Chapter 2

Concluded matters

2.1 This chapter considers responses 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 available on the committee's website.[1]

Bills and legislative instrument

Australian Immunisation Register Amendment (Reporting) Bill 2020
Australian Immunisation Register Amendment (Reporting) Rules 2021 [F2021L00133][2]

Purpose	The bill sought to amend the *Australian Immunisation Register Act 2015* to: • introduce provisions under which recognised vaccination providers are required to report certain information in relation to certain vaccinations administered, both within and outside Australia; • authorise the collection and use of Commonwealth assigned identifiers, known as a 'provider identification information'; • introduce civil penalties should vaccination providers not comply with the legislated requirements; and • provide power for the secretary of the Department of Health to require a recognised vaccination provider to produce information if they do not comply with this

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, Australian Immunisation Register Amendment (Reporting) Bill 2020 and Australian Immunisation Register Amendment (Reporting) Rules 2021 [F2021L00133], *Report 4 of 2021*; [2021] AUPJCHR 38.

	reporting requirement The related instrument amends the Australian Immunisation Register Rule 2015 to prescribe vaccinations for the coronavirus known as COVID-19 and for influenza as vaccinations which providers are required to report the administration of to the Australian Immunisation Register
Portfolio	Health
Introduced	House of Representatives, 3 December 2020 *Received Royal Assent on 15 February 2021*
Rights	Health; privacy

2.3 The committee requested a response from the minister in relation to the bill in *Report 1 of 2021*.[3]

Requirement to report vaccination information

2.4 The *Australian Immunisation Register Act 2015* (AIR Act) establishes the Australian Immunisation Register (the Register), which records the vaccinations given to all people enrolled in Medicare in Australia. The AIR Act did not require vaccination providers to report information relating to vaccinations (it was done on a voluntary basis). This bill (which is now an Act) amended the AIR Act to create a requirement for vaccination providers to report information relating to certain relevant vaccinations administered both in and outside Australia to the Register.[4] It also created a power to require a provider to give specified information if they do not comply with this requirement. The bill did not specify the kind of vaccination this will apply to, and the information that will be reported, leaving such matters to be set out in delegated legislation. Failure to comply with these reporting requirements is subject to a civil penalty of up to 30 penalty units for each failure to report.[5]

2.5 The Australian Immunisation Register Amendment (Reporting) Rules 2021 (reporting rules) prescribes the vaccinations to which these mandatory reporting requirements apply – namely vaccinations for COVID-19 and influenza. It sets out the information that must be reported, namely the name, contact details, date of birth, gender, Medicare number and healthcare identifier of the individual to whom a relevant vaccination is administered together with information about the provider, date of vaccination and brand and dose.

3 Parliamentary Joint Committee on Human Rights, *Report 1 of 2021* (3 February 2021), pp. 2-6.

4 Schedule 1, item 7, proposed new Division 2A.

5 Schedule 1, item 7, proposed subsections 10A(5) and 10B(3).

Summary of initial assessment

Preliminary international human rights legal advice

Rights to health and privacy

2.6 In increasing the ability for the government to enhance the monitoring of vaccine preventable diseases, and contributing to enriched monitoring and statistics on health related issues, this measure appears to promote the right to health. The right to health is the right to enjoy the highest attainable standard of physical and mental health.[6] It is a right to have access to adequate health care as well as to live in conditions which promote a healthy life (such as access to safe drinking water, housing, food, and a healthy environment).[7]

2.7 However, in requiring vaccination providers to provide personal information about individuals who receive vaccinations (such as a COVID-19 vaccination),[8] while noting that access to information stored on the Register is strictly controlled and limited, the measure also appears to limit the right to privacy. 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.[9] It also includes the right to control the dissemination of information about one's private life. The right to privacy 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.

2.8 In order to assess the compatibility of this measure with the right to privacy, further information is required as to:

(a) in what circumstances would personal information held on the Register be disclosed to employers, child-care centres and schools;

(b) if it is intended that the minister will specify classes of persons to whom information regarding individuals' COVID-19 vaccination status will be disclosed under the public interest exception (or any other basis), and if so, to whom will it be disclosed; and

6 International Covenant on Economic, Social and Cultural Rights, article 12(1).

7 UN Economic, Social and Cultural Rights Committee, *General Comment No. 14: the right to the Highest Attainable Standard of Health* (2000) [4]. See also, *General Comment No. 12: the right to food (article 11)* (1999); *General Comment No. 15: the right to water (articles 11 and 12)* (2002); and *General Comment No. 22: the right to sexual and reproductive health* (2016).

8 See, explanatory memorandum, p. 1.

9 International Covenant on Civil and Political Rights, article 17.

(c) whether, in making disclosures of personal information on broad public interest grounds, the decision-maker would be required to consider the impact of such disclosure on the privacy of an affected individual.

Committee's initial view

2.9 The committee considered that in increasing the ability for the government to enhance the monitoring of vaccine preventable diseases, this measure promotes the right to health. The committee also noted that requiring vaccination providers to provide personal information about individuals who receive vaccinations also appears to limit the right to privacy. The committee considered that monitoring information about vaccination coverage in order to identify health-related issues constitutes a legitimate objective for the purposes of international human rights law and the measure is rationally connected to that objective. The committee considered further information was required to assess the proportionality of the measure and accordingly sought the minister's advice as to the matters set out at paragraph [2.8].

2.10 The full initial analysis is set out in *Report 1 of 2021*.

Minister's response[10]

2.11 The minister advised:

> The amendments to the *Australian Immunisation Register Act 2015* (AIR Act) create a requirement for recognised vaccination providers to report to the Australian Immunisation Register (AIR) information relating to vaccinations they administer and vaccines they are notified about that were administered outside Australia.
>
> The protections available for the collection, use and disclosure of personal information under the AIR Act have not been amended as part of the Reporting Act. Personal information falls under the term 'protected information' in the AIR Act.
>
> The provisions concerning 'protected information' at section 22 of the AIR Act regulate how such information is collected, recorded, disclosed or otherwise used and section 23 of the AIR Act makes it an offence, punishable by imprisonment and/or penalty units, to obtain, make a record of, disclose or otherwise use protected information unless it is authorised under section 22 of the AIR Act. Neither section is affected by the Reporting Act.
>
> Generally, information concerning an individual's vaccination history is disclosed directly to the individual or their legal personal representative

10 The minister's response to the committee's inquiries was received on 16 March 2021. 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.

upon request so they can make a decision about whether, and to whom, they wish to disclose the information. Information of this nature is not ordinarily disclosed directly to employers, child care centres or schools.

Subsection 22(3) of the AIR Act provides that the Minister (or their delegate) may, in writing, authorise a person to make a record of, disclose or otherwise use protected information for a specified purpose that the Minister is satisfied is in the public interest.

At this time I, as Minister, (or a delegate in my Department) do not intend to specify classes of persons to whom information concerning individuals' COVID-19 vaccination status will be disclosed from the AIR.

Assessment of whether a disclosure is in the public interest generally requires the decision maker to consider a range of relevant factors, such as the impact of such a disclosure on the privacy of an affected individual.

The amendments in the Reporting Act do not change the existing provisions and are consistent with the secrecy provisions in Part 4 of the AIR Act, which controls the use and disclosure of information stored on the AIR and who can use and disclose this information.

Concluding comments

International human rights legal advice

Rights to health and privacy

2.12 The minister has advised that the bill (now Act) did not alter the existing protections available for the collection, use and disclosure of personal information under the AIR Act. However, it is noted that as this bill, and the associated reporting rules, expand the personal information contained in the Register (by making it mandatory, not voluntary, for providers to report vaccination information), the adequacy of the existing protections in the AIR Act are important in assessing the compatibility of these new mandatory measures with the right to privacy.

2.13 As noted in the initial analysis, the AIR Act currently provides that it is an offence for a person to record, disclose or use protected information (including personal information) obtained, or derived, under the AIR Act, unless they are authorised to do so.[11] A person is authorised to record, disclose or use protected information if they do so in order to include the information on the Register or to otherwise perform functions under the AIR Act, to disclose the information to a court or coroner, or where authorised to do so under another law.[12] In addition, the AIR Act includes a broad power for the minister (or their delegate) to authorise a person to use or disclose protected information for a specified purpose where satisfied 'it is

11 *Australian Immunisation Register Act 2015*, section 23.

12 *Australian Immunisation Register Act 2015*, section 22.

in the public interest' to do so.[13] Under international human rights law, when considering whether a limitation on a right is proportionate to achieve the stated objective, it is necessary to consider whether there are sufficient safeguards in place to protect the right to privacy and whether there are other less rights restrictive ways to achieve the stated objective. In this regard, while making it an offence to record, use or disclose protected information helps to safeguard the right to privacy, it is not clear why it is necessary that the AIR Act includes a broad discretionary power enabling the disclosure of the personal vaccination information of Australians to 'any person', for any specified purpose, so long as it is considered to be in the (undefined) 'public interest'.

2.14 The minister has advised that 'generally', information concerning an individual's vaccination history is disclosed directly to the individual or their legal personal representative on request. The minister advised that 'at this time' the minister, or delegate, does 'not intend to specify classes of persons to whom information concerning individuals' COVID-19 vaccination status will be disclosed'. The minister also advised that an assessment of whether a disclosure is in the public interest 'generally requires the decision maker to consider a range of relevant factors', which could include the impact of such a disclosure on the privacy of an affected individual.

2.15 As was set out in the committee's analysis of the bill that subsequently became the AIR Act,[14] empowering the minister to disclose protected information to 'a person' rather than 'a specified class of person', appears to enable disclosure without specifying or limiting the recipients of the information. While the minister has advised that it is not his intention 'at this time' to use this power to authorise the disclosure of information regarding COVID-19 vaccinations, as a matter of law the minister is empowered to, at any time, disclose personal information regarding a person's COVID-19 vaccination status to any person for any purpose, so long as the minister considers it to be in the public interest to do so. While it is difficult to assess the privacy implications of requiring vaccination providers to report information relating to vaccinations to the Register without knowing the extent to which such information may be disclosed or the purposes for which it may be used, there is a risk that expanding the range of personal information that may be so disclosed when there is a broad ministerial discretion to authorise the disclosure of this information may impermissibly limit the right to privacy.

13 *Australian Immunisation Register Act 2015*, subsection 22(3).

14 Parliamentary Joint Committee on Human Rights, *Thirty-Second Report of the 44th Parliament* (1 December 2015) p. 53.

Committee view

2.16 The committee thanks the minister for this response. The committee notes that this bill, which is now an Act, created a requirement for vaccination providers to report information relating to certain relevant vaccinations administered both in and outside Australia to the Australian Immunisation Register. The reporting rules prescribed the vaccinations to which this mandatory reporting requirements apply – namely vaccinations for COVID-19 and influenza.

2.17 The committee notes this will enable the government to track and trace every COVID-19 vaccine administered, and help to ensure this information can be used to monitor the effectiveness of the vaccines, monitor vaccination coverage across Australia and identify any parts of Australia at risk during the disease outbreak, and inform immunisation policy and research. The committee considers that increasing the ability for the government to enhance the monitoring of vaccine preventable diseases, this measure promotes the right to health.

2.18 The committee also notes that requiring vaccination providers to provide personal information about individuals who receive vaccinations also appears to limit the right to privacy. The committee considers that monitoring information about vaccination coverage in order to identify health-related issues constitutes a legitimate objective for the purposes of international human rights law and the measure is rationally connected to that objective. In relation to proportionality, the committee notes that while the legislation provides safeguards regarding collection, use and disclosure of personal information, there is some risk that the existing broad ministerial discretion to disclose personal information to any person and for any purpose if it is considered to be 'in the public interest' to do so, may not sufficiently safeguard the right to privacy.

Suggested action

2.19 The committee considers the proportionality of this measure may be assisted were subsection 22(3) of the *Australian Immunisation Register Act 2015* amended to provide that:

- **(a) the minister's power to disclose protected information is to 'a specified class of persons' rather than 'a person';**
- **(b) specific, and limited, purposes for disclosure are set out in the legislation; and**
- **(c) in authorising disclosure the minister must have regard to the extent to which the privacy of any person is likely to be affected by the disclosure.**

2.20 The committee draws these human rights concerns to the attention of the minister and the Parliament.

Biosecurity Amendment (Strengthening Penalties) Bill 2021[1]

Purpose	This bill seeks to increase civil penalties that could be imposed for non-compliance with requirements under the *Biosecurity Act 2015*
Portfolio	Agriculture, Water and the Environment
Introduced	House of Representatives, 18 February 2021
Right	Criminal process rights

2.21 The committee requested a response from the minister in relation to the bill in *Report 2 of 2021*.[2]

Increased civil penalties

2.22 This bill seeks to increase 28 penalties that apply to specified criminal offences and civil penalty provisions across the *Biosecurity Act 2015* (Biosecurity Act) relating to the management of risk of pests and diseases entering Australian territory. For example, the bill would increase the civil penalty for bringing or importing prohibited or suspended goods in Australian territory from 120 penalty units (currently $26,640)[3] to 1000 penalty units ($222,000).[4]

Summary of initial assessment

Preliminary international human rights legal advice

Criminal process rights

2.23 By increasing civil penalties for breaches of certain provisions of the Biosecurity Act this measure may engage criminal process rights. This is because certain civil penalties may, depending on the context, be regarded as criminal for the purposes of international human rights law.

2.24 Further information is required in order to conduct a full assessment of the potential limitation on criminal process rights, in particular:

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Biosecurity Amendment (Strengthening Penalties) Bill 2021, *Report 4 of 2021*; [2021] AUPJCHR 39.

2 Parliamentary Joint Committee on Human Rights, *Report X of 2020* (24 February 2021), pp. 2-4.

3 *Crimes Act 1914*, section 4AA.

4 Schedule 1, item 1, table item 14, subsection 185(3).

(a) whether the proposed civil penalties in the bill could apply to members of the public; and

(b) whether any of the proposed civil penalties could be characterised as criminal for the purposes of international human rights law, and if so, how they are compatible with criminal process rights.

Committee's initial view

2.25 The committee noted it is not clear if these civil penalty provisions could apply to members of the general public (rather than being restricted to an import or export context). The committee noted that these civil penalties may engage criminal process rights if they are more properly to be regarded as criminal penalties for the purposes of human rights law. If this were the case, the civil penalty provisions in question must be shown to be consistent with the criminal process guarantees. The committee considered further information was required to assess the human rights implications of this bill, and as such sought the minister's advice as to the matters set out at paragraph [2.24].

2.26 The full initial analysis is set out in *Report 2 of 2021*.

Minister's response[5]

2.27 The minister advised:

> The *Biosecurity Act 2015* (Act) provides the regulatory framework for the management of risks of pests and diseases entering Australian territory which may cause harm to animal, plant and human health, the environment and the economy. The penalty regime which underpins this regulatory framework needs to provide an effective deterrent against noncompliance.
>
> The Bill increases civil penalties for 16 provisions under the Act. The maximum penalties provided for by the Bill are intended to deter non-compliance with the Act, and to ensure that the penalties reflect the gains that individuals and businesses might obtain or seek to obtain from engaging in conduct that jeopardises Australia's biosecurity status. These proposed penalties are set at a level that means that the penalty is not merely perceived as a cost of doing business, and reflect the potentially devastating consequences of contravening the Act.
>
> *a) whether the proposed civil penalties in the Bill could apply to members of the public*
>
> As detailed below, two of the civil penalties provisions in the Bill apply exclusively to biosecurity industry participants. The remaining civil

5 The minister's response to the committee's inquiries was received on 10 March 2021. 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.

penalties provisions are of general application but, as noted in the Explanatory Memorandum to the Bill, apply to persons in charge of goods, including those individuals and bodies corporate who should reasonably be aware of their obligations under the Act such as those issued with a direction not to move goods.

The civil penalties for contraventions of sections 124 to 130, and 139 to 141 apply in the context of goods under biosecurity control.

Sections 124 to 128 apply to persons in charge of goods that are subject to biosecurity control, while sections 129 and 130 apply to persons who move, deal with, or interfere with goods that are subject to biosecurity control, or interfere with a notice in relation to such goods. A person in charge of the goods is aware that the goods are subject to biosecurity control and should reasonably be aware of their obligations while the goods remain under biosecurity control. Similarly, where a notice has been affixed in relation to those goods, a person should reasonably be aware that goods are subject to biosecurity control.

Sections 139 to 141 relate to managing unacceptable levels of biosecurity risk in relation to goods that are subject to biosecurity control. These sections apply to persons interfering with a notice affixed to goods in relation to which biosecurity control measures apply, interfering with goods to which a notice is affixed, or contravening a direction to take biosecurity measures. Persons contravening these provisions should reasonably be aware that the goods are subject to biosecurity control and that there are requirements as to how these goods are dealt with.

If the person in charge of goods under biosecurity control fails to comply with their obligations under the Act, they jeopardise the ability of biosecurity officers to effectively assess and/or manage the level of biosecurity risk associated with the goods. The penalty needs to reflect the seriousness of any contravention and have a significant deterrent effect.

Sections 185 and 186 provide for civil penalties for contraventions in relation to prohibited or suspended goods, and conditionally non-prohibited goods. Prohibited, suspended and conditionally non-prohibited goods are all goods or classes of goods where the associated level of biosecurity risk is unacceptable. This means that either they must not be brought into Australia territory at all, or must not be brought into Australian territory unless specified conditions are complied with.

The proposed penalties for these provisions apply to individuals and bodies corporate bringing goods into Australian territory. They are designed to achieve a deterrent effect and encourage people to confirm whether those goods are prohibited, suspended or conditionally non-prohibited goods before bringing or importing them into Australia.

Prohibited, suspended and conditionally non-prohibited goods are determined by legislative instruments that are publicly available on the Federal Register of Legislation and the website of the Department of

Agriculture, Water and the Environment (department), so that persons (both in industry and laypersons) may easily inform themselves of which goods are prohibited, suspended or conditionally non-prohibited. Regulated entities, especially importers, have a responsibility to know and understand their obligations in relation to the importation of goods.

Section 187 provides for civil penalties for contravening conditions of a permit issued under s 179 of the Act in relation to goods that are determined to be conditionally non-prohibited. The conditions imposed by the Director of Biosecurity are specified on the permit, and are those necessary to reduce the level of biosecurity risk associated with the goods to an acceptable level. The proposed increased penalties relating to this section will only apply to the holders of an import permit who should be aware of the conditions that they are required to comply with.

The proposed maximum civil penalty of 1,000 penalty units under sections 185 to 187 recognises that the consequences of non-compliance may be particularly damaging, potentially resulting in the devastation of Australia's $61 billion agriculture industry and our valuable and unique environmental assets. This is consistent with the principle outlined in Chapter 3 (3.1.1) of *A guide to framing Commonwealth offences, infringement notices and enforcement powers* (the Guide) when setting an appropriate penalty.

Individuals or bodies corporate bringing or importing prohibited or suspended goods, or conditionally non-prohibited goods, into Australia without complying with the specified conditions or in contravention of import permit conditions may introduce and spread exotic pests and diseases, such as Foot and Mouth Disease and Brown Marmorated Stink Bug (BMSB). This risk is present regardless of whether the goods are in the possession or control of a member of the public, an importer or a biosecurity industry participant. The introduction of exotic pests and diseases has potentially devastating consequences for Australia's agricultural industries, jobs, plant, animal and environmental health, and the confidence of trading partners.

Sections 428 and 429 provide civil penalties for contraventions by biosecurity industry participants of conditions of an approved arrangement. Biosecurity industry participants are persons who have voluntarily entered into an approved arrangement with the department to carry out specified activities to manage biosecurity risks associated with specified goods, premises or things, and so these civil penalty provisions do not apply to members of the general public.

