Chapter 2

Concluded matters

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

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

ASIC Credit (Flexible Credit Cost Arrangements) Instrument 2017/780 [F2017L01141]

Purpose	Seeks to amend the *National Consumer Credit Protection Act 2009* to: prohibit holders of an Australian credit licence and exempt special purpose funding entities from paying 'flex commissions' to individuals; prohibit the giving of benefits to persons who are party to a flexible credit cost arrangement where the person is to receive fees or charges at a higher rate than specified by the credit licensee or entity
Portfolio	Treasury
Authorising legislation	*National Consumer Credit Protection Act 2009*
Last day to disallow	30 November 2017 (Senate)
Rights	Criminal process rights (see **Appendix 2**)
Previous report	12 of 2017
Status	Concluded examination

Background

2.3 The committee first reported on the ASIC Credit (Flexible Credit Cost Arrangements) Instrument 2017/780 [F2017L01141] (the instrument) in its *Report 12 of 2017*, and requested a response from the Treasurer by 13 December 2017.[1]

2.4 The Assistant Minister to the Treasurer's response to the committee's inquiries was received on 29 January 2018. The response is discussed below and is reproduced in full at **Appendix 3**.

1 Parliamentary Joint Committee on Human Rights, *Report 12 of 2017* (28 November 2017) pp. 2-5.

Civil penalty provisions

2.5 The instrument seeks to amend the *National Consumer Credit Protection Act 2009* to introduce certain prohibitions under proposed new sections 53A and 53B applying to holders of an Australian credit licence (ACL) and some exempt special purpose funding entities[2] (collectively referred to as 'regulated persons').

2.6 Under proposed section 53A, regulated persons are prohibited from paying 'flex commissions' to intermediaries, such as car dealers, or associated persons. 'Flex commissions' refers to an arrangement in which an intermediary who sells a loan to a consumer earns a larger commission from his or her credit provider the higher the annual interest rate is above a base rate.[3] A breach of the prohibition applies to regulated persons and carries a civil penalty of up to 2,000 penalty units ($420,000) or a criminal penalty of up to 100 penalty units ($21,000) or 2 years imprisonment, or both.

2.7 Proposed section 53B also prohibits regulated persons who are party to a flexible credit cost arrangement from giving benefits to intermediaries or associated persons in circumstances where these persons are to be paid a fee or charges that exceed the amount specified by a regulated person. If a regulated person does not specify a fee, that fee is taken to be $0 (in other words, the intermediary or associated person cannot charge a fee).

2.8 In addition, the instrument introduces related procedural requirements providing that the regulated person must not determine the amount of specified fees or charges by reference to the loss or potential loss of revenue as a result of the proposed prohibition on flex commissions[4] and must keep records relating to the basis for determining the specified fees or charges for a period of seven years.[5] A breach of this prohibition and associated requirements also carries a civil penalty of up to 2,000 penalty units ($420,000), a criminal penalty of up to 100 penalty units ($21,000) or 2 years imprisonment, or both.

Compatibility of the measure with criminal process rights

2.9 Civil penalty provisions are dealt with in accordance with the rules and procedures that apply in relation to civil matters, where the burden of proof is on the

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2 Special purpose funding entities are described in the explanatory statement as 'a vehicle established to raise or receive funds from investors or a securitisation entity that usually has no employees and acts through a servicing agreement with a third party who must hold an ACL and who is required to meet the obligations of a credit provider under the agreement. A special purpose funding entity therefore does not need to hold an ACL if it operates under the exemption in the National Credit Regulations'. See ES, p. 6.

3 Explanatory Statement (ES) 1.

4 See subsection 53B(3).

5 See subsection 53B(4).

balance of probabilities. However, if a civil penalty provision is in substance regarded as 'criminal' for the purposes of international human rights law it therefore engages criminal process rights under articles 14 and 15 of the International Covenant on Civil and Political Rights (ICCPR). The classification of a penalty as 'criminal' under international human rights law does not mean that the penalty is illegitimate, but rather that criminal process rights, such as the right to be presumed innocent and the right not to be tried and punished twice, apply.

2.10 As stated in the initial analysis, the statement of compatibility does not identify that any rights are engaged or limited by the measure and does not address whether the civil penalty provisions may be classified as 'criminal' for the purposes of international human rights law.

2.11 The committee's *Guidance Note 2* sets out some of the key human rights compatibility issues in relation to civil penalties. Applying *Guidance Note 2*, the first step in determining whether a penalty is 'criminal' is to look to its classification under domestic law. Under the instrument, the pecuniary penalty of 2,000 penalty units is classified as 'civil'. However, this is not determinative of its status under international human rights law as a penalty or sanction may be 'criminal' for the purposes of the ICCPR even where it is classified as 'civil' under Australian law.

2.12 The second step is to consider the nature and purpose of the penalty. The penalty is likely to be considered to be criminal if the purpose of the penalty is to punish or deter, and the penalty applies to the public in general (rather than being restricted to people in a specific regulatory or disciplinary context). The initial analysis stated that, while the explanatory statement sets out the primary purpose of the instrument (addressing consumer harm arising from distortions in pricing that disproportionately affect vulnerable consumers),[6] no reasoning is provided in the explanatory materials as to the purpose of imposing civil penalties and the rationale for the amounts of those penalties. However, it was noted that the penalty applies to a particular regulatory context, namely to credit providers who are party to a flexible credit cost arrangement.

2.13 The third step is to consider the severity of the penalty. A penalty is likely to be considered 'criminal' where it carries a substantial pecuniary sanction. However, this must be assessed with due regard to regulatory context, including the nature of the industry or sector being regulated and the relative size of the pecuniary penalties being imposed. In this case, an individual or entity could be exposed to a penalty of up to $420,000. The initial analysis assessed that a significant sanction such as this raises the concern that the penalty may be 'criminal' for the purposes of international human rights law.

2.14 As set out above, if the civil penalty provisions in the instrument were considered to be 'criminal' for the purposes of international human rights law, they

6 ES, p. 2.

must be shown to be compatible with the criminal process guarantees set out in articles 14 and 15 of the ICCPR. For example, the application of a civil rather than a criminal standard of proof would raise concerns in relation to the right to be presumed innocent, which generally requires that the prosecution prove each element of the offence to the criminal standard of proof of beyond reasonable doubt. Accordingly, were the civil penalty provisions to be considered 'criminal' for the purpose of international human rights law, there would be questions about whether they are compatible with criminal process rights.

2.15 The committee therefore drew the attention of the Treasurer to its *Guidance Note 2* and sought the advice of the Treasurer as to whether:

- the civil penalty provisions in the instrument may be considered to be 'criminal' in nature for the purposes of international human rights law (having regard to the committee's *Guidance Note 2*); and
- if the penalties could be considered 'criminal' for the purposes of international human rights law, how, and whether, the measures could be amended to accord with criminal process rights (including specific guarantees of the right to a fair trial in the determination of a criminal charge such as the presumption of innocence (article 14(2)), the right not to incriminate oneself (article 14(3)(g)), the right not to be tried and punished twice for an offence (article 14(7)) and a guarantee against retrospective criminal laws (article 15(1))).

Assistant minister's response

2.16 In his response, the assistant minister provides the following information on the civil penalty provisions in the instrument:

> …The Explanatory Statement to the instrument explains that the use of flex commissions contributes to consumer harm due to distortions in the pricing of car finance. In particular, ASIC has identified that consumer harm from flex commissions disproportionately affects vulnerable customers. Due to the detrimental effect that these commissions have on vulnerable consumers, it is important that penalties in this area have a genuine deterrent effect. The Government considers that the maximum civil penalty of $420,000 is appropriate given the potential consumer detriment that may result from contravention.
>
> In relation to the Committee's concerns, and taking into account the Committee's Guidance Note 2 on offence provisions, civil penalties and human rights, the following factors support the view that the civil penalties included in the flex commissions instrument are not criminal in nature:
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> - the $420,000 penalty is not a criminal penalty under Australian law;

- the maximum penalty applies exclusively to Australian credit licensees and exempt special purpose funding entities, and not to the general public; and
- the proportionate size of the maximum penalty, given the corporate nature of the financial services industry. Further, the maximum penalty is consistent with penalties imposed by other provisions in Chapter 2 of the *National Consumer Credit Protection Act 2009* (the credit act), for example, sections 69 and 70 of the Credit Act.

2.17 The assistant minister's response acknowledges that the purpose of the penalty is to deter. However, the response explains that the penalty only applies to certain credit providers, not the public in general. Further, although the pecuniary sanction is substantial, as noted in the assistant minister's response, the penalty operates in the particular regulatory context of the financial services industry. Therefore, given the penalty will not apply to the general public and that it operates in the corporate context of the financial services industry, it is likely that the penalty would not be considered 'criminal' for the purposes of international human rights law.

Committee response

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

2.19 In light of the further information provided, the committee considers that the civil penalty provisions in the instrument are unlikely to be considered 'criminal' for the purposes of international human rights law.

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 reports	5 of 2017, 9 of 2017 and 12 of 2017
Status	Concluded examination

Background

2.20 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.[1] The minister's response to the committee's inquiries was received on 3 July 2017 and discussed in *Report 9 of 2017*.[2]

2.21 The committee requested a further response from the minister by 20 September 2017. The response was received on 5 October 2017 and discussed in *Report 12 of 2017*.[3]

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

2 Parliamentary Joint Committee on Human Rights, *Report 9 of 2017* (5 September 2017) pp. 45-63.

3 Parliamentary Joint Committee on Human Rights, *Report 12 of 2017* (28 November 2017) pp. 58-79.

2.22 The committee requested a third response from the minister by 13 December 2017. The minister's response to the committee's inquiries was received on 31 January 2018. The response is discussed below and is reproduced in full at **Appendix 3**.

Code for tendering and performance of building work

2.23 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*.[4]

2.24 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

2.25 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

4 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) pp. 1-30; *Tenth Report of the 44th Parliament* (26 August 2014) pp. 43-77; and *Fourteenth Report of the 44th Parliament* (28 October 2014) pp. 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) pp. 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.

- are inconsistent with freedom of association requirements set out in section 13 of the code of practice.

2.26 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 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.

2.27 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.

2.28 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.

Initial human rights analysis – compatibility of the measure with the right to collectively bargain and the right to just and favourable conditions of work

2.29 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).[5]

2.30 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.[6] 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

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

6 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.

parties will be free to reach their own settlement of a collective agreement without interference.[7]

2.31 The initial analysis stated that excluding certain code covered entity employers from being awarded Commonwealth funded work if they are subject to an enterprise agreement containing specific 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 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.

2.32 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.[8] 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.

2.33 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

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7 ILO, *General Survey by the Committee of Experts on the Application of Conventions and Recommendations on Freedom of Association and Collective Bargaining* (1994), [248]; 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). See, also, ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR), Direct Request (CEACR) - adopted 2016, published 106th International Labour Conference (ILC) session (2017) Right to Organise and Collective Bargaining Convention, 1949 (No. 98) - Australia (Ratification: 1973) http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:13100:0::NO::P13100_COMMENT_ID:3299912; 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.

8 See ICCPR article 22.

No. 98'.[9] 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'.[10]

2.34 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 businesses efficiently or restrict productivity improvements in the building and construction industry more generally.[11]

2.35 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.

2.36 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.

2.37 Additionally, the initial analysis noted that the ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR), another international 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

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9 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]).

10 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]).

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

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'.[12]

2.38 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 [CFA] 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 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 [CFA] 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.[13]

2.39 As the initial analysis noted, concerns about restrictions Australia has imposed on the right to freedom of association and the right to collectively bargain have also been raised by the United Nations Committee on Economic, Social and Cultural Rights (UNCESCR) in its Concluding Observations on Australia.[14] Such

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12 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.

13 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.

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

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.[15]

2.40 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);
- 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 initial response – the content of agreements and prohibited conduct

2.41 The minister's initial response, discussed in *Report 9 of 2017*,[16] provided 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 identified 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 identified 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'.

2.42 Information and reasoning was provided in relation to the importance of some, but not all, of these objectives. While the minister's initial response was not

15 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) pp. 55-56; *Report 7 of 2016* (11 October 2016) pp. 21-24, pp. 62-63; *Report 8 of 2016* (9 November 2016) pp. 62-64.

16 Parliamentary Joint Committee on Human Rights, *Report of 9 of 2017* (5 September 2017) pp. 45-63.

put in these terms, to the extent that the measure is aimed at addressing the rights and freedoms of others, this was noted in the previous analysis of the minister's initial response as capable of constituting a legitimate objective for the purposes of international human rights law.

2.43 The minister's response outlined specific concerns in relation to what she terms 'restrictive clauses' in enterprise agreements and their impact on productivity. With reference to some industry reports, the minister argued 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 stated 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.

2.44 The minister's response also provided a number of examples of the kind of clauses in enterprise agreements which she considers are of concern in the building and construction industry.[17] In essence, the minister appeared 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.

2.45 The minister further pointed 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 was noted that current restrictions on industrial action under Australian domestic law have been criticised by international supervisory

17 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.

mechanisms as going beyond what is permissible under international law.[18] Further, it was unclear how such suspected contraventions relate to the proposed measure or are rationally connected to the stated objective of this measure.

2.46 The minister's response argued 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.

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

> 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

18 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, CEACR, Direct Request - adopted 2016, published 106th ILC session (2017) Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) - Australia (Ratification: 1973) 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:3298573,102544,Australia,2016; CEACR, Observation - adopted 2016, published 106th ILC session (2017) Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) - Australia (Ratification: 1973) 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:3298569,102544,Australia,2016.

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.

2.48 Accordingly, the minister's response clarified 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 did 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.[19] In practice, this may have 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.[20] On the information provided by the minister, it did not appear that the limitation on the right to collectively bargain was likely to be proportionate.

