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]

Legislative instruments

Biosecurity (Entry Requirements—Human Coronavirus with Pandemic Potential) Determination 2023 [F2023L00009][2]

Purpose	This legislative instrument imposes entry requirements on passengers to provide proof of a negative test for Covid-19 taken within a 48-hour period prior to boarding a flight that has commenced from the People's Republic of China or the Special Administrative Region of Hong Kong or Macau and ends in Australian territory
Portfolio	Health and Aged Care
Authorising legislation	*Biosecurity Act 2015*
Disallowance	This legislative instrument is exempt from disallowance (see subsection 44(3) of the *Biosecurity Act 2015*)
Rights	Life; health; freedom of movement; privacy; equality and non-discrimination

2.3 The committee requested a response from the minister in relation to the instrument in *Report 2 of 2023*.[3]

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

2 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Biosecurity (Entry Requirements—Human Coronavirus with Pandemic Potential) Determination 2023 [F2023L00009], *Report 4 of 2023*; [2023] AUPJCHR 33.

3 Parliamentary Joint Committee on Human Rights, *Report 2 of* 2023 (8 March 2023), pp. 38-44.

Restriction of passengers entering Australia

2.4 This determination sets out entry requirements on passengers on flights that commence from the People's Republic of China or the Special Administrative Region of Hong Kong or Macau and end in Australian territory. The requirements are to provide proof of a negative test for Covid-19 taken within 48 hours prior to the flight. This requirement does not apply to:

- children less than 12 years old;
- individuals with evidence from a medical practitioner that:
  - (a) they have a medical condition that prevents them from taking a Covid-19 test;
  - (b) it has been at least 7 days since the person has had Covid-19 and they have now recovered, are not considered to be infectious, and have not had a fever or respiratory symptoms in the last 72 hours; or
  - (c) they have a serious medical condition that requires emergency management or treatment in Australia within 48 hours, that is not reasonably available in China, Hong Kong or Macau;
- individuals accompanying and supporting a person who is on an emergency medical evacuation flight;
- individuals granted an exemption by an official in exceptional circumstances (being that the individual provided a compelling reason for not being tested), or flights being granted an exemption in exceptional circumstances;
- class of individuals for whom no test for Covid-19 is reasonably available.

2.5 If a person fails to comply with an entry requirement they may contravene a civil penalty provision of 30 penalty units ($8,250).[4]

Summary of initial assessment

Preliminary international human rights legal advice

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

2.6 The explanatory statement does not explain why this determination has been made. However, the provision in the *Biosecurity Act 2015* that empowers the making of this determination states that the section applies for the purpose of preventing a listed human disease (in this case Covid-19) from entering, or

4 *Biosecurity Act 2015*, section 46.

establishing itself or spreading in, Australia.[5] As such, if the determination assists in preventing and managing the spread of Covid-19 it may promote and protect the rights to life and health for persons in Australia. The right to life requires the State to take positive measures to protect life.[6] The United Nations (UN) Human Rights Committee has stated that the duty to protect life implies that States parties should take appropriate measures to address the conditions in society that may give rise to direct threats to life, including life threatening diseases.[7]

2.7 The right to health is the right to enjoy the highest attainable standard of physical and mental health.[8] Article 12(2) of the International Covenant on Economic, Social and Cultural Rights requires that States parties shall take steps to prevent, treat and control epidemic diseases.[9] The UN Committee on Economic, Social and Cultural Rights has stated that the control of diseases refers to efforts to:

> make available relevant technologies, using and improving epidemiological surveillance and data collection on a disaggregated basis, the implementation or enhancement of immunization programmes and other strategies of infectious disease control.[10]

2.8 While the measure may promote the rights to life and health for persons in Australia, the effect of the measure may mean that persons who cannot produce a negative Covid-19 test may be temporarily banned from entering Australia, including Australian citizens and permanent residents. As such, this engages and may limit a number of other human rights, particularly the rights to freedom of movement and equality and non-discrimination. The right to freedom of movement includes the right to enter, remain in, or return to one's own country.[11] The UN Human Rights Committee has stated that the right of a person to enter his or her own country 'recognizes the special relationship of a person to that country'.[12] The reference to a person's 'own country' is not restricted to countries with which the person has the formal status of citizenship. It includes a country to which a person has very strong

5 *Biosecurity Act 2015*, section 44.

6 International Covenant on Civil and Political Rights, article 6.

7 See United Nations Human Rights Committee, *General Comment No. 36, Article 6 (Right to Life)* (2019), [26].

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

9 International Covenant on Economic, Social and Cultural Rights, article 12(2)(c).

10 UN Committee on Economic, Social and Cultural Rights, *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12)* (2000) [16].

