Chapter 2

Concluded matters

2.1 This chapter considers the responses of legislation proponents to matters raised previously by the committee. The committee has concluded its examination of these matters on the basis of the responses received.

Appropriation Bill (No. 3) 2014-2015

Appropriation Bill (No. 4) 2014-2015

Portfolio: Finance
Introduced: House of Representatives, 12 February 2014

Purpose

2.2 The Appropriation Bill (No. 3) 2014-2015 proposed appropriations from the Consolidated Revenue Fund (CRF) for the ordinary annual services of the government.

2.3 The Appropriation Bill (No. 4) 2014-2015 proposed appropriations from the CRF for services that are not considered to be for the ordinary annual services of the government.

2.4 Together, Appropriation Bill (No. 3) 2014-2015 and Appropriation Bill (No. 4) 2014-2015 are referred to as 'the bills'.

2.5 The amounts proposed for appropriation by the bills were in addition to the amounts appropriated through the Appropriation Acts that implemented the 2014-2015 Budget.

2.6 Measures raising human rights concerns or issues are set out below.

Background

2.7 The committee considered the bills in its *Twentieth Report of the 44th Parliament*, and requested further information from the Minister for Finance as to whether the bills were compatible with Australia's international human rights obligations.[1]

2.8 The bills finally passed both Houses of Parliament on 17 March 2015, and received Royal Assent on 2 April 2015.

1 Parliamentary Joint Committee on Human Rights, *Twentieth Report of the 44th Parliament* (18 March 2015) 5-9.

Potential engagement and limitation of human rights by appropriations Acts

2.9 The committee noted in its previous analysis that each of the bills was accompanied by a brief and substantially identical statement of compatibility which notes that the High Court has stated that, beyond authorising the withdrawal of money for broadly identified purposes, appropriations Acts 'do not create rights and nor do they, importantly, impose any duties'.[2] The statements of compatibility concluded that, as their legal effect is limited in this way, the bills do not engage, or otherwise affect, human rights.[3] They also stated that '[d]etailed information on the relevant appropriations, however, is contained in the portfolio [Budget] statements'.[4] No further assessment of the bills' compatibility with human rights was provided.

2.10 The committee also noted that substantially identical statements of compatibility were provided for previous appropriations bills considered by the committee.[5]

Multiple rights

2.11 In accordance with its previous assessment of appropriations bills, the committee noted in its previous analysis that proposed government expenditure to give effect to particular policies may engage and limit and/or promote a range of human rights. This includes rights under the International Covenant on Civil and Political Rights and the International Covenant on Economic Social and Cultural Rights.[6]

Assessment of the compatibility of the bills with human rights

2.12 The committee previously considered that the High Court case which held that appropriations Acts do not create rights or duties as a matter of Australian law does not fully address the fact that appropriations bills may nevertheless engage rights according to Australia's obligations under international human rights law.

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2 Explanatory memorandum, Appropriation Bill (No. 3) 2014-2015 (EM A) 4; Explanatory memorandum, Appropriation Bill (No. 4) 2014-2015 (EM B) 4.

3 EM A, 4; EM B, 4.

4 EM A, 4; EM B, 4.

5 See Parliamentary Joint Committee on Human Rights, *Third Report of 2013* (13 March 2013); Parliamentary Joint Committee on Human Rights, *Seventh Report of 2013* (5 June 2013); Parliamentary Joint Committee on Human Rights, *Third Report of the 44th Parliament* (4 March 2014); and Parliamentary Joint Committee on Human Rights, *Eighth Report of the 44th Parliament* (24 June 2014).

6 See Parliamentary Joint Committee on Human Rights, *Third Report of 2013* (13 March 2013); Parliamentary Joint Committee on Human Rights, *Seventh Report of 2013* (5 June 2013); Parliamentary Joint Committee on Human Rights, *Third Report of the 44th Parliament* (4 March 2014); and Parliamentary Joint Committee on Human Rights, *Eighth Report of the 44th Parliament* (24 June 2014).

2.13 First, the committee noted that compliance with Australia's obligations to progressively realise economic, social and cultural rights using the maximum of resources available is reliant on government allocation of budget expenditure.

2.14 Second, it noted that specific appropriations may involve reductions in expenditure which amount to retrogression or limitations on rights.

2.15 The committee thus noted that the appropriation of funds facilitates the taking of actions which both effect the progressive realisation of, and the failure to fulfil, Australia's obligations under the treaties listed in the *Human Rights (Parliamentary Scrutiny) Act 2011*.

2.16 Therefore, as noted in previous reports, the committee considered that, where there is a sufficiently close connection between a particular appropriations bill and the implementation of new legislation, policy or programs, or the discontinuation or reduction in support of a particular policy or program, that may engage human rights, the statement of compatibility for that bill should provide an assessment of any limitations of human rights that may arise from that engagement.[7]

2.17 The committee acknowledged that such bills may present particular difficulties given their technical and high-level nature, and because they generally include appropriations for a wide range of programs and activities across many portfolios. The committee therefore also acknowledged that the approach to human rights assessment of appropriations bills for the purposes of the *Human Rights (Parliamentary Scrutiny) Act 2011* may not generally be possible at the level of individual measures.

2.18 However, the committee considered that the allocation of funds via appropriations bills is susceptible to a human rights assessment that is directed at broader questions of compatibility—namely, their impact on progressive realisation obligations and on vulnerable minorities or specific groups (such as children; women; Aboriginal and Torres Strait Islander Peoples; persons with disabilities; and ethnic minorities).

2.19 The committee noted that there are some precedents in the Australian context for assessments of this nature in relation to budgetary measures by government and indicated its willingness to assist with the development of a template and approach to preparing statements of compatibility for appropriations bills that would support the assessment and examination of appropriations bills as required by the *Human Rights (Parliamentary Scrutiny) Act 2011*. The committee also noted that there are a range of international resources to assist in preparing assessments of budgets for human rights compatibility.

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7 See, for example, Parliamentary Joint Committee on Human Rights, *Eighth Report of the 44th Parliament* (24 June 2014) 7.

2.20 The committee considered that the appropriation of funds via annual and additional appropriations Acts may engage and potentially limit or promote a range of human rights that fall under the committee's mandate. The committee considered that, where there is a sufficiently close connection between a particular appropriations bill and the implementation of new legislation, policy or programs, or the discontinuation or reduction in support of a particular policy or program that may engage human rights, the statement of compatibility for that bill should provide an assessment of any limitations of human rights that may arise from that engagement. In order to assist the Minister for Finance in assessing any limitations on human rights in relation to these bills, the committee considered that attention should be given to the following questions in assessing whether the bills are compatible with Australia's human rights obligations: whether the bills are compatible with Australia's obligations of progressive realisation with respect to economic, social and cultural rights; whether any reductions in the allocation of funding are compatible with Australia's obligations not to unjustifiably take backward steps (a retrogressive measure) in the realisation of economic, social and cultural rights; and whether the allocations are compatible with the rights of vulnerable groups (such as children, women, Aboriginal and Torres Strait Islander Peoples, persons with disabilities and ethnic minorities).

Minister's response

> Thank you for your letter of 18 March 2015 drawing my attention to comments relating to *Appropriation Bill (No. 3) 2014-2015* and *Appropriation Bill (No. 4) 2014-2015* in the *Twentieth Report of the 44th Parliament* of the Parliamentary Joint Committee on Human Rights (the Committee). In particular I note the Committee considers that appropriation bills may engage rights according to Australia's obligations under international human rights law.
>
> My view remains however, that given the extremely limited legal effect of the appropriation bills, they do not engage or otherwise affect the rights or freedoms relevant to the *Human Rights (Parliamentary Scrutiny) Act 2011*. This is consistent with the position I have previously expressed to the Committee on the adequacy of the statements of compatibility with human rights within the explanatory memoranda of appropriation bills.
>
> I have noted and carefully considered the suggestions the Committee has made to assess whether the appropriation bills are compatible with human rights obligations. It is the government's view, however, that there are already extensive opportunities within the existing legislative process for the adequate scrutiny of these bills, and changes are not required.
>
> As my predecessor, Senator the Hon Penny Wong, replied on 10 May 2013 the detail of proposed Government expenditure and the Budget generally, appears in the Budget Papers rather than appropriation Bills, with more specific detail provided in the Portfolio Budget Statements prepared for each portfolio and authorised by the relevant Minister. This detail allows

> the examination of proposed expenditure and budgetary processes through the Senate Estimates process.
>
> The policy development process does however by its nature require an assessment of all factors that might relate to the relevant policies, including environmental, legal, economic, social and moral factors. The Attorney General's Department has developed an assessment tool and educational materials for use by policy officers to strengthen the capacity to develop policies, programs and legislation consistent with human rights.[8]

Committee response

2.21 **The committee thanks the Minister for Finance for his response and his thoughtful consideration of the committee's previous suggestions.**

2.22 **However, the committee remains of the view that, while it may not be possible to undertake a measure by measure analysis for compatibility with human rights, the allocation of funds via appropriations bills is susceptible to a human rights assessment that is directed at broader questions of compatibility—namely, their impact on progressive realisation obligations and on vulnerable minorities or specific groups. In particular, the committee considers there may be specific appropriations bills or specific appropriations where there is an evident and substantial link to the carrying out of a policy or program under legislation that gives rise to human rights concerns.**

2.23 **Nevertheless, in light of the minister's response, the committee has concluded its consideration of these bills.**

8 See Appendix 1, Letter from Senator the Hon Mathias Cormann, Minister for Finance, to the Hon Philip Ruddock MP (received 30 April 2015) 1.

Defence Legislation Amendment (Military Justice Enhancements—Inspector-General ADF) Bill 2014

Portfolio: Defence
Introduced: Senate, 3 December 2014

Purpose

2.24 The Defence Legislation Amendment (Military Justice Enhancements—Inspector-General ADF) Bill 2014 (the bill) amends the *Defence Act 1903* to:

- clarify the independence, powers and privileges of the Inspector-General ADF;
- provide a statutory basis to support regulatory change, including the re-allocation of responsibility for investigation of service-related deaths and the management of the Australian Defence Force (ADF) redress of grievance process to the Inspector-General ADF; and
- require the Inspector-General ADF to prepare an annual report.

2.25 Measures raising human rights concerns or issues are set out below.

Background

2.26 The committee considered the bill in its *Nineteenth Report of the 44th Parliament*, and requested further information from the Minister for Defence as to whether the proposed measures were compatible with Australia's international human rights obligations.[1]

2.27 The bill finally passed both Houses of Parliament on 14 May 2015, and received Royal Assent on 20 May 2015.

Inspector-General ADF investigations and inquiries—witness required to answer questions even if it may incriminate themselves

2.28 The bill enabled regulations to be made that, in relation to Inspector-General ADF investigations and inquiries, require a person to answer questions even if an answer may tend to incriminate that person.

2.29 The bill includes a use and derivative use immunity provision, which provides that any statement or disclosure made by the person in the course of giving evidence (or anything obtained as an indirect consequence of making the statement or disclosure) is not admissible in evidence against the witness.

2.30 However, there is an exception that would permit the statement or disclosure to be used against the person in a prosecution for giving false testimony.

1 Parliamentary Joint Committee on Human Rights, *Nineteenth Report of the 44th Parliament* (3 March 2015) 4-6.

2.31 The committee considered in its previous analysis that requiring a witness to answer questions even if it may incriminate them engages and may limit the right not to incriminate oneself (although this is alleviated by the inclusion of a use and derivative use immunity clause).

Right to a fair trial (right not to incriminate oneself)

2.32 The right to a fair trial and fair hearing is protected by article 14 of the International Covenant on Civil and Political Rights (ICCPR). The right applies to both criminal and civil proceedings, to cases before both courts and tribunals. The right is concerned with procedural fairness, and encompasses notions of equality in proceedings, the right to a public hearing and the requirement that hearings are conducted by an independent and impartial body.

