

Chapter 1¹

COVID-19 legislation

1.1 This chapter provides an assessment of the human rights compatibility of legislation made in response to the COVID-19 pandemic, specifically:

- legislative instruments registered on the Federal Register of Legislation between 13 May and 5 June 2020; and
- legislative instruments previously reported on.

1.2 Appendix 1 lists all new legislation considered in this chapter, including legislation on which the committee makes no comment, on the basis that the legislation does not engage, or only marginally engages, human rights; promotes human rights; and/or permissibly limits human rights.

1 This section can be cited as Parliamentary Joint Committee on Human Rights, COVID-19 legislation, *Report 7 of 2020*; [2020] AUPJCHR 90.

Further response required

1.3 The committee seeks a further response from the relevant minister with respect to the following instrument.

Foreign Acquisitions and Takeovers Amendment (Threshold Test) Regulations 2020 [F2020L00435]¹

Purpose	This instrument amends the monetary threshold above which certain investments in Australia by foreign persons may require notification to the Treasurer for approval
Portfolio	Treasury
Authorising legislation	<i>Foreign Acquisitions and Takeovers Act 1975</i>
Disallowance	15 sitting days after tabling (tabled in the House of Representatives and the Senate on 12 May 2020). Notice of motion to disallow must be given by 12 August 2020 in the House of Representatives and the Senate ²
Right	Equality and non-discrimination
Status	Further response required

1.4 The committee requested a response from the minister in relation to the instrument in [Report 5 of 2020](#).³

Reducing the monetary threshold for reporting investments by foreign persons

1.5 This instrument provides for a nil monetary threshold for actions taken by foreign persons in relation to entities, businesses and agricultural lands, and prescribes all kinds of land other than agricultural land as being land without a threshold value. This has the effect that all proposed foreign investments in relation to these actions and investments in Australia must be notified to the Treasurer for prior approval. The instrument repeals and replaces Part 4 of the Foreign

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Foreign Acquisitions and Takeovers Amendment (Threshold Test) Regulations 2020 [F2020L00435], *Report 7 of 2020*; [2020] AUPJCHR 91.

2 In the event of any change to the Senate or House's sitting days, the last day for the notice would change accordingly.

3 Parliamentary Joint Committee on Human Rights, *Report 5 of 2020* (29 April 2020), pp. 42-44.

Acquisitions and Takeovers Regulations 2015, which previously set out a number of different monetary thresholds in relation to which a proposed investment had to be notified to the Treasurer. The lowest previous monetary threshold was \$15 million, in relation to agricultural land being acquired by a foreign person.⁴

Summary of initial assessment

Preliminary international human rights legal advice

Right to equality and non-discrimination

1.6 By reducing to nil the monetary threshold for notification to the Treasurer regarding proposed foreign investments in Australia, which only applies to proposed investments by foreign persons,⁵ this measure may engage and limit the right to equality and non-discrimination.⁶ This measure may indirectly discriminate against persons based on their nationality, as it only applies to persons not ordinarily resident in Australia.

1.7 The initial analysis considered that further information was required as to the compatibility of this measure with the right to equality and non-discrimination.

1.8 The full initial legal analysis is set out in [Report 5 of 2020](#).

Committee's initial view

1.9 The committee noted that the measure may engage and limit the right to equality and non-discrimination. This right may be subject to permissible limitations if it is shown to be reasonable, necessary and proportionate. The committee sought the advice of the Treasurer as to the compatibility of this measure with the right to equality and non-discrimination.

*Treasurer's response*⁷

1.10 The Treasurer advised:

The *Foreign Acquisitions and Takeovers Act 1975* (the Act) allows the Treasurer to review foreign investment proposals that meet certain

4 Foreign Acquisitions and Takeovers Regulations 2015, subsection 52(4).

5 'Foreign person' is defined in section 5 of the *Foreign Acquisitions and Takeovers Act 1975* to include an individual not ordinarily resident in Australia.

6 Articles 2 and 26 of the International Covenant on Civil and Political Rights. 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'.

7 The minister's response to the committee's inquiries was received on 18 May 2020. This is an extract of the response. The response is available in full on the committee's website at: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports.

criteria. The Treasurer has the power to block foreign investment proposals or apply conditions to the way proposals are implemented to ensure they are not contrary to the national interest. The criteria that, if met, would require a proposed investment to be reviewed by the Treasurer, include whether the consideration for the proposed investment meets the monetary thresholds prescribed in the *Foreign Acquisitions and Takeovers Regulation 2015* (the 2015 Regulation). The 2020 Regulations amend the monetary threshold in the 2015 Regulation.

As the Report notes, it is the framework, which is set out in the Act, and which allows for acquisitions by foreign persons to be screened, that directly engages the rights of equality and non-discrimination. However, given the nature of the regulated activity, the extent of any incompatibility is likely to be small, and comprehensively outweighed by the national interest protected by the 2020 Regulations. As the Committee notes, this measure is designed to safeguard the national interest by protecting vulnerable businesses as COVID-19 puts intense pressure on the Australian economy and Australian businesses.

The significant impact of Coronavirus on the Australian economy has increased the risk of foreign investment in Australia occurring in ways that would be contrary to the national interest. To the extent that the 2020 Regulations engage the rights of equality and non-discrimination, limits imposed on those rights are thus reasonable, necessary and proportionate.

Concluding comments

International human rights legal advice

1.11 The Treasurer advises that given the nature of the activity regulated by the *Foreign Acquisitions and Takeovers Act 1975*, the extent of any incompatibility with the right to equality and non-discrimination is likely to be small, and is outweighed by the national interest and the objective of protecting vulnerable Australian businesses subjected to the pressure on the Australian economy due to the COVID-19 pandemic.

1.12 The objective of protecting vulnerable Australian businesses from the intense pressure placed on them during the COVID-19 pandemic would appear to be capable of constituting a legitimate objective for the purposes of international human rights law. However, it is not clear that the measure is rationally connected to this objective (that is, effective to achieve the objective). In providing for a nil monetary threshold for investment actions taken by foreign persons in relation to entities, businesses⁸ and agricultural lands, and prescribing all kinds of land other

8 Foreign Acquisitions and Takeovers Regulations 2015, section 51, states that in taking action in relation to entities and businesses (including agribusinesses) for the purposes of section 51 of the Act, the prescribed value is nil.

than agricultural land as being land without a threshold value,⁹ it would appear that the scope of the notification provision is broad. In effect, it would appear that these changes would mean that all proposed investments in land, at any value, including the purchase of any residential property,¹⁰ by foreign persons must be notified to the Treasurer for prior approval. It is not clear how requiring foreign persons to apply to the Treasurer for approval for purchasing any residential property would be effective to achieve the stated objective of protecting vulnerable Australian businesses.

