

## Chapter 1<sup>1</sup>

### New and continuing matters

1.1 In this chapter the committee has examined legislative instruments for compatibility with human rights registered on the Federal Register of Legislation between 2 September to 4 October 2021.<sup>2</sup>

1.2 The committee has commented in this chapter on one legislative instrument seeking a response from the relevant minister, and on one legislative instrument in chapter 2. The committee has determined not to comment on the remaining legislative instruments from this period on the basis that the instruments do not engage, or only marginally engage, human rights; promote human rights; and/or permissibly limit human rights.

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1 This section can be cited as Parliamentary Joint Committee on Human Rights, *New and continuing matters, Report 12 of 2021*; [2021] AUPJCHR 116.

2 The committee examines all legislative instruments registered in the relevant period, as listed on the Federal Register of Legislation. To identify all of the legislative instruments scrutinised by the committee during this period, select 'legislative instruments' as the relevant type of legislation, select the event as 'assent/making', and input the relevant registration date range in the Federal Register of Legislation's advanced search function, available at: <https://www.legislation.gov.au/AdvancedSearch>.

## Sydney Harbour Federation Trust Regulations 2021 [F2021L01255]<sup>1</sup>

<b>Purpose</b>	This instrument empowers the Sydney Harbour Federation Trust to grant licences or permits to authorise activities on Trust land; provides for the use and parking of vehicles on Trust land; sets out the appointment, and functions and powers, of rangers; and deals with miscellaneous matters, such as the charging of fees by the Harbour Trust, and delegation of powers by the Harbour Trust.
<b>Portfolio</b>	Agriculture, Water and the Environment
<b>Authorising legislation</b>	<i>Sydney Harbour Federation Trust Act 2001</i>
<b>Last day to disallow</b>	15 sitting days after tabling (tabled in the Senate and the House of Representatives on 18 October 2021). Notice of motion to disallow must be given by 2 December 2021 in the House of Representatives and 4 <sup>th</sup> sitting day of 2022 in the Senate <sup>2</sup>
<b>Rights</b>	Freedom of assembly; freedom of expression

### Prohibition of public assembly

1.3 These regulations remake the Sydney Harbour Federation Trust Regulations 2001 (the 2001 regulations) which are due to sunset on 1 October 2021. The regulations apply to the management of 'Trust land' under the *Sydney Harbour Federation Trust Act 2001* (the Act),<sup>3</sup> and set out what activities are permitted on Trust land.

1.4 Section 19 of the regulations provides that a person must notify the Sydney Harbour Federation Trust (the Trust) if the person intends to hold a public assembly on Trust land. A 'public assembly' is defined in subsection 19(5) as an organised assembly of persons for the purpose of holding a meeting, demonstration, procession or performance. Under subsection 19(2), the Trust may prohibit the assembly if: it is a commercial activity; it raises public safety concerns considering the number of

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Sydney Harbour Federation Trust Regulations [F2021L01255], *Report 12 of 2021*; [2021] AUPJCHR 117.

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 'Trust land' is defined in section 3 and listed in Schedules 1 and 2 of the *Sydney Harbour Federation Trust Act 2001*. It includes a number of Lots in Middle Head, Georges Heights, Woolwich, and Cockatoo Island.

participants and the size or area of Trust land; or if the assembly is likely to result in violence, endanger the safety or security of individuals, severely damage Trust land or property, or interfere with the rights of other persons to enjoy Trust land.

