Ministerial responses — Report 4 of 2021[1]

1 This can be cited as: Parliamentary Joint Committee on Human Rights, Ministerial responses, *Report 4 of 2021*; [2021] AUPJCHR 42.

The Hon Greg Hunt MP
Minister for Health and Aged Care

Ref No: MC21-003281

Senator the Hon Sarah Henderson
Chair
Joint Parliamentary Committee on Human Rights
human.rights@aph.gov.au

14 MAR 2021

Dear Chair Sarah

I refer to your correspondence of 4 February 2021 concerning the *Australian Immunisation Register Amendment (Reporting) Act 2021* (Reporting Act), formally known as the Australian Immunisation Register Amendment (Reporting) Bill 2020.

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 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.

Thank you for writing on this matter.

Yours sincerely

Greg Hunt

The Hon David Littleproud MP

Minister for Agriculture, Drought and Emergency Management
Deputy Leader of the Nationals
Federal Member for Maranoa

Ref: MS21-000377

Dr Anne Webster
Parliamentary Joint Committee on Human Rights

10 MAR 2021

Via email: Human.Rights@aph.gov.au

Dear Senator Webster

Thank you for your correspondence of 25 February 2021 concerning the *Human rights scrutiny report – Report 2 of 2021* regarding the Biosecurity Amendment (Strengthening Penalties) Bill 2021 (Bill). I appreciate the time you have taken to bring this matter to my attention.

I understand the Committee requested advice as to:

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.

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 non-compliance.

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.

Parliament House, Canberra ACT 2600 Telephone: 02 6277 7190 Email: Minister.Littleproud@awe.gov.au

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 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.

Thank you for bringing the Parliamentary Joint Committee on Human Rights' query to my attention.

Yours sincerely

DAVID LITTLEPROUD MP

The Hon Stuart Robert MP
Minister for the National Disability Insurance Scheme
Minister for Government Services

Ref: MS21-000318

Dr Anne Webster MP
Chair
Parliamentary Joint Committee on Human Rights
Parliament House
CANBERRA ACT 2600

Dear Dr Webster

I write in response to the Parliamentary Joint Committee on Human Rights' (the Committee's) observations on the Data Availability and Transparency Bill 2020 (the Bill) in *Report 2 of 2021*.

To support the Committee's assessment of the human rights implications of the Bill, I provide the following advice on matters requested by the Committee at paragraph 1.34 of the Report.

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.[1] 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.[2] 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.[3] 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.

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

[1] Department of the Prime Minister and Cabinet, The Australian Government's response to the Productivity Commission Data Availability and Use Inquiry (2018) p. 11.
[2] Clause 3.
[3] See further Royal Commission into National Natural Disaster Arrangements, Interim observations, 31 August 2020.

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).[4] 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.[5] 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 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.[6] 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

[4] Subclause 15(4); Data Availability and Transparency Bill Explanatory Memorandum (EM) para 112
[5] Paragraph 17(2)(b); Data Availability and Transparency Bill EM paras 144-145.
[6] Subclause 15(3); Data Availability and Transparency Bill EM para 111.

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.[7]

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 individuals with entities' interests in carrying out their functions and activities.[8]

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.[9] A condition of accreditation can be imposed requiring an entity to provide updated evidence at specified intervals to support the criteria for accreditation.[10] 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).[11] The Commissioner will also receive information about entities' handling of data through the Bill's data breach notification and information transfer provisions.[12]

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 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.[13] Individuals with concerns about the scheme will have access to existing

[7] Clause 27.
[8] *Privacy Act 1988* s 2A(b).
[9] Clauses 30-31.
[10] Paragraph 78(2)(c).
[11] Subclause 87(1); clauses 101, 109-110.
[12] Part 3.3; clauses 107-108; Data Availability and Transparency (Consequential Amendments) Bill items 6-8.
[13] Clauses 107-108.

complementary mechanisms, including complaints to the Commonwealth Ombudsman or Australian Information Commissioner.[14]

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, [15] and would be expected to apply appropriate protections to the data.[16] 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. [17]

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 principle.[18] 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.[19]

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.[20] 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

[14] 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.
[15] Subclause 16(8).
[16] Subclause 16(7).
[17] Paragraph 16(2)(d); clauses 29, 86.
[18] Subclauses 16(7)-(8); paragraph 16(10)(b)
[19] Subclauses 13(3) and 19(10).
[20] Productivity Commission, Data Availability and Use (2017) (PC Inquiry) pp. 331-333.

override is also limited by the Regulations, which list certain secrecy provisions that are not overridden by the Bill.[21]

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 secrecy provisions[22] 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.

