Chapter 2

Concluded matters

1.1 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.

1.2 Correspondence relating to these matters is included at **Appendix 3**.

Fair Work Amendment (Corrupting Benefits) Bill 2017

Purpose	This bill seeks to amend the *Fair Work Act 2009* to: • make it a criminal offence to give a registered organisation, or a person associated with a registered organisation, a corrupting benefit; • make it a criminal offence to receive or solicit a corrupting benefit; • make it a criminal offence for a national system employer (other than an employee organisation) to provide, offer or promise to provide any cash or in-kind payment, other than certain legitimate payments to an employee organisation or its prohibited beneficiaries; • make it a criminal offence to solicit, receive, obtain or agree to obtain any such prohibited payment; and • require full disclosure by employers and unions of financial benefits they stand to gain under an enterprise agreement before employees vote on the agreement
Portfolio	Employment
Introduced	House of Representatives, 22 March 2017
Rights	Fair trial; not to be tried and punished twice (double jeopardy) (see **Appendix 2**)
Previous report	4 of 2017
Status	Concluded examination

Background

1.3 The committee first reported on the bill in its *Report 4 of 2017*, and requested a response from the Minister for Employment by 26 May 2017.[1]

1.4 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**.

New offences and concurrent operation of state laws

1.5 The Fair Work Amendment (Corrupting Benefits) Bill 2017 (the bill) proposes to introduce a number of offence provisions, including in relation to the giving, receiving or soliciting of 'corrupting benefits' or making certain payments. Proposed section 536C provides that the new part introducing these offences does not exclude or limit the concurrent operation of a state or territory law. It states that even if an act or omission (or similar act or omission) would constitute an offence under this proposed Part and would constitute an offence or be subject to a civil penalty under state or territory law, these offence provisions can operate concurrently.

Compatibility of the measure with the right to a fair trial

1.6 A specific guarantee of the right to a fair trial in the determination of a criminal charge includes the right not to be tried and punished twice for an offence for which a person has already been finally convicted or acquitted (sometimes referred to as the principle of double jeopardy) (see, article 14(7) of the International Covenant on Civil and Political Rights (ICCPR)).

1.7 The effect of proposed section 536C of the *Fair Work Act 2009* appears to be that a person could be liable to be tried and punished for an act or omission under a state or territory law as well under this proposed Commonwealth law. Accordingly, the right not to be tried and punished twice for an offence is engaged and may be limited by the measure.

1.8 The initial human rights analysis noted that it is not clear if any state or territory offences (for example, criminalising corrupt benefits) may be the same or substantially the same offences as the new offences proposed (for example, the corrupting benefits offences), and if so, what effect proposed section 536C may have on the right not to be tried or punished again for the same offence.

1.9 The initial human rights analysis noted that section 4C of the *Crimes Act 1914* provides that a person is not liable for being tried and punished twice under Commonwealth law if they have been punished for that offence under the law of a state or territory. While this is an important safeguard, it does not address the reverse situation of possible prosecution under a state or territory law after being prosecuted under Commonwealth law.

1 Parliamentary Joint Committee on Human Rights, *Report 4 of 2017* (9 May 2017) 12-16.

1.10 This matter is not discussed in the statement of compatibility. The committee's usual expectation is that, where a human right is engaged, the statement of compatibility provide a reasoned explanation of why the measure is compatible with that right. This conforms with the committee's *Guidance Note 1*, and the Attorney-General's Department's guidance on the preparation of statements of compatibility.

1.11 The United Nations Human Rights Committee, in General Comment 32, provides the following guidance to nation states with respect to the right not to be tried and punished twice for the same offence under article 14(7) of the ICCPR:

> Article 14, paragraph 7 of the Covenant, providing that no one shall be liable to be tried or punished again for an offence of which they have already been finally convicted or acquitted in accordance with the law and penal procedure of each country, embodies the principle of *ne bis in idem*. This provision prohibits bringing a person, once convicted or acquitted of a certain offence, either before the same court again or before another tribunal again for the same offence; thus, for instance, someone acquitted by a civilian court cannot be tried again for the same offence by a military or special tribunal. Article 14, paragraph 7 does not prohibit retrial of a person convicted in absentia who requests it, but applies to the second conviction. Repeated punishment of conscientious objectors for not having obeyed a renewed order to serve in the military may amount to punishment for the same crime if such subsequent refusal is based on the same constant resolve grounded in reasons of conscience.
>
> The prohibition of article 14, paragraph 7, is not at issue if a higher court quashes a conviction and orders a retrial. Furthermore, it does not prohibit the resumption of a criminal trial justified by exceptional circumstances, such as the discovery of evidence which was not available or known at the time of the acquittal.
>
> This guarantee applies to criminal offences only and not to disciplinary measures that do not amount to a sanction for a criminal offence within the meaning of article 14 of the Covenant. Furthermore, it does not guarantee *ne bis in idem* with respect to the national jurisdictions of two or more States. This understanding should not, however, undermine efforts by States to prevent retrial for the same criminal offence through international conventions.[2]

1.12 Accordingly, the committee sought the advice of the Minister for Employment as to whether the measure limits the right not to be tried and punished twice for an offence which is the same, or substantially the same, as an offence for which the person has already been finally convicted or acquitted.

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2 UN Human Rights Committee, *General Comment No 32, Article 14: Right to equality before courts and tribunals and to a fair trial*, UN.Doc CCPR/C/GC/32 (2007).

Minister's response

1.13 In relation to whether the measure is compatible with the right to a fair trial and the right not to be tried and punished twice for the same offence, the minister's response states:

> As the Committee has noted (at [1.45]), section 4C of the *Crimes Act 1914* (Cth) protects a person from being punished for a Commonwealth offence after having been punished for the same offence under the law of a State or Territory.
>
> Where a person is first punished for a Commonwealth offence, the applicability to the person of any overlapping State or Territory offence is a matter to be determined by the applicable law in that State or Territory, including the common law.
>
> In this regard, I note that a number of States and Territories have express statutory provisions dealing with anterior punishments for Commonwealth offences: see for example *Crimes (Sentencing Procedure) Act 1999* (NSW), s 20; *Sentencing Act 1995* (WA), s 11(2); *Legislation Act [2001]* (ACT), s 191(2).