The Committee has raised a question about whether "a person who brings a prohibited item (such as food or other organic item such as a souvenir) with them on a plane into Australia, and who fails to declare it to customs, could be liable to pay a revised penalty of 1000 penalty units (or $222,000)." If an incoming traveller arrives in Australia with conditionally non-prohibited goods or prohibited or suspended goods in their possession and declares these goods, the traveller will be given the

opportunity to forfeit the goods or, if a treatment is available to manage the biosecurity risk associated with the goods to an acceptable level, treat the goods. If neither of these options are utilised by the incoming traveller, a biosecurity officer can require the goods be destroyed.

If the incoming traveller has failed to declare the conditionally non-prohibited goods or prohibited or suspended goods in their possession, they may be issued an infringement notice for an alleged contravention of s.532(1) or s 533(1) of the Act for an amount of up to 12 penalty units ($2,664).

b) whether any of the proposed civil penalties could be characterised as criminal for the purposes of international human rights law, and if so, how they are compatible with criminal process rights

As discussed in the Statement of Compatibility with Human Rights, civil penalty provisions may engage criminal process rights under Articles 14 and 15 of the ICCPR regardless of the distinction between criminal and civil penalties in domestic law. Having regard to the classification of the penalty provisions under Australian domestic law, the nature and purpose of the penalties and the severity of the penalties, the increase to the civil penalties in this Bill should not be regarded as elevating the civil penalties to be criminal in nature.

The civil penalties were created by the Act and the Bill seeks only to increase the penalties. As discussed in the Statement of Compatibility with Human Rights which accompanied the Act, the civil penalties should not be considered criminal under international law because the majority of provisions are aimed at objectives that are regulatory or disciplinary in nature rather than punitive. For instance, most provisions do not apply to the general public but to a sector or class of people who should reasonably be aware of their obligations under the Act. The Parliamentary Joint Committee on Human Rights, in its *Report 1 of 2015,* noted that the Act was consistent with Australia's human rights obligations and that any limitations on human rights had been well considered with appropriate safeguards.

The Bill only seeks to increase the applicable civil penalties under the Act to reflect the seriousness of the non-compliance with Australia's biosecurity laws and the impact the contraventions may have on Australia's biosecurity status, market access and economy. This is necessary as the current penalty regime no longer serves as an effective deterrent against non-compliance.

The proposed increases to the civil penalty provisions are proportionate and appropriate in the regulatory context of the Act, to reflect the seriousness of contraventions, and the corresponding need for deterrence. Contraventions of the provisions proposed to be amended may have significant impacts on Australia's agriculture industry. For example, if Foot and Mouth Disease established in Australia it could cost up to $50 billion

over 10 years, while BMSB is a risk to our $9 billion horticulture industry and $4 billion fruit and nut industries.

On balance, in the context of this regulatory regime for industry participants, the penalties should not be considered severe, noting:

- They are all pecuniary penalties (rather than a more severe punishment like imprisonment);
- There is no sanction of imprisonment for non-payment of penalties;
- The maximum amount of each civil penalty is no more than the corresponding criminal offence (except where applied to corporations);
- The penalties, for the most part, apply in a corporate context (to individuals and businesses such as commercial importers and biosecurity industry participants); and
- The maximum civil penalty quantum for the provisions is set to provide a proportionate and reasonable deterrent, particularly for corporate entities in relation to the gaining of financial benefit from non-compliance.
- There is no mandatory minimum penalty and the court has the discretion to determine the appropriate penalty having regard to all the circumstances of the matter.

The civil penalties apply in a specific regulatory context to a sector or class of people who should reasonably be aware of their obligations under the Act, as has been outlined above.

The current penalties are insufficient to effectively deter non-compliance with the Act. In the context of the commercial profits that can be made from the importation of goods in contravention of Australia's biosecurity framework, the increased penalties are a proportionate measure to deter non-compliance.

Having regard to the severity of the penalty, and the context in which they are applied, the increase in civil penalties should not be considered as elevating the civil penalties to criminal in nature under international law.

The Statement of Compatibility with Human Rights for the Act set out that the civil penalties introduced at the time were not criminal in nature but, in the event they could be perceived as such, provided detailed discussion of why they would also be compatible with the criminal process rights under Articles 14 and 15 of the ICCPR. These arguments are still applicable, insofar as the Bill does not propose to amend the operation of these civil penalty provisions and the conduct they apply to.

For example, Article 15 is not engaged by the Bill's amendments, as these amendments do not create retrospective criminal offences. The rights under Article 14 which may be perceived to be engaged by the Bill are Article 14(2), the right to the presumption of innocence, Article 14(3), the

right to be free from self-incrimination and Article 14(7), the right not to be tried or punished again for an offence for a which a person has already been finally convicted or acquitted (prohibition on double jeopardy).

Article 14(2)- Right to the presumption of innocence

The Guide notes that placing the burden of proof on the defendant should be limited to where the matter is peculiarly within the knowledge of the defendant and where it is significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter. The Guide also notes that a reverse burden provision is more readily justified if the matter in question is not central to the question of culpability for the offence, the penalties are at the lower end of the scale and the conduct proscribed by the offence poses a grave danger to public health or safety.

The Bill proposes to increase the civil penalty amounts in sections 129, 130, 139 and 141, which carry a reverse burden of proof. However, the reverse burden in these provisions only applies to a defendant seeking to rely on the exemption that they are authorised to engage in the conduct which is the subject of the relevant offence.

In this way, to the extent that the reverse burden that attaches to these offences limits the right to the presumption of innocence under Article 14(2), this only applies in relation to the exemption, and is not central to the question of culpability for the relevant offence. Further, the conduct proscribed by the offences in sections 129, 130, 139 and 141 would pose a very serious risk to Australia's biosecurity status. Although the Bill increases the penalties in these provisions, the proposed penalties are proportionate to achieve the necessary deterrent effect, and the maximum penalty that may be imposed will be determined by a court having regard to all the circumstances of the matter.

Article 14(3)- The right to be free from self-incrimination

The Bill proposes to amend sections 126 and 127, which are not subject to the privilege against self-incrimination under section 635. However, the increased penalties remain proportionate to the significant consequences of contravention and removing the privilege in these circumstances continues to be necessary to achieve the legitimate objective of effective assessment and management of biosecurity risks to human, plant and animal health, the environment and the economy, as was discussed in detail in the Statement of Compatibility with Human Rights for the Act. Section 635 provides that self-incriminatory disclosures cannot be used against the person who made the disclosure either directly in court or indirectly to gather other evidence against the person. In this way, the limitation of the right to be free from self-incrimination in Article 14(3) continues to be reasonable, necessary and proportionate.

Article 14(7)- The right not to be tried or punished again for an offence for which a person has already been finally acquitted or convicted (prohibition on double jeopardy)

Article 14(7) may be considered to be engaged by provisions proposed to be amended by the Bill that allow for the imposition of both a criminal and a civil penalty in relation to the same contravening conduct, including sections 185, 186, 187 and 428.

Despite the increase in the penalty amounts, these amounts are consistent with the prohibition on double jeopardy in Article 14(7). The civil penalty provisions create a distinct penalty regime from criminal sanctions and provide a proportionate and effective mechanism to punish actions that may contravene Australia's biosecurity laws. The civil penalty provisions cannot be used to impose criminal liability or subject a person to imprisonment and a finding by a court that they have been contravened does not lead to the creation of a criminal record.

A court has discretion to impose the penalty the court considers reflects the nature and seriousness of the offending, which may be a civil or criminal penalty or both.

Concluding comments

International human rights legal advice

Criminal process rights

2.28 In assessing the nature and purpose of the civil penalties which are proposed to be increased by this bill, the minister stated that the current penalties are intended to deter non-compliance with the Act, stating that the current penalty regime in the Biosecurity Act no longer serves as an effective deterrent against non-compliance, and that these revised penalties are set at a level such that the penalties are not perceived merely as the cost of doing business. The minister detailed numerous civil penalties that would apply to individuals and corporate entities in charge of goods sought to be brought into Australia.[6] In this respect, where the increased civil penalties apply to participants in a regulatory context where they may reasonably be expected to have certain knowledge and responsibilities (for example, a permit holder), the penalty is unlikely to be regarded as criminal under international human rights law.

2.29 In relation to increases to civil penalties that may apply to the public at large, the minister has advised that the civil penalties under section 185 (bringing or importing prohibited or suspended goods into Australian territory) and 186 (contravening conditions applying to conditionally non-prohibited goods brought or imported into Australian territory) apply to individuals bringing goods into Australia (including incoming travellers). It would appear, therefore, that these provisions

6 For example, sections 124–130; 139–141; and 187.

apply to the public at large, and are not just directed to people in a specific regulatory or disciplinary context. The minister stated that, in the case of a person bringing a prohibited item (such as food or a souvenir) on a plane, they could: declare it or forfeit it; and either the goods would be destroyed, or (if a suitable treatment was available) the goods would be treated. Alternatively, the minister stated, if such a traveller failed to declare the goods, they could be issued with an infringement notice of up to 12 penalty units ($2,664) under section 532 of the Biosecurity Act for providing false or misleading information. However, the minister did not directly advise whether in these circumstances, an individual could also be penalised for a breach of section 185 or 186, and be subject to a civil penalty of up to 1000 penalty units. On the face of it, it would appear that an incoming traveller who brings prohibited goods into Australia, and fails to declare this, may be subject to a penalty of up to $222,000.

2.30 Turning to the nature and purpose of the civil penalties in sections 185 and 186, the minister stated that these penalties are designed to achieve a deterrent effect, and to encourage people to access information online to confirm whether goods are prohibited or suspended prior to bringing them into Australia. The minister further noted that non-compliance with these provisions could introduce exotic pests and diseases, a risk which is present regardless of whether the goods are in the possession or control of a member of the public, an importer, or a biosecurity industry participant. With respect to the potential severity of the penalties, the minister highlighted that there is no mandatory minimum penalty, and that the court retains the discretion to determine the appropriate penalty having regard to the individual circumstances. However, it is noted that the fact that the court could exercise its discretion to impose a lower penalty does not take away from the fact that the court could impose the full penalty.

2.31 As set out in the initial advice, in assessing whether a civil penalty may be considered criminal, it is necessary to consider:

- the domestic classification of the penalty as civil or criminal (although the classification of a penalty as 'civil' is not determinative as the term 'criminal' has an autonomous meaning in human rights law);
- the nature and purpose of the penalty: a civil penalty is more likely to be considered 'criminal' in nature if it applies to the public in general rather than a specific regulatory or disciplinary context, and where there is an intention to punish or deter, irrespective of the severity of the penalty; and
- the severity of the penalty.

2.32 Considering the minister's advice that the civil penalties under sections 185 and 186 of the Biosecurity Act could apply to the public at large, and noting the potential severity of those penalties and the intention for them to serve as a deterrent, there is a risk that the increase to these penalties could mean that these penalties are regarded as 'criminal' under international human rights law. This does

not mean that the relevant conduct must be turned into a criminal offence in domestic law nor does it mean that the civil penalty is illegitimate. Instead, it means that the civil penalty provisions in question must be shown to be consistent with the criminal process guarantees set out in articles 14 and 15 of the International Covenant on Civil and Political Rights, including the right not to be tried twice for the same offence,[7] and the right to be presumed innocent until proven guilty according to law.[8]

2.33 The minister has stated that the civil penalty provisions establish a distinct penalty regime from criminal sanctions. However, subsection 185(2) would enable a criminal proceeding to be brought against a person for the same conduct as that for which a civil penalty could be imposed under subsection 185(3). Section 520 of the Biosecurity Act makes clear that while civil penalty proceedings cannot be brought against a person subject to criminal proceedings (or who has been convicted of an offence), there would be no bar to first pursuing a civil penalty under subsection 185(3) and then subsequently bringing a criminal prosecution in relation to the same conduct under subsection 185(1). As such, if the initial civil penalty was considered criminal under international human rights law, there is a risk that this could breach the criminal process right not to be tried twice in relation to the same offence.

2.34 As to the right to be presumed innocent until proven guilty according to law, this requires that the case against a person be demonstrated on the criminal standard of proof (beyond all reasonable doubt). Because the standard of proof applicable in civil penalty proceedings is lower (requiring proof only on the balance of probabilities), there is a risk that the civil penalties sought to be increased by this bill (namely, sections 185 and 186), if regarded as criminal for the purposes of international human rights law, may not comply with this criminal process right.[9]

Committee view

2.35 The committee thanks the minister for this response. The committee notes that the bill seeks to increase a range of civil penalties that could be imposed for non-compliance with requirements under the *Biosecurity Act 2015* relating to the management of risk of pests and diseases entering Australian territory. The committee notes the minister's advice as to the critical importance of regulating the flow of goods into Australia and preventing the outbreak of diseases and pests, such as Foot and Mouth.

7 International Covenant on Civil and Political Rights, article 14(7).

8 International Covenant on Civil and Political Rights, article 14(2).

9 UN Human Rights Committee, General Comment 32: Article 14: Right to equality before courts and tribunals and to a fair trial (2007) para. [30]: 'The presumption of innocence, which is fundamental to the protection of human rights… guarantees that no guilt can be presumed until the charge has been proved beyond reasonable doubt'.

2.36 The committee notes the minister's advice that most of these civil penalty provisions would not apply to members of the general public, and as such the vast majority of these penalties raise no concerns in terms of engaging criminal process rights under international human rights law.

2.37 However, the committee notes that two of the civil penalty provisions (relating to contraventions in relation to prohibited or suspended goods, and conditionally non-prohibited goods) could apply to the general public. It would appear that an incoming traveller who brings prohibited goods into Australia, and fails to declare this, may be subject to a penalty of up to $222,000 (up from the current maximum of $26,640). Noting the size of the penalty and that it applies to the general public, the committee considers these two civil penalties may more properly be regarded as criminal penalties for the purposes of human rights law. This does not mean that the relevant conduct must be turned into a criminal offence in domestic law nor does it mean that the civil penalty is illegitimate. Instead, it means that the civil penalty provisions in question must be shown to be consistent with criminal process rights, including the right not to be tried twice for the same offence, and the right to be presumed innocent until proven guilty according to law. The committee considers that, noting the lower standard of proof associated with civil penalties, and the existence of additional criminal offences for the same conduct, there is a risk that these provisions may not comply with the criminal process rights under the International Covenant on Civil and Political Rights.

2.38 The committee draws these human rights concerns to the attention of the minister and the Parliament.

Data Availability and Transparency Bill 2020[1]

Purpose	This bill seeks to establish a legislative framework to facilitate the sharing of, and controlled access to, public sector data held by Commonwealth bodies with accredited entities, and to establish the National Data Commissioner
Portfolio	Prime Minister
Introduced	House of Representatives, 9 December 2020
Rights	Privacy

2.39 The committee requested a response from the minister in relation to the bill in *Report 2 of 2020*.[2]

Public sector data sharing scheme

2.40 This bill seeks to establish a legislative framework for the sharing of public sector data, operating in addition to existing legislative mechanisms for data sharing. The bill would enable data custodians (being Commonwealth bodies which control the relevant data and have a right to deal with it)[3] to share their data with accredited users, either directly or via an intermediary termed an 'accredited data service provider'.[4] This would permit the sharing of data even where an existing applicable legislative scheme would prevent disclosure of the relevant data.

2.41 The bill defines 'data' broadly to mean 'any information in a form capable of being communicated, analysed or processed (whether by an individual or by a computer or other automated means)'.[5] The term 'public sector data' means data which is lawfully collected, created or held by or on behalf of a Commonwealth

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Data Availability and Transparency Bill 2020, *Report 4 of 2021*; [2021] AUPJCHR 40.

2 Parliamentary Joint Committee on Human Rights, *Report 2 of 2021* (24 February 2021), pp. 5-18.

3 Chapter 1, Part 1.2, subclause 11(2). Per subclause 11(3), Commonwealth entities which operate in national security and intelligence (including the Australian Security Intelligence Organisation and the Office of National Intelligence) are excluded from the definition of 'data custodian'.

4 An entity may be accredited as either a 'user' or 'data service provider' if the National Data Commissioner is satisfied that they meet the criteria for accreditation. See, Chapter 5, Part 5.2, clause 74.

5 Chapter 1, Part 1.2, subclause 10(5).

body.[6] An accredited entity with which Commonwealth data may be shared may include: non-corporate Commonwealth bodies;[7] entities from other levels of government; and industry, research and other entities in the private sector.[8]

2.42 The sharing of data pursuant to the scheme would be authorised where the sharing is:

(a) for a 'data sharing purpose' (being the delivery of government services; informing government policy; or research and development);[9]

(b) consistent with five 'data sharing principles', including the requirement that the sharing can reasonably be expected to serve the public interest; that any sharing of personal information of individuals is done with their consent, unless it is unreasonable or impracticable to seek their consent; and that appropriate protections are applied to the data;[10]

(c) not explicitly excluded from the scheme;[11] and

(d) in accordance with a data sharing agreement between a data custodian and an accredited user.[12]

2.43 Data scheme entities would be subject to data breach responsibilities, including an obligation to take steps to mitigate a data breach, and a requirement to notify specified persons of a data breach.[13] The unauthorised sharing of data under the scheme would be subject to a civil penalty of 300 penalty units,[14] or

6 Chapter 1, Part 1.2, subclause 10(2). This subclause notes that 'public sector data' includes: accredited data service provider-enhanced data; and output of which a Commonwealth body is declared by a data sharing agreement to be the data custodian.

7 Chapter 5, Part 5.2, clause 74. See also, explanatory memorandum, p. 47.

8 Explanatory memorandum, p. 4.

9 Chapter 2, clause 15. Subclause 15(2) states that the sharing of data for enforcement-related purposes, or a purpose which relates to, or prejudices, national security, or a purpose prescribed by rules, is precluded.

10 Chapter 2, clause 16.

11 Clause 17 of the bill proposes that sharing of data would be excluded from the scheme in a number of specified instances, including where: it relates to national security or law enforcement; would contravene or infringe rights such as intellectual property; the sharing would be inconsistent with Australia's obligations under international law; the data is being held as evidence before a court, or subject to court/tribunal orders; or it is prohibited under regulations.

12 Chapter 2, clauses 18–19.

13 Chapter 3, Part 3.3.

14 Chapter 2, subclauses 14(1) and (3).

imprisonment for up to two years where a person was reckless with respect to the circumstance that the sharing was not authorised.[15]

2.44 The bill would further provide for the establishment of the National Data Commissioner (the Commissioner), who would serve as statutory regulator for the scheme and whose role would include 'advocating for the sharing and release of public sector data more generally'.[16] The Commissioner would be empowered to enforce the scheme, including by assessing, monitoring and investigating data scheme entities. The Commissioner would have several enforcement powers, including the ability to: suspend, cancel or impose conditions on an entity's accreditation; issue written directions to a data scheme entity; impose a civil penalty; issue infringement notices; accept and enter into enforceable undertakings; and apply for injunctions.[17]

Summary of initial assessment

Preliminary international human rights legal advice

Right to privacy

2.45 This bill would facilitate the sharing of an extremely wide range of data held by Commonwealth bodies with other government and non-government entities (excluding only that data which is explicitly excluded from the scheme).[18] The bill defines the term 'public sector data' very broadly, and the term 'data' itself refers to *any* information capable of being communicated, analysed or processed.[19] The explanatory memorandum states that this data includes personal information, as defined by the *Privacy Act 1988* (Privacy Act).[20] In addition, the scheme would override a range of existing secrecy provisions preventing the sharing of data,[21] in order to facilitate the sharing of data. Commonwealth bodies hold an extremely broad range of complex information, including sensitive personal information about individuals in relation to: health; migration and citizenship; child support; social security; employment; disability; and Indigenous affairs. Given the breadth and depth of information which could be shared, and with a wide group of entities, the proposed measure engages and limits the right to privacy.