1.13 There are also questions as to whether the measure is proportionate to the objective sought to be achieved. In particular, it appears, for example, that a foreign-based person acquiring an interest in residential land would be liable for application fees in seeking the Treasurer's approval, starting at \$5,700 where the price of the acquisition is \$1 million or less.¹¹ Further, it appears that the time taken for the Treasurer to approve the application may be lengthy, noting that guidance from the Foreign Investment Review Board states that statutory timeframes for reviewing applications will be extended from 30 days to up to six months.¹² Given that this may significantly increase the time before which a foreign person may be given approval to purchase property, this may significantly impair the capacity of foreign persons who seek to purchase residential property in Australia. It is also not clear, if the measure is designed to safeguard businesses during the COVID-19 pandemic, why the legislative instrument does not include a sunset date for these changes, rather than applying them on an ongoing basis.

1.14 In order to more fully assess the compatibility of this measure with the right to equality and non-discrimination, further information is required as to:

- whether the changes made by this instrument apply to the purchase of any land at any value, including residential land, and if so, how is the measure rationally connected to the stated objective of protecting vulnerable businesses;
- what safeguards are in place to ensure that foreign persons are not disproportionately affected by this measure;
- what the application fees are that apply to foreign persons seeking to purchase property (including residential property) that apply as a result of the changes made by this instrument;

9 Foreign Acquisitions and Takeovers Regulations 2015, section 52(2), stipulates that for the purposes of paragraph 52(2)(b) of the Act on agricultural lands, the prescribed value is nil.

10 'Land' is defined in the *Foreign Acquisitions and Takeovers Act 1975* to include 'a building (including a new dwelling or an established dwelling) or a part of a building'.

11 See Foreign Investment Review Board, Guidance Note 29, Fees- residential land <https://firb.gov.au/index.php/guidance-resources/guidance-notes/gn29>.

12 Foreign Investment Review Board, Guidance Note 53: Temporary Measures in Response to the Coronavirus, 18 May 2020 https://firb.gov.au/sites/firb.gov.au/files/guidance-notes/GN_53_cv_0.pdf.

- what the timeframe is by which the Treasurer will make decisions regarding investments by foreign persons; and
- why these changes are made on an ongoing basis (noting that it has been stated to be in response to the COVID-19 pandemic).

Committee view

1.15 The committee thanks the Treasurer for this response. The committee notes that this instrument amends the monetary threshold above which certain investments in Australia by foreign persons may require notification to the Treasurer for approval to nil. The committee considers this measure is designed to achieve the legitimate objective of safeguarding the national interest by protecting vulnerable businesses as COVID-19 puts intense pressure on the Australian economy and Australian businesses.

1.16 The committee notes that the response did not provide sufficient information for it to finalise its assessment of this instrument. In order to fully assess the compatibility of this measure with the right to equality and non-discrimination, the committee seeks the Treasurer's further advice as to the matters set out at paragraph [1.14].

1.17 In seeking this further information, we are mindful that the Treasurer was required to act with great urgency and immediacy to safeguard the national interest by protecting assets more vulnerable to foreign acquisition by reason of the Coronavirus pandemic and that these assets may include residential property. The committee notes the legal advice with respect to these changes being made on an ongoing basis and understands that the Government intends these measures to be temporary.

Advice only

1.18 The committee draws the following legislative instruments to the attention of the relevant minister on an advice only basis. The committee does not require a response to these comments.

Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements) Amendment Determination (No. 2) 2020 [F2020L00594]

Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) Variation (Extension) Instrument 2020 [F2020L00574]¹

Purpose	<p>The Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements) Amendment Determination (No. 2) 2020 extends the operation of existing provisions until 17 September 2020 to prevent a cruise ship from entering Australian territory or Australian ports, unless an exemption applies to the ship.</p> <p>The Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) Variation (Extension) Instrument 2020 amends the Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) Declaration 2020 to extend the human biosecurity emergency period for a further 3 months until 17 September 2020.</p>
Portfolio	Health
Authorising legislation	<i>Biosecurity Act 2015</i>
Last day to disallow	These instruments are exempt from disallowance (see subsections 475(2) and 477(2) of the <i>Biosecurity Act 2015</i>)

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements) Amendment Determination (No. 2) 2020 [F2020L00594] and Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) Variation (Extension) Instrument 2020 [F2020L00574], *Report 7 of 2020*; [2020] AUPJCHR 92.

Rights	Life; health; freedom of movement
Status	Advice only

Extension of the human biosecurity emergency period

1.19 The Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) Variation (Extension) Instrument 2020 [F2020L00574] varies the Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) Declaration 2020 (the Declaration) to extend the human biosecurity emergency period for a further three months until 17 September 2020. The Declaration was made pursuant to section 475 of the *Biosecurity Act 2015* (the Biosecurity Act), and declared that a human biosecurity emergency exists regarding the listed human disease ‘human coronavirus with pandemic potential’ (COVID-19). The effect of the Declaration, and this variation, is to enable the Health Minister to exercise powers under the Biosecurity Act to deal with a human biosecurity emergency.²

1.20 The Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements) Amendment Determination (No. 2) 2020 [F2020L00594] extends the operation of a ban on cruise ships from entering Australian territory or Australian ports, unless an exemption applies to the ship, to 17 September 2020.

Preliminary international human rights legal advice

Rights to life, health, and freedom of movement

1.21 The variation of these instruments to extend the human biosecurity emergency period, and the ban on cruise ships, for a further three months until 17 September 2020, engages a number of human rights. As the measure is intended to prevent the spread of COVID-19, which has the ability to cause high levels of morbidity and mortality, it would appear that the measure may promote the rights to life and health.³

1.22 However, extending the biosecurity emergency period, and thereby continuing to enliven the various powers under the Biosecurity Act, is likely to limit a number of rights (including, freedom of movement, equality and non-discrimination

2 For an overview of the powers in the Biosecurity Act 2015 relating to human diseases, see Parliamentary Joint Committee on Human Rights, Report 5 Of 2020: Human rights scrutiny of COVID-19 legislation (29 April 2020), pp. 4-5.