2.49 As noted in the initial analysis, international supervisory mechanisms have been critical of these restrictions on bargaining outcomes.[21] For example, in relation to a draft of the code, the ILO Committee of Experts (CEACR) has reported 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'.[22]

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19 See, for example, CEACR Observation - adopted 2009, published 99th ILC session (2010) Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) - Australia (Ratification: 1973) 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:2314863,102544,Australia,2009.

20 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.

21 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.

22 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.

2.50 UNCESCR has a specific role to monitor the compliance of state parties with the ICESCR. Since the committee initially reported on the measure in its *Report 5 of 2017*, UNCESCR 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.[23]

2.51 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 outlined 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, the previous analysis of the minister's initial response stated that, the fact of consultation alone was not sufficient to address the human rights concerns in relation to the measure.

2.52 In relation to the committee's request that the minister address the concerns raised by international supervisory mechanisms, the minister's initial response did not provide further information other than to note that much of the previous UNESCR comments were focused around restrictions on industrial action.

2.53 The preceding analysis stated that the measure was likely to be incompatible with the right to collectively bargain, noting in particular recent concerns raised by the UNCESCR and the ILO Committee of Experts in relation to the code. However, the committee invited the minister to provide further information for the committee's consideration.

Minister's second response – the content of agreements and prohibited conduct

2.54 The minister's further response, discussed in *Report 12 of 2017,*[24] did not provide additional information but restated the government's view that 'these provisions are of a reasonable and proportionate nature' and 'appropriate to our national conditions'.

2.55 The committee considered that, in the absence of additional information addressing these concerns, the measure was likely to be incompatible with the right to collectively bargain.

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

24 Parliamentary Joint Committee on Human Rights, *Report 12 of 2017* (28 November 2017) pp. 58- 79.

2.56 The committee therefore sought further advice from the minister in relation to the compatibility of the measure with the right to collectively bargain, in particular any information in light of the recent concerns raised by the UN Committee on Economic, Social and Cultural Rights and the ILO Committee of Experts on the Application of Conventions and Recommendations in relation to the code.

Minister's third response – the content of agreements and prohibited conduct

2.57 On this aspect of the measures, the minister's third response to the committee refers to her previous response to the committee and does not provide additional information in light of recent concerns raised by international supervisory bodies in relation to the code.

Committee response

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

2.59 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 on the Application of Conventions and Recommendations in relation to the code.

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

2.60 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'.

2.61 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.

Initial human rights analysis – compatibility of the measure with the right to freedom of expression

2.62 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.[25]

2.63 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

25 ICCPR, article 19(2).

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.[26]

2.64 The initial human rights 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.[27] 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…
>
> 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.[28]

2.65 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.[29]

2.66 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

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

27 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].

28 ES, SOC, p. 8.

29 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.

associate.[30] 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.[31] 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.[32]

2.67 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:

> …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…

2.68 However, as the initial 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.

2.69 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.[33]

2.70 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

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30 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].

31 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].

32 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].

33 ES, SOC, p. 8.

Trade Union Governance and Corruption (the Heydon Royal Commission) including general issues of intimidation in the building and construction industry.[34] However, it is not evident 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. Nor was it evident that 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.

2.71 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.[35]

2.72 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.

2.73 The initial 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 initial response – compatibility of the measure with the right to freedom of expression

2.74 In relation to the objective of the measure, the minister's response stated:

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34 ES, p. 3.

35 ES, SOC, p. 8.

> 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.

2.75 The minister's response responded to the analysis in the initial 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.

2.76 As stated in the initial analysis, Australia is 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 expression that are permissible under international law. Accordingly, the committee is required to examine the measure against Australia's obligations under human rights law.

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

> 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."

2.78 The minister's response argued 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.

2.79 The minister's response further explained 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.

2.80 In this respect, it was 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.

2.81 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.

2.82 However, the minister's response did not demonstrate that there are no less rights restrictive approaches reasonably available to achieve the stated objective of protecting the ability of individuals to choose not to join a union. For example, the minister's response did not address whether providing education about the current protections contained in the *Fair Work Act 2009*, or better monitoring or enforcement against existing measures in the *Fair Work Act 2009* had been considered as alternatives, or whether the measure was sufficiently circumscribed so as to be a proportionate rights limitation.

2.83 Finally, as noted above, the minister's response outlined 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, the previous analysis of the minister's initial response stated that, the fact of consultation alone was not sufficient to address the human rights concerns in relation to the measure.

2.84 In light of the ongoing questions regarding the proportionality of the measure, the committee sought 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).

Initial human rights analysis - compatibility of the measure with the right to freedom of association and the right to form and join trade unions

2.85 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.[36] Further, no limitations on this right

36 See ICCPR article 22.

are permissible if they are inconsistent with the rights contained in ILO Convention No. 87.[37]

2.86 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 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'.[38] 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.

2.87 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 initial response – compatibility of the measure with the right to freedom of association and the right to form and join trade unions

2.88 In relation to the compatibility of the measure with the right to freedom of association under international human rights law, the minister's response relied upon the information set out above at [2.77], relating to court findings against union conduct, as indicative of building industry practice.

2.89 The minister's response did 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 [2.82], 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

37 See ICESCR article 8, ICCPR article 22.

38 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].

pursue this objective. Further, as noted above, the UNCESCR has recently raised specific human rights concerns in relation to the code.

2.90 The committee therefore sought 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).

Minister's second response – compatibility of the measure with the right to freedom of expression and the right to freedom of association

2.91 The minister's second response collectively addresses the committee's questions as to the human rights compatibility of the measure with the right to freedom of expression and the right to freedom of association.

2.92 In relation to the compatibility of the measure with these rights the minister's further response relies upon information previously provided as to the 'culture' of the building and construction industry, court findings and examples which the response argues 'demonstrate that the Construction, Forestry, Mining and Energy Union (CFMEU) has repeatedly contravened laws that protect freedom of association and does not respect the right of individuals to choose whether or not to join a union'. The minister also provides additional information about further court decisions since her initial response which she argues 'provide[s] additional evidence of the persistent culture of the [construction] industry'. As acknowledged above, 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.

2.93 In relation to the proportionality of the limitation on the right to freedom of association and the right to freedom of expression and whether there are less rights restrictive approaches to achieve the stated objective, the minister's response states:

> Other approaches, such as education and better monitoring and enforcement, are also useful and are encouraged. In fact, the Australian Building and Construction Commission (the ABCC), and its predecessors have long recognised the important role education plays in increasing rates of compliance and self-regulation. They have assisted building industry participants to understand how the relevant workplace laws protect the right of individuals to join or not join a union. They have also published details about the outcome of litigation commenced against unions and employers for alleged breaches of freedom of association protections.
>
> Since 2005 there has been a building industry specific regulator with functions that include monitoring and investigating compliance with relevant workplace laws and pursuing enforcement activities in relation to alleged contraventions. From late 2013 the ABCC's predecessor, Fair Work Building and Construction (FWBC), renewed its focus on identifying,

> investigating and pursuing particular types of unlawful conduct, including alleged breaches of freedom of association protections. However, despite the concerted effort by FWBC to enforce the freedom of association protections in the Fair Work Act (which has been continued by the ABCC), these protections continue to be breached by unions and employers, as evidenced in my response to the Committee of 3 July 2017. It is therefore clear that education, monitoring and enforcement activities alone are insufficient to bring about the cultural change required to protect the right of individuals to choose whether or not to join a union.
>
> That is why it is considered necessary to complement these activities with provisions that require code covered entities to ensure that 'no ticket, no start' signs or signs that seek to vilify or harass employees who do not participate in industrial activities are not displayed on their sites, and that union logos, mottos and insignia aren't applied to clothing, property or equipment issued or provided for by employers. These provisions seek to eliminate visual cues on sites that give a strong impression that union membership is compulsory or is being actively encouraged or endorsed by the employer and to challenge the custom and practice ingrained in the industry.

2.94 Accordingly, the minister's response indicates that education and better monitoring or enforcement have an important role to play, but have been insufficient to address the type of conduct referred to in the minister's response.

2.95 In considering the proportionality of the measure, it is relevant 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. Despite these exceptions, it remains the case that the limitation on freedom of expression is extensive. Signs which challenge non-union members, for example, for breaking a strike or not taking part in industrial action, may be uncomfortable or harassing but nonetheless be the expression of genuinely held views. The prohibition on expressing these views in the relevant workplace appears an overbroad limitation on the ability of individuals to exercise their freedoms of expression and association, in pursuit of the stated objective of protecting the ability of individuals to choose not to join a union. Prohibiting the application of union logos to employer supplied or required clothing also risks being overbroad, noting that in some workplaces this may include a significant portion of existing clothing and equipment. As stated in the previous analysis, as a matter of international human rights law, the display of particular union signs, union logos, mottos or indicia on clothing does not 'infringe' the right to freedom of association but rather constitutes an element of this right.[39] Relevantly, international supervisory bodies have expressed concerns, from the

39 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].

perspective of the right to freedom of expression and the right to freedom of association, regarding measures which restrict the display of union posters or signs in the workplace.[40]

2.96 The committee noted that the minister's further response did not provide sufficient information to conclude that the measure is a proportionate limitation on human rights. The committee considered that, in the absence of additional information addressing the proportionality of the measures, the measures are likely to be incompatible with the right to freedom of association and the right to freedom of expression under international law.

2.97 In light of the analysis outlined in relation to the measures concerning freedom of expression and the right to freedom of association, the committee sought 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.

Minister's third response – compatibility of the measure with the right to freedom of expression and the right to freedom of association

2.98 In relation to this question, the minister's response provides the following information:

> The Committee has sought my advice as to whether there are 'less rights restrictive approaches' than those in paragraphs 13(2)(b), (c) and (j) of the 2016 Code to achieve the stated objective of protecting the ability of individuals to choose not to join a union.
>
> In my responses to the Committee on 3 July 2017 and 5 October 2017 I outlined extensive material regarding the coercive culture that exists within the building and construction industry 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, whether voluntary or not. This included (but was not limited to) a number of findings by courts. Further decisions have been handed down since my last response of 5 October 2017 in which the Construction, Forestry, Mining and Energy Union (CFMEU) has repeatedly engaged in conduct that reinforces the coercive culture that an individual must be a union member:
>
> - In October 2017 the Federal Court found the CFMEU in 2015 through its delegate, engaged in adverse action when that delegate prevented a subcontractor's employee from working on site because he was not a union member and prevented the same employee from performing work on site with intent to coerce him to become a union member. The CFMEU also engaged in coercion when the delegate

40 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) [162]-[163].

insisted a second employee of the subcontractor pay fees to join the CFMEU. In imposing fines of $90,000 on the CFMEU and $8,000 on the delegate, Justice Tracey stated that ...*the Commissioner has identified 15 cases, since 2000, in which the CFMEU and its officials have been found to have contravened the Act and its predecessors by engaging in misconduct with a view to maintaining "no ticket no start" regimes' ...and that the delegate 'arrogated to himself the right to determine who would and would not work on the site in order to advance the 'no ticket no start' regime ...'*. Justice Tracey also observed that the CFMEU did not provide any assurance that '*it will direct its shop stewards not to seek to enforce "no ticket, no start" regimes and to respect the freedom of association provisions* ....' (*Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* (Werribee Shopping Centre Case) [2017] FCA 1235).

- In November 2017, the Federal Court found a CFMEU shop steward in 2014 knowingly made false representations when, upon learning two employees of a subcontractor were non-paying CFMEU members, told the first employee *'You need to fix it. I can't let you work if you're not paid up*' and the second ' ...*you can't work in here* ...*This job is a union site*'. The court also found that in making the false representation and refusing the first employee to work on site a few days later, the shop steward engaged in coercion and adverse action against that employee. His Honour also found the CFMEU to be vicariously liable for the actions of the shop steward. The Court is yet to consider the matter of penalties against the shop steward and the CFMEU (*Australian Building and Construction Commission v Construction, Forestry, Mining and Energy Union* (*The Quest Apartments Case*) [2017] FCA 1398).

The Committee has asserted the provisions are an overbroad limitation on freedoms of expression and association in protecting an individual's right to choose not to join a union. The Committee must however consider the context in which these provisions were introduced and operate. As can be seen from the many decisions of the courts, the CFMEU had promoted, and continues to persistently promote, a coercive culture in which a person cannot engage in a day's work if they are not a union member.

As was set out in my previous responses alternative approaches to address and challenge the custom and practice ingrained in the industry such as education and better mentoring and enforcement have been employed by the Australian Building and Construction Commission and its predecessors. It would be preferable if such approaches on their own were capable of making a difference to the ingrained practice. However, as I concluded in my response of 5 October 2017, it is clear that these approaches alone have not been sufficient (and in my view will continue [to] not be sufficient in the immediate future) to bring about the culture change required to protect the right of individuals to choose whether or not to join a union.

> It is in the context of a persistent coercive culture that has not responded to more traditional approaches to protecting freedom of association that the provisions in section 13 are necessary and proportionate. As I have stated in the previous responses, these provisions do not seek to eliminate all forms of expression in relation to union membership. Posters merely encouraging or conveying the benefits of union membership are not prohibited and an individual can display logos on their own personal clothing. The provisions are intended to eliminate visual cues that serve to reinforce the idea of 'union sites'; that is, signs that are directed at harassing or vilifying an individual on the basis of their participation or non-participation in industrial activities; 'no ticket, no start' signs; and union logos, mottos or indicia on employer clothing, property or equipment.
>
> An individual can still seek to express their genuinely held views about industrial action without necessarily making an individual feel coerced into joining or not joining an association. As such it cannot in my view be asserted, as the Committee has done, that the 'limitation on freedom of expression is extensive'. With respect, the Committee's characterisation of the issue, that prohibiting 'insulting language or communication' for the purpose of achieving the stated objective still constitutes a limitation on the right to freedom of expression, trivialises a very real issue for those actually in the building and construction workforce.
>
> The provisions are in my view absolutely essential in addressing the persuasive culture in the building and construction industry and achieving the objective of protecting the ability of individuals to choose to join or not to join a union.

