



Parliamentary Joint Committee on Human Rights

Human rights scrutiny report

Report 9 of 2017

5 September 2017

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ISSN 2204-6356 (Print)

ISSN 2204-6364 (Online)

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This document was prepared by the Parliamentary Joint Committee on Human Rights and printed by the Senate Printing Unit, Department of the Senate, Parliament House, Canberra.

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Committee information

Under the *Human Rights (Parliamentary Scrutiny) Act 2011* (the Act), the committee is required to examine bills, Acts and legislative instruments for compatibility with human rights, and report its findings to both Houses of the Parliament. The committee may also inquire into and report on any human rights matters referred to it by the Attorney-General.

The committee assesses legislation against the human rights contained in the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR); as well as five other treaties relating to particular groups and subject matter.¹ **Appendix 2** contains brief descriptions of the rights most commonly arising in legislation examined by the committee.

The establishment of the committee builds on Parliament's established tradition of legislative scrutiny. The committee's scrutiny of legislation is undertaken as an assessment against Australia's international human rights obligations, to enhance understanding of and respect for human rights in Australia and ensure attention is given to human rights issues in legislative and policy development.

Some human rights obligations are absolute under international law. However, in relation to most human rights, prescribed limitations on the enjoyment of a right may be justified under international law if certain requirements are met. Accordingly, a focus of the committee's reports is to determine whether any limitation of a human right identified in proposed legislation is justifiable. A measure that limits a right must be **prescribed by law**; be in pursuit of a **legitimate objective**; be **rationaly connected** to its stated objective; and be a **proportionate** way to achieve that objective (the **limitation criteria**). These four criteria provide the analytical framework for the committee.

A **statement of compatibility** for a measure limiting a right must provide a **detailed and evidence-based assessment** of the measure against the limitation criteria.

Where legislation raises human rights concerns, the committee's usual approach is to seek a response from the legislation proponent, or else draw the matter to the attention of the proponent on an advice-only basis.

More information on the committee's analytical framework and approach to human rights scrutiny of legislation is contained in Guidance Note 1 (see **Appendix 4**).

1 These are the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD); the Convention on the Elimination of Discrimination against Women (CEDAW); the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT); the Convention on the Rights of the Child (CRC); and the Convention on the Rights of Persons with Disabilities (CRPD).

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Chapter 1

New and continuing matters

- 1.1 This chapter provides assessments of the human rights compatibility of:
- bills introduced into the Parliament between 14 and 17 August (consideration of 1 bill from this period has been deferred);¹
 - legislative instruments received between 7 and 27 July (consideration of 2 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.
- 1.3 The committee has concluded its consideration of five bills and instruments that were previously deferred.³

Instruments not raising human rights concerns

- 1.4 The committee has examined the legislative instruments received in the relevant period, as listed in the *Journals of the Senate*.⁴ Instruments raising human rights concerns are identified in this chapter.
- 1.5 The committee has concluded that the remaining instruments do not raise human rights concerns, either because they do not engage human rights, they

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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 These are: Foreign Evidence (Certificate to Adduce Foreign Government Material - Prescribed Form) 2015 [F2017L00643] (first deferred in *Report 7 of 2017*); CASA EX74/17 - Exemption — DAMP organisations collecting and screening of oral fluid and urine body samples outside capital city areas [F2017L00837], the Criminal Code (Terrorist Organisation—Islamic State) Regulations 2017 [F2017L00838], the Criminal Code (Terrorist Organisation—Boko Haram) Regulations 2017 [F2017L00842], and the Competition and Consumer Amendment (Abolition of Limited Merits Review) Bill 2017 (deferred in *Report 8 of 2017*).
- 4 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.

contain only justifiable (or marginal) limitations on human rights or because they promote human rights and do not require additional comment.

Response required

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

Aged Care (Subsidy, Fees and Payments) Amendment Determination 2017 [F2017L00743]; Aged Care (Transitional Provisions) (Subsidy and Other Measures) Amendment Determination 2017 [F2017L00744]

Purpose	To implement a pause in the indexation of the amounts of the basic subsidy payable to approved providers of aged care services during 2017-2018
Portfolio	Aged Care
Authorising legislation	<i>Aged Care Act 1997; Aged Care (Transitional Provisions) Act 1997</i>
Last day to disallow	15 sitting days after tabling (tabled 8 August 2017)
Rights	Health; adequate standard of living (see Appendix 2)
Status	Seeking additional information

Pause in the indexation of the subsidy payments to aged care providers

1.7 Under the *Aged Care Act 1997* persons approved to provide aged care services (approved providers) may be eligible to receive subsidy payments in respect of aged care services they provide. The amount of subsidy is determined by the minister.

1.8 The Aged Care (Subsidy, Fees and Payments) Amendment Determination 2017 amends the Aged Care (Subsidy, Fees and Payments) Determination 2014 so as to implement a pause in the indexation of Aged Care Funding Instrument (ACFI) amounts of basic subsidy payable to approved providers of aged care services during 2017-2018. The Aged Care (Transitional Provisions) (Subsidy and Other Measures)

Amendment Determination implements the same pause in the indexation for continuing care recipients.⁵

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

1.9 The right to health includes the right to enjoy the highest attainable standard of physical and mental health, and to have access to adequate health care and live in conditions that promote a healthy life. The right to an adequate standard of living requires that the state take steps to ensure the adequacy and availability of food, clothing, water and housing for all people in Australia (see Appendix 2).

1.10 Australia also has obligations under the Convention on the Rights of Persons with Disabilities to provide persons with disabilities with the same range, quality and standard of free or affordable health care and programmes as provided to other persons, and to take appropriate steps to safeguard and promote the right of persons with disabilities to an adequate standard of living.

1.11 Australia has obligations to progressively realise the right to health and the right to an adequate standard of living using the maximum of resources available. Australia has a corresponding duty to refrain from taking retrogressive measures, or backwards steps, in relation to the realisation of these rights. A retrogressive measure is a type of limitation on an economic, social or cultural right.

1.12 The effect of pausing the indexation of the amount of the subsidy will be to reduce over time the value of the subsidy in real terms, which could consequently increase the cost of providing aged care services. This may represent a limitation on, or backward step in, the level of attainment of the right to the enjoyment of the highest attainable standard of physical and mental health. For example, reducing the value of the subsidy over time to aged care providers may impact on the ability of those providers to provide care and services to persons who require assistance. As those receiving aged care from approved providers may be in a condition of frailty or disability, Australia's human rights obligations to protect the right to health and adequate standard of living of persons with disabilities are also relevant.

1.13 A limitation on the right to health and the right to an adequate standard of living may be permissible provided that it is justified; that is, it addresses a legitimate objective, is effective to achieve (that is, rationally connected to) that objective and is a proportionate means to achieve that objective.

5 Continuing care recipients are those who entered a care service before 1 July 2014 and since that time have not left the service for a continuous period of more than 28 days (other than because the person is on leave), or before moving to another service, have not made a written choice to be subject to the new rules relating to fees and payments that took effect on 1 July 2014.

1.14 The statement of compatibility for each of the determinations provides that the pause in the indexation of the amount of the aged care subsidy is compatible with human rights 'as it promotes the human right to an adequate standard of living and the highest attainable standard of physical and mental health'.⁶ The statement of compatibility further states that:

The legislative instrument continues the rate of payment of the amount of basic subsidy payable to approved providers for the provision of care and services to people with a condition of frailty or disability who require assistance to achieve and maintain the highest attainable standard of physical and mental health.⁷

1.15 The statement of compatibility does not address whether pausing the indexation of the amount of the subsidy constitutes a retrogressive measure, and does not provide any information to justify such a limitation.

1.16 In relation to the objective of the measure, the statement of compatibility explains the measure is 'to ensure the sustainability of existing funding arrangements'.⁸ It is recognised that ensuring that funding for aged care is sustainable is an important objective and that the state must give priority to ensuring the right to health of the least well-off members of society.

1.17 However, no evidence has been provided in the explanatory statement or statement of compatibility that explains why the existing funding arrangement is not sustainable.

1.18 Further, no information is provided in the statement of compatibility as to whether the limitation is proportionate to the achievement of the stated objective, and whether the measure is the least rights restrictive alternative. In this respect, it should also be noted that information regarding the number of approved providers that may be affected by the pausing of indexation of the amount of the subsidy, and any anticipated financial impact on the provision of aged care services, are likely to be relevant.

Committee comment

1.19 The preceding analysis raises questions as to whether the pause of indexation is compatible with the right to health and the right to an adequate standard of living.

1.20 The committee therefore seeks the advice of the minister as to:

- **what effect the pausing of indexation will have on the level of attainment of the right to health and the right to an adequate standard of living;**

6 Statement of Compatibility (SOC) 4

7 SOC 4.

8 SOC 4.

- **whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the measure is otherwise aimed at achieving a legitimate objective;**
- **how the measure is effective to achieve (that is, rationally connected to) the objective; and**
- **whether the limitation is reasonable and proportionate for the achievement of that objective (including whether there are any safeguards in relation to the measure, information regarding the number of approved providers that may be affected by the pausing of indexation of the amount of the subsidy, and any anticipated financial impact on the provision of aged care services).**

Australian Border Force Amendment (Protected Information) Bill 2017

Purpose	This bill seeks to amend the <i>Australian Border Force Act 2015</i> to repeal the definition of 'protected information' in subsection 4(1) of the Act; remove the current requirement for bodies to which information can be disclosed and classes of information to be prescribed in the Australian Border Force (Secrecy and Disclosure) Rule 2015; and add new permitted purposes for which 'Immigration and Border Protection information' can be disclosed to the Act
Portfolio	Immigration and Border Protection
Introduced	House of Representatives, 9 August 2017
Rights	Freedom of expression; effective remedy (see Appendix 2)
Status	Seeking additional information

Background

1.21 The committee previously examined the Australian Border Force Bill 2015 (now Act) in its *Twenty-Second Report of the 44th Parliament* and its *Thirty-Seventh Report of the 44th Parliament*.¹

Secrecy provisions

1.22 Currently, section 42 of the *Australian Border Force Act 2015* (the Border Force Act) provides that a person commits an offence if they are, or have been, an 'entrusted person' such as an immigration and border protection worker and they disclose protected information.² 'Protected information' includes any information that was obtained by the person in their capacity as an immigration and border protection worker.³ The offence includes limited exceptions and is subject to up to two years imprisonment.

1 Parliamentary Joint Committee on Human Rights, *Twenty-Second Report of the 44th Parliament* (13 May 2015) 5-23; *Thirty-Seventh Report of the 44th Parliament* (2 May 2016) 5-35.

2 'Entrusted person' means: (a) the Secretary; or (b) the Australian Border Force Commissioner (including in his or her capacity as the Comptroller-General of Customs); or (c) an Immigration and Border Protection worker: Border Force Act section 4.

3 'Immigration and Border Protection worker' is defined broadly to include APS employees in the department; officers of state and territory governments; a person providing services to the department; a contractor performing services for the department: Border Force Act section 4.

1.23 The bill proposes replacing the current definition of 'protected information' in the Border Force Act with a new definition of 'Immigration and Border Protection Information' the disclosure of which would constitute an offence. The proposed definition of 'Immigration and Border Protection information' under proposed section 4(1) includes:

- (a) information the disclosure of which would or could reasonably be expected to prejudice the security, defence or international relations of Australia;
- (b) information the disclosure of which would or could reasonably be expected to prejudice the prevention, detection or investigation of, or the conduct of proceedings relating to, an offence or a contravention of a civil penalty provision;
- (c) information the disclosure of which would or could reasonably be expected to prejudice the protection of public health, or endanger the life or safety of an individual or group of individuals;
- (d) information the disclosure of which would or could reasonably be expected to found an action by a person (other than the Commonwealth) for breach of a duty of confidence;
- (e) information the disclosure of which would or could reasonably be expected to cause competitive detriment to a person;
- (f) information of a kind prescribed in an instrument under subsection (7).⁴

1.24 Accordingly, the new definition narrows the type of information which, if recorded or disclosed, would make a person liable to prosecution under section 42 of the Border Force Act. However, the offence of recording or disclosing such information continues to apply to all those defined as 'entrusted persons'.

1.25 Proposed section 4(5) provides that the kind of information which is taken to prejudice security, defence or international relations includes 'information that has a security classification'.⁵ There is no definition in the bill of what a 'security classification' means.

Compatibility of the measure with the right to freedom of expression

1.26 The right to freedom of expression requires the state not to arbitrarily interfere with freedom of expression, particularly restrictions on political debate.

1.27 In the time since section 42 of the Border Force Act was introduced, concerns have been raised by United Nations (UN) supervisory mechanisms about its

4 See item 1, proposed section 4(1) definition of 'Immigration and Border Protection information', paragraph (a).

5 See item 5, proposed section 4(5)(a).

operation and its chilling effect on freedom of expression. The UN special rapporteur on human rights defenders indicates that the provisions are incompatible with the right to freedom of expression:

I urge the Government to urgently review the Border Force Act's provisions that seem to be in contravention with human rights principles, including those related to the freedom of expression, and substantially strengthen the Public Interest Disclosure framework to ensure effective protection to whistleblowers.⁶

1.28 A determination in September 2016, by the secretary of the Department of Immigration and Border Protection, which exempted medical professionals from secrecy provisions, provided greater scope for such professionals to exercise freedom of expression about issues in immigration detention centres including potential human rights violations.⁷

1.29 However, the UN Special Rapporteur on the human rights of migrants, in his report on his mission to Australia, explains that despite this exemption, section 42 of the Border Force Act continues to have a serious impact on freedom of expression:

Civil society organizations, whistleblowers, trade unionists, teachers, social workers and lawyers, among many others, may face criminal charges under the Australian Border Force Act for speaking out and denouncing the violations of the rights of migrants. The Special Rapporteur welcomes the fact that health professionals have recently been excluded from these provisions and hopes that this will also extend to other service providers who are working to defend the rights of migrants in a vulnerable situation.⁸

1.30 By narrowing the type of information the disclosure of which would constitute an offence, the proposed measures and framework in the bill appear to provide a greater scope to freedom of expression than is currently the case under section 42 of the Border Force Act. This is a positive step. That the new scheme will apply retrospectively so that persons who may otherwise have committed a criminal offence will not have done so, is also positive from this perspective.

6 Michel Forst, *End of mission statement by United Nations Special Rapporteur on the situation of human rights defenders Visit to Australia*, 18 October 2016
<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20689&LangID=E>

7 See, *Determination of Immigration and Border Protection Workers – Amendment No. 1*, 30 September 2016. This amendment was made under sections 5(1)-(2) of the Border Force Act and section 33(3) of the *Acts Interpretation Act 1901* and is not required to be registered or tabled in parliament and therefore is not subject to parliamentary scrutiny.

8 François Crépeau, *Report of the Special Rapporteur on the human rights of migrants on his mission to Australia and the regional processing centres in Nauru*, Thirty-fifth session, Human Rights Council, A/HRC/35/25/Add.3 (24 April 2017) [86].

1.31 However, by continuing to criminalise the disclosure of information, the proposed secrecy provisions continue to engage and limit the right to freedom of expression.

1.32 Measures limiting the right to freedom of expression may be permissible where the measure pursues a legitimate objective, is rationally connected to that objective, and is a proportionate way to achieve that objective.

1.33 The statement of compatibility acknowledges that the measure engages and limits the right to freedom of expression but argues that the limitations are 'in line with the exceptions specifically envisaged... such as protection of national security, public order, or public health or morals'.⁹ While generally these matters are capable of constituting legitimate objectives for the purposes of international human rights law, the statement of compatibility provides no specific information about the importance of these objectives in the context of the measure. In order to show that the measure constitutes a legitimate objective for the purposes of international human rights law, a reasoned and evidence-based explanation of why the measure addresses a substantial and pressing concern is required.

1.34 The statement of compatibility further provides limited information as to whether the limitation imposed by the measure is rationally connected to (that is, effective to achieve) and proportionate to, these stated objectives.

1.35 In relation to the proportionality of the measure, concerns remain as to whether the measure is sufficiently circumscribed in respect of its stated objectives. The range of 'Immigration and Border Protection information' subject to the prohibition on disclosure remains broad, criminalising expression on a broad range of matters by a broad range of people, including Australian Public Service employees in the department; officers of state and territory governments; people providing services to the department; and contractors performing services for the department such as social workers, teachers or lawyers. As set out above at [1.23], 'Immigration and Border Protection information' is defined to include 'information the disclosure of which would or could reasonably be expected to prejudice the security, defence or international relations of Australia' as well as a broad range of other matters including a broad power to define other types of documents as 'Immigration and Border Protection information' through legislative instrument.¹⁰ The breadth of the current and possible definitions of 'Immigration and Border Protection information' raises concerns as to whether the limitation is proportionate.

1.36 Further, proposed section 4(5) provides that the kind of information which is taken to prejudice security, defence or international relations, includes 'information

9 Statement of compatibility (SOC) 16.

10 See item 1, proposed section 4(1) definition of 'Immigration and Border Protection information', paragraph (a).

that has a security classification'.¹¹ The explanatory memorandum states that this 'picks up the Australian Government's *Protective Security Policy Framework*' and the security classifications 'reflect the level of damage done to the national interest, organisations and individuals, of unauthorised disclosure, or compromise of the confidentiality, of information'.¹² The explanatory memorandum provides some examples of the broad range of information that has a security classification:

- new policy proposals and associated costing information marked as Protected or Cabinet-in-Confidence;
- other Cabinet documents, including Cabinet decisions;
- budget related material, including budget related material from other government departments; and
- adverse security assessments and qualified adverse security assessments of individuals from other agencies.¹³

1.37 No information is provided in the statement of compatibility as to how the application of the prohibition on disclosure to this type of information is necessary to achieve the stated objective of the measure. This raises a concern that the measure may not be the least rights restrictive way of achieving its stated objectives and may be overly broad.

1.38 Additionally, proposed section 50A provides that if an offence against section 42 relates to information that has a security classification, a prosecution must not be initiated 'unless the Secretary has certified that it is appropriate that the information had a security classification at the time of the conduct'.¹⁴ The explanatory memorandum states that the purpose of the provision is to ensure that a person cannot be prosecuted where 'it was not appropriate that the information had a security classification'.¹⁵ This suggests that there may be circumstances where information has a security classification which was not appropriately applied. As such, proposed section 50A appears to be a relevant safeguard in relation to the operation of the measure.

1.39 However, if the Secretary does certify that the information was appropriately classified, there does not appear to be any defence on the basis that the information was inappropriately classified. As such, it does not appear that an inappropriate security classification would be a matter that a court could consider in determining whether a person had committed an offence under section 42.

11 See item 5, proposed paragraph 4(5)(a).

12 Explanatory memorandum (EM) 15.

13 EM 15.

14 See item 21, proposed section 50A.

15 EM 18.

1.40 Accordingly, the breadth of the measure in criminalising expression by ‘entrusted persons’ on the full range of topics set out in the new definition of ‘Immigration and Border Protection information’ raises concerns that the measure is not a proportionate limitation on freedom of expression.

Committee comment

1.41 The measure engages and limits the right to freedom of expression.

1.42 The proposed measure in the bill appears to provide a greater scope to freedom of expression than is currently the case.

1.43 The preceding analysis raises questions about whether the measure imposes a proportionate limit on this right.

1.44 The committee therefore seeks the advice of the minister 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; and**
- **whether the limitation is a reasonable and proportionate measure to achieve the stated objective; and**
- **whether it is possible to narrow the range of information to which the offence in section 42 applies or provide greater safeguards including in relation to whether a document is inappropriately classified.**

Compatibility of the measure with the right to an effective remedy

1.45 The right to an effective remedy requires states parties to ensure a right to an effective remedy for violations of human rights. The prohibition on disclosing information may also affect human rights violations coming to light and being addressed as required by the right to an effective remedy. That is, the prohibition on disclosing information may adversely affect the ability of individual members of the public to know about possible violations of rights and seek redress. This may be particularly the case in the immigration detention context where there may be limited other mechanisms for such issues to be addressed.

1.46 The engagement of this right was not addressed in the statement of compatibility and accordingly no assessment was provided about this issue.

Committee comment

1.47 The preceding analysis raises questions about whether the measure is compatible with the right to an effective remedy. This right was not addressed in the statement of compatibility.

1.48 The committee therefore seeks the advice of the minister as to whether the measure is compatible with the right to an effective remedy.

Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2017

Purpose	Seeks to amend the <i>Fair Work (Registered Organisations) Act 2009</i> to expand the grounds upon which a person can be disqualified from holding office in a union; expand the grounds upon which the registration of unions may be cancelled; expand the grounds for a union to be placed into administration and provide a public interest test for amalgamations
Portfolio	Employment
Introduced	House of Representatives, 16 September 2017
Rights	Freedom of association; to form and join trade unions; just and favourable conditions at work; presumption of innocence (see Appendix 2)
Status	Seeking additional information

The right to freedom of association and the right to form and join trade unions

1.49 The Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2017 (the bill) contains a number of schedules which impact on the internal functioning of trade unions.

1.50 The right to freedom of association includes the right to form and join trade unions. The right to just and favourable conditions of work also encompasses the right to form trade unions. These rights are protected by the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).¹

1.51 The interpretation of these rights is informed by International Labour Organization (ILO) treaties, including the ILO Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize (ILO Convention No.87) and the ILO Convention of 1949 concerning the Right to Organise and Collective Bargaining (ILO Convention No. 98).² ILO Convention 87 protects the right of workers to autonomy of union processes including electing their own representatives in full freedom, organising their administration and activities and formulating their own programs without interference.³ Convention 87 also protects

1 See, article 22 of the ICCPR and article 8 of the ICESCR.

2 The Freedom of Association and Protection of the Right to Organize (ILO Convention No. 87) is expressly referred to in the ICCPR and the ICESCR.

3 See ILO Convention N.87 article 3.

unions from being dissolved, suspended or de-registered and protects the right of workers to form organisations of their own choosing.⁴

1.52 A number of measures in this bill, by limiting the ability of unions to govern their internal processes, engage and limit these rights.

Disqualification of individuals from holding office in a union

1.53 Schedule 1 of the bill would expand the circumstances in which a person may be disqualified from holding office in a registered organisation and make it a criminal offence for a person who is disqualified from holding office in a registered organisation to continue to hold office or act in a manner that would significantly influence the organisation.⁵

1.54 Specifically, the Fair Work Commissioner, the minister or another person with sufficient interest may apply to the Federal Court for an order disqualifying a person from holding office in a union. The Federal court may disqualify a person if satisfied that a ground for disqualification applies and it would not be unjust to disqualify the person having regard to the nature of the ground, the circumstances and any other matters the court considers relevant. Under proposed section 223 the grounds for the disqualification include:

- a 'designated finding' or contempt of court;
- a 'wider criminal finding' or contempt of court; or
- two or more failures to take reasonable steps to prevent such conduct by a union while the person was an officer of that union;
- corporate impropriety; or
- a person is not a 'fit and proper' person having regard to a range of factors.⁶

1.55 Under proposed section 9C, a 'designated finding' is defined to include a finding that a person has contravened a civil penalty provision of industrial laws or committed particular criminal offences.⁷ 'Wider criminal finding' is defined to include

4 See ILO Convention N.87 articles 2, 4. See, also, *ILO Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO*, Fifth Edition (2006) [292]-[308].

5 Explanatory Memorandum (EM) 2.

6 See proposed section 223, grounds for disqualification, item 9.

7 This includes contravening a civil penalty provision or committing a criminal offence under any of the following laws: *Fair Work Act 2009* (Fair Work Act); *Fair Work (Registered Organisations) Act 2009*; *Building and Construction Industry (Improving Productivity) Act 2016* (ABCC Act); Part IV of the *Competition and Consumer Act 2010*; *Work Health and Safety Act 2011*; each State or Territory OHS law Part 7.8 of the *Criminal Code* (causing harm to, and impersonation and obstruction of, Commonwealth public officials): See definition of designated law proposed section 9C(2), schedule 1, item 2.

that the person has committed an offence against any law of the Commonwealth or a State or Territory.⁸

Compatibility of the measure with the right to freedom of association and the right to just and favourable conditions at work

1.56 Expanding the circumstances in which individuals can be disqualified from holding office in a union engages and limits the right to freedom of association, the right to just and favourable conditions at work and in particular the right of unions to elect their own leadership freely. International supervisory mechanisms have explained the scope of this right and noted that:

The right of workers' organizations to elect their own representatives freely is an indispensable condition for them to be able to act in full freedom and to promote effectively the interests of their members. For this right to be fully acknowledged, it is essential that the public authorities refrain from any intervention which might impair the exercise of this right, whether it be in determining the conditions of eligibility of leaders or in the conduct of the elections themselves.⁹

1.57 The right to freedom of association may be subject to permissible limitations providing certain conditions are met. Generally, to be capable of justifying a limit on human rights, the measure must address a legitimate objective, be rationally connected to that objective and be a proportionate way to achieve that objective. Further, article 22(3) of the ICCPR and article 8 of the ICESCR expressly provide that no limitations are permissible on this right if they are inconsistent with the guarantees of freedom of association and the right to collectively organise contained in the ILO Convention No. 87.

1.58 The statement of compatibility identifies the objective of the measure as 'improving the governance of registered organisations and protecting the interests of members'.¹⁰ It points to evidence from the Final Report of the Royal Commission into Trade Union Governance and Corruption (Heydon Royal Commission) in support of this objective.¹¹ The statement of compatibility further explains that the measure, by ensuring the leadership of unions act lawfully, addresses these objectives.¹² The objective identified is likely to constitute a legitimate objective for the purposes of international human rights law.

8 Proposed section 9C(2).

9 ILO, *Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO*, Fifth Edition (2006) [391].

10 Statement of compatibility (SOC) viii.

11 SOC v, viii.

12 SOC viii.

1.59 The statement of compatibility further provides that the measure is a proportionate limitation and notes that the Federal Court will supervise the disqualification process.¹³ While it is a relevant safeguard that disqualification orders are to be made by the Federal Court, it is unclear that this alone is sufficient to ensure that the measure constitutes a proportionate limitation. Relevantly, conduct that could result in disqualification is extremely broad and includes a 'designated finding', that is, a finding of a contravention of an industrial relations law (including contraventions that are less serious in nature). This would include taking unprotected industrial action.¹⁴

1.60 As noted previously, as an aspect of the right to freedom of association, the right to strike is protected and permitted under international law. The existing restrictions on taking industrial action under Australian domestic law have been consistently criticised by international supervisory mechanisms as going beyond what is permissible.¹⁵ It appears that the proposed measure could lead to the disqualification of an individual for conduct that may be protected as a matter of international law. In this respect the measure would appear to further limit the right to strike. Additionally, this aspect of the measures raises questions about its rational connection to the stated objective of protecting the interests of members, where members may be of the view that taking particular forms of industrial action are in their interests.

1.61 It is further noted that under the proposed measure, a person may be disqualified from holding office in a union on the basis of their failure to prevent two or more contraventions by their union that amount to a 'designated finding' or a

13 SOC ix.

14 SOC vi.

15 See, UN Committee on Economic Social and Cultural Rights (UNCESCR), *Concluding Observations on Australia*, E/C.12/AUS/CO/5 (23 June 2017) [29]-30: 'The Committee is also concerned that the right to strike remains constrained in the State party (art. 8). The Committee recommends that the State party bring its legislation on trade union rights into line with article 8 of the Covenant and with the provisions of the relevant International Labour Organization (ILO) Conventions (nos. 87 and 98), particularly by removing penalties, including six months of incarceration, for industrial action, or the secret ballot requirements for workers who wish to take industrial action'. See, also, ILO CEACR, *Observation Concerning Freedom of Association and Protection of the Right to Organise Convention*, 1948 (No. 87), Australia, 103rd ILC session, 2013; ILO CEACR, *Observation Concerning Freedom of Association and Protection of the Right to Organise Convention*, 1948 (No. 87), Australia, 101st ILC session, 2013; ILO CEACR, *Observation Concerning Freedom of Association and Protection of the Right to Organise Convention*, 1948 (No. 87), Australia, 99th ILC session, 2009; ILO CEACR, *Individual Observation Concerning the Right to Organise and Collective Bargain Convention*, 1949, (No. 98), Australia, 99th session, 2009. See also, UNCESCR, *Concluding Observations on Australia*, E/C.12/AUS/CO/4 (12 June 2009) 5.

'wider criminal finding' or contempt of court. As noted above, 'designated findings' are defined to apply in relation to a broad range of contraventions of industrial law including taking unprotected industrial action. Where a union has engaged in two or more such contraventions, the effect of the measure could be that the entire elected union leadership could be subject to disqualification. This is regardless of whether or not union members agreed to participate in, for example, conduct which lead to 'designated findings' or contempt of court and whether they considered that this was in their best interests.