15 Chapter 2, subclauses 14(2) and (4).

16 Chapter 4, Part 4.2, see, clause 4.

17 Chapter 5, Part 5.5.

18 The sharing of data for an enforcement-related purpose, a purpose relating to or prejudicing national security, or a purpose prescribed by the rules, would be precluded under this scheme. See, Chapter 2, subclause 15(2). See also, Chapter 1, Part 1.2, subclause 11(3), which excludes specific entities from participation in the scheme.

19 Chapter 1, Part 1.2, subclauses 10(2) and (5).

20 Explanatory memorandum, p. 16.

21 Chapter 2, clause 23.

2.46 The right to privacy is multi-faceted. It comprises respect for informational privacy, including the right to respect for private and confidential information, particularly the storing, use and sharing of such information.[22] It prohibits arbitrary and unlawful interferences with an individual's privacy, family, correspondence or home.[23] This includes a requirement that the state does not arbitrarily interfere with a person's private and home life,[24] meaning that any interference with a person's privacy—including one provided for by law—should be in accordance with the provisions, aims and objectives of the International Covenant on Civil and Political Rights, and be reasonable in the particular circumstances.[25] The right to privacy also includes the right to control the dissemination of information about one's private life, and requires that States Parties take effective measures to ensure that information concerning a person's private life does not reach the hands of persons who are not authorised by law to receive, process and use it.[26] It also requires that legislation must specify in detail the precise circumstances in which an interference with privacy will be permitted.[27]

2.47 In order to assess the compatibility of this bill with the right to privacy, further information is required as to:

(a) what is the specific objective the measure seeks to achieve, including what public or social concern the measure seeks to address, which is pressing and substantial enough to warrant limiting the right to privacy;

(b) why the Australian Federal Police is not listed as an excluded entity under proposed subclause 11(3), noting that it is a law enforcement body;

(c) in what type of circumstances is it likely that data will be shared, or not shared, for a data sharing purpose (with examples provided as to what is, and is not, likely to be considered to be for 'the delivery of government services'; 'informing government policy and programs'; and 'research and development');

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22 International Covenant on Civil and Political Rights, article 17.

23 UN Human Rights Committee, *General Comment No. 16: Article 17 (Right to Privacy)* (1988) [3]-[4].

24 The UN Human Rights Committee further explains that this right is required to be guaranteed against all such interferences and attacks whether they emanate from State authorities or from natural or legal persons: *General Comment No. 16: Article 17 (Right to Privacy)* (1988).

25 UN Human Rights Committee, *General Comment No. 16: Article 17 (Right to Privacy)* (1988) [4].

26 UN Human Rights Committee, *General Comment No. 16: Article 17 (Right to Privacy)* (1988) [10].

27 UN Human Rights Committee, *General Comment No. 16: Article 17 (Right to Privacy)* (1988) [8].

(d) what considerations would be considered relevant (and irrelevant) in an assessment of the 'public interest' for the purpose of proposed subclause 16(2), and why does the bill not specifically reference the need to consider the right to privacy;

(e) in what circumstances, and based on what factors, would it be considered unreasonable or impracticable (under proposed paragraph 16(2)(c)) to seek the consent of individuals whose personal information would be shared, and would the provision of any government service be contingent on the individual giving their consent to the proposed sharing of their data;

(f) whether and in what manner accredited entities would be subject to ongoing monitoring (or auditing) of their continued compliance with the data sharing scheme, and their suitability for continued accreditation;

(g) why the scheme would not permit an individual to complain to the National Data Commissioner about a matter associated with the data sharing scheme, such as to report a suspected breach or data misuse, or to express concerns as to the sharing or use of their data in a specific context;

(h) noting the requirement that the sharing of personal information be minimised as far as possible without compromising the data sharing purpose, in what circumstances would the data sharing purpose be compromised by not sharing personal information;

(i) in what circumstances does the bill provide, and is it intended that the rules will provide, that a data sharing agreement may allow the accredited user to provide shared output data to a third party, and what protections apply to protect personal privacy in such circumstances; and

(j) why other, less rights restrictive alternatives would not be effective to achieve the intended objectives (such as amendments to individual pieces of legislation to invoke this data sharing scheme which take into account the specific data to be shared and the specific circumstances in which it is appropriate to share such data).

Committee's initial view

2.48 The committee noted that the measure engages and limits the right to privacy. The committee noted that this data sharing scheme is intended to facilitate greater data availability and use, in order to support economic and research opportunities, and streamline government service delivery. Noting the recent pressures placed on public service delivery following the 2020 bushfire season and the COVID-19 pandemic, greater data sharing is likely to support a 'tell us once'

approach to public service delivery. The committee considered that these appear to be important objectives.

2.49 However, the committee noted that the statement of compatibility does not, itself, set out what objectives are sought to be achieved by the bill. Accordingly, the committee considered that further information was required in order to assess whether the stated objectives constitute a legitimate objective for the purposes of international human rights law. Further, the committee noted that, while the statement of compatibility provides a list of safeguards with respect to the right to privacy, the extent to which the proposed scheme may limit the right to privacy is not clear. The committee considered further information was required to assess the human rights implications of this bill, and as such sought the minister's advice as to the matters set out at paragraph [2.47].

2.50 The full initial analysis is set out in *Report 2 of 2021*.

Minister's response[28]

2.51 The minister advised:

> *a) Objectives of the Bill*
>
> The Bill is central to the Government's response to the Productivity Commission's Inquiry into Data Availability and Use.[29] The Bill is designed to facilitate controlled access to public sector data for specific purposes in the public interest, with safeguards in place to mitigate risks.[30] The three permitted purposes for sharing under the data sharing scheme are: delivery of government services, informing government policies and programs, and research and development.
>
> The natural disasters and health and economic crises of the recent past demonstrate the public benefits of greater data sharing to support informed decision-making and timely delivery of government services to people in need.[31] The Bill's objective of promoting greater data sharing will remove legislative barriers to sharing, while establishing institutional arrangements such as a National Data Commissioner (the Commissioner) to provide oversight for the scheme and promote safe sharing.

28 The minister's response to the committee's inquiries was received on 11 March 2021. 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.

29 Department of the Prime Minister and Cabinet, The Australian Government's response to the Productivity Commission Data Availability and Use Inquiry (2018) p. 11.

30 Clause 3.

31 See further Royal Commission into National Natural Disaster Arrangements, *Interim observations*, 31 August 2020.

The Bill represents a proportionate means of facilitating greater data sharing for purposes in the public interest. The limitations on data sharing in existing legislation are a constraint that can only be addressed by further legislation, such as the Bill. It would be impractical and cumbersome to amend every applicable statutory provision imposing limitations on the use and disclosure of data to achieve the public policy purpose of facilitating the benefits and outcomes of improved data sharing. The Bill permits data sharing in a closely controlled, consistent and transparent manner, with a specific regulatory regime to ensure data sharing is undertaken safely. The Bill is therefore a proportionate limitation on the right to privacy.

b) Australian Federal Police (AFP) participation in the scheme

An entity listed under subclause 11(3) of the Bill cannot participate in the scheme as a data custodian or an accredited entity, and data originating with, held by, or received from such an entity cannot be shared under the scheme.

The Bill would enable the sharing, collection and use of public sector data by the AFP only for permitted purposes in the public interest, and this would be described in publicly available data sharing agreements. For example, if it became an accredited user, the AFP could collect and use data to undertake research, or to inform policies and programs that are related to law enforcement (as distinct from policing activities that target particular individuals).[32] As a data custodian, the AFP would also be able to share its non-operational data with accredited entities, where consistent with the requirements of Chapter 2 of the Bill. The Bill excludes sharing of the operational data of the AFP to protect the integrity and security of police operations.[33] Other dedicated legislative frameworks will continue to govern the AFP's law enforcement activities and any sharing of operational data.

c) Data sharing purposes

The data sharing purposes set out in clause 15 of the Bill reflect extensive public consultation on appropriate uses of public sector data for the scheme, and were considered as part of three independent Privacy Impact Assessments. While each project under the data sharing scheme will need to be assessed on a case-by-case basis, activities under each purpose may include:

- *Delivery of government services*: sharing data for this purpose could enable the provision of better services for Australians, such as the delivery of new disaster relief payments, grants or industry support

32 Subclause 15(4); Data Availability and Transparency Bill Explanatory Memorandum (EM) para 112.

33 Paragraph 17(2)(b); Data Availability and Transparency Bill EM paras 144-145.

payments. Facilitating service delivery agencies having access to up-to-date information about individuals will save time and boost productivity, while reducing friction in the process of delivering services and benefits to Australians. The sharing of data will also improve the planning and design of government services.

- *Inform government policy and programs*: sharing for this purpose could help enable the discovery of trends and risks to inform public policymaking, enable modelling of policy and program interventions and improve the quantity and quality of the data used by governments to inform important public policy decisions.
- *Research and development*: sharing for this purpose could enable academics, scientists, and innovators in the public and private sectors to access public sector data to gain insights that could enhance Australia's socio-economic wellbeing.

The Bill precludes the sharing of data for national security or enforcement related purposes.[34] While these activities are legitimate functions of government, they require specific oversight and redress mechanisms and are better addressed under dedicated legislation.

d) Assessment of the public interest

Consideration of whether a project would serve the public interest is one of several elements under the data sharing principles in clause 16 of the Bill. The data sharing principles strengthen the privacy settings for the scheme and ensure data is appropriately protected and risks are identified and mitigated for each project. The question of whether a project can reasonably be expected to serve the public interest must be made on a project-by-project basis, weighing a range of factors for and against sharing. It is a question of judgement in the particular case in which the test is applied. Factors will include impacts on an individual's right to privacy, the potential for serious harm to the public, and whether those impacts are reasonable, necessary and proportionate, as well as the potential benefits to the community that would arise from the project. The Commissioner will issue guidelines on assessing the public interest, which entities must have regard to when operating under the scheme.[35]

The Bill's holistic approach ensures privacy interests are appropriately balanced with the public interest in a project, and does not explicitly reference privacy to avoid the implication that one must prevail at the expense of the other. Similarly, the objects of the *Privacy Act 1988* specifically recognise the need to balance the protection of the privacy of

34 Subclause 15(3); Data Availability and Transparency Bill EM para 111.

35 Clause 27.

individuals with entities' interests in carrying out their functions and activities.[36]

e) When would it be unreasonable or impracticable to seek consent?

I propose to table an addendum to the Explanatory Memorandum (in response to observations of the Senate Standing Committee for the Scrutiny of Bills Scrutiny in Digest 3 of 2021) in the Parliament as soon as practicable. The addendum will outline key information and examples about the meaning of 'unreasonable or impracticable' to assist to clarify the interpretation of paragraph 16(2)(c) of the Bill. The addendum will also direct users to relevant guidance issued by the Australian Information Commissioner on the standard of consent, which also applies to sharing of personal information under the data sharing scheme.

f) Monitoring of accredited entities' compliance and suitability for accreditation

The Bill proposes a range of responsibilities on accredited entities, such as complying with conditions of accreditation and reporting relevant changes in circumstances to the Commissioner.[37] A condition of accreditation can be imposed requiring an entity to provide updated evidence at specified intervals to support the criteria for accreditation.[38] The Bill also includes mechanisms to support ongoing decisions about an entity's accreditation status. For example, the Bill empowers the Commissioner to request further information or evidence as prescribed by the rules, monitor compliance with the Bill, investigate complaints about suspected breaches, and conduct own-motion investigations (for example, in response to a 'tip-off' from the public or the media).[39] The Commissioner will also receive information about entities' handling of data through the Bill's data breach notification and information transfer provisions.[40]

Once the data sharing scheme commences, the Commissioner will identify annual regulatory priorities in a Regulatory Action Plan. Regulatory priorities will reflect areas where uncertainty, complexity or the risk of non-compliance may arise.

g) Individual complaints

The Bill's formal complaint mechanism is scheme-specific to supplement existing redress mechanisms and to reduce duplication and overlap. The complaints process is a highly structured mechanism to resolve concerns

36 *Privacy Act 1988* s. 2A(b).

37 Clauses 30-31.

38 Paragraph 78(2)(c).

39 Subclause 87(1); clauses 101, 109-110.

40 Part 3.3; clauses 107-108; Data Availability and Transparency (Consequential Amendments) Bill, items 6-8.

held by one data scheme entity about the conduct of another data scheme entity in relation to the data sharing scheme.

Individuals may complain to the Commissioner outside the formal complaints mechanism in the Bill. The Commissioner will respond to such complaints as appropriate and a complaint could lead to the Commissioner conducting an own-motion investigation or transferring the matter to a more appropriate regulator.[41] Individuals with concerns about the scheme will have access to existing complementary mechanisms, including complaints to the Commonwealth Ombudsman or Australian Information Commissioner.[42]

h) Data sharing purposes and data minimisation

Sharing of personal information will generally be reasonably necessary to support delivery of government services to particular individuals. Sharing of personal information may also be required for some data integration projects for a permitted purpose, as certain personal information may be necessary to support the integration of datasets. In these circumstances, data custodians will still be required to share only the personal information necessary to facilitate the data integration project,[43] and would be expected to apply appropriate protections to the data.[44] There are well-established conventions for integrated data, including to maintain functional separation of identifying information (e.g. name or date of birth) from content information (e.g. clinical information or benefit details) throughout the data integration process. These safeguards work with the project principle, under which data custodians must consider engaging a technical data expert, an accredited data service provider, to perform the data integration.[45]

i) Sharing outputs with third parties

Outputs containing personal information are protected by a range of safeguards.

While an output remains within the scheme, it may only be used in accordance with the data sharing agreement governing the sharing of the data. The data sharing agreement must be consistent with the data sharing principles, including the Bill's privacy safeguards such as the requirement that outputs contain only the data (including personal information) that is reasonably necessary to achieve the purpose of sharing under the data

41 Clauses 107-108.

42 Complaints may also be made to State or Territory privacy regulators, if related to an accredited entity that is a State or Territory government authority.

43 Subclause 16(8).

44 Subclause 16(7).

45 Paragraph 16(2)(d); clauses 29, 86.

principle.[46] As such, the most common circumstances where personal information would be shared by an accredited user with a third party would be to support government agencies providing an enhanced and streamlined service delivery experience to individuals who are entitled to receive current or new services or benefits.

Any sharing of output by an accredited user would only be permitted if this were agreed by the data custodian in accordance with the data sharing agreement governing the sharing of the data. For such sharing to be authorised, the data custodian must have determined that the access is consistent with the purpose test and data sharing principles.[47]

To support data sharing for service delivery, clauses 21(1) and (2) of the Bill sets out circumstances in which an accredited user may provide controlled access to an output to third parties. Where the output relates to an individual, subparagraph 21(1)(b)(ii) provides for the output to be shared with an individual to validate or correct the output. This provides a degree of both transparency as well as control back to the individual. In addition, outputs containing personal information remain subject to other laws that regulate the handling of that information, such as the *Privacy Act 1988* and State and Territory equivalents (as relevant).

j) Alternatives to a statutory override of laws that prohibit or restrict sharing

The Bill simplifies and streamlines public sector data sharing by providing a limited override of other laws that prevent or restrict sharing.[48] This override of other laws is 'limited' because it is engaged only when the Bill's requirements are met and only to the extent necessary to facilitate sharing. The override is also limited by the Regulations, which list certain secrecy provisions that are not overridden by the Bill.[49]

The Bill's authorisation to share and its limited override provide a consistent legal framework for sharing, supported by an independent regulator to oversee and champion the scheme. As principles-based legislation, the Bill supports entities to tailor sharing arrangements according to the data to be shared and the surrounding circumstances. The Bill also creates no duty to share, allowing data custodians to ultimately determine when it is appropriate to share. It would be complex and impractical to amend individual Commonwealth laws to facilitate greater sharing. An exercise of this nature would require changes to over 500

46 Subclauses 16(7)-(8); paragraph 16(10)(b).

47 Subclauses 13(3) and 19(10).

48 Productivity Commission, Data Availability and Use (2017) (PC Inquiry) pp. 331-333.

49 Subclause 17(4); Data Availability and Transparency Regulations Exposure Draft, September 2020.

secrecy provisions[50] without the benefits of a dedicated regulator to promote best practice and cultural change, and without the guarantee of less rights restrictive outcomes. The Bill provides for a consistent, best practice, controlled and transparent data sharing approach for all Australian Government data custodians.

Concluding comments

International human rights legal advice

Right to privacy

Legitimate objective and rational connection

2.52 As the statement of compatibility did not identify the legitimate objective sought to be achieved by the bill, further information was sought from the minister. The minister has now advised that the bill is designed to 'facilitate controlled access to public sector data for specific purposes in the public interest'. As to whether and how that constitutes a public or social concern that is pressing and substantial enough to warrant limiting the right to privacy, the minister stated that the natural disasters and health and economic crises of the recent past demonstrate the public benefits of greater data sharing to support informed decision-making and timely delivery of government services to people in need. The facilitation of controlled access to public sector data for specific purposes which are in the public interest is, itself, likely to constitute a legitimate objective under international human rights law. Further, to the extent that this scheme would provide for the sharing of such data for purposes in the public interest, it would appear to be rationally connected with (that is, capable of achieving) that objective.

Proportionality

2.53 The primary issue is whether this scheme would be a proportionate means by which to achieve that objective, having regard to the extent of the interference with the right to privacy and the question of whether the measure is appropriately circumscribed. It is also necessary to consider the presence of safeguards, the possibility of oversight, the availability of review, and any less rights restrictive alternatives.

Data sharing purposes

2.54 Further information was sought as to the types of circumstances in which data would likely be shared, or not shared, for a 'data sharing purpose'. The minister stated that data sharing for the purpose of 'delivery of government services' could enable the provision of better services for Australians (such as, delivery of new disaster relief payments), including by improving their planning and design. Data

50 Australian Law Reform Commission, *Secrecy Laws and Open Government in Australia*, Report No 112, December 2009.

sharing to 'inform government policy and programs' could help to enable the discovery of trends and risks to inform public policymaking, enable modelling of policy and program interventions and improve the quantity and quality of the data used by governments to inform public policy decisions. As to 'research and development', the minister stated that data sharing for this purpose could enable academics, scientists, and innovators in the public and private sectors to access data in order to gain insights that could enhance Australia's socio-economic wellbeing.

2.55 The examples given as to the outcomes that might be achieved suggest that data sharing can occur for important and potentially rights-promoting purposes. However, the three data sharing purposes are framed very broadly, and, considering the breadth and depth of data held by Commonwealth entities, could capture disclosure in an extremely wide range of circumstances. For example, while data sharing for the 'delivery of government services' could be to enable better services for Australians, it may be that it could also be used when considering compliance action relating to the delivery of services, that may result in withholding government services. The breadth of the purposes and the lack of detail in the bill raises questions as to whether this key feature of the proposed data-sharing scheme is sufficiently circumscribed, having regard to the scheme's potentially significant interference with the right to privacy. The minister also advised that data sharing for national security or enforcement related purposes is excluded from the bill as these functions require specific oversight and redress mechanisms and are better addressed under dedicated legislation.[51] However, it is not clear that security and enforcement related purposes are the only purposes undertaken by the Commonwealth government that would require specific oversight and redress mechanisms, noting that the Commonwealth delivers government services in a wide range of sensitive areas including: health; migration and citizenship; child support; social security; employment; disability; and Indigenous affairs.

Sharing of data in the 'public interest'

2.56 As to the requirement that, for data sharing to be permissible, the sharing of that data must reasonably be expected to serve the 'public interest', the minister stated that the determination of the 'public interest' must be made on a project-by-project basis, weighing a range of factors. He stated that these will include: impacts

51 With respect to the scope of the explicit preclusion of sharing data for enforcement-related purposes, the minister clarified the Australian Federal Police (AFP) could have restricted participation in the scheme. The AFP could be accredited as a user, but not as part of policing activities targeting particular individuals. It could only collect and use data to undertake research, or to inform policies and programs *related to* law enforcement. Further, as a data custodian, the AFP would also be able to share its own non-operational data with other accredited entities. This would appear to constrain the manner in which the AFP could participate in this scheme (should it participate) and ensure that this scheme could not be used to share data within the immediate context of detecting, investigating or prosecuting criminal conduct.

on an individual's right to privacy; the potential for serious harm to the public; and whether those impacts are reasonable, necessary and proportionate, as well as the potential benefits to the community that would arise from the project.