2.99 The minister's third response provides a range of further information which addresses questions related to the proportionality of the limitation in context. The response points to a range of serious conduct being dealt with by the courts relating to the ability of persons to choose not to join a union. In this context, as acknowledged above, protecting the ability not to join a union would appear to be a legitimate objective for the purposes of international human rights law.

2.100 In relation to the proportionality of the measure, the minister reiterates information she previously provided about the extent and scope of the limitation including exceptions. The view outlined in the committee's previous report that the limitation on the right to freedom of association and the right to freedom of expression was potentially extensive and appeared to be insufficiently circumscribed was based on an assessment of the measures in light of the scope of these rights and international jurisprudence. Identifying and assessing these limitations is in accordance with the committee's mandate under the *Human Rights (Parliamentary Scrutiny Act) 2011* and is different to an assessment of the broader policy merits of the measures. Relevantly, as noted above, international supervisory bodies have expressed concerns, from the perspective of the right to freedom of expression and

the right to freedom of association, regarding measures which restrict the display of union posters or signs in the workplace.

2.101 Further, the minister's response does not clearly articulate how the proposed measure is the least rights restrictive approach to achieving this objective. While relevant, the fact there are court cases which are dealing with such conduct including imposing fines does not necessarily mean the measure in the code is the least rights restrictive. The minister's third response states that less rights restrictive approaches such as education and better monitoring or enforcement have been insufficient to address the stated objective. However, the minister does not fully explain the extent to which other less rights restrictive approaches have been considered or explain what these approaches were. Accordingly, the measure as formulated may not be the least rights restrictive approach.

Committee response

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

2.103 The preceding analysis indicates that the measure may be incompatible with the right to freedom of association and the right to freedom of expression under international law.

Commonwealth Redress Scheme for Institutional Child Sexual Abuse Bill 2017; and

Commonwealth Redress Scheme for Institutional Child Sexual Abuse (Consequential Amendments) Bill 2017

Purpose	Seeks to establish a Commonwealth Redress Scheme for Survivors of Institutional Child Sexual Abuse
Portfolio	Social Services
Introduced	House of Representatives, 26 October 2017
Rights	Right to an effective remedy, privacy, equality and non-discrimination (see **Appendix 2**)
Previous report	13 of 2017
Status	Concluded examination

Background

2.104 The committee first reported on the Commonwealth Redress Scheme for Institutional Child Sexual Abuse Bill 2017 (the bill) and the Commonwealth Redress Scheme for Institutional Child Sexual Abuse (Consequential Amendments) Bill 2017 in its *Report 13 of 2017*, and requested a response from the Minister for Social Services by 20 December 2017.[1]

2.105 The minister's response to the committee's inquiries was received on 20 December 2017. The response is discussed below and is reproduced in full at **Appendix 3**.

2.106 The minister explained, by way of background, that the bill is a 'first step to encourage jurisdictions to opt-in to the Scheme, and has been designed in anticipation of their participation should a referral of powers be received'. If the states agree to provide a referral of power to participate in the scheme from its commencement, the minister intends to replace the bill with a National Redress Scheme for Institutional Child Sexual Abuse Bill 2017 (the national bill).

Eligibility to receive redress under the Commonwealth Redress Scheme

2.107 The bill seeks to establish a redress scheme (the scheme) for survivors of institutional child sexual abuse.

1 Parliamentary Joint Committee on Human Rights, *Report 13 of 2017* (5 December 2017) pp. 2-16.

2.108 A person is eligible for redress under the scheme if the person was sexually abused, that sexual abuse is within the scope of the scheme, and the person is an Australian citizen or permanent resident.[2] Proposed subsections 16(2) and (3) of the bill provide that the proposed Commonwealth Redress Scheme Rules (the rules) may also prescribe that a person is eligible or not eligible for redress under the scheme.[3]

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

2.109 The right to equality and non-discrimination in the International Covenant on Civil and Political Rights (ICCPR) provides that everyone is entitled to enjoy their rights without discrimination of any kind, and that all people are equal before the law and entitled without discrimination to the equal and non-discriminatory protection of the law.[4] Article 2 of the Convention on the Rights of the Child (CRC) further provides that states parties to the CRC must respect and ensure the right to equality and non-discrimination specifically in relation to children.

2.110 'Discrimination' encompasses both measures that have a discriminatory intent (direct discrimination) and measures which have a discriminatory effect on the enjoyment of rights (indirect discrimination). The UN Human Rights Committee has explained indirect discrimination as 'a rule or measure that is neutral on its face or without intent to discriminate', which exclusively or disproportionately affects people with a particular personal attribute.[5]

2.111 As acknowledged in the statement of compatibility, by precluding persons who are not Australian citizens or permanent residents from being eligible for the scheme, the restrictions on eligibility discriminate on the basis of nationality or national origin.

2.112 Persons who are the victim of violations of human rights within Australia's jurisdiction are entitled to a remedy for breaches of those rights irrespective of their residency or citizenship status.[6] However, differential treatment will not constitute unlawful discrimination if the differential treatment is based on reasonable and objective criteria such that it serves a legitimate objective, is rationally connected to that legitimate objective and is a proportionate means of achieving that objective.

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2 See proposed section 16 of the bill.

3 Proposed section 117(1) of the bill provides that the minister may, by legislative instrument, make rules prescribing matters required or permitted by the bill to be prescribed by the rules, or necessary or convenient to be prescribed for carrying out or giving effect to the bill.

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

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

6 For a further discussion of the right to an effective remedy, see below.

2.113 The statement of compatibility explains that the restrictions on eligibility of non-citizens and non-permanent residents are necessary to achieving legitimate aims of ensuring the scheme receives public support and protecting against large scale fraud. In relation to the latter, the minister explains:

> Non-citizens and non-permanent residents…will be ineligible to ensure the integrity of the Scheme. Verification of identity documents for non-citizens and non-permanent residents would be very difficult. Opening the Scheme to all people overseas could result in organised overseas groups lodging large scale volumes of false claims in attempts to defraud the Scheme, which could overwhelm the Scheme's resources and delay the processing of legitimate applications.[7]

2.114 The initial analysis stated that the objective of ensuring the integrity of a scheme to provide redress for victims of sexual abuse (such as protection against fraudulent claims) may be capable of being a legitimate objective for the purposes of human rights law, but the statement of compatibility did not provide sufficient information about the importance of this objective in the specific 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. It was noted that reducing administrative burdens or administrative inconvenience alone will generally be insufficient for the purposes of permissibly limiting human rights under international human rights law. It was also not clear whether there was evidence to suggest that large scale volumes of attempted fraud of the scheme may arise if non-citizens were included in the scheme, noting that the Royal Commission into Institutional Responses to Child Sexual Abuse concluded that it saw 'no need for any citizenship, residency or other requirements, whether at the time of the abuse or at the time of the application for redress'.[8]

2.115 In relation to the proportionality of the measure, the statement of compatibility noted that it will be possible to deem additional classes of people eligible for redress under the rules. The statement of compatibility explains that:

> This rulemaking power may be used to deem the following groups of non-citizen, non-permanent residents eligible: those currently living in Australia, those who were child migrants, and those who were formerly Australian citizens or permanent residents.[9]

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7 Statement of Compatibility (SOC), p. 70.

8 Royal Commission into Institutional Responses to Child Sexual Abuse, *Redress and Civil Litigation Report* (2015), p. 347.

9 SOC, pp. 69-70.

2.116 It was not clear from the information provided why it is necessary to include these classes of eligibility in a separate legislative instrument,[10] rather than in the primary legislation. Inclusion in the primary legislation of the classes of non-nationals foreshadowed in the statement of compatibility as being likely to be ruled eligible by the minister may be a less rights-restrictive means of achieving the stated objective of the measure.

2.117 The committee therefore sought the advice of the minister as to:

- whether the restriction on non-citizens' and non-permanent residents' eligibility for redress under the scheme is aimed at achieving a legitimate objective for the purposes of human rights law (including any information or evidence to explain why the measure addresses a pressing and substantial concern);
- how the measure is effective to achieve (that is, rationally connected to) that objective; and
- whether the restriction on non-citizens' and non-permanent residents' eligibility for the scheme is proportionate to achieve the stated objective (including whether there are less rights-restrictive means available to achieve the stated objective).

Minister's response

2.118 In relation to whether the restriction on non-citizens' and non-permanent residents' eligibility for redress under the scheme is aimed at achieving a legitimate objective, the minister's response states that, as the scheme is voluntary, it is important that the scheme provide 'appropriate architecture to support its integrity and legitimacy' to ensure maximum participation from institutions which, in turn, will maximise the opportunity for survivors to seek redress. The minister explained the difficulties of identifying and verifying the identity of those making the claim in the context of non-citizens and non-permanent residents as follows:

> A core principle of the Scheme is to ensure redress is paid to those who are eligible. It is important that the Scheme can identify and verify the identity of those making a claim…
>
> Given the comparative size of the monetary payments under the Scheme and the relatively low evidentiary burden that will be required of survivors making applications, the risk of fraud is a key concern. Verification of proof of identity is one means by which the Scheme can limit attempted fraud. Opening eligibility to non-citizens and non-permanent residents would significantly increase the difficulty of proof of identity verification for those applicants and increase overall processing times of applications.

10 The power to determine eligibility by way of legislative instrument will be discussed further below in relation to the right to an effective remedy.

> Verification of identity of those who are non-citizens and non-permanent residents would require primary documentation and verification from foreign governments and Australian embassies.
>
> …large volumes of false claims from organised overseas groups could overwhelm the Scheme's resources and delay the processing of legitimate applications. In this regard, the Commonwealth Government is continually undertaking fraud detection work to ensure the integrity of social security payments and there is evidence of organised crime attempting to defraud the Commonwealth. However, providing evidence of this nature to the committee may compromise fraud detection activities.

2.119 In response to the committee's concern that reducing administrative burdens is generally insufficient to constitute a legitimate objective for the purposes of international human rights law, the minister explained the importance of timely decision-making in the context of the bill as follows:

> …however I would emphasise that the nature of the survivor cohort is such that timeliness in processing Scheme applications is critical. Over half of the survivors anticipated to apply to the Scheme are over the age of 50, and so significant delays to the processing of applications may result in survivors passing away before they have the opportunity to apply for or accept redress. It is widely recognised that survivors of child sexual abuse also experience poorer health and social outcomes, amplifying the need for timely decision-making and for promoting the rights of survivors.
>
> It is important that our policy settings support the integrity and appropriate targeting of payments. Should the Scheme not safeguard against potential fraud, institutions may choose not to participate, or may seek to leave the Scheme.

2.120 The minister's response provides reasoning and an evidence-based explanation of how the measure addresses a substantial and pressing concern. The information provided in the minister's response indicates that the measure is likely to pursue a legitimate objective for the purposes of international human rights law. Restricting eligibility criteria of non-citizens and non-permanent residents also appears to be rationally connected to the stated objective.

2.121 As to whether the limitation is proportionate to achieving the stated objective, the minister's response notes that it is necessary for the classes of non-citizens referred to in the explanatory memorandum to be contained in a separate legislative instrument because investigation and consultation is continuing across government and with states and territories to determine if there are other classes of survivors that do not fit within the citizenship requirements that should be deemed eligible for the scheme. The minister further explains:

> There may also be classes of survivors that will apply for redress that the Scheme has not, or could not, envisage including in the legislation. The Scheme may not have accounted for categories of survivors that it needs to deal with promptly, to ensure the timely processing of applications and

> the best outcomes for survivors so subclause 16(2) of the Commonwealth Bill is necessary to allow the Scheme to respond to situations as they arise….
>
> Restricting the eligibility of non-citizens and non-permanent residents is necessary to achieve the legitimate aims of ensuring that survivors are provided the redress to which they are entitled in a timely manner, and that redress is provided only to those who submit genuine claims. Subsection 16(2) of the Commonwealth Bill will allow discretion to deem categories of survivors eligible despite these restrictions, such as child migrants. This ensures that the limitation of survivors' rights is proportionate.
>
> I am considering the committee's suggestion to include these predetermined cases in primary legislation in the context of any future legislation developed to reflect a national redress Scheme.

2.122 The concern as to the proportionality of precluding non-citizens and non-permanent residents from being eligible for the scheme is informed by the conclusion of the Royal Commission into Institutional Responses to Child Sexual Abuse that it saw 'no need for any citizenship, residency or other requirements, whether at the time of the abuse or at the time of the application for redress'.[11] As victims of violations of human rights within Australia's jurisdiction are entitled to a remedy for breaches of those rights irrespective of their residency or citizenship status, there are concerns that some survivors of child sexual abuse that would otherwise be eligible for the scheme may lose access to a remedy. However, as the minister's response explains, the power to determine in the rules further classes of persons eligible for redress notwithstanding the citizenship and residency requirements may address these concerns. If the bill is passed, the committee will consider the human rights implications of the rules once they are received.

Committee response

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

2.124 The preceding analysis indicates that restricting the eligibility of non-citizens and non-permanent residents engages and limits the right to equality and non-discrimination. While the measure pursues a legitimate objective, there are concerns that the breadth of the restriction on the eligibility of all non-citizens and non-permanent residents may not be proportionate. However, setting out further classes of persons who may be eligible in the proposed redress scheme rules, including those who would otherwise be excluded due to not being citizens or permanent residents, may be capable of addressing these concerns. If the bill is

11 Royal Commission into Institutional Responses to Child Sexual Abuse, *Redress and Civil Litigation Report* (2015) 347.

passed, the committee will consider the human rights implications of the legislative instrument once it is received.

2.125 The committee notes that the minister has indicated he will consider including further classes of persons who will be eligible for the scheme in any future legislation developed to reflect a national redress scheme.