11 International Covenant on Civil and Political Rights, article 12(4).

12 UN Human Rights Committee, *CCPR General Comment No. 27: Article 12 (Freedom of movement)* (1999) [19].

ties, such as long-standing residence and close personal and family ties.[13] The right to freedom of movement is not absolute: limitations can be placed on the right provided certain standards are met. However, the UN Human Rights Committee has stated in relation to the right to enter one's own country:

> In no case may a person be arbitrarily deprived of the right to enter his or her own country. The reference to the concept of arbitrariness in this context is intended to emphasize that it applies to all State action, legislative, administrative and judicial; it guarantees that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances. The Committee considers that there are few, if any, circumstances in which deprivation of the right to enter one's own country could be reasonable.[14]

2.9 Further, requiring the production of a negative Covid-19 test also engages and limits 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.[15] It also includes the right to control the dissemination of information about one's private life. A private life is linked to notions of personal autonomy and human dignity. It includes the idea that individuals should have an area of autonomous development; a 'private sphere' free from government intervention and excessive unsolicited intervention by others. The right to privacy may be subject to permissible limitations which are provided by law and are not arbitrary. In order for limitations not to be arbitrary, the measure must pursue a legitimate objective and be rationally connected to (that is, effective to achieve) and proportionate to achieving that objective.

2.10 In addition, the measure also appears to engage the right to equality and non-discrimination.[16] 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.[17] The right to equality encompasses both 'direct' discrimination (where

13 *Nystrom v Australia*, UN Human Rights Committee Communication No.1557/2007 (2011).

14 UN Human Rights Committee, *CCPR General Comment No. 27: Article 12 (Freedom of movement)* (1999) [21].

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

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

17 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.

measures have a discriminatory intent) and 'indirect' discrimination (where measures have a discriminatory effect on the enjoyment of rights).[18] Indirect discrimination occurs where 'a rule or measure that is neutral at face value or without intent to discriminate', exclusively or disproportionately affects people with a particular protected attribute, such as race or nationality.[19] In this case it appears that requiring passengers from China, Macau and Hong Kong to show evidence of a negative Covid-19 test is likely to disproportionately affect persons of Chinese descent. Where a measure impacts on a particular group disproportionately it establishes *prima facie* that there may be indirect discrimination.[20] 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, is rationally connected to that objective and is a proportionate means of achieving that objective.[21]

Committee's initial view

2.11 The committee noted that requiring only travellers from China, Macau and Hong Kong to show evidence of a negative Covid-19 test before entering Australia limits the rights to freedom of movement, a private life and equality and non-discrimination. The committee considered further information was required to assess the compatibility of this measure with these rights and sought the minister's advice in relation to:

(a) what is the objective behind requiring travellers from China, Macau and Hong Kong to show evidence of a negative Covid-19 test before entering Australia;

(b) how is requiring only travellers from China, Macau and Hong Kong to show such evidence rationally connected to – that is, effective to achieve – that objective;

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

19 *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'.

20 *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).

21 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].

(c) whether persons of Chinese descent will be disproportionately affected by this requirement, and if so, is this differential treatment based on reasonable and objective criteria;

(d) whether there is any less rights restrictive way to achieve the stated aims of preventing and controlling the entry, emergence, establishment or spread of Covid-19 into Australia; and

(e) why this instrument is not time-limited, but is due to sunset ten years from the date it was made.

2.12 The full initial analysis is set out in *Report 2 of 2023*.

Minister's response[22]

2.13 The minister advised:

> The decision to implement predeparture testing requirements was made to safeguard Australia from the risk of potential new emerging variants, and in recognition of the rapidly evolving situation in China and uncertainty about emerging viral variants at that time. These arrangements were precautionary and temporary and were kept under review. With effect from 11 March this year, on the basis of public health advice and epidemiological evidence, the requirements you wrote about were repealed.
>
> **(a) what is the objective behind requiring travellers from China, Macau and Hong Kong to show evidence of a negative Covid-19 test before entering Australia;**
>
> The objective of the requirements made by the *Biosecurity (Entry Requirements Human Coronavirus with Pandemic Potential] Determination 2023 (the Determination]* was to prevent the entry, emergence, establishment and spread of new COVID-19 variants in an Australian territory or part of an Australian territory.
>
> At the time the Determination was made, surveillance data from China was scant, and media reporting suggested very significant waves of infection being experienced across the country. Health experts in China predicted three winter waves of COVID-19 transmission, with the spike in transmission predicted to run until mid-January 2023, and subsequent waves predicted in late January and late February /early March – associated with the Lunar New Year celebrations and returning to work respectively. New variants of concern had the potential to emerge and circulate throughout these waves.

22 The minister's response to the committee's inquiries was received on 23 March 2023. This is an extract of the response. The response is available in full on the committee's website.

Subsections 44(1) and 44(2) of the *Biosecurity Act 2015* (the Act) provide that the Health Minister (who is the Federal Minister for Health and Aged Care) may determine one or more requirements for individuals who are entering Australian territory at a landing place or port for the purpose of preventing a listed human disease from entering, or establishing itself or spreading in, Australian territory or a part of Australian territory. Human coronavirus with pandemic potential, which includes COVID-19, is a listed human disease under the Act.

(b) how is requiring only travellers from China, Macau and Hong Kong to show such evidence rationally connected to - that is, effective to achieve – that objective;

The decision to require only travellers from China, Macau and Hong Kong to show evidence of a negative COVID-19 test was made to safeguard Australia from the risk of potential new emerging variants, in recognition of the rapidly evolving situation in China and the uncertainty about emerging variants of concern. More simply, a risk in China was identified, and measures were put in place to protect Australians.

I note that imposing pre-departure testing requirements is a legal and legitimate method of safeguarding against the entry and spread of listed human diseases under the Act. Pre-departure testing provides travellers, airport staff, airline staff and the Australian community with peace of mind and assurance they are travelling, working or existing with relevant and effective safeguards in place.

