may be a short term reduction in total PBS-subsidised prescription volume, it will return to the previous level within a couple of years. After the last co-payment increase, there was a reduction in total PBS subsidised prescription volume, combining general and concessional, of 1.15 per cent between 2005 and 2006 and by one per cent in 2007. The volume returned to the 2005 level in 2008.

Some researchers suggest the reduction in volume observed in 2005 was due to patients not filling prescriptions. However, many factors affect the use of medicines, and it is not possible to disaggregate the various factors that may have contributed to this reduction through available PBS data. For example, in 2005 there were a number of drugs that fell below the general co-payment contribution. This would cause the number of PBS-subsidised prescriptions to fall, but does not necessarily mean patients did not fill their prescriptions.

Impact on patients

The impact on patients will be modest, including for high users of medicines. On average, concessional patients use 17 subsidised prescriptions a year and concessional patients over 65 years, on average, over 30 prescriptions. The additional patient contributions resulting from the 80 cent co-payment increase for these patients would be $13.60 and $24 per annum respectively.

The average general patient, who uses two PBS-subsidised prescriptions per year, will pay $10 a year more in contributions. Many commonly used medicines, representing 70 per cent of total general patient prescriptions, are priced below the general co-payment. Because no PBS subsidy applies to these medicines, there will be no increase in the patient payment for these prescriptions under the measure.

As the number of medicines priced below the general PBS co-payment amount increases, both consumers and the Government continue to benefit from ongoing price reductions that result from more competition in the market. Taking into account under

co-payment prescriptions, it is estimated that the average increase in the cost of a general patient prescription will be between one and two dollars. The proposed change will mean that the percentage of medicines priced at less than the general co-payment will be well over 50 per cent.

The change proposed in the Bill applies to all Australians who access PBS medicines – the modest additional contribution is shared. However, the PBS will continue to protect all patients from excessive prescription medicine costs, as the PBS safety net arrangements will still be in place, although the levels will be slightly higher, again reflecting the increased cost of subsidising PBS medicines. Safety net arrangements apply to households, not individual costs, and support those households that collectively need to spend large amounts of medicines each calendar year.

The proposed changes will not affect the arrangements under the Remote Area Aboriginal Health Services (RAAHS) Programme which provide access to PBS medicines for Aboriginal and Torres Strait Islander patients in remote areas at no cost.

In addition, Aboriginal and Torres Strait Islander peoples living with, or at risk of, chronic disease will continue to be able to access medicines through the Closing the Gap arrangements. Under this measure eligible Indigenous Australians who would otherwise pay the general co-payment for PBS prescriptions, pay at the concessional rate. Patients, who would otherwise pay the concessional rate, receive their PBS medicines at no charge. It is important to note that in 2013, nearly 88 per cent of patients eligible to access the CTG Co-payment measure were concessional patients and therefore received their medicines free-of-charge. This will not change after the co-payment increase. To 31 March 2014, the CTG measure has assisted 258,316 eligible patients since its inception on 1 July 2010.

What the PBS achieves

The proposed increase of 80 cents for concessional patients and $5.00 for general patients needs to be considered in the context of these patients being able to access medicines that would otherwise be prohibitively expensive for most Australians. Treatments for melanoma (such as ipilimumab or dabrafenib) cost up to $110,000 a year; advanced breast cancer (everolimus) around $38,000 a year; prostate cancer (abiraterone) around $27,000 a year; and macular degeneration (such as ranibizumab or aflibercept) up to $17,000 a year. In 2015[1], concessional patients will be able to access these drugs for $6.90 and general patients $42.70 regardless of the actual cost of the prescription to government.

The PBS seeks to strike a balance between providing access to innovative and costly drugs such as those mentioned above, at a price patients can afford. The proposed increase in cost for consumers is reasonable and proportionate, given the increasing cost of listing drugs on the PBS. It is also necessary, given the factors driving PBS growth in the future. The changes in this Bill will strengthen the PBS while preserving all the features that make it such an essential part of Australia's health system.

The Government is comfortable that the changes are compatible with human rights, and do not impinge on access or the right to health for all Australians. The changes are a rational means to achieve the legitimate objective of ensuring the long term viability of

[1] 1 January 2015 co-payments are based on estimates of indexation by the Consumer Price Index.

the PBS, and the increase in co-payments is reasonable in comparison to the actual cost of the medicines that are made available to all Australians through the PBS.

I trust this information will be of assistance to the Committee.

Yours sincerely

PETER DUTTON

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14 JUL 2014

MC14-001862

Senator Dean Smith
Chair
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Dear Senator Smith

Thank you for your letter of 18 June 2014 concerning comments by the Parliamentary Joint Committee on Human Rights in its *Seventh Report of the 44th Parliament* on the Student Identifiers Bill 2014.

The Committee seeks my advice in relation to several comments about the *Student Identifiers Act 2014* (the Act). I shall deal with each of the comments in the order in which they appear in the report.