3 Right to life: International Covenant on Civil and Political Rights, article 6. Right to health: International Covenant on Economic, Social and Cultural Rights, article 12.

and privacy, by way of examples). The extension of the cruise ship ban, and international travel ban, engage and limit the right to freedom of movement.

1.23 Most of these rights may be subject to permissible limitations where the limitation pursues a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective. These measures are directed towards a legitimate objective, being the prevention of the spread of COVID-19, an infectious disease with the ability to cause high levels of morbidity and mortality. Further, noting that the measures seek to protect the general Australian population and neighbouring countries from exposure to COVID-19, they would also appear to be rationally connected to that objective. With respect to proportionality, it is significant that these are temporary measures. It would therefore appear that any limitation on human rights caused by these instruments may be permissible as a matter of international human rights law. However, as there are no statements of compatibility accompanying the explanatory statements to these instruments,⁴ no assessment of the compatibility of these measures with any human rights has been provided.

Committee view

1.24 The committee notes that these instruments extend the human biosecurity emergency period for a further three months until 17 September 2020 (thereby continuing to enliven various powers under the *Biosecurity Act 2015*) and extend the ban on cruise ships in Australian territory to the same date.

1.25 The committee considers that the measures, which are designed to prevent the spread of COVID-19, are likely to promote and protect the rights to life and health, noting that the right to life requires Australia to take positive measures to protect life and the right to health requires Australia to take steps to prevent, treat and control epidemic diseases. The committee notes that the measures may also limit a number of other rights, including, for example, the right to freedom of movement. These rights may be subject to permissible limitations if they are shown to be reasonable, necessary and proportionate. The committee considers that in light of the critical need to prevent the spread of COVID-19, and as these measures are temporary, any limit on rights is permissible as a matter of human rights law.

4 Noting that section 9 of the *Human Rights (Parliamentary Scrutiny) Act 2011* only requires rule-makers to prepare a statement of compatibility in relation to a legislative instrument that is subject to disallowance under section 42 of the *Legislation Act 2003*.

1.26 The committee notes that a statement of compatibility was not provided with these instruments, as this was not required as a matter of law.⁵ Given the potential impact on human rights of legislative instruments dealing with the COVID-19 pandemic, the committee considers it would be appropriate for all such legislative instruments to be accompanied by a detailed statement of compatibility.

5 *Human Rights (Parliamentary Scrutiny) Act 2011*, section 9, only requires statements of compatibility to be provided for legislative instruments that are subject to disallowance. This instrument is exempt from disallowance.

Coronavirus Economic Response Package (Deferral of Sunsetting—Income Management and Cashless Welfare Arrangements) Determination 2020 [F2020L00572]¹

Purpose	The instrument extends the end date for the Cashless Debit Card trial in all existing sites, and Income Management in the Cape York region, from 30 June 2020 to 31 December 2020.
Portfolio	Families and Social Services
Authorising legislation	<i>Coronavirus Economic Response Package Omnibus Act 2020</i>
Last day to disallow	15 sitting days after tabling (tabled in the House of Representatives 14 May 2020 and in the Senate 10 June 2020). Notice of motion to disallow must be given by 24 August 2020 in the House of Representatives and on 25 August 2020 in the Senate ²
Rights	Multiple rights
Status	Advice only

Extension of cashless welfare trial

1.27 This instrument extends the operation of the cashless welfare trials in all existing sites and the Cape York income management measure by six months. It does so by deferring the sunsetting of the enabling provisions from 30 June 2020 to 31 December 2020.

1.28 Under the Cashless Debit Card trial, 80 per cent of a participant's income support payments are restricted, and not available in cash.³ This restricted portion of a person's payments cannot be used to purchase alcohol, gambling products or cash-like gift cards, or to withdraw cash. Cashless welfare trials are currently in operation in the Ceduna region, South Australia; the East Kimberly and Goldfields

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Coronavirus Economic Response Package (Deferral of Sunsetting—Income Management and Cashless Welfare Arrangements) Determination 2020 [F2020L00572], *Report 7 of 2020*; [2020] AUPJCHR 93.

2 In the event of any change to the Senate or House's sitting days, the last day for the notice would change accordingly.

3 See, *Social Security (Administration) Act 1999*, Part 3D. See also section 123UF, which establishes the Cape York Income Management Welfare Reform Income Management measure.

regions, Western Australia; and the Bundaberg and Hervey Bay Region, Queensland. The Cape York income management measure provides that a portion of a person's income support payments are credited to an income management account, and can only be spent on items directed to meeting the priority needs of the person and their dependents.

International human rights legal advice

1.29 In providing for the extension of the cashless welfare trials and the Cape York income management measure, this instrument largely raises the same human rights issues as those raised with respect to the Social Security (Administration) Amendment (Income Management to Cashless Debit Card Transition) Bill 2019 (the 2019 bill), which sought to extend these trials (but which has not yet passed the Parliament). As such, the advice provided in relation to the 2019 bill in [Report 6 of 2019](#),⁴ and [Report 1 of 2020](#)⁵ is reiterated in relation to this instrument.

Committee view

1.30 The committee notes that this instrument extends the operation of the cashless welfare trials in all existing sites and the Cape York income management measure by six months.

1.31 The committee notes that extending the operation of these measures may engage a number of human rights. The committee assessed the human rights compatibility of extending the operation of the cashless welfare trial and the Cape York income management measure in [Report 1 of 2020](#) (when it considered the Social Security (Administration) Amendment (Income Management to Cashless Debit Card Transition) Bill 2019).

1.32 As such, the committee refers the minister and parliamentarians to that report in relation to the assessment of the human rights compatibility of this instrument.