2.33 Specific guarantees of the right to a fair trial in the determination of a criminal charge guaranteed by article 14(1) are set out in article 14(2) to (7). These include the presumption of innocence (article 14(2)) and minimum guarantees in criminal proceedings, such as the right not to incriminate oneself (article 14(3)(g)) and a guarantee against retrospective criminal laws (article 15(1)).

Compatibility of the measure with the right to a fair trial (right not to incriminate oneself)

2.34 The statement of compatibility stated that the provision granting use and derivative use immunity promotes the right to a fair trial.

2.35 In its previous analysis, the committee noted that measures which enable regulations to be made requiring a witness to answer a question, even if it may tend to incriminate themselves, limit the right not to incriminate oneself.

2.36 The right not to incriminate oneself can be limited if it can be demonstrated that the measure supports a legitimate objective, is rationally connected to that objective and is a reasonable and proportionate way to achieve that objective.

2.37 The statement of compatibility identified the measure's objective as being the government's legitimate interest in ascertaining 'the true circumstances and events subject to inquiry by Defence'. However, it provided no information or evidence as to how inquiries are currently conducted and why the existing provisions are insufficient.

2.38 The committee considered that, while the inclusion of the use and derivative use immunity alleviated the impact of this measure, the immunity provided an exception to permit a statement or disclosure made by a witness to be used against them in a prosecution for giving false testimony. No information was given in the statement of compatibility as to the need for this exception to the immunity provisions and what effect this has on the right not to incriminate oneself.

2.39 The committee therefore sought the advice of the Minister for Defence as to 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

The Department of Defence has long regarded ascertaining the true causes of significant events involving its personnel as being more important than possible prosecution of, or civil suit against, individuals. Such information enables actions to be undertaken to prevent the reoccurrence of adverse events - for example, you may recall that the Sea King Board of Inquiry led to major changes in the Navy's helicopter maintenance practices.

Experience suggests that individuals may be reluctant to provide evidence that could be used against them. This can make it difficult to investigate and ascertain the true causes of significant events, which are often systemic or cultural rather than solely the fault of individuals. Compelling individuals to provide information, even though it may implicate them in wrongdoing, and protecting the information from use in subsequent criminal or civil proceedings, will sometimes be the only way to determine the true causes of significant events. This is demonstrated in cases where witnesses have refused to cooperate with disciplinary investigations, but have provided information when compelled in an administrative inquiry.

Under the new arrangements made possible by the Bill, the Inspector-General of the Australian Defence Force be responsible for inquiring into service-related deaths and other matters directed by the Minister or the Chief of the Defence Force, in addition to a military justice oversight role. These functions will frequently involve ascertaining the true causes of significant events in order to prevent reoccurrence, often in situations where individuals could be implicated and, accordingly, where they could be reluctant to provide all relevant information. In these circumstances, limiting the abrogation against self-incrimination to compel witnesses to provide information to the Inspector-General ADF that may incriminate them, while also protecting witnesses from having information they have provided used against them, supports the legitimate objective of ascertaining the true causes of significant events.

Under current arrangements, the privilege against self-incrimination is abrogated by the Defence (Inquiry) Regulations 1985 (the Regulations) which have been made under paragraph 124(1)(gc) of the *Defence Act 1903* (the Act). The abrogation is also governed by sub-sections 124(2A), (28) and (2C) of the Act. The privilege is abrogated for all types of inquiry under the Regulations, including Chief of the Defence Force Commissions of Inquiry (Part 8 of the Regulations), Boards of Inquiry (Part 3), and to a lesser extent in Inquiry Officer inquiries (Part 6) and inquiries by the Inspector-General ADF (Part 7).

Currently, unless I direct otherwise, a Chief of the Defence Force Commission of lnquiry must be held into all service-related deaths. These Commissions have the ability to require witnesses to answer questions in

abrogation of their right against self-incrimination. For consistency of approach and to ensure quality outcomes, it is proposed that similar powers should apply to the Inspector-General ADF, who will take over responsibility for inquiring into service-related deaths under the new arrangements.

In these circumstances, it is considered that allowing for the privilege against self-incrimination to be abrogated, while protecting information collected from subsequent use in criminal and civil proceedings, is a reasonable and proportionate measure to achieve the objective of ascertaining the true causes of significant events in Defence.

It should also be noted that the abrogation of the privilege against self-incrimination can only have an extremely limited scope due to the limitations imposed by the new sub-section 110C(4) of the Act on the functions of the Inspector-General ADF.

Finally, Defence regrets not including this information in the explanatory material, which may have alleviated the Committee's concerns on these matters. A replacement explanatory memorandum addressing these concerns was tabled in the Senate on 5 March 2015.[2]

Committee response

2.40 **The committee thanks the Minister for Defence for his response.**

2.41 The committee notes the minister's advice that the Inspector-General of the Australian Defence Force will assume responsibility for inquiring into service-related deaths instead of a Chief of Defence Force Commission of Inquiry, and that the limitation on the right not to incriminate oneself is consistent with current legislative arrangements under the Defence (Inquiry) Regulations 1985.

2.42 The committee also appreciates the minister's advice that the above further information was contained within the replacement explanatory memorandum.

2.43 **On the basis of the information provided by the Minister for Defence and the existence of the use and deriviative use immunities, the committee considers that the measure is likely to be compatible with the right to a fair trial (right not to incriminate oneself).**

2 See Appendix 1, Letter from the Hon Kevin Andrews MP, Minister for Defence, to the Hon Philip Ruddock MP (received 19 May 2015) 1-2.

Fair Work Amendment (Bargaining Processes) Bill 2014

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

Purpose

2.44 The Fair Work Amendment (Bargaining Processes) Bill 2014 (the bill) seeks to amend the *Fair Work Act 2009* (FWA) to:

- provide for an additional approval requirement for enterprise agreements that are not greenfields agreements;
- require the Fair Work Commission (FWC) to have regard to a range of non-exhaustive factors to guide its assessment of whether an applicant for a protected action ballot order is genuinely trying to reach an agreement; and
- provide that the FWC must not make a protected action ballot order when it is satisfied that the claims of an applicant are manifestly excessive or would have a significant adverse impact on workplace productivity.

2.45 Measures raising human rights concerns or issues are set out below.

Background

2.46 The committee previously considered the bill in its *Nineteenth Report of the 44th Parliament*, and requested further information from the Minister for Employment as to whether measures in the bill were compatible with human rights.[1]

Industrial action—protected action ballot order

2.47 Currently, section 443 of the FWA sets out when the FWC must make a protected action ballot order in relation to the negotiation of a proposed enterprise agreement. A protected ballot order allows a ballot to occur so that employees can decide whether to engage in protected industrial action, which is permitted by the *Fair Work Act 2009* if certain requirements are satisfied.[2] The current requirements are that an application must have been made and that the FWC must be satisfied that each applicant has been, and is, genuinely trying to reach an agreement.

2.48 The bill would amend current subsection 443(2) to provide that the FWC must not make a protected action ballot order if it is satisfied that the applicant's claims:

- are manifestly excessive, having regard to the conditions at the workplace or industry; or

1 Parliamentary Joint Committee on Human Rights, *Nineteenth Report of the 44th Parliament* (3 March 2015) 7-12.

2 'Protected' industrial action is immune from civil liability (unless the action involves personal injury or damage to property).

- would have a significant adverse impact on productivity at the workplace.[3]

2.49 The committee considers that this measure engages and limits freedom of association and the right to form trade unions (specifically, the right to strike).

Freedom of association

2.50 Article 22 of the International Covenant on Civil and Political Rights (ICCPR) guarantees the right to freedom of association generally, and also explicitly guarantees everyone 'the right to form trade unions for the protection of [their] interests'.

2.51 Limitations on this right are only permissible where they are 'prescribed by law' and 'necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals, or the protection of the rights and freedoms of others'. Article 22(3) also provides that limitations are not permissible if they are inconsistent with the guarantees of freedom of association and the right to organise rights contained in the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize (ILO Convention No. 87).

The right to form trade unions (right to strike)

2.52 Article 8 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) also guarantees the right of everyone to form trade unions and to join the trade union of his or her choice; and sets out the rights of trade unions, including the right to function freely and the right to strike.[4]

2.53 Limitations on these rights are only permissible where they are 'prescribed by law' and 'are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others'. As with article 22 of the ICCPR, article 8 also provides that limitations on these rights are not permissible if they are inconsistent with the rights contained in ILO Convention No. 87.[5]

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3 See item 4 of Schedule 1 to the bill.

4 The committee notes that the precise formulation of when the right to strike may be permissibly limited varies according to the terms of the provision in the ICCPR (article 22), ICESCR (article 8) and the ILO conventions.

5 The *Human Rights (Parliamentary Scrutiny) Act 2011* does not include the ILO conventions on freedom of association and the right to bargain collectively in the list of treaties against which the committee must assess the human rights compatibility of legislation. However, the committee's usual practice is to draw on the jurisprudence of bodies recognised as authoritative in specialised fields of law that can inform the human rights treaties that fall directly under the committee's mandate. In the current case, ILO Convention No. 87 is also directly relevant to the right to freedom of association (ICCPR) and the right to form trade unions (ICESCR) because those conventions expressly state that measures may not be inconsistent with ILO Convention No. 87.

2.54 The committee considers that the measure engages and limits the right to freedom of association and the right to form trade unions (right to strike) as it places further limits on when approval to undertake protected industrial action (that is, strike action) may be granted.

Compatibility of the measure with right to freedom of association and the right to form trade unions (right to strike)

2.55 The statement of compatibility acknowledges that the proposed changes engage the right to freedom of association and the right to form trade unions (right to strike), but states that the restrictions are reasonable, necessary and proportionate to 'achieving the legitimate objectives of encouraging sensible and realistic bargaining claims'.[6]

2.56 In its previous analysis the committee noted that this stated objective only applies to the claims of an applicant (being claims made by unions and employees) and not to claims made by employers, and that Australia already has in place substantial regulation of industrial action. The FWA currently places a number of restrictions on the right to strike, making it an exception to the rule, rather than prescribing a right to strike with restrictions.

2.57 Accordingly, the committee considered that the statement of compatibility did not demonstrate that the objective of the measure may be considered a legitimate objective for the purposes of international human rights law.

2.58 The committee therefore sought the advice of the Minister for Employment as to whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise 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

> The Government's clear position set out in *The Coalition's Policy to Improve the Fair Work Laws* (the Policy), released in May 2013, was that it would legislate to 'encourage meaningful, genuine negotiations during enterprise bargaining' and 'change the laws to ensure that protected industrial action can only happen after there have been genuine and meaningful talks'.[7]
>
> As the Committee is no doubt aware, protected industrial action does not occur in a vacuum. Rather, protected industrial action is taken in support of *bargaining claims*. It is therefore wholly unexceptional to expect that

6 EM v.

7 *The Coalition's Policy to Improve the Fair Work Laws* 32.

parties have had, or at least attempted to have had, genuine and meaningful talks *in bargaining* before they resort to industrial action.

It is approaching the absurd to suggest that employees' right to take industrial action in support of a bargaining position is limited by an expectation that there has at least been an attempt to engage meaningfully on the bargaining position or that this requirement has human rights implications that warrant the attention of a Parliamentary Committee.