1.62 In this respect, the disqualification process may have a very extensive impact on freedom of association more broadly. It is unclear from the information provided in the statement of compatibility how the breadth and impact of this measure is rationally connected to the stated objective of 'improving the governance of registered organisations and protecting the interests of members' and whether the measure is the least rights restrictive way of achieving this objective as required in order to be a proportionate limitation on human rights.

Committee comment

1.63 The preceding analysis raises questions as to whether the measure is compatible with the right to freedom of association, the right to just and favourable conditions at work and, in particular, the right of unions to elect their own leadership freely and the right to strike.

1.64 The committee requests the further advice of the minister 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 (in particular, whether the measure is the least rights restrictive way of achieving its stated objective; the extent of the limitation including in respect of the right to strike, noting previous concerns raised by international supervisory mechanisms; and the existence of relevant safeguards).**

Cancellation of registration of registered organisations

1.65 The registration of a union under the *Fair Work (Registered Organisations) Act 2009* (Registered Organisations Act) grants the organisation a range of rights and responsibilities including representing the interests of its members.¹⁶ The bill seeks to expand the grounds for the cancellation of the registration of unions under the Registered Organisations Act. Under proposed section 28, the Fair Work Commissioner, the minister or another person with sufficient interest can apply to

16 See, *Fair Work (Registered Organisations) Act 2009* (including the right to represent members.)

the Federal Court for an order cancelling registration of an organisation, if the person considers there are grounds for such cancellation. These grounds include:

- A substantial number of officers or two or more senior officers have engaged in conduct abusing their position, perverted the course of justice, engaged in corruption, acted in their own interests rather than the interests of the members of the whole, conducted affairs of the organisation in a manner that is oppressive or prejudicial to a class of members or contrary to the interests of the members as a whole;¹⁷
- 2 or more 'designated findings' or 'wider criminal findings' have been made against the organisation;¹⁸
- The organisation is found to have committed a serious criminal offence (defined as an offence punishable by at least 1,500 penalty units);¹⁹
- That there have been multiple 'designated findings' against members;²⁰
- That the organisation has failed to comply with an order or injunction; or
- That the organisation or a substantial number of members have organised or engaged in 'obstructive industrial action'.²¹

1.66 Under proposed section 28K, if the court finds that a ground is established it must cancel the organisation's registration unless the organisation can satisfy the court that it would be unjust to cancel its registration (having regard to the nature of the matters constituting that ground; the action (if any) that has been taken by or against the organisation; the best interests of the members of the organisation as a whole and any other matters the court considers relevant).

17 See proposed section 28C.

18 Under proposed section 9C a 'designated finding' is defined to include a finding that a person has contravened a civil penalty provision or committed a criminal offence under any of the following laws: *Fair Work Act 2009* (Fair Work Act); *Fair Work (Registered Organisations) Act 2009*; *Building and Construction Industry (Improving Productivity) Act 2016* (ABCC Act); Part IV of the *Competition and Consumer Act 2010*; *Work Health and Safety Act 2011*; each State or Territory OHS law; or Part 7.8 of the *Criminal Code* (causing harm to, and impersonation and obstruction of, Commonwealth public officials): See definition of 'designated law' in proposed section 9C(2), schedule 1, item 2. 'Wider criminal finding' is defined to include that the person has committed an offence against any law of the Commonwealth or a State or Territory.

19 See proposed section 28E.

20 See proposed section 28F.

21 See proposed section 28H. The section covers industrial action other than protected industrial action that prevented, hindered or interfered with a federal system employer or the provision of any public service and that had or is having a substantial adverse impact on the safety, health or welfare of the community or part of the community.

1.67 The Federal Court would also be empowered to make a range of alternative orders including the disqualification of certain officers, the exclusion of certain members or the suspension of the rights of the organisation.²²

Compatibility of the measure with the right to freedom of association and the right to just and favourable conditions at work

1.68 By expanding the grounds upon which unions can be de-registered or suspended, the measure engages and limits the right to freedom of association and the right to just and favourable conditions at work. In this respect, it is noted that international supervisory mechanisms have recognised the importance of registration as 'an essential facet of the right to organize since that is the first step that workers' or employers' organizations must take in order to be able to function efficiently, and represent their members adequately'.²³ They have further noted that 'the dissolution of trade union organizations is a measure which should only occur in extremely serious cases' noting the serious consequences for the representation of workers.²⁴

1.69 Although the statement of compatibility contends that this measure does not limit the ability of individuals to form and join trade unions, it nevertheless provides some information as to whether the limitation on the right to freedom of association is permissible.²⁵ It states that the measure has the:

...sole objective of protecting the interests of members and guaranteeing the democratic functioning of organisations under the stewardship of officials and a membership that respects the law and thus maintains public order.²⁶

1.70 However, this statement appears to identify multiple objectives and does not provide evidence as to which, if any of these objectives addresses a substantial and pressing concern.

1.71 Even if the protection of the interests of members and/or the democratic functioning of unions and/or the maintenance of public order are to be considered legitimate objectives, it must be shown that the limitation imposed by the measure is effective to achieve (rationally connected to) and proportionate to these stated objectives.

22 Proposed sections 28N-28Q.

23 ILO Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO, Fifth Edition (2006) [295].

24 ILO Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO, Fifth Edition (2006) [696], [699].

25 SOC ix.

26 SOC ix.

1.72 The statement of compatibility argues that the measure addresses the costly and lengthy deregistration process and will 'facilitate the continued existence and functioning of an organisation or some of its component parts in circumstances in which one part of the organisation is affected by maladministration or dysfunction associated with a culture of lawlessness'.²⁷ While the measures may undoubtedly make the deregistration of unions easier, many of the grounds for cancellation could relate to less serious contraventions of industrial law or to taking unprotected industrial action such that it is unclear how the cancellation of union registration would necessarily be in the interests of members or would guarantee the democratic functioning of the organisation. For example, union members may have democratically decided to take unprotected industrial action and hold the view it is in their best interests.

1.73 As set out above at [1.60], restrictions on taking industrial action in Australian domestic law have been subject to serious criticisms by international treaty monitoring bodies as going beyond permissible limitations on the right to strike as an aspect of the right to freedom of association. Cancelling the registration of unions for undertaking such conduct further limits the right to freedom of association. It is further noted that the court would be empowered to exclude particular members from union membership in a way that would appear to undermine their capacity to be part of a union of their choosing. The breadth of the proposed power to cancel union registration raises specific questions about whether it is sufficiently circumscribed with respect to its stated objectives.

1.74 The statement of compatibility provides some arguments about the proportionality of the measure and in particular notes the availability of certain safeguards. These include that orders for cancellation may be limited to part of an organisation that has been undertaking the conduct and that workers will still be entitled to be represented by a union. These do not appear sufficient to ensure that the limitation is the least rights restrictive way to achieving its stated objectives, in view of the breadth of the grounds for cancellation of union registration set out above.

Committee comment

1.75 The preceding analysis raises questions as to whether the measure is compatible with the right to freedom of association and the right to just and favourable conditions at work.

1.76 The committee requests the further advice of the minister as to:

- **whether there is reasoning or evidence that establishes that one or more of the stated objectives addresses a pressing or substantial concern, or**

27 SOC ix.

whether the proposed changes are otherwise aimed at achieving a legitimate objective;

- **how the measure is effective to achieve (that is, rationally connected to) its stated objective;**
- **whether the limitation is a reasonable and proportionate measure to achieve the stated objective (in particular, whether the grounds for cancellation of registration are sufficiently circumscribed); and**
- **the extent of the limitation in respect of the right to strike noting previous concerns raised by international supervisory mechanisms.**

Placing unions into administration

1.77 The bill seeks to expand the grounds for a remedial scheme to be approved by the Federal Court including through the appointment of an administrator.²⁸

1.78 Proposed new section 323 enables the Federal Court to make a declaration on a number of bases including that 'an organisation or part of an organisation has ceased to exist or function effectively'.

1.79 New subsection 323(4) provides that an organisation will have ceased to function effectively if the Court is satisfied that officers of the organisation or a part of an organisation have: 'on multiple occasions, contravened designated laws; or misappropriated funds of the organisation or part; or otherwise repeatedly failed to fulfil their duties as officers of the organisation or part of the organisation'.²⁹

1.80 If a court makes a declaration under section 324 then it may order a scheme to resolve the circumstances of the declaration including providing for the appointment of an administrator; reports to be given to a court; when the scheme begins and ends and when elections (if any) are to be held.³⁰

Compatibility of the measure with the right to freedom of association and the right to just and favourable conditions at work

1.81 By allowing for unions to be placed into administration, the measure engages and limits the right to freedom of association and in particular the right of unions to organise their internal administration and activities and to formulate their own programs without interference. International supervisory mechanisms noted that '[t]he placing of trade union organizations under control involves a serious danger of

28 SOC x.

29 Proposed section 323.

30 Proposed section 323A.

restricting the rights of workers' organizations to elect their representatives in full freedom and to organize their administration and activities'.³¹

1.82 The statement of compatibility states that the measure has the:

...the sole objective of protecting the interests of members and guaranteeing the democratic functioning of organisations under the stewardship of officials and a membership that respects the law and thus maintains public order.³²

1.83 This is the same objective which was identified above. As noted above, the statement of compatibility appears to identify multiple objectives and it is unclear from the information provided whether each of these objectives addresses a substantial and pressing concern as required under international human rights law.

1.84 In relation to the proportionality of the measure, the statement of compatibility identifies a range of matters which do not address the proportionality of the measure but rather address the aims or goals of the regime.³³ The test of proportionality is concerned with whether a measure is sufficiently circumscribed in relation to its stated objective, including the existence of effective safeguards. In this respect, concerns arise regarding the scope of conduct that may lead a union to be placed into administration. Given the potential breadth of the definition of 'designated laws',³⁴ the proposed measure makes it possible for a declaration to be made in relation to less serious breaches of industrial law or for taking unprotected industrial action. The consequences of placing a union under administration may have significant consequences in terms of the representational rights of employees and any current campaigns or disputes.

Committee comment

1.85 The preceding analysis raises questions as to whether the measure is compatible with the right to freedom of association and the right to just and favourable conditions at work.

1.86 The committee requests the further advice of the minister as to:

- **whether there is reasoning or evidence that establishes that one or more of the stated objectives addresses a pressing or substantial concern, or whether the proposed changes are otherwise aimed at achieving a legitimate objective;**

31 ILO Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO, Fifth Edition (2006) [450].

32 SOC x.

33 SOC x.

34 'Designated law' has the meaning given in proposed section 9C(a) and includes industrial laws.

- **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 (in particular, whether the grounds for placing unions under administration are sufficiently circumscribed).**

Introduction of a public interest test for amalgamations of unions

1.87 Under proposed section 72A, before fixing a date for an amalgamation of unions, the Fair Work Commission must decide that the amalgamation is in the 'public interest'.³⁵ In determining whether an amalgamation is in the 'public interest' the Fair Work Commission must have regard to a range of factors including record of compliance with the law, the impact of the amalgamation on employees and employees in the industry and any other matters. In relation to compliance with the law, the Fair Work Commission must decide that the amalgamation is not in the public interest if the organisation has a record of not complying with the law.³⁶

Compatibility of the measure with the right to freedom of association and the right to just and favourable conditions at work

1.88 By inserting a public interest test in relation to the amalgamations the measure engages and limits the right to freedom of association, and particularly the right to form associations of one's own choosing. International supervisory mechanisms have noted concerns with measures that limit the ability of unions to amalgamate stating that '[t]rade union unity voluntarily achieved should not be prohibited and should be respected by the public authorities'.³⁷

1.89 The statement of compatibility identifies the objective of the measure as 'enhancing relations within workplaces and to reduce the adverse effects of industrial disputation'.³⁸ No information is provided as to whether this addresses a pressing and substantial concern as required to constitute a legitimate objective for the purposes of international human rights law. It cannot be assumed that industrial disputes necessarily have adverse effects given that the right to take industrial action is protected as a matter of international law. In this respect, international treaty monitoring bodies have consistently viewed this right 'by workers and their

35 See proposed section 72A.

36 See proposed section 72D.

37 ILO, Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO, Fifth Edition (2006) [332].

38 SOC x.

organizations as a legitimate means of defending their economic and social interests'.³⁹

Committee comment

1.90 The preceding analysis raises questions as to whether the measure is compatible with the right to freedom of association and the right to just and favourable conditions at work.

1.91 The committee requests the further advice of the minister as to:

- whether the measure pursues a legitimate objective for the purposes of international human rights law;
- 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 (in particular, whether the measure is the least rights restrictive way of achieving its stated objective, whether the measure is sufficiently circumscribed, the extent of the limitation including in respect of the right to strike noting previous concerns raised by international supervisory mechanisms and the existence of relevant safeguards).

39 ILO, Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO, Fifth Edition (2006) [521].

Financial Framework (Supplementary Powers) Amendment (Attorney-General's Portfolio Measures No. 2) Regulations 2017 [F2017L00822]

Purpose	Establishes legislative authority for the government to fund the National Facial Biometric Matching Capability
Portfolio	Finance
Authorising legislation	<i>Financial Framework (Supplementary Powers) Act 1997</i>
Last day to disallow	15 sitting dates after tabling (tabled 8 August 2017)
Right	Privacy (see Appendix 2)
Status	Seeking additional information

Funding of National Facial Biometric Matching Capability

1.92 The Financial Framework (Supplementary Powers) Amendment (Attorney-General's Portfolio Measures No. 2) Regulations 2017 (the regulations) establish legislative authority for the government to fund the National Facial Biometric Matching Capability (the Capability).

1.93 The Capability will allow the sharing and matching of facial images as well as biometric information between agencies through a central interoperability Hub (the Hub). It will also allow participating agencies to access the National Driver Licence Facial Recognition Solution (the Solution) which will make driver licence facial images available.¹

1.94 The explanatory statement states that the Hub and the Solution are being built to support a range of face matching services:

- the Face Verification Service (FVS) enables a facial image and associated biographic details of a person to be compared on a one-to-one basis against an image held on a specific government record for that same individual; and
- the Face Verification Service (FIS) searches or matches facial images on a one-to-many basis to help determine the identity of an unknown person, or detect instances where a person may hold multiple fraudulent identities.²

1 Explanatory Statement (ES) 2.

2 ES 2.

Compatibility of the measure with the right to privacy

1.95 The right to privacy includes respect for informational privacy, including the right to respect private information, particularly the storing, use and sharing of personal information; and the right to control the dissemination of information about one's private life. The collection, use and disclosure of identity information, including photographs through the Capability, engages and limits the right to privacy.³ By permitting government funds to be allocated towards this Capability, the measure also engages and limits this right.

1.96 Limitations on the right to privacy will be permissible where they are prescribed by law and are not arbitrary, they pursue a legitimate objective, are rationally connected to (that is, effective to achieve) that objective and are a proportionate means of achieving that objective. However, the statement of compatibility does not acknowledge the limitation on the right to privacy and merely states that the regulations 'do not engage any of the applicable rights or freedoms'.⁴ Accordingly, no assessment is provided as to whether the limitation on the right to privacy is permissible. The statement of compatibility therefore does not meet the standards outlined in the committee's *Guidance Note 1*.

1.97 It is noted that, in this case, the extent of interference with the right to privacy appears to be potentially extensive. For example, the FIS would appear to allow images of unknown individuals to be searched and matched against government repositories of facial images. It may not only reveal the identity of the individual but, depending on the circumstances, may reveal who a person is in contact with, when and where.

1.98 In order to be proportionate, the limitation on a right needs to be sufficiently circumscribed to ensure that it is only as extensive as is strictly necessary to achieve its objective. This includes having adequate and effective safeguards in relation to a limitation.

Committee comment

1.99 The measure engages and limits the right to privacy.

1.100 The preceding analysis raises questions about the compatibility of the measure with the right to privacy.

1.101 The statement of compatibility has not identified or addressed this limitation. The committee therefore seeks the advice of the minister as to:

- **whether the measure is aimed at achieving a legitimate objective for the purposes of human rights law;**

3 See, for example, *Peck v United Kingdom* (2003) 36 EHRR 41.

4 Statement of compatibility (SOC) 1.

- **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 whether there are adequate and effective safeguards, the scope of facial image databases, who can access information and the extent of interference).**

Migration and Other Legislation Amendment (Enhanced Integrity) Bill 2017

Purpose	The bill seeks to amend the <i>Migration Act 1958</i> so as to authorise the public disclosure of sponsor sanction details; and remove merits review in circumstances where a nomination application has been lodged but is not yet approved at the time the decision to refuse to grant a visa is made. The bill further seeks to amend the <i>Migration Act 1953</i> , the <i>Tax Administration Act 1953</i> and the <i>Income Tax Assessment Act 1936</i> to enable the Department of Immigration and Border Protection to collect, record, store and use tax file numbers of applicants and holders of specified visas for prescribed purposes in relation to prescribed visas
Portfolio	Immigration and Border Protection
Introduced	House of Representatives, 16 August 2017
Right	Privacy (see Appendix 2)
Status	Seeking additional information

Public disclosure of sponsor sanctions

1.102 Section 140K of the *Migration Act 1958* (the Migration Act) sets out actions that may be taken against approved sponsors for failing to satisfy sponsorship obligations. The Migration and Other Legislation Amendment (Enhanced Integrity) Bill 2017 (the bill) inserts new subsections 140K (4), (5), (6) and (7) into the Migration Act so as to require the minister to publish information prescribed by the regulations, including personal information, of sponsors who have been sanctioned for failing to satisfy sponsorship obligations imposed on them. The amendments to section 140K apply in relation to actions taken under that section on or after 18 March 2015.

Compatibility of the measure with the right to privacy

1.103 The right to privacy is the right not to have one's private, family and home life or correspondence unlawfully or arbitrarily interfered with, and includes the right to protection by law of one's reputation. The right to privacy also includes respect for informational privacy, including the respect for private information, and particularly the storing, use and sharing of personal information (see Appendix 2).

1.104 By requiring the minister to publish information, including personal information, if an action is taken under section 140K in relation to an approved sponsor or former approved sponsor who fails to satisfy sponsorship obligations, the measure engages and limits the right to privacy. The statement of compatibility explains that there will be limited circumstances where personal information of

individuals will be involved, as disclosure of information is limited to the name of the business, the Australian Business Number, and the relevant legal requirements that have been breached. However, the statement of compatibility acknowledges that information disclosed may be linked to individuals within an organisation, as in the case of sole proprietors. To this extent, the statement of compatibility acknowledges that the right to privacy is engaged.¹

1.105 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, they must seek to achieve a legitimate objective and be rationally connected and proportionate to achieving that objective.

1.106 The explanatory statement to the bill explains that the purpose of the measure 'is to deter businesses from breaching their sponsorship obligations, and to allow Australians and overseas workers to inform themselves about a sponsor's breaches'.² This is likely to be a legitimate objective for the purposes of international human rights law.

1.107 As to the proportionality of the measure, limitations on the right to privacy must be no more extensive than what is strictly necessary to achieve the legitimate objective of the measure. The statement of compatibility explains that publication of details of sponsor sanctions will be executed in accordance with the *Australian Border Force Act 2015*, and the *Privacy Act 1988* (Privacy Act), and that the disclosure regime is consistent with other enforcement regimes.³ However, the statement of compatibility does not examine whether there are less rights restrictive ways to achieve the objectives of the measure. No information is provided about whether these existing regimes will provide adequate and effective safeguards in the context of this particular measure. For example, while the Privacy Act contains a range of general safeguards it is not a complete answer to this issue because the Privacy Act and the Australian Privacy Principles (APPs) contain a number of exceptions to the prohibition on disclosure of personal information. Relevantly, for example, an agency may disclose personal information or a government related identifier of an individual where its use or disclosure is required or authorised by or under an Australian Law.⁴ This means that the Privacy Act and the APPs may not operate as an effective safeguard of the right to privacy in these circumstances.

1.108 An additional issue in relation to whether the measure is proportionate is whether the law specifies the precise circumstances in which interferences may be permitted. As set out above, the statement of compatibility explains that disclosure

1 Statement of Compatibility (SOC) 16.

2 Explanatory Statement (ES) 4.

3 SOC 16-17.

4 APP 9; APP 6.2(b).

of information is limited to the name of the business, the Australian Business Number, and the relevant legal requirements that have been breached.

1.109 The wording of the proposed sections 140K(4) and (7) to the bill provides:

- (4) the Minister must, subject to subsection (7), publish the information (including personal information) prescribed by the regulations if an action is taken under this section in relation to an approved sponsor or former approved sponsor who fails to satisfy an applicable sponsorship obligation [...]
- (7) The regulations may prescribe circumstances in which the Minister is not required to publish information under subsection (4).

1.110 The statement of compatibility states that:

The publication will be appropriately limited to cases where a breach has been substantiated and a sanction has been imposed. As such it will be confined to cases where it is necessary to inform future potential visa holders of the risks of accepting employment with the relevant sponsor and to cases that will genuinely act as a deterrent to other sponsors.⁵

1.111 However, the legislative requirement on the Minister to publish information in proposed section 140K(4) is broader than the narrow circumstances outlined in the statement of compatibility. It is therefore unclear in the bill as currently drafted whether the relevant provisions are sufficiently circumscribed and impose a proportionate limitation on the right to privacy in pursuit of the stated objective.

1.112 Finally, neither the bill nor the statement of compatibility provide any information as to whether, and if so how, information can be removed from the public domain if circumstances change. For instance, there is no information provided as to whether and how the information will be removed if a sanction imposed under section 140K is subsequently overturned on review. Similarly, there is no information as to whether information can be removed from public disclosure after a period of time or where the sanction has been complied with, such as where the department's monitoring shows a sponsor has complied with an undertaking accepted by the minister under the *Regulatory Powers (Standard Provisions) Act 2014* that the person would take or refrain from taking specified action.⁶ In this respect, the bill may not provide adequate safeguards.

Committee comment

1.113 The preceding analysis raises questions about whether the limitation on the right to privacy is proportionate to achieve the stated objective.

5 SOC 17.

6 See section 119 of the *Regulatory Powers (Standard Provisions) Act 2014* and section 140K(1)(a)(iv) of the *Migration Act 1958*.

1.114 The committee therefore seeks the advice of the minister as to whether the limitation is a reasonable and proportionate measure for the achievement of the stated objective (including whether the measure is sufficiently circumscribed and whether there are adequate and effective safeguards with respect to the right to privacy).

Disclosure of tax file numbers

1.115 The bill introduces new section 506B to the Migration Act, which permits tax file numbers (TFNs) of applicants and holders of specified visas to be requested, provided, used, recorded and disclosed. Amendments are also made to the *Income Tax Assessment Act 1936* (Income Tax Assessment Act) to add that the facilitation of the administration of the Migration Act is an object of Part IVA of the Income Tax Assessment Act. Amendments are also made to the *Tax Administration Act 1953* to provide that a person does not commit an offence under that Act by requesting, recording, using or disclosing a tax file number as authorised under the Migration Act.

Compatibility of the measure with the right to privacy

1.116 As noted above, the right to privacy includes the right to informational privacy including the respect for private information, particularly the storing, use and sharing of personal information.

1.117 The statement of compatibility acknowledges that through the provision, use, recording and disclosure of tax file numbers, the measure engages and limits the right to privacy. However, the statement further considers that this limitation is permissible:

Data matching using TFNs minimises the risk of misidentifying a visa holder when investigating a sponsor for compliance with their obligations. The limits placed on a visa holder's right to privacy by TFN sharing are justifiable as reasonable, necessary and proportionate because it provides the Department with a tool to more accurately identify and investigate infringements of that visa holder's work rights.⁷

1.118 The objective of the measure is stated to be to enable the department to undertake compliance activities with improved targeting, and also for research purposes insofar as data matching through tax file number sharing 'will improve the Department's ability to perform the research and trend analysis that underpins the development of visa policy'.⁸ The statement of compatibility also suggests the measure is aimed to provide protection for temporary work visa holders against exploitation.⁹

7 SOC 16.

8 SOC 11, 16.

9 See SOC 15,16.

1.119 The statement of compatibility provides some information about the importance of these objectives:

There are currently difficulties verifying that sponsors are paying visa holders correctly or if a visa holder is working for more than one employer. Employers may collude with visa holders to alter documentation provided to the Department as evidence of salary payments, or employers may be engaging skilled visa holders who are not approved to work for them.¹⁰

1.120 Ensuring that the department's compliance policies are targeted and effective is likely to be a legitimate purpose for international human rights law, as is the objective of protecting vulnerable visa holders. Collecting the tax file numbers of temporary work visa holders for these purposes would appear to be rationally connected to these objectives.

1.121 However, while the explanatory statement and statement of compatibility focus attention on the collection of tax file numbers for the investigation of infringements by sponsors of temporary work visa holders,¹¹ the scope of the proposed amendment is broader:

(1) The Secretary may request any of the persons mentioned in subsection (2) to provide the tax file number of a person (the **relevant person**) who is an applicant for, or holder or former holder of, a visa of a kind (however described) prescribed by the regulations.¹²

1.122 By allowing a tax file number to be collected from any class of visa applicant, holder or former visa holder, the measure may be overly broad with the respect to its stated objectives and accordingly may not be a proportionate limit on the right to privacy.

1.123 The explanatory statement further explains that it is not the intention to *require* a visa applicant, visa holder, or former holder to provide their tax file number.¹³ This is consistent with subsection 7(3) of the *Privacy (Tax File Number Rule) 2015* which provides that 'an individual is not legally obliged to quote their TFN, however there may be financial consequences for an individual who chooses not to quote their TFN'.¹⁴ However, no information has been provided as to how it will be made clear to a relevant person that there is no legal obligation to quote their tax file number. This raises specific questions as to whether there are adequate safeguards in place to protect the right to privacy.

10 SOC 11-12.

11 See, for example, SOC 16.

12 Paragraph 506B(1) to the bill.

13 EM 8.

14 See, section 7(3) of the *Privacy (Tax File Number) Rule 2015*.

Committee comment

1.124 The preceding analysis raises questions about whether the limitation on the right to privacy is proportionate to achieve the stated objective.

1.125 The committee therefore seeks the advice of the minister as to whether the limitation is a reasonable and proportionate measure for the achievement of the stated objective (including whether there are effective safeguards with respect to the right to privacy).

Social Services Legislation Amendment (Cashless Debit Card) Bill 2017

Purpose	Seeks to amend the <i>Social Security (Administration) Act 1999</i> to extend cashless debit card trials at existing sites and enable the expansion of trials to new locations
Portfolio	Human Services
Introduced	House of Representatives, 17 August 2017
Rights	Social security; private life; family; equality and non-discrimination (see Appendix 2)
Status	Seeking additional information

Background

1.126 The committee has considered the trial of cashless welfare arrangements in the two current trial locations of Ceduna and its surrounding region and East Kimberley in previous reports, including in relation to the Social Security Legislation Amendment (Debit Card Trial) Bill 2015 (Debit Card Bill 2015).¹

1.127 The committee has also examined the income management regime in its 2013 and 2016 Reviews of the Stronger Futures measures.²

1.128 The Debit Card Bill 2015 amended the *Social Security (Administration) Act 1999* to provide for a trial of cashless welfare arrangements in up to three prescribed locations, as set out in section 124PF. Persons on working age welfare payments in the prescribed sites would have 80 percent of their income support restricted, so that the restricted portion could not be used to purchase alcohol or to conduct gambling. A person subject to the trial is prevented from accessing this portion of their social security payment in cash. Rather, payment is accessible through a debit card which cannot be used at 'excluded businesses' or 'excluded services'.³ The trial arrangements were initially extended to a period of twelve months in two

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- 1 See Parliamentary Joint Committee on Human Rights, *Twenty-seventh report of the 44th Parliament* (8 September 2015) 20-29 and *Thirty-first report of the 44th Parliament* (24 November 2015) 21-36. Also see, Parliamentary Joint Committee on Human Rights, *Social Security (Administration) (Trial - Declinable Transactions) Amendment Determination (No. 2) 2016* [F2016L01248], *Report 7 of 2016* (11 October 2016) 58-61.
 - 2 See Parliamentary Joint Committee on Human Rights, *Eleventh Report of 2013: Stronger Futures in the Northern Territory Act 2012 and related legislation* (27 June 2013) and *2016 Review of Stronger Futures measures* (16 March 2016).
 - 3 See, further, Parliamentary Joint Committee on Human Rights, *2016 Review of Stronger Futures measures* (16 March 2016) 39.

instruments⁴ and, subsequently, by a further six months,⁵ bringing the total period of the trials to 18 months in each location.