4 Parliamentary Joint Committee on Human Rights, *Report 6 of 2019* (5 December 2019), pp. 39-53.

5 Parliamentary Joint Committee on Human Rights, *Report 1 of 2020* (5 February 2020), pp. 132-142.

Concluded matters

1.33 The committee has concluded its examination of these matters on the basis of the responses received.

1.34 Correspondence relating to these matters is available on the committee's website.¹

Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements for Remote Communities) Determination 2020 [F2020L00324]

Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements for Remote Communities) Amendment (No. 1) Determination 2020 [F2020L00415]²

Purpose	These instruments determine requirements to prevent or control the entry or spread of COVID-19 in designated remote communities in Australia, including establishing requirements for entry to these areas. The instruments commenced on 26 March 2020 and 8 April 2020 respectively, and remain in force for the duration of the human biosecurity emergency period
Portfolio	Health
Authorising legislation	<i>Biosecurity Act 2015</i>
Disallowance	These instruments are exempt from disallowance (see subsection 477(2) of the <i>Biosecurity Act 2015</i>)

1 See https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports.

2 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements for Remote Communities) Determination 2020 [F2020L00324], *Report 7 of 2020*; [2020] AUPJCHR 94.

Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements for Remote Communities) Determination 2020 [F2020L00324]

Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements for Remote Communities) Amendment (No. 1) Determination 2020 [F2020L00415]

Rights	Life; health; freedom of movement; equality and non-discrimination
Status	Concluded examination

1.35 The committee requested a response from the minister in relation to these instruments in [Report 5 of 2020](#).³

Controlling entry to certain remote communities

1.36 The Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements for Remote Communities) Determination 2020 (first instrument) designates a number of geographical areas in Western Australia, Queensland, South Australia and the Northern Territory for the purposes of the *Biosecurity Act 2015* (Biosecurity Act), and establishes that persons cannot enter these areas except in specified circumstances.

1.37 The Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements for Remote Communities) Amendment (No. 1) Determination 2020 amends the first instrument to alter the circumstances in which a person can enter.

1.38 These instruments are made under section 477(1) of the Biosecurity Act, which provides that during a human biosecurity emergency period, the Health Minister may determine emergency requirements, or give directions, that they are satisfied are necessary to prevent or control the entry, emergence, establishment or spread of the disease in Australian territory. Failure to comply with such a direction is a criminal offence punishable by five years' imprisonment, or a penalty of up to \$63,000.

Summary of initial assessment

Preliminary international human rights legal advice

Rights to life, health, freedom of movement and equality and non-discrimination

1.39 The explanatory statement notes that the purpose of designating these geographical areas for the purpose of the Biosecurity Act is to prevent or control the entry or spread of COVID-19 in these areas.⁴ As the measure is intended to prevent the spread of COVID-19, which has the ability to cause high levels of morbidity and mortality, it would appear that the measure may promote the rights to life and

3 Parliamentary Joint Committee on Human Rights, *Report 5 of 2020* (29 April 2020), pp. 6-9.

4 Explanatory statement, p. 1.

Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements for Remote Communities) Determination 2020 [F2020L00324]

Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements for Remote Communities) Amendment (No. 1) Determination 2020 [F2020L00415]

health.⁵ However, by restricting entry to these locations the instrument may also limit the right to freedom of movement. Furthermore, the restrictions of entry would appear to apply to anyone who lives in the designated area, and would mean that they would need to be granted permission to re-enter their community subject to the requirements stipulated by the instruments, thereby potentially limiting their freedom of movement. It appears that these remote geographical areas may have a high proportion of Indigenous people living there, although this has not been specifically addressed in the explanatory materials. As such, the restrictions may have a disproportionate impact on Indigenous persons. Consequently, the measure may also engage the right to equality and non-discrimination,⁶ which provides that everyone is entitled to enjoy their rights without distinction based on a personal attribute (for example, race).⁷

1.40 The initial analysis considered further information was required as to the compatibility of these measures with human rights, particularly the rights to freedom of movement, and equality and non-discrimination.

1.41 The full initial legal analysis is set out in [Report 5 of 2020](#).

Committee's initial view

1.42 The committee considered that the measure, which is designed to prevent the spread of COVID-19, is likely to promote and protect the rights to life and health, noting that the right to life requires that Australia takes positive measures to protect life, and the right to health requires Australia takes steps to prevent, treat and control epidemic diseases. The committee noted that the measure may also limit the rights to freedom of movement and equality and non-discrimination. These rights may be subject to permissible limitations if they are shown to be reasonable, necessary and proportionate. As no statements of compatibility were provided, which we note is not required, the committee sought the minister's advice as to the compatibility of these measures with human rights, particularly the rights to freedom of movement and equality and non-discrimination.

5 Right to life: International Covenant on Civil and Political Rights, article 6. Right to health: International Covenant on Economic, Social and Cultural Rights, article 12.

6 International Covenant on Civil and Political Rights, articles 2 and 26. See also International Convention on the Elimination of All Forms of Racial Discrimination.

7 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'.

Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements for Remote Communities) Determination 2020 [F2020L00324]

Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements for Remote Communities) Amendment (No. 1) Determination 2020 [F2020L00415]

Minister's response⁸

1.43 The minister advised:

As a result of the COVID-19 pandemic, governments around the world have taken unprecedented steps to contain the outbreak. In January 2020, 'human coronavirus with pandemic potential' was listed as a human disease in the *Biosecurity (Listed Human Diseases) Determination 2016*. Since that time I have made a number of instruments to manage and respond to risks to human health caused by the pandemic.

The *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) (Human Rights Act) authorises the Committee to examine all Bills and legislative instruments for compatibility with human rights. However, as the Report acknowledges, the Human Rights Act does not require a statement of compatibility to be prepared in respect of instruments that are not disallowable legislative instruments (section 9(1)), as are the instruments that I have made to respond to the COVID-19 pandemic to date. The structure of the Biosecurity Act, and the deliberate decision by the Parliament of Australia not to make these instruments disallowable, reflects the urgency that accompanies such measures and extraordinary circumstances in which they are made.

Responding⁸ to the COVID-19 pandemic has had a significant impact on my Department, which has diverted substantial resources from other priorities to support the Government's efforts to keep Australia safe. The fact that statements of compatibility were not prepared for these instruments should not be taken to indicate that such rights are not a key consideration in the Government's response. Indeed, the measures taken have engaged a wide variety of human rights. In particular, measures taken have been in support of the right to life, as enshrined in Article 6(1) of the International Covenant on Civil and Political Rights (ICCPR), and the right to physical and mental health, as enshrined in Article 12 of the International Covenant on Economic, Social and Cultural Rights, which includes measures to prevent, treat and control epidemics.