1.14 This response confirms that section 4C of the *Crimes Act 1914* protects a person from being tried and punished for a Commonwealth offence after having been punished for the same offence under the law of a state or territory. This is an important safeguard for the protection of the right not to be tried and punished twice for the same offence.

1.15 As regards protection against being tried for a Commonwealth offence and then being tried for a state or territory offence in respect of the same conduct, the minister's response helpfully identifies protections in New South Wales, Western Australia and the Australian Capital Territory. However, information is not provided in relation to the other states and territories. If such laws preventing double punishment do not exist in particular states or territories a person may face double punishment and the measure risks being incompatible with the right not to be tried and punished twice for the same offence. As a matter of international human rights law the Commonwealth has the relevant powers and responsibilities to ensure that the right not to be tried or punished twice for the same offence is complied with at all levels of government – including in the law of the states and territories – in respect of the measure.[3]

Committee response

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

3 See, Vienna Convention on the Law of Treaties 1969 article 27; Australian Constitution section 51(xxix).

1.17 Section 4C of the *Crimes Act 1914* is an important safeguard which prevents a person being tried and punished for a Commonwealth offence after having been punished for the same offence under the law of a state or territory.

1.18 However, the preceding analysis indicates that double jeopardy could still arise unless each state and territory also has laws preventing a person being tried and punished twice for the same offence. On the basis of the minister's response, it cannot be concluded that the measure is compatible with the right not to be tried and punished twice for the same offence.

Strict liability offences

1.19 Proposed section 536F makes it an offence for a national system employer to give cash or an in-kind payment to an employee organisation or prohibited beneficiary in circumstances where the defendant (or certain related persons) employs a person who is (or is entitled to be) a member of that organisation and whose industrial interests the organisation is entitled to represent. Proposed subsection (2) states that strict liability applies to paragraphs (1)(a), (c) and (d) of the offence, namely:

- that the defendant is a national system employer other than an employee organisation;
- that the other person (to whom cash or in kind payments are made) is an employee organisation or a prohibited beneficiary in relation to an employee organisation; and
- that the defendant, a spouse, or associated entity of the defendant or a person who has a prescribed connection with the defendant, employs a person who is, or is entitled to be, a member of the organisation and whose industrial interests the organisation is entitled to represent.

1.20 The offence carries a maximum penalty of 2 years imprisonment or 500 penalty units for an individual (2500 for a body corporate).

1.21 In addition, proposed section 536G makes it an offence to receive or solicit a cash or in kind payment. Proposed subsection (2) states that strict liability applies to paragraph 1(c) which provides that if the provider of the cash or in kind payment were to provide the benefit to the defendant or another person, the provider or another person would commit an offence against subsection 536F(1). The offence carries a maximum penalty of 2 years imprisonment or 500 penalty units for an individual (2500 for a body corporate).

Compatibility of the measures with the right to be presumed innocent

1.22 Article 14(2) of the ICCPR protects the right to be presumed innocent until proven guilty according to law. The right to be presumed innocent usually requires that the prosecution prove each element of the offence (including fault elements and physical elements). Strict liability offences engage and limit the right to be presumed innocent as they allow for the imposition of criminal liability without the need for the

prosecution to prove fault. In the case of a strict liability offence, the prosecution is only required to prove the physical elements of the offence. The defence of honest and reasonable mistake of fact is available to the defendant. Strict liability may apply to whole offences or to elements of offences.

1.23 As stated in the initial human rights analysis, strict liability offences will not necessarily be inconsistent with the presumption of innocence where they pursue a legitimate objective, are rationally connected to that objective and are a proportionate means of achieving that objective.[4]

1.24 While the statement of compatibility acknowledges that the offences engage and limit the right to be presumed innocent, it argues that this limitation is permissible. The statement of compatibility argues that the attachment of strict liability is necessary to pursue the legitimate objective of eliminating illegitimate cash or in kind payments.[5] However, the statement of compatibility does not explain how the imposition of strict liability is effective to achieve, or a proportionate means of achieving, this objective.[6] The initial analysis stated that further information from the minister in this regard would assist the committee to conclude whether the measure permissibly limits the right to be presumed innocent.

1.25 Noting that strict liability offences engage and limit the right to be presumed innocent, the preceding analysis raised questions about whether the strict liability offences are a permissible limitation on this right.

1.26 The committee drew to the attention of the Minister for Employment its *Guidance Note 2* which sets out information specific to strict liability offences.

1.27 The committee requested the further advice of the minister as to:

- how the strict liability offence 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.

Minister's response

1.28 In relation to these questions, the minister provided the following information:

> It is appropriate for strict liability to attach to paragraphs 536F(1)(a), (c) and (d) of the relevant criminal offence. Section 536F is intended to address the problem which the Royal Commission into Trade Union and Governance found to be 'insidious' and 'immensely damaging': the provision of corrupt payments and other benefits by employers to unions

4 *Guidance Note 2* — See Appendix 4.

5 Statement of compatibility (SOC) viii.

6 See, SOC viii.

and their officials (Final Report, Volume 5, Chapter 4 at [58]). The Commissioner stated (at [60]):

Seeking simply to prohibit payments made or received with a particular intention has consequent difficulties of investigation and proof. Instead it is recommended that, subject to certain exceptions, all payments by employers to a relevant union or officials of that union be outlawed.

Paragraph 536F(1)(a) limits the offence to the defendant being a national system employer who is not an employee organisation. As explained in the Explanatory Memorandum to the Bill, this element is jurisdictional in nature, in that it attaches the offence to the relevant Commonwealth head of power to legislate. Strict liability attaching to this element can be justified by virtue of the fact that it is jurisdictional in nature.

One of the principal purposes of the offence provision is to ensure that a defendant national system employer has sufficiently robust internal governance and accounting mechanisms in place so as to ensure that they are aware of whether the recipient of a payment is a person to whom the circumstances in paragraphs 536F(1)(c) and (d) apply. If the provision were to have fault elements for paragraphs 536F(1)(c) and (d), the imperative for employers to have appropriate mechanisms in place to prevent illegitimate payments to employee organisations and their associates would be diminished. The absence of fault elements is thus a necessary and proportionate means to achieve the provision's objectives. Proportionality is further served by the availability of the defence of reasonable mistake of fact.

Similarly, strict liability attaches to paragraph 536G(1)(c) because an employee organisation and its officers should be aware of the circumstances in which the payment of money by an employer would be an offence against section 536F. The provision is intended to ensure that employee organisations take sufficient care not to solicit payments from national system employers that would contravene section 536F. Proportionality is further served by the availability of the defence of reasonable mistake of fact.