1.5 The Act provides that the Trust may order any person, by written direction, to cease promoting, conducting or carrying out an activity on Trust land where the Trust reasonably believes that the activity contravenes the regulations, and a failure to comply with a written direction is an offence punishable by up to 10 penalty units (\$2,220).<sup>4</sup>

1.6 The committee previously considered the Legislation (Deferral of Sunsetting—Sydney Harbour Federation Trust Regulations) Certificate 2019, which deferred the sunsetting of the 2001 regulations for two years.<sup>5</sup> Section 11 of the 2001 regulations provided that it was an offence for a person to 'organise or participate in a public assembly on Trust land'. At that time, the Attorney-General advised that the regulations were being considered as part of a broader independent review of the work of the Trust, and that consideration of whether the approach taken under section 11 with respect to public assemblies remained appropriate would be undertaken during that review.<sup>6</sup>

1.7 The committee again considered the issue in relation to the Sydney Harbour Federation Trust Amendment Bill 2021.<sup>7</sup> The bill sought to establish the Trust as an ongoing entity and empower it to enforce compliance with a range of matters related to Trust lands, including matters provided for under the regulations. The minister advised that the regulations would be redrafted to ensure they are consistent with Australia's international human rights obligations, and in particular, are more explicitly compatible with the right of peaceful assembly.<sup>8</sup>

## **Preliminary international human rights legal advice**

### ***Rights to freedom of assembly and expression***

1.8 The current regulations seek to address the human rights concerns previously raised by the committee. The 2001 regulations made it an offence to assemble unless organisers of a public assembly received a permit from the Trust. The current regulations remove the permit system and provide that a public assembly is lawful without the need for Trust approval, and instead introduce a requirement where organisers must notify the Trust of their intention to assemble. Removing the offence

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4 *Sydney Harbour Federation Trust Act 2001*, section 65B to 65D.

5 Parliamentary Joint Committee on Human Rights, *Report 1 of 2020* (5 February 2020), pp. 35-38.

6 Parliamentary Joint Committee on Human Rights, *Report 4 of 2020* (9 April 2020), p. 101.

7 Parliamentary Joint Committee on Human Rights, *Report 4 of 2021* (31 March 2021), pp. 2-5.

8 Parliamentary Joint Committee on Human Rights, *Report 5 of 2021* (29 April 2021), p. 87.

provision for persons seeking to assemble on Trust land, and the requirement to seek a permit, removes a significant limitation on the rights to freedom of assembly and expression. The right to freedom of assembly protects the freedom of individuals and groups to meet and engage in peaceful protest and other forms of collective activity in public.<sup>9</sup> The right to freedom of expression extends to the communication of information or ideas through any medium, including public protest.<sup>10</sup>

### *Notification process*

1.9 The statement of compatibility notes that public assemblies on Trust land are now lawful without the need for the Trust to approve them, albeit there is a requirement to notify the Trust.<sup>11</sup> It further explains that there is no fee attached to notification, and that failure to notify the Trust does not create an offence. This process appears to be in line with comments made by the United Nations (UN) Human Rights Committee in relation to the right to freedom of assembly, which has noted that 'a failure to notify the authorities of an upcoming assembly, where required, does not render the act of participation in the assembly unlawful'.<sup>12</sup> The UN Human Rights Committee notes that a failure to notify must not be used to justify 'imposing undue sanctions, such as charging the participants or organizers with criminal offences. Where administrative sanctions are imposed...this must be justified by the authorities.'<sup>13</sup> However, it is not clear how this process operates when read in conjunction with the Act. The Act empowers the Trust to give an order to a person to cease carrying out an activity if the Trust reasonably believes that the activity contravenes the regulations. As the regulations state that a person 'must' notify the Trust if they intend to hold a public assembly, holding a public assembly without notifying the Trust would appear to contravene the regulations. If an order to cease such activity is given, the Act provides that failure to comply with such an order is an offence. Although noting the intent as outlined in the statement of compatibility not to create an offence for failure to notify, it is unclear how the regulations and the Act will operate together in practice and whether, in fact, it is possible for an offence to be created for failure to notify of a public assembly.

### *Prohibition of assembly*

1.10 By providing for the Trust to be able to prohibit the organisation of or participation in organised assemblies in certain circumstances, the regulations also

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9 International Covenant on Civil and Political Rights, article 21.

