Chapter 2 - Concluded matters

This chapter list matters previously raised by the committee and considered at its meeting on 25 August 2014. The committee has concluded its examination of these matters on the basis of responses received by the proponents of the bill or relevant instrument makers.

Agricultural and Veterinary Chemicals Legislation Amendment (Removing Re-approval and Re-registration) Act 2014

Portfolio: Agriculture
Introduced: House of Representatives, 19 March 2014

Purpose

2.1 The Agricultural and Veterinary Chemicals Legislation Amendments (Removing Re-approval and Re-registration) Bill 2014 (the bill) seeks to amend the *Agricultural and Veterinary Chemicals Code Act 1994* to:

- remove requirements for mandatory periodic re-registering of agricultural chemicals and veterinary medicines (together, 'agvet chemicals'), which would otherwise commence on 1 July 2014;
- prevent the expiry of active constituent approvals and prevent the application of dates after which a registration cannot be renewed;
- enable the Australian Pesticides and Veterinary Medicines Authority (APVMA) to require information to be provided about substances supplied as a chemical product;
- simplify how variations to approvals and registrations are processed by APVMA; and
- enable APVMA to charge a fee when it provides copies of documents in its possession.

2.2 The bill would also make consequential amendments to the Agricultural and Veterinary Chemicals Code Act 1994, Agricultural and Veterinary Chemical Products (Collection of Levy) Act 1994, Agricultural and Veterinary Chemicals Legislation Amendment Act 2013 and the Food Standards Australia New Zealand Act 1991.

Background

2.3 The committee reported on the bill in its *Eighth Report of the 44th Parliament*.

2.4 The Agricultural and Veterinary Chemicals Legislation Amendment (Removing Re-approval and Re-registration) Bill 2014 passed both Houses of

Parliament on 14 July 2014 and is now the *Agricultural and Veterinary Chemicals Legislation Amendment (Removing Re-approval and Re-registration) Act 2014*.

Committee view on compatibility

Right to health and a healthy environment

Removal of mandatory re-registration process

2.5 The committee noted that the the removal of the reregistration requirement 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. A detailed justification for this limitation was not provided in the statement of compatibility.

2.6 The committee sought the advice of the Minister for Agriculture 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.

Minister's Response

> 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.
>
> 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 (!mown 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.[1]

Committee response

2.7 The committee thanks the Minister for Agriculture for his response and has concluded its examination of this bill. The committee considers the bill compatible with human rights.

1 See Appendix 1, Letter from the Hon Barnaby Joyce MP, Minister for Agriculture, to Senator Dean Smith, dated 05/08/2014, pp 1-3.

Australian Citizenship (Intercountry Adoption) Bill 2014

Portfolio: Immigration and Border Protection

Introduced: House of Representatives, 29 May 2014

Purpose

2.8 The Australian Citizenship (Intercountry Adoption) Bill 2014 (the bill) seeks to amend the Australian Citizenship Act 2007 (the Act) to allow for acquisition of Australian citizenship by a person adopted outside Australia by an Australian citizen in accordance with a bilateral arrangement between Australia and another country.

2.9 Specifically, the bill would amend the Act to create an entitlement to citizenship for persons adopted in accordance with a bilateral arrangement. This entitlement is equivalent to that currently provided to persons adopted in accordance with the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (Hague Convention).[1]

Background

2.10 The committee reported on the bill in its *Eighth Report of the 44th Parliament.*

Committee view on compatibility

Rights of the child

Extension of citizenship rights to children adopted from countries that are not party to the Hague Convention

2.11 The committee sought 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 inter-country adoptions provided for in article 21 of the CRC and the Hague Convention.

Minister's response

> 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

1 The Hague (29 May 1993), Entry into force for Australia: 1 December 1998, [1998] ATS 21.

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.[2]

Committee response

2.12 The committee thanks the Minister for Immigration and Border Protection for his response.

2.13 The committee welcomes the confirmation that the Australian Government only establishes international adoption arrangements with countries which can apply the standards required by the Hague Convention.