Many like-minded countries across the Asia-Pacific, Europe and North America also moved to reinstate or implement border measures in response to the evolving COVID-19 situation in China in early January 2023. These like-minded countries have also only recently removed those requirements or recently announced their intention to remove those requirements.

(c) whether persons of Chinese descent will be disproportionately affected by this requirement, and if so, is this differential treatment based on reasonable and objective criteria;

The requirement affected all travellers from China, including from Hong Kong and Macau, regardless of nationality or descent. It is important to note that the requirement did not prevent the uplift of passengers. The information collected through the pre-departure testing was collected in accordance with the relevant Australian privacy laws.

(d) whether there is any less rights restrictive way to achieve the stated aims of preventing and controlling the entry, emergence, establishment or spread of Covid-19 into Australia; and

As outlined under Section 34 of the Act, one of the principles that must be considered prior to making a determination under the Act is that the measure is no more restrictive or intrusive than is required in the

circumstance. The exemptions to the requirements provided for in the Determination made the instrument proportionate and as least restrictive as possible.

Since the Determination came into effect, the Department of Health and Aged Care has been exploring ways to enhance Australia's existing surveillance capabilities, to further strengthen our capacity to detect and respond to emerging variants of concern of international origin.

This includes:

- pilot program to test aircraft wastewater
- expansion of the existing community sentinel wastewater testing program, and
- enhancing national consistency in follow-up of people who test positive for
- COVID-19 and have travelled overseas in the preceding 14 days.

(e) why this instrument is not time-limited, but is due to sunset ten years from the date it was made.

The *Biosecurity (Entry Requirements - Human Coronavirus with Pandemic Potential) Determination 2023* (Biosecurity Determination) is a legislative instrument made under subsection 44(2) of the *Biosecurity Act 2015* (Biosecurity Act). Subsection 44(2) of the Biosecurity Act enables the Health Minister to determine one or more requirements for individuals who are entering Australian territory at a landing place or port for the purpose of preventing a listed human disease from entering, or establishing itself or spreading in, Australian territory. Instruments made under subsection 44(2) of the Biosecurity Act are not time limited since they are in force for as long as required to achieve the instrument's purpose, and this timeframe is not evident at the time of the instrument's making.

Sunsetting is the automatic repeal of legislative instruments after a fixed 10-year period. All legislative instruments, including the Biosecurity Determination, are subject to sunsetting unless they are exempt from sunsetting under section 54 of the Legislation Act. Generally, legislative instruments sunset on 1 April or 1 October on or after the tenth anniversary of their registration. An instrument will continue to remain in force until the instrument sunsets or is actively repealed prior to the sunset date.

The human health provisions in the Act are intended to be flexible to provide the Government with options to manage human biosecurity risks in Australia. Every requirement made under the Act, particularly in relation to the COVID-19 pandemic response, is regularly reviewed based on the latest available public health advice. The Australian Government has been

monitoring the situation in China and reviewing epidemiological data as it became available. The instrument was repealed on 11 March 2023 as there have been no new variants of concern reported from China, and a significant decrease in cases, hospitalisations and deaths noted in the data from China.

Concluding comments

International human rights legal advice

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

2.14 The minister advised that the objective of this measure was to prevent the entry, emergence, establishment and spread of new Covid-19 variants, because at the time it was made media reporting suggested very significant waves of infection being experienced across China, with the potential for new variants of concern to emerge and circulate. Preventing the entry or spread of new Covid-19 variants is a legitimate objective for the purposes of international human rights law. In terms of whether the requirements in the determination would be rationally connected, that is, effective to achieve that objective, the minister advised that the measure was introduced in recognition of the rapidly evolving situation in China and the uncertainty about emerging variants of concern. The minister also advised that many like-minded countries across the Asia-Pacific, Europe and North America also moved to reinstate or implement border measures in response to the evolving Covid-19 situation in China in early January 2023. As this determination was preventative in nature, as it was seeking to mitigate the possibility of variants emerging, it is difficult to assess whether the measure was (at the time it was made) effective to achieve its objective. Rather, it is preferable to consider if the measure is reasonable and proportionate.

2.15 In this respect, the minister advised that shortly after the committee reported on this determination it was repealed, as there have been no new variants of concern reported from China, and a significant decrease in cases, hospitalisations and deaths noted in the data from China.[23] As such, the requirements imposed by the determination lasted from 5 January to 11 March 2023. The time-limited nature of the measure assists with its proportionality. As set out in the initial analysis, there are also a number of other matters that assist with proportionality. In particular, this is not a complete ban on travel to Australia from these countries, rather if an individual has Covid-19 they would need to wait until they were no longer infectious. Further, the instrument sets out a number of exceptions from the requirement, including exceptions based on individual circumstances.

23 See Biosecurity (Entry Requirements—Human Coronavirus with Pandemic Potential) Repeal Determination 2023 [F2023L00209].

2.16 While it remains unclear whether only subjecting travellers from China, Macau and Hong Kong to the extra testing requirement was effective to prevent the spread of Covid-19 variants in Australia, as the measure has now been repealed and so was time-limited, and noting the exemptions that applied in the instrument, the limits on the rights to freedom of movement, a private life and equality and non-discrimination appear likely to have been reasonable and proportionate.