2.57 If these matters were considered when determining if the sharing of data pursuant to a specific project can reasonably be expected to serve the public interest, this may operate to help to safeguard the right to privacy. However, much of the safeguard value would depend on how the term 'public interest' would be interpreted in practice.[52] The minister stated that the Commissioner will issue guidelines on assessing the public interest, to which entities would be required to have regard. However, the minister provided no information as to what those guidelines would require in practice, and it is noted that the bill itself does not require that such guidelines are made, only that if there are guidelines in place, data scheme entities 'must have regard' to them.[53] It is noted that the minister's advice to the Scrutiny of Bills committee was that this means that scheme entities 'must have regard for the guidelines however they are not binding'. The minister has added that the guidelines would not alter the law, but would only provide guidance about the Commissioner's view of the law and what is 'better practice'.[54] Consequently, without any legislative guidance as to what would be considered as part of the assessment of the 'public interest', it is not possible to conclusively assess the safeguard value of the public interest requirement.

Sharing of personal information without consent

2.58 With respect to the sharing of personal information without the consent of individuals concerned where it would be 'unreasonable or impracticable' to seek that consent, the minister indicated that he intends to table an addendum to the explanatory memorandum, which would outline key information and examples concerning the meaning of 'unreasonable or impracticable' to assist to clarify the interpretation, and to direct users to other relevant guidance issued by the Australian Information Commissioner on the standard of consent.[55] However, the minister did not provide any detail as to the content of that addendum, so it is not

52 In this regard, it is noted that existing Australian legislation does provide examples of relevant and irrelevant factors where assessing the disclosure of information in the context of the public interest. See, for example, *Freedom of Information Act 1982*, section 11B.

53 See clause 27.

54 See Senate Standing Committee for the Scrutiny of Bills, Scrutiny Digest 5 of 2021 (17 March 2021) p. 37.

55 In this regard, the Office of the Australian Information Commissioner website provides a brief overview of the different types of consent which may be required with respect to the handling of personal information, what consent requires (e.g. voluntary, informed, current and specific), and how that consent may be withdrawn. See, https://www.oaic.gov.au/privacy/your-privacy-rights/your-personal-information/consent-to-the-handling-of-personal-information/ (accessed 18 March 2021).

possible to assess what safeguard value (if any) such an addendum would have. Further, it is not clear why that information should not be provided for in the bill itself, noting the extent of the potential interference with the right to privacy pursuant to this measure.

Sharing identifiable personal information

2.59 Subclause 16(8) requires that only data which is reasonably necessary to achieve the data sharing purpose is to be shared, and the sharing of personal information is to be minimised as far as possible without compromising that data sharing purpose. As set out in the initial analysis, this could operate as a significant safeguard, as it may result in data being shared which de-identifies or anonymises the individual to whom the data relates. However, this protection is qualified by the requirement that this does not compromise the broadly framed data sharing purpose, and that there is no specific requirement that data be de-identified where possible. In response to the question regarding the circumstances in which the data sharing purpose would be compromised by not sharing personal information, the minister stated that the sharing of personal information 'will generally be reasonably necessary to support delivery of government services to particular individuals'. The minister further stated that sharing personal (non-anonymised) information may also be required for some data integration projects, as certain personal information may be necessary to support the integration of datasets. He advised that in these circumstances, data custodians would be required to share only the personal information necessary to facilitate the data integration project and would be expected to apply appropriate protections to the data. The minister further noted that there are established conventions for integrated data, including to maintain functional separation of identifying information (e.g. name or date of birth) from content information (e.g. clinical information or benefit details) throughout the data integration process. If such larger-scale multi-dataset integration projects were accompanied by these safeguards in practice, this would assist in terms of the sharing of personal information, including to help ensure that the information is not capable of being connected (or re-connected) such that it could be used to identify a person. However, the value of this as a safeguard would be better protected if the legislation specifically stated that where it is possible to do so, the data should only be shared where it does not identify individual personal data.

Monitoring the appropriateness of bodies to share data

2.60 As to the monitoring of accredited entities' compliance and ongoing suitability for accreditation to be able to share data under this scheme, the minister noted that, pursuant to subclause 78(2), a condition of accreditation which could be imposed on an entity may require it to provide updated evidence at specified intervals to demonstrate that it meets the criteria for accreditation. The minister noted that the bill also includes mechanisms to support ongoing decisions about an entity’s accreditation status, such as empowering the Commissioner to: request further information or evidence as prescribed by rules; monitor compliance;

investigate complaints about suspected breaches; and conduct own-motion investigations (for example in response to a 'tip off' from the public or media). In addition, he stated that the Commissioner will also receive information about entities' handling of data through the data breach notification and information transfer provisions, and noted that the Commissioner would identify annual regulatory priorities, which may reflect areas where a risk of non-compliance may arise.

2.61 By providing for a framework for ongoing monitoring of compliance these measures have the capacity to serve as useful safeguards. However, it is noted that many of the examples provided by the minister seem to involve reacting to problems that have already arisen with the accreditation of an entity, such as following a complaint or media interest. This approach would appear to mean that the privacy of persons may have been adversely affected before the Commissioner is alerted to problems with an entity. Noting the significant extent of the potential interference with the right to privacy pursuant to this scheme, it is not clear why the bill does not provide that an entity must provide updated evidence at specified intervals to support its criteria for accreditation (rather than leave this as a discretionary condition).

Avenues for complaints

2.62 Further information was also sought as to the capacity of individuals whose data has been shared under this scheme to register complaints with the Commissioner. The minister stated that the bill's formal complaints mechanism is scheme-specific, but that individuals could complain to the Commissioner outside the formal complaints mechanism in the bill, and the Commissioner would respond as appropriate, noting that this could lead to the Commissioner then conducting an investigation or transferring the matter to another regulator. However, given that the scheme itself is not designed to facilitate the management of complaints from the public, it is not clear that the public would be aware that they could complain directly to the Commissioner (for example, by having this information on the Commissioner's website). The bill itself does not establish a legislative basis for the management of individual complaints about matters associated with the scheme (such as to report a suspected breach or data misuse, or to express concerns as to the sharing or use of their data in a specific context) even though this would appear to support the Commissioner's own function of monitoring data entities, and the overall scheme, in practice. The minister noted that individuals could access existing complementary oversight mechanisms (such as the Commonwealth Ombudsman and the Australian Information Commissioner), which would likely serve as a useful safeguard. However, given that these bodies may likely need to liaise with the Commissioner to address any such complaints, as the Commissioner would be responsible for the administration of the scheme, it is unfortunate that the bill does not establish a mechanism for the management of individual complaints directly to the Commissioner.

Sharing personal information with third parties

2.63 Further information was also sought as to the circumstances in which it is intended that a data sharing agreement would allow the accredited user to provide shared 'output data' (that is, data that is the result or product of the use of public sector data) to a third party, and what protections would apply to protect personal privacy in such circumstances. The minister stated that this would most commonly occur in order to support government agencies providing an enhanced and streamlined service delivery experience to individuals who are entitled to receive current or new services or benefits. The minister stated that any such sharing of output by an accredited user would only be permitted if this were agreed by the data custodian in accordance with the data sharing agreement governing the sharing of the data. The minister stated that for such sharing to be authorised, the data custodian must have determined that the access is consistent with the purpose test and data sharing principles.

2.64 While the agreement of the data custodian to the sharing of output by an accredited user may serve as a safeguard in practice, it is noted that the data custodian is not the individual whose personal data may be shared (and that individual is not able to prevent the sharing of such data). Rather it is the Commonwealth body that controls the data and has the right to deal with the data.[56] In addition, considering the example provided (the sharing of data with a third party to support government agencies to provide streamlined service delivery), it is not clear why such a project would require the exiting of data from the scheme, as this would appear to be captured by the data-sharing purpose 'delivery of government services'. Further, while the minister noted that clause 21 provides for the exit of shared output data with affected individuals in order for them to validate it, the bill would also permit the exit of shared output data in circumstances prescribed by the rules (under paragraph 21(2)(b)), and it is not clear what those circumstances may be. As such, it does not appear to have been established that the proposed framework for the sharing of scheme data with a third party outside the scheme is itself sufficiently constrained, or accompanied by sufficient safeguards, such that it may be said to be proportionate to the stated objective of the measure overall.

Less rights restrictive alternatives

2.65 Finally, information was sought as to why other, less rights restrictive alternatives—such as amending individual pieces of legislation to invoke this data sharing scheme—would not be effective to achieve the scheme's objectives. The minister stated that it would be complex and impractical to amend individual laws to facilitate greater sharing, noting that this would require changes to over 500 secrecy provisions. The minister also stated that it would be impractical and cumbersome to amend every existing statutory provision imposing limitations on the use and

56 See subclause 11(2).

disclosure of data to achieve the public policy purpose of facilitating the benefits and outcomes of improved data sharing (as opposed to introducing a measure of this nature). However, the fact that amending individual pieces of legislation to invoke this data sharing scheme would be a complex exercise does not mean that it would not be effective to achieve the intended objectives of this scheme. It merely indicates that it would take more time. While the minister stated that such an approach would not have the benefit of a dedicated regulator to promote best practice and cultural change, or the guarantee of less rights restrictive outcomes, it is not clear that this is the case. It would appear that the bill could still provide for the establishment of the Commissioner with the same responsibilities, and establish a framework facilitating the progressive uptake of the scheme in individual legislative contexts, subject to its adoption by legislative amendment in each context. The fact that there are over 500 pieces of legislation that contain existing secrecy provisions that could be overridden by this broad data sharing power itself raises significant concerns that these targeted secrecy provisions could be overridden by this broad information sharing power in circumstances that may not be appropriate.

Concluding remarks

2.66 This bill appears to be directed towards the legitimate objective of facilitating controlled access to public sector data for specific purposes in the public interest, and would appear to be rationally connected to that objective. However, it is not clear that the measure would constitute a proportionate means by which to achieve that objective. It would establish an overarching framework to facilitate the sharing of a substantial range of Commonwealth-held data, some of which includes highly sensitive content (relating to, for example, child support, employment, health, Indigenous affairs, and immigration). The sheer breadth of data to which the scheme could apply, and the corresponding considerable extent of the potential interference with the right to privacy, means that the measure would need to be accompanied by stringent safeguards, oversight and review mechanisms. As set out above, it is not clear that the safeguards built into the scheme would be sufficient. In particular, the three data sharing purposes are broadly framed and would appear to capture a very wide range of purposes, and no guidance exists (or is required as a matter of law) to assess the extent to which the requirement that data sharing reasonably be expected to serve the 'public interest' is met. It remains unclear when it would be considered 'unreasonable or impracticable' to seek the consent of affected individuals in terms of sharing their personal information. It would also appear that the bill may permit the sharing of personal information in a potentially wide range of circumstances (being to support the delivery of government services), and although there appear to be some established data protection conventions which apply to data integration projects, there is no explicit requirement that data only be shared in a de-identified way where it is possible to do so. Questions also remain as to the circumstances in which output data may be provided to third parties outside the scheme, and the protections which would apply to it in those circumstances. Further, in terms of monitoring scheme participants, it would appear that the mechanisms built into the

scheme could be further strengthened such that entities must be required to provide information on an ongoing basis to justify their continued suitability for accreditation under the scheme. Additionally, noting the advice that the Commissioner could investigate individual complaints made to them about the scheme, it is not clear why the bill itself does not establish a formal framework to facilitate this.

2.67 Having regard to these matters, the question of whether a less rights restrictive alternative could achieve the objective of the measure is significant. In this regard, no information has been provided to demonstrate that a less rights restrictive mechanism—such as amending individual pieces of legislation to invoke this data sharing scheme—would not be equally as effective to achieve the scheme's objectives. The fact that this may be a complex undertaking does not, itself, indicate that it would not be effective to achieve the objective of facilitating controlled access to public sector data, particularly noting that no evidence has been presented identifying some urgency as to introducing a data-sharing scheme. As a result, it is not clear that this data sharing scheme would constitute a permissible limitation on the right to privacy.

Committee view

2.68 The committee thanks the minister for this response. The committee notes that the bill seeks to establish a legislative framework, that overrides existing laws, to facilitate the sharing of, and controlled access to, public sector data held by Commonwealth bodies with accredited entities.

2.69 The committee notes that, in doing so, the measure engages and limits the right to privacy. The committee notes that this right may be subject to permissible limitations if they are shown to be reasonable, necessary and proportionate.

2.70 The committee notes that this data sharing scheme is intended to facilitate greater data availability and use, in order to support economic and research opportunities, and streamline government service delivery. Noting the recent pressures placed on public service delivery following the 2020 bushfire season and the COVID-19 pandemic, greater data sharing is likely to support a 'tell us once' approach to public service delivery. The committee considers that these are important objectives, and that the measure appears likely to be capable of achieving them.

2.71 However, the committee retains concerns that this scheme, as drafted, may not be a proportionate means by which to achieve those objectives. The committee considers that the breadth of Commonwealth public sector data to which the scheme could apply, and the corresponding considerable extent of the potential interference with the right to privacy, means that the measure would need to be shown to be accompanied by stringent safeguards, oversight and review mechanisms. The committee is concerned that while the bill contains some important safeguards to help protect the right to privacy, it has not been clearly established that these safeguards are sufficient. In particular, the committee notes

that the bases on which personal data may be shared are broadly framed and would capture a wide range of purposes. The committee is also concerned that there is no legislative guidance as to when data sharing could reasonably be expected to serve the 'public interest', and no requirement that privacy considerations are considered in this process. The committee is also concerned that there is no explicit requirement in the bill that, where it is possible to do so, information is shared only in a way that does not allow for the identification of an individual.

2.72 The committee is particularly concerned that under clause 23 of this bill, authorisation under this overarching legislation would override any existing Commonwealth, State or Territory law that restricts or prohibits disclosure of personal information. As such, this scheme would permit a Commonwealth body to disclose personal data regardless of any law that currently prohibits this, and without parliamentary oversight of the specific privacy implications of sharing that type of data. This would also mean that the value of any future data protection or secrecy provisions in specific legislative contexts (aside from those related to law-enforcement and national security) would all need to be assessed having regard to the operation of this scheme. While sharing data in some contexts may have limited privacy implications, there may be other data (such as health data) which if shared using this umbrella type legislation may have significant privacy implications. Accordingly, in assessing proportionality, it is necessary to consider if there are less rights restrictive alternatives which would be effective to achieve the goals of this scheme. In this regard, no information has been provided to demonstrate that a less rights restrictive mechanism—such as amending individual pieces of legislation to invoke this umbrella data sharing scheme—would not be equally as effective to achieve the scheme's objectives. While the committee appreciates that this may be a complex undertaking, this does not, itself, indicate that it would not be effective to achieve the objective of facilitating controlled access to public sector data. As a result, the committee considers it has not been established that this data sharing scheme would constitute a permissible limitation on the right to privacy.

Suggested action

2.73 The committee considers that consideration should be given to establishing overarching data sharing legislation which does not override existing secrecy provisions but which requires that the data sharing powers must be specifically invoked by individual pieces of legislation, to ensure appropriate regard is had to whether these broad data sharing powers are appropriate in each specific context.

2.74 The committee otherwise considers that the proportionality of the measure may be assisted were the bill amended to provide that:

(a) determining if 'the sharing of information can reasonably be expected to serve the public interest', requires consideration of the impact on an individual's right to privacy, the potential for serious harm to the public, and whether those impacts are reasonable, necessary and proportionate, as well as the potential benefits to the community that would arise from the project;

(b) subclause 16(8) specifies that the application of appropriate protections to the data includes, where possible, ensuring personal information is shared in a manner that does not allow for the identification of individuals;

(c) clause 78 requires that it is a condition of accreditation that an entity which is required to provide evidence for accreditation must provide updated evidence at specified intervals to support its continued suitability for accreditation; and

(d) Part 5.3 makes clear that the Commissioner may consider complaints from individuals with respect to the scheme, and establish a mechanism for dealing with such complaints.

2.75 The committee recommends that consideration be given to updating the statement of compatibility with human rights to reflect the information which has been provided by the minister.

2.76 The committee draws these human rights concerns to the attention of the minister and the Parliament.

Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020[1]

Purpose	This bill sought to amend the *Fair Work Act 2009* and other legislation to: • provide regular casual employees a statutory pathway to ongoing employment by including a casual conversion entitlement in the National Employment Standards; • extend two temporary JobKeeper flexibilities to businesses significantly impacted by the COVID-19 pandemic; • allow the nominal life of greenfields agreements made in relation to the construction of a major project to be extended; • ensure industrial instruments do not transfer where an employee transfers between associated entities at the employee's initiative; and • amend various Fair Work Commission processes and powers
Portfolio	Industrial Relations
Introduced	House of Representatives, 9 December 2020 *Received Royal Assent on 26 March 2021*
Rights	Rights to work and just and favourable conditions of work; freedom of association; fair hearing; equality and non-discrimination

2.77 The committee requested a response from the minister in relation to the bill in *Report 2 of 2021*.[2]

Simplified additional hours agreements

2.78 The bill sought to include provisions relating to simplified additional hours agreements as terms of 12 identified modern awards in the accommodation and

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020, *Report 4 of 2021*; [2021] AUPJCHR 41.

2 Parliamentary Joint Committee on Human Rights, *Report 2 of 2020* (24 February 2021), pp. 19–50.

food services and retail trade industries, as well as any other awards prescribed by regulations.[3] This measure was subsequently omitted from the bill as a result of amendments to this bill made by the Senate on 18 March 2021.[4] This measure would have allowed for the making of a simplified additional hours agreement between an employer and part-time employee for the employee to work additional hours.[5] Additional agreed hours would be paid without overtime (namely, paid at the ordinary rate instead of the overtime rate) and would be treated as ordinary hours for certain purposes, including penalty rates, annual leave and superannuation.[6] A simplified additional hours agreement could have been entered into if an identified modern award applied; the employee was a part-time employee; and the employee's ordinary hours of work were at least 16 hours per week.[7] An employer would have been prohibited from requiring an employee to enter into a simplified additional hours agreement.[8] If an employee and employer entered into an agreement under the original proposed provisions, the bill provided that to the extent of any inconsistency between a simplified additional hours agreement provision and a provision in the relevant identified modern award, the former would have prevailed, except in specified circumstances.[9]

3 Schedule 2, Part 1, item 5, proposed subsections 168M(3) and (4).

4 See *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2021, Schedule of the amendments made by the Senate* (18 March 2021).

5 Schedule 2, Part 1, item 5, proposed section 168M.

6 Schedule 2, Part 1, item 5, proposed subsections 168Q(2)–(4). Proposed subsection 168Q(3) specifies the circumstances where overtime is still payable in respect of additional hours worked.

7 Schedule 2, Part 1, item 5, proposed subsection 168M(1). Proposed sections 168N and 168P sets out the conditions that must be met for the simplified additional hours agreement to have effect.

8 Schedule 2, Part 1, item 5, proposed subsection 168M(2). Section 344 of the *Fair Work Act 2009* also prohibits an employer from exerting undue influence or pressure on the employee in relation to a decision to enter into, or not enter into, an agreement, including an additional hours agreement (proposed section 168T).

9 Schedule 2, Part 1, item 5, proposed subsection 168M(6). Proposed subsection 168P(3) states that a simplified additional hours agreement has no effect to the extent that it is inconsistent with a provision of the relevant identified modern award that (a) limits the maximum number of consecutive days that the employee may be required to work or that requires the employee not to work on a day; and (b) that cannot be varied or avoided by any agreement or arrangement between the employer and employee.