Consistent with international law, which recognises that reasonable limits may be placed on human rights in certain circumstances, these measures do engage some human rights for the purposes of preventing or controlling the entry, emergence, establishment or spread of COVID-19. In particular, a number of measures engage the rights to liberty and freedom of movement by:

8 The minister's response to the committee's inquiries was received on 29 May 2020. The minister provided this response in relation to 11 legislative instruments. This is an extract of the response. The response is available in full on the committee's website at: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports.

- establishing 'health response zones' to temporarily quarantine individuals returning from high risk locations, including Wuhan in China, to prevent the spread of the virus in Australia;
- limiting the movement of individuals identified as high risk of transmitting the virus to prevent further spread of COVID-19; and
- limiting access to remote indigenous communities to protect the vulnerable populations of those areas from infection.

A number of measures also apply to identifiable groups or individuals, and engage the rights to equality and/or non-discrimination. These measures apply according to objective criteria to reduce the risk posed to or from the particular group. For example, prohibiting Australians from overseas travel reduces the risk of infection to the individual overseas and to persons in Australia on their return.

The ICCPR, the Convention on the Rights of Persons with Disabilities, and the Convention on the Rights of the Child protect the right to privacy. A number of the measures considered in the Report, as well as those made in support of the COVIDSafe App, including the emergency determination and subsequent legislation to enshrine the privacy protections into primary legislation, engage the right to privacy. The measures apply only to individuals either voluntarily providing information, seeking to travel internationally, or seeking to enter specified locations or zones. The information collected for these purposes is subject to the protections in the *Privacy Act 1988* (Cth).

I am satisfied that the measures taken by the Government are necessary and appropriate to prevent or control the entry, emergence, establishment or spread of COVID-19 in Australia and are compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the Human Rights Act.

Finally, I would like to assure the Committee that compatibility with human rights will continue as an important consideration in the development of any additional measures taken by the Government in addressing the COVID-19 pandemic.

Concluding comments

International human rights legal advice

1.44 By restricting entry to these locations, these measures may limit the right to freedom of movement, noting in particular that the restrictions of entry would appear to apply to anyone who lives in the designated area, and would mean that they would need to be granted permission to re-enter their community subject to the requirements stipulated by the instruments. Further, it appears that these remote geographical areas may have a high proportion of Indigenous people living

there, and as such, the restrictions may have a disproportionate impact on Indigenous persons.

1.45 The minister's response states that the measures engage the right to freedom of movement, but does not provide any information with respect to the limitation on the right to freedom of movement created by restricting entry to these remote communities. Further, the minister has provided no information about whether this measure will have a disproportionate impact on Indigenous people and, if so, whether such a limitation on the right to equality and non-discrimination is permissible.

1.46 Further information is required as to the compatibility of these measures with the right to freedom of movement, and to equality and non-discrimination, and in particular:

- whether these measures constitute a proportionate limit on the right to freedom of movement, having particular regard to the existence of any safeguards and oversight mechanisms;
- whether these measures have a disproportionate impact on Indigenous Australians;
- why it is necessary to impose these restrictions on the designated remote communities over and above the COVID-19 restrictions imposed by State and Territory governments;
- whether affected community members in these remote communities were consulted prior to the imposition of these measures, and/or have been consulted about the measures while they have been in place; and
- what safeguards (if any) are in place to ensure that community members who are unable to leave their community while subject to these restrictions can continue to access essential services (including medical care).

Committee view

1.47 The committee thanks the minister for this response. The committee notes that these instruments determine requirements to prevent or control the entry or spread of COVID-19 in designated remote communities in Australia, including establishing requirements for entry to these areas, for the duration of the period of emergency under the *Biosecurity Act 2015*.

1.48 The committee considers that the measures, which are designed to prevent the spread of COVID-19, promote and protect the rights to life and health, noting that the right to life requires that Australia takes positive measures to protect life, and the right to health requires Australia takes steps to prevent, treat and control epidemic diseases. The committee further notes that the measures may limit the rights to freedom of movement and to equality and non-discrimination. These

Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements for Remote Communities) Determination 2020 [F2020L00324]

Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements for Remote Communities) Amendment (No. 1) Determination 2020 [F2020L00415]

rights may be subject to permissible limitations if they are shown to be reasonable, necessary and proportionate.

1.49 Noting that the minister was required to act with great urgency and immediacy on behalf of the government to protect the life and livelihoods of Australians in the face of the coronavirus pandemic including those who reside in remote communities and who are arguably more vulnerable to COVID-19 should it spread to any such remote community, the committee is of the view that the minister has adequately explained the rationale for these measures and the rights to freedom of movement and to equality and non-discrimination constitute a permissible limitation which is reasonable, necessary and proportionate.

1.50 In forming this view, the committee is mindful of the potential loss of life that our nation was facing when the pandemic was first declared and the critical importance of responding immediately and urgently to mitigate and manage these risks. The committee also considers that it would be unreasonable to expect the minister to engage in extensive consultation with remote communities which may ordinarily take some months, given the urgency and immediacy with which he was required to act. The committee also notes that the government as a whole, in concert with the National Cabinet, made a wide range of decisions to mitigate the risks of the pandemic on the advice of the chief medical officers of the Commonwealth as well as the states and territories including in relation to managing the risks to life and health in remote communities.

1.51 As set out in the explanatory statement, the committee also notes that consultation also occurred, through the National Indigenous Australians Agency, with the relevant states and territories and Land Councils.