10 International Covenant on Civil and Political Rights, article 19.

11 Statement of compatibility, p. 36.

12 UN Human Rights Committee, *General Comment No.37 (2020) on the right of peaceful assembly (article 21)* (2020) [71].

13 UN Human Rights Committee, *General Comment No.37 (2020) on the right of peaceful assembly (article 21)* (2020) [71].

engage and appear to limit the rights to freedom of expression and assembly. Of particular concern is the power for the Trust to prohibit a public assembly if the assembly is likely to 'interfere with the rights of other persons to enjoy Trust land'.<sup>14</sup> The rights to freedom of assembly and expression may be permissibly limited where a measure seeks to achieve a legitimate objective, is rationally connected to (that is, effective to achieve) that objective, and is a proportionate means by which to achieve it. In order for a measure to be directed towards a legitimate objective for the purposes of these two rights, a limitation must be demonstrated to be necessary to protect: the rights or reputations of others; national security; public order; or public health or morals.<sup>15</sup> Further, in determining whether limitations on the right to freedom of expression are proportionate, the United Nations (UN) Human Rights Committee has noted that restrictions must not be overly broad.<sup>16</sup> On the right to peaceful assembly, the UN Human Rights Committee has noted that the prohibition of a specific assembly should be considered only as a measure of last resort.<sup>17</sup>

1.11 In relation to whether the measure pursues a legitimate objective, the statement of compatibility states that the grounds on which assemblies may be prohibited relate to public order and respect for the personal rights of others.<sup>18</sup> However, the UN Human Rights Committee has stated in relation to 'public order' that a vague definition of public order should not be relied on to justify overbroad restrictions on the right of peaceful assembly.<sup>19</sup> It has also noted that peaceful assemblies 'can in some cases be inherently or deliberately disruptive and require a significant degree of toleration'.<sup>20</sup> In addition, restrictions imposed for the protection of 'the rights and freedoms of others' relate to the human rights of people not participating in the assembly. In this regard, it is not clear what are the specific human rights being protected by the regulations in enabling assemblies to be prohibited if they are likely to interfere with the rights of other persons 'to enjoy Trust land'. In this respect it is noted that the UN Human Rights Committee has stated that assemblies are a legitimate use of public and other spaces and by their very nature entail a certain

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14 Subparagraph 19(2)(c)(iv).

15 UN Human Rights Committee, *General Comment No.34: Article 19: Freedoms of Opinion and Expression* (2011) [21]-[36].

16 UN Human Rights Committee, *General Comment No.34: Article 19: Freedoms of Opinion and Expression* (2011) [34]-[35].

17 UN Human Rights Committee, *General Comment No.37 (2020) on the right of peaceful assembly (article 21)* (2020) [37].

18 Statement of compatibility, p. 37.

19 UN Human Rights Committee, *General Comment No.37 (2020) on the right of peaceful assembly (article 21)* (2020) [44].

20 UN Human Rights Committee, *General Comment No.37 (2020) on the right of peaceful assembly (article 21)* (2020) [44].

level of disruption to ordinary life.<sup>21</sup> As such, 'disruptions must be accommodated, unless they impose a disproportionate burden, in which case the authorities must be able to provide detailed justification for any restrictions'.<sup>22</sup> In light of this, the statement of compatibility has not established that assemblies would impose a disproportionate burden, and as such it is not clear if the power to prohibit assemblies on the basis that it would interfere with the enjoyment of the land by others seeks to achieve a legitimate objective.

1.12 Further, a key aspect of whether a limitation on a right can be justified is whether the limitation is proportionate to the objective being sought. In this respect, it is necessary to consider a number of factors, including whether a proposed limitation is sufficiently circumscribed, whether it is accompanied by sufficient safeguards and whether it is the least rights restrictive way to achieve the stated objective.