Expanding trials of cashless welfare arrangements

1.129 The Social Services Legislation Amendment (Cashless Debit Card) Bill 2017 (the bill) seeks to remove section 124PF of the *Social Security (Administration) Act 1999* which specifies that the trial of cashless welfare arrangements is to occur in up to three locations, include no more than 10,000 participants and end on 30 June 2018.

1.130 By removing these restrictions, the bill provides for the extension of the cashless debit card trial in the two current sites of Ceduna and its surrounding region and East Kimberley, as well as the expansion of arrangements to new locations to be determined by disallowable legislative instruments.

Compatibility of the measure with human rights

1.131 The previous human rights assessments of the cashless welfare trial measures raised concerns in relation to the compulsory quarantining of a person's welfare payments and the restriction of a person's agency and ability to spend their welfare payments at businesses including supermarkets. These concerns related to the right to social security, the right to privacy and family and the right to equality and non-discrimination.⁶ Each of these rights is discussed in detail in the context of the income management regime in the committee's 2016 Review of Stronger Futures measures (2016 Review).⁷

1.132 By providing for the extension of the trial in each location and for expansion to new sites, this bill engages and limits these rights. Referring to the committee's previous reporting, the statement of compatibility acknowledges that these rights are engaged and limited.⁸ These rights may be subject to permissible limitations where they pursue a legitimate objective, are rationally connected to (that is, effective to achieve) and proportionate to that objective.

4 Social Security (Administration) (Trial Area - Ceduna and Surrounding Region) Amendment Determination (No. 2) 2016 [F2016L01424] and Social Security (Administration) (Trial Area – East Kimberley) Amendment Determination 2016 [F2016L01599]. See Parliamentary Joint Committee on Human Rights, *Report 8 of 2016* (9 November 2016) 53.

5 See Parliamentary Joint Committee on Human Rights, *Report 5 of 2017* (14 June 2017) 31-33 and *Report 8 of 2017* (15 August 2017) 122-125.

6 See Parliamentary Joint Committee on Human Rights, *Thirty-first report of the 44th Parliament* (24 November 2015) 21-36; *2016 Review of Stronger Futures measures* (16 March 2016) 61; and *Report 7 of 2016* (11 October 2016) 58-61.

7 Parliamentary Joint Committee on Human Rights, *2016 Review of Stronger Futures measures* (16 March 2016) 43-63.

8 Statement of compatibility (SOC) 1.

1.133 The statement of compatibility identifies that the objective of the measures is:

reducing immediate hardship and deprivation, reducing violence and harm, encouraging socially responsible behaviour, and reducing the likelihood that welfare payment recipients will be subject to harassment and abuse in relation to their welfare payments.⁹

1.134 While the committee previously accepted that the cashless welfare trial measures may pursue a legitimate objective,¹⁰ it has raised concerns as to whether the measures are rationally connected to (that is, effective to achieve) and proportionate to their objective.¹¹

1.135 In relation to whether the measure is effective to achieve its stated objective, the statement of compatibility cites findings from the Wave 1 Interim Evaluation Report of the Cashless Debit Card Trial, conducted by ORIMA Research and commissioned by the Department of Social Services, based on data collected in the two trial locations over the first six months of the trial.¹² The statement of compatibility describes the report as indicating that 'the trial is having positive early impacts in relation to alcohol consumption, illegal drug use, and gambling in the trial regions'.¹³ Statistics cited from the report include that 25% of participants reported drinking alcohol less frequently; 32% reported gambling less; and 24% reported using illicit drugs less often.¹⁴

1.136 While the report states that 'overall, the [trial] has been effective to date' in terms of its performance against certain pre-established indicators, the report also contains some other more mixed findings on the operation of the scheme. For example, 49% of participants said the trial had made their lives worse, as did 37% of family members;¹⁵ 33% of participants reported noticing an increase in

9 SOC 2.

10 Parliamentary Joint Committee on Human Rights, *Thirty-first report of the 44th Parliament* (24 November 2015) 27.

11 Parliamentary Joint Committee on Human Rights, *Thirty-first report of the 44th Parliament* (24 November 2015) 21-36; *2016 Review of Stronger Futures measures* (16 March 2016) 61; *Report 7 of 2016* (11 October 2016) 42; and *Report 5 of 2017* (14 June 2017) 31-33.

12 ORIMA Research, *Wave 1 Interim Evaluation Report of the Cashless Debit Card Trial*, (February 2017).

13 Explanatory memorandum (EM), statement of compatibility (SOC) 3.

14 EM, SOC 3.

15 ORIMA Research, *Wave 1 Interim Evaluation Report of the Cashless Debit Card Trial*, (February 2017) 5.

'humbugging'¹⁶ or harassment for money, as did 35% of family members;¹⁷ and 46% of participants reported experiencing problems using their card.¹⁸ These statistics are not cited in the statement of compatibility.

1.137 Further, a review of the ORIMA report, published by the Centre for Aboriginal Economic Policy Research at the Australian National University, raised several issues with the evaluation's findings and methodology.¹⁹ In particular, the review noted the difficulty in identifying whether a reduction in alcohol use was directly attributable to the cashless debit card trial or to alcohol restrictions separately implemented in both locations, including the Takeaway Alcohol Management System trial operating in the East Kimberley during the same period.²⁰

1.138 An additional concern is that the final evaluation of the trial based on the initial 12 month period, which the statement of compatibility cites as a safeguard in relation to the measure,²¹ has not yet been finalised. The trial is therefore being extended in the two locations, and expanded elsewhere, before more comprehensive evaluation findings are available. While the statement of compatibility states that 'early indications' suggest the next stage of the report 'will continue to demonstrate positive results',²² the concerns raised above in relation to some of the interim report's findings suggest the trials have not been definitively positive. It is therefore not clear from the statement of compatibility as to why extending and expanding the trials will be effective to achieve the objectives of the measure.

1.139 It is also unclear that the extension of the trials is a proportionate limitation on human rights. The existence of adequate and effective safeguards, to ensure that limitations on human rights are the least rights restrictive way of achieving the legitimate objective of the measure, are relevant to assessing the proportionality of these limitations.

16 Defined as 'Making unreasonable financial demands on family members or other local community members'. See ORIMA Research, *Wave 1 Interim Evaluation Report of the Cashless Debit Card Trial*, (February 2017) 6.

17 ORIMA Research, *Wave 1 Interim Evaluation Report of the Cashless Debit Card Trial*, (February 2017) 34.

18 ORIMA Research, *Wave 1 Interim Evaluation Report of the Cashless Debit Card Trial*, (February 2017) B7.

19 J Hunt, *The Cashless Debit Card trial evaluation: A short review*, Aboriginal Economic Policy Research, Australian National University, (1/2017).

20 J Hunt, *The Cashless Debit Card trial evaluation: A short review*, Aboriginal Economic Policy Research, Australian National University, (1/2017) 2.

21 EM, SOC 4.

22 SOC 3.

1.140 In this respect, the statement of compatibility argues that it is a relevant safeguard that the rollout of the trials in the two existing locations was subject to an extensive consultation process, and that similar consultation will be conducted in new trial locations, to be set out in legislative instruments. However, it is not clear from the statement of compatibility that consultation has been held in the existing locations in relation to the *extension* of the trials. It is noted that Indigenous people make up the overwhelming number of participants in both trial sites.²³ While the United Nations Declaration on the Rights of Indigenous Peoples is not included in the definition of 'human rights' under the *Human Rights (Parliamentary Scrutiny) Act 2011*, it provides some useful context as to how human rights standards under international law apply to the particular situation of Indigenous peoples. Under the Declaration, state parties such as Australia are obligated to 'consult and cooperate in good faith' with Indigenous peoples 'in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them'.²⁴

1.141 The explanatory memorandum for the Debit Card Bill 2015 noted that the policy intention was for the trial to take place for only 12 months in each location.²⁵ There is a concern that the trial is now being extended through the bill, with no specified end date or sunset provision and potentially without adequate consultation with the affected communities. In this respect, the bill would permit 'trials' to be rolled out, extended and imposed on communities on a compulsory basis through legislative instruments without existing safeguards.²⁶

1.142 More generally, the cashless debit card would be imposed without an assessment of individual participants' suitability for the scheme. In assessing whether a measure is proportionate, relevant factors to consider include whether the measure provides sufficient flexibility to treat different cases differently or whether it imposes a blanket policy without regard to the circumstances of individual cases.

1.143 As the cashless debit card trial applies to anyone residing in locations where the trial operates who is receiving a social security payment specified under the scheme, there are serious doubts as to whether the measures are the least rights restrictive way to achieve the stated objectives. By comparison, the income

23 Previous advice provided to the committee by the Assistant Minister to the Prime Minister in relation to the Debit Card Bill 2015 stated that Indigenous people make up 72% of the total number of trial participants in Ceduna. See Parliamentary Joint Committee on Human Rights, *Thirty-first report of the 44th Parliament* (24 November 2015) 31. The statement of compatibility to the bill examined in the current report states that, in the East Kimberley, Indigenous people made up around 83% of the total income support payment population who would become trial participants. See SOC 7.

24 Article 19 of the United Nations Declaration on the Rights of Indigenous Peoples.

25 See Social Security Legislation Amendment (Debit Card Trial) Bill 2015, EM 4.

26 See SOC 4.

management regime in Queensland's Cape York allows for individual assessment of the particular circumstances of affected individuals and the management of their welfare payments.²⁷ Accordingly, the committee previously stated that this regime may be less rights restrictive than the blanket location-based scheme applied under other income management measures.²⁸

1.144 The compulsory nature of the cashless debit card trial also raises questions as to the proportionality of the measures. In its 2016 Review, the committee stated that, while income management 'may be of some benefit to those who voluntarily enter the program, it has limited effectiveness for the vast majority of people who are compelled to be part of it'.²⁹ Application of the scheme on a voluntary basis, or with a clearly defined process for individuals to seek exemption from the trial, would appear to be a less right restrictive way to achieve the trial's objectives. This was not discussed in the statement of compatibility.

Committee comment

1.145 The effect of the bill is to extend the trials of cashless welfare arrangements in Ceduna and its surrounding region and East Kimberley, and to provide for the expansion of the trials to new sites. Previous human rights assessments of the trials identified that subjecting a person to compulsory income management engages and limits the right to equality and non-discrimination, the right to social security, and the right to privacy and family.

1.146 The preceding analysis raises questions as to the compatibility of the measure with these rights.

1.147 The committee therefore seeks further information from the minister as to:

- **why it is necessary to extend and expand the trials (including why the extension and expansion is proposed before the final evaluation report is finalised and why no end date to the current trial is specified);**
- **how the measures are effective to achieve the stated objectives (including whether there is further evidence in relation to the stated effectiveness of the trial);**
- **how the limitation on human rights is reasonable and proportionate to achieve the stated objectives (including the existence of safeguards and**

27 See Parliamentary Joint Committee on Human Rights, Social Services Legislation Amendment (Queensland Commission Income Management Regime) Bill 2017, *Report 5 of 2017* (14 June 2017) 45-48.

28 Parliamentary Joint Committee on Human Rights, *Report 5 of 2017* (14 June 2017) 47.

29 Parliamentary Joint Committee on Human Rights, 2016 Review of Stronger Futures measures (16 March 2016) 52.

whether affected communities have been adequately consulted in relation to the extension of the trial); and

- **whether the use of the cashless debit card could be restricted to instances where:**
 - **there has been an assessment of an individual's suitability to participate in the scheme rather than a blanket imposition based on location in a particular community;**
 - **individuals opt-in on a voluntary basis.**

Treasury Laws Amendment (Agricultural Lending Data) Regulations 2017 [F2017L00706]

Purpose	Seeks to allow the Australian Prudential Regulation Authority to collect data on debt held by the agricultural sector and share it with the Department of Agriculture and Water Resources for the purposes of assisting the department to perform its functions or exercise its powers
Portfolio	Treasury
Authorising legislation	<i>Australian Prudential Regulation Authority Act 1998; Financial Sector (Collection of Data) Act 2001</i>
Last day to disallow	15 sitting days after tabling (tabled in the House of Representatives 22 June 2017; tabled in the Senate 8 August 2017)
Right	Privacy (see Appendix 2)
Status	Seeking additional information

Power to collect and disclose information

1.148 Under the *Financial Sector (Collection of Data) Act 2001* (FSCDA), information may be collected from a financial sector entity (such as banks) by the Australian Prudential Regulation Authority (APRA) for the purpose of assisting another financial sector agency to perform its functions or exercise its powers.

1.149 The Treasury Laws Amendment (Agricultural Lending Data) Regulations 2017 (the regulations) prescribes the department administering the *Agricultural and Veterinary Chemicals Act 1994* (presently, the Department of Agriculture and Water Resources) as a 'financial sector agency' for the purposes of the FSCDA. The regulations thereby extend APRA's powers to collect and disclose information in respect of the department.

1.150 Currently, it is an offence under section 56(2) of the *Australian Prudential Regulation Authority Act 1998* (APRA Act) for an APRA officer to directly or indirectly

disclose protected documents and information.¹ However, there is an exception to this offence under section 56(5) of the APRA Act where a disclosure will assist an agency specified by regulation to perform its functions or exercise its powers and the disclosure is to that agency.² The regulations also specify the department as an agency for the purposes of section 56(5) of the APRA Act.

Compatibility of the measure with the right to privacy

1.151 The right to privacy includes respect for informational privacy, including the right to respect private information, particularly the storing, use and sharing of personal information; and the right to control the dissemination of information about one's private life (see Appendix 2).

1.152 By extending APRA's powers to collect and disclose information to the department, the measure engages and limits the right to privacy. The statement of compatibility for the regulations notes that the amendments will allow APRA to collect and disclose to the department data on debt held by the agricultural sector. The statement of compatibility acknowledges that this information from financial sector entities may include personal information, including the borrowing and lending activities of agricultural sector participants.³

1.153 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, they must seek to achieve a legitimate objective and be rationally connected and proportionate to achieving that objective.

1.154 The statement of compatibility states that the regulations do 'not engage any of the applicable rights or freedoms'.⁴ However, while the statement of compatibility does not specifically acknowledge that the measure engages and limits the right to privacy, it nevertheless concludes that the collection and sharing of personal information arising from the regulations does not constitute an arbitrary or unlawful interference with the right to privacy as:

The collection and sharing will be conducted lawfully and in furtherance of legitimate policy goals. It will have the defined and limited purpose of

1 Protected information is defined by section 56 of the APRA Act to mean information disclosed or obtained under, or for the purposes of, a prudential regulation framework law and relating to the affairs of: (a) a financial sector entity; or (b) a body corporate that has been or is related to a body regulated by APRA or to a registered entity; or (c) a person who has been, is, or proposes to be, a customer of a body regulated by APRA or of a registered entity; or (ca) a person in relation to whom information is, or was, required to be given under a reporting standard made in accordance with subsection 13(4A) of the *Financial Sector (Collection of Data) Act 2001*.

2 See, APRA Act section 56(5).

3 Statement of compatibility (SOC) 2.

4 SOC 2.

assisting [the department] to perform its functions and exercise its powers.

1.155 No further information is provided in the statement of compatibility to justify this limitation.

1.156 It is noted that the explanatory statement nevertheless provides some information as to the objective of the measure:

The Government seeks to improve the quality of available data on debt held by the agricultural sector in order to support policies that better target assistance measures to farmers. More specifically, over time, the improved data would enable the Government to better target assistance measures such as concessional loans, the Rural Financial Counselling Service and a nationally consistent Farm Debt Mediation scheme. It may also assist with developing and implementing other assistance measures, such as mental health and social support measures, community development measures and income support measures.⁵

1.157 Providing means through which policies may better target assistance measures to farmers is likely to be a legitimate objective for the purposes of international human rights law. The collection and disclosure of information also appears to be rationally connected to this objective, insofar as such information may assist the department exercising its powers and functions.

1.158 However, it is unclear from the information provided in the statement of compatibility that the measures impose a proportionate limitation on the right to privacy in pursuit of that stated objective. In particular, the statement of compatibility provides no information as to whether there are adequate safeguards in place with respect to the exercise of this power.

1.159 Laws that interfere with the right to privacy must specify in detail the precise circumstances in which such interferences may be permitted.⁶ As set out above, section 56(5) of the APRA Act allows a person to disclose protected information or documents (which may include personal information) when the person is satisfied that the disclosure will assist the department to perform its functions or exercise its powers. While the APRA Act restricts disclosure to circumstances where disclosure will assist the department to perform its functions or exercise its powers, the regulations do not provide any guidance as to how, and under what circumstances, a person may be 'satisfied' that the disclosure of information would assist the department.

1.160 Further, the power for information to be collected or disclosed to assist the department 'to perform its functions or exercise its powers' is broader than the

5 Explanatory Statement, 1.

6 UN Human Rights Committee, *General Comment No.16: The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation* (1988) [8].

stated purpose of the measure (to promote policies that provide assistance to farmers through the collection and disclosure of data on debt in the agriculture sector). In these respects, the regulations appear to be overly broad with respect to the stated objective and do not appear to provide satisfactory legal safeguards.

1.161 Further, limitations on the right to privacy must be no more extensive than what is strictly necessary to achieve the legitimate objective of the measure. The statement of compatibility does not examine whether there are less rights restrictive ways to achieve the objective of the measure, including any safeguards that may apply in relation to the sharing of personal information.

Committee comment

1.162 The preceding analysis raises questions about whether the limitation on the right to privacy is proportionate to achieve the stated objective.

1.163 The committee therefore seeks the advice of the Treasurer as to whether the limitation is a reasonable and proportionate measure for the achievement of the stated objective (including whether the measure is sufficiently circumscribed and whether there are adequate and effective safeguards with respect to the right to privacy).

Further response required

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

Code for the Tendering and Performance of Building Work 2016 [F2016L01859] and Code for the Tendering and Performance of Building Work Amendment Instrument 2017 [F2017L00132]

Purpose	Sets up a code of practice that is to be complied with by persons in respect of building work as permitted under section 34 of the <i>Building and Construction (Improving Productivity) Act 2016</i> (ABCC Act)
Portfolio	Employment
Authorising legislation	<i>Building and Construction (Improving Productivity) Act 2016</i>
Last day to disallow	15 sitting days after tabling (F2016L01859 tabled in the Senate 7 February 2017; F2017L00132 tabled in the Senate 20 March 2017)
Rights	Freedom of expression; freedom of association; collectively bargain; form and join trade unions; just and favourable conditions of work (see Appendix 2)
Previous report	5 of 2017
Status	Seeking further additional information

Background

1.165 The committee first reported on the Code for the Tendering and Performance of Building Work 2016 [F2016L01859] and the Code for the Tendering and Performance of Building Work Amendment Instrument 2017 [F2017L00132] (the instruments) in its *Report 5 of 2017* and requested a response from the Minister for Employment by 30 June 2017.¹¹⁶

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

Code for tendering and performance of building work

1.167 The committee previously examined the *Building and Construction (Improving Productivity) Act 2016* (ABCC Act) which is the authorising legislation for the instruments in its *Second Report of the 44th Parliament*, *Tenth Report of the 44th Parliament*, *Fourteenth Report of the 44th Parliament* and *Thirty-fourth Report of the 44th Parliament* and *Report 7 of 2016*.¹¹⁷

1.168 Under section 34 of the ABCC Act the Minister for Employment is empowered to issue a code of practice that is required to be followed by persons in respect of building work. The instrument sets up a code of practice for all building industry participants that seek to be, or are, involved in Commonwealth funded building work (a code covered entity). As noted in the previous human rights analysis, the code of practice contains a number of requirements which engage and limit human rights and are discussed further below.

Content of agreements and prohibited conduct

1.169 Section 11(1) of the code of conduct provides that a code covered entity must not be covered by an enterprise agreement in respect of building work which includes clauses that:

- impose or purport to impose limits on the right of the code covered entity to manage its business or to improve productivity;
- discriminate, or have the effect of discriminating against certain persons, classes of employees, or subcontractors; or
- are inconsistent with freedom of association requirements set out in section 13 of the code of practice;

1.170 Section 11(3) further provides that clauses are not permitted to be included in the enterprise agreement in relation to a range of matters including the number of employees, consultation on particular matters, the engagement of particular classes

117 The committee originally considered the Building and Construction Industry (Improving Productivity) Bill 2013 and Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013 in Parliamentary Joint Committee on Human Rights, *Second Report of the 44th Parliament* (11 February 2014) 1-30; *Tenth Report of the 44th Parliament* (26 August 2014) 43-77; and *Fourteenth Report of the 44th Parliament* (28 October 2014) 106-113. These bills were then reintroduced as the Building and Construction Industry (Improving Productivity) Bill 2013 [No. 2] and the Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013 [No. 2]; see *Thirty-fourth Report of the 44th Parliament* (23 February 2016) 2. The bills were reintroduced to the Senate on 31 August 2016, following the commencement of the 45th Parliament; see *Report 7 of 2016* (11 October 2016) 62-63. See also, International Labour Organization, Committee of Experts on the Application of Conventions and Recommendations, Direct Request, adopted 2016, published 106th ILC session (2017) Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) – Australia.

of staff, contractors and subcontractors, casualisation and the type of contracts to be offered, redundancy, demobilisation and redeployment, loaded pay, allocation of work to particular employees, external monitoring of the agreement, encouraging, discouraging or supporting people being union members, when and where work can be performed, union access to the workplace beyond what is provided for in legislation, and granting of facilities to be used by union members, officers or delegates.

1.171 Section 11A additionally provides that code covered entities must not be covered by enterprise agreements that purport to remedy or render ineffective other clauses that are inconsistent with section 11.

1.172 The effect of a failure to meet the requirements of section 11 by a code covered entity is to render the entity ineligible to tender for, or be awarded, Commonwealth funded work.

Compatibility of the measure with the right to collectively bargain and the right to just and favourable conditions of work

1.173 The right to freedom of association includes the right to collectively bargain without unreasonable and disproportionate interference from the state. The right to just and favourable conditions of work includes the right to safe working conditions. These rights are protected by the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).¹¹⁸

1.174 As stated in the initial analysis, the interpretation of these rights is informed by International Labour Organization (ILO) treaties, including the ILO Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize (ILO Convention No. 87) and the ILO Convention of 1949 concerning the Right to Organise and Collective Bargaining (ILO Convention No. 98), which protects the right of employees to collectively bargain for terms and conditions of employment.¹¹⁹ The principle of 'autonomy of bargaining' in the negotiation of collective agreements is an 'essential element' of Article 4 of ILO Convention No. 98 which envisages that parties will be free to reach their own settlement of a collective agreement without interference.¹²⁰

1.175 The initial analysis stated that, providing that certain code covered entity employers cannot be awarded commonwealth funded work if they are subject to an enterprise agreement containing a range of terms is likely to act as a disincentive for the inclusion of such terms in enterprise agreements. The measure is likely to have a corresponding restrictive effect on the scope of negotiations on a broad range of matters including those that relate to terms and conditions of employment and how work is performed. As such, the initial analysis stated that the measure interferes

118 See, article 22 of the ICCPR and article 8 of the ICESCR.

with the outcome of the bargaining process and the inclusion of particular terms in enterprise agreements. Accordingly, the measure engages and limits the right to just and favourable conditions of work and the right to collectively bargain.

1.176 Measures limiting the right to freedom of association including the right to collectively bargain may be permissible providing certain criteria are satisfied. Generally, to be capable of justifying a limit on human rights, the measure must address a legitimate objective, be rationally connected to that objective and be a proportionate way to achieve that objective.¹²¹ Further, Article 22(3) of the ICCPR and article 8 of ICESCR expressly provide that no limitations are permissible on this right if they are inconsistent with the guarantees of freedom of association and the right to collectively organise contained in the ILO Convention No. 87.

1.177 In the initial analysis, it was noted that the ILO's Committee on Freedom of Association (CFA Committee), which is a supervisory mechanism that examines complaints about violations of the right to freedom of association and the right to collectively bargain, has stated that 'measures taken unilaterally by the authorities to restrict the scope of negotiable issues are often incompatible with Convention No. 98'.¹²² The CFA Committee has noted that there are some circumstances in which it might be legitimate for a government to limit the outcomes of a bargaining process, stating that 'any limitation on collective bargaining on the part of the authorities should be preceded by consultations with the workers' and employers' organizations in an effort to obtain their agreement.'¹²³

1.178 In relation to the limitation that section 11 imposes on the right to collectively bargain, the statement of compatibility argues:

...the limitation is reasonable, necessary and proportionate in pursuit of the legitimate objective of seeking to ensure that enterprise agreements are not used to limit the ability of code covered entities to manage their

119 The Freedom of Association and Protection of the Right to Organize (ILO Convention No. 87) is expressly referred to in the ICCPR and the ICESCR.

120 ILO *General Survey by the Committee of Experts on the Application of Conventions and Recommendations on Freedom of Association and Collective Bargaining* (1994), [248]. See, also, ILO Committee of Experts on the Application of Conventions and Recommendations, *Individual Observation concerning Right to Organise and Collective Bargaining Convention, 1949 (No. 98) Australia (ratification: 1973)*, ILO Doc 062009AUS098 (2009).

121 See ICCPR article 22.

122 See ILO, *Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO*, Fifth Edition (2006) 182 (citing ILO Freedom of Association Committee 308th Report, Case No. 1897, [473]).

123 ILO, *Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO*, Fifth Edition (2006) 182 (citing ILO Freedom of Association Committee 330th Report, Case No. 2194, [791]; and 335th Report, Case No. 2293, [1237]).

businesses efficiently or restrict productivity improvements in the building and construction industry more generally.¹²⁴

1.179 The initial human rights analysis stated that limited information is provided in the statement of compatibility as to whether the stated objective addresses a pressing and substantial concern such that it may be considered a legitimate objective for the purpose of international human rights law or whether the measure is rationally connected to (that is, effective to achieve) that stated objective.

1.180 Further, no information was provided about the proportionality of the measure. In this respect, it was noted that section 11 imposes practical restrictions on the inclusion of a very broad range of matters relating to terms and conditions of employment in enterprise agreements. It was also noted that section 11(1)(a) is particularly broad and provides a practical restriction on the inclusion of a clause in an enterprise agreement which imposes or purports to impose limits on the right of the code covered entity to manage its business or to improve productivity. This clause raises concerns for it may be understood to cover many matters that are usually the subject of enterprise agreements such as ordinary working hours, overtime, rates of pay and any types of work performed.

1.181 Additionally, the previous analysis noted that the ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR), which is another supervisory mechanism, had recently reported on Australia's compliance with the right to collectively bargain in respect of matters which would also be covered by section 11. In relation to restrictions on the scope of collective bargaining and bargaining outcomes, the committee noted that 'parties should not be penalized for deciding to include these issues in their negotiations' and requested that Australia review such matters 'with a view to removing these restrictions on collective bargaining matters'.¹²⁵

1.182 The CFA Committee has also raised concerns in relation to similar measures previously enacted by Australia under the *Building and Construction Industry Improvement Act 2005* and stated that:

The Committee recalls that the right to bargain freely with employers with respect to conditions of work constitutes an essential element in freedom of association, and trade unions should have the right, through collective bargaining or other lawful means, to seek to improve the living and

124 Code for the Tendering and Performance of Building Work 2016, Explanatory Statement (ES), statement of compatibility (SOC) 6.

125 ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR), Direct Request - adopted 2016, published 106th ILC session (2017), Right to Organise and Collective Bargaining Convention, 1949 (No. 98) - Australia http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID,P11110_COUNTRY_ID,P11110_COUNTRY_NAME,P11110_COMMENT_YEAR:3299912,102544,Australia,2016.

working conditions of those whom the trade unions represent. The public authorities should refrain from any interference, which would restrict this right or impede the lawful exercise thereof. Any such interference would appear to infringe the principle that workers' and employers' organizations should have the right to organize their activities and to formulate their programmes... The Committee considers that the matters which might be subject to collective bargaining include the type of agreement to be offered to employees or the type of industrial instrument to be negotiated in the future, as well as wages, benefits and allowances, working time, annual leave, selection criteria in case of redundancy, the coverage of the collective agreement, the granting of trade union facilities, including access to the workplace beyond what is provided for in legislation etc.; these matters should not be excluded from the scope of collective bargaining by law, or as in this case, by financial disincentives and considerable penalties applicable in case of non-implementation of the Code and Guidelines.¹²⁶

1.183 As the initial analysis noted, concerns about restrictions Australia has imposed on the right to freedom of association and the right to collectively bargain have also been raised by the United Nations Committee on Economic, Social and Cultural Rights (UNCESCR) in its Concluding Observations on Australia.¹²⁷ Such comments from supervisory mechanisms were not addressed in the statement of compatibility. The committee has also previously commented on other measures which engage and limit these rights and raised concerns.¹²⁸

1.184 Accordingly, the committee 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;
- how the measure is effective to achieve (that is, rationally connected to) that objective;

126 ILO's Committee on Freedom of Association (CFA Committee), Report in which the committee requests to be kept informed of development - Report No 338, November 2005 Case No 2326 (Australia) - Complaint date: 10 March 2004 http://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002_COMPLAINT_TEXT_ID:2908523.