The Policy also stated that 'it is important to ensure that claims made by parties when negotiating for an enterprise agreement are sensible and realistic'[8] and that the Government 'will change the laws so that the Fair Work Commission must be satisfied that claims are realistic and sensible before they approve an application to take industrial action'.[9] In support of the above statements, the Policy sets out examples where 'fanciful, exorbitant or excessive' enterprise bargaining claims were, in effect, undermining the operation of Australia's enterprise bargaining and industrial action framework.[10]

The Fair Work Amendment (Bargaining Processes) Bill 2014 (the Bill) seeks to implement these commitments and respond to these concerns by providing that the independent Fair Work Commission must not make a protected action ballot order if it is satisfied that the bargaining claims of an applicant are manifestly excessive, having regard to the conditions at the workplace and the industry in which the employer operates, or, if acceded to, would have a significant adverse impact on productivity at the workplace.

The Committee, at 1.33 of its report, refers to the permissible limitations on rights where a limitation is 'necessary ... for the protection of the rights and freedoms of others'. It appears the Committee has inexplicably overlooked the potentially significant and disproportionate damage that protected industrial action can cause not only to an employer, but to other employees and workers not engaging in industrial action as well as on innocent third parties. Remembering also that those engaged in protected industrial action are provided with a statutory immunity over the loss or damage they cause to others by their industrial action, it is appropriate and entirely unexceptional that, for the protection of the rights of others, the powerful tool of protected industrial action is not used capriciously and in support of claims that are *manifestly* excessive or would have a *significant adverse impact* on productivity.

The Committee also comments that this same standard is not applied to claims by an employer. Whilst this is correct, the Committee's analysis

8 Ibid 33.

9 Ibid 34.

10 Ibid 34.

> embarrassingly ignores the reality that employers have no right to unilaterally commence protected industrial action in support of its bargaining claims. An employer's recourse to protected industrial action depends entirely on whether employees engage in industrial action first.
>
> The critical points are that these amendments do not limit the right to form trade unions by limiting the right to strike and the Committee's assertion to the contrary would be quite laughable if it didn't trivialise genuine human rights issues. The Committee's bland assertion without supportive evidence undermines the credibility of the Committee.[11]

Committee response

2.59 **The committee thanks the Minister for Employment for his response.**

2.60 The committee notes that the right to strike is derived from article 8 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), a binding multilateral treaty which Australia has been a party to since 1976, and which is included in the definition of 'human rights' in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

2.61 The committee is therefore required to assess bills and legislation for compatibility with the right to strike, and to report its findings to the Parliament, in accordance with section 7 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

2.62 Assessments of the compatibility of legislation by the committee involve the application of its analytical framework to, first, identify if a measure engages a human right (that is, whether in the broadest sense the measure may interact with a right); second, identify if a measure limits any right that is engaged; and third, assess whether any limitation is legally justified (that is, pursues a legitimate objective, is rationally connected to that objective and is proportionate).

2.63 Since its inception, the committee's approach is to apply the above analytical framework in undertaking a routine and technical examination of legislation, which therefore necessarily does not encompass consideration of its policy merits, or broader arguments which may be advanced in support of or against a proposed measure.

2.64 With reference to this context, while the minister's response provides a significant exposition of the policy rationale underpinning the bill, such matters fall outside the scope of the committee's examination bill as guided by the routine application of its analytical framework to the provisions of the bill.

2.65 Turning to the committee's analysis of the measure in question, the committee's initial report noted that the proposed amendment to subsection 443(2) of the FWA clearly engages and limits the right to strike because it would add a

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11 See Appendix 1, Letter from Senator the Hon Eric Abetz, Minister for Employment, to the Hon Philip Ruddock MP (dated 14 April 2015) 1-2.

further restriction on taking protected industrial action (that is, on exercising the right to strike) in accordance with Australian law.[12]

2.66 The committee's conclusion in this respect directly supports the analysis in the statement of compatibility for the bill, which also noted that the measure 'may limit access to protected industrial action over certain claims.'[13]

2.67 However, the committee notes that, in his response, the minister strongly rejects this analysis in stating that the measures:

> …do not limit the right to form trade unions by limiting the right to strike and the Committee's assertion to the contrary would be quite laughable if it didn't trivialise genuine human rights issues.

2.68 While noting this contradiction between the minister's own view and the statement of compatibility for the bill (which the member of Parliament introducing the bill must cause to be prepared), the committee restates its support for the proposition that the placing of restrictions on the right to strike represents a limitation of that right and, accordingly, must be justified as pursuing a legitimate objective, being rationally connected to that objective and proportionate.

2.69 In this respect, as set out in the committee's initial analysis, the measures in question must be assessed with reference to the content of the right to strike as defined and understood as a matter of international human rights law, and taking into account the extent to which Australia's domestic law already limits the right against those international standards.

2.70 It is therefore important to recognise that the right to strike is not provided for under Australian law but derives from article 8 of ICESCR (with article 22 of the ICCPR also protecting some aspects of the right). Under Australian law, taking strike action or protected industrial action is not provided for as a right but as an exceptional event that requires a lengthy process be followed, including prior approval from the Fair Work Commission followed by a secret ballot of union members administered by the Australian Electoral Commission.[14]

2.71 As noted above (at footnote 5), the committee's usual practice is to draw on the jurisprudence of bodies recognised as authoritative in specialised fields of law that can inform the human rights treaties that fall directly under the committee's mandate.

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12 The *Fair Work Act 2009* provides that a strike or the ability take 'protected industrial action' is available in limited prescribed circumstances. Persons taking 'protected industrial action' are given legislative protection from proceedings against them for breach of contract or industrial tort in respect of the protected action. The FWC can make an order to prohibit industrial action which is not 'protected.'

13 EM v.

14 See Fair Work Act, Part 3-3.

2.72 The committee therefore must take into account the fact that the absence of a general right to strike under Australian domestic law has been criticised by the Committee for Economic, Cultural and Social Rights (CESCR), which in 2009 recommended that Australia:

> …remove, in law and in practice, obstacles and restrictions to the right to strike, which are inconsistent with the provisions of article 8 of the Covenant and ILO Convention No. 87.[15]

2.73 Similarly, the committee must also take into account that the ILO has previously observed, in relation to Australia and strike action that may impact on the economy:[16]

> …a broad range of legitimate strike action could be impeded by linking restrictions on strike action to interference with trade and commerce. While the economic impact of industrial action and its effect on trade and commerce may be regrettable, such consequences in and of themselves do not render a service "essential" and thus do not justify restrictions on the right to strike.[17]

2.74 The committee also notes ILO guidance that:

> The legal procedures for declaring a strike should not be so complicated as to make it practically impossible to declare a legal strike.[18]

2.75 The committee notes that these statements are persuasive as interpretations of international human rights law that are consistent with the proper interpretation of treaties as set out in the Vienna Convention on the Law of Treaties (VCLT).[19]

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15 Committee on Economic, Social and Cultural Rights, *Concluding Observations: Australia*, Australia E/C.12/AUS/CO/4 12 June 2009.

16 As noted above (at footnote 5), International Labour Organisation (ILO) standards, as a specialised body of law, may inform the related rights set out in the ICCPR and the ICESCR; and both article 8 of the ICESCR and article 22 of the ICCPR explicitly refer to obligations under the ILO conventions.

17 See, ILO CEACR, Observation Concerning Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), Australia, 101st ILC session, 2013: http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:2698628 (accessed on 28 January 2015).

18 Freedom of Association – *Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO*, 5th (revised) edition, 2006, [547]-[548].

19 Australia is a party to this treaty and has voluntarily accepted obligations under it. Article 31 of that treaty provides that treaties are to be interpreted in good faith, according to ordinary meaning, in context, in light of object and purpose. Subsequent practice in the application and interpretation of the treaties is to be taken together with context in the interpretation of treaty provisions. The views of human rights treaty monitoring bodies may be considered an important form of subsequent practice for the interpretation of Australia's treaty obligations. More generally, statements by human rights treaty monitoring bodies are generally seen as authoritative and persuasive for the interpretation of international human rights law.

2.76 To apply these considerations to the present bill, the measures in the bill would impose further conditions on the approval of strike action, including that such action must not be approved by the FWC if it is satisfied that the applicant's claims:

- are manifestly excessive, having regard to the conditions at the workplace or industry; or
- would have a significant adverse impact on productivity at the workplace.[20]

2.77 Accordingly, it is without doubt that the measure limits the right to strike by providing additional circumstances in which the FWC must not permit strike action. Further, those additional circumstances, at least in part, relate to economic impacts (in terms of productivity), which the ILO has unequivocally stated are not, in and of themselves, legitimate restrictions on the right to strike.

2.78 The minister's view that the measure does not impose any limitation on the right to strike is therefore at odds with the committee's application of its analytical framework to the measure, as well as the assessment provided by the statement of compatibility for the bill.

2.79 As identified in the committee's initial analysis, the statement of compatibility for the bill did not provide sufficient evidence to justify the proposed limitation on the right to strike, and in particular did not provide any research or evidence to demonstrate that the measure would address a pressing and substantial concern (that is, would address a legitimate objective as understood in the terms of international human rights law).

2.80 The minister's response has not sought to provide any additional information to establish the measure pursues a legitimate objective, with reference to the committee's legal analytical framework and the extensive guidance provided by the Attorney-General's Department on providing assessments of legislation for the purposes of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

2.81 The committee notes the absence of any justification for the measure as pursuing a legitimate objective, and particularly the persuasive commentary of the CESCR and ILO on existing restrictions on the right in Australia and the impermissibility of restrictions related to economic impacts.

2.82 **Some committee members considered that the measure pursued a legitimate objective and did not impose an unreasonable restriction on the right to form trade unions (right to strike) and, accordingly, is compatible with those rights.**

2.83 **Other committee members consider that the proposed additional requirements that must be met before the FWC can make a protected action ballot order is a limitation on the right to freedom of association and the right to form trade unions (right to strike). As set out above, the minister has not justified that**

20 See item 4 of Schedule 1 to the bill.

limitation for the purposes of international human rights law. Those committee members therefore consider that the measure is likely to be incompatible with those rights.

Enterprise agreement approval process—requirement to discuss workplace productivity

2.84 As noted above, the bill would introduce a requirement that, before approving an enterprise agreement, the FWC must be satisfied that improvements to productivity at the workplace were discussed during the bargaining process.

2.85 Currently, sections 186 and 187 of the FWA provide that an enterprise agreement must be approved by the FWC if certain requirements are met. This requires the FWC to be satisfied that the agreement has been genuinely agreed to, the terms of the agreement generally comply with the National Employment Standards and the agreement passes the 'better off overall' test.[21] The FWC must also be satisfied that the agreement would not be inconsistent with, or undermine, good faith bargaining and be satisfied of certain procedural matters.

2.86 The committee considers a provision that requires employees and employers to discuss set matters such as improvements to productivity engages and limits the right to freedom of association and the right to form and join trade unions.

Freedom of association (right to organise and bargain collectively)

2.87 The right to organise and bargain collectively is a part of the right to freedom of association and the right to form trade unions as set out in article 22 of the ICCPR and article 8 of the ICESCR: see [2.50] to [2.54] above.

Compatibility of the measure with the right to organise and bargain collectively

2.88 The statement of compatibility acknowledges that the bill engages rights protected by the ILO Convention No. 87, which protects the right to organise, and the ILO *Right to Organise and Collective Bargaining Convention 1949* (No. 98), which protects the right of employees to collectively bargain for terms and conditions of employment. It goes on to state that the requirement to discuss productivity before an enterprise agreement is approved is 'reasonable, necessary and proportionate to achieving the legitimate objectives of the Bill'.[22]

2.89 In its previous analysis the committee considered that the measure engages and limits the right to organise and bargain collectively, as it imposes additional requirements on what must be discussed during enterprise agreement bargaining

21 Although, section 189 of the *Fair Work Act 2009* allows the FWC to approve an enterprise agreement that does not pass the better off overall test if satisfied, because of exceptional circumstances, that the approval of the agreement would not be contrary to the public interest. The better off overall test is set out in section 193 of the *Fair Work Act 2009*.