Committee view

2.17 The committee thanks the minister for this response. As stated in the initial report, the committee considers that as the determination was designed to prevent the spread of new Covid-19 variants, it likely promoted and protected the rights to life and health, noting that the right to life requires that Australia takes positive measures to protect life, and the right to health requires that Australia takes steps to prevent, treat and control epidemic diseases.

2.18 The committee welcomes the minister's advice that this determination was repealed shortly after the committee reported. As such, noting the determination sought to achieve the legitimate objective of seeking to prevent potential new variants of concern emerging and circulating in Australia, and as the determination was strictly time-limited and had exemptions available for individual circumstances, the committee considers any limit on human rights by this determination was likely reasonable and proportionate.

2.19 The committee notes the minister's advice that such determinations will be in force for as long as is required to achieve their purpose and in general such determinations will sunset after 10 years. The committee welcomes the advice that every requirement made under the *Biosecurity Act 2015* is regularly reviewed based on the latest available public health advice. The committee remains concerned, however, that there is no legislative requirement to regularly review such determinations. The committee notes that previous legislative responses to the Covid-19 pandemic were time-limited to three months, meaning new legislative instruments needed to be made to continue the measures.[24] The committee considers there is some risk, without a legislative requirement to regularly review the continued necessity for such measures, that these could continue beyond that which is strictly necessary.

24 For example, the declaration of the human biosecurity emergency period can only last for three months, see Biosecurity Act 2015, section 475. Further, the ban on travel from passengers from India was time limited to 12 days, see Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements—High Risk Country Travel Pause) Determination 2021 [F2021L00533].

2.20 Further, as noted in the initial analysis, there was no statement of compatibility provided with this instrument. The committee's role is to scrutinise all legislative instruments for compatibility with human rights.[25] There is no legislative requirement that these determinations, which are exempt from the disallowance process, be accompanied by a statement of compatibility.[26] However, the committee has consistently said since the start of the legislative response to the Covid-19 pandemic,[27] that given the human rights implications of legislation regulating the movement of persons, it would be appropriate for all such legislative instruments to be accompanied by a detailed statement of compatibility.

Suggested action:

2.21 The committee recommends that sections 44 and 45 of the Biosecurity Act 2015 be amended to provide that a determination made under these provisions:

(a) must not be in force longer than the period that the Health Minister considers necessary to meet the purposes stated in those provisions; and

(b) in any case, must not be longer than 3 months.

2.22 The committee reiterates that the Department of Health and Aged Care should be providing statements of compatibility for instruments made under the *Biosecurity Act 2015*, many of which can have a profound effect on human rights.

2.23 The committee considers that its concerns have been addressed by the repeal of this instrument, and makes no further comment in relation to this legislative instrument.

25 The *Human Rights (Parliamentary Scrutiny) Act 2011*, section 7, provides that the function of the committee is to examine all legislative instruments that come before either House of the Parliament for compatibility with human rights.

26 The *Human Rights (Parliamentary Scrutiny) Act 2011*, section 9, provides that only legislative instruments subject to disallowance under the *Legislation Act 2003* require a statement of compatibility.

27 The committee first stated this in Parliamentary Joint Committee on Human Rights, *Report 5 of 2020: Human rights scrutiny of COVID-19 legislation*, 29 April 2020. The committee also wrote to all ministers advising them of the importance of having a detailed statement of compatibility with human rights for all COVID-19 related legislation in April 2020 (see media statement of 15 April 2020, available on the committee's website).

Fair Entitlements Guarantee Regulations 2022 [F2022L01529][1]

Purpose	This legislative instrument repeals and replaces the Fair Entitlements Guarantee Regulation 2012 and makes modifications to the *Fair Entitlements Guarantee Act 2012* for the purpose of continuing the established scheme of financial assistance for textile, clothing and footwear industry contract outworkers
Portfolio	Employment and Workplace Relations
Authorising legislation	*Fair Entitlements Guarantee Act 2012*
Last day to disallow	15 sitting days after tabling (tabled in the House of Representatives on 29 November 2022 and in the Senate on 30 November 2022).
Rights	Just and favourable conditions of work; equality and non-discrimination

2.24 The committee requested a response from the minister in relation to the legislative instrument in *Report 1 of 2023*.[2]

Financial assistance scheme for textile, clothing and footwear industry contract outworkers

2.25 These regulations continue the scheme of financial assistance for textile, clothing and footwear (TCF) industry contract outworkers in situations where their employer has become insolvent.[3] A 'TCF contract outworker' is an individual who does, or has done, work in the TCF industry otherwise than as an employee and at a premises not normally regarded as a business premises, such as a residential premises.[4] The scheme allows TCF contract outworkers to recover unpaid employment entitlements, including annual leave, long service leave, payment in lieu

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Fair Entitlements Guarantee Regulations 2022 [F2022L01529], *Report 4 of 2023*; [2023] AUPJCHR 34.

2 Parliamentary Joint Committee on Human Rights, *Report 1 of 2023* (8 March 2023), pp. 46-53.

3 The financial assistance scheme for TCF contract outworkers was first established by the Fair Entitlements Guarantee Regulation 2012, which is repealed and replaced by this instrument. The scheme operates under the Fair Entitlements Guarantee (FEG), which is established under the *Fair Entitlements Guarantee Act 2012*.