127 UN Committee on Economic, Social and Cultural Rights, Concluding Observations, Australia, E/C.12/AUS/CO/4 (12 June 2009).

128 See, for example, Parliamentary Joint Committee on Human Rights, *Second Report of the 44th Parliament* (11 February 2014) 1-30; *Tenth Report of the 44th Parliament* (26 August 2014) 55-56; *Report 7 of 2016* (11 October 2016) 21-24, 62-63; *Report 8 of 2016* (9 November 2016) 62-64.

- whether the limitation is a reasonable and proportionate measure to achieve that objective (including findings by relevant international supervisory mechanisms about whether the limitation is permissible);
- whether consultation has occurred with the relevant workers' and employers' organisations in relation to the measure; and
- the government's response to the previous comments and recommendations made by international supervisory mechanisms including whether the government agrees with these views.

Minister's response

1.185 The minister provides a range of detailed information about the importance of the construction industry citing its size and its role in 'driving economic growth'. The minister's response identifies the objectives of the measure as improving 'efficiency, productiveness and jobs growth' in the construction industry and 'to ensure that enterprise agreements are not used to limit the ability of code covered entities to manage their businesses efficiently or restrict productivity improvement'. It also identifies the further objectives of ensuring that 'subcontractors have the ability to genuinely bargain and not be subject to coercion through the imposition of particular types of agreements by head contractors and unions; and to ensure that freedom of association is not impinged upon'.

1.186 Information and reasoning is provided in relation to the importance of some but not all of these objectives. While the minister's response was not put in those terms, to the extent that the measure is aimed at addressing the rights and freedoms of others, this is capable of constituting a legitimate objective for the purposes of international human rights law.

1.187 The minister's response outlines specific concerns in relation to what he terms 'restrictive clauses' in enterprise agreements and their impact on productivity. With reference to some industry reports, the minister argues that these clauses 'are often forced onto subcontractors by head contractors that have made agreements with unions, are contributing to costs and delays of projects within the building and construction industry'. The minister's response states that:

Head contractors on building sites typically employ few workers yet they often enter into deals with unions that mandate the pay and conditions for all other workers on the site, preventing those workers from engaging in genuine collective bargaining with their respective employer. The 2016 Code therefore prohibits clauses that prescribe the terms and conditions on which subcontractors and their employees are engaged.

1.188 The minister's response also provides a number of examples of the kind of clauses in enterprise agreements which he considers are of concern in the building

and construction industry.¹²⁹ In essence, the minister appears to argue that these clauses restrict the freedoms of certain employers and subcontractors and should accordingly be prohibited on the basis of their impact on building industry costs. In broad terms, in this respect, the measure may be rationally connected to the rights and freedoms of others.

1.189 The minister further points to unlawful behaviour by members and representatives of the Construction, Forestry, Mining and Energy Union (CFMEU) as being of concern. Some of the behaviour referred to relates to taking industrial action. However, it is to be noted that current restrictions on industrial action under domestic law have been criticised by international supervisory mechanisms as going beyond what is permissible under international law.¹³⁰ Further, it is unclear how such suspected contraventions relate to the proposed measure or are rationally connected to the stated objective of this measure.

1.190 The minister's response argues that, in some respects, the code promotes collective bargaining as it requires terms and conditions of employment to be dealt with in enterprise agreements made under the *Fair Work Act 2009*. However, merely restating in the code (which is a form of subordinate legislation) the current legal framework that applies in primary legislation is unlikely to constitute the promotion of this right.

1.191 In relation to the proportionality of the limitation, the minister's response explains the scope of the code and what would and would not be restricted in terms of bargaining outcomes:

129 These include clauses that provide subcontractors need to afford workers equivalent terms and conditions to those contained in the relevant enterprise agreement; that contain limitations on when and the ways in which employers can direct employees to perform work; paid union meetings on work time; and clauses requiring union consultation.

130 See, UN Committee on Economic Social and Cultural Rights (UNCESCR), *Concluding Observations on Australia*, E/C.12/AUS/CO/5 (23 June 2017) [29]-[30]: 'The Committee is also concerned that the right to strike remains constrained in the State party (art. 8). The Committee recommends that the State party bring its legislation on trade union rights into line with article 8 of the Covenant and with the provisions of the relevant International Labour Organization (ILO) Conventions (nos. 87 and 98), particularly by removing penalties, including six months of incarceration, for industrial action, or the secret ballot requirements for workers who wish to take industrial action.' See, also, ILO CEACR, *Observation Concerning Freedom of Association and Protection of the Right to Organise Convention*, 1948 (No. 87), Australia, 103rd ILC session, 2013; ILO CEACR, *Observation Concerning Freedom of Association and Protection of the Right to Organise Convention*, 1948 (No. 87), Australia, 101st ILC session, 2013; ILO CEACR, *Observation Concerning Freedom of Association and Protection of the Right to Organise Convention*, 1948 (No. 87), Australia, 99th ILC session, 2009; ILO CEACR, *Individual Observation Concerning the Right to Organise and Collective Bargain Convention*, 1949, (No. 98), Australia, 99th session, 2009. See also, UNCESCR, *Concluding Observations on Australia*, E/C.12/AUS/CO/4 (12 June 2009) 5.

The 2016 Code does not prohibit such matters as rostered days off or shift allowances, public holidays, or stable and agreed shift arrangements and rosters. Nor does it prohibit or restrict the right of workers and their representatives (including a union) to be consulted on redundancies and labour hire.

The 2016 Code does prevent clauses in agreements that limit the ability of workers and their employers to determine their day-to-day work arrangements. For example, clauses in enterprise agreements that require the additional agreement of the union, such as where an employee wishes to substitute a different rostered day off and the employer agrees, would not be permitted.

It is worth noting that the types of clauses described in sections 11 and 11A are not strictly prohibited from being included in enterprise agreements; being an "opt-in system", building contractors that do not wish to undertake Commonwealth-funded building work do not need to comply with the requirements of the Code.

1.192 Accordingly, the minister's response clarifies that there are a number of clauses in enterprise agreements relating to terms and conditions of employment which will not be prohibited. However, the response does not fully address the breadth of restrictions that are imposed by the measure on the content of enterprise agreements and why those restrictions are justified limitations on the right to collectively bargain. Further, while it is true that compliance with the code is not mandatory for building contractors, as noted in the initial analysis, the significant commercial consequences of not complying with the code impose a disincentive for the inclusion of particular clauses in enterprise agreements. In practice, this may have quite a far reaching effect in terms of enterprise agreements in the building industry, particularly given that once an entity becomes a code covered entity, it must comply with the code on all new projects, including those which are not Commonwealth funded.¹³¹ On the information provided by the minister, it does not appear that the limitation on the right to collectively bargain is likely to be proportionate.

1.193 As noted in the initial analysis, international supervisory mechanisms have been critical of these restrictions on bargaining outcomes.¹³² For example, in relation to a draft of the code, the ILO Committee of Experts (CEACR) has reported that

131 Section 6(1) of the Code for the Tendering and Performance of Building Work 2016 provides that an entity becomes covered by the code from the first time they submit an expression of interest or tender for commonwealth funded building work.

132 ILO's Committee on Freedom of Association (CFA Committee), Report in which the committee requests to be kept informed of development - Report No 338, November 2005 Case No 2326 (Australia) - Complaint date: 10 March 2004
http://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002_COMPLAINT_TEXT_ID:2908523.

'parties should not be penalized for deciding to include these issues in their negotiations' and requested that Australia review such matters 'with a view to removing these restrictions on collective bargaining matters'.¹³³

1.194 UNESCR has a specific role to monitor the compliance of state parties with the ICESCR. Since the committee previously reported on the measure in its *Report 5 of 2017*, UNESCR has published its 2017 concluding observations on Australia which expressed specific concerns about the code:

The [UNESCR] is concerned about the existence of legal restrictions to the exercise of trade union rights, including in the Fair Work Amendment Act of 2015, the Code for the Tendering and Performance of Building Work 2016, and The Building and Construction Industry (Improving Productivity) Act 2016.¹³⁴

1.195 In relation to the committee's request that the minister address the concerns raised by international supervisory mechanisms, the minister merely refers to previously canvassed information about whether the limitation is proportionate. The minister's response does not provide further information other than to note that much of the previous UNESCR comments were focused around restrictions on industrial action.

1.196 In response to the committee's question about whether consultation had occurred with the relevant workers' and employers' organisations regarding the measures, the minister's response outlines a number of examples of consultation which occurred with employer organisations and unions. Consultation processes are relevant to an assessment of the measure, and may assist in determining whether a limitation is the least rights restrictive means of pursuing a legitimate objective on the available evidence. However, in this case, the fact of consultation is not sufficient to address the human rights concerns in relation to the measure outlined above.

Committee comment

1.197 The committee thanks the minister for her response. The preceding analysis indicates that the measure is likely to be incompatible with the right to collectively bargain, noting in particular recent concerns raised by the UN Committee on Economic Social and Cultural Rights and the ILO Committee of Experts in relation to the code.

133 ILO, Committee of Experts on the Application of Conventions and Recommendations (CEACR), Direct Request - adopted 2016, published 106th ILC session (2017), Right to Organise and Collective Bargaining Convention, 1949 (No. 98) - Australia http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID,P11110_COUNTRY_ID,P11110_COUNTRY_NAME,P11110_COMMENT_YEAR:3299912,102544,Australia,2016.

134 UN Committee on Economic Social and Cultural Rights, Concluding Observations on Australia, E/C.12/AUS/CO/5 (23 June 2017) [29].

1.198 In light of the preceding analysis, the committee invites the minister to provide further information for the committee's consideration.

Prohibiting the display of particular signs and union logos, mottos or indicia

1.199 Section 13(2)(b)-(c) provides that the code covered entity must ensure that 'no ticket, no start' signs, or similar, are not displayed as well as signs that seek to 'vilify or harass employees who participate, or do not participate, in industrial activities are not displayed'.

1.200 Section 13(2)(j) provides that union logos, mottos or indicia are not applied to clothing, property or equipment supplied by, or which provision is made by, the employer or any other conduct which implies that membership of a building association is anything other than an individual choice for each employee.

Compatibility of the measure with the right to freedom of expression

1.201 The right to freedom of opinion and expression is protected by article 19 of the ICCPR. The right to freedom of expression extends to the communication of information or ideas through any medium, including written and oral communications, the media, public protest, broadcasting, artistic works and commercial advertising.¹³⁵

1.202 The right to freedom of expression may be subject to limitations that are necessary to protect the rights or reputations of others, national security, public order, or public health or morals. In order for a limitation to be permissible under international human rights law, limitations must be prescribed by law, pursue a legitimate objective, be rationally connected to the achievement of that objective and be a proportionate means of achieving that objective.¹³⁶

1.203 The initial analysis stated that, by providing that certain signs cannot be displayed and providing that union logos, insignias and mottos are not to be applied to certain clothing or equipment, the measures engage and limit the right to freedom of expression.¹³⁷ The statement of compatibility acknowledges that the right to freedom of expression is engaged and identifies the following as the objective of the measures:

The intimidation of employees to join or not join a building association is clearly an unacceptable infringement on their right to freedom of association...

135 ICCPR, article 19(2).

136 See, generally, Human Rights Committee, *General comment No 34 (Article 19: Freedoms of opinion and expression)*, CCPR/C/GC/34, paras 21-36 (2011).

137 See, ILO, *Freedom of Association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO*, Fifth revised edition (2006) [154]-[173].

The right to freedom of association can also be infringed by the presence of building association logos, mottos or indicia on clothing, property or equipment that is supplied by, or which provision is made for by, the code covered entity...

pursuing the legitimate policy objective of protecting the rights and freedoms of employees in the building and construction industry to choose to become, or not become, a member of a building association and ensuring that this choice does not impact on an employee's ability to work on a particular site.¹³⁸

1.204 As the initial analysis stated, the statement of compatibility provides limited information about the importance of these objectives. However, to be capable of justifying a proposed limitation on human rights, a legitimate objective must address a pressing or substantial concern and not simply seek an outcome regarded as desirable or convenient.¹³⁹

1.205 Furthermore, the reasoning articulated in the statement of compatibility does not accurately reflect the scope of freedom of association under international law. The scope of the right to freedom of association in a workplace under international law focuses on a positive right to associate rather than a right not to associate.¹⁴⁰ ILO supervisory mechanisms have found that under Convention 87 it is a matter for each nation state to decide whether it is appropriate to guarantee the ability of workers *not* to join a union.¹⁴¹ It was stated in the previous analysis that, as a matter of international human rights law, the display of particular union signs, union logos, mottos or indicia on clothing did not appear to 'infringe' the right to freedom of association but rather constitutes an element of this right.¹⁴²

1.206 The statement of compatibility provides the following information on whether the measure prohibiting certain signs (contained in section 13(2)(b)-(c)) is effective to achieve the stated objective:

138 ES, SOC 8.

139 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>.

140 See, ILO, *Freedom of Association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO*, Fifth revised edition (2006) [161]-[163].

141 See, ILO, *Freedom of Association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO*, Fifth revised edition (2006) [365]-[367].

142 See, ILO, *Freedom of Association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO*, Fifth revised edition (2006) [161]-[163].

...intimidation can take the form of signs implying that employees who are not members of a building association cannot work on the building site or, where such employees are present, seek to intimidate, harass or vilify such employees...

1.207 However, as the previous analysis stated, the statement of compatibility does not address how the display of specific signs rises to the level of intimidation, harassment or vilification. Without further information it is unclear how the removal of such signs would be effective in achieving the stated objective of protecting the choice to become, or not become, a member of a union.

1.208 The statement of compatibility further provides the following information on whether the measure prohibiting union logos, mottos or indicia on certain clothing, property or equipment (contained in section 13(2)(j)) is effective to achieve the stated objective:

... [union] signage on clothing or equipment that is supplied by a code covered entity carries a strong implication that membership of the building association in question is being actively encouraged or endorsed by the relevant employer and is against the principle that employees should be free to choose whether to become or not become a member of a building association.¹⁴³

1.209 In the initial human rights analysis, it was acknowledged that the explanatory statement outlines the findings of the final report of the Royal Commission into Trade Union Governance and Corruption (the Heydon Royal Commission) including general issues of intimidation in the building and construction industry.¹⁴⁴ However, without further information, it was unclear how merely viewing, for example, a union logo on clothing or equipment would prevent an employee who did not wish to join the relevant union from their choice to do so or from working on a particular site. Further, it was unclear whether such signs and logos would necessarily be seen as an employer endorsement of joining the union, and even if so, that this would affect an employee's freedom of choice or ability to decide not to join the union.

1.210 In relation to the proportionality of the measure prohibiting union logos, mottos or indicia on certain clothing, property or equipment (contained in section 13(2)(j)), the statement of compatibility provides that:

This prohibition only applies to clothing, property or equipment that is supplied by, or which provision is made for by, the code covered entity. Section 13 would not prevent these items from being applied to clothing, property or equipment that was supplied by other individuals at the site or by the relevant building association.¹⁴⁵

143 ES, SOC 8.

144 ES 3.

145 ES, SOC 8.

1.211 No further information is provided in the statement of compatibility about the proportionality of the measures including any relevant safeguards in relation to the right to freedom of expression.

1.212 The preceding analysis therefore raised questions as to the compatibility of the measures with the right to freedom of expression. Accordingly, the committee 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;
- 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 that objective (including findings by relevant international supervisory mechanisms about whether the limitation is permissible); and
- whether consultation has occurred with the relevant workers' and employers' organisations in relation to the measure.

Minister's response

1.213 In relation to the objective of the measure, the minister's response states:

The Statement of Compatibility with Human Rights for the 2016 Code states that these measures are reasonable, necessary and proportionate in pursuit of the legitimate policy objective of protecting the rights and freedoms of employees in the building and construction industry to choose to become, or not become, a member of a building association and ensure that this choice does not impact on an employee's ability to work on a particular site.

1.214 The minister's response responds to the analysis in the previous report which noted that the reasoning articulated in the statement of compatibility does not accurately reflect the scope of freedom of association under international law which focuses on a right to associate:

With regard to the stated objective, the Committee has noted that the ILO supervisory mechanisms have found that under the Freedom of Association and Protection of the Right to Organise Convention 1948 (No. 87) it is a matter for each nation state to decide whether it is appropriate to guarantee the right not to join a union. It is clear from the provisions of Part 3-1 of the *Fair Work Act 2009* – as implemented by the then Federal Labor Government – that Australia has decided it is appropriate to also guarantee the right not to join a union.

1.215 As stated in the initial analysis, Australia is clearly entitled as a matter of domestic law to decide it is appropriate to regulate the right not to join a union. This does not mean that steps taken to enable persons not join a union are automatically

human rights compatible. Rather, Australia must ensure that any such steps taken only impose limitations on the right to freedom of association that are permissible under international law. Accordingly, the committee is required to examine the measure against Australia's obligations under human rights law.

1.216 In relation to whether the objective of guaranteeing the ability not to join a union addresses a pressing and substantial concern, the minister's response states:

These measures are necessary to protect the right to join or not to join a union because of the pervasive culture that exists within the building and construction industry in Australia in which it is understood that there is such a thing as a 'union site' and on those sites all workers are expected to be members of a building association. Evidence of the existence of this culture can be found in many decisions of the courts, including most recently:

- In *Australian Building and Construction Commissioner v Barker & Anor* [2017] FCCA 1143 the Federal Circuit Court was satisfied that two workers had been deprived of their right to work and earn income for two days when, on 28 January 2016, they were told by Mr Barker, a CFMEU official in the role of shop steward/delegate, that they could not work on the project unless they paid union fees. When a site manager informed Mr Barker that the workers had a right not to be in a union, Mr Barker replied 'No, everybody's got to be in the union, this is an EBA site, it's in your EBA that they all have to be on site in the union and have an EBA.'
- In *Australian Building and Construction Commissioner v Moses & Ors* (2017) FCCA 738 the Federal Circuit Court was satisfied that CFMEU organiser Mr Moses, accompanied by a CFMEU delegate, threatened workers at Queensland's Gladstone Broadwalk [sic] project to the effect that if they did not join the CFMEU then no work would occur by the workers that day and they would be removed from the project. He told the workers that if they wanted to work on the project, which was a union site, they would have to join the CFMEU.
- In *Director of the Fair Work Building Industry Inspectorate v Vink & Anor* [2016] FCCA 488 a CFMEU official was found to have entered a construction site and, in an incident described as "sheer thuggery" by the Court, removed workers' belongings from the site shed, including lunches from the refrigerator. The Court concluded the conduct on site was intended "to give a clear message to all employees that benefits on the work site would only be afforded to members of the union."

1.217 The minister's response argues that contraventions show that stronger measures beyond those contained in the *Fair Work Act 2009* are needed. Based on the information provided, protecting the ability not to join a union would appear to be a legitimate objective for the purposes of international human rights law.

1.218 The minister's response further explains the need for the measures:

The display of signs asserting that non-union members will not be permitted to work on a particular site, or that seek to vilify or harass employees who do not participate in industrial activities, along with the presence of union logos, mottos or indicia on clothing, property or equipment issued or provided for by the employer gives workers a strong impression that not only is union membership compulsory for anyone that wishes to work on the particular site, but that relevant employers support this position.

In addition, in relation to signs that seek to vilify or harass employees who participate, or do not participate, in industrial activities I note that the ILO supervisory mechanisms have recognised that trade union organisations should respect the limits of propriety and not use insulting language in their communications.

1.219 In this respect, it is noted that prohibiting insulting language or communication for the purpose of protecting the right of employees not to join a union still constitutes a limitation on the right to freedom of expression that needs to be justifiable.

1.220 The minister further advised, in relation to the proportionality of the limitation on the right to freedom of expression, that the:

...limitation is clearly reasonable and proportionate in pursuit of the legitimate objective explained given the culture of the building industry and the ongoing threats to freedom of association by certain building unions. For example, they do not prevent posters and signs that merely encourage or convey the benefits of union membership or communicate other union information from being displayed on a site, nor do they prevent workers from applying union logos, mottos or indicia to their own personal clothing, property or equipment.

1.221 It is relevant to the proportionality of the measure that the display of posters conveying the benefits of union membership will not be prohibited and that workers will still be able to display union logos on their own personal clothing. However, the limitation on freedom of expression remains extensive. In relation to the display of union logos on clothing and equipment that is supplied, it is noted that in some workplaces this may include a significant portion of existing clothing and equipment.

1.222 Some signs which challenge non-union members, for example, for breaking a strike or not taking part in industrial action, may be uncomfortable, harassing or even vilifying. Yet, they may nonetheless be the expression of genuinely held views. The prohibition of such expression would appear to be broader than the stated objective of protecting the ability of individuals to choose not to join a union. As noted above, the UNESCR has recently raised specific human rights concerns in relation to the code.

1.223 It is unclear from the minister's response whether there are less rights restrictive approaches to achieve the stated objective of protecting the ability of individuals to choose not to join a union. For example, the minister's response does not address whether providing education about the current protections contained in the Fair Work Act, or better monitoring or enforcement have been considered as alternatives. It appears from the above that the measures are not a proportionate limitation on the right to freedom of expression.

1.224 Finally, as noted above, the minister's response outlines a number of examples of consultation which occurred with employer organisations and unions. Consultation processes are relevant to an assessment of the measure, and may assist in determining whether a limitation is the least rights restrictive means of pursuing a legitimate objective on the available evidence. However, in this case, the fact of consultation is not sufficient to address the human rights concerns in relation to the measure outlined above.

Committee response

1.225 The committee thanks the minister for her response.

1.226 In light of the preceding analysis, the committee seeks the minister's further advice as to whether there are less rights restrictive approaches to achieve the stated objective of protecting the ability of individuals to choose not to join a union (in particular, providing education about the current protections contained in the Fair Work Act, or better monitoring or enforcement).

Compatibility of the measure with the right to freedom of association and the right to form and join trade unions

1.227 Article 22 of the ICCPR guarantees the right to freedom of association generally, and also explicitly guarantees everyone 'the right to form trade unions for the protection of [their] interests.' Article 8 of the ICESCR also guarantees the right of everyone to form trade unions. As set out above, the right to freedom of association may only be subject to limitations that are necessary to protect the rights or reputations of others, national security, public order, or public health or morals. Generally, to be capable of justifying a limit on human rights, the measure must address a legitimate objective, be rationally connected to that objective and be a proportionate way to achieve that objective.¹⁴⁶ Further, no limitations on this right are permissible if they are inconsistent with the rights contained in ILO Convention No. 87.¹⁴⁷

1.228 As noted above, the understanding of the right to freedom of association expressed in the statement of compatibility and the code of conduct does not fully

146 See ICCPR article 22.

147 See ICESCR article 8, ICCPR article 22.

reflect the content of this right as a matter of international human rights law. The ILO supervisory mechanisms have noted, for example, that 'the prohibition of the placing of posters stating the point of view of a central trade union organization is an unacceptable restriction on trade union activities'.¹⁴⁸ As the measures restrict communication about union membership, including joining a union, the measures engage and may limit the right to freedom of association. This potential limitation was not addressed in the statement of compatibility.

1.229 Noting that the measure engages and may limit the right to freedom of association, the committee therefore sought the advice of the minister as to:

- whether the measure is aimed at achieving a legitimate objective for the purposes of 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.

Minister's response

1.230 In relation to the compatibility of the measure with the right to freedom of association under international human rights law, the minister's response relies upon the information set out above at [1.216], relating to court findings against union conduct, as indicative of building industry practice.

1.231 Noting this information, the minister's response nonetheless does not substantially address this issue with respect to the right to freedom of association as it is understood in international law. In order to justify limiting this right, which relevantly includes the right to engage in communication about union membership, it is necessary to identify why the existing law is insufficient to address the type of conduct with which the minister is concerned, such that the proposed measure is necessary. Further, as set out above at [1.223], while the measure may pursue the legitimate objective of protecting the ability not to join a trade union, less rights restrictive alternatives appear available to pursue this objective such that the measure does not appear to be a proportionate limitation on human rights. As noted above, the UNCESCR has recently raised specific human rights concerns in relation to the code.

Committee response

1.232 The committee thanks the minister for her response.

148 See, ILO, *Freedom of Association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO*, Fifth revised edition (2006) [161]-[163].

1.233 As the measures restrict communication about union membership, including joining a union, the measures engage and may limit the right to freedom of association.

1.234 In light of the analysis outlined in relation to the measure concerning freedom of expression, the committee seeks the minister's further advice as to whether there are less rights restrictive approaches to achieve the stated objective of protecting the ability of individuals to choose not to join a union (in particular, providing education about the current protections contained in the Fair Work Act, or better monitoring or enforcement).

Competition and Consumer Amendment (Competition Policy Review) Bill 2017

Purpose	Seeks to amend various provisions of the <i>Competition and Consumer Act 2010</i> 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)
Previous reports	6 of 2017
Status	Seeking further additional information

Background

1.235 The committee first reported on the Competition and Consumer Amendment (Competition Policy Review) Bill 2017 (the bill) in its *Report 6 of 2017*, and requested a response from the treasurer by 14 July 2017.¹

1.236 The treasurer's response to the committee's inquiries was received on 3 August 2017. The response is discussed below and is reproduced in full at **Appendix 3**.

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

1.237 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).

1.238 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).²

1 Parliamentary Joint Committee on Human Rights, *Report 6 of 2017* (20 June 2017) 2-7.

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

1.240 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

1.241 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)).

1.242 The ACCC has powers to investigate a range of civil and criminal matters. The initial human rights analysis noted that 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.³

1.243 The previous analysis stated that, 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.

1.244 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.

1.245 The initial analysis identified that 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

2 See, Schedule 11, item 4. One penalty unit increased to \$210 as of 1 July 2017.

3 Statement of compatibility (SOC) 160.

contravention of the competition law', however, 'the current sanction for a corporation failing to comply with section 155 of the [Competition Act] is inadequate'.⁴

1.246 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.

1.247 However, as the initial analysis stated, 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.⁵ 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.

1.248 The committee therefore requested 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

1.249 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.

1.250 The previous analysis stated that by increasing the penalty for refusal or failure to comply with a notice to furnish or produce information or to appear before

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

5 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.

the ACCC and by increasing the matters which may be subject to a notice, the measure engages and limits the right to privacy.

1.251 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.

1.252 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.⁶ However, as noted in the initial analysis, 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.

1.253 The committee therefore requested 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.

Treasurer's response

1.254 The treasurer's response usefully addresses each of the questions asked by the committee.

Increased penalty for failure to furnish or produce information

1.255 In relation to whether the increased penalty is aimed at achieving a legitimate objective, the treasurer's response states:

The legitimate objective of the increased penalty is to strengthen the effectiveness, and ensure the integrity, of the ACCC's primary investigative power. The ACCC relies heavily on this power to compel parties to provide information, documents and evidence, in order to investigate anti-competitive conduct, which often occurs secretly.

1.256 Ensuring the effectiveness and integrity of the ACCC's investigative power, in the context of competition law, appears to constitute a legitimate objective for the purposes of international human rights law.

1.257 In relation to how the increased penalty is effective to achieve that objective, the treasurer's response states:

The current penalty for non-compliance with section 155 was considered by the independent Competition Policy Review (the Harper Review) to be inadequate. Given that compliance with compulsory investigative powers is integral to the ACCC's investigation of competition concerns and a necessary part of the ACCC's enforcement of the CCA, the proposed increase in the penalty for non-compliance would more effectively deter non-compliance.

1.258 It is acknowledged that stronger penalties may be a mechanism for deterring non-compliance with coercive evidence gathering powers such that the increased penalty is rationally connected to its objective. However, as noted in the committee's initial analysis, the Harper Review's recommendations related to penalties applying to corporations. It is noted that the increased penalty of imprisonment can by its nature only apply to individuals. As such, it is unclear why current penalties with respect to individuals are necessarily insufficient in light of the Harper Review and this was not further explained or addressed in the treasurer's response.

1.259 In relation to whether the measure is a proportionate limitation on the right not to incriminate oneself, the treasurer's response provides:

The increased penalty is reasonable and proportionate as it is consistent with the penalty applicable to directly comparable provisions, such as a similar power under the *Australian Securities and Investments Commission Act 2001* (as recommended by the Harper Review). It is important to note that the increase is to a *maximum* possible penalty, and the court has discretion to set a penalty lower than the maximum.

...The compulsory information-gathering power in section 155 needs to be supported by an effective penalty to deter non-compliance with the power. The Harper Review found that the current penalty is inadequate and recommended that it be increased in line with similar powers under the *Australian Securities and Investments Commission Act 2001*. The Bill implements this recommendation and will ensure that the penalty better serves its deterrent purpose.

