Chapter 1

New and continuing matters

1.1 This chapter provides assessments of the human rights compatibility of:

- bills introduced into the Parliament between 13 and 15 June 2017 (consideration of 3 bills from this period has been deferred);[1]
- legislative instruments received between 12 and 25 May 2017 (consideration of 6 legislative instruments from this period has been deferred);[2] and
- bills and legislative instruments previously deferred.

1.2 The chapter also includes reports on matters previously raised, in relation to which the committee seeks further information following consideration of a response from the legislation proponent.

Instruments not raising human rights concerns

1.3 The committee has examined the legislative instruments received in the relevant period, as listed in the *Journals of the Senate*.[3] Instruments raising human rights concerns are identified in this chapter.

1.4 The committee has concluded that the remaining instruments do not raise human rights concerns, either because they do not engage human rights, they contain only justifiable (or marginal) limitations on human rights or because they promote human rights and do not require additional comment.

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1 See Appendix 1 for a list of legislation in respect of which the committee has deferred its consideration. The committee generally takes an exceptions based approach to its substantive examination of legislation.

2 The committee examines legislative instruments received in the relevant period, as listed in the *Journals of the Senate*. See Parliament of Australia website, *Journals of the Senate*, http://www.aph.gov.au/Parliamentary_Business/Chamber_documents/Senate_chamber_documents/Journals_of_the_Senate.

3 See Parliament of Australia website, *Journals of the Senate*, http://www.aph.gov.au/Parliamentary_Business/Chamber_documents/Senate_chamber_documents/Journals_of_the_Senate.

Response required

1.5 The committee seeks a response or further information from the relevant minister or legislation proponent with respect to the following bills and instruments.

Competition and Consumer Amendment (Competition Policy Review) Bill 2017

Purpose	Seeks to amend various provisions of the *Competition and Consumer Act 2010* including to increase the maximum penalty applying to breaches of the secondary boycott provisions; extend section 83 of the Act relating to admissions of fact and findings of fact made in certain proceedings; extend the Commission's power to obtain information, documents and evidence in section 155 of the Act; introduce a 'reasonable search' defence to the offence of refusing or failing to comply; and increase the penalties under section 155 of the Act
Portfolio	Treasury
Introduced	House of Representatives, 30 March 2017
Rights	Privacy; freedom of association; strike; fair trial; right to be presumed innocent (see **Appendix 2**)
Status	Seeking additional information

Coercive information gathering powers – increased penalty for failure to furnish or produce information and expansion of matters subject to notice

1.6 Currently, section 155 of the *Competition and Consumer Act 2010* (Competition Act) makes it an offence for a person to refuse or fail to comply with a notice to furnish or produce information or to appear before the Australian Competition and Consumer Commission (ACCC).

1.7 Schedule 11 of the bill proposes to increase the penalty for a contravention of section 155 to imprisonment of two years (currently 12 months) or 100 penalty units (currently 20 penalty units).[1]

1.8 Further, Schedule 11 proposes to expand the range of matters which may be subject to a notice.

1 See, Schedule 11, item 4. Currently, 1 penalty unit is $180 but is due to increase to $210 as of 1 July 2017.

1.9 Section 155(7) provides that a person is not excused from furnishing information or producing a document in pursuance of this section on the ground that the information or document may tend to incriminate the person.

Compatibility of the measure with the right not to incriminate oneself

1.10 Specific guarantees of the right to a fair trial in the determination of a criminal charge guaranteed by article 14 of the International Covenant on Civil and Political Rights (ICCPR) include the right not to incriminate oneself (article 14(3)(g)).

1.11 The ACCC has powers to investigate a range of civil and criminal matters. The right to a fair trial, and more particularly the right not to incriminate oneself, is engaged where a person is required to give information to the ACCC which may incriminate them and that incriminating information can be used indirectly to investigate criminal charges. In relation to the right not to incriminate oneself, the statement of compatibility acknowledges that:

> [Section] 155(7) already engages and places a limitation on that right. [Section 155] provides that a person is not excused from producing information, documents or evidence on the basis that such material would tend to incriminate that person or expose that person to a penalty. The amendments to Schedule 11 do not further limit the right against self-incrimination, except to the extent that section 155 notices may now be issued in relation to additional matters.[2]

1.12 While the statement of compatibility acknowledges the increase in the range of matters which may be subject to a notice, it does not acknowledge that the measure increases the penalty for non-compliance with a notice. Increasing the penalty for non-compliance, as well as expanding the ACCC's powers, further limits the right not to incriminate oneself beyond the limitation already imposed in the existing legislation.

1.13 The right not to incriminate oneself may be subject to permissible limitations where the limitation pursues a legitimate objective, is rationally connected to that objective and is a proportionate way of achieving that objective. However, as the statement of compatibility does not acknowledge that the measure limits the right not to incriminate oneself, it does not provide an analysis against these criteria.

1.14 The statement of compatibility only notes that these amendments are a result of recommendations of the Harper Review. However, the Harper Review noted that '[i]n relation to public enforcement by the ACCC, there appears to be general approval of the severity of the sanctions for contravention of the competition law',

2 Statement of compatibility (SOC) 160.

however, 'the current sanction for a *corporation* failing to comply with section 155 of the [Competition Act] is inadequate'.[3]

1.15 The statement of compatibility does point to a range of immunities and exceptions which could be relevant to whether the measure is a proportionate limit on the right not to incriminate oneself. In particular, the statement of compatibility notes that a 'use' immunity would be available in respect of information provided. This means that where a person has been required to give incriminating evidence, that evidence cannot be used against the person in any civil or criminal proceeding but may be used to obtain further evidence against the person.

1.16 However, no 'derivative use' immunity is provided in this case, which raises the question as to whether the measure is the least rights restrictive way of achieving its objective.[4] In order to be a proportionate limit on human rights, a measure must be the least rights restrictive way of achieving its stated objective. This issue was not addressed in the statement of compatibility.