Compatibility of the measure with the right to an effective remedy for breaches of human rights

2.126 Article 2(3) of the ICCPR requires State parties to ensure that persons whose human rights have been violated have access to an effective remedy. States parties are required to establish appropriate judicial and administrative mechanisms for addressing claims of human rights violations under domestic law, and to make reparation to individuals whose rights have been violated. Effective remedies can involve restitution, rehabilitation and measures of satisfaction – such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices – as well as bringing to justice the perpetrators of human rights violations. Such remedies should be appropriately adapted to take account of the special vulnerabilities of certain categories of persons, including, and particularly, children.

2.127 The redress scheme seeks to provide remedies in response to historical failures of the Commonwealth and other government and non-government organisations to uphold human rights obligations, including the right of every child to protection by society and the state,[12] and the right of every child to protection from all forms of physical and mental violence, injury or abuse (including sexual exploitation and abuse).[13] As acknowledged in the statement of compatibility, by implementing a redress scheme for victims who were sexually abused as children, the scheme promotes the right to state-supported recovery for child victims of neglect, exploitation and abuse under article 39 of the CRC.[14]

2.128 The power in proposed subsections 16(2) and (3) to determine eligibility by way of the proposed rules is broad and, in particular, the minister has a very broad power to determine persons to be ineligible for the scheme. It was noted in the initial analysis that in media reports concerning the introduction of the bill, the minister foreshadowed that he proposes to exclude persons from being eligible if

12 Article 24 of the International Covenant on Civil and Political Rights: see Statement of Compatibility (SOC), p. 70.

13 Articles 19 and 34 of the Convention on the Rights of the Child: see SOC, p. 69.

14 See also Committee on the Rights of the Child, *General Comment No.13: Article 19: The right of the child to freedom from all forms of violence,* CRC/C/GC/13 (2011), pp. 14-15.

they have been convicted of sex offences, or sentenced to prison terms of five years or more for crimes such as serious drug, homicide or fraud offences.[15]

2.129 International human rights law jurisprudence states that laws conferring discretion or rule-making powers on the executive must indicate with sufficient clarity the scope of any such power or discretion conferred on competent authorities and the manner of its exercise.[16] This is because, without sufficient safeguards, broad powers may be exercised in such a way as to be incompatible with human rights. The initial analysis noted that the breadth of the power to determine eligibility or ineligibility contained in the bill may therefore engage and limit the right of survivors of sexual abuse to an effective remedy. The statement of compatibility does not acknowledge that the right to an effective remedy is engaged by this aspect of the bill.[17]

2.130 While the statement of compatibility discusses limiting eligibility of persons on the basis of survivors' nationality and residency status,[18] no information is provided in the statement of compatibility as to the rationale for a broad power to determine eligibility or ineligibility by way of the proposed rules. As limited information has been provided in the statement of compatibility on this point, it is not possible to determine the extent to which the right to an effective remedy may be engaged and limited by this aspect of the bill, and whether such a limitation is permissible.

2.131 The committee therefore sought the advice of the minister as to the compatibility of the measure with the right to an effective remedy.

Minister's response

2.132 In relation to the rationale for using the rules to provide for further classes of eligibility or ineligibility rather than the primary legislation, the minister explained:

> The Scheme is designed to be responsive to survivors' and participating institutions' needs. Flexibility is needed to allow adjustments for the differing needs of survivors, participating institutions, and to enable the Scheme to quickly implement changes required to ensure positive

15 See 'Child sex abuse redress scheme to cap payments at $150,000 and exclude some criminals' (26 October 2017): http://www.abc.net.au/news/2017-10-26/sex-offenders-to-be-excluded-from-child-abuse-redress-scheme/9087256.

16 See the discussion of the human rights implications of expressing legal discretion of the executive in overly broad terms in *Hasan and Chaush v Bulgaria* ECHR 30985/96 (26 October 2000) [84].

17 The statement of compatibility does acknowledge this right is engaged in relation to other aspects of the bill, discussed further below.

18 See pages 69-70. This aspect of the bill is discussed above in relation to the right to equality and non-discrimination.

> outcomes for survivors. This is why it is necessary for elements of the Scheme to be in delegated legislation.
>
> Using rules, rather than regulations or incorporating all elements of the Scheme in the Commonwealth Bill, provides appropriate flexibility and enables the Scheme to respond to factual matters as they arise. It is uncertain how many applications for redress the Scheme will receive at its commencement, and whether there will be unforeseen issues requiring prompt responses. It is therefore appropriate that aspects of the Scheme be covered by rules that can be adapted and modified in a timely manner. The need to respond quickly to survivor needs is also a key feature of the Scheme as many survivors have waited decades for recognition and justice.

2.133 Responding quickly and with flexibility to survivors' needs and seeking to ensure positive outcomes for survivors in the redress scheme is relevant to providing an effective remedy for violations of human rights.

2.134 As to how the power is proposed to be exercised, the minister explained that subsection 16(3) would be used in 'exceptional circumstances', excluding persons from the scheme if they have been convicted of sex offences, or sentenced to prison terms of five years or more for crimes such as serious drug, homicide or fraud offences. In relation to this proposed exclusion, the minister explained:

> As the committee rightly highlights, this significant matter should not be delegated to subordinate legislation. The limitation on eligibility for persons with criminal convictions will therefore be included in the primary legislation of the proposed National Bill. There could be a perception that the Commonwealth Bill limits the rights to effective remedy for survivors with criminal convictions. However, the decision was made that in order to give integrity and public confidence to the Scheme, there had to be some limitations for applications from people who themselves had committed serious offences, but particularly sexual offences.
>
> The eligibility policy has been developed in consultation with State and Territory Attorneys-General, who were almost unanimous in their view that reasonable limitations on applications is necessary to have public faith and confidence in the Scheme. Excluding some people based on serious criminal offences is necessary to ensure taxpayer money is not used to pay redress to those who may not meet prevailing community standards.

2.135 Noting Australia's obligation to provide effective remedies for victims of human rights violations, any proposed restrictions on eligibility on persons with criminal records will need to be carefully considered. In this respect, the UN Human Rights Committee has stated that the right to an effective remedy is an obligation inherent in the ICCPR as a whole and so, while limitations may be placed in particular

circumstances on the nature of the remedy provided (judicial or otherwise), there is an absolute obligation to provide a remedy that is effective.[19]

2.136 Relevantly, in relation to the matters raised by the minister, the *Final Report* noted the impact of child sexual abuse on a survivor may manifest itself in 'interconnected and complex ways', including the development of 'addictions after using alcohol or other drugs to manage the psychological trauma of abuse, which in turn affected their physical and mental health, sometimes leading to criminal behaviour and relationship difficulties.'[20] A number of survivors who appeared before the royal commission had described how the impact of child sexual abuse had contributed to criminal behaviour as adolescents and adults.[21] This information raises concerns as to whether there is a reasoned and evidence-based explanation of how the proposed exclusion addresses a substantial and pressing concern, and whether any such exclusion is proportionate.

2.137 However, the minister further explained the discretion to determine eligibility for redress of survivors, including survivors who have criminal convictions:

> However, the Scheme Operator will have discretion at subsections 16(2) and (3) of the Commonwealth Bill to determine the eligibility of survivors applying for redress on a case-by-case basis, including survivors who are currently, or have been, incarcerated. Importantly, the Scheme Operator can use this discretion to deem a person eligible for redress if they are otherwise ineligible due to the criminal convictions exclusions. In considering whether to exercise discretion, the Scheme Operator will consider the nature of the crime committed, the duration of the sentence and broader public interest issues. The Scheme Operator discretion is also intended to mitigate the impact of jurisdictional differences in crimes legislation. For example, mandatory minimum sentences for certain offences may lead to some applicants receiving longer sentences than they would in other jurisdictions, and perhaps making them ineligible for the Scheme.

2.138 The minister also explained that 'all aspects of the Scheme have been subject to ongoing consultation' and that any legislative changes, including creating or amending legislative instruments, would be undertaken in consultation and

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19 See UN Human Rights Committee, *General Comment No. 29, States of Emergency (article 4)* (2001), [14].

20 Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report: Impacts,* Volume 3 (2017) 11. See also, James RP Ogloff, Margaret C Cutajar, Emily Mann and Paul Mullen, 'Child sexual abuse and subsequent offending and victimisation: A 45 year follow-up study'(2012) *Trends & Issues in Crime and Criminal Justice No.440*.

21 Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report: Impacts,* Volume 3 (2017) 143-145. See also Royal Commission into Institutional Responses to Child Sexual Abuse, *Interim Report, Volume 1* (2014), pp. 116-117.

agreement of a proposed Board of Governance established to advise on the scheme. The ability of the scheme operator to exercise discretion in the way proposed by the minister may address some of the concerns in relation to the compatibility of the measure with the right to an effective remedy, insofar as it places limits on how the broad power may be exercised and may ensure that survivors are eligible for the scheme. The committee will assess the human rights compatibility of any proposed rules or provisions in the proposed national bill that excludes persons convicted of certain offences once it is introduced.

Committee response

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

2.140 Noting the broad scope of the proposed power to determine eligibility or ineligibility in the national redress scheme rules, there may be concerns as to the compatibility of this measure with the right to an effective remedy. In particular, there are concerns in relation to the proposed exclusion of persons with certain criminal convictions from being eligible for the scheme. However, the discretion of the scheme operator to determine eligibility of survivors if they are otherwise ineligible may be capable of addressing some of these concerns. If the bill is passed, the committee will consider the human rights implications of any legislative instrument or proposed National Redress Scheme for Institutional Child Sexual Abuse Bill when it is received or introduced.

2.141 The committee notes the minister's intention to include any limitation on eligibility for persons with criminal convictions in the primary legislation of the proposed National Redress Scheme for Institutional Child Sexual Abuse Bill.

Power to determine when a participating institution is not responsible for sexual or non-sexual abuse

2.142 Proposed section 21 of the bill sets out when a participating institution is responsible for abuse. Subsection 21(7) provides that a participating institution is not responsible for sexual or non-sexual abuse of a person if it occurs in circumstances prescribed by the rules as being circumstances in which a participating institution is not, or should not be treated as being, responsible for the abuse of a person.

Compatibility of the measure with the right to an effective remedy for breaches of human rights

2.143 The statement of compatibility does not acknowledge that the right to an effective remedy is engaged by the power to determine by way of rules when a participating institution is not responsible for sexual or non-sexual abuse. However, as noted earlier, broad rule-making powers conferred on the executive may be incompatible with the right to an effective remedy where those powers are exercised in a manner that is incompatible with the right. Further, where public officials or state agents have committed violations of human rights, states parties

concerned may not relieve perpetrators from personal responsibility through the granting of amnesties, legal immunities and indemnities.[22]

2.144 The explanatory memorandum provides that proposed subsection 21(7) is intended to ensure that institutions are not found responsible for abuse that occurred in circumstances where it would be unreasonable to hold the institution responsible. The explanatory memorandum states by way of example that such circumstances may include where child sexual abuse was perpetrated by another child and the institution could not have foreseen this abuse occurring and could not be considered to have mismanaged the situation.[23]

2.145 As limited information has been provided in the statement of compatibility on this point, the initial analysis stated that it is not possible to determine the extent to which the right to an effective remedy may be engaged and limited by this aspect of the bill. The committee therefore sought the advice of the minister as to the compatibility of the measure with the right to an effective remedy.

Minister's response

2.146 The minister's response provides the following information in relation to the committee's inquiries:

> As the Committee has noted, subclause 21(7) of the Commonwealth Bill is intended to operate to ensure that participating institutions are not found responsible for abuse that occurred in circumstances where it would be unreasonable to hold the institution responsible.
>
> The power in subclause 21(7) will also be used to clarify circumstances where a participating government institution should not be considered responsible. Such circumstances may include:
>
> - where the government only had a regulatory role over a non-government institution;
> - where the government only provided funding to a non-government institution; and
> - where the only connection is that the non-government institution was established under law enacted by the government.
>
> Until institutions opt in to the Scheme, it is not possible to envisage every possible circumstance to include in the legislation. These rulemaking provisions allow the Scheme to be responsive to the realities of

22 UN Human Rights Committee, *General Comment 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant,* UN Doc CCPR/C/21/Rev.1/Add.1326 (2004) [18]; see also UN General Assembly, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law,* UNGA Res 60/147 (2006) pp. 8-9.

23 Explanatory memorandum, pp. 16-17.

implementation, which is necessary to achieve the legitimate aim of public and institutional support for the Scheme. Were the Scheme too fixed in its methodology, the Scheme may face criticism for reaching unreasonable decisions.

2.147 Providing for a national redress scheme that is responsive to issues that arise in relation to the scheme's implementation is likely to be a legitimate objective for the purposes of international human rights law, and providing a rule-making power to address such issues is likely to be rationally connected to this objective. As noted in the initial analysis, the concerns arise in relation to how the rule-making power may be exercised. Were the power to be exercised in a manner that was to relieve perpetrators from personal responsibility, this may be incompatible with the right to an effective remedy. However, the examples provided by the minister in his response indicate that the rule-making power may be exercised where a participating institution's role was minimal. If the bill is passed, the committee will consider the human rights implications of the instrument once it is received.

Committee response

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

2.149 Noting the broad scope of the proposed power to determine by way of rules when a participating institution is not responsible for sexual or non-sexual abuse, there may be human rights concerns in relation to its operation. This is because its scope is such that it could be used in ways that may risk being incompatible with the right to an effective remedy. If the bill is passed, the committee will consider the human rights implications of any redress scheme rules once they are received.

Bar on future civil liability of participating institutions

2.150 Proposed sections 39 and 40 of the bill provide that where an eligible person receives an offer of redress and chooses to accept that offer, the person releases and forever discharges all institutions participating in the scheme from all civil liability for abuse of the person that is within the scope of the scheme, and the eligible person cannot (whether as an individual, a representative party or a member of a group) bring or continue any civil claim against those participating institutions in relation to that abuse.