Summary of initial assessment

Preliminary international human rights legal advice

Rights to work and just and favourable conditions of work, and equality and non-discrimination

2.79 The statement of compatibility states that the simplified additional hours agreements are aimed at realising article 1(1) of International Labour Organization (ILO) Convention No. 122, namely stimulating economic growth and development, raising standards of living, meeting workforce demands, overcoming unemployment and underemployment, and promoting full, productive and freely chosen employment.[10] The statement of compatibility states that the measure is directed to this objective because it is intended to remove barriers to part-time employment by providing more flexibility around the deployment of part-time employees in response to changing business needs. The statement of compatibility states that this thereby promotes the right to work.[11] To the extent that the measure, if the simplified additional hours agreements were voluntarily entered into, may overcome underemployment and unemployment as well as promote full, productive and freely chosen employment, this may promote the rights to work and just and favourable conditions of work.

2.80 However, insofar as the measure would allow employers to not pay overtime for additional agreed hours performed by an employee, thereby having the effect of reducing an employee's wages and adversely altering their working conditions, the bill may limit the rights to work and just and favourable conditions of work. The right to work provides that everyone must be able to freely accept or choose their work, and must not be unfairly deprived of work.[12] The right to just and favourable conditions of work includes the right to fair wages and equal renumeration, a decent living for the worker and their families, and safe and healthy working conditions.[13] Regarding fair wages, the UN Committee on Economic, Social and Cultural Rights has stated that '[w]orkers should receive additional pay for overtime hours above the maximum permitted hours worked in any given week'.[14] It has previously criticised additional work without overtime pay and observed that a lack of compulsory overtime pay hinders the enjoyment of the right to just and favourable conditions of

10 Statement of compatibility, p. cviii; ILO Convention No. 122, article 1(1).

11 Statement of compatibility, p. cviii.

12 International Covenant on Economic, Social and Cultural Rights, article 6. See also, UN Committee on Economic, Social and Cultural Rights, *General Comment No. 18: the right to work (article 6)* (2005) [4].

13 International Covenant on Economic, Social and Cultural Rights, article 7.

14 UN Committee on Economic, Social and Cultural Rights, *General Comment No. 23: on the right to just and favourable conditions of work* (2016) [37].

work.[15] Australia has obligations to progressively realise economic, social and cultural rights, including the rights to work and just and favourable conditions of work, using the maximum of resources available,[16] and has a corresponding duty to refrain from taking retrogressive measures, or backwards steps, with respect to their realisation.[17] The measure may be characterised as retrogressive to the extent that it has the effect of reducing the rates of pay for employees who agree to work additional hours. Retrogressive measures, a type of limitation, may be permissible under international human rights law providing that they address a legitimate objective, are rationally connected to that objective and are a proportionate way to achieve that objective.

2.81 Additionally, as it appears that women comprise a majority of part-time employees in Australia,[18] the measure may engage and limit the right to equality and non-discrimination. This right 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 equal and non-discriminatory protection of the law.[19] The right to equality encompasses both 'direct' discrimination (where measures have a discriminatory intent) and 'indirect' discrimination (where measures have a discriminatory effect on the enjoyment of rights).[20] Indirect discrimination occurs where a 'measure that is neutral at face value or without intent to discriminate', disproportionately affects people with a particular protected

15 UN Committee on Economic, Social and Cultural Rights, *Concluding observations on the second and third periodic reports of Paraguay,* E/C.12/PRY/CO/3 (2008) [15]; UN Committee on Economic, Social and Cultural Rights, *Concluding observations on the third periodic report of the United Kingdom of Great Britain and Northern Ireland (Hong Kong)*, E/C.12/1/Add.10 6 (1996) [21].

16 UN Committee on Economic, Social and Cultural Rights, *General Comment No. 3: The nature of States parties obligations (Art. 2, par. 1)* (1990) [9]. The obligation to progressively realise the rights recognised in the ICESCR imposes an obligation on States to move 'as expeditiously and effectively as possible' towards the goal of full realisation of those rights.

17 International Covenant on Economic, Social and Cultural Rights, article 2.

18 Workplace Gender Equality Agency, *Gender workplace statistics at a glance 2020*, 17 August 2020, https://www.wgea.gov.au/publications/gender-workplace-statistics-at-a-glance-2020#:~:text=References-,Workforce%20participation,%2Dtime%20employees%20%5B2%5D. (accessed 10 February 2021). Women constitute 67.9% of all part-time employees.

19 International Covenant on Civil and Political Rights, articles 2 and 26. Article 2(2) of the International Covenant on Economic, Social and Cultural Rights also prohibits discrimination specifically in relation to the human rights contained in the International Covenant on Economic, Social and Cultural Rights. Articles 1–4 and 15 of the Convention on the Elimination of All Forms of Discrimination against Women further describe the content of these obligations, including the specific elements that States parties are required to take into account to ensure the rights to equality for women.

20 UN Human Rights Committee, *General Comment 18: Non-discrimination* (1989).

attribute.[21] In the context of gender equality and the rights to work and just and favourable conditions of work, the UN Committee on Economic, Social and Cultural Rights has, in another context, expressed concern at the overrepresentation of women in part-time employment and the persistent wage gap between men and women, with women being concentrated in lower paying and part-time working arrangements.[22] In order to realise the right to fair wages and equal renumeration, in particular the right of women to be guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work, the UN Committee on Economic, Social and Cultural Rights has encouraged States to adopt proactive measures to address structural gender inequalities, including temporary special measures to strengthen the right to full-time work for women.[23] As women comprise nearly 68 per cent of all part-time employees in Australia, the measure, which only applies to part-time employees, may have a disproportionate impact on women.[24] Where a measure has a disproportionate impact on a group with a protected attribute, including sex, it establishes that there may be indirect discrimination.[25] Differential treatment (including the differential effect of a measure that is neutral on its face) will not constitute unlawful discrimination if the differential treatment is based on reasonable and objective criteria such that it serves a legitimate objective,

21 *Althammer v Austria*, UN Human Rights Committee Communication No. 998/01 (2003) [10.2]. 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'.

22 UN Committee on Economic, Social and Cultural Rights, *Concluding observations on the fifth periodic report of Sweden*, E/C.12/SWE/CO/5 (2008) [18]; UN Committee on Economic, Social and Cultural Rights, *Concluding observations on the sixth periodic report of Sweden*, E/C.12/SWE/CO/6 (2016) [25]–[26].

23 UN Committee on Economic, Social and Cultural Rights, *Concluding observations on the fifth periodic report of Sweden*, E/C.12/SWE/CO/5 (2008) [18]; UN Committee on Economic, Social and Cultural Rights, *Concluding observations on the sixth periodic report of Sweden*, E/C.12/SWE/CO/6 (2016) [25]–[26].

24 Workplace Gender Equality Agency, *Gender workplace statistics at a glance 2020*, 17 August 2020, https://www.wgea.gov.au/publications/gender-workplace-statistics-at-a-glance-2020#:~:text=References-,Workforce%20participation,%2Dtime%20employees%20%5B2%5D. (accessed 10 February 2021). Additionally, the gender pay gap persists in Australia, with the full-time average weekly ordinary earnings for women being 14 per cent less than men.

25 *D.H. and Others v the Czech Republic,* European Court of Human Rights (Grand Chamber), Application no. 57325/00 (2007) [49]; *Hoogendijk v the Netherlands*, European Court of Human Rights, Application no. 58641/00 (2005).

is rationally connected to that objective and is a proportionate means of achieving that objective.[26]

2.82 In order to assess the compatibility of this measure with the rights to work and just and favourable conditions of work, and equality and non-discrimination, further information is required as to:

(a) whether the measure is likely to have a disproportionate impact on women, noting that women appear to constitute the majority of part-time employees in Australia, and if so, what safeguards, if any, exist to ensure that the measure does not indirectly discriminate against women;

(b) what is the pressing and substantial public or social concern that the measure is seeking to address;

(c) how the measure is rationally connected to that pressing and substantial concern and, in particular, how reducing the rate of pay for additional agreed hours is likely to be effective in achieving the objectives set out in article 1(1) of ILO Convention No. 122;

(d) why the current laws, in particular, the flexibility terms of modern awards as provided for by section 144 of the Fair Work Act, are insufficient to achieve the stated objectives;

(e) why there is no requirement that employers must demonstrate that their enterprise has been adversely affected by the COVID-19 pandemic to such an extent that they do not have the financial capacity to pay overtime rates; and

(f) whether awards applicable to other industries that have not been adversely affected by the COVID-19 pandemic are likely to be prescribed by regulations as an identified modern award for the purposes of the simplified additional hours agreement provisions.

Committee's initial view

2.83 To the extent that the measure may overcome underemployment and unemployment, and promote full, productive and freely chosen employment, the committee considered that this measure may promote the rights to work and just and favourable conditions of work.

2.84 Insofar as the measure allows employers, albeit with the agreement of the employee, to not pay overtime for additional agreed hours worked by part-time employees and may have the effect of reducing employees' rate of pay, the rights to work and just and favourable conditions of work may be engaged and limited. Noting

26 UN Human Rights Committee, *General Comment 18: Non-Discrimination* (1989) [13]; see also *Althammer v Austria*, UN Human Rights Committee Communication No. 998/01 (2003) [10.2].

that the measure only applies to part-time employees and that women constitute the majority of part-time employees, the right to equality and non-discrimination may also be engaged and limited.

2.85 The committee considered the general objectives of raising living standards, overcoming underemployment and unemployment, and promoting more permanent employment opportunities are capable of constituting legitimate objectives, but some questions remained as to whether these are legitimate objectives in the context of this measure. As regards proportionality, the committee noted that there are protections in place to safeguard minimum terms and conditions of employment, however, further information was required to fully assess the proportionality of the measure, so the committee sought the minister's advice as to the matters set out at paragraph [2.82].

2.86 The full initial analysis is set out in *Report 2 of 2021*.

Minister's response[27]

2.87 The minister advised:

> *Insufficiency of existing measures*
>
> Part-time employment is an important alternative to full-time and casual employment. It provides certainty and paid leave entitlements while enabling employees to work fewer than full-time hours to balance their other responsibilities.
>
> Most awards contain provisions that allow part-time employees to work additional hours, including at ordinary rates, either by varying their regular pattern of work (and/or roster) or by allowing them to work ordinary hours outside their agreed work pattern (and/or roster). Employers and employees can also utilise existing flexibility arrangements in modern awards as detailed by section 144 of the *Fair Work Act 2009* (the Fair Work Act). However, these award-based mechanisms differ in their complexity and efficacy in reflecting the business needs where employers commonly need to respond to ad hoc demand, especially in service-based industries, and adjust their operations quickly.
>
> For example, employers face unce1tainty when they offer their part-time employees additional hours under the General Retail Industry Award. While a part-time employee can agree to change their roster to work additional hours, this cannot change their total number of hours worked in a week. If the employee wants to temporarily increase the number of hours per week they can work, they need to make a separate written

27 The minister's response to the committee's inquiries was received on 12 March 2021. 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.

agreement with their employer. To avoid doubt, the employer and employee may need to make another written agreement to return to their previously agreed number of hours.

As a result of varied and inconsistent provisions under awards, the existing mechanisms to provide additional hours to part-time employees are unclear. It can be impracticable for businesses to offer additional hours to part-time employees even if the arrangement suits and is agreed by both employers and employees. Instead, businesses advise they either do not offer these additional hours or instead opt to use casual employment. Inhibiting mutual agreement to work additional hours disadvantages part-time employees who would prefer and are available to work more hours by preventing them from receiving those additional hours and reducing the choices prospective employees have in how they are employed.

Issue of public or social concern

Supporting the economy as it recovers from the impacts of the COVID-19 pandemic is a pressing and substantial public concern. It is important that employers have the confidence to offer permanent positions to employees. Reducing the barriers for employers to employ people as part-time employees, or to offer their part-time employees additional hours, will also provide greater scope for retail and hospitality sector workers, particularly women and young people, to freely choose the form of employment that best suits their needs.

These provisions in the Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020 (the Bill) will apply to employers and employees to whom one of the 12 awards in the retail or hospitality industries apply.[28] These industries were heavily impacted by the COVID-19 pandemic and continue to face the risk of government mandated trading restrictions in the event of further outbreaks.

These measures will help to address the pressing and substantial concern of underemployment in the retail and hospitality sector. In August 2020, 30.9 per cent (or 68,200) of part-time employees in Retail Trade and 39.0 per cent (or 42,500) of part-time employees in Accommodation and Food Services stated that they would prefer, and were available to work, more hours. This is a total of 110,700 permanent part-time workers across these two industries who would prefer, and were available, to work more hours. The inflexibility in awards surrounding the provision of additional hours to part-time employees hinder efforts to address the pressing concern of underemployment in these sectors of the economy.

28 The relevant awards are the Business Equipment Award 2020; Commercial Sales Award 2020; Fast Food Industry Award 20IO; General Retail Industry Award 2020; Hospitality Industry (General) Award 2020; Meat Industry Award 2020; Nursery Award 2020; Pharmacy Industry Award 2020; Restaurant Industry Award 2020; Registered and Licensed Clubs Award 2020; Seafood Processing Award 2020; and the Vehicle Repair, Services and Retail Award 2020.

These current barriers to more secure forms of employment disproportionately impact women and young people, who dominate part-time and casual employment in the hospitality and retail sectors.

- In the Retail trade industry, 65.0 per cent (369,500 employees) of all part time employees are women, and 59.8 per cent (237,300 employees) of all casual employees are women.
- In the Accommodation and food services industry, 61.4 per cent (287,300 employees) of all part time employees are women, and 61.6 per cent (247,600 employees) of all casual employees are women.

Removing barriers to part-time employees being offered these hours will facilitate additional hours being offered. Additionally, part-time employment is an important source of flexibility, providing access to paid leave entitlements, which can be important for people with caring responsibilities. Reducing perceived barriers to part-time employment or the offering of additional hours to part-time employees will provide greater choice for retail and hospitality sector workers to freely choose the employment arrangements that best suit their individual needs.

Addressing underemployment in these sectors of the economy will therefore support the realisation of article 1(1) of the International Labour Organization (ILO) Convention No. 122, namely stimulating economic growth and development, raising living standards, meeting workforce demands, overcoming underemployment and underemployment, and promoting full, productive and freely chosen employment.

Safeguards in the measures

The Bill includes important safeguards that will maintain the key benefits of part-time employment. Most importantly, part-time employee will have a clear and unambiguous right to refuse to enter into an additional hours agreement under the existing protections in the industrial relations system. This right is a workplace right for the purposes of the general protections, making it a contravention of the Fair Work Act for employers to take adverse action against an employee who refuses an offer to work additional hours on this basis. Section 342 of the Fair Work Act sets out the circumstances constituting adverse action. This includes dismissing an employee, injuring an employee in his or her employment, altering the position of the employee to the employee's prejudice, or discriminating between the employee and other employees of the employer.

A range of other safeguards have been included for the benefit of part-time employees who agree to work additional hours at their ordinary rates of pay. Employees will only be able to enter into additional hours agreements where they are already have at least 16 guaranteed hours per week or per roster cycle. This goes above and beyond most award requirements. Unlike overtime hours, any time worked under one of these arrangements will count for purposes such as leave accrual and the

superannuation guarantee. Overtime will continue to be payable when part-time employees work in excess of the daily maximums set out in their award, or if they work over 38 hours per week. Finally, penalty rates will continue to be payable.

To ensure appropriate coverage, the Bill contains an ability for the Minister to add or subtract awards from coverage. This can be done by regulation, which would be subject to parliamentary oversight in the form of disallowance.

Concluding comments

International human rights legal advice

Rights to work and just and favourable conditions of work, and equality and non-discrimination

2.88 Regarding the objective being pursued by the measure, the minister advised that the measure would have helped to address the pressing and substantial concern of underemployment in the retail and hospitality sectors, as in August 2020 over one hundred thousand permanent part-time employees across the retail and accommodation and food services industries would have preferred, and were available, to work more hours. The minister stated that the inflexibility in awards regarding the provision of additional hours to part time employees hinders efforts to address the pressing concern of underemployment in these industries. While most awards contain provisions that allow part-time employees to work additional hours, the minister noted that these award-based mechanisms differ in their complexity and efficacy and as a result, these mechanisms are unclear. As such, the minister stated that it can be impracticable for employers to offer additional hours to part-time employees and instead, employers advise that they either do not offer the additional hours or opt to use casual employees instead of part-time employees. The minister explained that by removing such barriers, the measure would facilitate additional hours being offered to part-time employees and provide greater flexibility to part-time employees to choose employment arrangements that suit their needs. More broadly, the minister stated that by reducing the barriers for employers to employ, and provide additional hours to, part-time employees, the measure would have addressed the pressing and substantial public concern of supporting the economy as it recovers from the impacts of the COVID-19 pandemic.

2.89 Addressing underemployment, particularly in industries heavily impacted by the COVID-19 pandemic, would appear to be a substantial and pressing concern, and may constitute a legitimate objective for the purposes of international human rights law. Insofar as the measure sought to reduce the barriers for employers to offer permanent positions and additional hours to part-time employees (where it suits the employee's needs), the measure would appear to be rationally connected to the objective of addressing underemployment. (Although, it remains unclear why it was necessary to meet the objective of addressing underemployment to require that the additional agreed hours be paid without overtime.)

2.90 As regards proportionality, the minister stated that the measure would have been subject to a range of important safeguards, including those safeguards identified in the preliminary analysis.[29] While some of these safeguards may have operated to protect certain minimum modern award terms and conditions of employment for those employees subject to an additional hours agreement, questions remain as to whether these safeguards would have been sufficient in all circumstances. In particular, while employees were not required to enter an agreement and could not be subjected to undue pressure by an employer to enter an agreement,[30] there appears to be a risk that an employer could apply a permissible degree of pressure or influence (which would not meet the threshold of 'undue') in order to cause the employee to consent to an agreement.[31] This is of particular concern where there is an inherent power imbalance between the employer and employee. In such cases, there are concerns that this safeguard may not have been adequate, a concern which was not addressed in the minister's response.

2.91 Another relevant factor in assessing proportionality is whether the measure is sufficiently circumscribed. The minister noted that the measure applied to those industries that were heavily impacted by the COVID-19 pandemic and continue to face the risk of government mandated trading restrictions in the event of further outbreaks. The minister further noted that these industries, particularly the retail and hospitality sectors, are experiencing underemployment. In addition, the minister stated that the modern awards to which the measure would have applied could be added or subtracted by regulations to ensure appropriate coverage. The minister did not address why employers were not required to demonstrate that their enterprise had been adversely affected by the COVID-19 pandemic to such an extent that they do not have the financial capacity to pay overtime rates; nor did he address whether other industries that have not been adversely affected by the COVID-19 pandemic may be prescribed by regulations so as to be covered by this measure.

2.92 The preliminary analysis noted that without a requirement that the employer demonstrate financial distress as a result of the COVID-19 pandemic, there may have been a risk that employers would use this measure to pay part-time

29 See Parliamentary Joint Committee on Human Rights, *Report 2 of 2021* (24 February 2021) [1.51].

30 Schedule 2, Part 2, item 8, proposed subsection 168M(2).

31 Australian courts have determined that 'influence' here means 'to move or impel to, or to do, something', whereas 'pressure' refers to harassment or oppression: see, *Wintle v RUC Cementation Mining Contractors Pty Ltd* (No. 2) [2012] FMCA 459 [37]. They have further stated that such pressure or influence will be 'undue' in this context where it is: 'unwarranted; excessive; too great' or 'not proper, fitting or right; unjustified': see *Stuart v Construction, Forestry, Mining and Energy Union* (2009) 190 IR 82 [18]. Such case law suggests that some forms of influence or pressure by an employer will not meet the threshold of being 'undue', and so may not be prohibited.

employees at a reduced rate, irrespective of whether they had the financial capacity to pay employees at the overtime rate. Such a requirement would appear necessary to limit the measure to those businesses that have been adversely affected by the pandemic, noting that the stated objective of the measure was to support the economy as it recovers from the impacts of the COVID-19 pandemic and target those industries heavily impacted by the pandemic. In light of the measure's broad scope, there remain concerns that it may not have been sufficiently circumscribed.