1.29 The response justifies the application of a strict liability element to the requirement that 'the defendant is a national system employer other than an employee' on the basis that it is a jurisdictional element of the offence. A jurisdictional element of an offence is an element that does not relate to the substance of the offence, but instead links the offence to the relevant legislative power of the Commonwealth. Accordingly, this particular element appears to be justifiable as a matter of international human rights law.

1.30 However, it is less clear that the other three strict liability elements are a proportionate means of achieving the objective of the measure. It is a serious matter for an individual to be found guilty of a criminal offence in circumstances where they are not at fault in respect of particular elements of the offence. The minister's response argues that it would not be appropriate to apply a fault element to the

offence because there should be sufficiently robust internal governance and accounting mechanisms in place, or the defendant should be properly aware of the relevant circumstances, and applying a fault element would weaken the deterrent effect of the provision. Acknowledging this justification, no specific evidence is provided to support the argument that inclusion of a fault element would necessarily weaken the deterrent effect, noting that the fault element may be designed to include knowledge as well as recklessness as to relevant facts.

1.31 As noted in the minister's response, the defence of reasonable mistake of fact is available such that there is still some scope provided for a defence on the strict liability elements of the offence. However, it is not clear from the response that the strict liability elements are the least rights restrictive way of achieving the objective of the measure.

1.32 Further, in relation to the proportionality of the measure, it is noted that the penalty is significant and that a person found guilty of an offence under these provisions may be subject to a maximum period of two years imprisonment and/or 500 penalty units. This accordingly is a significant limitation on the right to be presumed innocent.

1.33 On the basis of the information provided by the minister, it is not possible to conclude that each strict liability element is compatible with the right to be presumed innocent beyond reasonable doubt.

Committee response

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

1.35 The preceding analysis indicates that, based on the information provided, it is not possible to conclude that the strict liability elements of the offence are the least rights restrictive approach, and thereby compatible with the right to be presumed innocent beyond reasonable doubt.

Prime Minister and Cabinet Legislation Amendment (2017 Measures No. 1) Bill 2017

Purpose	Seeks to amend various Acts administered by the Prime Minister to update outdated provisions; repeal two Acts; align annual reporting requirements of the Auditor-General with his or her responsibility to the Parliament; provide new powers to royal commissions to require a person to provide information or a statement in writing; and increases the penalty from six months' to two years' imprisonment for failure of a witness to attend a royal commission
Portfolio	Indigenous Affairs
Introduced	House of Representatives, 30 March 2017
Right[s]	Privacy; reputation; fair trial; not to incriminate oneself (see **Appendix 2**)
Previous report	4 of 2017
Status	Concluded Examination

Background

1.36 The Prime Minister and Cabinet Legislation Amendment (2017 Measures No. 1) Bill 2017 (the bill) seeks to amend several provisions of the *Royal Commissions Act 1902* (RC Act).

1.37 The committee first reported on the bill in its *Report 4 of 2017*, and requested a response from the Minister of Indigenous Affairs by 26 May 2017.[1]

1.38 The assistant minister's response to the committee's inquiries was received on 26 May 2017. The response is discussed below and is reproduced in full at **Appendix 3**.

1.39 The committee has previously raised concerns in relation to the powers of royal commissions as they affect a range of human rights including the right to a fair trial, the right not to incriminate oneself, the right to privacy and reputation, right to freedom of expression, right to liberty and the right to freedom of assembly.[2]

1 Parliamentary Joint Committee on Human Rights, *Report 4 of 2017* (9 May 2017) 28-34.

2 See, for example, Parliamentary Joint Committee on Human Rights, *Thirty-sixth report of the 44th Parliament* (16 March 2016) 14; and *Thirty-eighth report of the 44th Parliament* (3 May 2016) 21. See also, *Third report of 2013* (13 March 2013); and *Seventh report of 2013* (5 June 2013) 91.

Coercive powers of Royal Commissions—increased penalty for failing to attend a Royal Commission as a witness

1.40 Section 3 of the RC Act provides that a person served with a summons to appear as a witness before a royal commission shall not fail to attend unless excused or released. The bill seeks to increase the maximum penalty for a failure to attend from six months' imprisonment or a $1000 fine to two years' imprisonment.

1.41 Section 6A(2) of the RC Act provides that a person appearing as a witness is not excused from answering a question on the ground that the answer might tend to incriminate that person.

Compatibility of the measure with the right not to incriminate oneself

1.42 The initial human rights analysis noted the 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) including the right not to incriminate oneself (article 14(3)(g)).

1.43 The RC Act is designed to enable the establishment of royal commissions with significant information gathering, but not law enforcement, powers. Royal commissions have historically been established to inquire into often complex and systemic issues that have thwarted traditional law enforcement efforts. As a royal commission is not determining a criminal charge but undertaking a broader examination of an issue, the investigative functions of a royal commission sit, in part, outside the protections of the right to a fair trial.

1.44 However, 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 a royal commission which may incriminate them and that incriminating information can be used either directly or indirectly by law enforcement agencies to investigate criminal charges. By increasing the penalty for a witness who fails to attend and give evidence to a royal commission in circumstances where the witness will not be afforded the privilege against self-incrimination, the measure engages and limits the right not to incriminate oneself. Current section 6P of the RC Act permits a royal commission to disclose evidence relating to a contravention of a law to certain persons and bodies including the police and the Director of Public Prosecutions (DPP) in these circumstances.

1.45 While the right not to incriminate oneself may be subject to permissible limitations in a range of circumstances, the statement of compatibility does not acknowledge that this right is engaged and limited, so does not provide an assessment as to whether the limitation is justifiable under international human rights law.

1.46 The statement of compatibility briefly discusses the abrogation of the right not to incriminate oneself (without acknowledging the limitation placed upon that right), and the availability of a 'use' immunity such 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.[3]

1.47 The availability of immunities is relevant to whether a measure is a proportionate limitation on the right not to incriminate oneself. However, the initial analysis noted that no 'derivative use' immunity is provided in this case and this may be relevant to the question of whether the limitation is proportionate.[4] This issue was not addressed in the statement of compatibility.