Compatibility of the measure with the right to an effective remedy for breaches of human rights

2.151 As noted earlier, the right to an effective remedy requires State parties to the ICCPR to establish appropriate judicial and administrative mechanisms for addressing claims of human rights violations, and further requires that State parties may not relieve perpetrators from personal responsibility for breaches of human rights.

2.152 Insofar as the bill requires persons who accept an offer of redress under the scheme to relinquish their right to seek further civil remedies from responsible institutions for sexual abuse and related non-sexual abuse, the bill may engage the right to an effective remedy. The statement of compatibility acknowledges that the right to an effective remedy may be engaged and limited by this aspect of the bill, but considers that any limitation is reasonable, necessary and proportionate to ensuring the scheme's integrity and proper functioning.[24] In particular, the statement of compatibility explains:

> Due to its non-legalistic nature, redress through the Scheme will be a more accessible remedy for eligible survivors than civil litigation. Entitlement to redress is determined based on a standard of 'reasonable likelihood', which is lower than the standard for determining the outcome of civil litigation, which is the balance of probabilities. The availability of redress is dependent on the extent to which Territory government and non-government institutions opt-in to the Scheme. Consultation has shown that institutions are not likely to opt-in to the Scheme if they remained exposed to paying compensation through civil litigation in addition to paying monetary redress. Attaching the release to entitlement to all elements of redress is necessary to encourage institutions to opt-in and to make redress available to the maximum number of survivors.[25]

2.153 However, relinquishing a person's opportunity to pursue civil litigation and possible common law damages is a significant decision for a victim of abuse to make, particularly as the amount to be provided under the redress scheme is capped at $150,000.[26] The minister explains that, in order to acknowledge the limitation on the right to an effective remedy that arises from this aspect of the bill:

> …the Scheme will deliver free, trauma informed, culturally appropriate and expert Legal Support Services. These services will be available to survivors for the lifetime of the Scheme at relevant points of the application process, and will assist survivors to understand the implications of releasing responsible institutions from further liability. This means that survivors will be able to make an informed choice as to whether they wish to accept their offer and in doing so release the institution from civil liability for abuse within the scope of the Scheme or seek remedy through other avenues.[27]

2.154 Notwithstanding the description of the proposed legal support services described in the statement of compatibility, the bill itself includes limited detail as to the provision of legal advice to survivors of sexual abuse. Proposed section 37(1)(g)

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24 SOC, p. 70 and p. 73.

25 SOC, p. 70.

26 See SOC, p. 66.

27 SOC, pp. 70-71.

of the bill requires that a written offer of redress to an eligible person 'gives information about the opportunity for the person to access legal services under the scheme for the purposes of obtaining legal advice about whether to accept the offer'. The provision of legal services under the scheme is to be determined by legislative instrument.[28] The initial analysis stated that further information as to the content of the proposed rules relating to the provision of legal services would assist in determining whether this will serve as a sufficient safeguard so as to support the measure constituting an effective remedy.[29]

2.155 The committee therefore sought the advice of the minister as to the compatibility of the measure with the right to an effective remedy, in particular the content of the proposed rules relating to the provision of legal services under the scheme.

Minister's response

2.156 In response, the minister provided the following information:

> The measure is supported by proportionate and essential safeguards for survivors through the provision of a free community-based legal service to ensure survivors understand the legal implications of signing a release. The free community-based legal service will be available to survivors at the commencement of their engagement with the Scheme. The website, helpline and other engagement documents will make it clear to survivors that a release will be required in order to receive redress under the Scheme. The Scheme will make available legal advice during this process so that survivors understand the legal implications.
>
> The Rules will include a provision which provides funding for legal services for the purposes of a person receiving trauma informed, culturally appropriate and expert legal advice as required throughout the Scheme.
>
> Legal services will be available during the four key stages of the redress application process:
>
> 1. prior to application so survivors understand eligibility requirements and the application process of the Scheme;
>
> 2. during completion of a survivor's application;
>
> 3. after a survivor has received an offer of redress (including if they elect to seek an internal review); and

28 See proposed section 117(2)(a) of the bill.

29 It is noted that the recommendation as to the provision of legal services of the Royal Commission into Institutional Responses to Child Sexual Abuse was that 'a redress scheme should fund, at a fixed price, a legal consultation for an applicant before the applicant decides whether or not to accept the offer of redress and grant the required releases': Royal Commission into Institutional Responses to Child Sexual Abuse, *Redress and Civil Litigation Report* (2015) Recommendation 64, 390

4. on the effect of signing a Deed of Release (DoR), including its impact on the prospect of future litigation.

Survivors will be able to obtain free legal assistance on an ongoing basis as required across each of the above four stages.

The Rules will also include a provision that allows a person who cannot access the funded legal service because of a conflict of interest, to be referred to another legal firm and have their legal costs covered by the Scheme's legal services provider.

In relation to the release, legal support could include:

- providing an explanation of the factors which make up the offer survivors have received and the matters considered by the assessment team;
- identifying the potential rights that the survivor is releasing; and
- helping the survivor decide whether they wish to accept the offer or not.

2.157 This information provides useful further information as to the content of the proposed rules relating to the provision of legal services. However, whether the safeguards are sufficient so as to be compatible with the right to an effective remedy will depend on the precise wording of the rules, and therefore the committee will consider the human rights compatibility of the rules when the instrument is received.

Committee response

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

2.159 The bar on future civil liability of participating institutions may engage and limit the right to an effective remedy. However, the proposed rules governing the provision of legal services under the redress scheme may operate as a sufficient safeguard so as to support the human rights compatibility of the measure. The committee will consider the compatibility of the proposed rules governing the provision of legal services, and whether they offer adequate safeguards, when they are received.

Information Sharing Provisions

2.160 Proposed section 77 of the bill sets out the circumstances in which the Commonwealth Redress Scheme Operator[30] (the Operator) may disclose protected information. 'Protected information' is defined in proposed section 75 of the bill as

30 The Commonwealth Redress Scheme Operator is the Secretary to the Human Services Department (or the Department administered by the Minister administering the *Human Services (Centrelink) Act 1997*), and is responsible for operating the scheme, including making offers of redress to the person.

information about a person obtained by an officer for the purposes of the scheme that is or was held by the department. The Operator can disclose such protected information if it was acquired by an officer in the performance of their duties or in the exercise of their powers under the bill if the Operator certifies that the disclosure is necessary in the public interest in a particular case or class of case, and the disclosure is to such persons and for such purposes as the Operator determines.[31] Disclosure may also be made by the Operator to certain persons set out in the bill, including the secretary of a department, the chief executive of Centrelink and the chief executive of Medicare.[32]

Compatibility of the measure with the right to privacy

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

2.162 The information sharing powers of the Operator in proposed section 77 of the bill engage and limit the right to privacy by providing for the disclosure of protected information. As acknowledged in the statement of compatibility, this protected information may include highly sensitive information about child sexual abuse the person has experienced.[33]

2.163 The right to privacy may be subject to permissible limitations which are provided by law and are not arbitrary. In order for limitations not to be arbitrary, the measure must pursue a legitimate objective and be rationally connected and proportionate to achieving that objective.

2.164 As outlined in the initial analysis, the statement of compatibility acknowledges that the right to privacy is engaged by the information sharing provisions in the bill, which includes proposed section 77. However, the statement of compatibility explains any limitation by the information sharing provisions on the right to privacy is permissible, as the provisions are 'necessary to achieve the legitimate aims of assessing eligibility under the Scheme and protecting children from abuse, and are appropriately limited to ensure that they are a proportionate means to achieve those aims'.[34]

2.165 The initial analysis stated that the objective of protecting children from abuse is a legitimate objective under international human rights law. Collecting,

31 Proposed section 77(1)(a) of the bill.

32 Proposed section 77(1)(b) of the bill.

33 SOC, p. 71.

34 SOC, p. 72.

using and disclosing this information to relevant bodies so as to prevent abuse and provide redress is likely to be rationally connected to this objective.

2.166 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 the broad rationale for allowing persons to obtain and disclose protected information for the purposes of the scheme as follows:

> To establish eligibility, survivors will be required to supply the Scheme with personal information including highly sensitive information about the child sexual abuse they experienced. To progress the application to assessment, limited survivor and alleged perpetrator details will be provided, with the survivor's consent, to the participating institutions identified in their application. Participating institutions will be able to use this information in a limited way to facilitate making insurance claims and to institute internal disciplinary procedures where an alleged perpetrator or person with knowledge of abuse is still associated with the institution. Participating institutions will be required to provide the Scheme with specific information pertaining to survivors and alleged perpetrators, including survivor and the alleged perpetrator's involvement with the institution, any related complaints of abuse made to the institution and details of any prior payments made to the survivor. This collection and exchange of information is necessary for the eligibility assessment process and information under the Scheme will be subject to confidentiality. Outside of Scheme representatives, only survivors and those they nominate will have access to records relating to their application. Strict offence provisions will be put in place to mitigate risks of unlawful access, disclosure, recording, use, soliciting or offering to supply Scheme information.[35]

2.167 However, the statement of compatibility does not appear to address the proportionality of the bill insofar as it relates to the Operator's disclosure powers in proposed section 77. The power in proposed section 77 for the Operator to disclose information is very broad: the Operator can disclose protected information to 'such persons and for such purposes as the Operator determines', provided the Operator considers it necessary in the public interest to do so.[36] It is not clear from the statement of compatibility whether it is strictly necessary to include such a broad category of persons to whom disclosure may be made by the Operator, and what circumstances will constitute a 'public interest', which raises concerns that these information sharing provisions may not be sufficiently circumscribed.

35 SOC, p. 71.

36 Proposed section 77(1(a) of the bill.

2.168 Another relevant factor in assessing proportionality is whether there are adequate safeguards in place to protect the right to privacy. It was noted that there are penalties in place for persons who engage in unauthorised recording, disclosure or use of protected information.[37] However, the powers of the Operator to disclose information in the public interest in proposed section 77 do not appear to be accompanied by safeguards present in other information sharing provisions in the bill, such as a requirement that the Operator consider the impact disclosure may have on a person to whom the information relates. By way of contrast, it was noted that there is a separate provision in section 78 of the bill addressing disclosure of protected information to certain agencies (such as the Australian Federal Police or state and territory police forces) for the purposes of law enforcement or child protection, where there is a safeguard in place that requires the Operator to have regard to the impact the disclosure might have on the person,[38] as well as a requirement that the Operator is satisfied that disclosure of the information is reasonably necessary for the enforcement of the criminal law or for the purposes of child protection.[39] Further, the initial analysis stated that disclosure for other purposes such as for the purpose of the participating institution facilitating a claim under an insurance policy must only occur if there has been consideration to the impact that disclosure might have on the person who has applied for redress.[40] It is not clear from the statement of compatibility why such safeguards are available in relation to some information sharing provisions in the bill, but not in relation to the Operator's disclosure powers in proposed section 77.

2.169 The committee therefore sought the advice of the minister as to whether the limitation on the right to privacy is proportionate to the stated objective of the measure (including whether there are adequate safeguards in place in relation to disclosure by the Operator of protected information).

Minister's response

2.170 The minister's response provides the following information in relation to the committee's inquiries:

> Section 77 of the Commonwealth Bill has been drafted to reflect similar provisions in other legislation within the Social Services portfolio, which routinely deals with a person's sensitive information and provides a consistent approach to the way in which the Department deals with protected information. It was considered appropriate to provide a power to enable rules to be made by the Minister if it was considered necessary to assist with the exercise of the Scheme Operator's disclosure of

37 Proposed sections 81-84 of the bill.

38 See proposed section 78(3) of the bill.

39 See proposed section 78(1) of the bill.

40 Proposed section 79(3) of the bill.

> protected information. This provides flexibility to address any circumstances that arise which are of sufficient public interest to warrant the exercise of that power. Incorporating high-level rules in the Commonwealth Bill would restrict the Scheme Operator's power to make a public interest disclosure to those circumstances set out in the Commonwealth Bill.
>
> Careful consideration will be given to ensure that any personal information held by the Scheme Operator is given due and proper protection. It is envisaged the power to make public interest disclosures will only be used where it is necessary to prevent, or lessen, a threat to life, health or welfare, for the purpose of briefing the Minister or if the information is necessary to assist a court, coronial inquiry, Royal Commission, or similar, for specific purposes such as a reported missing person or a homeless person. These criteria are some of those that are already outlined in other legislation in the Social Services portfolio that govern public interest certificates, such as the *Social Security (Public Interest Certificate Guidelines) (DSS) Determination 2015* and the *Paid Parental Leave Rules 2010*.
>
> Despite there not being a positive requirement in the Commonwealth Bill, the intention is to make rules to regulate the Scheme Operator's disclosure power to ensure that the limitation on the right to privacy is proportionate to achieve the various legitimate aims of public interest disclosures. However, the Committee's concerns are noted and I will consider including a positive requirement for rules in the National Bill, including a requirement that the Scheme Operator must have regard to the impact the disclosure may have on a person to whom the information relates.

2.171 The minister's response provides useful information as to the scope of the Operator's power to make public interest disclosures. In particular, the minister's explanation that the power is proposed to be exercised in similar circumstances to those outlined in other instruments that govern public interest certificates such as the Social Security (Public Interest Certificate Guidelines) (DSS) Determination 2015, suggests any disclosure of personal information would be exceptional.[41] Disclosure in the circumstances outlined by the minister (namely, where it is necessary to prevent, or lessen, a threat to life, health or welfare, for the purpose of briefing the Minister or if the information is necessary to assist a court, coronial inquiry, Royal Commission, or similar, for specific purposes such as a reported missing person or a homeless person) would likely be sufficiently circumscribed so as to constitute a proportionate limitation on the right to privacy.

41 The committee has previously considered that the *Social Security (Public Interest Certificate Guidelines) (DSS) Determination 2015* is compatible with the right to privacy: see Parliamentary Joint Committee on Human Rights, *Thirtieth Report of the 44th Parliament* (10 November 2015) p. 140 and pp. 146-147.