2.14 The committee notes, however, that the response does not provide information on how Australia establishes that a country that is not a party to the

2 See Appendix 1, Letter from the Hon Scott Morrison MP, Minister for Immigration and Border Protection, to Senator Dean Smith, dated 05/08/2014, pp 20-21.

Hague Convention can nevertheless apply the standards required by that convention. In addition, the response does not explain how Australia confirms the efficacy of child protection measures in countries to which Australia has or proposes to have bilateral relationships which are not party to the Hague Convention. Further, the response does not explain how the Australian government determines its satisfaction that inter-country adoptions will take place in an ethical and responsible way in jurisdictions beyond its control.

2.15 Compliance with the Hague Convention is a critical component of ensuring the protections required by article 21 of the Convention on the Rights of the Child are maintained in any inter-country adoption.

2.16 The committee is of the view that the information provided by the Minister is insufficient to support a conclusion that the bill is compatible with article 21 of the Convention on the Rights of the Child.

2.17 The committee therefore concludes that the bill is likely to be incompatible with Australia's international human rights obligations under the Convention on the Rights of the Child.

Customs Tariff Amendment (Product Stewardship for Oil) Bill 2014 and Excise Tariff Amendment (Product Stewardship for Oil) Bill 2014

Portfolio: Immigration and Border Protection
Introduced: House of Representatives, 29 May 2014

Purpose

2.18 The Customs Tariff Amendment (Product Stewardship for Oil) Bill 2014 seeks to amend the *Customs Tariff Act 1995* to increase the excise-equivalent customs duty on new and recycled petroleum-based oils and greases and their synthetic equivalents (Oils) from 5.449 cents to 8.5 cents per litre or kilogram from 1 July 2014.

2.19 The Excise Tariff Amendment (Product Stewardship for Oil) Bill 2014 seeks to amend the *Excise Tariff Act 1921* to increase the excise on new and recycled petroleum-based oils, greases and their synthetic equivalents from 5.449 cents to 8.5 cents per litre or kilogram from 1 July 2014.

Background

2.20 The committee reported on the bill in its *Seventh Report of the 44th Parliament*.

Committee view on compatibility

Right to work and rights at work

Economic impact of measures

2.21 The committee sought clarification from the minister as to the compatibility of the bill with the right to work and rights at work.

Parliamentary Secretary's Response

> 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.

I therefore consider the amendments to be reasonable, necessary and proportionate to achieving a legitimate objective.[1]

Committee response

2.22 The committee thanks the Parliamentary Secretary to the Treasurer for his response and has concluded its examination of this bill. The committee considers the bill compatible with human rights.

1 See Appendix 1, Letter from the Hon Steven Ciobo MP, Parliamentary Secretary to the Treasurer, to Senator Dean Smith, 31/07/2014, pp 1-2.

Fair Work Amendment Bill 2014

Portfolio: Employment
Introduced: House of Representatives, 27 February 2014

Purpose

2.23 The bill proposes amendments to the Fair Work Act 2009 (FWA) to implement elements of The Coalition's Policy to Improve the Fair Work Laws. Specifically, the bill seeks to gives effect to a number of recommendations made in the report of the Fair Work Act Review Panel.

2.24 The bill proposes to make a number of changes to the FWA including to:

- provide that an employer must not refuse a request for extended unpaid parental leave unless the employer has given the employee a reasonable opportunity to discuss the request;
- provide that, on termination of employment, untaken annual leave is paid out as provided by the applicable industrial instrument;
- provide that an employee cannot take or accrue leave under the FWA during a period in which the employee is absent from work and in receipt of workers' compensation;
- amends flexibility terms in modern awards and enterprise agreements;
- confirm that benefits other than an entitlement to a payment of money may be taken into account in determining whether an employee is better off overall under an individual flexibility agreement;
- establish a new process for the negotiation of single-enterprise greenfields agreements;
- amend the right of entry framework of the FWA;
- provide that an application for a protected action ballot order cannot be made unless bargaining has commenced;
- provide that, subject to certain conditions, the FWC is not required to hold a hearing or conduct a conference when determining whether to dismiss an unfair dismissal application under section 399A or section 587; and
- provide for the Fair Work Ombudsman to pay interest on unclaimed monies.