1.260 While it is acknowledged that the court would retain discretion in relation to the application of a penalty of imprisonment, a human rights analysis must assess the possible maximum penalty that is being proposed by the legislation. In respect of similar powers under the *Australian Securities and Investment Commissions Act 2001*, the fact that other agencies may have such powers or such penalties does not mean that such measures are, for that reason, necessarily compatible with the right not to incriminate oneself. On the other hand, coercive evidence gathering powers of

this kind may be more likely to be proportionate given the particular regulatory context and the type of material the ACCC is dealing with (although this issue was not addressed in the treasurer's response).

1.261 In relation to whether the measure is the least rights restrictive way of achieving its objective, the initial analysis stated that a less rights restrictive alternative would be to include a 'derivative use' immunity. The treasurer's response states that the government has no plans to introduce such an immunity and that it was not recommended by the Harper Review. There was no information provided in the treasurer's response as to why such an immunity would not be reasonably available.

1.262 The treasurer's response provides some useful information as to existing safeguards in relation to the operation of a coercive evidence gathering notice under section 155 of the Competition Act:

Before it can issue a section 155 notice, the ACCC must have 'reason to believe' that a person is capable of providing information, documents or evidence relating to certain limited matters (including a possible contravention of the Act, a merger authorisation determination or a possible contravention of a court-enforceable undertaking). That is, the ACCC cannot use the section 155 power merely for a 'fishing expedition'.

Further, subsection 155(2A) is clear that the ACCC cannot issue a section 155 notice merely because a person has refused or failed to comply with certain other information-gathering powers on the basis that compliance may incriminate that person.

Finally, the ACCC may only use and disclose such material in accordance with the provisions of section 155AAA of the CCA [Competition Act]. Section 155AAA provides that an ACCC official must not disclose any protected information (which includes information obtained under section 155) to any person, except when performing duties or functions as an ACCC official or where the disclosure is required or permitted by law.

The ACCC is also subject to the *Privacy Act 1988* and the Australian Privacy Principles, which contain important requirements and safeguards around the collection, storage, use and disclosure of personal information.

1.263 These are relevant safeguards with respect to the operation of the powers. As set out above, section 155 of the Competition 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*. Increasing the penalty for non-compliance, with this provision, affects the proportionality of the coercive evidence gathering powers more generally. While some helpful information has been provided as to relevant safeguards, concerns remain as to whether the coercive evidence gathering powers under the Competition Act are compatible with the right not to incriminate oneself and the right to privacy.

Expansion of matters subject to notice

1.264 In relation to the expansion of matters subject to notice, the treasurer's response provides that:

The Bill introduces two new matters in relation to which a section 155 notice may be issued.

The first new matter is a merger authorisation determination of the ACCC. The objective of this addition is to support the ACCC in its new role as the first-instance decision-maker for merger authorisation determinations.

The second new matter is an actual or possible contravention of a court-enforceable undertaking given under section 87B. The objective of this addition is to ensure the integrity of court-enforceable undertakings.

1.265 In broad terms, providing the ACCC relevant information to perform its functions is likely to be a legitimate objective for the purposes of international human rights law.

1.266 In relation to how the expansion of matters subject to notice is effective to achieve those objectives, the treasurer's response states:

In relation to the first new matter, section 155 already allows a notice to be issued in relation to decisions of the ACCC under the existing powers to grant general authorisations (such as section 91B, which deals with revocation of general authorisations) and merger clearances (such as 95AS, which deals with revocation of merger clearances). The addition of merger authorisation determinations to the list reflects the fact that the Bill repeals the merger clearance process and makes the ACCC the first-instance decision-maker for merger authorisations.

In relation to the second new matter, the expansion of section 155 to cover court-enforceable undertakings enables the ACCC to investigate possible non-compliance with such an undertaking. Generally, a section 87B undertaking will be given to the ACCC in order to address a competition concern, and enforcing the undertaking before the court relies on the ACCC being able to investigate possible non-compliance.

1.267 It is acknowledged that coercive information gathering powers may be of assistance in the ACCC performing its functions. Accordingly, they are likely to be rationally connected to the stated objective of the measure.

1.268 In relation to the proportionality of the expansion of matters subject to a notice, the treasurer's response states:

The reasonableness and proportionality of this measure must be judged against the harm which it is seeking to address.

In the case of merger authorisation determinations, the addition of this matter to section 155 reflects the fact that the ACCC (rather than the Tribunal) will now be the first-instance decision-maker. In order to properly assess an application for merger authorisation, the ACCC needs to

be able to properly investigate to uncover all significant information which is relevant to its decision. If an anti-competitive merger were to be authorised on the basis of incomplete information, this could lead to significant competitive harm and substantial detriment to consumer welfare.

The extension of s155 to court-enforceable undertakings will significantly improve the ability of the ACCC to quickly gather relevant information where it has a reason to believe an undertaking has been contravened. Given that section 87B undertakings are often given to address a competition concern, the lack of an information-gathering power could result in competitive harm and detriment to consumer welfare.

In these circumstances, the expansion of the matters subject to a section 155 notice is both reasonable and proportionate.

1.269 In relation to whether there are any less rights restrictive alternatives available, the treasurer's response states:

There are no effective alternatives to extending the use of the information-gathering powers in s155 to support the ACCC's roles in assessing merger authorisation applications and investigating breaches of court-enforceable undertakings. Further, whether or not a section 155 notice can be issued in relation to a given matter is a binary question: either a matter (such as an actual or potential contravention of a court-enforceable undertaking) is subject to section 155, or it is not. Therefore, it is difficult to envisage a 'less rights-restrictive' way of bringing these new matters within the ACCC's compulsory investigative powers.

1.270 Noting the regulatory matters to which such proposed powers relate, this may support a finding that the expansion of matters subject to a notice is proportionate. However, it should be clarified that a less rights restrictive alternative would not necessarily require legislation to limit the matters on which a notice may be issued: an alternative may be less rights restrictive by providing better protections against use of information that is compulsorily acquired for the purposes of any future criminal proceedings (in relation to the right not to incriminate oneself) or the sharing of information compulsorily acquired (in relation to the right to privacy). However, as noted above, other than noting that a derivative use immunity would not be provided, the treasurer's response does not provide any reasoning to explain why such an immunity would not be workable.

Committee response

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

1.272 As set out above, the measures engage and limit the right not to incriminate oneself and the right to privacy.

1.273 The measures expand the effect of coercive evidence gathering provisions which were legislated prior to the establishment of the committee and have 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*. The preceding analysis identifies concerns that arise from increased penalties for non-compliance and the expansion of matters that may be subject to a section 155 notice.

1.274 In relation to the increased penalty for non-compliance, while the measure seeks to implement a recommendation of the Harper Review with respect to penalties for corporations, it extends beyond corporations to apply to individuals.

1.275 In relation to the expansion of matters that may be subject to a notice, questions arise as to the sufficiency of relevant safeguards provided by the Competition Act.

1.276 The committee draws the human rights implications of the measure to the attention of parliament.

Increased penalties for secondary boycotts

1.277 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.

1.278 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 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

1.279 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.

1.280 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.⁷

1.281 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.

1.282 The previous analysis noted that 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.⁸ The statement of compatibility does not explain what 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. The previous analysis stated that further information would assist the committee's assessment of the measure.

1.283 The committee therefore requested 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

1.284 The right to freedom of assembly and the right to freedom of expression are protected by articles 19 and 21 of the ICCPR. As noted in the initial human rights analysis, 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,

7 SOC 151-152.

8 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*.

public order, public health or morals. Additionally, such limitations must be prescribed by law, reasonable, necessary and proportionate to achieving the prescribed purpose.

1.285 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.

1.286 The committee therefore requested 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).

Treasurer's response

1.287 The treasurer's response provided the following information in relation to the proposal to increase penalties for secondary boycotts:

Schedule 6 to the Bill proposes to increase the maximum penalty for a contravention of the secondary boycott provisions (section 45D and 45DA of the CCA), to align with the penalties applicable to other breaches of the competition law.

This change was recommended by the Harper Review. Importantly, the Bill does not change the scope of what is and is not prohibited by the secondary boycott provisions.

Broadly, secondary boycotts are boycotts which are engaged in for the purpose of causing substantial loss or damage to the business of a person (section 45D) or causing a substantial lessening of competition in a market (section 45DB). Secondary boycotts have been prohibited since 1977 and the Harper Review found that a strong case remained for this prohibition. It is in the public interest to prevent this type of harm, particularly where it is not justified by the protection of other rights, as secondary boycotts can disrupt competitive markets, increase costs for businesses and consumers, and reduce productivity.

The CCA recognises the importance of workplace rights, and expressly permits secondary boycotts by employees and trade unions if the dominant purpose of the conduct is substantially related to employment matters (remuneration, conditions of employment, hours or work or working conditions).

1.288 In relation to the compatibility of this measure with the right to freedom of association and the right to freedom of assembly and expression, the treasurer's response states:

Whether the measure is aimed at achieving a legitimate objective for the purposes of international human rights law:

The objective of the increased penalty is to provide an effective deterrent to engaging in secondary boycotts, of the type captured by sections 45D and 45DA, and thereby protect the rights and interests of businesses and consumers by ensuring such boycotts do not undermine the proper functioning of competitive markets.

How the measure is effective to achieve that objective:

The increased penalty is effective to achieve that objective as it ensures that secondary boycotts, as prohibited by sections 45D and 45DA, are more strongly deterred.

Whether the limitation is a reasonable and proportionate measure to achieve the stated objective:

The increased penalty is reasonable and proportionate, in light of the Harper Review finding that the current penalty for secondary boycotts was inadequate and its recommendation that the maximum penalty for secondary boycotts should be the same as that applying to other breaches of the competition law.

What matters do or do not have a 'dominant purpose' related to employment:

The 'dominant purpose related to employment' exemption, as contained in subsection 45DD(1), can be illustrated by the following two examples.

Example – secondary boycott without dominant purpose related to employment:

Company A and Company B both supply components to a factory. A new competitor, Company C, enters the market and starts supplying components to the factory. Companies A and B decide to boycott the factory (that is, they stop supplying the factory), until the factory ceases dealing with C, so as to damage Company C's business and try to eliminate Company C as a competitor.

In this example, Company A and Company B have engaged in conduct which is unrelated to employment matters and which has the purpose of substantially damaging Company C's business. This has not only unfairly damaged Company C's business, but has also caused competitive harm to the market for the component by eliminating a new market entrant.

Example – secondary boycott with dominant purpose related to employment:

Company X owns a site which hosts a number of companies, including Company Z, a contractor which is in dispute with its employees over enterprise bargaining claims. Negotiations between Company Z and its employees have broken down, and so the employees of Company Z picket the site, which prevents customers accessing the site. The intention of

Company Z's employees is to cause substantial losses to Company X, so that Company X pressures Company Z to resume negotiations with its employees. In this example, the dominant purpose of Company Z's employees is related to employment matters.

1.289 The information provided usefully indicates that the measure pursues a legitimate objective and is rationally connected to that objective. It is further noted that the 'dominant purpose' of employment exception is an important and relevant exception to the prohibition on secondary boycotts in section 45D.⁹

1.290 However, the examples do not make clear to what extent the exemption would provide any protection to sympathy strikes or related assembly. It is noted that in a broad range of contexts such as outsourced employment models, conduct against entities that may not be a person's direct employer may be seen as an aspect of the right to strike, freedom of expression or assembly.

1.291 There is also an exemption from section 45D if the conduct is not 'industrial action' and it is engaged in for a dominant purpose substantially related to environmental or consumer protection. However, the measure may still have the effect of prohibiting campaigns and protest action that may use boycotts as a technique. It is noted that there is no exception provided on the grounds, for example, that the boycott action relates to human rights matters. Further, section 45DB would appear to prohibit cross-border sympathy strikes or solidarity action including in relation to international supply chains or in support of Australian workers.¹⁰ This means that the relevant sections may prohibit an aspect of the right to freedom of association, the right to freedom of expression and the right to freedom of assembly as understood in international law. The substantial increase in penalty proposed by the measure makes these provisions less likely to be proportionate limitations on these rights.

Committee response

1.292 The preceding analysis indicates that, in light of existing provisions and the information provided, the substantial increase in the penalty for the breaches of the secondary boycott provisions makes these provisions less likely to be proportionate with the right to freedom of association, the right to freedom of assembly and the right to freedom of expression.

9 Under section 45D: a person (A) must not engage in conduct, in concert with another person (B) which: hinders or prevents a third person (C) either supplying goods or services to a fourth person (D) or acquiring goods or services from D; and is engaged in for the purpose and would have or be likely to have the effect of causing substantial loss or damage to the business of D. D must not be an employer of A or B for the purpose of the section.

10 See, for example, Australian Competition and Consumer Commission, *Press Release ACCC/Maritime Union of Australia*, 28 May 1998, <http://www.accc.gov.au/content/index.phtml/itemId/87308/fromItemId/378006>.

1.293 Accordingly, the committee requests the advice of the treasurer as to whether:

- **section 45D prohibits sympathy strikes or assembly against entities who are not the person's primary employer;**
- **section 45D prohibits any actions such as assembly or picketing against a person's primary employer;**
- **section 45D prohibits boycotts on human rights grounds; and**
- **section 45DB prohibits cross-border strikes or sympathy action, such that the increased penalty would apply to each of these types of action.**

Advice only

1.294 The committee draws the following bills and instruments to the attention of the relevant minister or legislation proponent on an advice only basis. The committee does not require a response to these comments.

Australian Bill of Rights Bill 2017

Purpose	Seeks to introduce a Bill of Rights in Australian law, giving effect to certain provisions of the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the Convention on the Rights of the Child. The bill further provides for the role of the Australian Human Rights Commission in inquiring into and receiving complaints concerning alleged infringements of rights or freedoms in the Bill of Rights
Sponsor	Andrew Wilkie MP
Introduced	House of Representatives, 14 August 2017
Rights	Multiple rights (see Appendix 2)
Status	Advice only

Incorporation of international human rights into domestic law

1.295 The Australian Bill of Rights Bill (the bill) seeks to enshrine a Bill of Rights in Australian law.¹ The explanatory statement to the bill explains that the Bill of Rights is modelled closely on the Australian Bill of Rights Bill 2001 (the 2001 bill).

1.296 Overall, the bill engages and promotes human rights that are contained in major human rights treaties to which Australia is party, principally in the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the Convention on the Rights of the Child.² It should be noted that the UN Committee on Economic, Social and Cultural Rights has recently recommended that Australia incorporate human rights obligations into Australian domestic law.³

1.297 While other international human rights instruments to which Australia is a party and which fall within the scope of the committee's mandate are not explicitly

1 The Bill of Rights is contained in part 5 of the bill.

2 Statement of Compatibility (SOC) 1.

3 UN Committee on Economic, Social and Cultural Rights, *Concluding observations on the fifth periodic report of Australia* (23 June 2017) E/C.12/AUS/CO/5.

mentioned in section 3 of the bill,⁴ a number of provisions in the Part 5 of the bill, which sets out the particular rights to be protected, protect some of the rights which are contained within these other treaties.⁵

1.298 Several of the provisions of the bill go beyond the human rights recognised in the seven core human rights treaties which fall within the scope of the committee's mandate under section 7 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.⁶

Role of the Australian Human Rights Commission

1.299 The bill also gives the Australian Human Rights Commission (the commission) powers in addition to what it has under the *Australian Human Rights Commission Act 1986* (the AHRC Act).

1.300 In this respect, it is noted that the committee recently considered amendments to the AHRC Act which introduced a number of changes to the process for how the commission handles complaints of discrimination and the ability of persons alleging discrimination to apply to court after their complaint has been terminated.⁷

Permissible limitations to human rights

1.301 International human rights law recognises that reasonable limits may be placed on most human rights. Some rights have express limitation clauses setting out when the rights may be limited, while others have implied limitations, and some treaties contain a general limitation clause.⁸

1.302 There are, however, a number of absolute rights that may never be subject to permissible limitations in any circumstances. These include the right not to be subjected to torture, cruel, inhuman or degrading treatment, and the right not to be subjected to slavery.⁹

4 Specifically, section 3 (b) of the bill does not refer to the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of Discrimination Against Women, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and the Convention on the Rights of Persons with Disabilities.

5 Article 14(1) of the Bill of Rights.

6 For example, Article 22 (Property) of the Bill of Rights.

7 Parliamentary Joint Committee on Human Rights, *Report 4 of 2017*, 50; see further Parliamentary Joint Committee on Human Rights, *Freedom of Speech in Australia: Inquiry into the operation of Part IIA of the Racial Discrimination Act 1975 (Cth) and related procedures under the Australian Human Rights Commission Act 1986 (Cth)*.

8 See Parliamentary Joint Committee on Human Rights, *Guidance Note 1: Drafting Statements of Compatibility* (December 2014).

9 See Parliamentary Joint Committee on Human Rights, *Guide to Human Rights*, 7.

1.303 The bill contains a general limitations clause which sets out the permissible limitations to human rights in Article 3 as follows:

(1) The rights and freedoms set out in this Bill of Rights are subject only to such reasonable limitations prescribed by law as can be demonstrably justified in a free and democratic society.

(2) A right or freedom set out in this Bill of Rights may not be limited by any law to any greater extent than is permitted by the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.

1.304 This provision applies to all rights contained in Part 5 of the bill. The explanatory memorandum and statement of compatibility to the bill do not discuss this general limitation clause, however the explanatory memorandum to the 2001 bill (which is in substantively identical terms and upon which the bill heavily draws) explains the rationale for including a general limitations clause as follows:

...in order to produce an inspirational charter of rights in a simple declaratory style, the drafting technique of consolidating the qualifications into one Article has been used in preference to attaching detailed qualifications to individual Articles.¹⁰

1.305 The explanatory memorandum to the 2001 bill further explains that the provision is modelled on a similar provision in the 1982 *Canadian Charter of Rights and Freedoms*.¹¹

1.306 The bill does not expressly state that the general limitations provision does not apply to those rights which are absolute rights under international law. However, the terms of article 3(2) may be capable of addressing this such that it prevents the general limitations clause allowing for limitations to be placed on those rights within the bill which are absolute rights.

The rights of Indigenous Australians

1.307 Article 10 of the Bill of Rights contained in Part 5 of the bill sets out specific rights and responsibilities concerning Indigenous Australians.

1.308 Article 10 engages and promotes a number of international human rights, including the right for members of minorities to enjoy their culture, practice their religion and use their language and the right to self-determination. However, unlike the other subsections of Article 10, which are expressed in terms of rights, Article 10(e) is framed in terms of responsibility:

Aboriginal and Torres Strait Islander people have the following individual and collective rights and responsibilities:

10 Explanatory Memorandum to the Australian Bill of Rights Bill 2001, 8.

11 Article 1 of the *Canadian Charter of Rights and Freedoms 1982*.

[...]

(e) the responsibility to respect their laws and customs and to promote Indigenous culture.

1.309 The UN Declaration on the Rights of Indigenous Peoples (Declaration) contains a number of rights and freedoms of Indigenous peoples. While the Declaration is not included in the definition of 'human rights' under the *Human Rights (Parliamentary Scrutiny) Act 2011*, it provides some useful context as to how human rights standards under international law apply to the particular situation of Indigenous peoples. The language of the Declaration is cast in terms of rights and freedoms (such as the right to be free from discrimination, the right to self-determination, and the right to cultural identity). The Declaration provides, among other rights, that Indigenous peoples have the right to determine the responsibilities of individuals to their communities.¹²

1.310 Neither the explanatory statement nor the statement of compatibility provide any information as to why Article 10(e) is phrased in terms of responsibility instead of rights.

Proposed right of every person to end his or her own life

1.311 Article 12(3) of the Bill of Rights provides that 'every person has the right to end his or her own life'.

1.312 The ICCPR recognises that every human being has the inherent right to life, that this right shall be protected by law, and that no one shall be arbitrarily deprived of his or her life.¹³ States must take positive steps to safeguard the right to life.

1.313 In giving persons a right to end his or her own life, the provision engages a number of human rights. In particular, it engages and limits the right to life. It also engages various other human rights, including the freedom from cruel, inhuman or degrading treatment, the right to respect for private life, and freedom of thought, conscience and religion.

1.314 The compatibility of voluntary euthanasia with international human rights law is not settled.¹⁴ The UN Human Rights Committee has made clear that States are obliged 'to apply the most rigorous scrutiny to determine whether the state party's obligations to ensure the right to life are being complied with', including stringent

12 Article 35 of the UN Declaration on the Rights of Indigenous Peoples.

13 Article 6(1) of the ICCPR.

14 See Australian Human Rights Commission, *Euthanasia, human rights and the law: Issues Paper* (May 2016).

safeguards.¹⁵ The European Court of Human Rights has held the right to life cannot be interpreted as conferring a right to die, and has further held that the right to life could 'not create a right to self-determination in the sense of conferring on an individual the entitlement to choose death rather than life'.¹⁶ The European Court of Human Rights has also emphasised, however, the importance of a patient's wishes in the medical decision making process, and that there is a balance to be struck between the protection of the right to life and the protection of persons' right to respect for their private life and personal autonomy.¹⁷

Committee comment

1.315 The committee draws the human rights implications of the Australian Bill of Rights Bill 2017 to the legislation proponent and parliament.

1.316 If the bill proceeds to further stages of debate, the committee may request further information from the legislation proponent.

15 UN Human Rights Committee, *Consideration of Reports by States Parties under Article 40 of the Covenant : Concluding observations of the Human Rights Committee – Netherlands*, CCPR/CO/72/NET (2001) 2; Australian Human Rights Commission, *Euthanasia, human rights and the law: Issues Paper* (May 2016) 34-35.

16 *Pretty v United Kingdom*, European Court of Human Rights Application No. 2346/02, 29 April 2002.

17 *Lambert and Others v France*, European Court of Human Rights Application No. 46043/14, 5 June 2015 [147].

Bills not raising human rights concerns

1.317 Of the bills introduced into the Parliament between 14 and 17 August, 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):

- Defence Amendment (Fair Pay for Members of the ADF) Bill 2017;
- Electoral Amendment (Banning Foreign Political Donations) Bill 2017;
- Family Trust Distribution Tax (Primary Liability) Amendment (National Disability Insurance Scheme Funding) Bill 2017;
- Fringe Benefits Tax Amendment (National Disability Insurance Scheme Funding) Bill 2017;
- Income Tax Rates Amendment (National Disability Insurance Scheme Funding) Bill 2017;
- Income Tax (TFN Withholding Tax (ESS)) Amendment (National Disability Insurance Scheme Funding) Bill 2017;
- Medicare Levy Amendment (National Disability Insurance Scheme Funding) Bill 2017;
- Nation-building Funds Repeal (National Disability Insurance Scheme Funding) Bill 2017;
- Superannuation (Excess Non-concessional Contributions Tax) Amendment (National Disability Insurance Scheme Funding) Bill 2017;
- Superannuation (Excess Untaxed Roll-over Amounts Tax) Amendment (National Disability Insurance Scheme Funding) Bill 2017;
- Taxation Administration Amendment (Corporate Tax Entity Information) Bill 2017;
- Taxation (Trustee Beneficiary Non-disclosure Tax) (No. 1) Amendment (National Disability Insurance Scheme Funding) Bill 2017;
- Taxation (Trustee Beneficiary Non-disclosure Tax) (No. 2) Amendment (National Disability Insurance Scheme Funding) Bill 2017; and
- Treasury Laws Amendment (Untainting Tax) (National Disability Insurance Scheme Funding) Bill 2017.

Chapter 2

Concluded matters

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

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

Federal Financial Relations (National Partnership payments) Determination No. 116-119 (February 2017)-(May 2017)¹

Purpose	Specifies the amounts to be paid to the states and territories to support the delivery of specified outputs or projects, facilitate reforms by the states or reward the states for nationally significant reforms
Portfolio	Treasury
Authorising legislation	<i>Federal Financial Relations Act 2009</i>
Last day to disallow	Exempt
Rights	Health; social security; adequate standard of living; children; education (see Appendix 2)
Previous report	7 of 2017
Status	Concluded examination

Background

2.3 The committee first reported on the Federal Financial Relations (National Partnership payments) Determination No. 116-119 (February 2017)-(May 2017) in its *Report 7 of 2017*, and requested a response from the treasurer by 22 August 2017.²

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- 1 Federal Financial Relations (National Partnership payments) Determination No. 116 (February 2017) [F2017L00198]; Federal Financial Relations (National Partnership payments) Determination No. 117 (March 2017) [F2017L00413]; Federal Financial Relations (National Partnership payments) Determination No. 118 (April 2017) [F2017L00540]; Federal Financial Relations (National Partnership Payments) Determination No. 119 (May 2017) [F2017L00707]. This report entry also deals with Federal Financial Relations (National Partnership payments) Determination No.121 (29 June 2017) [F2017L00939] and Federal Financial Relations (National Partnership payments) Determination No. 120 (June 2017) [F2017L00943] received since *Report 7 of 2017*.
 - 2 Parliamentary Joint Committee on Human Rights, *Report 7 of 2017* (8 August 2017) 2-6.

2.4 The assistant minister to the treasurer's response to the committee's inquiries was received on 18 August 2017. The response is discussed below and is reproduced in full at **Appendix 3**.

2.5 The committee has previously examined a number of related Federal Financial Relations (National Partnership payments) Determinations made under the *Federal Financial Relations Act 2009* and requested and received further information from the treasurer as to whether they were compatible with Australia's human rights obligations.³

Payments to the states and territories for the provision of health, education, employment, housing and community services

2.6 The Intergovernmental Agreement on Federal Financial Relations (the IGA) provides for a range of payments from the Commonwealth government to the states and territories. These include National Partnership payments (NPPs) which are financial contributions to support the delivery of specified projects, facilitate reforms or provide incentives to jurisdictions that deliver on nationally significant reforms. These NPPs are set out in National Partnership agreements made under the IGA, which specify mutually agreed objectives, outcomes, outputs and performance benchmarks.

2.7 The *Federal Financial Relations Act 2009* provides for the minister, by legislative instrument, to determine the total amounts payable in respect of each NPP in line with the parameters established by the relevant National Partnership agreements. Schedule 1 to each of the determinations sets out the amounts payable under the NPPs to states and territories, contingent upon the attainment of specified benchmarks or outcomes, in areas including health, employment, education, community services and affordable housing.

Compatibility of the measure with multiple rights

2.8 In its previous analysis, the committee has noted that setting benchmarks for achieving certain standards, which may consequently result in fluctuations in funding allocations, has the capacity to both promote rights and, in some cases, limit rights, including the right to health; the right to social security; the right to an adequate standard of living, including housing; the right to education; and the rights of children.

2.9 Under international human rights law, Australia has obligations to progressively realise economic, social and cultural (ESC) rights using the maximum of

3 See Parliamentary Joint Committee on Human Rights, *Twenty-eighth report of the 44th Parliament* (17 September 2015) 10-14; *Thirtieth report of the 44th Parliament* (10 November 2015) 102-109; *Report 7 of 2016* (11 October 2016) 40-43; *Report 8 of 2016* (9 November 2016) 84-87; and *Report 3 of 2017* (28 March 2017) 13-16.

resources available, and a corresponding duty to refrain from taking retrogressive measures, or backwards steps, in relation to the realisation of these rights.

2.10 Because realisation of these rights is reliant on government allocation of expenditure, a reduction in funding for services such as health and education may be considered a retrogressive measure in the attainment of ESC rights.⁴ Any backward step regarding the progressive attainment of such rights therefore needs to be justified for the purposes of international human rights law.

2.11 As noted in the previous human rights analysis, the statement of compatibility for each of the determinations contains a standard paragraph, similar to information provided for past related determinations considered by the committee, which states:

neither this determination nor the making of National Partnership payments more generally could be said to have a detrimental impact on any human right.⁵

2.12 The statements of compatibility for the determinations therefore do not provide an assessment of the extent to which fluctuations in funding, with reference to the achievement or failure to achieve specific benchmarks or outcomes, may promote human rights (where funding is increased) or may be regarded as retrogressive (where funding is reduced).

2.13 As noted above, the committee previously requested further advice from the treasurer as to whether the setting of benchmarks for the provision of funds under the previous NPPs is compatible with human rights (for example, how the benchmarks may or may not support the progressive realisation of human rights such as the rights to health and education); whether there are any retrogressive trends over time indicating reductions in payments which may impact on human rights (such as health, education or housing); and whether any retrogressive measures or trends pursue a legitimate objective, are rationally connected to their stated objective, and are a reasonable and proportionate measure for the achievement of that objective.