1.48 Furthermore, the statement of compatibility does not acknowledge the committee's previous concerns, stated on a number of occasions, with respect to related powers and the effect that strengthening these powers may have.[5]

1.49 Accordingly, the committee sought the advice of the Minister for Indigenous Affairs 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; and
- whether a derivative use immunity would be workable.

Compatibility of the measure with the right to privacy

1.50 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.

1.51 The initial human rights analysis stated that by increasing the penalty for failure to appear as a witness and answer questions, in circumstances where the witness is not afforded the privilege against self-incrimination, the measure engages and limits the right to privacy.

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3 Explanatory memorandum (EM) 5. See section 6DD.

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.

5 See, for example, Parliamentary Joint Committee on Human Rights, *Thirty-sixth report of the 44th Parliament* (16 March 2016) 14; *Thirty-eighth report of the 44th Parliament* (3 May 2016) 21. See also *Third Report of 2013* (13 March 2013) 42; and *Seventh Report of 2013* (5 June 2013) 91.

1.52 While the right to privacy may be subject to permissible limitations in a range of circumstances, this particular limitation on the right to privacy was not addressed in the statement of compatibility.

1.53 Accordingly, the committee sought the advice of the Minister for Indigenous Affairs 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.

Assistant minister's response

1.54 The Assistant Minister to the Prime Minister on behalf of the Minister for Indigenous Affairs provided a range of information in response to the committee's requests.

1.55 In relation to the proposal to increase the penalty for failing to attend a Royal Commission, the assistant minister's response notes that:

> The Bill implements recommendation 78 of the final report of the Royal Commission into Trade Union Governance and Corruption. The Hon John Dyson Heydon AC QC recommended that the *Royal Commissions Act 1902* be amended '*to increase the penalties for a failure to comply with a summons to attend, a failure to comply with a notice to produce, a failure to be sworn or answer questions, and a failure or refusal to provide documents to at least a maximum penalty of 2 years' imprisonment or a fine of 120 penalty units or both*'…
>
> In making that recommendation, Commissioner Heydon observed that the existing penalty for those offences is 'inadequate' and that a penalty of up to 2 years' imprisonment is consistent with the penalty applicable to a failure to comply with notices issued by the Australian Security and Investments Commission and by the Australian Competition and Consumer Commissioner (pages 626; 630 Final Report).

1.56 Despite the apparent basis for the Heydon Royal Commission recommendation, such high penalties do not currently apply consistently in respect of the coercive information gathering powers of the Australian Securities and Investment Commission (ASIC) and the Australian Competition and Consumer Commission (ACCC).[6]

6 See Royal Commission into Trade Union Governance and Corruption, *Reform of the Royal Commissions Act 1902*, (2015), paragraph 27 of Chapter 10, Volume 5 of the Final Report.

1.57 A failure to furnish information or produce documents to the ACCC or appear before the ACCC is currently subject to imprisonment up to 12 months or a fine not exceeding 20 penalty units.[7]

1.58 While some offences relating to ASIC's investigation powers subject a person to up to two years imprisonment or 100 penalty units (or both) for a failure to appear for examination, answer a question or produce documents,[8] this is not the case across all such offences.[9]

1.59 In any event, the fact that other agencies have such powers or such penalties does not mean that such measures are, for that reason, compatible with the right not to incriminate oneself or the right to privacy.

Compatibility of the measure with the right not to incriminate oneself

1.60 In response to whether the measure is compatible with the right not to incriminate oneself, the assistant minister's response states that:

> As noted in the Bill's statement of compatibility (para 13), the Bill does not engage Article 14 because a Royal Commission does not exercise judicial power and cannot determine criminal charges…

1.61 However, as noted above, this right is engaged and limited because a person may be required to give self-incriminating information to a royal commission which may be used by law enforcement agencies to investigate criminal charges.

1.62 The assistant minister's response nevertheless provides information addressing whether the measure constitutes a permissible limitation on this right. As regards the objective of the measure, the response explains:

> The proposal to increase penalties for failure to comply with summonses is aimed at achieving the legitimate objective of ensuring a Royal Commission can fully inquire into, and report on, matters of public importance. The proposal is 'rationally connected' to that objective because higher penalties will enhance compliance with the summonses and therefore the Commission's ability to obtain information and evidence so that it can conduct its inquiry.

1.63 The initial human rights analysis of the bill stated that, in broad terms, ensuring that a royal commission can fully inquire into matters of public importance is likely to be a legitimate objective for the purposes of international human rights law. It can be accepted that the measure is rationally connected to this objective.

1.64 The assistant minister's response provides the following information in relation to the proportionality of the measure:

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7 See section 155 of the *Competition and Consumer Act 2010*.

8 See section 63(1) of the *Australian Securities and Investments Commission Act 2001*.

9 See section 63 of the *Australian Securities and Investments Commission Act* 2001.

> [The proposal to *increase* the penalty for failure to comply with summonses] is reasonable and proportionate because while it reinforces an objective of equipping Royal Commissions with appropriate investigative powers, there are limits or safeguards on the abrogation of the privilege against self-incrimination. The privilege still applies where the production of information or answer to a question might tend to incriminate the person in relation to an offence, and the person has been charged with the offence, and the charge has not been finally dealt with by a court. Furthermore, if incriminating evidence is obtained by a Royal Commission, the Royal Commissions Act provides a 'use' immunity so that any statement or disclosure made by the person is not admissible in evidence against that person in any civil or criminal proceedings (section 6DD).
>
> A Commissioner may communicate information or evidence that relates to a contravention of the law to certain office holders such [as] the police or the Director of Public Prosecutions where the Commissioner considers it appropriate to do so (section 6P). Introducing a 'derivative use' immunity would unreasonably hinder the ability of these law enforcement agencies to investigate and prosecute matters reported on by a Royal Commission. However, because of the 'use' immunity in section 6DD, the law enforcement agencies could not directly use that information against the person, and could only use it to obtain further evidence against that person.

1.65 The availability of a 'use' immunity is an important safeguard. The provision for a 'derivative use' immunity would be a less rights restrictive approach and provide a stronger level of protection against self-incrimination.[10] The minister's response indicates the view that a 'derivative use' immunity may not be a reasonably available alternative. It is acknowledged that such an immunity would make it more difficult to investigate individuals on the basis of self-incriminating information.