2.93 Furthermore, to the extent that the measure would have had the effect of reducing the rates of pay for employees who agreed to work additional hours and may thus be characterised as retrogressive under international human rights law (that is, a backwards step in relation to the rights to work and just and favourable conditions of work), Australia has the burden of proving that the measure had been 'introduced after the most careful consideration of all alternatives'.[32] As noted in the preliminary analysis, it is not clear that a measure which authorises employers to effectively contract out of minimum employment terms and conditions, particularly the requirement to pay overtime rates for additional hours worked, is the least rights restrictive way of achieving the stated objective. For example, it is unclear why an employer should not be required to pay overtime rates for any additional hours worked by an employee as part of a simplified additional hours agreement, except in circumstances where the employer has met a decline in turnover test or equivalent test demonstrating financial distress as a result of the COVID-19 pandemic. Such an amendment may assist with the proportionality of this measure.

2.94 In conclusion, the measure appears to have pursued a legitimate objective and be rationally connected to that objective. However, there is a risk that, in practice, the measure may have impermissibly limited the rights to work and just and favourable conditions of work, particularly the right to fair wages, to the extent that it had the effect of reducing an employee's rate of pay. Further, it may have a disproportionate impact on women, noting that women comprise the majority of part-time employees in the industries targeted by this measure, and may therefore limit the right to equality and non-discrimination. It is not clear that the safeguards accompanying this measure were sufficient in all circumstances and concerns remain that the measure may not have been sufficiently circumscribed. It is also not evident that all alternatives had been carefully considered so as to ensure that the measure was the least rights restrictive way of achieving the stated objective. However, it is noted that amendments were made by the Senate on 18 March 2021 to omit this measure from the bill.

32 UN Committee on Economic, Social and Cultural Rights, *General Comment 13: the right to education* (1999) [45], where the Committee stated that 'the State party has the burden of proving that they have been introduced after the most careful consideration of all alternatives and that they are fully justified by reference to the totality of [all Covenant rights]…and in the context of the full use of the State party's maximum available resources'.

Committee view

2.95 The committee thanks the minister for this response. The committee notes that the measure would have allowed for the making of a simplified additional hours agreement between an employer and part-time employee for the employee to work additional hours at the ordinary rather than overtime rate of pay. The measure would have applied to 12 identified modern awards in the accommodation and food services and retail trade industries, as well as any other awards prescribed by regulations.

2.96 To the extent that the measure would have had the effect of facilitating the provision of additional hours to those part-time employees seeking more work, it may have addressed underemployment and supported full, productive and freely chosen employment and so promoted the rights to work and just and favourable conditions of work. However, the measure may also have limited these rights, particularly the right to fair wages, to the extent that it would have allowed employers to not pay overtime rates for additional agreed hours, thereby reducing an employee's wages. The committee also notes the right to equality and non-discrimination may have been limited insofar as the measure may have had a disproportionate impact on women, as women comprise the majority of part-time employees in the industries targeted by the measure. Retrogressive measures, a type of limitation, may be permissible under international human rights law providing that they address a legitimate objective, are rationally connected to that objective and are a proportionate way to achieve that objective.

2.97 Noting that amendments were made to the bill which omitted this measure from the bill, the committee makes no further comment in relation to this measure.[33]

Flexible work directions

2.98 The bill sought to introduce provisions to allow employers to issue flexible work directions to employees about their functions and duties (a flexible work duties direction), and the location of their work (a flexible work location direction). This measure was subsequently omitted from the bill as a result of amendments to this bill made by the Senate on 18 March 2021.[34] The measure would have permitted employers to issue a flexible work duties direction requiring an employee to perform any duties during a period that were within the employee's skill and competency so long as the duties were safe, the employee had the requisite licence or qualification,

33 See *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2021, Schedule of the amendments made by the Senate* (18 March 2021).

34 See *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2021, Schedule of the amendments made by the Senate* (18 March 2021).

and the duties were reasonably within the scope of the employer's business operations.[35] A flexible work location direction could have required an employee to perform duties during a period at an alternative location, including the employee's home. The alternative location needed to be suitable having regard to the employee's duties; could not require the employee to travel a distance that was unreasonable in all circumstances, including the COVID-19 pandemic; and need to be safe and reasonably within the employer's business operations.[36] To have effect, flexible work directions could not be unreasonable in all the circumstances and the employer must have reasonably believed that the direction was a necessary part of a reasonable strategy to assist in the revival of the employer's enterprise.[37] The employer was also required to consult with the employee about the direction, although the employee was not required to consent to the direction for it to have effect.[38] The flexible work direction measure would have applied to employees and employers covered by an identified modern award and to the extent of any inconsistency between this measure and an identified modern award provision, the flexible work direction provision would have prevailed.[39] Additionally, this measure would have ceased to have effect after two years from the day the proposed sections would commence.[40]

Summary of initial assessment

Preliminary international human rights legal advice

Rights to work and just and favourable conditions of work

2.99 To the extent that the measure may have the effect of adversely altering an employee's working conditions, including directing an employee to work in potentially less favourable conditions, without their consent, the bill may limit the rights to work and just and favourable conditions of work, including the right to

35 Schedule 2, Part 2, item 8, proposed section 789GZG.

36 Schedule 2, Part 2, item 8, proposed section 789GZH.

37 Schedule 2, Part 2, item 8, proposed sections 789GZJ and 789GZK.

38 Schedule 2, Part 2, item 8, proposed section 789GZL. Subsection 789GZL(2) provides that the employer is not required to consult with the employee in relation to a subsequent direction if consultation occurred in relation to the first direction and during that consultation, the employee expressed their views and the employer considered the employee's views.

39 Schedule 2, Part 2, item 8, proposed sections 789GZD and 789GZF. The identified modern awards are those specified in proposed subsection 168M(3), including 12 identified modern awards in the accommodation and food services and retail trade industries, as well as any other awards prescribed by regulations.

40 Schedule 2, Part 2, item 8, proposed subsection 789GZI(3) and Part 3, item 10.

freely accept or choose work.[41] 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.

2.100 In order to assess the compatibility of this measure with human rights, particularly the proportionality of the measure, further information is required as to:

(b) why there is no requirement that, before issuing a flexible work direction, employers must demonstrate that their enterprise has been adversely affected by the COVID-19 pandemic, such as by satisfying a decline in turnover test;

(c) what awards applicable to other industries are likely to be prescribed by regulations as an identified modern award for the purposes of the flexible work directions provisions (and will this be limited to industries adversely affected by the COVID-19 pandemic);

(d) whether there are any guidelines to assist employers in interpreting the requirement that the flexible work direction must assist in the revival of the employer's enterprise;

(e) why the bill does not include a non-exhaustive list of factors that must be considered by the employer in determining whether a direction is unreasonable in all of the circumstances;

(f) why it is appropriate to only require an employer to provide at least three days' notice to an employee of their intention to give the direction, and whether this notice period is sufficient to facilitate meaningful consultation between an employee and employer; and

(g) whether careful consideration has been given to alternative, less rights restrictive ways of achieving the stated objective.

Committee's initial view

2.101 To the extent that the measure may result in less favourable working conditions for an employee subject to a flexible work direction, the measure may engage and limit the rights to work and just and favourable conditions of work.

2.102 The committee noted that the measure pursues the legitimate objectives of facilitating ongoing employment, maximising employee retention rates and supporting employers during the COVID-19 pandemic, and that the measure would appear to be rationally connected to these objectives. As regards proportionality, the committee noted that the measure includes a number of safeguards, but raised

41 International Covenant on Economic, Social and Cultural Rights, articles 6 and 7. See also, UN Committee on Economic, Social and Cultural Rights, *General Comment No. 18: the right to work (article 6)* (2005) [4].

questions as to the adequacy of these safeguards in practice and so sought the minister's advice as to the matters set out at paragraph [2.100].

2.103 The full initial analysis is set out in *Report 2 of 2021*.

Minister's response

2.104 The minister advised:

> *Proposed measures*
>
> As noted in the Bill's human rights compatibility statement, the Bill will temporarily continue the ability of employers covered by identified modern awards to direct employees to work at different locations, including at home, and to perform a broader range of duties in targeted sectors, namely the accommodation and food services and retail trade industries. It provides a straightforward mechanism (in addition to existing processes in modern awards) that allows employers to direct their employees to perform different functions and perform work at alternative locations.
>
> The objective of the measure is to facilitate ongoing employment and support Australian economic growth and development in the wake of the COVID-19 pandemic. The JobKeeper flexibilities in the Fair Work Act, which were introduced alongside the JobKeeper payment that commenced in March 2020, played an important role in helping employers to survive the COVID-19 pandemic. These flexibilities are due to expire in March 2021, but Australia's economic situation is constantly changing so ongoing and targeted assistance is needed to help employers to maximise employee retention rates and engage new employees during this period.
>
> *Alternative ways to achieve objectives*
>
> Extensive consideration was given during the development of the Bill to options for achieving this stated objective. While the full suite of the flexibilities in the JobKeeper provisions in the Fair Work Act were needed throughout the year, now we are in the comeback phase. Based on these considerations, the Government narrowed the scope of what directions an employer can issue. This will enable employers to manage their businesses flexibly by directing employees to undertake different duties within their skill and competency, or undertake work at different locations, provided this does not involve unreasonable travel.
>
> To further tailor the application of these measures, they have been designed to support a limited range of employers in award-reliant, small

business dominated industries[42] to manage their workplaces as the impacts of the COVID-19 pandemic continue to be felt and maximise employee retention rates.

Guidance for employers and safeguards in the measures

Reflecting the need for these businesses to be able to quickly adapt to changing circumstances and the narrower range of directions available, the Government has adopted an existing test from section 189 of the Fair Work Act requiring employers to have information before them that leads the employer to reasonably believe that the direction is a necessary part of a reasonable strategy to assist in the revival of the employer's business. This test is a well understood part of the industrial relations framework and is appropriate as it ensures employers can only use flexible work directions as part of a broader effort to revive their business without being overly prescriptive as to what this should look like.

Critically, the Bill continues to provide a minimum rate of pay guarantee that ensures no employee's base rate of pay is reduced as a result of their employer issuing a direction. As with the previous JobKeeper flexibilities, a flexible work direction does not apply if the direction is unreasonable in all the circumstances. This is a broad test that encompasses the unique nature of each employee's personal circumstances. For example, a note under the section highlights that a direction may be unreasonable depending on the impact of the direction on any caring responsibilities the employee may have.

A flexible work direction also does not apply if the employer did not give the employee written notice of their intention to give the direction at least three days before the direction was given, or a lesser notice period if agreed by the employee. This is an appropriate safeguard in light of the limited scope of flexible work directions, and continues the approach taken in the current JobKeeper flexibilities.

As noted above, to ensure appropriate coverage, the Bill contains an ability for the Minister to add or subtract awards from coverage. This can be done by regulation, which would be subject to parliamentary oversight in the form of disallowance.

42 The relevant awards are the Business Equipment Award 2020; Commercial Sales Award 2020; Fast Food Industry Award 2010; General Retail Industry Award 2020; Hospitality Industry (General) Award 2020; Meat Industry Award 2020; Nurse1y Award 2020; Pharmacy Industry Award 2020; Restaurant Industry Award 2020; Registered and Licensed Clubs Award 2020; Seafood Processing Award 2020; and the Vehicle Repair, Services and Retail Award 2020.

Concluding comments

International human rights legal advice

Rights to work and just and favourable conditions of work

2.105 The preliminary analysis noted that to the extent that the measure may have resulted in an employee's working conditions being adversely affected, the rights to work and just and favourable conditions of work may be limited. In such cases, noting that the issuing of a flexible work direction may not necessarily limit these rights in all cases, the preliminary analysis raised questions as to whether the measure was sufficiently circumscribed and whether the identified safeguards would likely have been adequate in practice.

2.106 The minister noted that extensive consideration was given during the development of this bill to options for achieving the objective of facilitating ongoing employment and supporting Australian economic growth and development in the wake of the COVID-19 pandemic, although it is noted that no alternative options were identified in the minister's response. The minister noted that the measure was designed to support a limited range of employers in award-reliant, small business dominated industries to manage the impacts of the COVID-19 pandemic. Regarding proposed section 789GZK, which provided that a flexible work direction has no effect unless the employer reasonably believes that the direction is a necessary part of a reasonable strategy to assist in the revival of the employer's enterprise, the minister stated that this provision adopted an existing test which is well understood within the industrial relations framework.[43] The minister stated that the test is appropriate as it ensured that employers could only use flexible work directions as part of a broader effort to revive their business without being overly prescriptive as to what this should look like.

2.107 With respect to safeguards, the minister noted that the measure included a minimum rate of pay guarantee that ensured no employee's base rate of pay was reduced as a result of the issuing of a direction. The minister further noted that a direction would not apply if it was unreasonable in all the circumstances. The minister stated that this broad unreasonableness test encompassed the unique nature of each employee's personal circumstances, for example, an employee's caring responsibilities. The minister further referred to the notice provisions, which would have required an employer to give an employee written notice of their intention to issue a direction at least three days before the direction is given. The minister noted that this was an appropriate safeguard in light of the limited scope of flexible work directions, and continues the approach taken in the current JobKeeper flexibilities.

43 See *Fair Work Act 2009*, section 189(3).

2.108 Regarding whether the measure was sufficiently circumscribed, while it is noted that the measure was intended to support distressed industries to manage the impacts of the COVID-19 pandemic, as noted in the preliminary analysis, the measure was not limited to those industries and may have had a broader application. However, the requirement that a flexible work direction be a necessary part of a reasonable strategy to assist in the revival of the employer's enterprise may have assisted in limiting the measure to those enterprises that needed revival, most likely due to the COVID-19 pandemic. It should be noted, however, that, unlike the existing revival test in the Fair Work Act, the test in proposed section 789GZK was more broadly framed and did not require the revival of the enterprise to be in response to a short term crisis.[44] As drafted, there would not have needed to be a causal nexus between the COVID-19 pandemic and the revival of an enterprise. A requirement that a flexible work direction be necessary to assist in the revival of the enterprise *in response to* the COVID-19 pandemic may have assisted to ensure that the measure was sufficiently circumscribed.

2.109 Regarding the existence of safeguards, as noted in the preliminary analysis, the measure contained a range of protections that may have operated as important safeguards, such as the minimum rate of pay guarantee and the requirement that directions were safe and not unreasonable in all the circumstances. With respect to the latter, the minister noted that this test was broadly framed to encompass the unique nature of each employee's personal circumstances. Without any further information as to how this test would have been interpreted and applied in practice, it is difficult to assess the strength of this safeguard. In addition, it remains unclear whether there were less rights restrictive ways of achieving the stated objective. While the minister noted that consideration was given to alternative options, these options were not set out in the response. Furthermore, it remains unclear whether the notice period of three days would have been sufficient in practice, as much would have depended on the nature of the direction and the extent of any interference with an employee's rights.

2.110 In conclusion, this measure may not have limited rights in all cases, noting that much would depend on the nature of the direction and the consequent

44 In the context of approving enterprise agreements that do not meet the better off overall test, subsection 189(3) provides that 'an example of a case in which the FWC may be satisfied of the matter referred to in subsection (2) is where the agreement is part of a reasonable strategy to deal with a short-term crisis in, and to assist in the revival of, the enterprise of an employer covered by the agreement'. In interpreting this provision, Fair Work Australia has stated '[t]he use of the conjunction "and" in s 189(3) is also relevant. The example deals with circumstances where the agreement is part of a reasonable strategy to deal with a short time crisis in, and to assist with the revival of the enterprise of an employer covered by the Agreement – ie. a revival following a short term crisis and not a revival in general terms': *Agnew Legal Pty Ltd re CLB No. 1 Pty Ltd – Enterprise agreement 2012* [2012] FWA 10861 (24 December 2012) [13].

interference with an employee's working conditions. However, in practice it appears there may have been a risk that there would be a cohort of employees for whom this measure may have had an adverse impact on their working conditions, and where this occurred, their rights to work and just and favourable conditions of work may have been limited. In these cases, in assessing proportionality it remains unclear whether the safeguards would have been sufficient in practice, whether the measure was sufficiently circumscribed and whether there were less rights restrictive ways of achieving the stated objective. However, it is noted that amendments were made by the Senate on 18 March 2021 to omit this measure from the bill.

Committee view

2.111 The committee thanks the minister for this response. The committee notes the measure would have allowed an employer to issue a flexible work direction, which may have required an employee to perform different functions and duties and work at an alternative location, including at the employee's home. The committee considers that in many instances this measure would not have limited the right to work or just and favourable conditions of work. However, the committee notes that there was some risk that there may have been a cohort of employees for whom this measure may have had an adverse impact on their working conditions and their right to freely accept or choose their work. To the extent that the measure had this effect, the committee notes that the measure may have limited the rights to work and just and favourable conditions of work, although the committee considers that the extent of any interference would have depended on how the measure was applied in practice.

2.112 Noting that amendments were made to the bill which omitted this measure from the bill, the committee makes no further comment in relation to this measure.[45]

Enterprise agreements

2.113 The bill proposed a number of measures that would have amended processes relating to the making and approval of enterprise agreements as well as the Fair Work Commission's (FWC) power to vary or revoke decisions relating to enterprise agreements and workplace determinations. These measures were subsequently omitted from the bill as a result of amendments to this bill made by the Senate on 18 March 2021.[46]

45 See *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2021, Schedule of the amendments made by the Senate* (18 March 2021).

46 See *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2021, Schedule of the amendments made by the Senate* (18 March 2021).

2.114 The bill sought to amend how the FWC may inform itself in relation to approving and varying an enterprise agreement.[47] In considering an agreement, the FWC would have been permitted to inform itself only on the basis of an exhaustive list of matters prescribed in proposed subsection 254AA(2), unless exceptional circumstances existed. The effect of the amendment would have been to limit the FWC's ability to inform itself on the basis of submissions, evidence or other information provided by or requested from persons or organisations that were not bargaining representatives, including trade unions that were not bargaining representatives.

2.115 Further, the bill would have authorised the FWC to vary or revoke decisions that dealt with enterprise agreements or workplace determinations.[48] The FWC would have been able to vary or revoke such a decision on its own initiative or on application by a person who is affected by the decision or a person prescribed in the regulations.[49] For example, the FWC could revoke or vary its decision to approve an agreement where the agreement lodged contained an error.[50]

Summary of initial assessment

Preliminary international human rights legal advice

Rights to just and favourable conditions of work and freedom of association

2.116 The rights to just and favourable conditions of work and freedom of association may be limited insofar as the ability of trade unions to intervene in applications to approve or vary agreements would be restricted, thereby limiting the right of trade unions to function freely; and the terms and conditions of agreements that were collectively bargained for may be varied or revoked by the FWC. The right to just and favourable conditions of work includes the right of all workers to adequate and fair remuneration, safe working conditions, and the right to join trade unions.[51] The right to freedom of association protects the right of all persons to group together voluntarily for a common goal and to form and join an association.[52] It explicitly guarantees everyone 'the right to form trade unions for the protection of

47 Schedule 3, Part 9, item 54, proposed section 254AA.

48 Schedule 6, item 2. Under the current law, the FWC must not vary or revoke decisions that deal with enterprise agreements or workplace determinations: *Fair Work Act 2009*, subsection 603(3)(b) and (c).

49 *Fair Work Act 2009*, subsections 603(1)–(2).