1.52 The Minister for Indigenous Affairs, the Hon Ken Wyatt AM, MP also advised the Parliament on 14 May 2020 that the measure had been subject to consultation, stating:

So, right from the beginning, we worked with elders, leaders and peak organisations. Working with my colleague Greg Hunt, we used the Biosecurity Act to define secure areas for remote communities in order to isolate them from people bringing COVID-19 in. One of the best expressions I heard was from an elder who said, 'This thing has no songline, and we don't want to create a songline that brings death.'⁹

1.53 We thank the minister for his response which concludes the committee's examination.

9 Minister for Indigenous Australians, House of Representatives, *House Hansard*, 14 May 2020, p. 3525.

Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements for Remote Communities) Determination 2020 [F2020L00324]

Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements for Remote Communities) Amendment (No. 1) Determination 2020 [F2020L00415]

Biosecurity determinations – various instruments¹

Purpose	These nine instruments determine requirements to prevent or control the entry or spread of COVID-19
Portfolio	Health
Authorising legislation	<i>Biosecurity Act 2015</i>
Disallowance	These instruments are exempt from disallowance (see subsection 477(2) of the <i>Biosecurity Act 2015</i>)
Rights	Life; health; freedom of movement; equality and non-discrimination
Status	Concluded examination

1.54 The committee requested a response from the minister in relation to these nine instruments in [Report 5 of 2020](#):²

- Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements) Determination 2020 [F2020L00267]. This prohibits international cruise ships from entering Australian ports;
- Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements) Amendment Determination (No. 1) 2020 [F2020L00339]. This prevents cruise ships from entering Australian territory and requires that foreign cruise ships leave Australian territory before 15 June 2020, subject to limited exceptions, to prevent or control the entry or spread of COVID-19 in Australian territory;
- Biosecurity (Exit Requirements) Determination 2020 [F2020L00323]. This requires persons who are departing from prescribed airports and arriving in prescribed countries to be screened by a biosecurity officer or human biosecurity officer for the purposes of establishing whether the individual may be, or may have been, infected with human coronavirus with pandemic potential;
- Biosecurity (Exit Requirements) Amendment (Nauru) Determination 2020 [F2020L00388]. This adds Nauru to the list of countries for which exit screening of individuals applies;

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Biosecurity determinations – various instruments, *Report 7 of 2020*; [2020] AUPJCHR 95.

2 Parliamentary Joint Committee on Human Rights, *Report 5 of 2020* (29 April 2020), pp. 6-28.

- Biosecurity (Human Health Response Zone) (Howard Springs Accommodation Village) Determination 2020 [F2020L00107]. This specifies the Howard Springs Accommodation Village as a human health response zone and sets requirements for individuals entering and leaving the zone;
- Biosecurity (Human Health Response Zone) (Swissotel Sydney) Determination 2020 [F2020L00313]. This specifies the Swissotel Sydney as a human health response zone and sets requirements for individuals entering and leaving the zone.
- Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Overseas Travel Ban Emergency Requirements) Determination 2020 [F2020L00306]. This prohibits an Australian citizen or permanent resident from travel outside Australia (by air or sea or as the operator of an outgoing aircraft or vessel), unless an exemption is granted to them.
- Biosecurity (Human Health Response Zone) (North West Point Immigration Detention Centre) Determination 2020 [F2020L00087] and Biosecurity (Human Health Response Zone) (Royal Australian Air Force Base Learmonth) Determination 2020 [F2020L00086]. These instruments specify the Royal Australian Air Force Base Learmonth and the North West Point Immigration Detention Centre on Christmas Island as human health response zones and sets requirements for individuals entering the zone.

Summary of initial assessments

Preliminary international human rights legal advice

Rights to life, health, freedom of movement, equality and non-discrimination, liberty and privacy

1.55 These nine instruments designate four locations as 'human health response zones', prohibit overseas travel, ban cruise ships from docking in Australia, and establish exit requirements with respect to a number of Pacific nations.

1.56 As noted in the preliminary international human rights legal advice with respect to these nine instruments, measures which are intended to prevent the spread of COVID-19, which has the ability to cause high levels of morbidity and mortality, may promote the rights to life and health. However, these measures may also limit a number of other human rights, including the right to: freedom of movement (with respect to the travel ban, cruise ship restrictions, and establishment of quarantine zones); liberty (with respect to quarantine requirements); equality and non-discrimination (with respect to measures which may treat some people differently from others); and privacy (with respect to establishing exit requirements to travel to some Pacific countries). Further information was sought as to the compatibility of these measures with these human rights.

1.57 The full initial legal analyses are set out in [Report 5 of 2020](#).

Committee's initial view

1.58 The committee considered that these measures, which are designed to prevent the spread of COVID-19, promote and protect the rights to life and health, noting that the right to life requires that Australia takes positive measures to protect life, and the right to health requires Australia takes steps to prevent, treat and control epidemic diseases. The committee noted that the measures may also limit a number of rights, which may be subject to permissible limitations if they are shown to be reasonable, necessary and proportionate. As no statements of compatibility were provided which is not required as a matter of law, the committee sought the minister's advice as to the compatibility of these measures with human rights.

Minister's response³

1.59 The minister advised:

As a result of the COVID-19 pandemic, governments around the world have taken unprecedented steps to contain the outbreak. In January 2020, 'human coronavirus with pandemic potential' was listed as a human disease in the *Biosecurity (Listed Human Diseases) Determination 2016*. Since that time I have made a number of instruments to manage and respond to risks to human health caused by the pandemic.

The *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) (Human Rights Act) authorises the Committee to examine all Bills and legislative instruments for compatibility with human rights. However, as the Report acknowledges, the Human Rights Act does not require a statement of compatibility to be prepared in respect of instruments that are not disallowable legislative instruments (section 9(1)), as are the instruments that I have made to respond to the COVID-19 pandemic to date. The structure of the Biosecurity Act, and the deliberate decision by the Parliament of Australia not to make these instruments disallowable, reflects the urgency that accompanies such measures and extraordinary circumstances in which they are made.

Responding to the COVID-19 pandemic has had a significant impact on my Department, which has diverted substantial resources from other priorities to support the Government's efforts to keep Australia safe. The fact that statements of compatibility were not prepared for these instruments should not be taken to indicate that such rights are not a key consideration in the Government's response. Indeed, the measures taken have engaged a wide variety of human rights. In particular, measures taken have been in support of the right to life, as enshrined in Article 6(1) of the International Covenant on Civil and Political Rights (ICCPR), and the right to physical and

3 The minister's response to the committee's inquiries was received on 29 May 2020. This is an extract of the response. The response is available in full on the committee's website at: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports.

mental health, as enshrined in Article 12 of the International Covenant on Economic, Social and Cultural Rights, which includes measures to prevent, treat and control epidemics.

Consistent with international law, which recognises that reasonable limits may be placed on human rights in certain circumstances, these measures do engage some human rights for the purposes of preventing or controlling the entry, emergence, establishment or spread of COVID-19. In particular, a number of measures engage the rights to liberty and freedom of movement by:

- establishing 'health response zones' to temporarily quarantine individuals returning from high risk locations, including Wuhan in China, to prevent the spread of the virus in Australia;
- limiting the movement of individuals identified as high risk of transmitting the virus to prevent further spread of COVID-19; and
- limiting access to remote indigenous communities to protect the vulnerable populations of those areas from infection.