2.14 As outlined in the previous analysis, the response previously provided by the Treasurer in relation to similar measures provided a very useful assessment of the human rights compatibility of the NPPs in the context of ESC rights. The provision of

4 The committee has previously considered similar issues in relation to the human rights compatibility of funding allocation measures through appropriation bills: See, Parliamentary Joint Committee on Human Rights, *Twenty-third report of the 44th Parliament* (18 June 2015) Appropriation Bill (No. 3) 2014-2015 and Appropriation Bill (No. 4) 2014-2015, 13-17; *Report 2 of 2017* (21 March 2017) Appropriation Bill (No. 3) 2016-2017 and Appropriation Bill (No. 4) 2016-2017, 44-46; *Report 5 of 2017* (14 June 2017) Appropriation Bill (No. 1) 2017-2018 and Appropriation Bill (No. 2) 2017-2018, 42-44.

5 Explanatory statement, statement of compatibility 2.

such additional information by the treasurer allowed the committee to conclude that past determinations were likely to be compatible with Australia's international obligations.⁶ While the committee recommended this type of information be included in future statements of compatibility going forward, this had not occurred to date.

2.15 Without this additional information included in statements of compatibility, it is difficult for the committee to complete its assessment of the compatibility of NPPs. The previous analysis stated that, if such information were included in the statement of compatibility at the outset then the committee may not need to request further information from the Treasurer in relation to NPPs.

2.16 In relation to the determinations examined in its *Report 7 of 2017*, the committee therefore sought the advice of the treasurer as to:

- whether the setting of benchmarks for the provision of funds under the National Partnership payments is compatible with human rights (for example, how the benchmarks may or may not support the progressive realisation of human rights such as the rights to health and education);
- whether there are any retrogressive trends over time indicating reductions in payments which may impact on human rights (such as health, education or housing); and
- whether any retrogressive measures or trends pursue a legitimate objective; are rationally connected to their stated objective; and are a reasonable and proportionate measure for the achievement of that objective.

2.17 Additionally, the committee sought the advice of the treasurer as to whether this type of information, previously provided by the treasurer to the committee, could be included in future statements of compatibility for related National Partnership payment determinations to assist the committee to fully assess the compatibility of the measure with human rights in future.

Assistant minister's response

2.18 The response addresses whether the setting of benchmarks for the provision of funds through NPPs is compatible with human rights. The response states that the setting of performance requirements promotes the progressive realisation of human rights by creating an incentive for the efficient delivery of services, projects and reforms where NPPs support human rights in sectors such as health, education, housing and community services. It explains that states and territories meet the overwhelming majority of performance requirements in NPPs. The response notes that the associated funding is then paid in accordance with the determinations for NPPs, consistent with the terms and conditions of the relevant agreement. This

6 Parliamentary Joint Committee on Human Rights, *Report 8 of 2016* (9 November 2016) 84-87.

indicates that setting mutually-agreed benchmarks for the provision of payments under the NPPs is likely to be positively impacting a number of service areas that affect the progressive realisation of ESC rights.

2.19 The previous human rights assessment of the determinations also raised concerns regarding whether there have been any retrogressive trends over time in relation to the allocation of NPPs. In relation to potential issues of decreases in funding and the impact this may have on the capacity of states and territories to deliver essential services, the assistant minister states that there is no evidence to suggest that the setting of performance requirements would lead to a situation where states and territories frequently become ineligible for NPPs due to a failure to meet those requirements. He states that where payments do cease, this is usually because the agreed project or reform is completed and no further funding is required. As such, decreases in payments are usually a direct result of the achievement of the agreement's stated objective. This in itself could indicate potential steps towards the progressive realisation of ESC rights in that state or territory.

2.20 The assistant minister also sets out other reasons for fluctuations in payments that do not necessarily reflect retrogressive trends (for example, structural changes to funding mechanisms as a result of the full implementation of the National Disability Insurance Scheme).

2.21 In relation to the committee's request that the type of information provided in this response be included in future statements of compatibility, the assistant minister agreed that from September 2017 onwards, the statements of compatibility that accompany determinations will be expanded to include this information.

Committee response

2.22 The committee thanks the assistant minister for his response and has concluded its examination of the determinations.

2.23 The committee welcomes the useful information in relation to the operation and impact of NPPs set out in this response.

2.24 The preceding legal analysis indicates that, based on the information provided, the NPPs are unlikely to constitute a retrogressive measure for the purposes of international human rights law.

2.25 Based on the information provided, NPPs are likely to assist and provide a mechanism for the progressive realisation of a number of economic, social and cultural rights.

2.26 The committee welcomes the commitment by the treasurer to include the above information in future statements of compatibility for related NPP determinations to assist the committee to fully assess the continued compatibility of NPPs with human rights.

Mr Ian Goodenough MP

Chair

Appendix 1

Deferred legislation

3.1 The committee has deferred its consideration of the following legislation for the reporting period:

- Anti-Money Laundering and Counter-Terrorism Financing Amendment Bill 2017;
- Telecommunications (Integrated Public Number Database Scheme - Conditions for Authorisations) Determination 2017 [F2017L00941]; and
- Telecommunications (Integrated Public Number Database Scheme - Criteria for Deciding Authorisation Applications) Instrument 2017 [F2017L00937].

3.2 The committee continues to defer its consideration of the following legislation:

- Autonomous Sanctions Amendment (Democratic People's Republic of Korea) Regulations 2017 [F2017L00880];
- Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Ukraine) Amendment List 2017 [F2017L00675];
- Autonomous Sanctions (Designated Persons and Entities – Democratic People's Republic of Korea) Amendment List 2017 [F2017L00637];
- Charter of the United Nations (Sanctions—Democratic People's Republic of Korea) Amendment (2017 Measures No. 1) Regulations 2017 [F2017L00878];
- Criminal Code Amendment (Control Orders—Legal Representation for Young People) Regulations 2017 [F2017L00843]; and
- Therapeutic Goods Legislation Amendment (2017 Measures No. 1) Regulations 2017 [F2017L00853].

Appendix 2

Short guide to human rights

4.1 The following guide contains short descriptions of human rights regularly considered by the committee. State parties to the seven principal human rights treaties are under a binding obligation to respect, protect and promote each of these rights. For more detailed descriptions please refer to the committee's *Guide to human rights*.¹

4.2 Some human rights obligations are absolute under international law, that is, a state cannot lawfully limit the enjoyment of an absolute right in any circumstances. The prohibition on slavery is an example. However, in relation to most human rights, a necessary and proportionate limitation on the enjoyment of a right may be justified under international law. For further information regarding when limitations on rights are permissible, please refer to the committee's *Guidance Note 1* (see Appendix 4).²

Right to life

Article 6 of the International Covenant on Civil and Political Rights (ICCPR); and article 1 of the Second Optional Protocol to the ICCPR

4.3 The right to life has three core elements:

- it prohibits the state from arbitrarily killing a person;
- it imposes an obligation on the state to protect people from being killed by others or identified risks; and
- it imposes on the state a duty to undertake an effective and proper investigation into all deaths where the state is involved (discussed below, [4.5]).

4.4 Australia is also prohibited from imposing the death penalty.

Duty to investigate

Articles 2 and 6 of the ICCPR

4.5 The right to life requires there to be an effective official investigation into deaths resulting from state use of force and where the state has failed to protect life. Such an investigation must:

- be brought by the state in good faith and on its own initiative;
- be carried out promptly;

1 Parliamentary Joint Committee on Human Rights, *Guide to Human Rights* (June 2015).

2 Parliamentary Joint Committee on Human Rights, *Guidance Note 1* (December 2014).

- be independent and impartial; and
- involve the family of the deceased, and allow the family access to all information relevant to the investigation.

Prohibition against torture, cruel, inhuman or degrading treatment

Article 7 of the ICCPR; and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)

4.6 The prohibition against torture, cruel, inhuman or degrading treatment or punishment is absolute. This means that torture or cruel, inhuman or degrading treatment or punishment is not permissible under any circumstances.

4.7 The prohibition contains a number of elements:

- it prohibits the state from subjecting a person to torture or cruel, inhuman or degrading practices, particularly in places of detention;
- it precludes the use of evidence obtained through torture;
- it prevents the deportation or extradition of a person to a place where there is a substantial risk they will be tortured or treated inhumanely (see also non-refoulement obligations, [4.9] to [4.11]); and
- it requires an effective investigation into any allegations of such treatment and steps to prevent such treatment occurring.

4.8 The aim of the prohibition against torture, cruel, inhuman or degrading treatment is to protect the dignity of the person and relates not only to acts causing physical pain but also acts causing mental suffering. The prohibition is also an aspect of the right to humane treatment in detention (see below, [4.18]).

Non-refoulement obligations

Article 3 of the CAT; articles 2, 6(1) and 7 of the ICCPR; and Second Optional Protocol to the ICCPR

4.9 Non-refoulement obligations are absolute and may not be subject to any limitations.

4.10 Australia has non-refoulement obligations under both the ICCPR and the CAT, as well as under the Convention Relating to the Status of Refugees and its Protocol (**Refugee Convention**). This means that Australia must not under any circumstances return a person (including a person who is not a refugee) to a country where there is a real risk that they would face persecution, torture or other serious forms of harm, such as the death penalty; arbitrary deprivation of life; or cruel, inhuman or degrading treatment or punishment.

4.11 Effective and impartial review by a court or tribunal of decisions to deport or remove a person, including merits review in the Australian context, is integral to complying with non-refoulement obligations.

Prohibition against slavery and forced labour

Article 8 of the ICCPR

4.12 The prohibition against slavery, servitude and forced labour is a fundamental and absolute human right. This means that slavery and forced labour are not permissible under any circumstances.

4.13 The prohibition on slavery and servitude is a prohibition on 'owning' another person or exploiting or dominating another person and subjecting them to 'slavery-like' conditions.

4.14 The right to be free from forced or compulsory labour prohibits requiring a person to undertake work that they have not voluntarily consented to, but which they do because of either physical or psychological threats. The prohibition does not include lawful work required of prisoners or those in the military; work required during an emergency; or work or service that is a part of normal civic obligations (for example, jury service).

4.15 The state must not subject anyone to slavery or forced labour, and ensure adequate laws and measures are in place to prevent individuals or companies from subjecting people to such treatment (for example, laws and measures to prevent trafficking).

Right to liberty and security of the person

Article 9 of the ICCPR

Right to liberty

4.16 The right to liberty of the person is a procedural guarantee not to be arbitrarily and unlawfully deprived of liberty. It applies to all forms of deprivation of liberty, including detention in criminal cases, immigration detention, forced detention in hospital, detention for military discipline and detention to control the spread of contagious diseases. Core elements of this right are:

- the prohibition against arbitrary detention, which requires that detention must be lawful, reasonable, necessary and proportionate in all the circumstances, and be subject to regular review;
- the right to reasons for arrest or other deprivation of liberty, and to be informed of criminal charge;
- the rights of people detained on a criminal charge, including being promptly brought before a judicial officer to decide if they should continue to be detained, and being tried within a reasonable time or otherwise released (these rights are linked to criminal process rights, discussed below);
- the right to challenge the lawfulness of any form of detention in a court that has the power to order the release of the person, including a right to have

access to legal representation, and to be informed of that right in order to effectively challenge the detention; and

- the right to compensation for unlawful arrest or detention.

Right to security of the person

4.17 The right to security of the person requires the state to take steps to protect people from others interfering with their personal integrity. This includes protecting people who may be subject to violence, death threats, assassination attempts, harassment and intimidation (for example, protecting people from domestic violence).

Right to humane treatment in detention

Article 10 of the ICCPR

4.18 The right to humane treatment in detention provides that all people deprived of their liberty, in any form of state detention, must be treated with humanity and dignity. The right complements the prohibition on torture and cruel, inhuman or degrading treatment or punishment (see above, [4.6] to [4.8]). The obligations on the state include:

- a prohibition on subjecting a person in detention to inhumane treatment (for example, lengthy solitary confinement or unreasonable restrictions on contact with family and friends);
- monitoring and supervision of places of detention to ensure detainees are treated appropriately;
- instruction and training for officers with authority over people deprived of their liberty;
- complaint and review mechanisms for people deprived of their liberty; and
- adequate medical facilities and health care for people deprived of their liberty, particularly people with disability and pregnant women.

Freedom of movement

Article 12 of the ICCPR

4.19 The right to freedom of movement provides that:

- people lawfully within any country have the right to move freely within that country;
- people have the right to leave any country, including the right to obtain travel documents without unreasonable delay; and
- no one can be arbitrarily denied the right to enter or remain in his or her own country.

Right to a fair trial and fair hearing

Articles 14(1) (fair trial and fair hearing), 14(2) (presumption of innocence) and 14(3)-(7) (minimum guarantees) of the ICCPR

4.20 The right to a fair hearing is a fundamental part of the rule of law, procedural fairness and the proper administration of justice. The right provides that all persons are:

- equal before courts and tribunals; and
- entitled to a fair and public hearing before an independent and impartial court or tribunal established by law.

4.21 The right to a fair hearing applies in both criminal and civil proceedings, including whenever rights and obligations are to be determined.

Presumption of innocence

Article 14(2) of the ICCPR

4.22 This specific guarantee protects the right to be presumed innocent until proven guilty of a criminal offence according to law. Generally, consistency with the presumption of innocence requires the prosecution to prove each element of a criminal offence beyond reasonable doubt (the committee's *Guidance Note 2* provides further information on offence provisions (see Appendix 4)).

Minimum guarantees in criminal proceedings

Article 14(2)-(7) of the ICCPR

4.23 These specific guarantees apply when a person has been charged with a criminal offence or are otherwise subject to a penalty which may be considered criminal, and include:

- the presumption of innocence (see above, [4.22]);
- the right not to incriminate oneself (the ill-treatment of a person to obtain a confession may also breach the prohibition on torture, cruel, inhuman or degrading treatment (see above, [4.6] to [4.8]));
- the right not to be tried or punished twice (double jeopardy);
- the right to appeal a conviction or sentence and the right to compensation for wrongful conviction; and
- other specific guarantees, including the right to be promptly informed of any charge, to have adequate time and facilities to prepare a defence, to be tried in person without undue delay, to examine witnesses, to choose and meet with a lawyer and to have access to effective legal aid.

Prohibition against retrospective criminal laws

Article 15 of the ICCPR

4.24 The prohibition against retrospective criminal laws provides that:

- no-one can be found guilty of a crime that was not a crime under the law at the time the act was committed;
- anyone found guilty of a criminal offence cannot be given a heavier penalty than one that applied at the time the offence was committed; and
- if, after an offence is committed, a lighter penalty is introduced into the law, the lighter penalty should apply to the offender. This includes a right to benefit from the retrospective decriminalisation of an offence (if the person is yet to be penalised).

4.25 The prohibition against retrospective criminal laws does not apply to conduct which, at the time it was committed, was recognised under international law as being criminal even if it was not a crime under Australian law (for example, genocide, war crimes and crimes against humanity).

Right to privacy

Article 17 of the ICCPR

4.26 The right to privacy prohibits unlawful or arbitrary interference with a person's private, family, home life or correspondence. It requires the state:

- not to arbitrarily or unlawfully invade a person's privacy; and
- to adopt legislative and other measures to protect people from arbitrary interference with their privacy by others (including corporations).

4.27 The right to privacy contains the following elements:

- respect for private life, including information privacy (for example, respect for private and confidential information and the right to control the storing, use and sharing of personal information);
- the right to personal autonomy and physical and psychological integrity, including respect for reproductive autonomy and autonomy over one's own body (for example, in relation to medical testing);
- the right to respect for individual sexuality (prohibiting regulation of private consensual adult sexual activity);
- the prohibition on unlawful and arbitrary state surveillance;
- respect for the home (prohibiting arbitrary interference with a person's home and workplace including by unlawful surveillance, unlawful entry or arbitrary evictions);

- respect for family life (prohibiting interference with personal family relationships);
- respect for correspondence (prohibiting arbitrary interception or censoring of a person's mail, email and web access), including respect for professional duties of confidentiality; and
- the right to reputation.

Right to protection of the family

Articles 17 and 23 of the ICCPR; and article 10 of the International Covenant on Economic, Social and Cultural Rights (ICESCR)

4.28 Under human rights law the family is recognised as the natural and fundamental group unit of society and is therefore entitled to protection. The right requires the state:

- not to arbitrarily or unlawfully interfere in family life; and
- to adopt measures to protect the family, including by funding or supporting bodies that protect the family.

4.29 The right also encompasses:

- the right to marry (with full and free consent) and found a family;
- the right to equality in marriage (for example, laws protecting spouses equally) and protection of any children on divorce;
- protection for new mothers, including maternity leave; and
- family unification.

Right to freedom of thought and religion

Article 18 of the ICCPR

4.30 The right to hold a religious or other belief or opinion is absolute and may not be subject to any limitations.

4.31 However, the right to exercise one's belief may be subject to limitations given its potential impact on others.

4.32 The right to freedom of thought, conscience and religion includes:

- the freedom to choose and change religion or belief;
- the freedom to exercise religion or belief publicly or privately, alone or with others (including through wearing religious dress);
- the freedom to exercise religion or belief in worship, teaching, practice and observance; and
- the right to have no religion and to have non-religious beliefs protected (for example, philosophical beliefs such as pacifism or veganism).

4.33 The right to freedom of thought and religion also includes the right of a person not to be coerced in any way that might impair their ability to have or adopt a religion or belief of their own choice. The right to freedom of religion prohibits the state from impairing, through legislative or other measures, a person's freedom of religion; and requires it to take steps to prevent others from coercing persons into following a particular religion or changing their religion.

Right to freedom of opinion and expression

Articles 19 and 20 of the ICCPR; and article 21 of the Convention on the Rights of Persons with Disabilities (CRPD)

4.34 The right to freedom of opinion is the right to hold opinions without interference. This right is absolute and may not be subject to any limitations.

4.35 The right to freedom of expression relates to the communication of information or ideas through any medium, including written and oral communications, the media, public protest, broadcasting, artistic works and commercial advertising. It may be subject to permissible limitations.

Right to freedom of assembly

Article 21 of the ICCPR

4.36 The right to peaceful assembly is the right of people to gather as a group for a specific purpose. The right prevents the state from imposing unreasonable and disproportionate restrictions on assemblies, including:

- unreasonable requirements for advance notification of a peaceful demonstration (although reasonable prior notification requirements are likely to be permissible);
- preventing a peaceful demonstration from going ahead or preventing people from joining a peaceful demonstration;
- stopping or disrupting a peaceful demonstration;
- punishing people for their involvement in a peaceful demonstration or storing personal information on a person simply because of their involvement in a peaceful demonstration; and
- failing to protect participants in a peaceful demonstration from disruption by others.

Right to freedom of association

Article 22 of the ICCPR; and article 8 of the ICESCR

4.37 The right to freedom of association with others is the right to join with others in a group to pursue common interests. This includes the right to join political parties, trade unions, professional and sporting clubs and non-governmental organisations.

4.38 The right prevents the state from imposing unreasonable and disproportionate restrictions on the right to form associations and trade unions, including:

- preventing people from forming or joining an association;
- imposing procedures for the formal recognition of associations that effectively prevent or discourage people from forming an association;
- punishing people for their membership of a group; and
- protecting the right to strike and collectively bargain.

4.39 Limitations on the right are not permissible if they are inconsistent with the guarantees of freedom of association and the right to organise as contained in the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize (ILO Convention No. 87).

Right to take part in public affairs

Article 25 of the ICCPR

4.40 The right to take part in public affairs includes guarantees of the right of Australian citizens to stand for public office, to vote in elections and to have access to positions in public service. Given the importance of free speech and protest to the conduct of public affairs in a free and open democracy, the realisation of the right to take part in public affairs depends on the protection of other key rights, such as freedom of expression, association and assembly.

4.41 The right to take part in public affairs is an essential part of democratic government that is accountable to the people. It applies to all levels of government, including local government.

Right to equality and non-discrimination

Articles 2, 3 and 26 of the ICCPR; articles 2 and 3 of the ICESCR; International Convention on the Elimination of All Forms of Racial Discrimination (CERD); Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW); CRPD; and article 2 of the Convention on the Rights of the Child (CRC)

4.42 The right to equality and non-discrimination is a fundamental human right that is essential to the protection and respect of all human rights. The human rights treaties provide that everyone is entitled to enjoy their rights without discrimination of any kind, and that all people are equal before the law and entitled to the equal and non-discriminatory protection of the law.

4.43 'Discrimination' under the ICCPR encompasses both measures that have a discriminatory intent (direct discrimination) and measures which have a

discriminatory effect on the enjoyment of rights (indirect discrimination).³ The UN Human Rights Committee has explained indirect discrimination as 'a rule or measure that is neutral on its face or without intent to discriminate', which exclusively or disproportionately affects people with a particular personal attribute.⁴

4.44 The right to equality and non-discrimination requires that the state:

- ensure all laws are non-discriminatory and are enforced in a non-discriminatory way;
- ensure all laws are applied in a non-discriminatory and non-arbitrary manner (equality before the law);
- have laws and measures in place to ensure that people are not subjected to discrimination by others (for example, in areas such as employment, education and the provision of goods and services); and
- take non-legal measures to tackle discrimination, including through education.

Rights of the child

CRC

4.45 Children have special rights under human rights law taking into account their particular vulnerabilities. Children's rights are protected under a number of treaties, particularly the CRC. All children under the age of 18 years are guaranteed these rights, which include:

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

Obligation to consider the best interests of the child

Articles 3 and 10 of the CRC

4.46 Under the CRC, states are required to ensure that, in all actions concerning children, the best interests of the child are a primary consideration. This requires active measures to protect children's rights and promote their survival, growth and wellbeing, as well as measures to support and assist parents and others who have

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

4 *Althammer v Austria* HRC 998/01, [10.2]. See above, for a list of 'personal attributes'.

day-to-day responsibility for ensuring recognition of children's rights. It requires legislative, administrative and judicial bodies and institutions to systematically consider how children's rights and interests are or will be affected directly or indirectly by their decisions and actions.

4.47 Australia is required to treat applications by minors for family reunification in a positive, humane and expeditious manner. This obligation is consistent with articles 17 and 23 of the ICCPR, which prohibit interference with the family and require family unity to be protected by society and the state (see above, [4.29]).

Right of the child to be heard in judicial and administrative proceedings

Article 12 of the CRC

4.48 The right of the child to be heard in judicial and administrative proceedings provides that states assure to a child capable of forming his or her own views the right to express those views freely in all matters affecting them. The views of the child must be given due weight in accordance with their age and maturity.

4.49 In particular, this right requires that the child is provided the opportunity to be heard in any judicial and administrative proceedings affecting them, either directly or through a representative or an appropriate body.

Right to nationality

Articles 7 and 8 of the CRC; and article 24(3) of the ICCPR

4.50 The right to nationality provides that every child has the right to acquire a nationality. Accordingly, Australia is required to adopt measures, both internally and in cooperation with other countries, to ensure that every child has a nationality when born. The CRC also provides that children have the right to preserve their identity, including their nationality, without unlawful interference.

4.51 This is consistent with Australia's obligations under the Convention on the Reduction of Statelessness 1961, which requires Australia to grant its nationality to a person born in its territory who would otherwise be stateless, and not to deprive a person of their nationality if it would render the person stateless.

Right to self-determination

Article 1 of the ICESCR; and article 1 of the ICCPR

4.52 The right to self-determination includes the entitlement of peoples to have control over their destiny and to be treated respectfully. The right is generally understood as accruing to 'peoples', and includes peoples being free to pursue their economic, social and cultural development. There are two aspects of the meaning of self-determination under international law:

- that the people of a country have the right not to be subjected to external domination and exploitation and have the right to determine their own political status (most commonly seen in relation to colonised states); and

- that groups within a country, such as those with a common racial or cultural identity, particularly Indigenous people, have the right to a level of internal self-determination.

4.53 Accordingly, it is important that individuals and groups, particularly Aboriginal and Torres Strait Islander peoples, should be consulted about decisions likely to affect them. This includes ensuring that they have the opportunity to participate in the making of such decisions through the processes of democratic government, and are able to exercise meaningful control over their affairs.

Rights to and at work

Articles 6(1), 7 and 8 of the ICESCR

Right to work

4.54 The right to work is the right of all people to have the opportunity to gain their living through decent work they freely choose, allowing them to live in dignity. It provides:

- that everyone must be able to freely accept or choose their work, including that a person must not be forced in any way to engage in employment;
- a right not to be unfairly deprived of work, including minimum due process rights if employment is to be terminated; and
- that there is a system of protection guaranteeing access to employment.

Right to just and favourable conditions of work

4.55 The right to just and favourable conditions of work provides that all workers have the right to just and favourable conditions of work, particularly adequate and fair remuneration, safe working conditions, and the right to join trade unions.

Right to social security

Article 9 of the ICESCR

4.56 The right to social security recognises the importance of adequate social benefits in reducing the effects of poverty and plays an important role in realising many other economic, social and cultural rights, in particular the right to an adequate standard of living and the right to health.

4.57 Access to social security is required when a person lacks access to other income and is left with insufficient means to access health care and support themselves and their dependents. Enjoyment of the right requires that sustainable social support schemes are:

- available to people in need;
- adequate to support an adequate standard of living and health care;

- accessible (providing universal coverage without discrimination; and qualifying and withdrawal conditions that are lawful, reasonable, proportionate and transparent); and
- affordable (where contributions are required).

Right to an adequate standard of living

Article 11 of the ICESCR

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

Right to health

Article 12 of the ICESCR

4.59 The right to health is the right to enjoy the highest attainable standard of physical and mental health. It is a right to have access to adequate health care (including reproductive and sexual healthcare) as well as to live in conditions that promote a healthy life (such as access to safe drinking water, housing, food and a healthy environment).

Right to education

Articles 13 and 14 of the ICESCR; and article 28 of the CRC

4.60 This right recognises the right of everyone to education. It recognises that education must be directed to the full development of the human personality and sense of dignity, and to strengthening respect for human rights and fundamental freedoms. It requires that primary education shall be compulsorily and freely available to all; and the progressive introduction of free secondary and higher education.

Right to culture

Article 15 of the ICESCR; and article 27 of the ICCPR

4.61 The right to culture provides that all people have the right to benefit from and take part in cultural life. The right also includes the right of everyone to benefit from scientific progress; and protection of the moral and material interests of the authors of scientific, literary or artistic productions.

4.62 Individuals belonging to minority groups have additional protections to enjoy their own culture, religion and language. The right applies to people who belong to minority groups in a state sharing a common culture, religion and/or language.

Right to an effective remedy

Article 2 of the ICCPR

4.63 The right to an effective remedy requires states to ensure access to an effective remedy for violations of human rights. States are required to establish

appropriate judicial and administrative mechanisms for addressing claims of human rights violations under domestic law. Where public officials have committed violations of rights, states may not relieve perpetrators from personal responsibility through amnesties or legal immunities and indemnities.

4.64 States are required to make reparation to individuals whose rights have been violated. Reparation can involve restitution, rehabilitation and measures of satisfaction—such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices—as well as bringing to justice the perpetrators of human rights violations. Effective remedies should be appropriately adapted to take account of the special vulnerability of certain categories of persons including, and particularly, children.

Appendix 3

Correspondence



Senator the Hon Michaelia Cash
Minister for Employment
Minister for Women
Minister Assisting the Prime Minister for the Public Service

Reference: MC17-047773

Mr Ian Goodenough MP
Chair
Parliamentary Joint Committee on Human Rights
S1.111
Parliament House
CANBERRA ACT 2600

Dear Mr Goodenough

Code for the Tendering and Performance of Building Work 2016 and Code for the Tendering and Performance of Building Work Amendment Instrument 2017

This letter is in response to your letter of 15 June 2017, on behalf of the Parliamentary Joint Committee on Human Rights, concerning the *Code for the Tendering and Performance of Building Work 2016* (the 2016 Code) and the *Code for the Tendering and Performance of Building Work Amendment Instrument 2017* (the Amendment Instrument).

The 2016 Code sets out the Australian Government's expected standards of conduct for all building contractors and building industry participants that seek to be, or are, involved in Commonwealth funded building work.

The Amendment Instrument amended the 2016 Code to reflect amendments made to subsection 34(2E) of the *Building and Construction Industry (Improving Productivity) Act 2016* and to provide additional transitional exemptions to assist building contractors and building industry participants with the transition to compliance with the 2016 Code.

A detailed response to the questions raised by the Committee is enclosed. I trust that this comprehensive response assists the Joint Committee in its deliberations.

Yours sincerely

Senator the Hon Michaelia Cash

3 July 2017

Encl

Code for the Tendering and Performance of Building Work 2016

Code for the Tendering and Performance of Building Work Amendment Instrument 2017

Please find below responses to each of the requests of the Parliamentary Joint Committee on Human Rights (the Committee) for further information.