Background

2.25 The committee reported on the bill in its *Seventh Report of the 44th Parliament*.

2.26 The bill was the subject of an inquiry by the Senate Education and Employment Legislation Committee, which reported on 5 June 2014.[1]

Committee view on compatibility

Right to just and favourable conditions of work

Inability to review decision to refuse extensions of parental leave

2.27 The committee sought the Minister for Employment's advice as to the compatibility of the measure with the right to just and favourable conditions of work.

Minister's Response

> 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.[2]

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1 Senate Education and Employment Legislation Committee, *Fair Work Amendment Bill 2014 [Provisions]* (5 June 2014).

2 See Appendix 1, Letter from Senator the Hon. Eric Abetz, Minister for Employment, to Senator Dean Smith, dated 12/08/2014, p. 1.

Committee response

2.28 The committee thanks the Minister for Employment for his response and has concluded its consideration of this measure.

Removal of payment of annual leave loading on termination of employment

2.29 The committee requested the Minister for Employment's advice as to:

- whether the proposed limitation on the right to just and favourable conditions of work is aimed at achieving a legitimate objective;
- whether there is a rational connection between the limitation and that objective; and
- whether the limitation is proportionate to that objective.

Minister's Response

> 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.[3]

3 See Appendix 1, Letter from Senator the Hon. Eric Abetz, Minister for Employment, to Senator Dean Smith, dated 12/08/2014, pp 1-2.

Committee response

2.30 The committee thanks the Minister for Employment for his response and has concluded its consideration of this measure.

Restrictions on taking or accruing leave while receiving workers' compensation

2.31 The committee requested the Minister for Employment's advice as to:

- whether the proposed changes to the eligibility of some workers to take or accrue annual leave while on workers' compensation is 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.

Minister's Response

> 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.[4]

Committee response

2.32 The committee thanks the Minister for Employment for his response and has concluded its consideration of this measure.

4 See Appendix 1, Letter from Senator the Hon. Eric Abetz, Minister for Employment, to Senator Dean Smith, dated 12/08/2014, p. 2.

Individual flexibility arrangements – potential reductions in the 'better off overall test'

2.33 The committee requested the advice of the Minister for Employment as to whether the proposed amendments to the Act in relation to IFAs are a reasonable and proportionate limitation on the right to just and favourable conditions of work.

Minister's Response

> 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.[5]
>
> 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.[6] 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 overall requirement. These protections include that individual flexibility arrangements must be genuinely agreed and cannot be used to undercut the national minimum

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

6 See paragraphs 860 and 867- 868 of the Explanatory Memorandum to the Fair Work Bill 2008.

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.[7]

Committee response

2.34 The committee thanks the Minister for Employment for his response and has concluded its consideration of this measure.

Right to freedom of association

Employer's ability to limit period for negotiation

2.35 The committee sought the Minister for Employment's advice as to whether the proposed amendments relating to greenfields agreements are a reasonable and proportionate limitation on the right to bargain collectively.

Minister's Response

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

7 See Appendix 1, Letter from Senator the Hon. Eric Abetz, Minister for Employment, to Senator Dean Smith, dated 12/08/2014, pp 2-3.

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.[8]

Committee response

2.36 The committee thanks the Minister for Employment for his response.

2.37 The committee recognises the critical importance that both parties to a negotiation act in good faith and suggests that the inclusion of such a requirement in the bill is consistent with the right to collectively bargain.

2.38 The committee notes, however, that currently federal industrial law provides two parallel schemes for ensuring the pay and conditions of workers – the award system and the enterprising bargaining process. The very foundation of the enterprise bargaining scheme is that it is a process build on agreements between employers and employees (through their representatives). The bill will permit employers to take their proposed greenfields agreement to the Fair Work

8 See Appendix 1, Letter from Senator the Hon. Eric Abetz, Minister for Employment, to Senator Dean Smith, dated 12/08/2014, pp 3-4.