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negotiations. The statement of compatibility states that the measure is intended to put productivity improvements on the agenda of negotiations, but does not explain why this is necessary or how this is a legitimate objective for human rights purposes.

2.90 The committee therefore sought the advice of the Minister for Employment as to whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise 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

> The Government was very clear in the Policy that it intended to 'put productivity back on the agenda' by requiring that 'before an enterprise agreement is approved, the Fair Work Commission will have to be satisfied that the parties have at least discussed productivity as part of their negotiation process'.[23]
>
> The Bill seeks to implement this commitment by requiring that before the Fair Work Commission approves an agreement, it must be satisfied that improvements to productivity at the workplace were discussed during bargaining for the agreement. That is all. All this amendment requires is that there has been a discussion about productivity at some point in bargaining.
>
> The Government reiterates (as noted in the Explanatory Memorandum to the Bill) that this amendment is not intended to require the Fair Work Commission to consider the merit of the improvements to productivity that were discussed, the detail of the matters that were discussed, the outcome of those discussions or whether it would be reasonable for certain provisions to be included in an enterprise agreement. All that is required is that there is a discussion. This is hardly onerous on either the employer, employees or bargaining representatives.
>
> It was ludicrous and unsustainable for the Committee to have concluded in its report, at 1.45, that a requirement to have a discussion about productivity at some point during bargaining "limits the right to organise and bargaining collectively". Many objective observers would disagree that the need to have a discussion 'limits' in any substantive way the right to freedom of association and the right to organise and bargaining collectively.
>
> The Committee's approach to whether the requirement to have a discussion constitutes a substantive limitation is, with respect, narrow, impractical and ignores the realities of bargaining and again, regrettably,

23 *The Coalition's Policy to Improve the Fair Work Laws* 33.

only trivialises the work of the Committee and genuine human rights issues.

The Government does not consider that the proposed amendment limits the right to freedom of association.[24]

Committee response

2.91 **The committee thanks the Minister for Employment for his response.** The committee notes that collective bargaining is recognised under international human rights law as a fundamental aspect of the right to form trade unions, which is protected under article 8 of the ICESCR.[25]

2.92 The committee notes that the right is properly understood as procedural: a right to access a process of collective bargaining. The process of collective bargaining involves voluntary negotiation between the parties, which relies on the autonomy of the parties to the negotiation, and also encompasses the principle that parties should be free to reach their own settlement as the outcome of bargaining processes. Generally, the role of the state is to refrain from interfering in the conduct of negotiation between parties, as such interference would conflict with the principle of autonomy in the bargaining process.

2.93 As noted above, the bill would introduce a requirement that, before approving an enterprise agreement, the FWC must be satisfied that improvements to productivity at the workplace were discussed during the bargaining process. As set out above at [2.84] to [2.85], this is a new requirement in the context where collective bargaining is already heavily regulated by the FWA.

2.94 While the minister has stated his view (and that of 'many objective observers') that the requirement to discuss improvements to productivity at the workplace would not be onerous and would not be a 'substantive limitation on the right to organise and bargain collectively, the committee notes that its examination of legislation does not strictly encompass the weight of individual or majority opinion, and is restricted to the routine application of its legal analytical framework to the provisions of the legislation being examined.

2.95 In this regard, the committee notes that the measure imposes a requirement on the content of discussions between parties to a collective bargain. As such, it limits the autonomy of the parties to determine the scope and nature of the bargain. It is therefore unequivocal that, as a matter of law, the measure limits the right to organise and bargain collectively. On the application of the committee's analytical framework, it follows that the question is whether this limitation is justified as a matter of international law.

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24 See Appendix 1, Letter from Senator the Hon Eric Abetz, Minister for Employment, to the Hon Philip Ruddock MP (dated 14 April 2015) 2.

25 CESCR, *General comment No. 18: The Right to Work*, E/C.12/GC/18, 24 November 2005.

2.96 The statement of compatibility for the bill acknowledged that the measure may limit the right to collectively bargain but nevertheless asserted that it was justified:

> To the extent that requiring bargaining parties to hold a discussion over productivity improvement is said to limit the right to collectively bargain, the requirement is reasonable, necessary and proportionate to achieving the legitimate objectives of the Bill.[26]

2.97 As the statement of compatibility did not provide any further information to support the assertion that the limitation was nevertheless justified, the committee sought, with reference to the elements of its analytical framework, further information from the minister as to the legitimate objective of the measure, whether the measure was rationally connected to that objective and whether the limitation was proportionate to that objective.

2.98 The minister in response does not seek to justify the limitation on the right to collectively bargain identified in the statement of compatibility other than on the on the basis that the limitation in question is not 'onerous' or 'substantive'. In not seeking to address the questions set out above at [2.57], the response does not assess the compatibility of the measure with human rights in the form or substance suggested by the Attorney-General's Department or as set out in the committee's Guidance Note 1. The minister states that:

> The Committee's approach to whether the requirement to have a discussion constitutes a substantive limitation is, with respect, narrow, impractical and ignores the realities of bargaining and again, regrettably, only trivialises the work of the Committee and genuine human rights issues.

2.99 The committee is required to assess bills and legislation for compatibility with the right to strike, and to report its findings to the Parliament, in accordance with section 7 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

2.100 Assessments of the compatibility of legislation by the committee involve the application of its analytical framework to, first, identify if a measure engages a human right (that is, whether in the broadest sense the measure may interact with a right); second, identify if a measure limits any right that is engaged; and third, assess whether any limitation is legally justified (that is, pursues a legitimate objective, is rationally connected to that objective and is proportionate).

2.101 In this respect, the committee notes that the minister's response attempts only to address the first step in assessing the human rights compatibility of the measure. Noting the minister's view that the measure would not impose an onerous or significant limitation on the right to collectively bargain, it appears that it may

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have been possible to justify the limitation as compatible with human rights through the application of the committee's longstanding analytical framework (as explained in Guidance Note 1).

2.102 The committee notes the measure must be considered in the context of the existing regulatory regime for collective bargaining.

2.103 **Some committee members considered that the proposed mandated discussion of workplace productivity during the bargaining process is not unduly onerous and, accordingly, is compatible with the right to collectively bargain.**

2.104 **Other committee members consider that the proposed requirement that workplace productivity must be discussed before an enterprise agreement can be approved is a limitation on the right to organise and bargain collectively. As set out above, the response does not justify that limitation for the purposes of international human rights law. Accordingly, those committee members consider that the measure is likely to be incompatible with the right to collectively bargain.**

National Vocational Education and Training Regulator Amendment Bill 2015

Portfolio: Education and Training
Introduced: House of Representatives, 25 February 2015

Purpose

2.105 The National Vocational Education and Training Regulator Amendment Bill 2015 (the bill) amends the *National Vocational Education and Training Regulator Act 2011* (the Act) and the *National Vocational Education and Training Regulator (Transitional Provisions) Act 2011* to:

- extend registration periods from five to seven years;
- require any person advertising or representing a nationally recognised training course to clearly identify the provider responsible for the qualification in their marketing material;
- establish the capacity of the minister to make standards in relation to quality in the vocational education and training sector;
- clarify the National Vocational Education and Training (VET) Regulator's (the regulator) ability to share information collected in the course of its operations; and
- make minor administrative amendments and include transitional provisions.

2.106 Measures raising human rights concerns or issues are set out below.

Background

2.107 The committee considered the bill in its *Twentieth Report of the 44th Parliament*, and requested further information from the Minister for Education and Training as to whether the bill was compatible with Australia's international human rights obligations.[1]

2.108 The bill finally passed both Houses of Parliament on 16 March 2015, and received Royal Assent on 2 April 2015.

Disclosure of information by the regulator

2.109 Part 4 of the bill amended the definition of 'VET information' to include all information and documents collected by the regulator in the course of exercising its functions or powers under the Act or in administering the Act.

2.110 The bill also widened information disclosure provisions to allow the regulator to disclose VET information to a Commonwealth or state or territory authority if

1 Parliamentary Joint Committee on Human Rights, *Twentieth Report of the 44th Parliament* (18 March 2015) 32-35.

necessary to enable that authority to perform or exercise its functions or powers, or to a royal commission. The bill provided that if personal information is disclosed to a royal commission the regulator must advise the person whose information is disclosed of the details of the information disclosed.

2.111 The committee considered in its previous analysis that the disclosure of personal information engages and limits the right to privacy.

Right to privacy

2.112 Article 17 of the International Covenant on Civil and Political Rights (ICCPR) prohibits arbitrary or unlawful interferences with an individual's privacy, family, correspondence or home. The right to privacy includes respect for informational privacy, including:

- the right to respect for private and confidential information, particularly the storing, use and sharing of such information; and
- the right to control the dissemination of information about one's private life.

2.113 However, this right may be subject to permissible limitations which are provided by law and are not arbitrary. In order for limitations not to be arbitrary, they must seek to achieve a legitimate objective and be reasonable, necessary and proportionate to achieving that objective

Compatibility of the measure with the right to privacy

2.114 The statement of compatibility acknowledged that the bill engaged the right to privacy by enabling the regulator to disclose information.[2]

2.115 The committee noted in its previous analysis that the definition of 'VET information' is very broad and captures all information and documents collected by the regulator in the performance of its functions. Under the Act the regulator's functions include, in addition to registering and accrediting courses and organisations, the issuing of VET qualifications to students.[3] It also provides that VET student records are to be provided to the regulator,[4] including a document or object that has been kept because of its connection to a current or former VET student.[5]

2.116 The committee also noted that the information able to be disclosed by the regulator could include information about students, including personal information, and as such the committee considered that the bill limited the right to privacy.

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2 Explanatory memorandum (EM) 4-5.

3 Section 55 of the *National Vocational Education and Training Regulator Act 2011.*

4 Section 211 of the *National Vocational Education and Training Regulator Act 2011.*

5 See definition of 'VET student records' in section 3 of the *National Vocational Education and Training Regulator Act 2011.*

2.117 While the committee noted that improving the ability of the regulator to cooperate with other government entities to remove dishonest providers is likely to be a legitimate objective for the purposes of international human rights law, it found it unclear, on the basis of the information provided in the statement of compatibility, whether the measure may be regarded as proportionate to this objective.

2.118 In particular, the statement of compatibility listed only one safeguard in the legislation – namely, that if personal information is disclosed to a royal commission the regulator must advise the affected person that the information has been disclosed and give details of the information disclosed. However, this requirement does not apply when personal information is disclosed to a Commonwealth, state or territory authority.

2.119 The committee also noted that the definition of a Commonwealth or state or territory authority in the Act includes any Commonwealth department, the state or territory (as a whole) or a body established under law. This is extremely broad, and could include hundreds of bodies or entities. The statement of compatibility did not explain why it is necessary to enable disclosure to all Commonwealth, state or territory authorities, rather than to a specified list of relevant authorities.

2.120 In addition, the statement of compatibility did not describe the specific types of personal information that might be disclosed under the bill.

2.121 The committee therefore required further information on the specific types of personal information subject to the disclosure scheme, and why it is regarded as proportionate to enable the disclosure of information to any Commonwealth, state or territory authority.

2.122 The committee considered that disclosure of VET information limits the right to privacy. The statement of compatibility for the bill did not provide sufficient information to establish that the breadth of the measure may be regarded as proportionate to its stated objective of improving the regulator's ability to cooperate with other government entities to remove dishonest VET providers.

2.123 The committee therefore sought the advice of the Minister for Education and Training as to whether the limitation on the right to privacy imposed by the breadth of the measure is proportionate to the measure's stated objective.