1.13 The statement of compatibility states that if the Trust decides to prohibit an assembly it must give a written notice of the decision with reasons, and a person may apply to the Administrative Appeals Tribunal (AAT) for review of the decision.<sup>23</sup> The ability to appeal the decision to the AAT may operate to provide some oversight of the measure. However, concerns remain as to the breadth of the Trust's power to prohibit a public assembly if it interferes with the rights of other persons to enjoy Trust land. Noting that public assemblies can often be inherently or deliberately disruptive, it would appear that this would empower the Trust to ban almost all peaceful protests, on the basis it may disrupt others' enjoyment of the land. It is unclear what criteria the Trust would use when deciding to ban an assembly on this basis. It is also noted that the regulations give a broad power to the Trust to prohibit assemblies where the proposed number of participants in the assembly may result in public safety concerns, or where the assembly is likely to result in violence, endanger the safety or security of individuals, or severely damage Trust land or property.<sup>24</sup> As such, it is unclear why there is any need for any broader powers to ban assemblies.

1.14 It is also unclear what the consequences are for those who organise or participate in assemblies on Trust land where the Trust has prohibited the assembly under these provisions. It is noted that rangers under the regulations have a number of powers to remove persons, obstructions and vehicles from Trust land, but only if they believe an offence has been committed under the regulations. Holding an assembly that has been prohibited does not appear to be an offence under the regulations. However, the Act provides that the Trust may, if it reasonably believes

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21 UN Human Rights Committee, *General Comment No.37 (2020) on the right of peaceful assembly (article 21)* (2020) [47].

22 UN Human Rights Committee, *General Comment No.37 (2020) on the right of peaceful assembly (article 21)* (2020) [47].

23 Statement of compatibility, p. 37.

24 Paragraph 19(2)(b) and subparagraphs (c)(i)–(iii).

that an activity on Trust land may contravene the regulations, order a person to cease promoting, conducting or carrying out the activity by written notice.<sup>25</sup> Failure to comply with such an order is a criminal offence punishable by up to 10 penalty units (\$2,220).<sup>26</sup> It is not clear how any such order would operate in practice once an assembly had already gathered.

1.15 Further information is required in order to assess the compatibility of this measure with the rights to freedom of assembly and expression, and in particular:

- (a) whether a public assembly can be held if the Trust has not been notified, including what the consequences are for failure to notify of a public assembly;
- (b) in what circumstances would the Trust consider that assemblies would interfere with the rights of other persons to enjoy Trust land, and on what criteria would this be based;
- (c) why it is necessary to empower the Trust to ban assemblies that might interfere with the enjoyment of Trust land by others, noting the other powers to ban assemblies that may cause public safety concerns, or which may result in violence, endanger safety or security of others, or lead to property destruction; and
- (d) how is it proposed that the prohibition of public assemblies will be enforced, and how does the Trust's power in sections 65B to 65D of the Act interact with these provisions.

### **Committee view**

**1.16 The committee notes these regulations apply to the management of 'Trust land' under the *Sydney Harbour Federation Trust Act 2001*. The committee notes the regulations set out what activities are permitted on Trust land, provide for a system of notification for public assemblies and empower the Trust to prohibit public assemblies, including where the public assembly is likely to interfere with the rights of other persons to enjoy Trust land.**

**1.17 The committee notes that these regulations remove the previous offence for organising or participating in a public assembly on Trust land unless a person held a permit, replacing it instead with a requirement to notify the Trust of any proposed assembly. The committee welcomes the minister's stated commitment to comply with the rights to freedom of assembly and expression, in response to the committee's previous comments. The committee considers removing the offence provision removes a significant limitation on the rights to freedom of assembly and expression.**

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25 *Sydney Harbour Federation Trust Act 2001*, sections 65B and 65C.

26 *Sydney Harbour Federation Trust Act 2001*, section 65D.

**1.18** However, the committee notes that the Trust's power to prohibit public assemblies on Trust land also engages and appears to limit the rights to freedom of expression and assembly. The committee notes that these rights may be permissibly limited where a limitation is reasonable, necessary and proportionate. The committee notes that the measure is designed to protect public order and the rights of others to enjoy Trust land, but questions remain as to how this will operate in practice and whether it is a proportionate limitation.

**1.19** The committee has not yet formed a concluded view in relation to this matter. It considers further information is required to assess the human rights implications of these regulations, and as such seeks the minister's advice as to the matters set out at paragraph [1.15].