4 Section 4; *Fair Work Act 2009*, section 12. See generally Department of Employment and Workplace Relations, *TCF contract outworkers scheme* (September 2022).

of notice, redundancy pay and wages entitlements.[5] A TCF contract outworker is eligible to recover such entitlements if, among other things, they are an Australian citizen or a holder of a permanent visa or a special category visa (namely persons who hold New Zealand citizenship). [6]

Summary of initial assessment

Preliminary international human rights legal advice

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

2.26 For those eligible for the scheme, the payment of financial assistance to workers who are owed unpaid employment entitlements would promote the right to just and favourable conditions of work.[7] This includes the right of all workers to adequate and fair remuneration, which, at a minimum, encompasses:

> fair wages, equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work…and a decent living for workers and their families.[8]

2.27 The United Nations (UN) Committee on Economic, Social and Cultural Rights has stated that workers 'should receive all wages and benefits legally due upon termination of a contract or in the event of the bankruptcy or judicial liquidation of the employer'.[9] The enjoyment of the right to just and favourable conditions of work is important for realising other economic, social and cultural rights, including the right to an adequate standard of living through decent remuneration.[10]

2.28 However, by excluding TCF contract outworkers who are not Australian citizens, permanent residents or holders of a special category visa from accessing the financial assistance scheme, the measure engages and limits the right to equality and non-discrimination by treating individuals differently on the basis of nationality. The

5 Schedule 1, item 1.

6 Schedule 1, item 2, paragraph 10(1)(f).

7 International Covenant on Economic, Social and Cultural Rights, article 7. The statement of compatibility states that this measure also promotes the right to social security, p. 16.

8 UN Committee on Economic, Social and Cultural Rights, *General Comment No. 23 (2016) on the right to just and favourable conditions of work (article 7 of the International Covenant on Economic, Social and Cultural Rights)* (2016) [9].

9 UN Committee on Economic, Social and Cultural Rights, *General Comment No. 23 (2016) on the right to just and favourable conditions of work (article 7 of the International Covenant on Economic, Social and Cultural Rights)* (2016) [10].

10 UN Committee on Economic, Social and Cultural Rights, *General Comment No. 23 (2016) on the right to just and favourable conditions of work (article 7 of the International Covenant on Economic, Social and Cultural Rights)* (2016) [1]. The right to an adequate standard of living is protected by the International Covenant on Economic, Social and Cultural Rights, article 11.

statement of compatibility acknowledges that the measure limits this right by making citizenship or visa status a condition of eligibility for financial assistance.[11] The right to equality and non-discrimination 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.[12] 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).[13] This measure not only treats people differently on the basis of nationality or migration status, but it appears to also have a disproportionate impact on people with other protected attributes, such as sex and race, noting that the majority of TCF contract outworkers are women, many of whom are from migrant backgrounds and experience cultural and linguistic barriers.[14]

2.29 Under international human rights law, where a person possesses characteristics which make them particularly vulnerable to intersectional discrimination, such as on the grounds of both sex and race or nationality, the UN Committee on Economic, Social and Cultural Rights has highlighted that 'particularly special or strict scrutiny is required in considering the question of possible

11 Statement of compatibility, p. 12.

12 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 State parties are required to take into account to ensure the rights to equality for women.

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

14 See Fair Work Ombudsman, *Textile, Clothing and Footwear Compliance Phase Campaign Report* (January 2019) p. 10, which reports women comprise 59.1% of TCF workers and 44 % are people born overseas. The Fair Work Ombudsman states that TCF workers are 'especially vulnerable to exploitation' due to a number of factors, including that 'a high proportion are mature-aged migrant women, who face cultural and linguistic barriers to understanding and inquiring about their workplace entitlements' and 'an unverified number are outworkers, who work away from business premises (often at home) at the end of long and complex production supply chains - and are therefore difficult to identify, or "hidden"': p 5. See also The Senate Education, Employment and Workplace Relations Legislation Committee, *Fair Work Amendment (Textile, Clothing and Footwear Industry) Bill 2011* (February 2012) pp. 3, 12; Textile Clothing and Footwear Union of Australia, *Submission No 214* to the Productivity Commission Review into the Workplace Relations Framework (27 March 2015) [3.2].

discrimination'.[15] In general, differential treatment will not constitute unlawful discrimination if the differential treatment is based on reasonable and objective criteria.[16]

2.30 Additionally, insofar as the measure results in certain workers enjoying more favourable working conditions than others, the measure may engage and limit the right to just and favourable conditions of work and potentially associated rights, such as the right to an adequate standard of living, for those workers unable to access the scheme. States parties have an immediate obligation to guarantee that the right to just and favourable working conditions is exercised without discrimination of any kind, including distinction based on race, ethnicity, nationality, migration status or gender.[17] The right to just and favourable conditions of work is to be enjoyed by 'all workers in all settings', including workers in the informal sector, migrant workers and workers from ethnic and other minorities.[18] Regarding migrant workers in particular, the UN Committee on Economic, Social and Cultural Rights has stated that 'laws and policies should ensure that migrant workers enjoy treatment that is no less favourable than that of national workers in relation to remuneration and conditions of work'.[19] More generally, States parties have an obligation to fulfil the right to just and favourable conditions of work, which could include 'establishing non-

15 See *Marcia Cecilia Trujillo Calero v. Ecuador*, UN Committee on Economic, Social and Cultural Rights, Communication No. 10/2015, E/C.12/63/D/10/2015 (26 March 2018) [19.2]. See also *Rodriguez v Spain,* UN Committee on Economic, Social and Cultural Rights, Communication No. 1/2013 E/C.12/57/D/1/2013 (20 April 2016) [14.1]; UN Committee on Economic, Social and Cultural Rights, *General Comment 20: non-discrimination in economic, social and cultural rights* (2009) [17] and *General Comment 16: the equal right of men and women to the enjoyment of all economic, social and cultural rights* (2005) [5]; and Committee on the Elimination of Discrimination against Women, *General Recommendation No. 28: The Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, CEDAW/C/GS/28 (16 December 2010) [28].