50 Explanatory memorandum, p. 89.

51 International Covenant on Economic, Social and Cultural Rights, article 7. See, UN Committee on Economic, Social and Cultural Rights, *General Comment No. 18: the right to work (article 6)* (2005) [2].

52 International Covenant on Civil and Political Rights, article 22.

[their] interests',[53] and 'the right of trade unions to function freely'.[54] The right to freedom of association includes the right to collectively bargain without unreasonable and disproportionate interference from the state.

2.117 The rights to just and favourable conditions of work and freedom of association 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. However, no limitations are permissible on the right to freedom of association if the measures taken would prejudice the guarantees of freedom of association and the right to collectively organise contained in the ILO Convention No. 87.[55]

2.118 In order to assess the compatibility of these measures with human rights further information is required as to:

(a) how often non-bargaining representatives are involved in applications to approve or vary agreements;

(b) whether the measures address an issue of public or social concern that is pressing and substantial enough to warrant limiting rights;

(c) whether the measures would likely be effective in achieving all the stated objectives; and

(d) whether consideration has been given to less rights restrictive ways of achieving the stated objectives.

Committee's initial view

2.119 By restricting the rights of trade unions that are not bargaining representatives, and allowing the FWC to vary or revoke agreements that were collectively bargained for and determine terms and conditions of employment, the measures engage and may limit the rights to just and favourable conditions of work as well as freedom of association.

2.120 The committee noted that the general objectives of preserving employment and supporting employers during the COVID-19 pandemic and recovery period may be capable of constituting legitimate objectives for the purposes of international human rights law. However, questions remain as to whether the measures address a pressing and substantial concern for the purposes of international human rights law and are rationally connected to those objectives. The committee noted that the bill contains some safeguards that may assist with the proportionality of the measures. However, further information was required to assess whether these safeguards are

53 International Covenant on Civil and Political Rights, article 22.

54 International Covenant on Economic, Social and Cultural Rights, article 8.

55 International Covenant on Civil and Political Rights, article 22(3); and International Covenant on Economic, Social and Cultural Rights, article 8(3).

likely to be sufficient and whether there are less rights restrictive ways of achieving the stated objectives, and so the committee sought the minister's advice as to the matters set out at paragraph [2.118].

2.121 The full initial analysis is set out in *Report 2 of 2021*.

Minister's response

2.122 The minister advised:

Involvement of non-bargaining representatives

It is rare for people who were not parties to an enterprise agreements to intervene in applications to approve or vary those agreements.

The Fair Work Commission (FWC) has informed the department that in the experience of senior FWC Members, 'non-parties' intervene in less than 2 per cent of matters, with the percentage being slightly higher in the construction sector.

Of the agreement-related decisions issued by the FWC in 2019-2020, only 36 refer to a party intervening in the matter. While not all decisions will explicitly refer to the involvement of a third party, this appears to further suggest that it is occasional for third parties to intervene in these matters.

How the FWC may inform itself

Issue of public or social concern

The measures in Schedule 3, Part 9 of the Bill seek to reduce delay, cost and disruption in the process of having an enterprise agreement approved by the FWC. It is one of a number of amendments in the Bill designed to remove complexity and delay associated with enterprise bargaining, a concern that is raised consistently by stakeholders and through various reviews. The amendments are designed to encourage people to make enterprise agreements.

This is an issue of pressing and substantial public and social concern because enterprise bargaining supports more productive and flexible work arrangements, higher wages and better working conditions. However, enterprise bargaining is in decline. The number of employees covered by enterprise agreements is falling, while the number of those covered by modern awards is growing. In 2018, the number of new agreements made was around half the number made in 2010. Complexity and delay in the agreement approval process are among the reasons for this decline in bargaining.

Efficacy in achieving stated objectives

The measures in Schedule 3, Part 9 of the Bill are part of a broader package of reforms in the Bill designed to arrest this decline and encourage enterprise bargaining. The measures in Part 9 alone will not reverse the decline (given they are likely to affect only a small number of

applications), however, they are likely to effectively reduce delays in those matters that the measures do affect.

Intervention by patties not involved in negotiating an agreement can cause delay, cost and disruption. It can be particularly frustrating when those not involved in bargaining make extensive claims that were already considered and dealt with by the employer and employee bargaining representatives when the agreement was being negotiated.

The Bill amends the Fair Work Act to ensure the FWC focuses on the views and evidence of those directly involved with, and affected by, the agreement. The Bill is also clear that the FWC may still inform itself in other ways in 'exceptional circumstances', including by accepting submissions from third parties where concerns are raised about the human rights implications of an agreement, or if an agreement would have a significant impact on the economy or the health and wellbeing of the population or a part of it.

Alternative ways to achieve objectives

Consideration was given to a number of ways of encouraging enterprise bargaining. Concerning the specific question of how the FWC may inform itself, the measures in Schedule 3, Part 9 of the Bill are modest and place very few restrictions on how the FWC may inform itself.

The Bill is clear that the FWC may hear from the parties involved in bargaining, which will include employers, employees, and any bargaining representatives for the agreement, including trade unions. The FWC will also be able to hear from other parties not involved in bargaining in ' exceptional circumstances'.

Some stakeholders have suggested in fact that the FWC need not, under any circumstances, hear from people who were not involved in negotiating an agreement. However, the Bill recognises that there will be circumstances in which the intervention of these parties will be justified.

Varying or revoking agreements

Issue of public or social concern

The FWC does not have the power to vary or revoke its decisions concerning enterprise agreements and workplace determinations. These types of decisions are excluded from the FWC's general power to vary or revoke the decisions it makes under the Act (see s 603).

This means that, where a minor error has been made in a decision, rather than simply correct the error, the decision must be appealed to the Full Bench of the Commission, which will then either make a new decision, or remit the matter to be decided afresh. Naturally, this can cause frustration and delays for the parties.

Delay and complexity in making and approving agreements is one of the reasons fewer enterprise agreements are being made. Given the benefits of enterprise bargaining to both employees and employers, this decline is

of real public concern. The measure in Schedule 6, item 2 of the Bill will help address this concern.

Efficacy in achieving stated objectives

The measure in Schedule 6, item 2 of the Bill is one of a number of measures designed to make enterprise bargaining simpler and more attractive by removing technical obstacles and complexity. This particular measure will allow the FWC to correct minor errors in the decisions they make, and so make the agreement approval process more efficient.

Alternative ways to achieve objectives

This measure no more restricts rights than the FWC's ability to approve, or decide not to approve, agreements, based on the statutory criteria. This power would not be exercised in a rights restrictive manner, as the FWC would be required to exercise it in a manner that is fair and just; quick, informal and avoids unnecessary technicality; open and transparent; and promotes harmonious and cooperative workplace relations. When exercising this power, the FWC must also take into account the objects of the Act and of Part 2-4, and the need for equity, good conscience, and the merits of the matter.

Concluding comments

International human rights legal advice

Rights to just and favourable conditions of work and freedom of association

Restricting the intervention of non-bargaining representatives

2.123 Regarding the objective being pursued, the minister stated that the measure sought to reduce delay, cost and disruption in the process of having an enterprise agreement approved by the FWC. The minister stated that the measure, alongside other proposed amendments, was designed to remove complexity and delay associated with enterprise bargaining and encourage people to make enterprise agreements. The minister explained that this is an issue of pressing and substantial public and social concern because enterprise bargaining supports more productive and flexible work arrangements, higher wages and better working conditions. The minister stated that complexity and delay in the agreement approval process are among the reasons for the decline in enterprise bargaining. Regarding the frequency of intervention by non-bargaining representatives, the minister stated that it is rare for people who are not parties to an enterprise agreement to intervene in applications to approve or vary those agreements. The FWC informed the minister that 'non-parties' intervene in less than two per cent of matters, with the percentage being slightly higher in the construction sector. The minister further noted that of the agreement-related decisions issued by the FWC in 2019–2020, only 36 decisions refer to a party intervening in the matter. The minister acknowledged that while not all decisions will explicitly refer to the involvement of a third party, this statistic suggests that it is occasional for third parties to intervene in these matters.

2.124 While the general objective of encouraging enterprise agreement making may be capable of constituting a legitimate objective, noting that collective agreements can be effective in securing just and favourable conditions of work, it is not clear that the objective of reducing complexity and delay in agreement approval processes is necessarily a legitimate objective for the purposes of international human rights law. A legitimate objective is one that is necessary and addresses an issue of public or social concern that is pressing and substantial enough to warrant limiting the right. It is not sufficient, therefore, that a measure simply seeks an outcome regarded as desirable or convenient. Administrative convenience, in and of itself, is unlikely to be sufficient to constitute a legitimate objective for the purposes of international human rights law. The minister's response suggests that the measure primarily pursued an outcome that is desirable or convenient, insofar as it sought to improve the efficiency and expediency of agreement approval processes. Given the advice that it is rare for non-bargaining representatives to intervene in agreement approval proceedings, it is not evident that restricting the intervention of non-bargaining representatives is necessary or addresses a pressing social or public concern. As such, it does not appear that the stated objective with respect to this measure would have been legitimate for the purposes of international human rights law insofar as it does not appear to address an issue of public or social concern that is pressing and substantial enough to warrant limiting the rights.

2.125 Under international human rights law, it must also be demonstrated that any limitation on a right has a rational connection to the objective sought to be achieved. Further information was sought from the minister as to whether this measure would be likely to be effective in achieving the objective being sought. The minister stated that this measure was designed to arrest the decline in, and encourage, enterprise bargaining. While the minister acknowledged that this measure alone would not reverse the decline—given that the measure would be likely to affect only a small number of applications—the minister stated that the measure would be likely to effectively reduce delays in those matters that the measure would affect. Where intervention by non-bargaining representatives occurs, the minister stated that such intervention can cause delay, cost and disruption. The minister also noted that the measure sought to ensure that the FWC focuses on the views and evidence of those directly involved with, and affected by, the agreement.

2.126 The preliminary analysis noted that restricting third parties may be rationally connected to the objective of reducing delays in agreement approval processes insofar as it would reduce the number of parties involved in proceedings and the number of submissions made to the FWC. However, given that third party intervention is extremely rare and the vast majority of agreement approval proceedings do not involve non-bargaining representatives, it is not evident that restricting third party intervention in less than two per cent of matters would have been effective to achieve the general objectives of reducing delay, cost and disruption in agreement approval processes as well as reversing the decline in, and encouraging, enterprise bargaining.

2.127 As regards proportionality, it is necessary to consider whether a proposed limitation is accompanied by sufficient safeguards and whether any less rights restrictive alternatives could achieve the same stated objective. The minister stated that the FWC can accept submissions from third parties in exceptional circumstances, such as where concerns are raised about the human rights implications of an agreement, or if the agreement would have a significant impact on the economy or the health and wellbeing of part of the population. Regarding alternative ways to achieve the objectives, the minister noted that consideration was given to a number of ways of encouraging enterprise bargaining, although did not specify these alternatives. The minister stated that the proposed amendments were modest and placed very few restrictions on how the FWC may inform itself, noting that the FWC may hear from employees and bargaining representatives, including trade unions, as well as non-bargaining representatives in exceptional circumstances.

2.128 As noted in the preliminary analysis, while the measure provided for some difference of treatment in 'exceptional circumstances', which may operate as a safeguard, this threshold would appear a high bar to reach. As such, it is not clear that this safeguard alone would have been sufficient in all circumstances. It is also not clear that this measure would have been the least rights restrictive way of achieving the stated objectives.

2.129 In conclusion, there appears to be a risk that the measure would have impermissibly limited the right of freedom of association, including the right of trade unions to function freely, insofar as the measure did not appear to be necessary or address a public or social concern that is pressing and substantial enough to warrant limiting rights; it is not evident that the measure would likely have been effective to achieve the stated objectives; and the measure may not have been accompanied by sufficient safeguards or been the least rights restrictive way of achieving the stated objectives. However, it is noted that amendments were made by the Senate on 18 March 2021 to omit this measure from the bill.

FWC's power to vary or revoke decisions

2.130 Regarding the objective being pursued, the minister stated that this measure sought to address the public concern of a decline in enterprise bargaining by reducing delay and complexity in making and approving agreements. The current law does not permit the FWC to vary or revoke decisions concerning enterprise agreements and workplace determinations. The minister explained that under the current law, where a minor error has been made in a decision, rather than simply correcting the error, the decision must be appealed to the Full Bench of the FWC to either make a new decision or remit the matter to be decided afresh. This process can cause frustration and delay for parties. As to efficacy in achieving the stated objectives, the minister noted that this measure, alongside other amendments, was designed to make enterprise bargaining simpler and more attractive by removing technical obstacles and complexity. The minister stated that it would allow the FWC

to correct minor errors in decisions and so make the agreement approval process more efficient.

2.131 The objective of encouraging enterprise bargaining would be capable of constituting a legitimate objective. To the extent that the power to vary or revoke decisions would have been exercised in the manner outlined by the minister, namely, to correct minor errors as opposed to altering the terms and conditions of agreements that were collectively bargained for, the measure would appear to be rationally connected to this objective. In this regard, the power to correct minor errors, and thereby reduce technical obstacles and improve the efficiency and simplicity of enterprise bargaining processes, may be effective to achieve the stated objective. As regards proportionality, the preliminary analysis noted that the requirement for the FWC to exercise its powers in accordance with the Fair Work Act may operate as a safeguard, noting that the objects of the Act expressly recognise the right to freedom of association and collective bargaining and promote fair, relevant and enforceable minimum terms and conditions of employment.[56] A further consideration is the extent of any interference with human rights. If the FWC only exercised its discretion to correct minor errors, as indicated by the minister, it appears that the potential interference with rights would have been minimal. On this basis, it appears that the measure may have been a permissible limitation on rights. It is noted that amendments were made by the Senate on 18 March 2021 to omit this measure from the bill.

Committee view

2.132 The committee thanks the minister for this response. The committee notes that the measure sought to amend the Fair Work Act to restrict intervention of non-bargaining representatives in applications to approve or vary agreements; and expand the FWC's power to vary or revoke decisions relating to enterprise agreements and workplace determinations. To the extent that these measures would have had the effect of restricting the rights of trade unions that are not bargaining representatives and allowing the FWC to vary or revoke agreements that were collectively bargained for and determine terms and conditions of employment, the measures engaged and may have limited the rights to just and favourable conditions of work as well as freedom of association. The committee

56 *Fair Work Act 2009*, section 3. Section 577 of the *Fair Work Act 2009* provides that the FWC must perform its functions and exercise its powers in a manner that: is fair and just; quick, informal and avoids unnecessary technicalities; is open and transparent; and promotes harmonious and cooperative workplace relations. Section 578 of the *Fair Work Act 2009* specifies matters that the FWC must take into account in performing its functions or exercising powers, including: the objects of the Act; equity, good conscience and the merits of the matter; and the need to respect and value the diversity of the work force by helping to prevent and eliminate discrimination on the basis of various protected attributes.

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

2.133 Noting that amendments were made to the bill which omitted these measures from the bill, the committee makes no further comment in relation to these measures.[57]

Extending the nominal expiry of greenfields agreements

2.134 A greenfields agreement is an enterprise agreement relating to a genuinely new enterprise which is made at a time when the employer has not yet employed any workers for the business. Currently, such an agreement expires four years after it is made. The bill sought to double the maximum nominal expiry date from four years to eight years for greenfields agreements made in relation to construction of major projects, such as new mining ventures.[58] If satisfied that the nominal expiry date should have been extended beyond four years, the FWC must also have been satisfied that the agreement included a term that provided for at least an annual increase of the base rate of pay payable to each employee who will be covered by the agreement.[59] This measure was subsequently omitted from the bill as a result of amendments to this bill made by the Senate on 18 March 2021.[60]

Summary of initial assessment

Preliminary international human rights legal advice

Rights to just and favourable conditions of work and freedom of association

2.135 To the extent that the measure requires greenfields agreements that have a nominal expiry date of more than four years to include a term that provides for at least an annual wage increase for employees covered by the agreement, the measure may engage and promote the right to just and favourable conditions of work. The right to just and favourable conditions of work includes the right of all workers to adequate and fair remuneration, and decent work providing an income that allows the worker to support themselves and their family.[61] The statement of compatibility states that the measure promotes this right by ensuring that

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57 See *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2021, Schedule of the amendments made by the Senate* (18 March 2021).

58 Schedule 4, item 3, substituted subsection 186(5)(b). Explanatory memorandum, p. 60.

59 Schedule 4, item 4, proposed subsection 187(7).

60 See *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2021, Schedule of the amendments made by the Senate* (18 March 2021).

61 International Covenant on Economic, Social and Cultural Rights, article 7. See, UN Committee on Economic, Social and Cultural Rights, *General Comment No. 18: the right to work (article 6)* (2005) [2].

employees receive annual pay increases.[62] While requiring annual wage increases may promote the right to fair remuneration, it is unclear whether other conditions of work would also be promoted by this measure. This is because the effect of the measure would be to extend the timing for renegotiating a new enterprise agreement and this may limit the ability of employees to bargain for more favourable conditions of work, noting that the employees were not employed at the time the enterprise agreement was entered into.

2.136 In addition, section 417 of the Fair Work Act currently prohibits employees or employee organisations organising or engaging in industrial action before the nominal expiry date of an enterprise agreement.[63] Thus, by extending the nominal expiry date of greenfields agreements, employees covered by that agreement would be prohibited from organising or engaging in industrial action for up to eight years, which engages and limits the rights to strike and freedom of association. 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 the International Covenant on Economic, Social and Cultural Rights. The UN Committee on Economic, Social and Cultural Rights has noted that the right to 'freedom of association and the right to strike are crucial means of introducing, maintaining and defending just and favourable conditions of work'.[64] The existing restrictions on taking industrial action under Australian domestic law have been consistently found by international supervisory mechanisms to go beyond what is permissible under international law.[65]

62 Statement of compatibility, p. cx.

63 See *Fair Work Act 2009*, sections 417–421.

64 UN Committee on Economic, Social and Cultural Rights, *General Comment No. 23: on the right to just and favourable conditions of work* (2016) [1].

65 UN Committee on Economic Social and Cultural Rights, *Concluding Observations on Australia*, E/C.12/AUS/CO/5 (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, UN Committee on Economic Social and Cultural Rights, *Concluding Observations on Australia*, E/C.12/AUS/CO/4 (2009) 5; *Observation Concerning Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) - Australia*, ILO Committee of Experts on the Adoption of Conventions and Recommendations (CEACR), adopted 2013,published 103rd ILC session (2014); *Observation Concerning Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) – Australia,* ILO CEACR, adopted 2011, published 101st ILC session (2012); *Observation Concerning Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) – Australia*, ILO CEACR, adopted 2009, published 99th ILC session (2010*); Observation Concerning the Right to Organise and Collective Bargain Convention, 1949, (No.98) – Australia*, ILO CEACR, adopted 2009, published 99th ILC session (2010).

2.137 The right to strike is not absolute and may be limited in certain circumstances. Generally, to be capable of justifying a limitation on human rights, the measure must address a legitimate objective, be rationally connected to that objective and be a proportionate way to achieve that objective. Further, article 8 of the International Covenant on Economic, Social and Cultural Rights expressly provides 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.

2.138 In order to assess the compatibility of this measure with human rights further information is required as to:

(a) evidence as to why the existing nominal expiry date of greenfields agreements is insufficient to achieve the stated objectives, including how many agreements have expired before the construction of a major project has been completed;

(b) why is it necessary to double the nominal expiry date of greenfields agreements, rather than choose a shorter extension;

(c) whether there are any other safeguards to ensure the limitation is proportionate; and

(d) whether consideration has been given to less rights restrictive ways of achieving the stated objectives.

Committee's initial view

2.139 To the extent that the measure would provide for an annual wage increase for employees covered by a greenfields agreement, the measure may promote the right to just and favourable conditions of work. However, insofar as the measure has the effect of extending the existing limit on the right to strike, the measure may also engage and limit the right to freedom of association.