Assistant Minister's response

> I note the Committee is concerned with the amendments to the definition of 'VET information' and the disclosure provisions, in particular in relation to the potential for disclosure of students' personal information held by the national training regulator, the Australian Skills Quality Authority (ASQA).
>
> Under the provisions of the *National Vocational Education and Training Regulator Act 2011* (the Act), ASQA may, in the course of regulating registered training organisations (RTOs), collect vocational education and training (VET) information. After the amendments in the Bill commence,

VET information will be defined to mean information that is held by ASQA and relates to the performance of ASQA's functions, including information and documents collected by ASQA in the course of administering the Act, or in the exercise or performance of a function under the Act.

I have been advised that ASQA does collect some personal information relating to individual students and l agree, this information will be VET information under the Act.

As the Committee notes, one of the purposes of amending the definition of VET information is to assist ASQA in removing dishonest providers from the VET sector. It is envisaged that this objective will be predominantly achieved by means of ASQA providing other (not personal) types of VET Information, such as marketing materials to the Australian Competition and Consumer Commission.

The amended provision allows for the possibility that there may be circumstances where it is necessary for ASQA to disclose personal information to another agency for the purposes of, among other things, identifying and removing unscrupulous providers from the VET sector.

While such a circumstance may not be a common occurrence, it is important that ASQA is able to respond in a timely and efficient manner, and to ensure that the relevant receiving agency has the information necessary to perform its functions or exercise its powers. I note the Committee's concerns that this measure may limit an individual's right to privacy. There are a number of safeguards in place to ameliorate that risk.

ASQA will only be permitted to disclose an individual's personal information to a Commonwealth authority or state or territory authority if it is reasonably satisfied that disclosure is necessary to enable or assist the authority to perform or exercise any of its functions or powers. Under Part 9 Division 2 of the Act, which governs the disclosure and sharing of information (including any personal student information), it is an offence for a person to make an unauthorised disclosure of VET information, with a penalty of two years imprisonment. In addition, ASQA is bound by the *Privacy Act 1988* and the Australian Privacy Principles (APPs). The APPs include rules around the collection, use and disclosure of personal information. The Office of the Australian Information Commissioner can investigate potential breaches of the APPs.

The amended provision, when combined with the existing privacy safeguards, is an effective way of ensuring that the right to privacy is balanced with the need to protect the interests of VET students, as well as to protect and enhance Australia's reputation for VET nationally and internationally.[6]

6 See Appendix 1, Letter from Senator the Hon Simon Birmingham, Assistant Minister for Education and Training, to the Hon Philip Ruddock MP (dated 20 May 2015) 1-2.

Committee response

2.124 **The committee thanks the Assistant Minister for Education and Training for his response.**

2.125 The committee notes, in particular, the assistant minister's advice regarding the information that will be shared under the provisions, such as marketing materials to the Australian Competition and Consumer Commission.

2.126 The committee further notes the assistant minister's advice regarding the safeguards that will apply to these provisions, including unauthorised disclosure offences under the *National Vocational Education and Training Regulator Act 2011*.

2.127 **On the basis of the information provided, the committee considers that the measure is compatible with the right to privacy and has concluded its examination of the bill.**

Omnibus Repeal Day (Autumn 2015) Bill 2015

Portfolio: Prime Minister and Cabinet
Introduced: House of Representatives, 18 March 2015

Purpose

2.128 The Omnibus Repeal Day (Autumn 2015) Bill 2015 (the bill) seeks to amend or repeal legislation across seven portfolios.

2.129 The bill also includes measures that repeal redundant and spent Acts and provisions in Commonwealth Acts, and complements measures included in the Statue law Revision Bill (No. 1) 2015 and the Amending Acts 1980 to 1989 Repeal Bill 2015.

2.130 One of the Acts which would be repealed is the *Aboriginal and Torres Strait Islanders (Queensland Discriminatory Laws) Act 1975*.

2.131 Measures raising human rights concerns or issues are set out below.

Background

2.132 The committee first reported on the bill in its *Twenty-first Report of the 44th Parliament*, and requested further information from the Parliamentary Secretary to the Prime Minister as to whether the bill was compatible with Australia's international human rights obligations.[1]

Repeal of *Aboriginal and Torres Strait Islanders (Queensland Discriminatory Laws) Act 1975*

2.133 As noted above, the bill seeks to repeal the *Aboriginal and Torres Strait Islanders (Queensland Discriminatory Laws) Act 1975* (the Act).

2.134 The Act contains a range of protections against discriminatory treatment of Aboriginal people. The purpose of the Act is stated to be 'preventing Discrimination in certain respects against those Peoples under laws of Queensland'.[2]

2.135 Accordingly, the committee considered in its previous analysis that the repeal of the Act engages the right to equality and non-discrimination.

Right to equality and non-discrimination

2.136 The right to equality and non-discrimination is protected by articles 2, 16 and 26 of the International Covenant on Civil and Political Rights (ICCPR).

2.137 This is a fundamental human right that is essential to the protection and respect of all human rights. It provides that everyone is entitled to enjoy their rights

1 Parliamentary Joint Committee on Human Rights, *Twenty-first Report of the 44th Parliament* (24 March 2015) 5-7.

2 *Aboriginal and Torres Strait Islanders (Queensland Discriminatory Laws) Act 1975*, section 1.

without discrimination of any kind, and that all people are equal before the law and entitled without discrimination to the equal and non-discriminatory protection of the law.

2.138 The ICCPR defines 'discrimination' as a distinction based on a personal attribute (for example, race, sex or religion),[3] which has either the purpose (called 'direct' discrimination), or the effect (called 'indirect' discrimination), of adversely affecting human rights.[4] The UN Human Rights Committee has explained indirect discrimination as 'a rule or measure that is neutral on its face or without intent to discriminate', which exclusively or disproportionately affects people with a particular personal attribute.[5]

2.139 Articles 1, 2, 4 and 5 of the Convention on the Elimination of All Forms of Racial Discrimination (CERD) further describe the content of this right and the specific elements that state parties are required to take into account to ensure the elimination of discrimination on the basis of race, colour, descent, national or ethnic origin.

Compatibility of the measure with the right to equality and non-discrimination

2.140 While the statement of compatibility stated that repealing the Act would have no substantive effect, the committee sought further information to help it assess whether repealing the Act could limit the right to equality and non-discrimination. The committee noted in particular that no details were provided in the statement of compatibility as to the Queensland laws the Act was designed to override, or whether the *Racial Discrimination Act 1975* (RDA) provides equivalent and sufficient protection of the right to equality and non-discrimination as is provided by the Act. The committee therefore sought the advice of the Parliamentary Secretary to the Prime Minister as to:

- whether existing federal legislation provides equivalent protection of the right to equality and non-discrimination as that contained in the Act; and
- whether there are any Queensland laws which continue to apply such that the Act may not be redundant.

Parliamentary Secretary's response

> **The Committee seeks advice as to whether existing federal legislation provides equivalent protection of the right to equality and non-discrimination as that contained in the *Aboriginal and Torres Strait***

3 The prohibited grounds are race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Under 'other status' the following have been held to qualify as prohibited grounds: age, nationality, marital status, disability, place of residence within a country and sexual orientation.

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

5 *Althammer v Austria* HRC 998/01, [10.2].

Islanders (Queensland Discriminatory Laws) Act 1975 **(the Queensland Discriminatory Laws Act).**

The *Racial Discrimination Act 1975* (the Racial Discrimination Act) will continue to provide protection of the rights of Aboriginal persons and Torres Strait Islanders to equality and non-discrimination.

Specifically, section 9 of the Racial Discrimination Act prohibits 'direct' race discrimination, while section 10 provides for a general right to equality before the law. Subsection 10(3) supersedes State or Territory laws that authorise the management of Aboriginal or Torres Strait Islander property without their consent. This subsection is essentially in the same terms as section 5 of the Queensland Discriminatory Laws Act.

The Committee also seeks advice as to whether there are any Queensland laws which continue to apply such that the Queensland Discriminatory Laws Act may not be redundant.

The Queensland Discriminatory Laws Act deals with the *Aborigines Act 1971* (Qld) and *the Torres Strait Islanders Act 1971* (Qld) and, where relevant, their successor Acts.

These Acts imposed a different legal regime on Aboriginal and Torres Strait Islander reserves in Queensland than that which applied to persons in other parts of Queensland.

The laws targeted by the Queensland Discriminatory Laws Act have since been repealed. While the Discriminatory Laws Act continues to have legal effect, it serves no practical purpose. Please refer to Attachment A which traces changes to targeted Queensland laws, including the removal of discriminatory aspects.[6]

2.141 See Appendix 1 for Attachment A referred to in the Parliamentary Secretary's response.

Committee response

2.142 **The committee thanks the Parliamentary Secretary to the Prime Minister for his response.**

2.143 The committee notes the Parliamentary Secretary's advice that the RDA provides protection of the right to equality and non-discrimination, for Aboriginal and Torres Strait Islander peoples in Queensland, which appears to be at least equivalent to many of the protections provided under the Act.

2.144 Further, the committee notes the advice regarding Queensland laws which have since been repealed. Attachment A of the Parliamentary Secretary's advice

6 See Appendix 1, Letter from the Hon Christian Porter MP, Parliamentary Secretary to the Prime Minister, to the Hon Philip Ruddock MP (dated 13/04/2015) 1-2.

usefully traces changes to those targeted discriminatory Queensland laws, including showing when discriminatory aspects of the laws were repealed or amended.

2.145 **In light of the advice provided by the Parliamentary Secretary, and noting in particular the protections of the *Racial Discrimination Act 1975* and the repeal of certain discriminatory laws in Queensland, the committee considers that the repeal of the *Aboriginal and Torres Strait Islanders (Queensland Discriminatory Laws) Act 1975* is compatible with the right to equality and non-discrimination.**

Telecommunications Legislation Amendment (Deregulation) Bill 2014

Portfolio: Communications
Introduced: House of Representatives, 22 October 2014

Purpose

2.146 The Telecommunications Legislation Amendment (Deregulation) Bill 2014 (the bill) contains a number of amendments, including to:

- repeal the *Telecommunications Universal Service Management Agency Act 2012* to abolish the Telecommunications Universal Service Management Agency (TUSMA);
- transfer TUSMA's functions and contractual responsibilities to the Department of Communications;
- amend the *Australian Communications and Media Authority Act 2005*, *Export Market Development Grants Act 1997* and *Telecommunications (Consumer Protection and Service Standards) Act 1999* (the Consumer Protection Act) to make amendments consequential on the regulation of the supply of telephone sex services via a standard telephone service being removed from the Consumer Protection Act;
- amend the *Do Not Call Register Act 2006* to enable an indefinite registration period for numbers on the register; and
- reduce requirements on carriage service providers in relation to customer service guarantees.

2.147 Measures raising human rights concerns or issues are set out below.

Background

2.148 The committee first considered the bill in its *Sixteenth Report of the 44th Parliament*, and requested further information from the Minister for Communications as to whether the proposed repeal of Part 9A of the Consumer Protection Act is compatible with the rights of the child.[1]

2.149 The committee considered the minister's response in its *Eighteenth Report of the 44th Parliament*, and sought further information in relation to information provided in the response.[2]

1 Parliamentary Joint Committee on Human Rights, *Sixteenth Report of the 44th Parliament* (25 November 2014) 23-24.

2 Parliamentary Joint Committee on Human Rights, *Eighteenth Report of the 44th Parliament* (10 February 2015) 89-94.

2.150 The bill passed both Houses of Parliament on 25 March 2015 and received Royal Assent on 13 April 2015.

Repeal of Part 9A of the Consumer Protection Act

2.151 The bill repealed Part 9A of the Consumer Protection Act (CPA), which regulates the supply of telephone sex services via a standard telephone service. The explanatory memorandum (EM) stated that Part 9A is outdated and no longer necessary due to changes in technology and consumer behaviour.