2.172 It is also noted that the minister intends to make rules regulating the Scheme Operator's disclosure power and is also considering including a positive requirement for rules in any proposed national bill, as well as a safeguard by requiring the Scheme Operator to have regard to the impact disclosure may have on a person to whom the information relates. Such matters would likely address the concerns outlined in the initial analysis as to the scope of the power and the sufficiency of safeguards.

Committee response

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

2.174 The further information provided by the minister indicates that the power to make public interest disclosures will only be used where it is necessary to prevent, or lessen, a threat to life, health or welfare, for the purpose of briefing the minister or if the information is necessary to assist a court, coronial inquiry, Royal Commission, or similar, for specific purposes such as a reported missing person or a homeless person. The committee notes that disclosure in such circumstances may be sufficiently circumscribed such that the measure would be a proportionate limitation on the right to privacy. The committee recommends that the Scheme Operator's disclosure power be monitored by government to ensure that any limitation on the right to privacy be no more extensive than what is strictly necessary.

2.175 The committee will consider the human rights compatibility of the proposed rules to regulate the Scheme Operator's disclosure power when they are received.

2.176 The committee notes that the minister has indicated he will consider including a positive requirement that the Scheme Operator must have regard to the impact the disclosure may have on a person to whom the information relates in any future legislation developed to reflect a national redress scheme, and will also consider including a positive requirement for rules to regulate the Scheme Operator's disclosure power.

Absence of external merits review and removal of judicial review

2.177 The bill establishes a system of internal review of determinations made under the scheme.[42] No provision is provided in the bill for determinations to be able to be subject to external merits review. Pursuant to the internal review procedure, a person may apply to the Operator to review a determination made in relation to redress and the Operator must cause that determination to be reviewed by an independent decision-maker to whom the Operator's power under this section is delegated, and who was not involved in the making of the determination.[43] A person

42 Proposed Part 4-3 of the bill.

43 Proposed sections 87 and 88 of the bill.

reviewing the original determination must reconsider the determination and either affirm, vary, or set aside the determination and make a new determination.[44] When reviewing the original determination, the person may only have regard to the information and documents that were available to the person who made the original determination.[45]

2.178 The Commonwealth Redress Scheme for Institutional Child Sexual Abuse (Consequential Amendments) Bill 2017 (the consequential amendments bill) exempts decisions made under the scheme from judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act).[46]

Compatibility of the measure with the right to a fair hearing

2.179 Article 14(1) of the ICCPR requires that in the determination of a person's rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. A determination of a person's entitlement to redress as a result of sexual abuse, and a finding of responsibility on the part of institutions for such abuse, involves the determination of rights and obligations and therefore is likely to constitute a suit at law.[47]

2.180 The initial analysis stated that the absence of external merits review and the removal of a form of judicial review may engage and limit the right to a fair hearing, as it limits survivors' opportunities to have their rights and obligations determined by an independent and impartial tribunal. However, the statement of compatibility does not acknowledge that the right to a fair hearing is engaged by the measures.

2.181 A limitation on the right to a fair hearing may be permissible if it pursues a legitimate objective, is rationally connected to that legitimate objective and is a proportionate means of achieving that objective.

2.182 The explanatory memorandum to the consequential amendments bill explains the rationale for limiting the scheme to internal review and the removal of judicial review. In particular, the explanatory memorandum explains that judicial review may cause undue administrative delays under the scheme, and the internal review mechanism is intended to prevent re-traumatising victims through having to re-tell their story of past institutional child sexual abuse.

2.183 Preventing re-traumatisation of victims of sexual abuse is likely to be a legitimate objective under international human rights law. However, in

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44 Proposed section 88(2) of the bill.

45 Proposed section 88(3) of the bill.

46 Schedule 3 of the consequential amendments bill.

47 See UN Human Rights Committee, *General Comment 32: Article 14, Right to Equality before Courts and Tribunals and to Fair Trial* (2007) [16].

circumstances where the victim themselves may choose to pursue external review (by way of merits review or judicial review) if they are unsatisfied with the decision, it is not clear based on the information provided that preventing victims from pursuing external review if dissatisfied with the internal decision would be an effective means of achieving this objective.

2.184 Further, the explanatory memorandum explains that, when internally reviewing the decision, the Operator or independent decision-makers are not permitted to have been involved in making the original decision under review. However, it was unclear whether the internal review mechanism provides greater or lesser scope for independent and impartial review than that which would be provided by the (external) Administrative Appeals Tribunal. It was not clear, therefore, whether the internal review mechanism is an effective substitute for external review.

2.185 The committee therefore sought the advice of the minister as to the compatibility of the measure with the right to a fair hearing, including:

- whether the absence of external merits review and removal of judicial review pursues a legitimate objective;
- whether the measures are rationally connected to (that is, effective to achieve) that objective; and
- whether the measures are a proportionate means of achieving the stated objective.

Minister's response

2.186 The minister's response provides the following information on the internal review mechanism:

> The decision to exclude external merits review for applicants was made on the advice of the Independent Advisory Council on Redress and following the Royal Commission's recommendation on this matter. The Council recommended the Scheme provide survivors with access to an internal review process, but no access to external merits or judicial review as it considered that providing survivors with external review would be overly legalistic, time consuming, expensive and would risk further harm to survivors. If judicial review avenues were available, many survivors may have unrealistic expectations of what could be achieved given the low evidentiary barrier to entry to the Scheme compared to civil litigation, and that therefore the judicial review process is likely to re-traumatise a survivor.
>
> The Department of Social Services will recruit appropriately qualified, independent assessors, known as Independent Decision Makers, who will make all decisions on applications made to the Scheme. Independent Decision Makers will not report or be answerable to Government. These Independent Decision Makers will be able to provide survivors with access

> to independent and impartial review without subjecting them to potential re-traumatisation.
>
> Members of the Administrative Appeals Tribunal are appointed based on their judicial experience, not recruited for the skillset and understanding of the survivor cohort that will be required of Independent Decision Makers. The Administrative Appeals Tribunal must make a legally correct or preferable decision, while Independent Decision Makers will make decisions on applications with highly variable levels of detail and without strict legislative guidance on what weight should be applied to the information they do receive. Without an understanding of past decisions under the Scheme, the Tribunal may reach decisions that are inconsistent with past decisions made by Independent Decision Makers. Utilising the Administrative Appeals Tribunal for merits review under the Scheme risks inappropriately imposing a legalistic lens on a non-legalistic decision making process.

2.187 The minister's response provides useful information as to the rationale for excluding external merits review and the proposed operation of the internal review scheme with Independent Decision Makers. Having regard to this information and the particular context in which the review scheme operates, the internal review mechanism may be capable of ensuring that survivors have adequate opportunities to have their rights and obligations determined in a manner that is compatible with the right to a fair hearing. It is also noted that the consequential amendments bill, which removes judicial review under the ADJR Act, does not appear to preclude judicial review under section 75(v) of the Constitution and section 39B of the *Judiciary Act 1903*. However, noting that it is difficult to determine how, and the extent to which, the internal review mechanism may impact on the right to a fair hearing until it is in operation, it is recommended that the mechanism be monitored to ensure that the review mechanism operates in such a way as to ensure that survivors have sufficient opportunities to have their rights and obligations determined by an independent and impartial tribunal.

Committee response

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

2.189 Having regard to this information and the particular context in which the review scheme operates, the internal review mechanism may be capable of ensuring that survivors have adequate opportunities to have their rights and obligations determined in a manner that is compatible with the right to a fair hearing. However, the committee recommends that the operation of the internal review mechanism be monitored to ensure that survivors have sufficient opportunities to have their rights and obligations determined by an independent and impartial tribunal.

Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2017

Purpose	Amends the *Fair Work Act 2009* to: prohibit terms of a modern award or an enterprise agreement requiring or permitting contributions for the benefit of an employee to be made to any fund other than a superannuation fund, a registered worker entitlement fund or a registered charity; prohibit any term of a modern award, enterprise agreement or contract of employment permitting or requiring employee contributions to an election fund for an industrial association; and prohibit any action with the intent to coerce an employer to pay amounts to a particular worker entitlement fund, superannuation fund, training fund, welfare fund or employee insurance scheme. Amends the *Fair Work (Registered Organisations) Act 2009* to: require registered organisations to adopt, and periodically review, financial management policies; require registered organisations to keep credit card records and report certain loans, grants and donations; require specific disclosure by registered organisations and employers of the financial benefits obtained by them and persons linked to them in connection with employee insurance products, welfare fund arrangements and training fund arrangements; and introduce a range of new penalties relating to compliance with financial management, disclosure and reporting requirements
Portfolio	Employment
Introduced	House of Representatives, 19 October 2017
Rights	Freedom of association; collectively bargain (see **Appendix 2**)
Previous reports	12 of 2017 and 1 of 2018
Status	Concluded examination

Background

2.190 The committee first reported on the Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2017 (the bill) in its *Report 12 of 2017*, and requested a response from the Minister for Employment by 13 December 2017.[1]

2.191 The minister's response to the committee's inquiries was received on 19 December 2017 and discussed in *Report 1 of 2018*.[2]

1 Parliamentary Joint Committee on Human Rights, *Report 12 of 2017* (28 November 2017) pp. 16-24.

2.192 The committee requested a second response from the minister by 8 February 2018, specifically in relation to prohibiting terms of industrial agreements requiring or permitting payments to worker entitlement funds and the right to collectively bargain. The committee also welcomed any additional comments in relation to any other matter relevant to its consideration of the bill. A response from the Minister for Small and Family Business, the Workplace and Deregulation was received on 8 February 2018. The response is discussed below and is reproduced in full at **Appendix 3**. The response addressed the committee's specific request and did not provide further comments more generally in relation to the bill.

Prohibiting terms of industrial agreements requiring or permitting payments to worker entitlement funds

2.193 Schedule 2 of the bill would amend the *Fair Work Act 2009* (Fair Work Act) to prohibit any term of a modern award or an enterprise agreement requiring or permitting contributions for the benefit of an employee to be made to any fund other than a superannuation fund, a registered worker entitlement fund or a registered charity.[3]

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

2.194 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).[4]

2.195 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 Organise (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.[5] The principle of 'autonomy of bargaining' in the negotiation of collective agreements is an 'essential

2 Parliamentary Joint Committee on Human Rights, *Report 1 of 2018* (6 February 2018) pp. 59-77.

3 Statement of Compatibility (SOC), p. xi.

4 See, article 22 of the ICCPR and articles 7, 8 of the ICESCR.

5 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.

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.[6]

2.196 Prohibiting the inclusion of particular terms in an enterprise agreement interferes with the outcomes of the bargaining process. Accordingly, the initial human rights analysis stated that the measure engages and may limit the right to just and favourable conditions of work and the right to collectively bargain as an aspect of the right to freedom of association.

2.197 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.[7] 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.

2.198 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'.[8] 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

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6 ILO, *General Survey by the Committee of Experts on the Application of Conventions and Recommendations on Freedom of Association and Collective Bargaining* (1994) [248];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). See, also, ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR),Direct Request (CEACR) - adopted 2016, published 106th International Labour Conference (ILC) session (2017) Right to Organise and Collective Bargaining Convention, 1949 (No. 98) - Australia (Ratification: 1973) http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:13100:0::NO::P13100_COMMENT_ID:3299912; 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.

7 See ICCPR article 22.

8 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]).

by consultations with the workers' and employers' organizations in an effort to obtain their agreement'.[9]

2.199 Indeed, international supervisory mechanisms have previously raised specific concerns in relation to current restrictions imposed on bargaining outcomes under Australian domestic law.[10] In relation to restrictions on the scope of collective bargaining and bargaining outcomes, CFA Committee noted 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 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.[11]

2.200 In this respect the statement of compatibility acknowledges that the measure engages the right to freedom of association, the right to voluntarily reach bargaining outcomes, and the right to just and favourable conditions at work. However, the statement of compatibility asserts that the limitation on these rights is permissible. It states that the measure pursues the legitimate objectives of addressing 'the potential for misappropriation of funds and [to] avoid conflicts of interest and possible coercion'.[12] It points to the Final Report of the Royal Commission into Trade Union Governance and Corruption (Heydon Royal Commission) in support of this objective.[13] While the stated objectives may be capable of constituting a legitimate objective for the purposes of international human rights law, the initial analysis noted that it would have been useful if the

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9 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]).

10 See, for example, 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.

11 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.

12 SOC, p. xi.

13 SOC, p. x.

statement of compatibility had more fully explained how any findings from the Heydon Royal Commission supported the importance of this objective as a substantial or pressing concern.

2.201 The statement of compatibility provides some information as to whether the measure is rationally connected to (that is, effective to achieve) its stated objectives. It notes that the measure does not prohibit contributions to worker entitlement funds but requires any contributions 'to be made to registered worker entitlement funds that are subject to basic governance and disclosure requirements designed to address potential conflicts of interest, breaches of fiduciary duty and the potential for coercion'.[14] As such the measure would appear to be rationally connected to its stated objective.

2.202 However, the statement of compatibility provides limited information as to whether the limitation is proportionate. In order to be a proportionate limitation on human rights a measure must be the least rights restrictive way of achieving its stated objective.

2.203 Accordingly, the committee sought the advice of the Minister for Employment as to:

- 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 first response

2.204 The minister's first response described the current restrictions on bargaining outcomes imposed by the Fair Work Act and restates the scope of the new restrictions. The minister's response noted that the committee's initial report stated that the limitation imposed by the measure appeared to be rationally connected to its stated objective.