16 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].

17 UN Committee on Economic, Social and Cultural Rights, *General Comment No. 23 (2016) on the right to just and favourable conditions of work (article 7 of the International Covenant on Economic, Social and Cultural Rights)* (2016) [5], [11], [53].

18 UN Committee on Economic, Social and Cultural Rights, *General Comment No. 23 (2016) on the right to just and favourable conditions of work (article 7 of the International Covenant on Economic, Social and Cultural Rights)* (2016) [5].

19 UN Committee on Economic, Social and Cultural Rights, *General Comment No. 23 (2016) on the right to just and favourable conditions of work (article 7 of the International Covenant on Economic, Social and Cultural Rights)* (2016) [47(e)].

contributory social security programmes for certain workers, such as workers in the informal economy'.[20]

2.31 The above rights may be subject to permissible limitations where the limitation pursues a legitimate objective and is rationally connected to, and a proportionate means of achieving, that objective.

2.32 Seeking to financially support vulnerable workers during an insolvency event would, in general, constitute a legitimate objective for the purposes of international human rights law. However, in relation to the specific objective sought to be achieved by excluding certain TCF contract outworkers from the scheme, it is not clear that ensuring legislative consistency would constitute a legitimate objective. To be capable of justifying a proposed limitation on human rights, a legitimate objective must address a pressing or substantial concern and not simply seek an outcome regarded as desirable or administratively convenient. It must also be demonstrated that any limitation on a right has a rational connection to the objective sought to be achieved.

2.33 In assessing whether the limitation is proportionate to the objective being sought, it is necessary to consider a number of factors, including whether a proposed limitation is accompanied by sufficient safeguards and whether any less rights restrictive alternatives could achieve the same stated objective.

Committee's initial view

2.34 The committee noted that providing a financial assistance scheme for eligible TCF contract outworkers during an insolvency event would promote the right to just and favourable conditions of work. However, restricting access to this scheme on the basis of migration status also engages and limits the rights to equality and non-discrimination and may limit the right to just and favourable conditions of work. The committee sought the minister's advice in relation to:

(a) what is the pressing or substantial concern sought to be addressed by excluding certain TCF contract outworkers from accessing the financial assistance scheme on the basis of migration status;

20 UN Committee on Economic, Social and Cultural Rights, *General Comment No. 23 (2016) on the right to just and favourable conditions of work (article 7 of the International Covenant on Economic, Social and Cultural Rights)* (2016) [64]. International labour law has also recognised that migrant workers have a right to access non-contributory schemes for income support and grants migrant workers in irregular situations equality of treatment in respect of rights arising out of past employment, including access to social security and other benefits. See International Labour Organization, *Protecting the rights of migrant workers in irregular situations and addressing irregular labour migration: A compendium* (2022) pp. 24–25; ILO Convention of 1974 concerning Migrant Workers (Supplementary Provisions) (ILO Convention No. 143), article 9(1); ILO Social Protection Floors Recommendation 2012 (ILO Recommendation No. 2020).

(b) what proportion of TCF contract outworkers are not eligible for the financial assistance scheme (namely, how many TCF contract outworkers are not Australian citizens, permanent residents or holders of a special category visa);

(c) why was it considered necessary to make the eligibility criteria exhaustive such that the secretary is unable to consider the individual circumstances of each worker who were to apply for financial assistance;

(d) whether, in the period since the establishment of the scheme in 2012, any TCF contract outworkers who were ineligible for the scheme have successfully recovered unpaid entitlements from former employers in the event of insolvency;

(e) what safeguards accompany the measure; and

(f) whether consideration was given to less rights restrictive ways of achieving the stated objective, and if so, why these alternatives were considered inappropriate.

2.35 The full initial analysis is set out in *Report 1 of 2023*.

Minister's response[21]

2.36 The minister advised:

> *a) what is the pressing or substantial concern sought to be addressed by excluding certain TCF contract outworkers from accessing the financial assistance scheme on the basis of migration status*
>
> The TCF Regulations (and its predecessor, the *Fair Entitlements Guarantee Regulation 2012)* mirror arrangements under the FEG Act, under which eligibility is limited to Australian citizens, permanent visa holders and special category visa holders. It is desirable that such eligibility criteria are consistent across the FEG Act and the TCF Regulations to achieve equitable outcomes.
>
> *b) what proportion of TCF contract outworkers are not eligible for the financial assistance scheme (namely, how many TCF contract outworkers are not Australian citizens, permanent residents or holders of a special category visa)*
>
> The Department of Employment and Workplace Relations has been unable to source data that identifies the proportion of TCF contract outworkers who are ineligible under the financial assistance scheme.