Committee comment

1.17 The committee therefore requests the advice of the Treasurer as to:

- **whether the measure is aimed at achieving a legitimate objective for the purposes of international human rights law;**
- **how the measure is effective to achieve (that is, rationally connected to) that objective;**
- **whether the limitation is a reasonable and proportionate measure to achieve the stated objective;**
- **whether the increased penalty is necessary to achieve that objective;**
- **whether there are less rights restrictive ways of achieving that objective; and**
- **whether a derivative use immunity would be reasonably available.**

Compatibility of the measure with the right to privacy

1.18 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.

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3 Harper, Anderson, McCluskey and O'Bryan, *Competition Policy Review*, Final Report, March 2015, 71 (emphasis added).

4 A 'derivative use' immunity provides that self-incriminatory information or documents provided by a person cannot be used to investigate unlawful conduct by that person but can be used to investigate third parties.

1.19 By increasing the penalty for refusal or failure to comply with a notice to furnish or produce information or to appear before the ACCC and by increasing the matters which may be subject to a notice, the measure engages and limits the right to privacy.

1.20 The right to privacy may be subject to permissible limitations where the limitation pursues a legitimate objective, is rationally connected to that objective and a proportionate means of achieving that objective.

1.21 The statement of compatibility acknowledges that the coercive information gathering powers may engage the right to privacy and identifies some matters which could go towards the proportionality of the measure.[5] However, no information is provided in the statement of compatibility as to whether the measure pursues a legitimate objective (that is, addresses a pressing and substantial concern) and is rationally connected to that objective. It is difficult to assess whether a measure is a proportionate limitation on a particular right in circumstances where the objective of the measure has not been clearly identified in the statement of compatibility.

Committee comment

1.22 The committee therefore requests the advice of the Treasurer as to:

- **whether the measure is aimed at achieving a legitimate objective for the purposes of international human rights law;**
- **how the measure is effective to achieve (that is, rationally connected to) that objective;**
- **whether the limitation is a reasonable and proportionate measure to achieve the stated objective;**
- **whether the increased penalty is necessary to achieve that objective;**
- **whether there are less rights restrictive ways of achieving that objective; and**
- **whether there are adequate and effective safeguards in relation to the measure.**

Increased penalties for secondary boycotts

1.23 Schedule 6 to the bill proposes to increase the maximum penalty applying to breaches of the secondary boycott provisions (sections 45D and 45DB of the Competition Act) from $750,000 to $10,000,000.

1.24 Currently, section 76(2) of the Competition Act provides that individuals cannot be fined for contravention of the boycott provisions. However, this is subject to section 45DC(5) which provides that where an organisation is not a body

5 SOC 160-161.

corporate, proceedings for damages can be taken against an officer of the union as a representative of union members. These damages can be enforced against the property of the union, or against any property that members of the union hold in their capacity as members.

Compatibility of the measure with the right to freedom of association

1.25 The right to strike is protected as an aspect of the right to freedom of association and the right to form and join trade unions under article 22 of the ICCPR and article 8 of the International Covenant on Economic Social and Cultural Rights (ICESCR). The right to strike, however, is not absolute and may be limited in certain circumstances.

1.26 The statement of compatibility acknowledges that the measure may engage work-related rights:

> However, section 45DD makes it clear that boycotts are permitted under the competition law if the dominant purpose of the conduct relates substantially to employment matters, i.e. remuneration, conditions of employment, hours of work or working conditions.
>
> Consequently, the increased penalty in section 76 is only applicable to secondary boycotts with a dominant purpose that does not relate to employment matters.
>
> Where a secondary boycott has a dominant purpose not related to employment matters, but a non-dominant purpose that does relate to employment matters, the boycott may be prohibited under section 45D or 45DB.
>
> To this extent, sections 45D and 45DB may engage the rights described in Article 8 of the ICESCR.[6]

1.27 The statement of compatibility contends that the measure engages but does not further limit work-related rights. However, where a measure increases the penalties imposed in relation to offences which limit human rights, this has consistently been considered to constitute a further limitation on the relevant right. The statement of compatibility does not explain the objective of the measures, nor engage in an assessment of proportionality against the limitation criteria.

1.28 The scope of the right to strike under international human rights law is generally understood as also permitting 'sympathy strikes' or primary as well as secondary boycott activities.[7] The statement of compatibility does not explain what

6 SOC 151-152.

7 See ILO, *Committee of Experts on the Application of Conventions and Recommendations (CEACR)* - adopted 2013, published 103rd ILC session (2014); Observation (CEACR) - adopted 2011, published 101st ILC session (2012), Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) – Australia.

kinds of matters are not considered to have a 'dominant purpose' relating to employment, such that secondary boycott activities are prohibited and the increased penalty is to apply. Further information will assist the committee's assessment of the measure.

Committee comment

1.29 The committee therefore requests the advice of the Treasurer as to:

- **whether the measure is aimed at achieving a legitimate objective for the purposes of international human rights law;**
- **how the measure is effective to achieve (that is, rationally connected to) that objective;**
- **whether the limitation is a reasonable and proportionate measure to achieve the stated objective (including any relevant safeguards); and**
- **what matters do or do not have a 'dominant purpose' related to employment.**

Compatibility of the measure with the right to freedom of assembly and expression

1.30 The right to freedom of assembly and the right to freedom of expression are protected by articles 19 and 21 of the ICCPR. The right to freedom of assembly and the right to freedom of expression may be limited for certain prescribed purposes. That is, that the limitation is necessary to respect the rights of others, to protect national security, public safety, public order, public health or morals. Additionally, such limitations must be prescribed by law, reasonable, necessary and proportionate to achieving the prescribed purpose.

1.31 As the increased penalty may have the effect of discouraging certain kinds of protest activities it may engage and limit the right to freedom of assembly and expression. These rights were not addressed in the statement of compatibility.

Committee comment

1.32 The committee therefore requests the advice of the Treasurer as to:

- **whether the measure is aimed at achieving a legitimate objective for the purposes of international human rights law;**
- **how the measure is effective to achieve (that is, rationally connected to) that objective; and**
- **whether the limitation is a reasonable and proportionate measure to achieve the stated objective (including any relevant safeguards).**

Further response required

1.33 The committee seeks a further response from the relevant minister or legislation proponent with respect to the following bills and instruments.

Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017

Purpose	Amends the *Fair Work Act 2009* to: increase maximum civil penalties for certain serious contraventions of the Act; hold franchisors and holding companies responsible for certain contraventions of the Act by their franchisees or subsidiaries where they knew or ought reasonably to have known of the contraventions and failed to take reasonable steps to prevent them; clarify the prohibition on employers unreasonably requiring their employees to make payments in relation to the performance of work; provide the Fair Work Ombudsman with evidence-gathering powers similar to those available to corporate regulators such as the Australian Securities and Investment Commission and the Australian Competition and Consumer Commission
Portfolio	Employment
Introduced	House of Representatives, 1 March 2017
Rights	Fair trial; right to be presumed innocent; not to be tried and punished twice; not to incriminate oneself; privacy (see **Appendix 2**)
Previous report	4 of 2017
Status	Seeking further additional information

Background

1.34 The committee first reported on the Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017 (the bill) in its Report 4 of 2017, and requested a response from the Minster for Employment by 26 May 2017.[1]

1.35 The minister's response to the committee's inquiries was received on 1 June 2017. The response is discussed below and is reproduced in full at **Appendix 3**.

1 Parliamentary Joint Committee on Human Rights, *Report 4 of 2017* (9 May 2017) 17-27.

Civil penalty provisions

1.36 Schedule 1, Part 1 of the bill would increase the maximum civil penalties for failure to comply with certain provisions of the *Fair Work Act 2009* (Fair Work Act) and would introduce a new civil penalty provision for 'serious contraventions' of certain existing provisions of the Fair Work Act.[2] The maximum penalty for a 'serious contravention' would be 600 penalty units ($108,000).[3]

1.37 Proposed section 557A provides that a contravention is a 'serious contravention' if the conduct was deliberate and part of a systematic pattern of conduct relating to one or more persons. The range of existing civil penalty provisions to which the 'serious contravention' provision would apply are mostly in respect of conduct by employers, however, some of the provisions also apply to individual persons including employees.[4] Depending on the particular civil penalty provision under the Fair Work Act, there may be a range of persons and organisations that may seek to have a civil penalty imposed including an employee, an employer, an employee organisation, an employer organisation or an inspector.[5]

1.38 Schedule 1, Part 2-5 of the bill would also introduce a number of new civil penalty provisions which can apply to individuals, including for failing to comply with a notice from the Fair Work Ombudsman (FWO), hindering or obstructing the FWO or providing false information or documents.[6]

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2 See proposed section 539(2).

3 See proposed section 539(2). As of 1 July 2017, a penalty unit will increase to $210 so that 600 penalty units would be $126,000.

4 The range of existing civil penalty provisions to which the 'serious contravention' provision would apply include: for an employer contravening national employment standards (section 44 of the Fair Work Act); for a person contravening a term of a modern award (section 45 of the Fair Work Act); for a person contravening a term of an enterprise agreement (section 50 of the Fair Work Act); for a person contravening a workplace determination (section 280 of the Fair Work Act); for an employer contravening a national minimum wage order (section 293 of the Fair Work Act); for an employer contravening a term of an equal remuneration order (section 305 of the Fair Work Act); for an employer failing to comply with requirements regarding the method and frequency of payments (section 323 of the Fair Work Act); for an employer requiring an employee to unreasonably spend any part of an amount payable in relation to the performance of work (section 325 of the Fair Work Act); for an employer to fail to comply with obligations with respect to annual earnings (section 328 of the Fair Work Act); for an employer failing to comply with requirements to make and keep certain employee records; (section 535 of the Fair Work Act); for an employer failing to comply with requirements with respect to payslips (section 536 of the Fair Work Act).

5 See Fair Work Act section 539.

6 See proposed sections 712B(1); 717(1); 718A(1).

Compatibility of the measure with criminal process rights

1.39 Civil penalty provisions are dealt with in accordance with the rules and procedures that apply in relation to civil matters (the burden of proof is on the balance of probabilities). However, if the increased civil penalty provisions are regarded as 'criminal' for the purposes of international human rights law, they will engage the criminal process rights under articles 14 and 15 of the International Covenant on Civil and Political Rights (ICCPR).

1.40 Where a penalty is 'criminal' for the purposes of international human rights law this does not mean that it is necessarily illegitimate or unjustified. Rather it means that criminal process rights, such as the right to be presumed innocent (including the criminal standard of proof) and the right not to be tried and punished twice (the prohibition against double jeopardy) and the right not to incriminate oneself, apply.[7]

1.41 The question as to whether a civil penalty might be considered to be 'criminal' for the purposes of international human rights law may be a difficult one and often requires a contextual assessment. It is settled that a penalty or other sanction may be 'criminal' for the purposes of the ICCPR, despite being classified as 'civil' under Australian domestic law. The committee's *Guidance Note 2* sets out some of the key human rights compatibility issues in relation to provisions that create offences and civil penalties.[8]

1.42 As noted in the initial human rights analysis, the statement of compatibility usefully refers to the committee's *Guidance Note 2* and undertakes an assessment of whether the civil penalty provisions in the bill should be considered to be 'criminal' for the purposes of international human rights law.[9] The provisions are classified as 'civil' under domestic law meaning they will not automatically be considered 'criminal' for the purposes of international human rights law.

1.43 In relation to the nature and purpose of the penalty, a penalty is more likely to be considered 'criminal' in nature if it applies to the public in general rather than a specific regulatory or disciplinary context and proceedings are instituted by a public authority with statutory powers of enforcement. In this regard, the statement of compatibility argues that, since the penalty only applies to the regulatory regime of the Fair Work Act rather than to the public at large, and enforcement proceedings

7 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)), the right not to be tried and punished twice for an offence (article 14(7)) and a guarantee against retrospective criminal laws (article 15(1)).