2.140 The committee noted that attracting investment in major projects to promote employment opportunities may be capable of constituting a legitimate objective for the purposes of international human rights law. However, the committee noted that questions remained as to whether the measure addresses a pressing and substantial concern and is rationally connected to those objectives. As regards proportionality, the committee noted that further information was required to assess whether there are sufficient safeguards and less rights restrictive ways of achieving the stated objective, and as such the committee sought the minister's advice as to the matters set out at paragraph [2.138].

2.141 The full initial analysis is set out in *Report 2 of 2021*.

Minister's response

Insufficiency of existing measures

A key part of Australia's recovery from the economic impact of COVID-19 will entail attracting investment in major projects, which create thousands of jobs, inject money into local economies, and make large contributions to Gross Domestic Product. In a competitive global market for capital, Australia must have appropriate regulatory settings to attract investment and create jobs.

At a global level, Australia's industrial relations arrangements ranked towards the most complex and in the bottom half of countries in the World Economic Forum's Global Competitiveness Report 2019. In this report, Australia ranked 57th in labour market flexibility, 95th in flexibility of wage determination and 53rd in cooperation between employers and employees out of 141 countries surveyed. A key concern raised with Government in the context of attracting investment for major projects is the current 4 year limitation on the term of greenfields agreements, which means that agreements can nominally expire pa1t way through the construction of a major project.

The risk of exposure to renegotiating wages and other conditions - including the consequent possibility of protected industrial action and protracted bargaining - during the critical build of a project, has created a perception of cost and timing uncertainty, affecting the ability of projects to attract investment. For example in the 2020 tripartite working group process that informed the development of the Bill, the government heard evidence that industrial relations and the risk of mid-construction delay or cost blow outs is a factor that weighs against investing in Australian vs other countries.

Similarly in consultation undertaken in 2019 via the public release of a discussion paper on longer greenfields agreements, submissions from employer groups argued that Australia would be a more attractive place to invest if greenfields agreements for major projects had a nominal duration that covered the length of the construction of a project, so that ce1tainty of labour arrangements - and ultimately of the length and cost of the project overall – could be guaranteed. For example:

- The Australian Chamber of Commerce and Industry, wrote in its submission,"[a]ny agreement with a life less than the expected duration of the construction of a particular project exposes the business to substantial risks, and risks the negative implications for investment, job creation and the community".[66]

66 Australian Chamber of Commerce and Industry "Submission to Greenfields Discussion Paper" 2019.

- Similarly, AMMA (Australian Resources and Energy Group) noted in its submission that it "has long contended that uncompetitive aspects of Australia's approach to industrial relations under the FW Act has been a significant contributing factor to a loss of investment attractiveness in the nation's resources and energy industry".[67]

The Attorney-General's Department's submission to the Senate Committee Inquiry into the provisions for the Bill listed examples of projects expected to take more than 4 years to construct.[68] This analysis is further supported by data from the Deloitte Access Economics Investment Monitor (June 2020), which indicates that 27 per cent of projects categorised as 'under construction' and 'committed' are projected to take 5 or more years to construct (see the below table).

Some of these major projects can be covered by dozens or even hundreds of greenfields agreements. While not all employers on major projects will use extended term greenfields agreements, a significant amount of contractors and subcontractors on major projects will benefit from the reform.

Number of years under construction	**No. of projects**	**Percentage**
1	3	2%
2	23	16%
3	40	27%
4	27	18%
5	14	10%
6	13	9%
7	3	2%
8	11	7%
9	3	2%
10+	10	7%

Necessity of the measures

The Bill ensures that patties retain the power to negotiate a greenfields agreement that best meets the circumstances of that particular project. The maximum 8 year nominal expiry date for greenfields agreements

67 AMMA (Australian Resources and Energy Group) "Submission to Greenfields Discussion Paper" 2019.

68 Attorney General's Department Submission to the Senate Education and Employment Legislation Committee 2021, pp 27-28.

under these provisions has been chosen to give employers and unions negotiating these agreements the ability to agree wages and conditions covering the full construction period of most major projects. It must be emphasised that agreements can be made for up to 8 years, they are not mandated to be 8 years.

Deloitte Investment Monitor data from June 2020 also shows that 92% of current major projects either under construction or under consideration (i.e. a decision to proceed has been announced but construction has not yet started), worth more than $250 million, will be eligible to make one greenfields agreement covering the entire length of the project's construction.

Safeguards in the measures

The Bill has a number of safeguards to ensure the appropriate use of extended term greenfields agreements.

Greenfields agreements with a nominal expiry date of more than 4 years can only be made in relation to projects that meet minimum capital value thresholds specified in the Bill. The thresholds are:

- at least $500 million; or
- between $250 million and $500 million if declared a major project by the relevant Minister.

The agreement must relate to the construction of a major project and the agreement must contain annual wage increases for the nominal life of the agreement. Unions will continue to be the default bargaining representative for every greenfields agreement.

The depa1iment expects that in most cases the nominal expiry date of the greenfields agreement will closely align with the projected length of construction. Additionally the FWC will only be able to approve an extended term greenfields agreement that includes a nominal expiry date of more than four years from the date of approval if it is satisfied that the work to be performed under the agreement relates only to the construction of a major project. This means that, while longer term agreements can also cover ancillary work, they will not be able to cover work performed after construction is completed.

Alternative ways to achieve objectives

Extending the term of greenfields agreements to better cover the construction period of major projects has been raised previously by stakeholders, including by the Productivity Commission. The Productivity Commission's Inquiry Report into the Workplace Relations Framework (2015) noted the significant risks associated with greenfields agreements that have a nominal expiry date that occurs earlier than the expected completion date of the project. It stated that, "where an employer can demonstrate that a project will take longer than five years to complete the construction, there are clear grounds for the FWC to approve greenfields

agreements with an expiry date that matches the construction of a major project. This proposal was supported by numerous employer participants."[69]

Allowing the nominal expiry date of a greenfields agreement to fully match the construction life of a major project could see some agreements lasting for very long periods. Deloitte Access Economics Investment Monitor data indicates that 16 per cent of projects valued over $250 million currently under construction or committed are expected to take 8 or more years or more to construct. Seven per cent of the same projects will take 10 or more years to construct.[70] The Government, considers, however, that the model presented in the Bill, which includes the ability to negotiate a greenfields agreement with a nominal term of up to 8 years, strikes the right balance between flexibility and the interests of employers, employees and employee representatives.

The amendments are further reasonable, necessary and proportionate achieving the legitimate objectives of encouraging investment to promote conditions for productive and increased employment and the realisation of the right to work. Changes to the model, including for example increasing the monetary threshold, has the potential to limit the effectiveness of the reform. According to Deloitte Access Economics September 2020 data, a $5 billion threshold for example, would only capture 7% of projects.

Concluding comments

International human rights legal advice

Rights to just and favourable conditions of work and freedom of association

2.142 In assessing whether the measure sought to pursue a legitimate objective, further information was sought as to the sufficiency of existing laws and the likelihood that agreements may expire during the construction of a major project. In relation to attracting investment, the minister stated that Australia's industrial relations arrangements ranked towards the most complex and in the bottom half of countries in the World Economic Forum's Global Competitiveness Report 2019. The minister noted a key concern in the context of attracting investment is the current nominal expiry date of greenfields agreements, because agreements can expire part-way through the construction of a major project. The minister explained that the risk of this occurring has created a perception of cost and timing uncertainty, affecting the ability of projects to attract investment. The minister advised that 37 per cent of major projects are under construction for more than four years, meaning that while not all employers would use extended greenfields agreements, a significant number would benefit from the reform. The minister stated that the measure was therefore

69 Productivity Commission 2015, *Workplace Relations Framework,* Final Report, Canberra, p 690.

70 Deloitte Access Economics Investment Monitor project pipeline data, June 2020.

necessary to give employers and unions negotiating these agreements the ability to agree wages and conditions covering the full construction period, potentially up to eight years.

2.143 Attracting investment in major projects to promote employment opportunities may be capable of constituting a legitimate objective for the purposes of international human rights law, and it would appear that the measure was rationally connected to this objective insofar as it sought to address this risk by reducing cost and timing uncertainty.

2.144 As regards proportionality, the minister stated that the bill contained a number of safeguards to ensure that extended term greenfields agreements were used appropriately, including: limits on the type of major projects it applies to; mandated annual wage increases; and unions as the default bargaining representatives. The minister also noted that it was expected that in most cases, the nominal expiry date of the agreement would closely align with the projected length of construction. Where this occurred, it may have ensured that the extent of any interference with rights was not greater than was strictly necessary.

2.145 Some of the safeguards identified by the minister may have assisted with the proportionality of the measure. In particular, providing for annual wage increases may have safeguarded the right to just and favourable conditions of work and involving trade unions as the default bargaining representative may have safeguard the right to freedom of association. However, these protections do not appear to operate as a safeguard with respect to the right to strike. They would also seem to have limited safeguard value where negotiations are ineffective and employees are of the view that taking particular forms of industrial action, including unprotected industrial action, may be a necessary means of 'introducing, maintaining and defending just and favourable conditions of work'.[71] In addition, where a greenfields agreement is made without the consent or agreement of an employee organisation, the involvement of trade unions may not necessarily be effective in safeguarding the rights and interests of employees. Section 182(4) of the Fair Work Act provides that notwithstanding that the employee organisation has not agreed to a greenfields agreement, an agreement is taken to have been made between an employer and

71 UN Committee on Economic, Social and Cultural Rights, *General Comment No. 23: on the right to just and favourable conditions of work* (2016) [1]. The ILO Committee on Freedom of Association has held that, at a minimum, where 'strikes are prohibited while a collective agreement is in force, this restriction must be compensated for by the right to have recourse to impartial and rapid mechanism, within which individual or collective complaints about the interpretation or application of collective agreements can be examined: International Labour Office, *Freedom of Association: Compilation of decisions of the Committee of Freedom of Association* (6th ed, 2018) [768].

employee organisation where certain criteria are met.[72] In these circumstances, there would be a risk that employees could have been subject to an agreement that governs the terms and conditions of their employment for a period of up to eight years, without their consent or the consent of a representative trade union.

2.146 In conclusion, while the measure appears to have pursued a legitimate objective and been rationally connected to that objective, there remain serious concerns that the proposed safeguards would have been insufficient to ensure that the measure constituted a proportionate limitation on the right to strike. The measure may have substantially interfered with the right to strike and the associated right to just and favourable conditions of work, as it would have doubled the nominal expiry date of greenfields agreements, thereby prohibiting employees from exercising their right to strike for up to eight years. As such, there was a significant risk that the measure would have impermissibly limited the right to freedom of association. However, it is noted that amendments were made by the Senate on 18 March 2021 to omit this measure from the bill.

Committee view

2.147 The committee thanks the minister for this response. The committee notes that the measure sought to extend the nominal expiry date of greenfields agreements relating to the construction of a major project from four years to eight years. To the extent that the measure provided for an annual wage increase for employees covered by a greenfields agreement, the measure may have promoted the right to just and favourable conditions of work. However, insofar as the measure would have had the effect of extending the existing limit on the right to strike, the measure may also have engaged and limited the right to freedom of association. The committee notes that this right may be subject to permissible limitations if they are shown to be reasonable, necessary and proportionate.

2.148 Noting that amendments were made to the bill which omitted these measures from the bill, the committee makes no further comment in relation to these measures.[73]

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72 *Fair Work Act 2009,* section 182(4): The agreement is taken to have been made if there has been a notified negotiation period for the agreement; that period has ended; the employer gave each employee organisation that was a bargaining representative a reasonable opportunity to sign the agreement; and the employer applied to the FWC for approval of the agreement.

73 See *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2021, Schedule of the amendments made by the Senate* (18 March 2021).

Fair Work Commission appeal or review without a hearing

2.149 The bill would have enabled the FWC to hear an appeal without a hearing where the FWC considers that a matter could be adequately determined without oral evidence and submissions, provided it has taken into account the view of the persons who would otherwise make submissions as to whether the appeal should be heard on that basis.[74] The Fair Work Act currently provides that an appeal may be conducted without holding a hearing only with the consent of the person who would otherwise be making oral or written submissions for consideration.[75] This measure was subsequently omitted from the bill as a result of amendments to this bill made by the Senate on 18 March 2021.[76]

Summary of initial assessment

Preliminary international human rights legal advice

Right to a fair hearing

2.150 In providing for an appeals process which may deny an individual the ability to have a hearing involving oral evidence and submissions, this measure engages and may limit the right to a fair hearing. The right to a fair hearing provides 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. In order to constitute a fair hearing, the hearing must be conducted by an independent and impartial court or tribunal, before which all parties are equal, and have a reasonable opportunity to present their case.[77] Ordinarily, the hearing must be held in public, but in certain circumstances, a fair hearing may be conducted in private. The right to a fair hearing 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.

2.151 In order to assess the compatibility of this measure with the right to a fair hearing, further information is required as to:

(a) why the existing legislative requirement that an affected person must consent to an appeal from, or review of, a decision without a hearing requires amendment;

74 Schedule 6, item 3, substituted subsection 607(1)(b). See also *Fair Work Act 209*, subsection 607(1)(a).

75 *Fair Work Act 209*, subsection 607(1)(b).

76 See *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2021, Schedule of the amendments made by the Senate* (18 March 2021).

77 See UN Human Rights Committee, *General Comment 32: Article 14, Right to Equality before Courts and Tribunals and to Fair Trial* (2007) [18].

(b) whether (and to what extent) appeals from, or reviews of, a decision of the FWC, as provided for under section 607 of the Fair Work Act, involve determinations involving questions of fact; and

(c) what opportunity there is for a public hearing in relation to the initial decision and whether all relevant documents relating to the initial decision and the appeal (including the final decision) will be made public.

Committee's initial view

2.152 The committee noted that this measure engages and may limit the right to a fair hearing and considered that it was not clear whether this proposed amendment would unduly limit the right of an individual to a public hearing in the determination of their rights in a suit at law, and as such sought the minister's advice as to the matters set out at paragraph [2.151].

2.153 The full initial analysis is set out in *Report 2 of 2021*.

Minister's response

2.154 The minister advised:

> The Committee sought additional information to inform its view of the human rights implications of the proposed amendment to s 607(1), which would enable the FWC to conduct an appeal or review without a hearing, provided it takes into account the views of persons making submissions in the matter as to whether this is appropriate (removing the requirement for parties' consent to dispense with an oral hearing). The Committee is concerned this may limit the right to a fair hearing.
>
> *Necessity of the measures*
>
> This amendment was sought by the President of the FWC, the Hon Justice Iain Ross AO. The President considers the current requirement for the parties' consent unduly restrictive, as it prevents the FWC from dealing with appeals in the most appropriate way, with consequent delays and increased costs to parties. Proposed news 607(1)(b) addresses this inflexibility.
>
> *Hearings and determinations of fact*
>
> The FWC is generally not required to hold a hearing except as required by the Act (s 593), but is of course bound by the requirements of procedural fairness. However, the obligation to afford procedural fairness (and specifically, an opportunity to be heard) does not necessarily require an oral hearing: *Minister for Immigration and Border Protection v WZARH* [2015] HCA 40 at [33], [63]. Whether an oral hearing (as distinct from an opportunity to provide written submissions) is required depends on the circumstances.

Generally, an oral hearing is required (for example) where disputed facts need to be resolved or there is otherwise evidence of a kind that needs to be able to be tested.

The amendment to s 607(1) relates to appeals against and reviews of FWC decisions under ss 604 and 605 of the Act. By way of background, an appeal or review requires the Full Bench to decide if error in the original decision should be corrected. Consistent with the High Court's decision in *Coal & Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 203 CLR 194, an appeal to the Full Bench involves an appeal by way of rehearing rather than a hearing de novo, and appeal powers may only be exercised if the Full Bench identifies error at first instance.

Unlike first instance proceedings in which oral hearings may be needed in the context of contested evidence, on appeal or review such questions may not arise for consideration by a Full Bench of the FWC. However, in an appeal or review the FWC can admit further evidence (s 607(2)). The FWC's Practice Note 1/2013 - Appeal Proceedings (last republished 29 November 2018 and available at https://www.fwc.gov.au/resources/practice-notes/appeal-proceedings) says the Full Bench will normally deal with an appeal on the basis of evidence in the first instance proceedings, but it may admit further evidence (in accordance with settled legal principle) if:

- it could not have been obtained with reasonable diligence for use at the proceedings at first instance;
- there is a high degree of probability that it would lead to a different decision; and
- it is credible.

In circumstances where further evidence is admitted, procedural fairness may necessitate an oral hearing. The FWC is expected to exercise its new discretion in light of the requirements of procedural fairness in particular cases, having appropriate regard to the parties' views.

So far as the conduct of first instance proceedings is concerned, the FWC's Practice Note 2/2013 - Fair Hearings (last republished 22 March 2019 and available at: https://www.fwc.gov.au/documents/documents/practicenotes/pn2013-2fairhearings.pdf) observes that the FWC is obliged to perform its functions and exercise its powers in a manner that is fair, just and quick. Where facts are contested, the FWC will determine the question on the balance of probabilities, and may inform itself as it considers appropriate, including by inviting parties to make oral and/or written submissions, conducting a conference or holding a hearing (consistent with ss 590-593 of the Act).

Decisions of the FWC (including on appeal or review) must generally be in writing and most must be published (s 601). The FWC publishes transcripts of its proceedings at https://www.fwc.gov.au/cases-decisions-orders/transcripts/2020-transcripts.

Concluding comments

International human rights legal advice

Right to a fair hearing

2.155 The minister advised that this measure was sought by the President of the FWC. The President considered the current requirement for the parties' consent to be unduly restrictive because it prevents the FWC from dealing with appeals in the most appropriate way, with consequent delays and increased costs to parties. The minister stated that the measure sought to address the inflexibility in the current law. As to the necessity of oral hearings, the minister stated that the obligation to afford procedural fairness does not necessarily require an oral hearing and much would depend on the circumstances of each case. Where disputed facts need to be resolved or new evidence admitted, the minister stated that an oral hearing would generally be required. As regards this measure, which would have applied to appeals from, and reviews of, FWC decisions, the minister advised that, in accordance with Practice Note 1/2013, the Full Bench would normally deal with an appeal on the basis of evidence admitted in the first instance proceedings, but may admit further evidence in certain circumstances.[78] Where further evidence is admitted, the minister stated that procedural fairness may necessitate an oral hearing. The minister noted that it was expected that the FWC would exercise its discretion as to whether to hear an appeal without a hearing in light of procedural fairness requirements and the parties' views. The minister further noted that all FWC decisions must generally be in writing and published.

2.156 The minister's response suggests that where an appeal or review involves the admission of further evidence and the resolution of questions of fact, procedural fairness requirements may necessitate an oral hearing. If the discretion to hear an appeal without a hearing was exercised by the FWC in the manner outlined by the minister, it does not appear that the right to a fair hearing would necessarily have been limited, insofar as parties would have had a reasonable opportunity to present their case in an oral hearing where procedural fairness required this. As such, this measure does not appear to limit the right to a fair hearing. It is noted that amendments were made by the Senate on 18 March 2021 to omit this measure from the bill.

78 See Fair Work Commission, *Practice Note 1/2013: Appeal Proceedings* (29 November 2018) [38]–[40].

Committee view

2.157 The committee thanks the minister for this response. The committee notes that the measure would have enabled the Fair Work Commission (FWC) to hear an appeal without a hearing where the FWC considers a matter can be adequately determined without oral evidence and submissions, provided it has taken into account the view of the persons who would otherwise make submissions as to whether the appeal should be heard on that basis.

2.158 Noting that amendments were made to the bill which omitted these measures from the bill, the committee makes no further comment in relation to these measures.[79]

Dr Anne Webster MP

Chair

79 See *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2021, Schedule of the amendments made by the Senate* (18 March 2021).