The Committee is seeking advice about the circumstances, and according to what criteria, an individual without a unique student identifier may be granted an exemption from the prohibition on the issuing of Vocational Education and Training (VET) qualifications, and whether a decision to refuse to grant an exemption will be subject to merits review. The criteria for the granting of exemptions to individuals will be determined by me with the agreement of the Ministerial Council and set out in a legislative instrument to be administered by the Registrar. The purpose of this exemption is to provide a process for individuals who object to being issued a student identifier to opt out of the scheme. Any legislative instrument made pursuant to the Act would be subject to tabling and possible disallowance by Parliament. In addition, I anticipate that any administrative decision taken by the Registrar in respect of requests by individuals for an exemption would be subject to appeal under the provisions of the *Administrative Decisions (Judicial Review) Act 1977.*

The committee asks why the lower standard of 'reasonably necessary' is required to authorise the collection, use and disclosure of information for the purposes outlined in s.20 of the bill. I assume that the Committee is referring to s.21 of the bill. This section authorises the collection, use and disclosure of the student identifier, rather than personal information, for several law enforcement purposes. The standard 'of reasonably necessary' is justified in these cases as the student identifier will likely be a minor element in the law enforcement activities listed. Therefore, while 'reasonably necessary' is a lower threshold than 'necessary', it is required to

ensure that the legitimate policy objective of law enforcement can be achieved and is not unnecessarily impeded, as this will ultimately benefit students and the wider community.

The Committee is seeking advice specifically on whether the limitation on the right to privacy in subsection 21(f) is a reasonable, necessary and proportionate measure for the prevention, detection, investigation or remedying of misconduct of a serious nature, or other conduct prescribed by the regulations. The Committee also seeks advice on what types of conduct are likely to be prescribed by the regulations. I consider that the measure provided for by subsection 21(f), which is the collection, use or disclosure of the student identifier, is appropriate and proportionate for the law enforcement purposes it can assist and is not inconsistent with the general privacy protections provided by the bill. As for the type of conduct to be prescribed in regulation for the purpose of subsection 21(f), this will relate to the obtaining of a student identifier fraudulently or as a result of misconduct. It will be a matter for the Student Identifiers Registrar to determine what circumstances will constitute misconduct.

Yours sincerely

Ian Macfarlane

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Senator Dean Smith
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Dear Dean.

Dear Senator Smith,

I refer to your letter of 24 June 2014 to the Treasurer, on behalf of the Parliamentary Joint Committee on Human Rights (the Committee) concerning the *Tax Laws Amendment (Implementation of the FATCA Agreement) Bill 2014* (the Bill), which received Royal Assent on 30 June 2014. I am responding to you in my capacity as the Acting Assistant Treasurer.

As you know, the Bill amended the *Taxation Administration Act 1953* to give effect to the treaty-status agreement signed by Australia and the United States of America (US) on 28 April 2014: the *Agreement between the Government of Australia and the Government of the United States of America to Improve International Tax Compliance and to Implement FATCA* (the FATCA Agreement).

The FATCA Agreement and the amendments contained in the Bill will enable Australian financial institutions to comply with the information-reporting requirements of the US anti-tax evasion FATCA (*Foreign Account Tax Compliance Act)* regime, which commenced on 1 July 2014.

Under the FATCA Agreement, the Australian Taxation Office (ATO) and the US Internal Revenue Service (IRS) are required to annually exchange certain information, on an automatic basis, in accordance with Article 25 (*Exchange of Information*) of the Australia-US tax treaty: the *Convention between the Government of Australia and the Government of the United States of America for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income.*

A key feature of Article 25 (consistent with the corresponding articles of Australia's other bilateral tax treaties) is the protection it affords to the confidentiality of taxpayer information exchanged between the ATO and the IRS. Specifically, paragraph 2 of Article 25 states:

> *Any information so exchanged shall be treated as secret and shall not be disclosed to any persons other than those (including a Court or administrative body) concerned with the assessment, collection, administration or enforcement of, or with litigation with respect to, the taxes to which this Convention applies.*

In essence, paragraph 2 prohibits both the ATO and the IRS from disclosing information to any persons that are not directly involved in the administration or enforcement of tax laws, or in litigation relating to taxes covered by the treaty (these are essentially income taxes).

The provisions of the tax treaty create legal obligations for Australia and the US under international law. In this regard, the confidentiality safeguards contained in Article 25 of the tax treaty complement Australian and US tax secrecy laws concerning the disclosure of taxpayer information to prescribed third parties (for example, Division 355 of the Australian *Tax Administration Act 1953* and Section 6103 of the US *Internal Revenue Code*).

The effect of Article 25 of the tax treaty is to significantly narrow the range of recipients to which taxpayer information can be disclosed compared to the range of recipients permitted by Australian and US domestic tax secrecy laws. In practice, Article 25 imposes a higher standard of tax secrecy and prohibits the use of FATCA-related information in Australia and the US for non-tax purposes.