Commission for approval if they do not reach an agreement with the union within a three month negotiation period.

2.39 Notwithstanding the safeguards in the bill to ensure the Fair Work Commission only approves an agreement if certain minimum requirements are met, the ability of the employer to impose an enterprise agreement in the absence of union agreement would appear inconsistent with the right to collectively bargain.

Restrictions on union rights of entry to work places

2.40 The committee sought the Minister for Employment's advice as to whether the measures are compatible with the right to bargain collectively 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 reasonable and proportionate measure for the achievement of that objective.

Minister's Response

> 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.[9]

9 *Towards more productive and equitable workplaces - An evaluation of the Fair Work legislation*, p. 193.

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 I 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.[10] 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.

10 Parliamentary Joint Committee on Human Rights, *Seventh Report of the 44'" Parliament for Bills Introduced 13 - 29 May 2014*, at paragraph 1.77.

Accordingly, the amendments are necessary, reasonable and proportionate.[11]

Committee response

2.41 The committee thanks the Minister for Employment for his response and has concluded its consideration of this measure.

Repeal of requirements for employers to facilitate union visits to remote locations

2.42 The committee requested the Minister for Employment's advice as to whether the proposed repeal of sections 521A to 521D of the FWA is compatible with the right to freedom of association and the right to bargain collectively.

Minister's Response

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 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[12], 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.[13]

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11 See Appendix 1, Letter from Senator the Hon. Eric Abetz, Minister for Employment, to Senator Dean Smith, dated 12/08/2014, pp 4-5.

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

13 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 p. 12.

> 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'.[14] 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.[15]

Committee response

2.43 The committee thanks the Minister for Employment for his response.

2.44 The committee notes the Minister's statement, that transport to a remote site 'could cost upwards of $40,000 for a specially scheduled flight for union officials.' The committee notes that under the Act an occupier is obliged to provide transport only if to do so 'would not cause the occupier undue inconvenience.' The committee further notes that under the Act the occupier is entitled to charge the permit holder a fee 'provided that the fee is no more than what is necessary to cover the cost to the occupier of providing such transport.'

2.45 Accordingly it is not clear that there is an obligation on an employer to provide the specially scheduled flight or to incur similarly high costs in providing transport.

2.46 The committee considers that the amendments may be incompatible with the right to freedom of association and the right to bargain collectively.

Restrictions on the location of interviews and discussions

2.47 The committee requested the advice of the Minister for Employment as to the compatibility of the proposed amendments to sections 494 and 492A, with the rights 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

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

15 See Appendix 1, Letter from Senator the Hon. Eric Abetz, Minister for Employment, to Senator Dean Smith, dated 12/08/2014, pp 5-6.

- whether the limitation is reasonable and proportionate measure for the achievement of that objective.

Minister's Response

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.[16]

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 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.[17] 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.

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

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

> 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.[18]

Committee response

2.48 The committee thanks the Minister for Employment for his response and has concluded its consideration of this measure.

Power of FWC to deal with disputes over frequency of entry

2.49 The committee requested the Minister for Employment's advice as to the compatibility of the measures with the rights 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 reasonable and proportionate measure for the achievement of that objective.

Minister's Response

> 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

18 See Appendix 1, Letter from Senator the Hon. Eric Abetz, Minister for Employment, to Senator Dean Smith, dated 12/08/2014, pp 6-7.

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 b 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.[19] 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 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.[20]

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

20 See Appendix 1, Letter from Senator the Hon. Eric Abetz, Minister for Employment, to Senator Dean Smith, dated 12/08/2014, pp 7-8.

Committee response

2.50 The committee thanks the Minister for Employment for his response and has concluded its consideration of this measure.

Restrictions on protected action ballot orders

2.51 The committee sought the Minister for Employment's advice as to the compatibility of the measure 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 reasonable and proportionate measure for the achievement of that objective.

Minister's Response

> 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.[21]

Committee response

2.52 The committee thanks the Minister for Employment for his response and has concluded its consideration of this measure.

21 See Appendix 1, Letter from Senator the Hon. Eric Abetz, Minister for Employment, to Senator Dean Smith, dated 12/08/2014, pp 8-9.