2.205 In relation to whether the limitation is reasonable and proportionate to achieve the stated objective, the minister's response stated:

> Any worker entitlement fund, including those controlled by any industrial association, can be registered provided it meets basic governance and disclosure requirements. These requirements are designed to address potential conflicts of interest, breaches of fiduciary duty and coercive conduct. There is no restriction on who can be a member of a fund. The provisions enhance the right to just and favourable conditions of work by ensuring that money held by worker entitlement funds is used to benefit workers. The amendments will provide employees with a guarantee that

14 SOC, p. xi.

> any contributions they voluntarily make to a worker entitlement fund is subject to appropriate scrutiny and oversight.
>
> To the extent that the prohibition may engage any of these rights, the measure is reasonable and proportionate and enhances workers' rights by ensuring that money held on their behalf is protected. The amendments are the least rights restrictive possible in that they do not represent an unqualified prohibition on terms of industrial agreements that provide for contributions to worker entitlement funds. Rather, they require such contributions to be made to registered worker entitlement funds that are subject to basic governance and disclosure obligations.
>
> The International Labour Organization (ILO) has stated that 'Restrictions on [the] principle [of leaving the greatest possible autonomy to organizations in their functioning and administration] should have the sole objective of protecting the interests of members'.
>
> To the extent the proposed provisions may engage with these rights they do so only to protect the rights of workers by ensuring that their money is properly managed and their interests protected.
>
> The provisions support the basic governance and disclosure requirements of the Bill that are designed to address potential conflicts of interest, breaches of fiduciary duty and potential for coercive conduct that were found by the Royal Commission into Trade Union Governance and Corruption (Royal Commission) in examining the operation in Australia of worker entitlement funds. As such, the amendment protects the interests of workers.

2.206 The minister's response provided a range of information about the scope of the limitation on bargaining outcomes. In this respect, it is relevant to the proportionality of the measure that it will still be possible to negotiate clauses in enterprise agreements which require or permit payments to be made to registered workers' entitlement funds, superannuation funds or charities. However, prohibiting any term of an enterprise agreement that otherwise requires or permits contributions for the benefit of an employee may still have significant effects on voluntarily negotiated outcomes.

2.207 As discussed further below, there are a range of restrictions on registered worker entitlement funds and who can operate them. Under the proposed bill, registered organisations including unions are prohibited from operating registered workers' entitlement funds and there are restrictions on how funds can be spent. This means that, for example, even if an employer and employees agreed through an enterprise agreement to set up an occupational health and safety training fund to be administered and run by the relevant union, this would not be permissible. It was unclear from the minister's response how prohibiting this kind of voluntarily negotiated clause in general is the least rights restrictive approach to achieving the stated objective. Further, while the minister's response referred to ILO comments about when it may be legitimate to limit particular rights, it did not address the

specific concerns raised by international monitoring bodies in relation to Australia's restrictions on bargaining outcomes through prohibiting particular matters in enterprise agreements (discussed at [2.199] above). In light of the concerns raised by these international monitoring bodies as to the existing restrictions on bargaining outcomes in Australia, it is likely that any amendments which further restrict such matters would also raise concerns.

2.208 Finally, the minister's response outlined consultation which occurred with worker entitlement funds and employee and employer organisations prior to introduction. 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, the fact of consultation alone is not sufficient to address the human rights concerns in relation to the measure.

2.209 The committee considered that, in the absence of additional information addressing these concerns, prohibiting terms of industrial agreements that require or permit payments to worker entitlement funds is likely to be incompatible with the right to collectively bargain.

2.210 The committee therefore sought further advice from the minister in relation to the compatibility of the measure with the right to collectively bargain, in particular any information in light of findings by relevant international supervisory mechanisms.

Minister's second response

2.211 The Minister for Small and Family Business, the Workplace and Deregulation provided the following information in relation to the committee's inquiries:

> A detailed response to issues raised in Human Rights Scrutiny Report No. 12 of 2017 in relation to the Bill was provided to the Committee by the office of Senator the Hon Michaelia Cash, then Minister for Employment, on 19 December 2017. That response addressed the proposed prohibition on industrial instruments requiring or permitting payments to unregistered worker entitlement funds, noting that while the prohibition engages the right to collectively bargain, it does so in a manner that is reasonable and proportionate and enhances workers' rights.
>
> The Bill prohibits terms in industrial agreements that require or permit payments only to unregistered worker entitlement funds. Registered worker entitlement funds will be required to comply with basic governance and disclosure requirements. The prohibition on payments to unregistered worker entitlement funds is simply a mechanism to ensure that such funds are properly regulated, subject to appropriate minimum governance requirements and comply with laws similar to those that apply to other managed investment schemes.
>
> Findings from two Royal Commissions have emphasised the importance of properly regulating worker entitlement funds, particularly given the

significant sums of money held by these funds for the benefit of workers, and the consequences that would follow if a fund was to fail.

Most recently, the 2016 report of the Royal Commission into Trade Union Governance and Corruption (2016 Royal Commission) recommended that legislation be enacted dealing comprehensively with the minimum governance, financial reporting and financial disclosures for worker entitlement funds. This Bill implements that recommendation.

As noted in the previous response of 19 December 2017, the International Labour Organisation (ILO) has stated that 'Restrictions on [the] principle [of leaving the greatest possible autonomy to organizations in their functioning and administration] should have the sole objective of protecting the interests of members'. It is considered that the 'functioning' of organisations includes their ability to collectively bargain, such that any restriction on collective bargaining should have the sole objective of protecting the interests of members.

A prohibition on industrial instruments requiring or permitting payments to unregistered worker entitlement funds is intended to protect the interests of members of organisations by ensuring that such payments may only be made to worker entitlement funds that are registered. A worker entitlement fund can be registered provided it meets basic governance and disclosure requirements. These requirements are designed to address potential conflicts of interest, breaches of fiduciary duty and coercive conduct. The provisions in the Bill ensure that money held by worker entitlement funds is used to benefit workers. The amendments will provide members with a guarantee that any contributions made to a worker entitlement fund is subject to appropriate scrutiny and oversight.

In addition, the ILO considers that there are some exceptions to the general rule that measures taken to restrict the scope of negotiable issues are generally considered to be incompatible with international labour standards. These include 'the prohibition of certain subjects for reasons of public order'. Further, Article 4 of the ILO Right to Organize and Collective Bargaining Convention 1949 (No. 98) specifies that the machinery for voluntary negotiation of terms and conditions of employment should be 'appropriate to national conditions'.

Given that the prohibition supports the basic governance and disclosure requirements of the Bill that are intended to address potential conflicts of interest, breaches of fiduciary duty and potential for coercive conduct outlined in the 2016 Royal Commission, in addition to protecting the interests of workers and supporting public order, it is appropriate to Australian conditions and so is permissible.

2.212 The minister's second response provides a range of further information to address the committee's inquiry. The information provided further demonstrates that the stated objective of protecting the rights and interests of members is likely to

constitute a legitimate objective for the purposes of international human rights law. The minister's response shows that the measure is rationally connected to this objective by restricting payments to registered worker entitlement funds which are subject to regulation.

2.213 With reference to international supervisory mechanisms, the minister is correct to note there are exceptions to the general rule that measures taken unilaterally to restrict the scope of negotiable outcomes will generally be incompatible with the right to collectively bargain. However, concerns remain as to the proportionality of these proposed measures in light of international jurisprudence.

2.214 While the minister's response explains that negotiation on certain subjects may be prohibited for reasons of public order, it is unclear how this particular measure relates to issues of public order. Further, even if the measure did address this issue, as set out at [2.207] above, it is unclear how prohibiting voluntarily negotiated clauses in general which require or permit contributions for the benefit of an employee (other than a superannuation fund, a registered worker entitlement fund or a registered charity) is the least rights restrictive approach to achieving the stated objective.

2.215 The minister's response further points to the terms of article 4 of ILO Convention No. 98 as a basis for how the measure is permissible. Article 4 relevantly provides that:

> Measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements (emphasis added).

2.216 The minister's response appears to argue, drawing upon article 4, that the measure is appropriate to Australian conditions and so is permissible. However, the fact that a measure may (or may not) be appropriate to national conditions does not mean that they are necessarily permissible limitations on the right to collectively bargain under international law. Indeed, the 'measures appropriate to national conditions' referred to in article 4 are focused on those that are necessary to *encourage* and *promote* voluntary negotiation. That is, the term 'national conditions' operates not as an exception to obligations but is rather an acknowledgement that measures taken to fulfil article 4 need to take national conditions into account. By contrast, in this case, by prohibiting the inclusion of particular terms in an enterprise agreement, the measure interferes with voluntarily negotiated outcomes and thereby limits the right to collectively bargain.

2.217 Additionally, the minister's response did not address the committee's request for comment on the specific concerns raised by international monitoring bodies concerning Australia's restrictions on bargaining outcomes through

prohibiting particular matters in enterprise agreements (discussed at [2.199] above). As noted previously, in light of the concerns raised by these international monitoring bodies as to the existing restrictions on bargaining outcomes in Australia, it is likely that any measures, such as this one (which further restrict such matters) would also raise concerns.

Committee response

2.218 The committee thanks the minister for his response and has concluded its examination of this issue. The committee acknowledges that the response was requested and received within a short timeframe.

2.219 The International Labour Organization's Committee on Freedom of Association has raised concerns in relation to Australia's restrictions on bargaining outcomes through prohibiting particular matters in enterprise agreements. The provisions introduced by the bill prohibiting terms of industrial agreements that require or permit payments to worker entitlement funds is a further restriction on bargaining outcomes.

2.220 Based on the information provided and the above analysis, prohibiting terms of industrial agreements that require or permit payments to worker entitlement funds is likely to be incompatible with the right to collectively bargain.

Regulation of worker entitlement funds

2.221 Schedule 2 of the bill would require 'worker entitlement funds' to meet requirements for registration and meet certain conditions relating to financial management, board composition, disclosure and how money is spent. A 'worker entitlement fund' is defined in proposed section 329HC of the *Fair Work (Registered Organisations) Act 2009* (Registered Organisations Act) as a fund whose purposes include paying worker entitlements to members, dependents or legal representatives of fund members or a fund prescribed by the minister.

2.222 Under proposed new section 329LA of the Registered Organisations Act a 'worker entitlement fund' will only be able to be operated by a corporation and cannot be operated by a registered organisation (that is, a trade union or employer organisation.) Under proposed sections 329JA-B of the Registered Organisations Act it will be an offence to operate an unregistered fund and a civil penalty provision for employers to contribute to such a fund.

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

2.223 As described above, the interpretation of the right to freedom of association and the right to just and favourable conditions of work is informed by the ILO

treaties.[15] ILO Convention 87 specifically protects the right of workers to autonomy of union processes, organising their administration and activities and formulating their own programs without interference.[16] Providing that registered organisations cannot administer 'worker entitlement funds' and limiting the purposes for which such money may be used appears to engage and limit these rights. However, the statement of compatibility does not acknowledge this limitation so does not provide an assessment of whether the limitation is permissible as a matter of international human rights law.[17]

2.224 The committee therefore requested the further advice of the minister as to:

- whether the measure is aimed at pursuing 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 (including whether the measure is the least rights restrictive way of achieving its stated objective).

Minister's first response

2.225 The minister's first response explained the scope of current provisions and proposed amendments:

> *Current provisions*
>
> An ASIC class order currently exempts worker entitlement funds from regulation under the Corporations Act 2001.
>
> Contributions to 'approved worker entitlement funds' under the *Fringe Benefits Tax Assessment Act 1986* (FBTA Act 1986) are exempt from fringe benefits tax. Funds can be approved if they meet certain minimum criteria, largely concerned with how fund money can be spent. This imposes a degree of indirect regulation on these funds.
>
> *Changes proposed through the Bill*
>
> The Bill will amend the *Fair Work (Registered Organisations) Act 2009* (RO Act) to insert new Part 3C of Chapter 11 to apply governance, financial reporting and financial disclosure requirements to worker entitlement funds. As noted by the Committee, Schedule 2 of the Bill would require worker entitlement funds to meet requirements for registration and meet

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

16 See ILO Convention N.87 article 3.

17 SOC, p. x.

> certain conditions relating to financial management, board composition, disclosure and how money is spent. These conditions include that a worker entitlement fund will only be able to be operated by a corporation and cannot be operated by a registered organisation (proposed new section 329LA condition 2).

2.226 The minister also provided a range of information as to whether the limitation on human rights imposed by the measure is permissible. In relation to whether the measure is aimed at pursuing a legitimate objective for the purposes of international human rights law, the minister's response stated:

> The objective of the Bill in relation to the administration of worker entitlement funds and limiting the purposes for which worker entitlement fund income and contributions can be used is to ensure that workers' entitlements are managed responsibly and transparently and in their interests. Funds will have to be run by trained professionals of good fame and character and fund money will be restricted from being re-characterised and spent for unauthorised purposes. These measures are intended to prohibit what the Royal Commission found were substantial payments flowing out of worker entitlement funds to other parties for purposes other than paying members.

2.227 This would appear to be a legitimate objective for the purposes of international human rights law.

2.228 As to how the measure is effective to achieve the stated objective, the minister's response stated:

> Requiring the registration of worker entitlement funds and placing conditions on that registration are measures that are rationally connected to the objective of ensuring that workers' entitlements are managed responsibly and transparently in their interests.
>
> Requiring a fund operator to be a constitutional corporation is necessary to ensure that the provisions regulating such funds are valid. A similar requirement applies to superannuation funds under the *Superannuation Industry (Supervision) Act 1993*.

2.229 This information indicates that the regulation of worker entitlement funds is likely to be rationally connected to the stated objective of the measure.

2.230 The requirement that registered workers' entitlement funds cannot be operated by a registered organisation such as a trade union or employers' organisation raised questions in relation to the proportionality of the limitation. In this respect the minister's response explained that:

> Requiring that a fund operator cannot be an organisation is designed to prevent conflicts of interest for worker entitlement funds that also make substantial payments to those organisations for purposes other than paying members worker entitlements.
>
> In this respect, the Royal Commission stated that:

> The very substantial revenue flows to unions generate significant conflicts of interest and potential breaches of fiduciary duty on the part of unions and union officials negotiating enterprise agreements … In short, the union and union officials owe a duty to act in the interests of union member employees when negotiating enterprise agreements. At the same time, there is a significant potential and incentive for the union to act in its own interests to generate revenue.