1.66 Whether a 'derivative use' immunity is a reasonably available, less rights-restrictive alternative is an issue that arises in relation to the RC Act as it currently exists, as well as the bill seeking to increase penalties under the RC Act. Beyond the general statement in the assistant minister's response, no further information is provided which addresses why such a 'derivative use' immunity is not reasonably available or would be unworkable in achieving the stated objective of the measure to enable royal commissions to 'fully inquire into, and report on, matters of public

10 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.

importance'. This is especially so as witnesses would still be required to provide the information requested to the royal commission.

1.67 Accordingly, it appears that increasing the penalty for non-compliance, in circumstances where the person is not afforded the privilege against self-incrimination or given the protection of both a use and derivative use immunity may not be the least rights restrictive approach. In order to be a proportionate limit on human rights, a measure must be the least rights restrictive way of achieving its stated objective.

1.68 Further, increasing the penalty for non-compliance, in context, affects the proportionality of the coercive evidence gathering powers more generally. Based on the information provided and this analysis, it is not possible to conclude that the measure is compatible with the right not to incriminate oneself.

1.69 The committee has previously raised concerns in relation to the powers of royal commissions, including concerns regarding the right not to incriminate oneself, on a number of occasions. These concerns relate to the underlying statutory regime governing royal commissions as well as amendments which have expanded that regime.[11] For the reasons set out below at [2.104]-[2.110], the RC Act would benefit from a full review of its compatibility with the right to a fair trial, including whether the provision of immunities under the legislation is sufficient to protect the privilege against self-incrimination.

Compatibility of the measure with the right to privacy

1.70 In relation to the compatibility of the measure with the right to privacy, the assistant minister acknowledges that the measure engages and limits this right. The minister's response explains that the limitation pursues a legitimate objective and is rationally connected to that objective, as set out above at [2.62].

1.71 In relation to the proportionality of the limitation on the right to privacy, the assistant minister's response states:

> The proposal is reasonable and proportionate because while it reinforces an objective of equipping Royal Commissions with appropriate investigative powers, there are limits and safeguards on the use and sharing of personal information obtained by a Commission. For example, a Commission has power to make a non-publication direction over any evidence given before a Commission, over the contents of any documents or written statement given to a Commission, and over any information that might enable a person who [has] given evidence before the Commission to be identified (section 6D(3)).

11 See, for example, Parliamentary Joint Committee on Human Rights, Report 4 of 2017 (9 May 2017) 66-69; *Thirty-sixth report of the 44th Parliament* (16 March 2016) 14; and *Thirty-eighth report of the 44th Parliament* (3 May 2016) 21. See also, *Third report of 2013* (13 March 2013); and *Seventh report of 2013* (5 June 2013) 91.

Further, a witness can request that their evidence be taken in private where the evidence relates to the profits or financial position of any person and taking of the evidence in public would be unfairly prejudicial to the interests of that person (section 6D(2)). If there is any incriminating evidence about an individual, the 'use' immunity in section 6DD of the Royal Commissions Act applies so that any information or statement given by the person is not admissible in evidence against that person in any civil or criminal proceedings.

1.72 Under international human rights law the right to privacy encompasses 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.

1.73 That is, while the right encompasses respect for personal information, the right will also be engaged and limited in relation to some other forms of information collected, used and shared by royal commissions.

1.74 While the assistant minister's response has identified some relevant safeguards, as set out above, there remain questions about whether the measure is, in this context, the least rights restrictive way of achieving its stated objective. As the committee has pointed out on a number of occasions, discretionary safeguards may not be sufficient for ensuring that a limitation on the right to privacy is proportionate in each individual case.

Committee response

1.75 The committee thanks the Assistant Minister for his response.

1.76 The preceding analysis indicates, based on the information provided, that questions remain as to the compatibility of the measure with the right to privacy and the right not to incriminate oneself, including whether less rights restrictive measures are reasonably available, and the sufficiency of relevant safeguards provided by the RC Act.

1.77 The committee considers that the *Royal Commission Act 1902* would benefit from a full review of its compatibility with the right to a fair trial and the right to privacy, including whether the provision of immunities and safeguards under the legislation are sufficient to protect human rights.

Coercive powers of Royal Commissions—Power to require person to give information or statement in writing

1.78 The bill seeks to amend section 2(3B) of the RC Act to give a royal commission the power to issue a notice requiring a person to give information or a statement in writing.

1.79 Section 6A(1) of the RC Act provides that a person is not excused from producing a document or other thing on the basis that it might incriminate that person.

1.80 Section 6P of the RC Act provides that a royal commission is empowered to disclose evidence relating to a contravention of the law to certain persons and bodies including the police and the DPP.

Compatibility of the measure with the right to privacy

1.81 As set out above, the right to privacy includes respect for informational privacy, including the right to respect for private and confidential information and the right to control the dissemination of information about one's private life.

1.82 The initial analysis noted that as the measure would provide powers for a royal commission to require, on a compulsory basis, a person to give a written statement or written information (including private and confidential information), the measure engages and limits the right to privacy. It does so in circumstances where the person providing the document is not afforded the privilege against self-incrimination.[12]

1.83 Information provided under such powers may be disclosed to the police or DPP under section 6P of the RC Act. The initial analysis noted that by expanding the range of information that may be compulsorily acquired and then subject to disclosure, the measure further engages and limits the right to privacy.

1.84 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.

1.85 The statement of compatibility acknowledges that the measure engages and limits the right to privacy but argues that the limitation is permissible on the basis that:

> The collection and use of that personal information is a proportionate limitation of the right to privacy in pursuit of a legitimate objective to ensure a Royal Commission can fully inquire into, and report on, matters of public importance.[13]

1.86 As set out above, ensuring that a royal commission can fully inquire into matters of public importance is likely to be a legitimate objective for the purposes of international human rights law.

1.87 The compulsory provision of information is also likely to be rationally connected to this objective as the collection of further information may assist the

12 RC Act section 6A(1).

13 EM 5.

royal commission's inquiry function. However, the initial human rights analysis noted that the statement of compatibility does not demonstrate that the measure imposes a proportionate limitation on the right to privacy in pursuit of that legitimate objective. In particular, the statement of compatibility provides no information about why the measure is necessary to achieve the legitimate objective and does not addresses whether there are adequate safeguards in place with respect to the exercise of this power.