G20 (Safety and Security) Complementary Act 2014

Portfolio: Justice
Introduced: House of Representatives, 20 March 2014

Purpose

2.53 The G20 (Safety and Security) Complementary Act 2014 creates a new standalone Commonwealth Act intended to clarify the interaction between provisions in the G20 (Safety and Security) Act 2013 (Qld) and existing Commonwealth legislation at the Brisbane Airport during the 2014 G20 Summit, which is to be held in Brisbane in November 2014.

2.54 The new Act will provide for specified Commonwealth aviation laws (including regulations or other subordinate legislation made under Commonwealth aviation legislation) to operate concurrently with the G20 (Safety and Security) Act 2013 (Qld). The operation of the specified Commonwealth aviation laws will be rolled back with respect to certain areas of the Brisbane Airport (a Commonwealth place) to avoid inconsistency with the Queensland G20 legislation. To the extent that they are not inconsistent with the Queensland G20 legislation, Commonwealth aviation laws will continue to apply to those areas.

Background

2.55 The committee first reported on the bill in its *Sixth Report of the 44th Parliament*. It then reported on the response received from the Minister for Justice in its *Ninth Report of the 44th Parliament*.

Committee view on compatibility

Multiple rights

Human rights assessment of state laws applied by Commonwealth laws

2.56 The committee noted that the response received did not address the committee's original request as to the compatibility of the measures in the Queensland Act with human rights, insofar as they will apply as Commonwealth laws.

2.57 The committee wrote to the Minister for Justice seeking a detailed assessment of the compatibility of the measures in the Queensland Act with human rights, insofar as they will apply as Commonwealth laws.

Application of State laws to Commonwealth places under the Commonwealth Places Act

2.58 The committee requested that the Minister for Justice provide a statement of compatibility for the Commonwealth Places (Application of Laws) Act 1970.

2.59 The committee noted that identification of particular state laws that impact on the assessment, as well as the number and area of Commonwealth places, would be particularly relevant to the human rights assessment.

Minister's Response

> 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 bas no greater impact on human rights than the State laws being applied.[1]

Committee response

2.60 The committee thanks the Minister for Justice for his response. The committee notes that the effect of the G20 Act appears to be to make applicable to a Commonwealth place State laws that may not otherwise have applied. To the extent that it merely clarifies or confirms the application of existing State laws, it also engages human rights.

2.61 Accordingly, the committee requested the Minister to provide a statement of compatibility to be prepared for the Commonwealth Places Act to assist in the committee's assessment of the human rights compatibility of that Act. In the absence of a statement of compatibility, the committee will undertake an

1 See Appendix 1, Letter from the Hon Michael Keenan MP, Minister for Justice, to Senator Dean Smith, dated 13/08/2014, p. 1.

assessment of the compatibility of the Act with human rights on the basis of information publicly available.

National Health Amendment (Pharmaceutical Benefits) Bill 2014

Portfolio: Health
Introduced: House of Representatives, 18 June 2014

Purpose

2.62 The National Health Amendment (Pharmaceutical Benefits) Bill 2014 (the bill) amends the National Health Act 1953 (the Act) to increase patient co-payments and safety net thresholds for the Pharmaceutical Benefits Scheme (PBS) and the Repatriation Pharmaceutical Benefits Scheme (RPBS).

2.63 These increases are in addition to the usual Consumer Price Index (CPI) indexation on 1 January each year under the Act.

Background

2.64 The committee reported on the bill in its *Eighth Report of the 44th Parliament*.

Committee view on compatibility

Right to health and a healthy environment

Increasing co-payments for access to medicines

2.65 The committee requested the Minister for Health's advice as to whether the increase in co-payments for medicines under the PPBS and RPBS is compatible with the right to health, and particularly:

- 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.

Minister's Response

> 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.