2.152 The statement of compatibility for the bill stated that no human rights were engaged by this amendment.

2.153 However, the committee considered in its initial analysis that, as Part 9A was introduced in order to address community concerns that telephone sex services were too easily accessed by children, the deregulation of these services may expose children to a risk of harm currently minimised under Part 9A.

2.154 Accordingly, the committee considered that the measure engages article 19 of the Convention on the Rights of the Child and the obligation to protect children from harm.

Rights of the child

2.155 Children have special rights under human rights law taking into account their particular vulnerabilities. Under a number of treaties, particularly the Convention on the Rights of the Child (CRC), children's rights are protected. All children under the age of 18 years are guaranteed these rights.

2.156 The rights of children includes the right of children to develop to the fullest; protection from harmful influences, abuse and exploitation; family rights; and access to health care, education and services that meet their needs.

2.157 Under article 19 of the CRC, Australia is required to take all appropriate legislative, administrative, social and educational measures to protect children from all forms of harm.

Compatibility of the measure with the rights of the child

2.158 The committee sought the advice of the Minister for Communications as to whether the proposed repeal of Part 9A of the CPA is compatible with the rights of the child, 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.

2.159 The committee considered the minister's response in its *Eighteenth Report of the 44th Parliament*, and noted the minister's response stated that Part 9A of the CPA

is not required to ensure the protection of children from the harm of telephone sex services because of the existing protections in Schedule 7 of the BSA.[3]

2.160 The committee noted that, in order to ensure no diminution in protection of children from harm as required by the Convention on the Rights of the Child, Schedule 7 of the BSA must provide equivalent protection to Part 9A of the CPA.

2.161 However, as Schedule 7 of the BSA effectively imposes a regulatory regime on telephone sex service providers that is based on industry codes of conduct, it was not clear from the minister's response that the protections in Schedule 7 are equivalent to those proposed to be repealed in Part 9A of the CPA, which imposes mandatory compliance obligations.

2.162 The committee therefore sought the advice of the Minister for Communications as to whether Schedule 7 of the BSA offers a comparable level of protection for children from the harm of telephone sex services to that provided by Part 9A of the CPA as required by the Convention on the Rights of the Child.

Minister's response

> In my previous response, I outlined the protections within Schedule 7 of the *Broadcasting Services Act 1992* (BSA) that protect children from accessing R18+ content via a range of platforms, including telephone sex services. I note the Committee's request for further clarification on whether Schedule 7 of the BSA offers a comparable level in terms of protecting children from harm to that which was provided under Part 9A of the TCPSS Act.
>
> It may be useful to outline the background to Part 9A, which was originally made as part of amendments to the Telecommunications Consumer Protection and Service Standards Bill 1998, before it was passed by the Parliament as the TCPSS Act in 1999. Part 9A originally provided a regulatory solution to address community concern that telephone sex services were too easily accessed by children of standard telephone service customers. At that time there had been a steady increase in complaints about telephone sex services since the introduction of premium rate services in 1990-91.
>
> However, since the passage of the *Communications Legislation Amendment (Content Services) Act 2007*, provisions that ensure the protection of children from adult content, including that delivered via telephone sex services, have resided within Schedule 7 of the BSA. The *Communications Legislation Amendment (Content Services) Act 2007* also repealed most of the key provisions previously contained in Part 9A of the TCPSS Act.

3 Parliamentary Joint Committee on Human Rights, *Eighteenth Report of the 44th Parliament* (10 February 2015) 103-105.

The Committee has sought my advice that Schedule 7 of the BSA offers a comparable or equivalent level of protection for children from the harm of telephone sex services to that which was provided by Part 9A. This seems to be based on an assumption that both Part 9A of the TCPSS Act and Schedule 7 of the BSA worked in parallel to protect children from harm.

However, as I have previously advised the Committee, Schedule 7 of the BSA continues to be the primary regulatory instrument protecting children from accessing telephone sex services or other age restricted materials. I also note that at the time Schedule 7 of the BSA was introduced, Part 9A of the TCPSS Act was substantially amended. Since that time, Part 9A had not contained provisions specifically designed to protect children from harm, instead it only provided certain limited consumer protections by:

- regulating billing arrangements for telephone sex services; and
- prohibiting telephone sex services from being bundled with other goods and services.

Until its recent repeal, section 158B of Part 9A prohibited a carriage service provider from billing a customer in relation to the supply of a telephone sex service unless the telephone sex service was supplied using a specific number range (that is, the 1901 prefix, or another prefix determined by the Minister for Communications or the Australian Communications and Media Authority (ACMA)).

However, the former requirements in Part 9A around billing arrangements were clearly only relevant to the extent that a consumer had access to, and had used a telephone sex service. Fundamentally, Schedule 7 of the BSA has proven to be effective in requiring industry to have a range of mechanisms to prevent children from accessing telephone sex services in the first place. Therefore, I considered the repeal of the billing arrangements for telephone sex services in Part 9A of the TCPSS Act would clearly not in any way reduce the protection from harm already afforded to children.

Secondly, until its recent repeal, Section 158C of Part 9A limited how telephone sex services were marketed and supplied, by preventing telephone sex services from being tied to the supply of any other goods or services. The original Explanatory Memorandum[4] explained this was to:

> "*...prevent suppliers getting customers to 'opt-in' to telephone sex services by requiring them to 'opt-in' as a condition of purchasing certain services, or by giving discounts or special offers if they do 'opt-in'.*"

There is no equivalent or directly comparable provision contained in Schedule 7 of the BSA. However, regardless of how telephone sex services

4 http://www.comlaw.gov.au/Details/C2004B00256/Supplementary Explanatory Memorandum/Text.

are marketed now or into the future, Schedule 7 provides assurances that appropriate age verification requirements are in place to protect children from accessing these types of services in the first instance.

In conclusion, the recent repeal of Part 9A reflects rapid technological developments and consumer usage trends whereby online services and mobile apps have become the preferred means by which consumers access adult content. Further, during consultation on the proposed repeal of Part 9A, the ACMA confirmed it had not received any complaints in recent years about telephone sex services. Accordingly, the Government considered Part 9A of the TCPSS Act was obsolete and notes the repeal was supported by all stakeholders consulted, including the peak consumer and industry representative bodies, namely the Australian Communications Consumer Action Network and the Communications Alliance.[5]

Committee response

2.163 **The committee thanks the Minister for Communications for his response. On the basis of the further information provided, particularly advice that Part 9A does not contain provisions specifically designed to protect children from harm, but instead provides certain limited consumer protections, the committee considers that the measure is compatible with the rights of the child, and has concluded its examination of the bill.**

5 See Appendix 1, Letter from the Hon Malcolm Turnbull MP, Minister for Communications, to Senator Dean Smith (dated 13 May 2015) 1-3.

Competition and Consumer (Industry Codes-Franchising) Regulation 2014 [F2014L01472]

Portfolio: Treasury
Authorising legislation: Competition and Consumer Act 2010
Last day to disallow: 2 March 2015

Purpose

2.164 The Competition and Consumer (Industry Codes—Franchising) Regulation 2014 (the Franchising Code) regulates the conduct of participants in franchising relationships.

2.165 The Franchising Code replaces the Trade Practices (Industry Codes—Franchising) Regulations 1998. It requires franchisors to disclose certain information to franchisees, prescribes minimum standards in franchise agreements, and provides dispute resolution processes.

2.166 The Franchising Code creates civil penalties of 300 units for the breach of certain provisions in the Code.

2.167 Measures raising human rights concerns or issues are set out below.

Background

2.168 The committee first reported on the regulation in its *Eighteenth Report of the 44th Parliament*, and requested further information from the Minister for Small Business as to whether the bill was compatible with Australia's international human rights obligations.[1]

Civil penalties provisions

2.169 The regulation creates civil penalties of 300 units for the breach of certain provisions in the Franchising Code. As set out in the committee's Guidance Note 2, civil penalty provisions may engage fair trial rights and rights to a fair hearing. They may also engage criminal process rights such as the presumption of innocence.

Right to a fair trial and fair hearing rights

2.170 The right to a fair trial and fair hearing are protected by article 14 of the International Covenant on Civil and Political Rights (ICCPR). The right applies to both criminal and civil proceedings, to cases before both courts and tribunals and to military disciplinary hearings. The right is concerned with procedural fairness, and encompasses notions of equality in proceedings, the right to a public hearing and the requirement that hearings are conducted by an independent and impartial body. Circumstances which engage the right to a fair trial and fair hearing may also engage

1 Parliamentary Joint Committee on Human Rights, *Eighteenth Report of the 44th Parliament* (10 February 2015) 68-70.

other rights in relation to legal proceedings contained in article 14, such as the presumption of innocence and minimum guarantees in criminal proceedings.

2.171 Many bills and existing statutes contain civil penalty provisions. These are generally prohibitions on particular forms of conduct that give rise to liability for a 'civil penalty' enforceable by a court. As these penalties are pecuniary and do not include the possibility of imprisonment, they are said to be 'civil' in nature and do not constitute criminal offences under Australian law. Given their 'civil' character, applications for a civil penalty order are dealt with in accordance with the rules and procedures that apply in relation to civil matters; that is, proof is on the balance of probabilities.

2.172 However, civil penalty provisions may engage the criminal process rights under articles 14 and 15 of the ICCPR where the penalty may be regarded as 'criminal' for the purposes of international human rights law. The term 'criminal' has an 'autonomous' meaning in human rights law. In other words, a penalty or other sanction may be 'criminal' for the purposes of the ICCPR even though it is considered to be 'civil' under Australian domestic law.

Compatibility of the measure with the right to a fair trial and fair hearing rights

2.173 While the statement of compatibility stated that the new Franchising Code did 'not engage any of the applicable rights or freedoms',[2] the committee observed that civil penalty provisions prescribed in the Franchising Code engaged the right to a fair trial and a fair hearing. Given their 'civil' character, applications for a civil penalty order are dealt with in accordance with the rules and procedures that apply in relation to civil matters.

2.174 However, the committed noted that 'civil' penalty provisions under Australian domestic law may be considered 'criminal' under international human rights law. A provision that is considered 'criminal' under international human rights law will engage criminal process rights under articles 14 and 15 of the International Covenant on Civil and Political Rights (ICCPR), such as the right to be presumed innocent. The right to be presumed innocent requires, for example, that the case against a person be demonstrated on the criminal standard of proof, that is, be proven beyond reasonable doubt.

2.175 The committee's expectations in relation to assessing the human rights compatibility of civil penalty provisions are set out in its *Guidance Note 2*.[3] This notes that in a corporate context where the penalties are small it is generally not necessary

2 Explanatory memorandum (EM) 5.

3 See, Parliamentary Joint Committee on Human Rights, *Guidance Note 2: Offence provisions, civil penalties and human rights* (December 2014) http://www.aph.gov.au/~/media/Committees/Senate/committee/humanrights_ctte/guidance_notes/guidance_note_2/guidance_note_2.pdf.

to provide an assessment of whether civil penalty provisions are considered 'criminal' for the purposes of international human rights law.

2.176 However, in this case, some of the penalties under the Franchising Code apply to franchisees, who may be individuals or small businesses, and the maximum civil penalty of 300 penalty units ($51000) therefore appears significant. The committee therefore considered that, due to these factors, an assessment was required as to whether the civil penalty provisions should be considered 'criminal' for the purposes of international human rights law and, if so, whether the provisions were compatible with criminal process rights under article 14 and 15 of the ICCPR.

2.177 Accordingly, the committee sought the advice of the Minister for Small Business as to whether the civil penalty provisions in the new Franchising Code were compatible with the right to a fair trial and fair hearing.

Minister's response

Having regard to the matters outlined below, I believe it is reasonable for the Committee to conclude that the civil penalties regime set out in the Franchising Code is not a 'criminal' penalty regime for the purposes of international human rights law.