> The worker entitlement fund, Incolink, provides an example of the substantial revenue that flows to unions and employer groups. Between 2011 and 2015, the Construction, Forestry, Mining and Energy Union (CFMEU), the Master Builders Association of Victoria and the Plumbing Joint Training Fund together received over $85 million from Incolink. These organisations are all represented on the board of lncolink.

> In addition, none of the existing worker entitlement funds that are approved under the FBTA Act 1986 are operated by registered organisations; most worker entitlement funds are run by corporations with a mix of representatives from employer and employee associations on their boards. The Bill does not alter this position. Officers of registered organisations can still sit on the board of worker entitlement funds.

2.231 The minister's response articulated that there is a potential for conflicts of interest in relation to the administration of such funds as well as the potentially large sums of money involved. It is also relevant to the proportionality of the measure that none of the funds registered under the existing FBTA Act are operated by registered organisations. However, it was unclear whether there are funds that are not registered under the FBTA Act which are currently administered by registered organisations. Accordingly, based on the information provided there is some uncertainty as to the potential impact of the measure. The measure may still therefore be a significant limitation on the right for a union to organise its internal affairs and formulate its own program. For example, notwithstanding the issues raised in the minister's response, it may be the preference of some union members that money paid for their benefit is administered by their union.

2.232 The minister's response further stated, in relation to whether the measure is proportionate to achieve its stated objective, that:

> The Bill also retains the existing legal limits on how contributions and income of a fund can be spent under the FBTA Act 1986.

> To the extent that these measures may limit human rights, any limitation is reasonable and proportionate in achieving the objectives of the Bill. Commensurate with this, the measures are the least rights restrictive as they do not prevent contributions to worker entitlement funds but provide appropriate governance and transparency to ensure that workers' entitlements are managed responsibly and transparently in their interests. They also take into account the feedback provided by funds during

consultation, including to allow funds to use income to pay for training and welfare services, subject to appropriate criteria, and the provision of a separate regulatory scheme for single employer worker entitlement funds.

2.233 While noting that contributions will still be able to be made to registered workers' entitlement funds, it was unclear from the information provided that this necessarily means that the measure is the least rights restrictive approach. It was unclear from the response whether there are any other reasonably available less rights restrictive alternatives to prohibiting registered organisations from operating such funds in general. Accordingly, it was uncertain whether the measure constitutes a proportionate limitation on the right to freedom of association.

2.234 Based on the information provided and the above analysis, the committee was unable to conclude that the measure is a proportionate limitation on the right to freedom of association and the right to just and favourable conditions at work.

Prohibiting terms of industrial instruments requiring payments to election funds

2.235 Schedule 3 of the bill would amend the Fair Work Act to prohibit any term of a modern award, enterprise agreement or contract of employment permitting or requiring employee contributions to an election fund.[18]

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

2.236 As set out above, the right to freedom of association includes the right to collectively bargain without unreasonable and disproportionate interference from the state. Prohibiting the inclusion of particular terms in an enterprise agreement interferes with the outcomes of the bargaining process. Accordingly, the initial analysis stated that the measure engages and limits the right to just and favourable conditions of work and the right to collectively bargain as an aspect of the right to freedom of association. The statement of compatibility acknowledges that the measure engages the right to negotiate terms and conditions of employment voluntarily.[19] However, the statement of compatibility appears to indicate that the limitation is permissible.

2.237 The statement of compatibility identifies one objective of the measure as being to 'remove any legal or practical compulsion on an employee to contribute to election funds'.[20] This appears to be a description of what the measure does rather than articulating the pressing or substantial concern the measure addresses as required to constitute a legitimate objective for the purposes of international human

18 SOC, p. x.

19 SOC, p. x.

20 SOC, p. x.

rights law. The statement of compatibility identifies a second objective as addressing 'the possibility of contributions made in accordance with a relevant instrument being used to avoid the intent of the prohibition on organisations using their resources to favour a particular candidate'. While this could be capable of constituting a legitimate objective, limited explanation or reasoning is provided as to why this objective is important. Further, in relation to whether the measure is rationally connected (that is, effective to achieve) and proportionate to the stated objectives, the statement of compatibility provides no reasoning or evidence and only asserts that the measure 'is reasonable, necessary and proportionate'.[21]

2.238 The committee therefore requested the further 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;
- how the measure is effective to achieve (that is, rationally connected to) its stated objective; and
- whether the limitation is a reasonable and proportionate measure to achieve the stated objective (including whether the measure is the least rights restrictive way of achieving its stated objective).

Minister's first response

2.239 The minister's first response provided the following information about the proposed amendments:

> *Current provisions*
>
> There are currently no provisions in the FW Act or RO Act that deal with terms of industrial instruments requiring or permitting employees to pay into election funds. This is despite the fact that section 190 of the RO Act prohibits an organisation from using its resources for the purposes of the election of a particular candidate. Because election funds are structurally separate from the organisation, they are not captured by this provision.
>
> *Changes proposed through the Bill*
>
> Schedule 3 of the Bill would amend section 194 of the FW Act to prohibit any term of an enterprise agreement or contract of employment requiring or permitting employee contributions for a regulated election purpose.
>
> Schedule 3 would also amend Part 2-9 of the FW Act to provide that any term of a contract of employment requiring or permitting payments for a regulated election purpose will have no effect.

21 SOC, p. x.

> A 'regulated election purpose' is one that includes the purpose of funding, supporting or promoting the election of candidates for election to office in an industrial association.

2.240 The minister's response provided some further information about whether the limitation on human rights was permissible. In relation to whether the measure addresses a substantial or pressing concern, the minister's response explained:

> Election funds are established to fund election campaigns for office within registered organisations and are regularly sourced from contributions from employees of such organisations. These funds are usually managed by one or more individuals who hold elected office within the organisation. They are not established in the interests of workers who are subject to the collective agreement but rather the interests of officials of the bargaining representative. The Royal Commission found that such arrangements unfairly disadvantage candidates who are not already in office and have been misused by officials controlling the funds where there are no contested elections. The Royal Commission also found a lack of oversight of election funds, with information about revenue and expenditure sometimes hidden, or not kept at all.
>
> The amendments remove any legal or practical compulsion on employees to contribute to a particular election fund. They ensure employees have a choice about whether to contribute to the particular fund.

2.241 Based on this information, ensuring that non-incumbent candidates for elected union positions are not disadvantaged and that employees have a free choice about whether to contribute to a particular fund in the particular circumstances, would appear to constitute legitimate objectives for the purposes of international human rights law. The measures would also appear to be rationally connected to these objectives.

2.242 In relation to whether the measure is reasonable and proportionate, the minister's response states that registered organisation employees will still be able to make genuine contributions, voluntarily and independently of an industrial instrument. On balance, this would appear to be a proportionate limitation on bargaining outcomes.

2.243 The committee therefore noted that the measure appears to be compatible with the right to freedom of association and the right to just and favourable conditions of work.

Prohibiting any action with the intent to coerce a person or employer to pay amounts to a particular fund

2.244 Schedule 4 of the bill would introduce a civil penalty into section 355A of the Fair Work Act prohibiting a person from organising, taking or threatening to take any action, other than protected industrial action, with the intent to coerce a person to

pay amounts to a particular worker entitlement fund, super fund, training fund, welfare fund or employee insurance scheme.[22]

Compatibility of the measure with the right to freedom of association

2.245 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 8 of ICESCR. The right to strike, however, is not absolute and may be limited in certain circumstances.

2.246 By prohibiting action (other than protected industrial action) intended to coerce a person to pay amounts into a particular fund, the initial analysis assessed that the measure further engages and limits the right to strike. This is because it may impose an additional penalty or disincentive to taking unprotected industrial action with the intent of influencing the conduct of an employer. 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.[23] While the statement of compatibility acknowledges that the measure engages work-related rights it does not expressly acknowledge that the right to strike is an aspect of the right to freedom of association.

2.247 Beyond providing a description of the measure, the statement of compatibility does not identify the legitimate objective of the measure. While the statement of compatibility appears to argue that the measure in fact supports freedom of association and human rights, it provides no explanation of the reasoning for this.[24] The statement of compatibility therefore does not meet the standards outlined in the committee's *Guidance Note 1*, which require that where a limitation on a right is proposed the statement of compatibility provide a reasoned and

22 See, Schedule 4, item 355, proposed section 355A of the Fair Work Act.

23 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) p. 5.

24 SOC, p. xi.

evidence-based assessment of how the measure pursues a legitimate objective, is rationally connected to that objective, and is proportionate.

2.248 The committee therefore requested the further advice of the minister 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 and whether the measure is the least rights restrictive way of achieving its stated objective).

Minister's first response

2.249 The minister's first response provided the following information about the proposed amendments:

> *Current provisions*
>
> Part 3-1 of the FW Act provides for general workplace protections. It contains specific prohibitions against coercive behaviour in relation to workplace rights (section 343) and industrial activities (348). However, the Part does not specifically prohibit coercive action in relation to the making [of] payments to certain funds, particularly where such action occurs outside of the enterprise bargaining process. These funds include superannuation funds, training and welfare funds, worker entitlement funds and insurance arrangements and are collectively referred to by the Royal Commission as 'worker benefit funds'.
>
> *Changes proposed through the Bill*
>
> Schedule 4 of the Bill would amend Part 3-1 of the FW Act to insert a new section 355A to prohibit a person from taking coercive action in relation to the making of payments to a particular worker benefit fund. This would fix an existing gap in the Act, which prohibits coercion in relation to a wide range of other conduct, but not in relation to contributions to funds.

2.250 In relation to the current law, the minister's response stated that 'compelling contributions to a particular worker benefit fund infringes basic principles of freedom of association and, by prohibiting mandatory contributions, the amendment is in fact promoting human rights'. However, the response did not specifically explain how 'compelling' a contribution through, for example, protest or strike action would 'infringe' principles of freedom of association or promote human rights. As noted in the initial analysis, the measure, by prohibiting action (other than protected industrial action) intended to influence or 'coerce' a person to pay amounts into a particular fund, the measure further engages and limits the right to strike. This is because it may impose an additional penalty or disincentive to taking unprotected industrial action with the intent of influencing the conduct of an employer.

2.251 In relation to whether the measure imposes permissible limitations on the right to strike, the minister's response stated that the measure pursues the 'legitimate objective of reducing the potential for coercive behaviour outside the enterprise bargaining process, for example in side deals'. In this respect, the minister's response discussed examples of pressure being applied to employers, potential conflicts of interest and the findings of the Heydon Royal Commission. While not articulated in this way in the minister's response, it may be that the measure pursues the objective of providing protection for employers or other people from particular forms of action. To the extent that the measure is aimed at protecting the rights and freedoms of others this was noted as being capable of constituting a legitimate objective for the purposes of international human rights law.

2.252 The minister's response further noted that 'the Bill does not alter the circumstances in which industrial action will be considered protected industrial action, or the consequences provided for failures to comply with Part 3-3 of the FW Act, dealing with industrial action'. However, as set out above, 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.[25] Such findings call into serious question whether any further restrictions on the right to strike, such as this one, are permissible. While the minister's response identified that the measure addresses a gap in current restrictions, it did not explain how such restrictions are proportionate in view of the stated objective including whether they represent the least rights restrictive approach.

2.253 Accordingly, based on the information available, the measure did not appear to be a proportionate limitation on the right to strike as an aspect of the right to freedom of association.

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25 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) p. 5.

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

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

2.255 The initial analysis stated that it appears that the measure may extend to prohibiting forms of expression or assembly. As such, it may engage and limit the right to freedom of expression and assembly. The prohibition on forms of protest action appears to be potentially quite broad. This issue was not addressed in the statement of compatibility and as such it is unclear whether the measure is compatible with these rights.

2.256 The committee therefore sought the advice of the minister as to:

- the scope of any restriction on the right to freedom of expression and assembly;
- 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) its stated objective; and
- whether the limitation is a reasonable and proportionate measure to achieve the stated objective (including whether the measure is sufficiently circumscribed, any relevant safeguards and whether the measure is the least rights restrictive way of achieving its stated objective).

Minister's first response

2.257 In relation to the right to freedom of assembly and the right to freedom of expression, the minister's first response stated:

> The Committee is also concerned that the measure circumscribes the right to freedom of expression as set out in Article 19 of the International Covenant on Civil and Political Rights (ICCPR) and the right of peaceful assembly set out in Article 21 of the ICCPR. It is not clear how the relevant rights are engaged as the measure does not interfere with an individual's right to hold opinions without interference, the right to freedom of expression or the freedom to seek, receive and impart information and ideas of any kind or the right of peaceful assembly. In any event, the amendment pursues the legitimate objective of ensuring that a person cannot coerce another person to make payments into certain worker benefit funds and is reasonable and proportionate.

2.258 The particular concern articulated in the initial human rights analysis was that the prohibited forms of action may extend to forms of expression and assembly. For example, protest activities outside of a workplace or a boycott of goods that is aimed at influencing or 'coercing' a person to make payments into a particular fund. It was noted in this respect that the right of freedom of expression extends to the expression of ideas through a range of conduct including speech and public protest. It would have been useful if the minister's response provided an explanation of why she does not consider that these rights were engaged and limited. There is also a question about the breadth of the provision, noting it could potentially apply broadly beyond the employer-employee relationship. As such, it was unclear whether the breadth of this provision may be overly broad with respect to an objective, for example, of protecting the rights and freedoms of others.

2.259 As the information provided to the committee did not include a substantive assessment as to whether any limitation on the right to freedom of expression and assembly is permissible, it was not possible to conclude that the measure is proportionate.

Mr Ian Goodenough MP

Chair