1.88 Additionally, as noted above, the statement of compatibility does not acknowledge the committee's previous concerns with respect to related measures that expand existing powers.[14]

Compatibility of the measure with the right not to incriminate oneself

1.89 As set out above, article 14 of the ICPPR protects the right not to incriminate oneself. The measure engages and limits this right as the requirement to give information or a statement in writing applies regardless of whether such information might incriminate the person.

1.90 The initial analysis noted that, in this respect, such information may be disclosed to the police or DPP under existing powers.[15] By expanding the range of information that may be compulsorily acquired and then subject to disclosure, in circumstances where the person was not afforded the privilege against self-incrimination, the measure further engages and limits the right not to incriminate oneself.

1.91 The statement of compatibility does not acknowledge that this right is engaged and limited so does not provide an assessment as to whether the limitation is justifiable under international human rights law.

1.92 As set out above, the legitimate objective of the measure appears to be 'to ensure a Royal Commission can fully inquire into, and report on, matters of public importance'.[16] The measure also appears to be rationally connected to this legitimate objective.

1.93 However, the initial human rights analysis stated that the statement of compatibility did not demonstrate that the measure imposes a proportionate limitation on the right not to incriminate oneself in pursuit of that legitimate objective.

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14 See, for example, Parliamentary Joint Committee on Human Rights, *Thirty-sixth report of the 44th Parliament* (16 March 2016) 14; *Thirty-eighth report of the 44th Parliament* (3 May 2016) 21. See also *Third Report of 2013* (13 March 2013) 42; and *Seventh Report of 2013* (5 June 2013) 91.

15 RC Act section 6P.

16 EM 5.

Assistant minister's response

1.94 In relation to the proposal to give royal commissions the power to require a person to give information or a statement in writing, the assistant minister advises the following in relation to the importance of the measure:

> This proposal implements a recommendation by Mr Ian Hanger AM QC in his report of the Royal Commission into the Home Insulation Program 'to empower a Royal Commission to compel the provision of statement by a potential witness' (page 12 of the report). Commissioner Hanger supported the rationale for a similar recommendation made by the Australian Law Reform Commission in its 2009 *Making Inquiries Report*. The ALRC considered that the power to require written statements ' ... may reduce the need for hearings and examinations and enable more flexible, less formal and more cost-effective inquiry procedures' (page 271 of the report).

1.95 In response to the committee's question about the compatibility of this measure with the right not to incriminate oneself, the assistant minister stated:

> As noted in the Bill's statement of compatibility (para 13), the Bill does not engage Article 14 [of the ICCPR] because a Royal Commission does not exercise judicial power and cannot determine criminal charges…

1.96 However, the scope of the right not to incriminate oneself is broader than described by the assistant minister. As set out above, by expanding the range of information that may be compulsorily acquired and then subject to disclosure, in circumstances where the person was not afforded the privilege against self-incrimination, the measure further engages and limits the right not to incriminate oneself. It is noted in this respect that disclosure may be made to criminal investigatory authorities and self-incriminating information could be used to pursue evidence against the person for the purpose of prosecution.

1.97 The assistant minister's response does however provide the following information in support of the proportionality of this limitation:

> It is acknowledged that the Bill would amend existing section 6A of the Royal Commissions Act so that a person is not, in all cases, excused from giving information or a written statement on the ground that the information or statement might tend to incriminate the person. That power is reasonable and proportionate because while it reinforces an objective of equipping Royal Commissions with appropriate investigative powers, there are limits or safeguards on the abrogation of the privilege against self-incrimination. The privilege would still apply where the giving of information or a statement might tend to incriminate the person in relation to an offence, and the person has been charged with the offence, and the charge has not been finally dealt with by a court. Furthermore, if incriminating evidence is obtained by a Royal Commission, it is proposed in the Bill that the 'use' immunity in section 6DD of the Royal Commissions Act apply so that any information or statement given by the person is not

> admissible in evidence against that person in any civil or criminal proceedings.
>
> It is also acknowledged that a Commissioner may communicate information or evidence that relates to a contravention of the law to certain office holders such [as] the police or the Director of Public Prosecutions where the Commissioner considers it appropriate to do so (section 6P). Introducing a 'derivative use' immunity would unreasonably hinder the ability of these law enforcement agencies to investigate and prosecute matters reported on by a Royal Commission. However, because of the 'use' immunity in section 6DD, the law enforcement agencies could not directly use that information against the person, and could only use it to obtain further evidence against that person.

1.98 For the reasons stated above at [2.66]-[2.68], while the availability of a 'use' immunity is an important safeguard, other less rights-restrictive approaches may be available to achieve the objective of the measure.

1.99 In relation to right to privacy, the assistant minister's response acknowledges that the measure engages and limits the right to privacy. Regarding the proportionality of the limitation on this right, the assistant minister's response states:

> The proposal is reasonable and proportionate because while it reinforces an objective of equipping Royal Commissions with appropriate investigative powers, there are limits and safeguards on the use and sharing of personal information obtained by a Commission. For example, the Bill would extend existing section 6D(3) of the Royal Commissions Act so that a Commission has power to make a non-publication direction over the contents of any written statement given to a Commission (item 26 of Schedule 5 of the Bill). Existing section 6D(3)(c) gives a Commission the power to make a non-publication order over any information that might enable a person who has given evidence before the Commission to be identified. If there is any incriminating evidence about an individual, it is proposed that the 'use' immunity in section 6DD of the Royal Commissions Act apply so that any information or statement given by the person is not admissible in evidence against that person in any civil or criminal proceedings (item 28 of Schedule 5 of the Bill).
>
> While a Royal Commission can now invite individuals to give information or a statement in writing, under that approach the Commission would need to rely on other existing powers to require an individual to attend to give evidence if that person refuses voluntarily give the information. As noted above, the ALRC considered that the power '*may reduce the need for hearings and examinations and enable more flexible, less formal and more cost-effective inquiry procedures* '.

1.100 It is acknowledged that the measure appears to be aimed at pursuing the effective operation of royal commissions. However, the coercive nature of the measure imposes a serious limitation on the right to privacy. While the assistant minister's response identifies some relevant safeguards, it is unclear that these will

be sufficient to ensure the limitation on the right is proportionate in all circumstances. As noted above, discretionary safeguards may not be sufficient for ensuring that a limitation on the right to privacy is proportionate.