21 The minister's response to the committee's inquiries was received on 9 March 2023. This is an extract of the response. The response is available in full on the committee's website.

c) why was it considered necessary to make the eligibility criteria exhaustive such that the Secretary is unable to consider the individual circumstances of each worker who were to apply for financial assistance

The TCF Regulations (and its predecessor Regulation) mirrors core eligibility conditions under the FEG Act, which sets out exhaustive criteria that must be satisfied for a person to be eligible for financial assistance. It is desirable that such eligibility criteria are consistent across the FEG Act and the TCF Regulations to achieve equitable outcomes.

d) whether, in the period since the establishment of the scheme in 2012, any TCF contract outworkers who were ineligible for the scheme have successfully recovered unpaid entitlements from former employers in the event of insolvency

The Department of Employment and Workplace Relations has been unable to source information about whether TCF contract outworkers who were ineligible for the scheme have successfully recovered unpaid amounts in insolvency. Additionally, it is noted that since the establishment of the scheme in 2013, there have not been any claims from TCF contract outworkers made under the scheme.

e) what safeguards accompany the measure

TCF outworkers who are ineligible for financial assistance under the scheme due to their migration status may be entitled under the *Fair Work Act 2009* to recover unpaid amounts from indirectly responsible entities in the supply chain. No additional safeguards accompany the measure in order to maintain consistency with the scheme established under the FEG Act.

f) whether consideration was given to less rights restrictive ways of achieving the stated objective, and if so, why these alternatives were considered inappropriate

As noted above, the TCF Regulations extend the scheme established under the FEG Act to TCF contract outworkers. Given this, it is appropriate that such an extension is consistent with the core policy parameters set out in the FEG Act, with modifications limited to those necessary to recognise the different characteristics of the relationship between a TCF contract outworker and their direct engagers.

Concluding comments

International human rights legal advice

2.37 In relation to the objective sought to be achieved by excluding certain TCF contract outworkers from the scheme, the minister advised that the regulations mirror arrangements under the *Fair Entitlements Guarantee Act 2012* (the Fair Entitlements Guarantee Act), under which eligibility is limited to Australian citizens, permanent visa holders and special category visa holders. The minister stated that it

is desirable that such eligibility criteria are consistent across the Fair Entitlements Guarantee Act to achieve equitable outcomes.

2.38 As noted in the initial analysis, seeking to financially support vulnerable workers during an insolvency event would, in general, constitute a legitimate objective for the purposes of international human rights law. However, with respect to the specific measure of excluding certain TCF contract outworkers from the scheme on the basis of migration status, the primary objective appears to be ensuring legislative consistency, which would likely be regarded as a desirable outcome and one of administrative convenience. However, to be capable of justifying a proposed limitation on human rights, a legitimate objective must address a pressing or substantial concern and not simply seek a desirable or administratively convenient outcome. Moreover, in light of the minister's advice that there is no available data on the number of TCF contract outworkers who are ineligible for the scheme, it is not clear that making such workers eligible for the scheme would pose any real threat to the sustainability or integrity of the scheme, such that excluding them is necessary. As such, it has not been established that the measure pursues a legitimate objective for the purposes of international human rights law.

2.39 As to what safeguards accompany the measure, the minister stated that those outworkers who are excluded from the scheme are entitled to recover unpaid amounts from indirectly responsible entities in the supply chain under the *Fair Work Act 2009* (Fair Work Act). As to the number of outworkers who have successfully recovered unpaid amounts in the event of insolvency, the minister advised that this information is unavailable and noted that since the establishment of the scheme in 2013, there have been no claims made under the scheme by TCF contract outworkers. The minister stated that there are no additional safeguards that accompany the measure.

2.40 As noted in the initial analysis, noting that there is a recognised need to establish a financial assistance scheme for workers affected by an insolvency event, in part due to their unique vulnerabilities and the challenges in recovering unpaid entitlements, it seems unlikely that the alternative option of individuals recovering payments under the Fair Work Act would be effective in practice. The fact that there is no available information regarding outworkers successfully recovering unpaid amounts may suggest that this avenue of redress is rarely utilised. It appears that seeking to recover unpaid accounts from indirectly responsible entities in the supply chain would likely be a complex process to navigate, particularly for individuals who experience linguistic and cultural barriers to accessing justice. Questions also arise as to whether claims may not have been made from TCF contract outworkers under the scheme because a significant number of those to whom unpaid entitlements are owed are excluded from the scheme on the basis of their migration status, noting

that a large number of outworkers are migrants.[49] As such, the avenues for redress under the Fair Work Act do not appear to assist with the proportionality of the measure.