Article 25 also operates on the condition that the exchange of taxpayer information is limited to information that is necessary for administering the tax treaty, administering the domestic laws of Australia or the US or for the prevention of fraud. This condition helps to ensure privacy insofar as access to taxpayer information within the ATO and the IRS is limited to officials who require it to perform their duties.

Having regard to the above, and in response to the specific points raised in paragraph 1.126 of the Committee's report, the *Eighth Report of the 44th Parliament*, I consider that the privacy safeguards that will apply in the US are the safeguards provided by Article 25 of the Australia-US tax treaty. These safeguards constitute an international legal obligation on both countries and build on existing safeguards contained in either country's domestic law.

I am satisfied that the safeguards activated by the FATCA Agreement and the Bill are consistent with the right to privacy. Further, in light of the legitimate tax system integrity objectives discussed in the human rights compatibility statement in the explanatory memorandum to the Bill, the limitations on privacy in this case are necessary and proportionate to the objectives of the Bill.

Thank you for bringing these concerns to my attention. I trust that this information is of assistance to the Committee.

Yours sincerely

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04 AUG 2014

MC14-002305

Senator Dean Smith
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Dear Senator Smith Dean

Thank you for your letter of 15 July 2014 concerning the Parliamentary Joint Committee on Human Rights (the Committee) remarks reported in the *Ninth Report of the 44th Parliament* in relation to the Trade Support Loans Bill 2014. The Trade Support Loans Bill was introduced into Parliament on 4 June 2014 to introduce income contingent loans of up to $20,000 for apprentices. The *Trade Support Loan Act 2014* passed both Houses of Parliament on 15 July 2014 and received Royal Assent on 17 July 2014.

I note the Committee has sought information about the Trade Support Loan Bill, in particular regarding the compatibility of the Bill with the right to education, rights to equality and non-discrimination, right to privacy, and right to a fair trial and fair hearing rights.

The Committee requested that I, as the Minister for Industry, provide advice on the following:

- **Compatibility of the bill with the right to education (refer to paragraph 1.485).**

  The availability of the Trade Support Loans will ensure that regardless of socioeconomic status, regional location or cultural background, apprentices in a priority occupation will have access to financial support designed to help them remain in their apprenticeship and complete their qualification. It is therefore my view that the Bill is compatible with the right to education.

- **Whether the qualification requirement for the loan through the TSL Priority List is compatible with the rights to equality and non-discrimination (refer to paragraph 1.492).**

  The qualification requirement of the Trade Support Loans programme ensures that anyone in an apprenticeship in a priority occupation who is an Australian resident and resides in Australia and has a tax file number can apply for a loan. These requirements are not discriminatory and do not limit access based on race, colour, sex, language, religion,

political or other opinion, national or social origin, property or birth. These requirements ensure the objective of increasing skilled workers in priority occupations through income contingent loans is achieved and repayment of the loans is maximised to meet the Commonwealth's budgetary requirements. The qualification requirement is, in my view, compatible with the rights to equality and non-discrimination.

- **Whether the powers to obtain certain information are compatible with the right to privacy and particularly: whether the limitation is aimed at achieving a legitimate objective; whether there is a rational connection between the limitation and that objective; and whether the limitation is a reasonable and proportionate measure for the achievement of that objective (refer to paragraph 1.500).**

  The powers to obtain certain information ensures that anyone applying for Trade Support Loans meets the qualification and payability criteria and anyone receiving payments continues to meet the criteria and is able to make repayment through the taxation system once their income reaches the minimum repayment threshold. These powers do not create unlawful or arbitrary interferences with a person's privacy, family, home and correspondence, and they do not create unlawful attacks on a person's reputation. The information collected for the purposes outlined above is not used for anything other than for administering the Trade Support Loans programme, and the information collected is collected, used, disclosed and stored in line with the *Privacy Act 1988* and the Australian Privacy Principles. These powers are, in my view, compatible with the right to privacy.

- **Whether the new offences are compatible with the right to a fair trial and fair hearing rights, and particularly: whether the measures are aimed at achieving a legitimate objective; whether there is a rational connection between the limitation and that objective; and whether the limitation is reasonable and proportionate measure for the achievement of that objective (refer to paragraph 1.507).**

  The new offences provided for in the Bill are designed to ensure that apprentices only receive Trade Support Loan payments if they are undertaking training in priority occupations in the manner set out in the *Trade Support Loans Act 2014*. The offences also ensure the apprentice can be followed through the taxation system so that they begin to pay back their loan when their income reaches the minimum income threshold. This ensures the Commonwealth's budgetary priorities are met, and that the programme achieves its goal of increased supply of skills in priority occupation areas. The offences do not deny the apprentice's right to a fair and public criminal trial or a fair and public hearing in civil proceedings which include that all persons are equal before courts and tribunals and the right to a fair and public hearing before a competent, independent and impartial court or tribunal established by law. The new offences are, in my view, compatible with the right to a fair trial and fair hearing rights.

I hope the Committee finds this information of assistance.

Yours sincerely

Ian Macfarlane