A number of measures also apply to identifiable groups or individuals, and engage the rights to equality and/or non-discrimination. These measures apply according to objective criteria to reduce the risk posed to or from the particular group. For example, prohibiting Australians from overseas travel reduces the risk of infection to the individual overseas and to persons in Australia on their return.

The ICCPR, the Convention on the Rights of Persons with Disabilities, and the Convention on the Rights of the Child protect the right to privacy. A number of the measures considered in the Report, as well as those made in support of the COVIDSafe App, including the emergency determination and subsequent legislation to enshrine the privacy protections into primary legislation, engage the right to privacy. The measures apply only to individuals either voluntarily providing information, seeking to travel internationally, or seeking to enter specified locations or zones. The information collected for these purposes is subject to the protections in the *Privacy Act 1988* (Cth).

I am satisfied that the measures taken by the Government are necessary and appropriate to prevent or control the entry, emergence, establishment or spread of COVID-19 in Australia and are compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the Human Rights Act.

Finally, I would like to assure the Committee that compatibility with human rights will continue as an important consideration in the development of any additional measures taken by the Government in addressing the COVID-19 pandemic.

Concluding comments

International human rights legal advice

1.60 The rights to freedom of movement, liberty, equality and non-discrimination and privacy may be subject to permissible limitations where a measure seeks to achieve a legitimate objective, is rationally connected to that objective, and proportionate.

1.61 These nine instruments are all directed towards a legitimate objective, that is, to prevent the spread of COVID-19, an infectious disease with the ability to cause high levels of morbidity and mortality. Noting that these measures variously seek to isolate potentially infected individuals, protect the general Australian population and neighbouring countries from exposure to COVID-19, and regulate access to Australian territory, they would also appear to be rationally connected to that objective. With respect to proportionality, it is significant that these are temporary measures. It would therefore appear that any limitation on human rights caused by these instruments may be permissible as a matter of international human rights law. However, it would have been useful for more specific information to have been provided by the minister as to why these particular measures would constitute proportionate limitations on human rights, and what safeguards (if any) would regulate their application.

Committee view

1.62 The committee thanks the minister for this response. The committee notes that these nine instruments have been made in response to the COVID-19 pandemic and temporarily impose certain restrictive measures.

1.63 The committee considers that these measures, which are designed to prevent the spread of COVID-19, promote and protect the rights to life and health, noting that the right to life requires that Australia takes positive measures to protect life, and the right to health requires Australia takes steps to prevent, treat and control epidemic diseases.

1.64 The committee also considers that these measures engage and limit the rights to freedom of movement, liberty, equality and non-discrimination and privacy. These rights may be subject to permissible limitations if they are shown to be reasonable, necessary and proportionate. The committee considers that in light of the critical need to prevent the spread of COVID-19, and as these measures are temporary, any limit on rights is permissible as matter of human rights law.

1.65 The committee thanks the minister for his advice that compatibility with human rights will continue to be an important consideration in the development of any additional measures taken by the government in addressing the COVID-19 pandemic. The committee considers that it would be appropriate for all future legislative instruments developed in response to the COVID-19 pandemic to be accompanied by a detailed statement of compatibility.

CASA EX57/20—Licensing, and Operator Training and Checking (Extensions of Time Due to COVID-19) Exemptions Instrument 2020 [F2020L00337]

CASA EX63/20 — Licensing, and Operator Training and Checking (Extensions of Time Due to COVID-19) Exemptions Amendment Instrument 2020 (No. 1) [F2020L00412]¹

Purpose	These instruments exempt some pilots, air traffic controllers, air operator certificate holders and air traffic service providers from certain regulatory requirements related to medical certification, continued operational proficiency and training. These instruments commenced on 1 April 2020 and 7 April 2020 respectively and are in force until 31 March 2021
Portfolio	Infrastructure, Transport, Regional Development and Communications
Authorising legislation	<i>Civil Aviation Safety Regulations 1998</i>
Disallowance	15 sitting days after tabling
Rights	Life; health; rights at work
Status	Concluded examination

1.66 The committee requested a response from the minister in relation to these instruments in [Report 5 of 2020](#).²

Temporary exemption from certain regulatory requirements

1.67 The CASA EX57/20 — Licensing, and Operator Training and Checking (Extensions of Time Due to COVID-19) Exemptions Instrument 2020 temporarily provides pilots with an extension to complete proficiency checks and undertake flight reviews related to their licence and rating, and temporarily exempts cabin crews from the requirement to complete a test of their emergency procedure proficiency.

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, CASA EX57/20 — Licensing, and Operator Training and Checking (Extensions of Time Due to COVID-19) Exemptions Instrument 2020 [F2020L00337] and CASA EX63/20 — Licensing, and Operator Training and Checking (Extensions of Time Due to COVID-19) Exemptions Amendment Instrument 2020 (No. 1) [F2020L00412], *Report 7 of 2020*; [2020] AUPJCHR 96.

2 Parliamentary Joint Committee on Human Rights, *Report 5 of 2020* (29 April 2020), pp. 29-31.

It also authorises licence holders and other aviation authorisation holders to continue to use their existing medical certificates for the exercise of the privileges of their licences or other aviation authorisation, for a period of six months beyond the certificates' current expiry dates. Further, the instrument temporarily relieves from the compliance obligations an operator who has an approved safety plan.

1.68 The CASA EX63/20 — Licensing, and Operator Training and Checking (Extensions of Time Due to COVID-19) Exemptions Amendment Instrument 2020 (No. 1) extends some of the emergency exemptions relating to medical certificates required to be held by certain pilots, and some operator proficiency check requirements.

Summary of initial assessment

Preliminary international human rights legal advice

Rights to life, health, rights at work

1.69 By temporarily exempting pilots and other air traffic staff from certain regulatory requirements related to medical certification and continued operational proficiency and training, this instrument may engage a number of human rights. The explanatory statement notes that action to comply with the former regulatory requirements could 'break, weaken or undermine the social distancing rules'.³ As these measures are intended to prevent the spread of COVID-19, which has the ability to cause high levels of morbidity and mortality, it would appear that these measures may promote the rights to life and health.⁴

1.70 However, because the instruments provide temporary exemptions from several regulatory requirements which appear to be related to flight safety, they may potentially limit the right to life. Furthermore, as these exemptions deal with regulatory requirements related to employment as pilots and air traffic staff, they may also potentially limit rights at work, including the right to safe working conditions.⁵

1.71 The initial analysis considered that further information was required as to the compatibility of these instruments with the rights to life and work.