- Penalties under the Franchising Code do not apply to the public in general. Rather, they apply only in relation to persons in a particular business relationship, in a specific regulatory context, and are directed towards promoting openness and transparency between the parties to that relationship. This is inconsistent with characterising the penalties as criminal.
- I note that the penalties are moderate having regard to other civil penalties that are imposed under the *Competition and Consumer Act 2010* (CCA). The amount of the penalty is also mitigated by the fact that the penalties are only imposed on persons in a particular business relationship.
- It is also important to appreciate that 300 penalty units is the maximum penalty; the Court has full discretion to determine the appropriate level of penalty having regard to all relevant matters, including the nature and extent of the relevant conduct, any loss or damaged suffered as a result of that conduct, the circumstances in which the conduct took place, and whether the person has previously engaged in similar conduct (see section 76(1) of the CCA).

I would also like to draw the Committee's attention to the following matters, which may be relevant to its deliberations.

- The civil penalties imposed under the Franchising Code slot into the existing pecuniary penalty regime established by the CCA. This regime is long-standing and well litigated. It has not previously been thought that the failure to apply the criminal standard of proof in these type of proceedings has resulted in injustice. Indeed, the courts

have indicated on numerous occasions that the gravity of the allegations being tested in the court will be taken into account, and that the graver the allegation, the greater the strictness of proof that will be required (see, for example, *Australian Competition and Consumer Commission v IF Woo lam & Sons Pry Ltd* (2011) 196 FCR 212 at [8]).

- The penalties imposed in respect of clauses 6, 39 and 41 of the Code are imposed in respect of conduct engaged in by persons in a particular relationship. The relevant provisions are intended to encourage both parties to that relationship to act openly towards each other. Given this, if it is accepted that it is unnecessary to apply the criminal standard of proof to one party to that relationship (the franchisor), it would be inappropriate to apply a different standard of proof to the other.
- The civil penalties imposed under the Code are but one of a number of enforcement provisions provided for in the CCA, which include infringement notices (Part IVB, Division 2A) and public warning notices (Part 1VB, Division 3). Given this, even if it is possible that a civil penalty could be imposed on an individual, it is unlikely that this would occur, save in exceptional circumstances.

Industry codes prescribed under the provisions of the CCA are co-regulatory measures designed to encourage best practice among an industry and improve transparency and conduct in business to business relationships.

The introduction of civil penalties for serious breaches of the Franchising Code is an important development in ensuring that the franchising sector is effectively regulated. The introduction of penalties followed extensive public consultation and engagement with the franchising sector. There was significant industry consensus that penalties were an appropriate mechanism for responding to instances of inappropriate conduct in the sector.[4]

Committee response

2.178 **The committee thanks the Minister for Small Business for his response.**

2.179 The committee notes the minister's belief that the civil penalties set out in the Franchising Code should not be considered 'criminal' for the purposes of international human rights law.

2.180 In particular, the committee notes the minister's advice that the penalties under the Franchising Code do not apply to the public in general, but apply in a specific regulatory context and are only imposed on persons in a particular business

4 Appendix 1, Letter from the Hon Bruce Billson MP, Minister for Small Business, to the Hon Philip Ruddock MP (received 05/05/2015) 1-2.

relationship. A penalty is likely to be considered 'criminal' for the purposes of international human rights law if its purpose is to punish or deter; and it applies to the public in general (rather than being restricted to people in a specific regulatory or disciplinary context.) The penalties are therefore less likely to be considered 'criminal' for the purposes of international human rights law.[5]

2.181 However, even if a penalty occurs in a regulatory context, it may still be considered 'criminal' for the purposes of international human rights law if the penalty carries a substantial pecuniary sanction. In relation to the severity of the penalty, the committee notes the minister's advice that 300 penalty units is relatively moderate in its specific regulatory context when compared to other civil penalties under the *Competition and Consumer Act 2010.* On this basis, the committee considers that the civil penalty provisions under the Franchising Code are not 'criminal' for the purposes of international human rights law. The criminal process rights contained in articles 14 and 15 of the ICCPR are therefore not engaged or limited.

2.182 **Based on the information provided, the committee considers that the civil penalty provisions set out in the Franchising Code are not 'criminal' for the purposes of international human rights law. Accordingly, the criminal process rights contained in articles 14 and 15 of the ICCPR are not engaged or limited. The committee notes that other aspects of article 14, which relate to the right to a fair hearing in civil matters, are still engaged by the civil penalty provisions.**

2.183 **The committee considers that the civil penalty provisions in the Franchising Code are compatible with the right to a fair hearing.**

5 See, Parliamentary Joint Committee on Human Rights, *Guidance Note 2: Offence provisions, civil penalties and human rights* (December 2014) http://www.aph.gov.au/~/media/Committees/Senate/committee/humanrights_ctte/guidance_notes/guidance_note_2/guidance_note_2.pdf.

Migration Amendment (Partner Visas) Regulation 2014 [F2014L01747]

Portfolio: Immigration and Border Protection
Authorising legislation: Migration Act 1958
Last day to disallow: 26 March 2015

Purpose

2.184 The Migration Amendment (Partner Visas) Regulation 2014 (the regulation) amends the Migration Regulations 1994 to increase visa application charges by 50 per cent for the subclasses 100 (Partner (Permanent)), 300 (Prospective Marriage (Temporary)) and 801 (Partner (Permanent)).

2.185 Measures raising human rights concerns or issues are set out below.

Background

2.186 The committee reported on the regulation in its *Eighteenth Report of the 44th Parliament*, and requested further information from the Minister for Immigration and Border Protection as to whether the bill was compatible with Australia's international human rights obligations.[1]

Increase to visa application charges

2.187 The committee noted in its previous analysis that the regulation engages the right to protection of the family.

2.188 The committee considered that the increases to visa application charges (VACs) limit the right to protection of the family of Australian citizens and residents who wish to live permanently in Australia with their partner.

Right to protection of the family

2.189 The right to respect for the family is protected by articles 17 and 23 of the International Covenant on Civil and Political Rights (ICCPR) and article 10 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). Under these articles, the family is recognised as the natural and fundamental group unit of society and, as such, being entitled to protection.

2.190 An important element of protection of the family, arising from the prohibition under article 17 of the ICCPR against unlawful or arbitrary interference with family, is to ensure family members are not involuntarily separated from one another. Laws and measures which prevent family members from being together, impose long periods of separation, or forcibly remove children from their parents, will therefore limit this right.

1 Parliamentary Joint Committee on Human Rights, *Eighteenth Report of the 44th Parliament* (10 February 2015) 86-87.

Compatibility of the measure with the right to protection of the family

2.191 The statement of compatibility for the bill states that no human rights are engaged by the regulation.

2.192 The committee noted in its previous analysis that the fees for the affected visa classes were, prior to the making of the regulation, already considerable. Given this, the 50 per cent increase to the VACs could make it less affordable and therefore more difficult for an Australian citizen or resident to bring their partner to Australia. Accordingly, the committee considered that the regulation may limit the right to the protection of the family.

2.193 The committee therefore sought the advice of the Minister for Immigration and Border Protection as to whether the increases to certain VACs are compatible with the right to protection of the family, and in particular whether the limit imposed on human rights by the amendment is in pursuit of a legitimate objective, has a rational connection between the limitation and that objective, and is proportionate to achieving that objective.

Minister's response

> This regulation does not impact the ability of individuals to form a family. The right to protection of the family in Articles 17 and 23 does not amount to a right to enter or remain in Australia where there is no other right to do so. Requiring a visa applicant to pay a higher application charge has no impact upon the ability of the Australian citizen, permanent resident or eligible New Zealand citizen sponsor from travelling, visiting or residing with their partner or prospective partner in other countries. In order to demonstrate eligibility for the visa, the applicant must show that the couple has been living together or has not been living separately and apart on a permanent basis. This requirement has been provides for in migration legislation since 1994. For offshore applicants, this means that the relationship will have been established in a country other than Australia and any separation of the couple in order to save for the VAC would be voluntary.
>
> The government offers a wide range of visa options to potential applicants and it is open to affected individuals to seek other visa options where they meet the specific application requirements for the visa. Applicants who are affected by the VAC increase have been encouraged to consider applying for a skilled visa, and visitor visas are available for short term stays. As the committee points out, it is legitimate for the Australian government to charge visa processing fees. Given the availability of alternative visas pathways with lower associated costs and that there is nothing preventing the couple from residing together in the applicant's country of residence, I

> am of the view that this regulation does not limit the right to protection of the family or any other applicable rights or freedoms.[2]

Committee response

2.194 **The committee thanks the Minister for Immigration and Border Protection for his response.** The committee notes the minister's view that increasing the visa charges for partner visas does not limit the right to protection of the family, on the basis that affected persons would have the opportunity to travel to, visit and reside with their partner in other countries, or to seek other visa options.

2.195 Assessments of the compatibility of legislation by the committee involve the application of its analytical framework to, first, identify if a measure engages a human right (that is, whether in the broadest sense the measure may interact with a right); second, identify if a measure limits any right that is engaged; and third, assess whether any limitation is legally justified (that is, pursues a legitimate objective, is rationally connected to that objective and is proportionate).

2.196 Since its inception, the committee's approach is to apply the above analytical framework in undertaking a routine and technical examination of legislation, which therefore necessarily does not encompass consideration of its policy merits, or broader arguments which may be advanced in support of or against a proposed measure.

2.197 With reference to this context, while the minister's response identifies a number of alternatives for persons potentially affected by the increased visa charge, the existence of such alternatives falls outside the scope of the committee's examination of the regulation as guided by the routine application of its analytical framework to the bill.

2.198 Turning to the committee's analysis of the increases to the VACs, the committee considers that it is uncontentious as a matter of law that significant increases to VACs for partners may limit the right to protection of the family for Australian citizens and residents who wish to live permanently in Australia with their partner. This is because such increases could represent a 'financial barrier' to persons who wish to live with their partner in Australia.

2.199 The committee's conclusion in this respect appears to be consistent with guidance from the Attorney-General's Department on the preparation of statements of compatibility, which states that the right to the protection of the family may be engaged by policy or legislation that:

> …provides for the entry into or removal from Australia of persons under migration laws in circumstances that may affect the unity of a family.[3]

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2 See Appendix 1, Letter from the Hon Peter Dutton MP, Minister for Immigration and Border Protection, to the Hon Philip Ruddock MP (dated 8 April 2015) 20.

2.200 As noted above, the statement of compatibility for the bill provided no assessment of this limitation of the right to the protection of the family, and the minister's response has maintained the view that the measure does not limit the right.

2.201 The existence of alternative courses of action for persons affected by the measure does not provide a justification for the limitation. The very significant quantum of increase to the VACs for a partner visa from $4,575 to $6,865 could represent a substantial financial barrier to persons otherwise eligible for the grant of a visa that would allow them to reside in Australia with their partner. The committee also notes that the charges appear to be set at a level that will enable the government to collect revenue and may not reflect only the costs involved in reviewing and verifying the veracity of the visa application.

2.202 **Some committee members noted the minister's advice that applicants have the ability to reside together in another country and, accordingly, consider the measure is compatible with the right to protection of the family.**

2.203 **Other committee members considered that the regulation increasing the visa application charges for partner visas limits the right to protection of the family. As set out above, the Minister for Immigration and Border Protection does not accept that the right is limited, and has provided no justification for the limitation. Noting that the significant increase to VACs has reduced the affordability of applying for a visa that would allow a person to live with their partner in Australia, those committee members consider the regulation is likely to be incompatible with the right to protection of the family.**

3 Attorney-General's Department, List Of Guidance Sheets And Policy Triggers available at http://www.ag.gov.au/RightsAndProtections/HumanRights/PublicSector/Documents/PolicyTriggers.pdf.