Content of agreements and prohibited conduct – right to collectively bargain and right to just and favourable conditions of work

Sections 11 and 11A of the *Code for the Tendering and Performance of Building Work 2016* (the 2016 Code) prohibit a code covered entity from being covered by an enterprise agreement that includes certain types of clauses. The Statement of Compatibility with Human Rights for the 2016 Code states that this measure pursues the legitimate objective of seeking to ensure that enterprise agreements are not used to limit the ability of code covered entities to manage their business efficiently or restrict productivity improvements in the building and construction industry more generally.

Committee's request for advice

The committee has sought my advice 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;
- 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 that objective (including findings by relevant international supervisory mechanisms about whether the limitation is permissible);
- whether consultation has occurred with the relevant workers' and employers' organisations in relation to the measure; and
- the government's response to the previous comments and recommendations made by international supervisory mechanisms including whether the government agrees with these views.

Response

The building and construction industry is the second largest industry in Australia, accounting for around 8.1 per cent of gross domestic product and around 9 per cent employment.¹ An efficient and productive building and construction industry is crucial to promoting jobs, driving economic growth and ultimately lowering costs for the taxpayer and other consumers of building and construction services.

When the Australian Building and Construction Commission (ABCC) previously existed (October 2005 to June 2012), productivity in the construction sector grew by 20%.

In the four years prior to the establishment of the former ABCC the rate of industrial disputes was 5 times the average across all industries.

During the former ABCC's operation, disputes fell to just 2 times the average across all industries.

The former ABCC was abolished by the then Federal Labor Government in June 2012 and replaced with a new agency, Fair Work Building and Construction (FWBC), with weaker powers. During the operation of FWBC (June 2012 to December 2016) disputes in the construction industry increased to nearly 5 times the average across all industries.

Increase in costs or delays in completing projects has a negative impact on the growth and productivity of the building and construction industry.² The Productivity Commission has also stated that given the

¹ Office of the Chief Economist, Department of Industry, Innovation and Science, *Australian Industry Report 2016* <https://www.industry.gov.au/Office-of-the-Chief-Economist/Publications/AustralianIndustryReport/assets/Australian-Industry-Report-2016-Chapter-2.pdf>

² The Productivity Commission noted that ABS data does not capture many aspects of industrial disputation such as go-slows, work-to-rule, and overtime bans meaning that the true costs of industrial relations disharmony in the

importance of the building and construction sector to many other industries, higher costs or delays in the provision of construction projects have widespread effects on the economy as a whole.³

Many inquiries into the building and construction industry have identified that the cost of building infrastructure in Australia is higher than other nations and have linked these high building costs with workplace relations issues. The inquiries have recommended that governments use their purchasing power to achieve reform in the industry and to increase efficiency, productiveness and jobs growth. For example, in its 2014 report, *Public Infrastructure*, the Productivity Commission found that:

*'the most promising policy approach is for Australian governments to use their substantial purchasing power as a countervailing measure against conduct that leads to high costs, 'sweetheart' deals, coercion, sham contracting and poor work health and safety practices. Governments could achieve this through adoption of guidelines modelled on those of the Victorian Government, which covers all of the above undesirable conduct.'*⁴

There is a substantial concern that restrictive clauses in enterprise agreements, which are often forced onto subcontractors by head contractors that have made agreements with unions, are contributing to costs and delays of projects within the building and construction industry. For example:

- In a report published in June 2012 the Business Council of Australia reported that it costs considerably more to build a variety of infrastructure in Australia than it does in the United States of America. The worst cases cited were airports, which were 90 per cent more expensive, and hospitals, which were 62 per cent more expensive.⁵ Other projects ranged from 26 per cent to 43 per cent more expensive. The report concluded that Australia is a high cost, low productivity environment for building infrastructure projects.⁶
- Infrastructure Australia has also found Australian projects to be 40 per cent more expensive than projects in the United States of America, requiring 30 to 35 per cent more labour input.⁷
- In 2014 Master Builders Association suggested that the cost of a building enterprise agreement can add up to a 30 per cent premium to construction costs.⁸

Restrictive clauses commonly found in building and construction industry enterprise agreements include:

- 'jump up' clauses which provide that subcontractors cannot be engaged unless they apply wages and conditions at least at the same level as the enterprise agreement that applies to the head contractor. In its final report on the workplace relations framework, the Productivity Commission found 70 per cent of a random sample of construction agreements contained a jump up clause.⁹ The direct effect of this clause is an increase in labour costs and therefore overall costs on a project.
- clauses that constrain the ability of the employer to direct its employees to work in order to meet operational requirements or to maximise employee productivity. The effect of these clauses can result in sites shutting down for days, delaying completion of a project and therefore increasing costs. In early 2017, the Construction, Forestry, Mining and Energy Union (CFMEU) set its calendar so that no work was to be performed between Easter and ANZAC day, resulting in a 12 day shutdown of major building sites.¹⁰

construction industry and its resulting impact on the economy is not known: Productivity Commission (2014), *Public Infrastructure*, Inquiry Report No. 7, Canberra, published 27 May 2014, page 540.

³ Ibid page 539.

⁴ Ibid page 547

⁵ Business Council of Australia, *Pipeline or Pipe Dream? Securing Australia's Investment Future: Overview and Full Study*, page 29

⁶ Ibid, page 38

⁷ Infrastructure Australia, *National Infrastructure Plan June 2013*, page 25

⁸ Daily Telegraph *Ransoming our future ... union managers push construction costs sky high* 6 February 2014 <http://www.dailytelegraph.com.au/news/ransoming-our-future-unions-managers-push-construction-costs-sky-high/news-story/9e91755054faf0bb059f7368d301ad90>

⁹ Productivity Commission 2015, *Workplace Relations Framework*. Final Report, Canberra p 817

¹⁰ CFMEU Construction, *2017 RDOs*

<http://www.cfmeunsw.asn.au/sites/cfmeunsw.asn.au/files/downloads/rdo/rdocalendar2017.pdf> ;

- clauses that provide the union with the right to hold a paid meeting with workers for up to two hours per shift. This clause has been misused, for example at the Commonwealth Games site in Queensland, in a rolling fashion for key trades (i.e. with one trade after another taking a two hour paid meeting) effectively giving the union standing rights to disrupt the project and leverage demands. It was reported that the meetings forced construction to largely grind to a halt at the Games venue and cost head contractor Hansen Yuncken \$700,000, and also threatened to delay the finish date of the sports complex¹¹.
- clauses that allow unions to veto the use of subcontractors, or, if the union allows them to be engaged, then dictates the terms and conditions of engagement (CFMEU Queensland pattern agreement).
- clauses that give the unions the power to veto any employer measures to improve productivity by prohibiting the introduction of productivity schemes unless written agreement has been reached with all parties to the agreement (CFMEU Queensland pattern agreement).

Moreover, these restrictive practices, that are imposed by deals done by head contractors and unions, substantially inhibit the right of subcontractors to freely engage in collective bargaining. For many subcontractors in the Australian building industry, there is no such thing as free bargaining, as acceptance of such agreements, imposed by others, is a condition of being able to perform work on certain types of building projects.

The high level of unlawful behaviour in the industry impacts its productivity and that in turn impacts the national economy. There are around 95 CFMEU representatives currently before the courts for more than 976 suspected contraventions. The courts have imposed more than \$9.6 million in fines on the CFMEU, in cases brought by the ABCC, Fair Work Building and Construction, and their predecessors.

Despite the imposition of substantial fines, judicial commentary provides concerning evidence of the CFMEU's record of disregard for the law:

"[The CFMEU is] an organisation with a long and sorry history of industrial disputation in which its willingness to disregard the industrial laws of this country seems to know no bounds".

"The CFMEU does have an egregious record of repeated and wilful contraventions of all manner of industrial laws..."¹²

"What is notable is not only the sheer number of contraventions, but the frequency of them [featuring] abuse of industrial power and the use of whatever means the individuals involved considered likely to achieve outcomes favourable to the interests of the CFMEU..."¹³

"The CFMEU's record of non-compliance with legislation of this kind has now become notorious ... That record ought to be an embarrassment to the trade union movement."¹⁴

"Has there ever been a worse recidivist in the history of the common law?"¹⁵

"(the officials' behaviour) bespeak a deplorable attitude, on the part of the CFMEU, to its legal obligations and the statutory process which govern relations between unions and employers in this country".¹⁶

¹¹ The Australian Commonwealth Games site hostage to union 'ploy' 26 July 2016

¹² Judge Jarrett, ABCC v CFMEU & Anor [2016] FCCA 3265

¹³ Justice Mortimer, Director, Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union (No. 2) [2016] FCA 436

¹⁴ Justice Jessup, Director, Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union [2016] FCA 772

¹⁵ Justice Jessup, Director, Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union (No. 2) [2015] FCA 1462

¹⁶ Justice Tracey, Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union (No 2) [2015] FCA 407

The Committee has also sought my advice as to whether consultation has occurred with the relevant workers' and employers' organisations in relation to the measure.

Extensive consultation with a range of parties was undertaken before the 2016 Code was made, the details of which are set out in Attachment C of the Explanatory Statement to the 2016 Code. In particular:

- The Coalition Task Force on re-establishing the Australian Building and Construction Commission (ABCC) undertook consultation with industry and unions prior to the 2013 election.
- On 30 October 2013 the Department of Employment consulted with relevant employer organisations and unions in relation to the re-establishment of the ABCC and circulated detailed proposed provisions for inclusion in a new building code for discussion.
- The Government also consulted with state and territory ministers through the Select Council on Workplace Relations on 1 November 2013 and with employer organisations and unions through the National Workplace Relations Consultative Council on 8 November 2013.
- On 9 December 2013, the Department of Employment consulted further with relevant employer associations, unions and state government representatives on a draft building code. Feedback from this consultation was taken into consideration and the draft building code was amended as appropriate. The organisations consulted included Master Builders Australia, Australian Chamber of Commerce and Industry, Australian Industry Group, Housing Industry Association, Australian Council of Trade Unions and construction unions.
- An advance release of the draft building code was then made available on the Department of Employment's website in April 2014 and updated in November 2014 as a result of further feedback from interested parties.

Finally, the Committee has noted that a number of international supervisory mechanisms have previously made comments and recommendations in relation to restrictions Australia has imposed on the right to freedom of association and the right to collectively bargain and has sought the Government's response, including whether the Government agrees with these views.

As to those observations from international bodies, I refer to my comments above as to why the requirements in sections 11 and 11A are a reasonable and proportionate measure in pursuit of the legitimate objective of seeking to ensure that enterprise agreements are not used to limit the ability of subcontractors from freely engaging in bargaining and being free to manage their own affairs in the most appropriate manner. In particular, I note that sections 11 and 11A do not prevent parties bargaining freely on a broad range of matters that relate to their terms and conditions of employment including wages, benefits, allowances ordinary working hours and the like.

As such the Government considers that these measures appropriately balance the right of employees to negotiate with respect to their terms and conditions of employment with the need to ensure that employers, particularly small subcontractors, are not subject to coercion in relation to the content of agreements and able to manage their businesses efficiently and productively.

The Committee has also referred to the concluding observations of the United Nations Committee on Economic, Social and Cultural Rights published in May 2009. Those concluding observations primarily concerned restrictions on the right to strike in the *Building and Construction Industry Improvement Act 2005* and the *Fair Work Act 2009*. In 2010 the then Federal Labor Government responded to these observations, stating that it was the Government's view that the *Fair Work Act 2009* balances the right of employees to participate in collective bargaining, including taking protected industrial action in support of claims in pursuit of an enterprise agreement, with the need for economic stability and business certainty.

Conclusion - reasonable and proportionate measures to achieve the stated objective

As a major procurer of building and construction services, the Australian Government takes seriously its responsibility to ensure that taxpayer funds are spent appropriately so to achieve maximum benefit and value for money and generate productivity benefits to the Australian economy. The 2016 Code applies solely to employers and ensures that workplace relations practices are productive and fair.

Code covered entities and their workers are free to bargain collectively at the enterprise level, as

provided under the *Fair Work Act 2009*. To the extent there is any limitation of the right to bargain collectively it is:

- in pursuit of the legitimate objective of seeking to ensure that enterprise agreements are not used to limit the ability of code covered entities to manage their businesses efficiently or restrict productivity improvements;
- to ensure that subcontractors have the ability to genuinely bargain and not be subject to coercion through the imposition of particular types of agreements by head contractors and unions; and
- to ensure that freedom of association is not impinged upon.

Head contractors on building sites typically employ few workers yet they often enter into deals with unions that mandate the pay and conditions for all other workers on the site, preventing those workers from engaging in genuine collective bargaining with their respective employer. The 2016 Code therefore prohibits clauses that prescribe the terms and conditions on which subcontractors and their employees are engaged.

The 2016 Code also promotes collective bargaining because it requires terms and conditions of employment to be dealt with in enterprise agreements made under the *Fair Work Act 2009* and discourages the use of agreements outside this framework. This ensures transparency and guarantees oversight by the independent Fair Work Commission of agreements containing terms and conditions of employment.

The 2016 Code does not prohibit such matters as rostered days off or shift allowances, public holidays, or stable and agreed shift arrangements and rosters. Nor does it prohibit or restrict the right of workers and their representatives (including a union) to be consulted on redundancies and labour hire.

The 2016 Code does prevent clauses in agreements that limit the ability of workers and their employers to determine their day-to-day work arrangements. For example, clauses in enterprise agreements that require the additional agreement of the union, such as where an employee wishes to substitute a different rostered day off and the employer agrees, would not be permitted.

It is worth noting that the types of clauses described in sections 11 and 11A are not strictly prohibited from being included in enterprise agreements; being an “opt-in system”, building contractors that do not wish to undertake Commonwealth-funded building work do not need to comply with the requirements of the Code.

Prohibiting the display of particular signs and union logos, mottos or indicia – Right to freedom of expression and association and the right to form and join trade unions

Committee's request for advice

The committee has sought my advice 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;
- 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 that objective (including findings by relevant international supervisory mechanisms about whether the limitation is permissible);
- whether consultation has occurred with the relevant workers' and employers' organisations in relation to the measure; and

Response

Paragraph 13(1) of the Code provides that employers must protect freedom of association by adopting and implementing policies and practices that ensure that persons are:

- free to become or not become members of building associations (which includes unions),
- free to be represented or not represented by building associations;
- free to participate or not participate, in lawful industrial activities; and
- are not discriminated against in respects of benefits in the workplace because they are, or are not, members of a building association.

In furtherance of that objective, paragraphs 13(2)(b) and (c) of the Code provide that, without limiting paragraph 13(1), code covered entities must ensure that 'no ticket, no start' signs, or similar, are not displayed and signs that seek to vilify or harass employees who participate, or do not participate, in industrial activities are not displayed. Whether a sign rises to the level of harassing or vilifying a person would depend on the particular subject matter of the sign and would be a question of fact to be determined in the particular circumstances.

Paragraph 13(2)(j) requires code covered entities to ensure that building association logos, mottos or indicia are not applied to clothing, property or equipment supplied or provided for by the employer, or any other conduct is engaged in which implies that membership of a building association is anything other than an individual choice for each employee.

The Statement of Compatibility with Human Rights for the 2016 Code states that these measures are reasonable, necessary and proportionate in pursuit of the legitimate policy objective of protecting the rights and freedoms of employees in the building and construction industry to choose to become, or not become, a member of a building association and ensure that this choice does not impact on an employee's ability to work on a particular site.

With regard to the stated objective, the Committee has noted that the ILO supervisory mechanisms have found that under the Freedom of Association and Protection of the Right to Organise Convention 1948 (No. 87) it is a matter for each nation state to decide whether it is appropriate to guarantee the right not to join a union. It is clear from the provisions of Part 3-1 of the *Fair Work Act 2009* – as implemented by the then Federal Labor Government - that Australia has decided it is appropriate to also guarantee the right not to join a union.

These measures are necessary to protect the right to join or not to join a union because of the pervasive culture that exists within the building and construction industry in Australia in which it is understood that there is such a thing as a 'union site' and on those sites all workers are expected to be members of a building association. Evidence of the existence of this culture can be found in many decisions of the courts, including most recently:

- In *Australian Building and Construction Commissioner v Barker & Anor* [2017] FCCA 1143 the Federal Circuit Court was satisfied that two workers had been deprived of their right to work and earn income for two days when, on 28 January 2016, they were told by Mr Barker, a

CFMEU official in the role of shop steward/delegate, that they could not work on the project unless they paid union fees. When a site manager informed Mr Barker that the workers had a right not to be in a union, Mr Barker replied ‘No, everybody’s got to be in the union, this is an EBA site, it’s in your EBA that they all have to be on site in the union and have an EBA.’¹⁷

- In *Australian Building and Construction Commissioner v Moses & Ors* [2017] FCCA 738 the Federal Circuit Court was satisfied that CFMEU organiser Mr Moses, accompanied by a CFMEU delegate, threatened workers at Queensland’s Gladstone Broadwalk project to the effect that if they did not join the CFMEU then no work would occur by the workers that day and they would be removed from the project. He told the workers that if they wanted to work on the project, which was a union site, they would have to join the CFMEU.¹⁸
- In *Director of the Fair Work Building Industry Inspectorate v Vink & Anor* [2016] FCCA 488 a CFMEU official was found to have entered a construction site and, in an incident described as “sheer thuggery” by the Court, removed workers’ belongings from the site shed, including lunches from the refrigerator. The Court concluded the conduct on site was intended “to give a clear message to all employees that benefits on the work site would only be afforded to members of the union.”

In this context, the measures prescribed in the Code are clearly necessary to ensure that freedom of association is protected. It is clear from the CFMEU’s repeated record of contraventions of this right that it does not respect freedom of association and that it is therefore necessary that an instrument such as the Code include stronger protections of this right than those already contained in the *Fair Work Act 2009*.

The CFMEU’s misrepresentation of a worker’s choice to become or not become a member of a union has been ongoing with contraventions dating back a number of years.¹⁹

There is also evidence that the idea that a worker must be a member of a building association has become so ingrained in the building and construction industry that even employers are making misrepresentations about freedom of association in fear of the CFMEU.

For example, in *Director of the Fair Work Building Industry Inspectorate v Construction Forestry, Mining and Energy Union (Quest Apartments and Greek Community Centre)* [2016] FCA 1262 the director of Arteam, Mr Hanna, was found to have sent a text message to workers on 11 March 2014 stating they must have union membership before starting work at two Melbourne projects. Despite a worker informing Mr Hanna of his right to choose whether or not he joined a union Mr Hanna told the worker that the CFMEU could close the site and prevent others from working if the employee refused to pay union membership fees. As a result, the worker left the site and did not perform any work. In handing down penalties Justice Tracey of the Federal Court stated:

Mr Hanna had become immersed in the culture of at least some commercial construction sites on which compulsory union membership was accepted by both employers and employees...

*There are thousands of small contractors involved in the construction industry. Many are, potentially, susceptible to pressure to require employees to join a union, fearing that if they do not do so they will not be engaged to work on commercial construction sites.*²⁰

The display of signs asserting that non-union members will not be permitted to work on a particular site, or that seek to vilify or harass employees who do not participate in industrial activities, along with the presence of union logos, mottos or indicia on clothing, property or equipment issued or provided for by the employer gives workers a strong impression that not only is union membership compulsory for anyone that wishes to work on the particular site, but that relevant employers support this position.

In addition, in relation to signs that seek to vilify or harass employees who participate, or do not participate, in industrial activities I note that the ILO supervisory mechanisms have recognised that trade union organisations should respect the limits of propriety and not use insulting language in their

¹⁷ at [17]

¹⁸ at [1] and [149]

¹⁹ For example see *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union (No 2)* [2015] FCA 199; *Hadgkiss v Blevin* [2004] FCA 697

²⁰ at [30], [37]

communications.²¹

The Committee has also sought my advice as to whether consultation has occurred with the relevant workers' and employers' organisations in relation to the measure. As stated above, extensive consultation took place before the 2016 Code was made.

The Committee has noted that the Statement of Compatibility with Human Rights for the 2016 Code does not address the fact that ILO supervisory mechanisms have indicated that 'the prohibition of the placing of posters stating the point of view of a central trade union organization is an unacceptable restriction on trade union activities.' As such, the Committee considers that measures that restrict communication about union membership may limit the right to freedom of association.

In this context, the Committee's professed concern is misplaced and it is disappointing that the Committee has failed to take in the many findings by the courts over a number of years of the pervasive culture of building unions that does not respect freedom of association. The Committee's efforts would be better focussed on considering actual evidence of the manner in which the building industry operates in practice, rather than the self-serving and misleading assertions of a trade union organisation that seeks to defend the culture of building unions.

Conclusion - reasonable and proportionate measures to achieve the stated objective

To the extent that the right to freedom of expression is limited by these measures (noting the protection of freedom of association provided by paragraph 13(1) of the Code), that limitation is clearly reasonable and proportionate in pursuit of the legitimate objective explained given the culture of the building industry and the ongoing threats to freedom of association by certain building unions. For example, they do not prevent posters and signs that merely encourage or convey the benefits of union membership or communicate other union information from being displayed on a site, nor do they prevent workers from applying union logos, mottos or indicia to their own personal clothing, property or equipment.

The Code requires building employers to comply with all laws of the Commonwealth and the relevant state and territory that give a right of entry permit holder a right to enter premises where building work is performed.

The Code does not impose any additional restrictions on right of entry for officers of unions, rather it places an obligation on employers to comply with existing right of entry requirements and to ensure, so far as is reasonably practicable, that officers of unions seeking to enter their building sites also comply with these requirements.

This measure is reasonable, necessary and proportionate in light of evidence that the right of entry is being abused in this industry to disrupt work and cause economic loss to businesses. The misuse and abuse of right of entry by union officials in the building industry has been well documented by two Royal Commissions and the Courts.

²¹ ILO, *Freedom of Association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO*, Fifth revised edition (2006) [154]



TREASURER

Ref: MC17-005192

Mr Ian Goodenough MP
Chair
Parliamentary Joint Committee on Human Rights
S1.111
Parliament House
CANBERRA ACT 2600

Dear Chair

Thank you for your correspondence of 21 June 2017 seeking information about the Competition and Consumer Amendment (Competition Policy Review) Bill 2017, as requested by the Parliamentary Joint Committee on Human Rights in its Report 6 of 2017.

My response to the Committee's request is attached.

I trust this information will be of assistance to you.

Yours sincerely

The Hon Scott Morrison MP

3 / 8 / 2017

Cc: human.rights@aph.gov.au

**COMPETITION AND CONSUMER AMENDMENT (COMPETITION POLICY REVIEW) BILL
2017**

RESPONSE TO PARLIAMENTARY JOINT COMMITTEE ON HUMAN RIGHTS

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

Section 155 of the *Competition and Consumer Act 2010* (the CCA) contains the primary investigative power of the Australian Competition and Consumer Commission (the ACCC), the competition regulator, and is crucial to the ACCC's effective administration and enforcement of the CCA.

Schedule 11 to the Competition and Consumer Amendment (Competition Policy Review) Bill 2017 (the Bill) proposes to:

- extend the ACCC's power under section 155 to cover investigations of court-enforceable undertakings and merger authorisation determinations;
- introduce a 'reasonable search' defence to the offence of refusing or failing to comply with section 155; and
- increase the penalty for non-compliance with section 155.

Increased penalty for failure to furnish or produce information – compatibility of the measure with the right not to incriminate oneself

1) Whether the measure is aimed at achieving a legitimate objective for the purposes of international human rights law:

The legitimate objective of the increased penalty is to strengthen the effectiveness, and ensure the integrity, of the ACCC's primary investigative power. The ACCC relies heavily on this power to compel parties to provide information, documents and evidence, in order to investigate anti-competitive conduct, which often occurs secretly.

2) How the measure is effective to achieve that objective:

The current penalty for non-compliance with section 155 was considered by the independent Competition Policy Review (the Harper Review) to be inadequate. Given that compliance with compulsory investigative powers is integral to the ACCC's investigation of competition concerns and a necessary part of the ACCC's enforcement of the CCA, the proposed increase in the penalty for non-compliance would more effectively deter non-compliance.

3) Whether the limitation is a reasonable and proportionate measure to achieve the stated objective:

The increased penalty is reasonable and proportionate as it is consistent with the penalty applicable to directly comparable provisions, such as a similar power under the *Australian Securities and Investments Commission Act 2001* (as recommended by the Harper Review). It is important to note that the increase is to a *maximum* possible penalty, and the court has discretion to set a penalty lower than the maximum.

4) *Whether the increased penalty is necessary to achieve that objective:*

The compulsory information-gathering power in section 155 needs to be supported by an effective penalty to deter non-compliance with the power. The Harper Review found that the current penalty is inadequate and recommended that it be increased in line with similar powers under the *Australian Securities and Investments Commission Act 2001*. The Bill implements this recommendation and will ensure that the penalty better serves its deterrent purpose.

5) *Whether there are less rights-restrictive ways of achieving that objective:*

Where a penalty is found to be inadequate, the only way to increase its effectiveness is to increase the penalty itself. As noted above, the proposed increase is reasonable and proportionate.

6) *Whether a derivative use immunity would be reasonably available:*

The Government currently has no plans to introduce a ‘derivative use immunity’ to section 155. Such a change was not recommended by the Harper Review.

Increased penalty for failure to furnish or produce information – compatibility of the measure with the right to privacy

7) *Whether the measure is aimed at achieving a legitimate objective for the purposes of international human rights law:*

See answer 1 above.

8) *How the measure is effective to achieve that objective:*

See answer 2 above.

9) *Whether the limitation is a reasonable and proportionate measure to achieve the stated objective:*

See answer 3 above.

10) *Whether the increased penalty is necessary to achieve that objective:*

See answer 4 above.

11) *Whether there are less rights-restrictive ways of achieving that objective:*

See answer 5 above.

12) *Whether there are adequate and effective safeguards in relation to the measure:*

There are a number of important limitations and safeguards around the use of the section 155 power.

Before it can issue a section 155 notice, the ACCC must have ‘reason to believe’ that a person is capable of providing information, documents or evidence relating to certain limited matters (including a possible contravention of the Act, a merger authorisation determination or a possible contravention of a court-enforceable undertaking). That is, the ACCC cannot use the section 155 power merely for a ‘fishing expedition’.

Further, subsection 155(2A) is clear that the ACCC cannot issue a section 155 notice merely because a person has refused or failed to comply with certain other information-gathering powers on the basis that compliance may incriminate that person.

Finally, the ACCC may only use and disclose such material in accordance with the provisions of section 155AAA of the CCA. Section 155AAA provides that an ACCC official must not disclose any protected information (which includes information obtained under section 155) to any person, except when performing duties or functions as an ACCC official or where the disclosure is required or permitted by law.

The ACCC is also subject to the *Privacy Act 1988* and the Australian Privacy Principles, which contain important requirements and safeguards around the collection, storage, use and disclosure of personal information.

Expansion of matters subject to notice – compatibility of the measure with the right not to incriminate oneself

13) Whether the measure is aimed at achieving a legitimate objective for the purposes of international human rights law:

The Bill introduces two new matters in relation to which a section 155 notice may be issued.

The first new matter is a merger authorisation determination of the ACCC. The objective of this addition is to support the ACCC in its new role as the first-instance decision-maker for merger authorisation determinations.

The second new matter is an actual or possible contravention of a court-enforceable undertaking given under section 87B. The objective of this addition is to ensure the integrity of court-enforceable undertakings.

14) How the measure is effective to achieve that objective:

In relation to the first new matter, section 155 already allows a notice to be issued in relation to decisions of the ACCC under the existing powers to grant general authorisations (such as section 91B, which deals with revocation of general authorisations) and merger clearances (such as 95AS, which deals with revocation of merger clearances). The addition of merger authorisation determinations to the list reflects the fact that the Bill repeals the merger clearance process and makes the ACCC the first-instance decision-maker for merger authorisations.

In relation to the second new matter, the expansion of section 155 to cover court-enforceable undertakings enables the ACCC to investigate possible non-compliance with such an undertaking. Generally, a section 87B undertaking will be given to the ACCC in order to address a competition concern, and enforcing the undertaking before the court relies on the ACCC being able to investigate possible non-compliance.

15) Whether the limitation is a reasonable and proportionate measure to achieve the stated objective:

The reasonableness and proportionality of this measure must be judged against the harm which it is seeking to address.

In the case of merger authorisation determinations, the addition of this matter to section 155 reflects the fact that the ACCC (rather than the Tribunal) will now be the first-instance decision-maker. In order to properly assess an application for merger authorisation, the ACCC needs to be able to properly investigate to uncover all significant information which is relevant to its decision. If an anti-competitive merger were to be authorised on the basis of incomplete information, this could lead to significant competitive harm and substantial detriment to consumer welfare.

