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	*Aged Care Act 1997; Aged Care (Transitional Provisions) Act 1997*
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.

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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;**

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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 *Australian Border Force Act 2015* 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.

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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

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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.

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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.

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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 *Fair Work (Registered Organisations) Act 2009* 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

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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

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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.

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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).

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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.

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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**

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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

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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;**

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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

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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	*Financial Framework (Supplementary Powers) Act 1997*
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;**

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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 *Migration Act 1958* 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 *Migration Act 1953,* the *Tax Administration Act 1953* and the *Income Tax Assessment Act 1936* 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

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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.

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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]

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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.

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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 *Social Security (Administration) Act 1999* 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.

instruments[4] 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.

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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.

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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 sunsetting 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

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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**

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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	*Australian Prudential Regulation Authority Act 1998*; *Financial Sector (Collection of Data) Act 2001*
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

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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 *Building and Construction (Improving Productivity) Act 2016* (ABCC Act)
Portfolio	Employment
Authorising legislation	*Building and Construction (Improving Productivity) Act 2016*
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**.

116 Parliamentary Joint Committee on Human Rights, *Report of 5 of 2017* (14 June 2017) 2-13.

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

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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 (UNCESC) 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;

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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:

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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.

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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…

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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:

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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]

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

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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

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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

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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 secretively.

6 SOC 160-161.

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,

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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.

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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

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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]

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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:

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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

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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.

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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.