Committee response

1.101 The committee thanks the Assistant Minister for his response.

1.102 The preceding analysis indicates, based on the information provided, that questions remain as to the compatibility of the measure with the right to privacy and the right not to incriminate oneself, including whether less rights restrictive measures are reasonably available, and the sufficiency of relevant safeguards provided by the *Royal Commission Act 1902*.

1.103 The committee considers that the *Royal Commission Act 1902* would benefit from a full review of its compatibility with the right to a fair trial and the right to privacy, including whether the provision of immunities and safeguards under the legislation are sufficient to protect human rights.

Compatibility of the coercive powers of royal commissions with multiple rights

1.104 In addition to the right not to incriminate oneself and the right to privacy, the committee has previously raised concerns in relation to the powers of royal commissions including against the right to reputation, the right to freedom of expression, the right to liberty and the right to freedom of assembly on a number of occasions.[17] The statement of compatibility does not acknowledge or address the committee's previous concerns with respect to related powers.

1.105 The Australian Law Reform Commission also identified a number of human rights concerns in relation to royal commissions in its 2009 report, *Making Inquiries: A statutory framework*.[18]

1.106 The initial analysis noted that the existing RC Act was legislated prior to the establishment of the committee, and for that reason, has never been required to be subject to a foundational human rights compatibility assessment in accordance with the terms of the *Human Rights (Parliamentary Scrutiny) Act 2011*. A full human rights assessment of proposed measures which extend or amend existing legislation requires an assessment of how such measures interact with the existing legislation. The committee is therefore faced with the difficult task of assessing the human rights

17 See, for example, Parliamentary Joint Committee on Human Rights, *Thirty-sixth report of the 44th Parliament* (16 March 2016) 14; *Thirty-eighth report of the 44th Parliament* (3 May 2016) 21. See also, *Third Report of 2013* (13 March 2013) 42; and *Seventh Report of 2013* (5 June 2013) 91.

18 See Australian Law Reform Commission, *Making Inquiries: A statutory framework* (2009).

compatibility of amendments without the benefit of a foundational human rights assessment of the RC Act from the Minister for Indigenous Affairs.

1.107 Accordingly, the committee sought the advice of the Minister for Indigenous Affairs as to whether a foundational assessment of the RC Act could be undertaken to determine its compatibility with human rights (including in respect of matters previously raised by the committee).

Assistant minister's response

1.108 In relation to the committee's request, the assistant minister's response states:

> I note the *Human Rights (Parliamentary Scrutiny) Act 2011* does not require an assessment of this kind. In accordance with the requirements in sections 8 and 9 of the *Human Rights (Parliamentary Scrutiny) Act 2011,* the Government will continue to prepare statements of compatibility in relation to Bills that amend the Royal Commissions Act and certain legislative instruments made under the Royal Commissions Act.
>
> I note the Committee refers to particular examples of other legislation relating to the Royal Commissions Act that has been the subject of requests for information by the Committee. I understand that the Committee would have received responses to those requests.

1.109 While the assistant minister is correct in noting that the committee did receive a response in relation to matters raised previously, the human rights concerns raised are continuing.

1.110 Further, it is understood that the RC Act was legislated prior to the establishment of the committee, and for that reason, was never required to be subject to a foundational human rights compatibility assessment in accordance with the terms of the *Human Rights (Parliamentary Scrutiny) Act 2011*. However, in light of the existing human rights concerns with the RC Act, any extension of its provisions requires an assessment of how these interact with existing provisions. It would therefore be of considerable assistance if the RC Act were subject to a foundational human rights assessment.

Committee response

1.111 The committee thanks the Assistant Minister for his response and has concluded its examination of this issue.

1.112 The preceding analysis indicates that the *Royal Commission Act 1902* has a range of human rights implications.

1.113 The committee considers that the *Royal Commission Act 1902* would benefit from a full review of the human rights compatibility of the legislation.

1.114 The committee draws these matters to the attention of the Parliament.

Treasury Laws Amendment (2017 Measures No. 1) Bill 2017

Purpose	Amends the *Income Tax Assessment Act 1997* to ensure that investors who invest through an interposed trust are able to access specified capital gain concessions; and the *Australian Securities and Investments Commission Act 2001* to permit the sharing of confidential information by the Australian Securities and Investments Commission with the Commissioner of Taxation
Portfolio	Treasury
Introduced	House of Representatives, 16 February 2017 (passed both Houses of Parliament on 27 March 2017)
Right	Privacy (see **Appendix 2**)
Previous report	Report 4 of 2017
Status	Concluded examination

Background

1.115 The committee first reported on the Treasury Laws Amendment (2017 Measures No. 1) Bill 2017 (the bill) in its *Report 4 of 2017*, and requested a response from the Treasurer in relation to the human rights issues identified in that report by 26 May 2017.[25]

1.116 The bill passed both Houses of Parliament on 27 March 2017 and received royal assent on 4 April 2017.

1.117 The minister's response to the committee's inquiries was received on 8 June 2017. The response is discussed below and is reproduced in full at **Appendix 3**.

Sharing of confidential information with the Commissioner of Taxation

1.118 Schedule 2 of the bill amended subsection 127(2A) of the *Australian Securities and Investments Commission Act 2001* (ASIC Act) to allow the Australian Securities and Investments Commission (ASIC) to share confidential information with the Commissioner for Taxation (commissioner) without first needing to be satisfied that doing so would enable or assist the commissioner to perform or exercise their functions or powers.

25 Parliamentary Joint Committee on Human Rights, *Report 4 of 2017* (9 May 2017) 39-41.

Compatibility of the measure with the right to privacy

1.119 The right to privacy encompasses respect for informational privacy, including the right to respect for private information and private life, particularly the storing, use and sharing of personal and confidential information.

1.120 Schedule 2 of the bill engages and limits the right to privacy by allowing ASIC to share confidential information with the commissioner.