8 *Guidance Note 2* – see Appendix 4.

9 Explanatory memorandum (EM), Statement of compatibility (SOC) 3.

may be brought not only by the FWO but an affected employee or union, the nature of the penalty should not be considered 'criminal'.[10]

1.44 This argument supports the civil character of the relevant provisions under international human rights law, however a countervailing consideration is that the Fair Work Act governs terms of employment very broadly, such that it is unclear whether the regime can categorically be said not to apply to the public in general.

1.45 The initial human rights analysis stated that, in relation to the severity of the penalty, a penalty is likely to be considered criminal for the purposes of international human rights law if it carries a term of imprisonment or a substantial pecuniary sanction. A maximum penalty of 600 penalty units ($108,000)[11] is proposed in relation to a number of the provisions. In relation to the severity of the penalty, the statement of compatibility argues that the provisions should not be considered 'criminal' as:

> The severity of the relevant civil penalties should be considered low. They are pecuniary penalties (rather than a more severe punishment like imprisonment) and there is no sanction of imprisonment for non-payment of penalties. Only courts may apply a pecuniary penalty. The pecuniary penalties are set at levels which are considered to be consistent with the nature and severity of the corresponding contraventions.[12]

1.46 Further, according to the explanatory memorandum, the severity of the increased or new penalties proposed in the bill are aimed at addressing concerns about preventing the exploitation of vulnerable workers.[13] The explanatory memorandum states that the bill:

> …addresses concerns that civil penalties under the Fair Work Act are currently too low to effectively deter unscrupulous employers who exploit vulnerable workers because the costs associated with being caught are seen as an acceptable cost of doing business. The Bill will increase relevant civil penalties to an appropriate level so the threat of being fined acts as an effective deterrent to potential wrongdoers.[14]

1.47 This provides one argument as to why the penalties may be considered civil in nature, rather than criminal, insofar as they apply to employers found to have contravened the relevant protections in the Fair Work Act. However, there is a significant, broader range of conduct in respect of which the increased or new civil

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10 EM, SOC 3-4.

11 As of 1 July 2017, a penalty unit will increase to $210 so that 600 penalty units would be $126,000.

12 EM, SOC 5.

13 See EM i; EM, SOC 5.

14 EM i.

penalties will apply. While most of the provisions apply to employers, some of the provisions may apply to individuals, including *employees*.

1.48 For example, the failure of an individual employee together with other employees to comply with a workplace determination may result in the application of a significant civil penalty of 600 penalty units ($108,000), a 10-fold increase from the current maximum penalty of 60 penalty units.[15] The previous analysis noted that the potential application of such a large penalty to an individual in this context raises significant questions about whether this particular measure ought to be considered 'criminal' for the purposes of international human rights law. The analysis stated that it was unclear how the application of this substantial increase in the civil penalty to any contravention of a term of a workplace determination by 'a person' addresses the concerns regarding exploitation of vulnerable workers by employers identified in the explanatory memorandum.

1.49 The committee therefore sought the advice of the Minister for Employment as to whether the civil penalty provisions in the bill may be considered to be 'criminal' in nature for the purposes of international human rights law (having regard to the committee's *Guidance Note 2*), addressing in particular:

- whether the severity of the civil penalties that may be imposed on individuals including employees is such that the penalties may be considered criminal;
- whether the increases in the maximum civil penalties could be limited so as to not apply, or to be reduced, in respect of individuals including employees; and
- if the penalties are considered 'criminal' for the purposes of international human rights law, whether the measure accords with criminal process rights (including specific guarantees of the right to a fair trial in the determination of a criminal charge such as the presumption of innocence (ICCPR, article 14(2)), the right not to incriminate oneself (article 14(3)(g)), the right not to be tried and punished twice for an offence (article 14(7)) and a guarantee against retrospective criminal laws (article 15(1)).

Minister's response

1.50 In relation to whether the penalty provisions in the bill may be considered to be 'criminal' in nature for the purposes of international human rights law, the minister states:

> The objective of the proposed new penalties is to implement a proportionate response to address persistent and deliberate exploitation of vulnerable workers (including migrant workers). This new penalty is justified because the new provisions specifically target deliberate and

15 See item 8; see also section 280 of the Fair Work Act.

> systematic misconduct, and the penalty needs to be high enough to ensure that the consequences of such egregious law-breaking aren't simply written off as an acceptable 'cost of doing business'.
>
> I acknowledge the Committee's observation that 'the Fair Work Act governs the terms of employment very broadly, such that it is unclear whether the regime can categorically be said not to apply to the public in general'. The relevant provisions do however specifically target employer-employee relationships, not work relationships more broadly.
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> On balance, and taking all of the relevant features into account, I am satisfied the penalties are not 'criminal' in nature.
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> Application of proposed penalties for 'serious contraventions' to individuals
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> I have also considered the application of the proposed maximum civil penalties to individuals including employees. The provisions have been crafted to specifically target contraventions relating to underpayment of employees, so the new penalties will apply to employers or others who are involved in such contraventions, whether individuals or otherwise.
>
> I am not satisfied that employers who are individuals, including sole traders, should be excluded from the proposed 'serious contraventions' regime given the purpose of these provisions is to deter deliberate and systematic underpayment of workers.
>
> The appropriate penalty to be applied in any particular case will be determined by the courts, which are in the best position to ensure the penalties imposed are appropriate to the case at hand and achieve effective deterrence.

1.51 As the initial human rights analysis acknowledged, the civil penalty provisions are aimed at addressing human rights concerns over the exploitation of vulnerable workers. This response provides a range of reasons as to why the proposed civil penalty provisions should not be considered 'criminal' for the purpose of international human rights law with respect to *employers* (including individual employers).