1.72 The full initial legal analysis is set out in [Report 5 of 2020](#).

3 Explanatory statement, p. 1.

4 Right to life: International Covenant on Civil and Political Rights, article 6. Right to health: International Covenant on Economic, Social and Cultural Rights, article 12(1).

5 International Covenant on Economic, Social and Cultural Rights, articles 6-7.

CASA EX57/20 — Licensing, and Operator Training and Checking (Extensions of Time Due to COVID-19) Exemptions Instrument 2020 [F2020L00337]

CASA EX63/20 — Licensing, and Operator Training and Checking (Extensions of Time Due to COVID-19) Exemptions Amendment Instrument 2020 (No. 1) [F2020L00412]

Committee's initial view

1.73 The committee considered that the measure, which is designed to prevent the spread of COVID-19, is likely to promote and protect the rights to life and health, noting that the right to life requires Australia to take positive measures to protect life and the right to health requires Australia to take steps to prevent, treat and control epidemic diseases. The committee noted that the measure may also limit rights at work and the right to life, if aviation safety were affected by the measure. These rights may be subject to permissible limitations if they are shown to be reasonable, necessary and proportionate.

1.74 The committee sought the minister's advice as to the compatibility of this measure with human rights, particularly the rights to life and at work.⁶

Minister's response and revised statements of compatibility⁷

1.75 The minister advised:

Your Committee was concerned that the Statements of Compatibility with Human Rights contained in the Explanatory Statements for these two instruments did not address potential issues of human rights arising under Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

I referred your Committee's concerns to CASA to consider the issues raised. I understand CASA has revised the relevant Statements of Compatibility and submitted the updated Explanatory Statements to the Federal Register of Legislation.

CASA has also identified two additional related COVID-19 exemption instruments not mentioned in your correspondence but potentially giving rise to the same issue, namely:

- CASA EX70/20 - Licensing, and Operator Training and Checking (Extensions of Time Due to COVID-19) Exemptions Amendment Instrument 2020 (No. 2) [F2020L00457]; and
- CASA EX69/20 - EPC Requirements for ATOs Transitioning to the FER (Extensions of Time Due to COVID-19) - Exemption Amendment Instrument 2020 (No. 1) [F2020L00456].

6 The committee's consideration of the compatibility of a measure which limits rights is assisted if the response addresses the limitation criteria set out in the committee's [Guidance Note 1](#), pp. 2-3.

7 The minister's response to the committee's inquiries was received on 22 May 2020. This is an extract of the response. The response is available in full on the committee's website at: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports.

CASA EX57/20 — Licensing, and Operator Training and Checking (Extensions of Time Due to COVID-19) Exemptions Amendment Instrument 2020 [F2020L00337]

CASA EX63/20 — Licensing, and Operator Training and Checking (Extensions of Time Due to COVID-19) Exemptions Amendment Instrument 2020 (No. 1) [F2020L00412]

I understand CASA has adopted the same course of action with regard to these two additional exemption instruments.

1.76 The revised statements of compatibility state:

The exemption instrument may engage the following human rights:

- the right to life under Article 6 of the International Covenant on Civil and Political Rights (the *ICCPR*)
- the right to safe and healthy working conditions under Article 7 of the International Covenant on Economic, Social and Cultural Rights (the *ICESCR*)
- the right to work under Article 6 (1) of the *ICESCR*.

The COVID-19 pandemic has given rise to the need to observe Australian Government social distancing rules to prevent people contracting or spreading the virus. These rules apply to all, including to protect the life, health and safety of personnel engaged in aviation operations and associated activities like training. At the same time, aviation safety requires pilots and others to adhere to certain regulatory requirements concerning, for example, medical certification, ongoing operational review, proficiency, training, checking, certain rating renewal and operations manual compliance.

It follows that if essential aviation services are to be safely continued, a careful and calculated balance has had to be struck between these competing objectives. Because of their temporary, calibrated and conditional nature, the range of exemptions in the exemption instrument is considered to achieve an appropriate balance including, for example, by requiring approved safety risk mitigation plans for exemptions from time-based requirements that might last for some months. The requirement for such approved plans will, in turn, contribute to protecting the right to life through approved safety risk mitigation measures that will minimise the risk of accidents and prevent accidental death.

A consequential effect of the careful balance described above is to protect the right to work of various categories of aviation personnel who might otherwise have lost that right, for example, by losing medical certification, ongoing operational review, proficiency, training, checking, rating renewal and operations manual compliance.

Concluding comments

International human rights legal advice

1.77 The revised statements of compatibility address the three rights that are engaged by the instruments, namely: the rights to life, safe and healthy working conditions and to work. They explain that that the application of social distancing rules as a result of the pandemic has had to be carefully balanced with the competing objective of requiring pilots to adhere to certain regulatory requirements for the purposes of aviation safety. They also explain that the range of exemptions achieve an appropriate balance, including requiring approved safety risk mitigation plans in order to minimise the risk of accidents and prevent accidental death. They also state that taking such measures will protect the right to work of various categories of aviation personnel who might otherwise have lost that right by not being able to meet certain requirements.

1.78 As such, noting that aviation safety would not appear to be affected by these temporary measures, and that taking such measures may promote the right to work, the exemptions appear to strike an appropriate balance.

Committee view

1.79 The committee thanks the minister for this response. The committee notes that these instruments exempt some pilots, air traffic controllers, air operator certificate holders and air traffic service providers from certain regulatory requirements related to medical certification, continued operational proficiency and training, on the basis of the need to adhere to social distancing measures to prevent the spread of COVID-19.

1.80 The committee commends CASA for revising the statements of compatibility to address the human rights that may be engaged for these two instruments, and for adopting the same course of action for two additional relevant instruments that it has identified.

1.81 The committee notes the advice that these changes will not adversely affect aviation safety and on this basis considers the exemptions appear to strike an appropriate balance and do not appear to limit the rights to life and health.