I thank the Committee for raising concerns about the Bill for my attention.

Yours sincerely

Stuart Robert

11 March 2021

[21] Subclause 17(4); Data Availability and Transparency Regulations Exposure Draft, September 2020.
[22] Australian Law Reform Commission, *Secrecy Laws and Open Government in Australia*, Report No 112 (December 2009).

Senator the Hon Michaelia Cash

Minister for Employment, Skills, Small and Family Business
Deputy Leader of the Government in the Senate

MS21-000204

Dr Anne Webster
Chair
Parliamentary Joint Committee on Human Rights
Parliament House
CANBERRA ACT 2600
human.rights@aph.gov.au

Dear Dr Webster

Thank you for your email of 25 February 2021 to the Attorney-General and Minister for Industrial Relations regarding issues raised in the Parliamentary Joint Committee on Human Rights' Report 2 of 2021 in relation to the Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020 (the Bill).

The Australian Government is committed to reforming aspects of the industrial relations system to re-grow jobs, reduce complexity, increase flexibility and boost productivity in Australian workplaces and put Australians in a strong position following the COVID-19 pandemic. The balanced measures in the Bill will sustain the immediate economic recovery from the COVID-19 pandemic and promote longer term reforms to ensure the industrial relations system remains fit-for-purpose in a modern economy.

My detailed response to the requests for further information raised in the Report is attached. I trust the Committee will find the information useful.

Yours sincerely

Senator the Hon Michaelia Cash
Acting Minister for Industrial Relations

Perth
44 Outram Street, West Perth WA 6005
Ph 08 9226 2000

Canberra
Parliament House, Canberra ACT 2600
Ph 02 6277 7610

Detailed response to issues raised in *Human Rights Scrutiny Report 2 of 2021*

FAIR WORK AMENDMENT (SUPPORTING AUSTRALIA'S JOBS AND ECONOMIC RECOVERY) BILL 2020

Additional hours agreements

The Committee asks:

1.56 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:

- **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;**
- **what is the pressing and substantial public or social concern that the measure is seeking to address;**
- **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;**
- **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;**
- **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;**
- **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.**

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 uncertainty 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 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.[1] 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.

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.

[1] 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; 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.

- 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.

Flexible work directions

The Committee asks:

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

a. **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 satisfying a decline in turnover test;**
b. **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 it be limited to industries adversely affected by the COVID-19 pandemic);**
c. **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;**
d. **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;**
e. **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**
f. **whether careful consideration has been given to alternative, less rights restrictive ways of achieving the stated objective.**

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[2] to manage their

[2] 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

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.

Enterprise agreements

The Committee asks:

1.86 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.

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.

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 parties 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.

Greenfields agreements

The Committee asks:

1.100 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.

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 part 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 certainty 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".[3]

- 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".[4]

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.[5] 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 parties 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 under these provisions has been chosen to give employers and unions negotiating these agreements the ability to agree wages and conditions covering the full

[3] Australian Chamber of Commerce and Industry "Submission to Greenfields Discussion Paper" 2019.
[4] AMMA (Australian Resources and Energy Group) "Submission to Greenfields Discussion Paper" 2019.
[5] Attorney General's Department Submission to the Senate Education and Employment Legislation Committee 2021, pp 27-28.

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 department 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."[6]

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

[6] Productivity Commission 2015, *Workplace Relations Framework*, Final Report, Canberra, p 690.

to construct. Seven per cent of the same projects will take 10 or more years to construct.[7] 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.

Fair Work Commission appeal or review without a hearing

The Committee asks:

1.108 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;
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.

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 new s 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.

[7] Deloitte Access Economics Investment Monitor project pipeline data, June 2020.

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/pn2013-2-fairhearings.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.