1.52 However, this response fails to address the specific issue raised in the initial human rights analysis about the application of some civil penalty provisions to individual *employees*. For example, as set out above, the failure of an individual employee together with other employees to comply with a workplace determination may result in the application of a significant civil penalty of 600 penalty units ($108,000), a 10-fold increase from the current maximum penalty of 60 penalty units. Accordingly, the potential application of such a large penalty to an individual employee in this context continues to raise significant questions about whether this particular measure ought to be considered 'criminal' for the purposes of international human rights law. Contrary to the minister's response that the civil penalty provisions have been specifically crafted to address exploitation, the

application of this substantial increase in the civil penalty to any contravention of a term of a workplace determination by an individual employee does not appear directed towards combatting the exploitation of vulnerable workers.

1.53 In relation to whether the civil penalty provisions nevertheless comply with criminal process rights, the minister's response states:

> The provisions do however comply with the requirements of articles 14 and 15.
>
> The proposed legislation draws on the existing civil penalty regime, which means:
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> • the standard of proof for allegations involving 'serious contraventions' is the civil standard of proof (Article 14(2))
>
> • the privilege against self-incrimination is abrogated but replaced with immunities (Article 14(3)(g))
>
> • protection against 'civil double jeopardy' is included under the Fair Work Act (s 556), so criminal proceedings may follow civil proceedings in relation to conduct which is the same or substantially the same (see the Fair Work Act, s 554), and
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> • the proposed provisions would not apply retrospectively (Article 15(1)).
>
> Importantly there is no risk of 'double punishment' because the proposed new provisions are regulatory in nature and there are no apparent corresponding criminal offences. This means there would be no real need for supplementary protections against 'double jeopardy', for the purposes of international human rights law.

1.54 Some of these mechanisms provide relevant safeguards in relation to criminal process rights, particularly the protection against being tried and punished twice and that the provisions do not apply retrospectively. However, other aspects of the scheme do not comply with criminal process rights. The application of a civil rather than a criminal standard of proof raises concerns in relation to the right to be presumed innocent. The right to be presumed innocent generally requires that the prosecution prove each element of the offence to the criminal standard of proof of beyond reasonable doubt. The abrogation of the privilege against self-incrimination will also impact upon the proportionality of any limitation on this right. Accordingly, were the civil penalty provisions to be considered 'criminal' for the purpose of international human rights law, there would be serious questions about whether they are compatible with criminal process rights.

Committee response

1.55 The committee thanks the minister for her response. Noting that questions remain as to whether the civil penalty provisions in the bill may be considered to be 'criminal' in nature for the purposes of international human rights law, and such penalty provisions can be legitimate as long as they have appropriate safeguards in place, the committee requests the further advice of the minister as to whether:

- **the severity of the civil penalties that may be imposed on individual employees is such that the penalties may be considered criminal; and**
- **the increases in the maximum civil penalties could be limited so as to not apply, or to be reduced, in respect of individual employees.**

Requirement to comply with Fair Work Ombudsman Notice – coercive information-gathering powers

1.56 The bill also proposes to provide the FWO with a range of evidence gathering powers. Proposed section 712A would empower the FWO to require a person, by notice (FWO notice) to give information, produce documents or attend before the FWO to answer questions where the FWO reasonably believes the person has information or documents relevant to an investigation.[16] Failure to comply with the FWO notice may result in a civil penalty of 600 penalty units ($108,000).[17]

1.57 Under proposed section 713(1) a person is not excused from giving information, producing a record or document or answering a question under the FWO notice on the basis that to do so might tend to incriminate the person.[18] Proposed section 713(3) provides that information provided by an individual under a FWO notice is not admissible in evidence against the individual in proceedings. This is subject to exceptions in relation to failures to comply with the FWO notice and false and misleading information. It is also subject to exceptions for particular criminal offences under the Criminal Code under section 137.1 or 137.2 relating to false and misleading information and section 149.1 in relation to the obstruction of Commonwealth officials.[19]

Compatibility of the measure with the right to privacy

1.58 The right to privacy includes respect for informational privacy, including the right to respect for private and confidential information, particularly the use and sharing of such information and the right to control the dissemination of information about one's private life.

1.59 The breadth of this power to compel individuals to provide information including private and confidential information and attend for questioning is a serious and extensive limitation on the right to privacy. The power applies even in respect of information which may tend to incriminate the individual and serious penalties may be imposed for non-compliance.[20]

16 See proposed section 712B.

17 See proposed section 712B; EM 17.

18 See proposed section 713.

19 See proposed section 713.

20 See proposed section 713(1).

1.60 As stated in the initial human rights analysis, the right to privacy may be subject to permissible limitations which are provided by law and are not arbitrary. In order for limitations not to be arbitrary, the measure must pursue a legitimate objective and be rationally connected and proportionate to achieving that objective.

1.61 The statement of compatibility acknowledges that the powers would engage the right to privacy and identifies the objective of the powers as:

> …helping to achieve positive investigative outcomes where existing powers have been demonstrated to fall short…New powers will enable the most serious cases involving the exploitation of vulnerable workers to be propertly [sic] investigated and help ensure the lawful payment of wages.[21]

1.62 In broad terms, achieving positive investigative outcomes in relation to serious cases of exploitation and ensuring the lawful payment of wages is likely to be a legitimate objective for the purposes of international human rights law.

1.63 However, the statement of compatibility provides very limited information as to whether the measure will be rationally connected to, or a proportionate way of, achieving this objective. The initial analysis stated that there is no reasoning or evidence provided as to how it is anticipated that the powers will be effective in achieving their objective.

1.64 Instead, the statement of compatibility states that the new powers are similar to those provided in other regimes, but provides no further details as to the effectiveness of these existing powers. The initial human rights analysis noted that, the fact that some other bodies may have coercive evidence gathering powers does not mean those regimes are justifiable limits on the right to privacy, nor does it necessarily mean that such powers will be justifiable limits in this particular context. The committee has previously considered similar coercive evidence gathering powers in the workplace relations context for the building and construction industry, and could not conclude that such powers were compatible with the right to privacy.[22] The committee's consideration of similar measures and its previous concerns about human rights compatibility were not addressed in the statement of compatibility.

1.65 To be proportionate, a limitation on the right to privacy should only be as extensive as is strictly necessary to achieve its legitimate objective and must be accompanied by appropriate safeguards. However, as stated in the previous analysis,

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21 EM, SOC 6.