1.121 The statement of compatibility recognises that the right to privacy is engaged, but explains the measure as follows:

> The amendment to the process for ASIC to share information with the Commissioner of Taxation mirrors the existing power for the Commissioner of Taxation to share confidential information with ASIC under Division 355 of Schedule 1 to the *Taxation Administration Act 1953*. Mirroring the information sharing process between ASIC and the Commissioner of Taxation will enable effective and timely collaboration during investigations into illegal and high risk activities. The amendment is a reasonable change as it will allow ASIC and the Commissioner of Taxation to more effectively work together to ensure compliance with corporate and taxation laws.
>
> Furthermore, the amendment is appropriate as it will ensure that the process for ASIC to share confidential information with the Commissioner of Taxation is consistent with the process for ASIC to share confidential information with the Reserve Bank of Australia, the Australian Prudential Regulation Authority and the relevant Minister.
>
> …A simpler and more efficient information sharing arrangement between ASIC and the Commissioner of Taxation is justified as it will benefit the community by enabling better monitoring of illegal and other high-risk activities by the Commissioner of Taxation and strengthen corporate compliance with taxation law.[26]

1.122 Under the existing law, ASIC may share confidential information with the commissioner if ASIC is satisfied that the information will enable or assist the commissioner to perform or exercise their functions or powers. The initial analysis noted that this approach would already allow for the sharing of confidential information in fairly broad terms.

1.123 The objective of the measure appears to be to enable the commissioner to 'conduct timely compliance activity and better protect the integrity of Australia's tax system'.[27] The initial human rights analysis stated that, while this objective may be legitimate for the purposes of international human rights law, the statement of compatibility does not provide information to demonstrate how the existing law was

26 Explanatory memorandum (EM), statement of compatibility (SOC) 18-19.

27 EM, SOC 18.

ineffective in meeting this goal. The initial analysis noted it is therefore unclear whether the limitation on the right to privacy is proportionate to the stated objective; in particular, it is unclear whether the measure is the least rights restrictive approach to achieving the objective of the measure.

1.124 As noted in the previous analysis, the removal of the requirement for an assessment by ASIC that sharing confidential information would enable or assist the commissioner to fulfil relevant functions raises the concern that the measure is not sufficiently circumscribed. The statement of compatibility does not explain why such an assessment is no longer required, or has become inappropriate.

1.125 The assessment previously required by ASIC may have assisted to ensure that only necessary sharing of information took place. The statement of compatibility identifies safeguards which remain under the proposed legislation, including restrictions on the scope of information that can be requested by the commissioner, and Division 355 of Schedule 1 to the *Taxation Administration Act 1953*, which makes the unauthorised disclosure of confidential information an offence. However, the previous analysis noted that these safeguards alone do not appear to be sufficient to demonstrate that the limitation on the right to privacy is proportionate in light of the concerns raised above. For example, the statement of compatibility does not identify whether sufficient safeguards are in place to ensure that any unnecessary sharing of personal or confidential information will not have an adverse effect on individuals whose information has been shared.

1.126 Accordingly, the committee sought the advice of the Treasurer as to whether:

- there are less rights restrictive ways to achieve the objective of the measure; and
- there are safeguards in place to demonstrate that the limitation on the right to privacy is proportionate to the objective sought to be achieved.

Minister's response

1.127 The Minister for Finance provided some information in response to the committee's requests, including explaining the scope of previous information sharing provisions and how the new powers are intended to be used:

> Prior to the amendment made by the Bill, the Australian Securities and Investments Commission (ASIC) was able to share confidential information with the Commissioner of Taxation (ATO) on an ad hoc basis. Subsection 127(4) of the *Australian Securities and Investments Commission Act 2001* required the ASIC Chairperson, or their delegate, to be satisfied that sharing particular information would enable or assist the ATO to perform or exercise its functions or powers.
>
> The amendment in the Bill supports improved machine-to-machine data matching and sharing as it removes the need for the ASIC Chairperson, or their delegate, to be personally involved in the process. The approach is

> appropriate to achieve the objective of streamlining the process for ASIC to share confidential information with the ATO as it mirrors the existing arrangements already in place for ASIC to share information with the Reserve Bank of Australia, the Australian Prudential Regulation Authority and the responsible Minister.

1.128 In order to be a permissible limit on the right to privacy, regimes that permit the disclosure of personal and confidential information need to be sufficiently circumscribed. Disclosure of information should be restricted only to that private and confidential information which is strictly necessary to achieve the stated objective of the measure. However, the minister's response appears to confirm that the measure will be used for machine-to-machine data matching without any assessment of whether that information needs to be shared.

1.129 Further, the response does not address the committee's question as to whether the measure is the least rights restrictive means of achieving its stated objective. Indeed, the broad scope of the powers and their intended use in machine-to-machine data matching indicate that the measure may not be the least rights restrictive way of achieving its previously stated objective of 'conduct[ing] timely compliance activity and better protect the integrity of Australia's tax system'. As set out above, the ASIC chairperson or their delegate already had fairly broad information sharing powers that appeared capable of addressing this objective. The minister's response does not explain why requiring the ASIC chairperson or their delegate to be satisfied that sharing particular information would enable or assist the ATO to perform or exercise its functions or powers is no longer reasonably available. Accordingly, the measure does not appear to be the least rights restrictive way of achieving its stated objective as is required for it to be a proportionate limit on human rights.

1.130 It is noted in this respect that the minister's response now puts forward the objective of the measure as 'streamlining' processes. A legitimate objective—that is, one that is capable of justifying a proposed limitation of human rights—must address a pressing or substantial concern and not simply seek an outcome regarded as desirable or convenient. Streamlining data sharing processes across agencies is unlikely to satisfy this standard.

1.131 The minister's response also provides some information about relevant safeguards in relation to confidential and personal information:

> As outlined in the explanatory memorandum to the Bill, where ASIC has shared information with the ATO, the information remains protected from unauthorised disclosure as Division 355 of Schedule 1 to the *Taxation Administration Act 1953* makes the unauthorised disclosure of confidential information an offence. The legislation ensures that the confidential information ASIC shares with the ATO is subject to the same high level of protection from unauthorised disclosure as all other confidential information held by the ATO.

> Furthermore, the application of the Australian Privacy Principles and Australian Public Service Code of Conduct to the ATO and ASIC provides for additional protection of confidential information, particularly in relation to personal information.

1.132 The availability of safeguards is an important factor in ensuring that a measure is a proportionate limit on human rights. It is noted that the minister considers that the Australian Privacy Principles and Australian Public Service Code of Conduct will apply, although the minister does not explain which specific principles will apply to protect against the sharing of personal information by ASIC unless necessary.

Committee comment

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

1.134 Based on the information provided, the preceding analysis raises some concerns in relation to the right to privacy, insofar as it allows for the sharing of personal and confidential information without requiring any assessment that such sharing is necessary.

Mr Ian Goodenough MP

Chair