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, 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 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.[1]

1 See Appendix 1, Letter from the Hon Peter Dutton MP, Minister for Health, to Senator Dean Smith, 17/07/2014, pp 1-4.

Committee response

2.66 **The committee thanks the Minister for Health for his response and has concluded its examination of this bill. In light of the information received, the committee considers the bill is compatible with human rights. The committee recommends that information of this type should be included in the statement of compatibility in any future bill of a similar nature.**

Student Identifiers Bill 2014

Portfolio: Industry

Introduced: House of Representatives, 27 March 2014

Purpose

2.67 This bill establishes a framework for the introduction of a unique student identifier for individuals undertaking nationally recognised vocational education and training from 1 January 2015, and sets out how the identifier will be assigned, collected, used and disclosed. The bill further provides for the creation of an authenticated transcript of an individual's record of nationally recognised training undertaken or completed after 1 January 2015. The bill also provides for the appointment of a Student Identifiers Registrar (the Registrar), who will administer the student identifier scheme.

Background

2.68 The committee reported on the instrument in its *Seventh Report of the 44th Parliament*.

Committee view on compatibility

Right to education

2.69 The committee sought clarification from the Minister for Education as to what 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 VET qualifications, and whether a decision to refuse to grant an exemption will be subject to merits review.

Right to work

2.70 The committee sought the Minister for Education's advice as to what 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 VET qualifications, and whether a decision to refuse to grant an exemption will be subject to merits review.

Right to privacy

2.71 The committee sought clarification from the Minister for Education as to why the lower standard of 'reasonably necessary' is required to authorise the collection, use and disclosure of information for the purposes outlined in proposed section 20 of the bill.

2.72 The committee has also sought clarification as to whether the proposed limitation on the right to privacy in proposed subsection 20(f) is a reasonable, necessary and proportionate measure in pursuit of the legitimate objective of 'law enforcement'.

2.73 Noting the absence of specified criteria for the prescribing of conduct by regulation for the purposes of subsection 20(f), the committee has also sought the minister's advice as to what types of conduct are envisaged as likely to be prescribed in this way, and whether the measure is reasonable, necessary and proportionate to achieving the objective of 'law enforcement'.

Minister's Response

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 2l(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.[1]

Committee response

2.74 The committee thanks the Minister for Industry for his response and has concluded its examination of this bill. The committee considers the bill compatible with human rights.

1 See Appendix 1, Letter from the Hon Ian Macfarlane, Minister for Industry, to Senator Dean Smith, 14/07/2014, pp 1-2.

Tax Laws Amendment (Implementation of the FATCA Agreement) Bill 2014

Portfolio: Treasury
Introduced: House of Representatives, 29 May 2014

Purpose

2.75 The bill would amend Schedule 1 of the Taxation Administration Act 1953 (TAA 1953) to require Australian financial institutions to collect information about their customers that are likely to be taxpayers in the United States of America (US) and to provide that information to the Commissioner of Taxation (Commissioner) who will, in turn, provide that information to the US Internal Revenue Service (IRS).

Background

2.76 The committee reported on the bill in its *Eighth Report of the 44th Parliament*.

Committee view on compatibility

Right to Privacy
Protections on personal information once in the hands of the IRS

2.77 The committee sought the Treasurer's advice as to whether the safeguards in the bill for the protection of personal information are consistent with the right to privacy, and particularly whether the limitation is reasonable and proportionate measure for the achievement of that objective.

2.78 Specifically, the committee sought the Treasurer's advice as to:

- the privacy safeguards that will apply under US law in relation to personal information provided to US authorities pursuant to the FATCA Agreements; and
- whether these safeguards can be said to be provided by 'law' insofar as they do not appear and are not identified in the bill.

Acting Assistant Treasurer's Response

> 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 FA TCA *(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 A TO 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 44t1₁ 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.[1]

Committee response

2.79 The committee thanks the Acting Assistant Treasurer for his response and has concluded its examination of this bill. In light of the information received, the committee considers the bill compatible with human rights. The committee recommends that information of this type should be included in the statement of compatibility in any future bill of a similar nature.

1 See Appendix 1, Letter from Kevin Andrews MP, Acting Assistant Treasurer, to Senator Dean Smith, 22/07/2014, pp 1-2.