22 See, for example, Parliamentary Joint Committee on Human Rights, *Tenth Report of the 44th Parliament* (26 August 2014) 66; Parliamentary Joint Committee on Human Rights, *Second Report of the 44th Parliament* (11 February 2014) 17. Compare, Parliamentary Joint Committee on Human Rights, *Twenty-second Report of the 44th Parliament* (13 May 2015) 24-25.

there are serious questions about whether such powers constitute a proportionate limit on the right to privacy in this case.

1.66 First, the proposed powers appear to be insufficiently circumscribed with reference to the stated objective of the measure. The powers are not limited to achieving positive investigative outcomes in relation to the exploitation of workers and ensuring the lawful payment of wages. Rather, the information that might be compelled applies to a broad range of industrial matters. This could include, for example, matters relating to the regulation of industrial action by employees.

1.67 Second, the statement of compatibility argues that the 'FWO's graduated approach to compliance and enforcement means that these powers will only be used where other co-operative [approaches] have failed or are inappropriate.'[23] However, no such restriction on the use of these powers is contained in the bill. This means that the powers could be used in a much broader range of circumstances, again raising the question of whether the measure as drafted is sufficiently circumscribed.

1.68 Third, it is unclear whether there are sufficient safeguards to ensure that the measure is a proportionate limit on human rights. The statement of compatibility addresses some safeguards that may be available in relation to the exercise of the measure including providing 14 days' notice to a person and permitting a person's lawyer to be present during questioning. However, the absence of external review of an FWO notice at the time it is made may substantially reduce the adequacy of these safeguards. For example, there is no requirement that an application be made to the Administrative Appeals Tribunal (AAT) for the grant of a notice as was the case with previous legislation which regulated particular industries. It is noted that such a process could assist to ensure a FWO notice is necessary in an individual case.[24] The statement of compatibility does not address the apparent lack of external safeguards that would apply prior to issuing an FWO notice, nor what oversight mechanisms will exist in relation to the regime.

1.69 Fourth, as noted above, the committee has previously considered similar coercive evidence gathering powers in the workplace relations context and could not conclude that such powers were compatible with the right to privacy.[25] Australia has also been criticised for similar coercive information gathering powers by

23 EM, SOC 6.

24 See *Fair Work (Building Industry) Act 2012* section 45 (now repealed).

25 See, for example, Parliamentary Joint Committee on Human Rights, *Tenth Report of the 44th Parliament* (26 August 2014) 66 and *Second Report of the 44th Parliament* (11 February 2014) 17. Compare, Parliamentary Joint Committee on Human Rights, *Twenty-second Report of the 44th Parliament* (13 May 2015) 24-25.

international treaty monitoring bodies on the basis of the breadth of the powers conferred and the absence of adequate safeguards on a number of occasions.[26]

1.70 Fifth, it is unclear whether such extensive coercive powers, which go beyond those that are usually available to police in the context of criminal investigations, are proportionate to the investigation of industrial matters. It was noted in this respect that section 713(1) also abrogates the privilege against self-incrimination.

1.71 The committee therefore sought the advice of the Minister for Employment as to:

- how the measure is effective to achieve (that is, rationally connected to) its stated objective; and
- whether the limitation is a reasonable and proportionate measure to achieve the stated objective, including with regard to the matters set out at [1.64] to [1.70].

Minister's response

1.72 In relation to how the measure is effective to achieve (that is, rationally connected to) its stated objective, the minister provided the following advice:

> The proposed FWO powers are effective to achieve the stated objectives of:
>
> • more 'effectively deterring unlawful practices, including those that involve the deliberate and systematic exploitation of workers', and
>
> • ensuring 'the Fair Work Ombudsman has adequate powers to investigate and deal with serious cases involving the exploitation of vulnerable workers and the deliberate obstruction of its investigations'.
>
> Inadequacies in the Fair Work Ombudsman's powers have been highlighted by some recent cases. In FWO investigations into 7-Eleven for example, the Fair Work Ombudsman resorted to CCTV footage and registers of fuel levels to reconstruct hours of work for underpaid workers due to a lack of cooperation by the company. Investigations into the Baiada group in New South Wales stalled altogether due to lack of cooperation. These are not discrete examples but form part of a broader picture of deliberate non-compliance by certain unscrupulous operators.

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26 See International Labour Organization, *Committee on Freedom of Association*, Case No 2326 (Australia), in which the committee requests to be kept informed of development - Report No 338, November 2005, [454]-[456]; Case No 2326 (Australia), Effect given to the recommendations of the committee and the Governing Body - Report No 353, March 2009, [21]-[24]; Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III (Part 1A), General Report and observations concerning particular countries, International Labour Conference, 102nd Session, 2013, p 537 (in the context of the Labour Inspection Convention, 1947 (No 81)).

> These cases show how serious instances of underpayment may not be able to be investigated where any employer refuses to provide documents or cooperate with a FWO investigation. The limitation on the powers also means that vulnerable workers may not have sufficient confidence that they can come forward without facing retribution from their employer or others.

1.73 The minister's response further explains that the current law is ineffective in addressing such issues:

> While FWO Inspectors may interview people under the Fair Work Act, para 709(e), there is currently no penalty for a person who refuses or fails to answer questions. In these kinds of cases, investigations stall and the Act becomes very difficult if not impossible to enforce.

1.74 It is acknowledged that the coercive information gathering powers may be of assistance in tackling and addressing systematic worker exploitation. Accordingly, they are likely to be rationally connected to the stated objective of the measure.

1.75 In relation to whether the limitation is proportionate to achieving its stated objective, the minister's response states:

> The proposed FWO powers have been drafted to pursue the legitimate objective of ensuring 'the Fair Work Ombudsman has adequate powers to investigate and deal with serious cases involving the exploitation of vulnerable workers and the deliberate obstruction of its investigations'. The breadth of the powers goes no further than necessary to achieve this stated objective.
>
> The proposed measure is carefully drafted to include appropriate safeguards, so the proposed new FWO powers are proportionate to the outcomes being sought. The safeguards have been modelled on provisions conferring similar powers on ASIC and the ACCC and are described in more detail in the Explanatory Memorandum.
>
> The Fair Work Act is the primary workplace legislation in Australia and it is critical that it is, and is seen to be, enforceable and enforced.