Migration Amendment (Subclass 050 Visas) Regulation 2014 [F2014L01460]

Portfolio: Immigration and Border Protection
Authorising legislation: Migration Act 1958
Last day to disallow: 2 March 2015

Purpose

2.204 The Migration Amendment (Subclass 050 Visas) Regulation 2014 (the regulation) amends the Migration Regulations 1994 to provide the Minister for Immigration and Border Protection (the minister) with a discretion to apply a 'no work' condition (condition 8101) on a Bridging Visa E (BVE) granted by the minister. Previously, a 'no work' condition was mandatorily imposed on some BVEs granted by the minister and could not be imposed on others.

2.205 Measures raising human rights concerns or issues are set out below.

Background

2.206 The committee previously considered the bill in its *Twenty-first Report of the 44th Parliament*, and requested further information from the Minister for Immigration and Border Protection as to whether the discretion to apply the 'no work' condition on the grant of a BVE was compatible with the right to work, the right to an adequate standard of living, and the obligation to consider the best interests of the child.[1]

Discretion to apply the 'no work' condition on the grant of a BVE

2.207 The discretion to apply a 'no work' condition on the grant of a BVE engages the right to work and the right to an adequate standard of living as well as the rights of the child. Australia's obligations under international human rights treaties apply to all individuals lawfully in Australia and not just to citizens.

Right to work

2.208 The right to work and rights in work are protected by articles 6(1), 7 and 8(1)(a) of the International Covenant on Economic, Social and Cultural Rights (ICESCR).[2]

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1 Parliamentary Joint Committee on Human Rights, *Twenty-first Report of the 44th Parliament* (24 March 2015) 20-24.

2 Related provisions relating to such rights for specific groups are also contained in the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), articles 11 and 14(2)(e) of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), article 32 of the Convention on the Rights of the Child (CRC) and article 27 of the Convention on the Rights of Persons with Disabilities (CRPD).

2.209 The UN Committee on Economic, Social and Cultural Rights has stated that the obligations of state parties to the ICESCR in relation to the right to work include the obligation to ensure individuals their right to freely chosen or accepted work, including the right not to be deprived of work unfairly, allowing them to live in dignity. The right to work is understood as the right to decent work providing an income that allows the worker to support themselves and their family, and which provides safe and healthy conditions of work.

2.210 Under article 2(1) of ICESCR, Australia has certain obligations in relation to the right to work. These include:

- the immediate obligation to satisfy certain minimum aspects of the right;
- the obligation not to unjustifiably take any backwards steps (retrogressive measures) that might affect the right;
- the obligation to ensure the right is made available in a non-discriminatory way; and
- the obligation to take reasonable measures within its available resources to progressively secure broader enjoyment of the right.

2.211 The right to work may be subject only to such limitations as are determined by law and that are compatible with the nature of the right, and solely for the purpose of promoting the general welfare in a democratic society.

Compatibility of the measure with the right to work

2.212 In its previous analysis the committee noted that the regulation in part advances the right to work as compared with the situation prior to the making of the regulation because some BVE visa holders will have the right to work in Australia where previously they did not have that right.

2.213 Nevertheless, the committee noted that the right to work will not be afforded to all BVE holders and that a BVE holder's right to work will be at the discretion of the minister. Accordingly, the committee considered that the regulation limits the right to work.

2.214 While the committee notes that the measure's stated objective of protecting the integrity of the migration program may be a legitimate objective for the purposes of international human rights law, it is unclear, on the basis of the information provided in the statement of compatibility, whether the measure may be regarded as proportionate to this objective (that is, as the least rights restrictive alternative to achieve this result).

2.215 The decision to allow a BVE holder to work will be at the discretion of the minister when granting the BVE. As the committee has previously noted, administrative and discretionary processes are likely to be less stringent than the protection of statutory processes.

2.216 The committee therefore sought the advice of the Minister for Immigration and Border Protection as to whether the regulation imposes a proportionate limitation on the right to work.

Right to an adequate standard of living

2.217 The right to an adequate standard of living requires that the state take steps to ensure the availability, adequacy and accessibility of food, clothing, water and housing for all people in Australia.

2.218 Australia has two types of obligations in relation to this right. It has immediate obligations to satisfy certain minimum aspects of the right; not to unjustifiably take any backwards steps that might affect living standards; and to ensure the right is made available in a non-discriminatory way. It also has an obligation to take reasonable measures within its available resources to progressively secure broader enjoyment of the right to an adequate standard of living.

Compatibility of the measure with the right to an adequate standard of living

2.219 Working for wages is one of the primary means through which individuals in Australia are able to obtain an adequate standard of living for themselves and their family. The committee noted in its previous analysis that 'no work' conditions on BVEs limit an individual's ability to ensure an adequate standard of living through employment.

2.220 The statement of compatibility acknowledges that the regulation engages the right to an adequate standard of living, but explains that BVE holders who are not granted the right to work 'may nonetheless have access to financial support' such as the Community Assistance Support (CAS) program and the Asylum Seeker Assistance Scheme (ASAS) for eligible Protection visa applicants.

2.221 As noted at [2.214], the committee considered that it is unclear as to whether the measure may be regarded as proportionate to its stated objective (that is, as the least rights restrictive alternative to achieve this result).

2.222 The statement of compatibility sets out the forms of support that may be available to BVE holders if they are unable to work, but notes that not all individuals who are not permitted to work will be provided with support. It states that this will 'generally' be because of non-cooperation with the department in resolving the individual's visa status. However, there is no statutory requirement that the minister only impose a 'no work' condition on an individual who is not cooperating with the department. Accordingly, the regulation may impose a limitation on the right to an adequate standard of living which is not proportionate. A least rights restrictive approach would appear to be to limit the power to cases where there is non-cooperation or other non-compliance.

2.223 The committee therefore sought the advice of the Minister for Immigration and Border Protection as to whether the regulation imposes a proportionate limitation on the right to an adequate standard of living.

Minister's response

I respectfully advise the committee that the regulation applies only to Subclass 050 BVEs granted by me personally under section 195A of the Migration Act. The regulation does not apply to BVEs granted by me under other provisions of the Migration Act, including where an individual makes a valid application for a BVE.

Section 195A provides me with a non-compellable, non-delegable power to grant visas to persons who are in immigration detention under section 189 of the Migration Act, if I think that it is in the public interest to do so. Section 189 relates to the immigration detention of unlawful non-citizens.

As a result, the regulation only applies to individuals who are:

- unlawful non-citizens; and
- detained under section 189 of the Migration Act; and
- granted a BVE by me using my personal, non-compellable power under section 195A of the Migration Act.

Section 196(1) of the Migration Act provides that:

'An unlawful non-citizen detained under section 189 must be kept in immigration detention until:

(a) he or she is removed from Australia under section 198 or 199; or

(aa) an officer begins to deal with the non-citizen under subsection 198AD(3); or

(b) he or she is deported under section 200; or

(c) he or she is granted a visa.'

Granting a BVE under section 195A is, therefore, a mechanism by which I can decide that an individual will be released from immigration detention.

Section 195A of the Migration Act provides that I may grant a person who is in immigration detention a visa of a particular class, whether or not the person has applied for the visa. When exercising my personal power under section 195A, I am not bound by Subdivision AA (Applications for visas), Subdivision AC (Grant of visas) or Subdivision AF (Bridging visas) of Division 3 of Part 2 of the Migration Act, or by the Migration Regulations. As a result, I am not required to consider whether or not an individual is able to meet the eligibility requirements of the visa I grant. I do not have a duty to consider whether to exercise this power, but must think that it is in the public interest to grant the detainee a visa.

In practice, where I grant a BVE under section 195A, it is to people who are otherwise ineligible for the grant of a visa (for example, because the Migration Act prevents them from making a valid visa application). Individuals who make a valid application for a visa will have that application assessed under the Migration Act and Migration Regulations, and visa conditions will be imposed accordingly.

> I consider that the discretion to impose a 'no work' condition on certain BVE holders is appropriately limited, and is a least rights restrictive approach. As outlined above, the discretion to grant or withhold permission to work under this regulation will only exist in the context of the exercise of my personal power under section 195A of the Migration Act to grant a BVE to a non-citizen who has become unlawful and been taken into immigration detention. Further, the fact that the regulation only permits (rather than requires) me to impose the condition does not mean that the 'no work' condition will be imposed on all individuals to whom I grant a BVE under section 195A.
>
> It is not feasible or appropriate to codify the range of circumstances in which I may exercise my power under section 195A of the Migration Act to grant a BVE to an immigration detainee. It is, however, appropriate for permission to work to be granted on a discretionary basis to individuals who are granted BVEs by me using this power. This allows me to consider an individual's personal circumstances against the integrity of the migration programme, which is a proportionate limitation on the right to work and on the right to an adequate standard of living. As outlined in the Statement of Compatibility for this Regulation, this discretion also allows me to give permission to work in circumstances where this was previously prevented by the Migration Regulations.[3]

Committee response

2.224 **The committee thanks the Minister for Immigration and Border Protection for his response. On the basis of the information provided, the committee considers that the measure is compatible with the right to work and the right to an adequate standard of living, and has concluded its examination of this aspect of the instrument.**

Obligation to consider the best interests of the child

2.225 Under the Convention on the Rights of the Child (CRC), state parties are required to ensure that, in all actions concerning children, the best interests of the child are a primary consideration.[4]

2.226 This principle requires active measures to protect children's rights and promote their survival, growth and wellbeing, as well as measures to support and assist parents and others who have day-to-day responsibility for ensuring recognition of children's rights. It requires legislative, administrative and judicial bodies and institutions to systematically consider how children's rights and interests are or will be affected directly or indirectly by their decisions and actions.

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3 See Appendix 1, Letter from the Hon Peter Dutton MP, Minister for Immigration and Border Protection, to the Hon Philip Ruddock MP (dated 1 May 2015) 6-7.

4 Article 3(1).

Compatibility of the measure with the obligation to consider the best interests of the child

2.227 The imposition of a 'no work' condition on the grant of a BVE holder may inhibit a parent's ability to provide for their child. Accordingly, the imposition of a 'no work' condition may not be in the best interests of the child.

2.228 As noted at [2.214], the committee considered that it is unclear as to whether the measure may be regarded as proportionate to its stated objective (that is, as the least rights restrictive alternative to achieve this result).

2.229 The decision to allow a BVE holder to work will be at the discretion of the minister when granting the BVE. As the committee has previously noted, administrative and discretionary processes are likely to be less stringent than the protection of statutory processes. In particular, given the absence of a statutory requirement to consider the interests of a BVE holder's child when deciding whether or not to impose a 'no work' condition, it is unclear whether the regulation may be considered compatible with the obligation to consider the best interests of the child.

2.230 The committee therefore sought the advice of the Minister for Immigration and Border Protection as to whether the regulation imposes a proportionate limitation on the obligations to consider the best interests of the child.

Minister's response

> As the committee has pointed out, the Statement of Compatibility explained that I may consider the best interests of the child (for example, the child of a non-citizen to whom I grant a BVE under section 195A of the Migration Act) when deciding whether or not to impose condition 8101 on a BVE granted by me under section 195A. Clearly, however, there will be circumstances in which it will not be necessary to consider the best interests of the child, for example, where there are no children involved.
>
> It is my view that the regulation does not in fact limit consideration of the best interests of the child.[5]

Committee response

2.231 **The committee thanks the Minister for Immigration and Border Protection for his response, and has concluded its examination of this aspect of the instrument.**

5 See Appendix 1, Letter from the Hon Peter Dutton MP, Minister for Immigration and Border Protection, to the Hon Philip Ruddock MP (dated 1 May 2015) 8.

The Hon Philip Ruddock MP

Chair