The extension of s155 to court-enforceable undertakings will significantly improve the ability of the ACCC to quickly gather relevant information where it has a reason to believe an undertaking has been contravened. Given that section 87B undertakings are often given to address a competition concern, the lack of an information-gathering power could result in competitive harm and detriment to consumer welfare.

In these circumstances, the expansion of the matters subject to a section 155 notice is both reasonable and proportionate.

16) Whether there are less rights-restrictive ways of achieving that objective:

There are no effective alternatives to extending the use of the information-gathering powers in s155 to support the ACCC's roles in assessing merger authorisation applications and investigating breaches of court-enforceable undertakings. Further, whether or not a section 155 notice can be issued in relation to a given matter is a binary question: either a matter (such as an actual or potential contravention of a court-enforceable undertaking) is subject to section 155, or it is not. Therefore, it is difficult to envisage a 'less rights-restrictive' way of bringing these new matters within the ACCC's compulsory investigative powers.

17) Whether a derivative use immunity would be reasonably available:

See answer 6 above.

Expansion of matters subject to notice – compatibility of the measure with the right to privacy

18) Whether the measure is aimed at achieving a legitimate objective for the purposes of international human rights law:

See answer 13 above.

19) How the measure is effective to achieve that objective:

See answer 14 above.

20) Whether the limitation is a reasonable and proportionate measure to achieve the stated objective:

See answer 15 above.

21) Whether there are less rights-restrictive ways of achieving that objective:

See answer 16 above.

22) Whether there are adequate and effective safeguards in relation to the measure:

See answer 12 above.

Increased penalties for secondary boycotts

Schedule 6 to the Bill proposes to increase the maximum penalty for a contravention of the secondary boycott provisions (section 45D and 45DA of the CCA), to align with the penalties applicable to other breaches of the competition law.

This change was recommended by the Harper Review. Importantly, the Bill does not change the scope of what is and is not prohibited by the secondary boycott provisions.

Broadly, secondary boycotts are boycotts which are engaged in for the purpose of causing substantial loss or damage to the business of a person (section 45D) or causing a substantial lessening of competition in a market (section 45DB). Secondary boycotts have been prohibited since 1977 and the Harper Review found that a strong case remained for this prohibition. It is in the public interest to prevent this type of harm, particularly where it is not justified by the protection of other rights, as secondary boycotts can disrupt competitive markets, increase costs for businesses and consumers, and reduce productivity.

The CCA recognises the importance of workplace rights, and expressly permits secondary boycotts by employees and trade unions if the dominant purpose of the conduct is substantially related to employment matters (remuneration, conditions of employment, hours or work or working conditions).

Compatibility of the measure with the right to freedom of association

23) Whether the measure is aimed at achieving a legitimate objective for the purposes of international human rights law:

The objective of the increased penalty is to provide an effective deterrent to engaging in secondary boycotts, of the type captured by sections 45D and 45DA, and thereby protect the rights and interests of businesses and consumers by ensuring such boycotts do not undermine the proper functioning of competitive markets.

24) How the measure is effective to achieve that objective:

The increased penalty is effective to achieve that objective as it ensures that secondary boycotts, as prohibited by sections 45D and 45DA, are more strongly deterred.

25) Whether the limitation is a reasonable and proportionate measure to achieve the stated objective:

The increased penalty is reasonable and proportionate, in light of the Harper Review finding that the current penalty for secondary boycotts was inadequate and its recommendation that the maximum penalty for secondary boycotts should be the same as that applying to other breaches of the competition law.

26) What matters do or do not have a ‘dominant purpose’ related to employment:

The ‘dominant purpose related to employment’ exemption, as contained in subsection 45DD(1), can be illustrated by the following two examples.

Example – secondary boycott without dominant purpose related to employment:

Company A and Company B both supply components to a factory. A new competitor, Company C, enters the market and starts supplying components to the factory. Companies A and B decide to boycott the factory (that is, they stop supplying the factory), until the factory ceases dealing with C, so as to damage Company C’s business and try to eliminate Company C as a competitor.

In this example, Company A and Company B have engaged in conduct which is unrelated to employment matters and which has the purpose of substantially damaging Company C’s business. This has not only unfairly damaged Company C’s business, but has also caused competitive harm to the market for the component by eliminating a new market entrant.

Example – secondary boycott with dominant purpose related to employment:

Company X owns a site which hosts a number of companies, including Company Z, a contractor which is in dispute with its employees over enterprise bargaining claims. Negotiations between Company Z and its employees have broken down, and so the employees of Company Z picket the site, which prevents customers accessing the site. The intention of Company Z's employees is to cause substantial losses to Company X, so that Company X pressures Company Z to resume negotiations with its employees. In this example, the dominant purpose of Company Z's employees is related to employment matters.

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

27) Whether the measure is aimed at achieving a legitimate objective for the purposes of international human rights law:

See answer 23 above.

28) How the measure is effective to achieve that objective:

See answer 24 above.

29) Whether the limitation is a reasonable and proportionate measure to achieve the stated objective:

See answer 25 above.



ASSISTANT MINISTER TO THE TREASURER

Chair
Parliamentary Joint Committee on Human Rights
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Parliament House
CANBERRA ACT 2600

Dear Mr Goodenough

Thank you for your letter of 9 August 2017 seeking the Treasurer's advice as to the human rights compatibility of Federal Financial Relations (National Partnership payments) Determinations Nos 116 to 119. The Treasurer has asked me to respond to you and the Parliamentary Joint Committee on Human Rights.

The instruments in question are monthly determinations for National Partnership payments (NPPs) made from February 2017 to May 2017 period. National Partnership payments are made by the Commonwealth to the States and Territories to support the delivery of specified services or projects and facilitate the undertaking of nationally-significant reforms. The *Federal Financial Relations Act 2009* requires the Minister to determine the amount to be credited to the COAG Reform Fund in order to make these payments. As payments are made on the 7th day of each month, in accordance with Schedule D of the Intergovernmental Agreement on Federal Financial Relations, a determination is generally made at least once per month.

The Committee has asked me to advise whether the setting of benchmarks for the provision of funds through National Partnership payments (NPP) is compatible with human rights. National Partnership agreements set out mutually-agreed objectives, outcomes, outputs and performance requirements for the specific services, project or reform to be delivered under that agreement. Each agreement is negotiated between the Commonwealth and the relevant States and Territories. Through the negotiation process, the States and Territories have input into the setting of benchmarks to be used to measure progress in delivering services, projects and reforms. As such, the benchmarks in National Partnership agreements are agreed by all parties as achievable and demonstrating the realisation of the mutually-agreed policy objectives.

The States and Territories meet the overwhelming majority of performance requirements in National Partnership agreements. The associated funding is then paid in accordance with the determinations for NPPs, consistent with the terms and conditions of the relevant agreement. The setting of performance requirements promotes the progressive realisation of human rights by creating an incentive for the efficient delivery of services, projects and reforms where National Partnership payments support human rights in sectors such as health, education, housing and community services.

The Committee also sought my advice on whether there have been any retrogressive trends over time indicating reductions in payments which may impact on human rights. National Partnerships are time-limited agreements and, as above, the overwhelming majority of funding available under National Partnerships is paid to the States and Territories. There is no evidence

to suggest that the setting of performance requirements leads to a situation where States and Territories frequently become ineligible for NPPs due to failure to meet those requirements. To the extent that payments cease under individual agreements, this is usually because the agreed project or reform is completed and no further funding is required. In such cases, localised decreases in payments are a direct result of the achievement of the agreement's stated objective.

At an aggregate level, total National Partnership payments vary from month to month and year to year for a variety of reasons. Different projects and reforms are delivered over different time periods, and annual funding allocations under individual agreements vary over the term of the agreement depending on the pace at which services, projects or reforms are expected to occur. Structural changes to the way that services are provided can also mean that funding arrangements change. For example, funding for the provision of disability services is currently experiencing significant change as the Commonwealth and the States and Territories transition to full implementation of the National Disability Insurance Scheme. As such, and more generally, trends in NPPs for sectors that support human rights do not necessarily reflect trends in overall payments to the States and Territories for service provision.

Finally, the Committee requested that the information I have provided in this letter be included in future statements of compatibility with human rights. From September 2017 onwards, the statements of compatibility that accompany determinations will be expanded to include this information.

Yours sincerely

The Hon Michael Sukkar MP

18/8/17

Appendix 4

Guidance Note 1 and Guidance Note 2

GUIDANCE NOTE 1: Drafting statements of compatibility

December 2014

This note sets out the committee's approach to human rights assessments and its requirements for statements of compatibility. It is designed to assist legislation proponents in the preparation of statements of compatibility.

Background

Australia's human rights obligations

Human rights are defined in the *Human Rights (Parliamentary Scrutiny) Act 2011* as the rights and freedoms contained in the seven core human rights treaties to which Australia is a party. These treaties are:

- International Covenant on Civil and Political Rights
- International Covenant on Economic, Social and Cultural Rights
- International Convention on the Elimination of All Forms of Racial Discrimination
- Convention on the Elimination of All Forms of Discrimination against Women
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
- Convention on the Rights of the Child
- Convention on the Rights of Persons with Disabilities

Australia has voluntarily accepted obligations under these seven core UN human rights treaties. Under international law it is the state that has an obligation to ensure that all persons enjoy human rights. Australia's obligations under international human rights law are threefold:

- **to respect** – requiring government not to interfere with or limit human rights;
- **to protect** – requiring government to take measures to prevent others (for example individuals or corporations) from interfering with human rights;
- **to fulfil** – requiring government to take positive measures to fully realise human rights.

Where a person's rights have been breached, there is an obligation to ensure accessible and effective remedies are available to that person.

Australia's human rights obligations apply to all people subject to Australia's jurisdiction, regardless of whether they are Australian citizens. This means Australia owes human rights obligations to everyone in Australia, as well as to persons outside Australia where Australia is exercising effective control over them, or they are otherwise under Australia's jurisdiction.

The treaties confer rights on individuals and groups of individuals and not companies or other incorporated bodies.

Civil and political rights

Australia is under an obligation to respect, protect and fulfil its obligations in relation to all civil and political rights. It is generally accepted that most civil and political rights are capable of immediate realisation.

Economic, social and cultural rights

Australia is also under an obligation to respect, protect and fulfil economic, social and cultural rights. However, there is some flexibility allowed in the implementation of these rights. This is the obligation of progressive realisation, which recognises that the full realisation of economic, social and cultural rights may be achieved progressively. Nevertheless, there are some obligations in relation to economic, social and cultural rights which have immediate effect. These include the obligation to ensure that people enjoy economic, social and cultural rights without discrimination.

Limiting a human right

It is a general principle of international human rights law that the rights protected by the human rights treaties are to be interpreted generously and limitations narrowly. Nevertheless, international human rights law recognises that reasonable limits may be placed on most rights and freedoms – there are very few absolute rights which can never be legitimately limited.¹ For all other rights, rights may be limited as long as the limitation meets certain standards. In general, any measure that limits a human right has to comply with the following criteria (*The limitation criteria*) in order for the limitation to be considered justifiable.

Prescribed by law

Any limitation on a right must have a clear legal basis. This requires not only that the measure limiting the right be set out in legislation (or be permitted under an established rule of the common law); it must also be accessible and precise enough so that people know the legal consequences of their actions or the circumstances under which authorities may restrict the exercise of their rights.

Legitimate objective

Any limitation on a right must be shown to be necessary in pursuit of a legitimate objective. To demonstrate that a limitation is permissible, proponents of legislation must provide reasoned and evidence-based explanations of the legitimate objective being pursued. To be capable of justifying a proposed limitation on human rights, a legitimate objective must address a pressing or substantial concern, and not simply seek an outcome regarded as desirable or convenient. In addition, there are a number of rights that may only be limited for a number of prescribed purposes.²

Rational connection

It must also be demonstrated that any limitation on a right has a rational connection to the objective to be achieved. To demonstrate that a limitation is permissible, proponents of legislation must provide reasoned and evidence-based explanations as to how the measures are likely to be effective in achieving the objective being sought.

Proportionality

To demonstrate that a limitation is permissible, the limitation must be proportionate to the objective being sought. In considering whether a limitation on a right might be proportionate, key factors include:

- whether there are other less restrictive ways to achieve the same aim;
- whether there are effective safeguards or controls over the measures, including the possibility of monitoring and access to review;

¹ Absolute rights are: the right not to be subjected to torture, cruel, inhuman or degrading treatment; the right not to be subjected to slavery; the right not to be imprisoned for inability to fulfil a contract; the right not to be subject to retrospective criminal laws; the right to recognition as a person before the law.

² For example, the right to association. For more detailed information on individual rights see Parliamentary Joint Committee on Human Rights, Guide to Human Rights (March 2014), available at <http://www.aprh.gov.au/~media/Committees/Joint/PJCHR/Guide%20to%20Human%20Rights.pdf>.

- the extent of any interference with human rights – the greater the interference the less likely it is to be considered proportionate;
- whether affected groups are particularly vulnerable; and
- whether the measure provides sufficient flexibility to treat different cases differently or whether it imposes a blanket policy without regard to the merits of an individual case.

Retrogressive measures

In respect of economic, social and cultural rights, as there is a duty to realise rights progressively there is also a corresponding duty to refrain from taking retrogressive measures. This means that the state cannot unjustifiably take deliberate steps backwards which negatively affect the enjoyment of economic, social and cultural rights. In assessing whether a retrogressive measure is justified the limitation criteria are a useful starting point.

The committee's approach to human rights scrutiny

The committee's mandate to examine all existing and proposed Commonwealth legislation for compatibility with Australia's human rights obligations, seeks to ensure that human rights are taken into account in the legislative process.

The committee views its human rights scrutiny tasks as primarily preventive in nature and directed at minimising risks of new legislation giving rise to breaches of human rights in practice. The committee also considers it has an educative role, which includes raising awareness of legislation that promotes human rights.

The committee considers that, where relevant and appropriate, the views of human rights treaty bodies and international and comparative human rights jurisprudence can be useful sources for understanding the nature and scope of the human rights referred to in the Human Rights (Parliamentary Scrutiny) Act 2011. Similarly, there are a number of other treaties and instruments to which Australia is a party, such as the International Labour Organization (ILO) Conventions and the Refugee Convention which, although not listed in the *Human Rights (Parliamentary Scrutiny) Act 2011*, may nonetheless be relevant to the interpretation of the human rights protected by the seven core human rights treaties. The committee has also referred to other non-treaty instruments, such as the United Nations Declaration on the Rights of Indigenous Peoples, where it considers that these are relevant to the interpretation of the human rights in the seven treaties that fall within its mandate. When the committee relies on regional or comparative jurisprudence to support its analysis of the rights in the treaties, it will acknowledge this where necessary.

The committee's expectations for statements of compatibility

The committee considers statements of compatibility as essential to the examination of human rights in the legislative process. The committee expects statements to read as stand-alone documents. The committee relies on the statement as the primary document that sets out the legislation proponent's analysis of the compatibility of the bill or instrument with Australia's international human rights obligations.

While there is no prescribed form for statements under the *Human Rights (Parliamentary Scrutiny) Act 2011*, the committee strongly recommends legislation proponents use the current templates provided by the Attorney-General's Department.³

The statement of compatibility should identify the rights engaged by the legislation. Not every possible right engaged needs to be identified in the statement of compatibility, only those that are substantially engaged. The committee does not expect analysis of rights consequentially or tangentially engaged in a minor way.

³ The Attorney-General's Department guidance may be found at <https://www.ag.gov.au/RightsAndProtections/HumanRights/Human-rights-scrutiny/Pages/Statements-of-Compatibility.aspx>.

Consistent with the approach set out in the guidance materials developed by the Attorney-General's department, where a bill or instrument limits a human right, the committee requires that the statement of compatibility provide a detailed and evidence-based assessment of the measures against the limitation criteria set out in this note. Statements of compatibility should provide analysis of the impact of the bill or instrument on vulnerable groups.

Where the committee's analysis suggests that a bill limits a right and the statement of compatibility does not include a reasoned and evidence-based assessment, the committee may seek additional/further information from the proponent of the legislation. Where further information is not provided and/or is inadequate, the committee will conclude its assessment based on its original analysis. This may include a conclusion that the bill or instrument (or specific measures within a bill or instrument) are incompatible with Australia's international human rights obligations.

This approach is consistent with international human rights law which requires that any limitation on a human right be justified as reasonable, necessary and proportionate in pursuit of a legitimate objective.

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GUIDANCE NOTE 2: Offence provisions, civil penalties and human rights

December 2014

This guidance note sets out some of the key human rights compatibility issues in relation to provisions that create offences and civil penalties. It is not intended to be exhaustive but to provide guidance on the committee's approach and expectations in relation to assessing the human rights compatibility of such provisions.

Introduction

The right to a fair trial and fair hearing are protected by article 14(1) of the International Covenant on Civil and Political Rights (ICCPR). The right to a fair trial and fair hearing applies to both criminal and civil proceedings.

A range of protections are afforded to persons accused and convicted of criminal offences under article 14. These include the presumption of innocence (article 14(2)), the right to not incriminate oneself (article 14(3)(g)), the right to have a sentence reviewed by a higher tribunal (article 14(5)), the right not to be tried or punished twice for the same offence (article 14(7)), a guarantee against retrospective criminal laws (article 15(1)) and the right not to be arbitrarily detained (article 9(1)).¹

Offence provisions need to be considered and assessed in the context of these standards. Where a criminal offence provision is introduced or amended, the statement of compatibility for the legislation will usually need to provide an assessment of whether human rights are engaged and limited.²

The *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* provides a range of guidance in relation to the framing of offence provisions.³ However, legislation proponents should note that this government guide is neither binding nor conclusive of issues of human rights compatibility. The discussion below is intended to assist legislation proponents to identify matters that are likely to be relevant to the framing of offence provisions and the assessment of their human rights compatibility.

Reverse burden offences

Article 14(2) of the ICCPR protects the right to be presumed innocent until proven guilty according to law. Generally, consistency with the presumption of innocence requires the prosecution to prove each element of a criminal offence beyond reasonable doubt.

¹ For a more comprehensive description of these rights see Parliamentary Joint Committee on Human Rights, *Guide to Human Rights* (March 2014), available at <http://www.aph.gov.au/~media/Committees/Join/PJCHR/Guide%20to%20Human%20Rights.pdf>.

² The requirements for assessing limitations on human rights are set out in *Guidance Note 1: Drafting statements of compatibility* (December 2014).

³ See *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011 edition, available at <http://www.ag.gov.au/Publications/Documents/GuidetoFramingCommonwealthOffencesInfringementNoticesandEnforcementPowers/A%20Guide%20to%20Framing%20Cth%20Offences.pdf>.

An offence provision which requires the defendant to carry an evidential or legal burden of proof, commonly referred to as 'a reverse burden', with regard to the existence of some fact engages and limits the presumption of innocence. This is because a defendant's failure to discharge the burden of proof may permit their conviction despite reasonable doubt as to their guilt. Where a statutory exception, defence or excuse to an offence is provided in proposed legislation, these defences or exceptions must be considered as part of a contextual and substantive assessment of potential limitations on the right to be presumed innocent in the context of an offence provision.

Reverse burden offences will be likely to be compatible with the presumption of innocence where they are shown by legislation proponents to be reasonable, necessary and proportionate in pursuit of a legitimate objective. Claims of greater convenience or ease for the prosecution in proving a case will be insufficient, in and of themselves, to justify a limitation on the defendant's right to be presumed innocent.

It is the committee's usual expectation that, where a reverse burden offence is introduced, legislation proponents provide a human rights assessment in the statement of compatibility, in accordance with Guidance Note 1.

Strict liability and absolute liability offences

Strict liability and absolute liability offences engage and limit the presumption of innocence. This is because they allow for the imposition of criminal liability without the need to prove fault.

The effect of applying strict liability to an element or elements of an offence therefore means that the prosecution does not need to prove fault. However, the defence of mistake of fact is available to the defendant. Similarly, the effect of applying absolute liability to an element or elements of an offence means that no fault element needs to be proved, but the defence of mistake of fact is not available.

Strict liability and absolute liability offences will not necessarily be inconsistent with the presumption of innocence where they are reasonable, necessary and proportionate in pursuit of a legitimate objective.

The committee notes that strict liability and absolute liability may apply to whole offences or to elements of offences. It is the committee's usual expectation that, where strict liability and absolute liability criminal offences or elements are introduced, legislation proponents should provide a human rights assessment of their compatibility with the presumption of innocence, in accordance with Guidance Note 1.

Mandatory minimum sentencing

Article 9 of the ICCPR protects the right to security of the person and freedom from arbitrary detention. An offence provision which requires mandatory minimum sentencing will engage and limit the right to be free from arbitrary detention. The notion of 'arbitrariness' under international human rights law includes elements of inappropriateness, injustice and lack of predictability. Detention may be considered arbitrary where it is disproportionate to the crime that has been committed (for example, as a result of a blanket policy).⁴ Mandatory sentencing may lead to disproportionate or unduly harsh outcomes as it removes judicial discretion to take into account all of the relevant circumstances of a particular case in sentencing.

Mandatory sentencing is also likely to engage and limit article 14(5) of the ICCPR, which protects the right to have a sentence reviewed by a higher tribunal. This is because mandatory sentencing prevents judicial review of the severity or correctness of a minimum sentence.

The committee considers that mandatory minimum sentencing will be difficult to justify as compatible with human rights, given the substantial limitations it places on the right to freedom

⁴ See, for example, *A v Australia* (1997) 560/1993, UN Doc. CCPR/C/59/D/560/1993, [9.4]; Concluding Observations on Australia in 2000 (2000) UN doc A/55/40, volume 1, [522] (in relation to mandatory sentencing in the Northern Territory and Western Australia).

from arbitrary detention and the right to have a sentence reviewed by a higher tribunal (due to the blanket nature of the measure). Where mandatory minimum sentencing does not require a minimum non-parole period, this will generally be insufficient, in and of itself, to preserve the requisite judicial discretion under international human rights law to take into account the particular circumstances of the offence and the offender.⁵

Civil penalty provisions

Many bills and existing statutes contain civil penalty provisions. These are generally prohibitions on particular forms of conduct that give rise to liability for a 'civil penalty' enforceable by a court. As these penalties are pecuniary and do not include the possibility of imprisonment, they are said to be 'civil' in nature and do not constitute criminal offences under Australian law.

Given their 'civil' character, applications for a civil penalty order are dealt with in accordance with the rules and procedures that apply in relation to civil matters. These rules and procedures often form part of a regulatory regime which provides for a graduated series of sanctions, including infringement notices, injunctions, enforceable undertakings, civil penalties and criminal offences.

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

There is a range of international and comparative jurisprudence on whether a 'civil' penalty is likely to be 'criminal' for the purpose of human rights law.⁶ This criteria for assessing whether a penalty is 'criminal' for the purposes of human rights law is set out in further detail on page 4. The following steps (one to three) may assist legislation proponents in understanding whether a provision may be characterised as 'criminal' under international human rights law.

- **Step one:** *Is the penalty classified as criminal under Australian Law?*

If so, the penalty will be considered 'criminal' for the purpose of human rights law. If not, proceed to step two.

- **Step two:** *What is the nature and purpose of the penalty?*

The penalty is likely to be considered criminal for the purposes of human rights law if:

- a) the purpose of the penalty is to punish or deter; **and**
- b) the penalty applies to the public in general (rather than being restricted to people in a specific regulatory or disciplinary context.)

If the penalty does not satisfy this test, proceed to step three.

- **Step three:** *What is the severity of the penalty?*

The penalty is likely to be considered criminal for the purposes of human rights law if the civil penalty provision carries a penalty of imprisonment or a substantial pecuniary sanction.

Note: even if a penalty is not considered 'criminal' separately under steps two or three, it may still be considered 'criminal' where the nature and severity of the penalty are cumulatively considered.

⁵ This is because the mandatory minimum sentence may be seen by courts as a 'sentencing guidepost' which specifies the appropriate penalty for the least serious case. Judges may feel constrained to impose, for example, what is considered the usual proportion for a non-parole period (approximately 2/3 of the head sentence).

⁶ The UN Human Rights Committee, while not providing further guidance, has determined that 'civil' penalties may be 'criminal' for the purpose of human rights law, see, for example, *Osiyuk v Belarus* (1311/04); *Sayadi and Vinck v Belgium* (1472/06).

When a civil penalty provision is 'criminal'

In light of the criteria described at pages 3-4 above, the committee will have regard to the following matters when assessing whether a particular civil penalty provision is 'criminal' for the purposes of human rights law.

a) Classification of the penalty under domestic law

The committee considers that in accordance with international human rights law, the classification of the penalty as 'civil' under domestic law will not be determinative. However, if the penalty is 'criminal' under domestic law it will also be 'criminal' under international law.

b) The nature of the penalty

The committee considers that a civil penalty provision is more likely to be considered 'criminal' in nature if it contains the following features:

- the penalty is intended to be punitive or deterrent in nature, irrespective of its severity;
- the proceedings are instituted by a public authority with statutory powers of enforcement;
- a finding of culpability precedes the imposition of a penalty; and
- the penalty applies to the public in general instead of being directed at people in a specific regulatory or disciplinary context (the latter being more likely to be viewed as 'disciplinary' or regulatory rather than as 'criminal').

c) The severity of the penalty

In assessing whether a pecuniary penalty is sufficiently severe to amount to a 'criminal' penalty, the committee will have regard to:

- the amount of the pecuniary penalty that may be imposed under the relevant legislation with reference to the regulatory context;
- the nature of the industry or sector being regulated and relative size of the pecuniary penalties and the fines that may be imposed (for example, large penalties may be less likely to be criminal in the corporate context);
- the maximum amount of the pecuniary penalty that may be imposed under the civil penalty provision relative to the penalty that may be imposed for a corresponding criminal offence; and
- whether the pecuniary penalty imposed by the civil penalty provision carries a sanction of imprisonment for non-payment, or other very serious implications for the individual in question.

The consequences of a conclusion that a civil penalty is 'criminal'

If a civil penalty is assessed to be 'criminal' for the purposes of human rights law, this does not mean that it must be turned into a criminal offence in domestic law. Human rights law does not stand in the way of decriminalisation. Instead, it simply means that the civil penalty provision in question must be shown to be consistent with the criminal process guarantees set out in articles 14 and 15 of the ICCPR.

By contrast, if a civil penalty is characterised as not being 'criminal', the specific criminal process guarantees in articles 14 and 15 will not apply. However, such provisions must still comply with the right to a fair hearing before a competent, independent and impartial tribunal contained in article 14(1) of the ICCPR. The Senate Standing Committee for the Scrutiny of Bills may also comment on whether such provisions comply with accountability standards.

As set out in Guidance Note 1, sufficiently detailed statements of compatibility are essential for the effective consideration of the human rights compatibility of bills and legislative instruments. Where

a civil penalty provision could potentially be considered 'criminal' the statement of compatibility should:

- explain whether the civil penalty provisions should be considered to be 'criminal' for the purposes of human rights law, taking into account the criteria set out above; and
- if so, explain whether the provisions are consistent with the criminal process rights in articles 14 and 15 of the ICCPR, including providing justifications for any limitations of these rights.

It will not be necessary to provide such an assessment in the statement of compatibility on every occasion where proposed legislation includes civil penalty provisions or draws on existing civil penalty regimes. For example, it will generally not be necessary to provide such an assessment where the civil penalty provision is in a corporate or consumer protection context and the penalties are small.

Criminal process rights and civil penalty provisions

The key criminal process rights that have arisen in the committee's scrutiny of civil penalty provisions include the right to be presumed innocent (article 14(2)) and the right not to be tried twice for the same offence (article 14 (7)). For example:

- article 14(2) of the International Covenant on Civil and Political Rights (ICCPR) protects the right to be presumed innocent until proven guilty according to law. This requires that the case against the person be demonstrated on the criminal standard of proof, that is, it must be proven beyond reasonable doubt. The standard of proof applicable in civil penalty proceedings is the civil standard of proof, requiring proof on the balance of probabilities. In cases where a civil penalty is considered 'criminal', the statement of compatibility should explain how the application of the civil standard of proof for such proceedings is compatible with article 14(2) of the ICCPR.
- article 14(7) of the ICCPR provides that no-one is to be liable to be tried or punished again for an offence of which she or he has already been finally convicted or acquitted. If a civil penalty provision is considered to be 'criminal' and the related legislative scheme permits criminal proceedings to be brought against the person for substantially the same conduct, the statement of compatibility should explain how this is consistent with article 14(7) of the ICCPR.

Other criminal process guarantees in articles 14 and 15 may also be relevant to civil penalties that are viewed as 'criminal', and should be addressed in the statement of compatibility where appropriate.

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