1.76 It is acknowledged that the measure pursues a legitimate objective. The minister's response states that the measure goes 'no further than necessary' to achieve this objective. However, as noted above, the coercive information gathering powers would apply across an extremely broad range of conduct under the Fair Work Act including conduct by individual employees and in circumstances where there are no allegations or evidence of worker exploitation. The measure accordingly appears to be insufficiently circumscribed. This concern is reinforced by the committee's

previous conclusions,[27] and the criticism by international supervisory bodies, regarding similar coercive information gathering powers set out above at [1.69].[28]

1.77 The minister's response states that there are sufficient safeguards to ensure that the measure is a proportionate limit on the right to privacy. However, no information is provided about these safeguards or response made to the concerns raised in the initial human rights analysis. The response does not address the apparent lack of external safeguards that would apply *prior* to issuing an FWO notice, nor what oversight mechanisms will exist in relation to the regime. Finally, the minister's response does not address why the powers, which go beyond those that are usually available to police in the context of criminal investigations, are proportionate to the investigation of industrial matters or why it is necessary to abrogate the privilege against self-incrimination.

Committee response

1.78 The committee thanks the minister for her response.

1.79 The preceding analysis indicates that questions remain as to whether the coercive evidence gathering powers are compatible with the right to privacy.

1.80 Accordingly, the committee requests the further advice of the minister as to the proportionality of the measure including:

- **what safeguards exist in relation to the measure;**
- **whether additional safeguards could be included in relation to the measure (such as external safeguards);**
- **whether the power could be further circumscribed so as to only apply to cases where there is suspected exploitation of employees; and**
- **why the extent of the limitation is proportionate to the investigation of industrial matters noting that the powers go beyond those usually available to the police.**

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27 See, for example, Parliamentary Joint Committee on Human Rights, *Tenth Report of the 44th Parliament* (26 August 2014) 66 and *Second Report of the 44th Parliament* (11 February 2014) 17. Compare, Parliamentary Joint Committee on Human Rights, *Twenty-second Report of the 44th Parliament* (13 May 2015) 24-25.

28 See International Labour Organization, *Committee on Freedom of Association*, Case No 2326 (Australia), Report in which the committee requests to be kept informed of development - Report No 338, November 2005, [454]-[456]; Case No 2326 (Australia), Effect given to the recommendations of the committee and the Governing Body - Report No 353, March 2009, [21]-[24]; Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III (Part 1A), General Report and observations concerning particular countries, International Labour Conference, 102nd Session, 2013, 537 (in the context of the Labour Inspection Convention, 1947 (No 81).

Compatibility of the measure with the right not to incriminate oneself

1.81 The specific guarantees of the right to a fair trial in the determination of a criminal charge guaranteed by article 14 of the ICCPR include the right not to incriminate oneself (article 14(3)(g)).

1.82 Proposed section 713(1) engages and limits this right by providing that a person is not excused from giving information, producing a record or document or answering a question under a FWO notice on the basis that to do so might tend to incriminate that person.

1.83 While the right not to incriminate oneself may be permissibly limited, this right was not addressed in the statement of compatibility. The committee's usual expectation where a measure limits a human right is that the accompanying statement of compatibility provide a reasoned and evidence-based explanation of how the measure supports a legitimate objective, is rationally connected to that objective and is a proportionate way to achieve that objective. This conforms with the committee's *Guidance Note 1*,[29] and the Attorney-General's Department's guidance on the preparation of statements of compatibility.[30]

1.84 While the statement of compatibility does not provide an assessment of the measure against the right not to incriminate oneself, the explanatory memorandum provides some relevant information:

> Abrogating the privilege against self-incrimination is necessary to ensure the FWO has all the available, relevant information to properly carry out its statutory functions. It is particularly important to address non-compliance by those determined to disregard workplace laws… those who may be best placed to give information about possible contraventions of workplace laws may have had some level of involvement in those contraventions or may have contravened another law. If the privilege is not abrogated, there may be no reason for such individuals to provide information to the FWO.[31]

1.85 As noted in the previous analysis, it can readily be accepted that the removal of the privilege against self-incrimination means that more information might be obtained by the FWO to carry out its functions. However, this explanation does not

29 See Parliamentary Joint Committee on Human Rights, *Guidance Note 1—Drafting Statements of Compatibility* (December 2014) – Appendix 4.

30 See Attorney-General's Department, *Template 2: Statement of compatibility for a bill or legislative instrument that raises human rights issues* at https://www.ag.gov.au/RightsAndProtections/HumanRights/Human-rights-scrutiny/Documents/Template2.pdf.

31 EM 19.

sufficiently identify a legitimate objective, that is, one which addresses a pressing and substantial concern, for the purposes of international human rights law.[32]

1.86 The initial analysis noted that the availability of use and derivative use immunities can be one important factor in determining whether the limit on the right not to incriminate oneself is proportionate. It is noted that partial use immunity would be provided for criminal offences, meaning no information or documents obtained under a FWO notice would be admissible in evidence in proceedings subject to exceptions.[33] However, no derivative use immunity is provided (which would prevent information or evidence indirectly obtained from being used in criminal proceedings against the person). The lack of a derivative use immunity raised questions about whether the measure is the least rights restrictive way of achieving its objective.

1.87 While not addressed in the statement of compatibility, the explanatory memorandum provides some information as to why a derivative use immunity has not been provided:

> Provision of a derivative use immunity means that further evidence obtained through a chain of inquiry resulting from the protected evidence cannot be used in relevant proceedings, even if the additional evidence would have been uncovered by the regulator through independent investigation processes. A related issue is that it can be very difficult and time-consuming in a complex investigation to prove whether evidence was obtained as a consequence of the protected evidence or obtained independently.[34]

1.88 The previous analysis noted, however, that administrative difficulties, in and of themselves, are unlikely to be a sufficient reason for not providing a derivative use immunity, if this is otherwise a less rights restrictive way of achieving the objective of the measure.

1.89 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 for the purposes of international human rights law;
- how the measure is effective to achieve (that is, rationally connected to) that objective;

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32 See Parliamentary Joint Committee on Human Rights, *Guidance Note 1—Drafting Statements of Compatibility* (December 2014) – Appendix 4.

33 See proposed section 713(3).

34 EM 21.

- whether the limitation is a reasonable and proportionate measure to achieve the stated objective; and
- whether a derivative use immunity could be included in proposed section 713(3) to ensure information or evidence indirectly obtained from a person compelled to answer questions or provide information or documents under a FWO notice cannot be used in evidence against that person.

Minister's response

1.90 In relation to whether the measure pursues a legitimate objective and is rationally connected to that objective, the minister's response provides:

> The provisions are directed at the legitimate objective of ensuring the Fair Work Ombudsman has adequate powers to investigate and deal with serious cases involving the exploitation of vulnerable workers and the deliberate obstruction of its investigations.
>
> Abrogating the privilege against incrimination is critical to achieving the stated objective. The proposed laws are concerned with addressing deliberate and systematic non-compliance with workplace laws, and ensuring they are enforceable in cases involving serious misconduct, poor, falsified or no records, and orchestrated cover-ups. Those who may be best placed to give information about possible contraventions of workplace laws may have had some level of involvement in those contraventions, or may have contravened another law. If the privilege is not abrogated, such individuals would be unlikely to provide information to the FWO. The proposed arrangements will enhance the FWO's evidence-gathering powers to ensure these kinds of serious cases can be effectively investigated under the Fair Work Act.

1.91 It is acknowledged that this may be considered a legitimate objective for the purposes of international human rights law.

1.92 In relation to whether the measure is proportionate, the minister's response states:

> The limitation on the protection against self-incrimination is justified because it is subject to a full use immunity, which extends in relation to all future proceedings, except several criminal proceedings relating to perjury-type offences.
>
> I do not believe a derivative use immunity is necessary for the limitation to be proportionate. The information gathering powers are based on those available to corporate regulators such as ASIC and the ACCC, which do not include a derivative use immunity. The burden placed on investigating authorities in conducting a prosecution before the courts is the main reason why the powers of the Australian Securities Commission (now ASIC) were amended to remove derivative use immunity. Similarly, the Government considers that the absence of derivative use immunity is

> reasonable and necessary for effective proceedings to be brought in this context.
>
> ASIC in its submission to the Australian Law Reform Commission Inquiry into Traditional Rights and Freedoms: Interim Report 127, noted the full scope of derivative use immunity cannot be accurately predicted in advance and risks making a person conviction-proof for an unforeseeable range of contraventions. Furthermore, while specific provision may not be made for derivative use immunity there remains 'wide and flexible' judicial discretion to exclude derivative evidence in order to prevent or remedy potential unfairness. These observations are equally relevant in the present context and should be taken into account.

1.93 It is noted that the availability of a 'use' immunity is an important safeguard. However, the addition of a 'derivative use' immunity would appear to be a less rights restrictive approach and provide a stronger level of protection.[35] The minister's response argues that a derivative use immunity would place too great a burden on investigative agencies, risks prejudicing conviction for an unforeseeable range of contraventions, and that the judicial discretion to exclude derivative evidence provides a relevant safeguard. The minister can be understood to argue therefore that a 'derivative use' immunity is not a reasonably available alternative in light of the objective of effective prosecution of criminal offences.

1.94 On the other hand, under the measure, the abrogation of the privilege against self-incrimination will apply more broadly than to the investigation of serious contraventions of workplace laws by employers. It will extend to the conduct of individual workers, including conduct that may not, in relative terms, be serious. The powers may apply to persons who are less sophisticated than, and lack the legal resources that may be available to, persons in the corporate context of ASIC or ACCC information gathering. The context and breadth of the powers of compulsion under the bill make it unlikely that, in the absence of a comprehensive immunity, the bill is a proportionate limitation on the right not to incriminate oneself. This assessment is

35 A 'use' immunity provides that where a person has been required to give incriminating evidence, that evidence cannot be used directly against the person in any civil or criminal proceeding but may be used to obtain further evidence against the person. A 'derivative use' immunity provides that self-incriminatory information or documents provided by a person cannot be used to investigate unlawful conduct by that person but can be used to investigate third parties.

further supported by the conclusions reached by the ILO treaty supervisory bodies, in relation to similar powers applied in the building and construction industry.[36]

Committee response

1.95 The committee thanks the minister for her response and has concluded its examination of this issue.

1.96 The preceding analysis indicates that the coercive evidence gathering powers are likely to be incompatible with the right not to incriminate oneself.

36 See, for example, International Labour Organization, *Committee on Freedom of Association Report*, in which the committee requests to be kept informed of development - Report No 338, November 2005 Case No 2326 (Australia) [453]-[457]; Committee of Experts on the Application of Conventions and Recommendations, CEACR Observation - adopted 2011, published 101st ILC session (2012); Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) – Australia.

Bills not raising human rights concerns

1.97 Of the bills introduced into the Parliament between 13 and 15 June 2017, the following did not raise human rights concerns (this may be because the bill does not engage or promotes human rights, and/or permissibly limits human rights):

- Commercial Broadcasting (Tax) Bill 2017;
- Corporations Amendment (Modernisation of Members Registration) Bill 2017;
- Environment and Infrastructure Legislation Amendment (Stop Adani) Bill 2017;
- Great Barrier Reef Marine Park Amendment Bill 2017;
- Liquid Fuel Emergency Amendment Bill 2017;
- Productivity Commission Amendment (Addressing Inequality) Bill 2017;
- Regional Investment Corporation Bill 2017; and
- Treasury Laws Amendment (2017 Measures No. 3) Bill 2017.