2.41 Another relevant factor in assessing proportionality is whether the measure provides sufficient flexibility to treat different cases differently. As to why it is necessary that the eligibility criteria be exhaustive such that the secretary is unable to consider the individual circumstances of each worker who were to apply for financial assistance, the minister advised that the criteria under these regulations mirror core eligibility conditions under the Fair Entitlements Guarantee Act and it is desirable that eligibility criteria are consistent. Under international human rights law, a measure that imposes a blanket policy without regard to the merits of an individual case is less likely to be proportionate. With respect to this measure, the eligibility criteria to access the scheme are exhaustive and do not afford the secretary any discretion to consider the individual circumstances of each worker who were to apply for financial assistance. A desire for legislative consistency does not appear to be a sufficient justification for restricting the matters which the secretary may take into account in assessing eligibility for the scheme. Were the secretary conferred with the discretion to consider, for example, the impact of the insolvency event on the worker's personal and family life; the amount of unpaid entitlements owing; whether the worker has access to other social security benefits or financial assistance; or any other vulnerabilities experienced by the worker, such as disability, linguistic and cultural diversity or family and caring responsibilities, noting these other factors may influence a worker's ability to obtain other employment,[50] this may be a less rights restrictive and more proportionate approach when providing a benefit, rather than restricting access on the basis of nationality.

Committee view

2.42 The committee thanks the minister for this response. The committee notes that providing a financial assistance scheme for eligible TCF contract outworkers during an insolvency event promotes the right to just and favourable conditions of work. However, restricting access to this scheme on the basis of migration status also

49 See Fair Work Ombudsman, *Textile, Clothing and Footwear Compliance Phase Campaign Report* (January 2019) p. 10, which reports women comprise 59.1% of TCF workers and 44% are people born overseas. See also The Senate Education, Employment and Workplace Relations Legislation Committee, *Fair Work Amendment (Textile, Clothing and Footwear Industry) Bill 2011* (February 2012) pp. 3, 12; Textile Clothing and Footwear Union of Australia, *Submission No 214* to the Productivity Commission Review into the Workplace Relations Framework (27 March 2015) [3.2].

50 The FWO observed that the 'lack of higher-level educational attainment [among TCF workers] compounds the vulnerability of [this] labour force by imposing further barriers to alternative employment options'. See Fair Work Ombudsman, *Textile, Clothing and Footwear Compliance Phase Campaign Report* (January 2019) p.11.

engages and limits the rights to equality and non-discrimination and may limit the right to just and favourable conditions of work.

2.43 The committee considers that the overall objective of the scheme, that is, to provide financial support to vulnerable workers during an insolvency event, constitutes a legitimate objective for the purposes of international human rights law. With respect to the specific objective sought to be achieved by excluding certain TCF contract outworkers on the basis of their migration status, the committee notes the minister's advice that it is desirable for eligibility criteria to be consistent across the Fair Entitlements Guarantee Act in order to achieve equitable outcomes. The committee considers that while achieving legislative consistency is desirable, it is not, in itself, sufficient to constitute a legitimate objective for the purposes of international human rights law. Regarding proportionality, the committee notes that the only safeguard identified, that is, the possibility of recovering unpaid amounts under the Fair Work Act, appears unlikely to be effective in practice, and that the measure offers no flexibility to consider the individual circumstances of each case. The committee notes the minister's advice that there are no additional safeguards accompanying the measure in order to maintain consistency with the scheme established under the Fair Entitlements Guarantee Act.

2.44 Having regard to these factors, the committee considers there to be a risk that limiting eligibility of workers in Australia on the basis of migration status may not constitute a proportionate limitation on the right to equality and non-discrimination and, to the extent that it results in certain workers enjoying more favourable working conditions than others (noting Australia's immediate obligation to realise this right without discrimination of any kind), the right to just and favourable conditions of work.

Suggested action:

2.45 The committee considers that the proportionality of the measure may be assisted were the regulations amended to provide the secretary with discretion to allow those who are ineligible for assistance to receive assistance after consideration of their individual circumstances.

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

Federal Court Legislation Amendment Rules 2022 [F2023L00033][51]

Purpose	This legislative instrument amends the Federal Court Rules 2011, Federal Court (Criminal Proceedings) Rules 2016, Federal Court (Bankruptcy) Rules 2016, and Federal Court (Corporations) Rules 2000 to provide updates to references to rules, regulations and the Federal Circuit and Family Court of Australia. It clarifies the transfer of proceedings to and from the Federal Circuit and Family Court of Australia (Division 2)
Portfolio	Attorney-General
Authorising legislation	*Federal Court of Australia Act 1976*
Last day to disallow	15 sitting days after tabling (tabled in the Senate and the House of Representatives on 6 February 2023). Notice of motion to disallow must be given by 23 March 2023 in the House and by 29 March 2023 in the Senate[52]
Right	Freedom of expression

2.47 The committee requested a response from the minister in relation to the instrument in *Report 2 of 2023*.[53]

Access to court documents

2.48 These rules provide that a person who is not a party to a Federal Court proceeding cannot inspect certain court documents in a proceeding until after the first directions hearing or the hearing (whichever is earlier).[54]

2.49 This applies to documents such as originating applications; pleadings; statements of agreed facts; judgments or orders of court; notices of appeal; and reasons for judgment.[55]

51 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Federal Court Legislation Amendment Rules 2022 [F2023L00033], *Report 4 of 2023*; [2023] AUPJCHR 35.

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

53 Parliamentary Joint Committee on Human Rights, *Report 2 of 2023* (8 March 2023), pp. 45-48.

54 Schedule 1, item 4.

55 See Federal Court Rules 2011, subrule 2.32(2).

Summary of initial assessment

Preliminary international human rights legal advice

Right to freedom of expression

2.50 Restricting access to court documents, which journalists may use to help them accurately report on cases before the Federal Court, engages and limits the right to freedom of expression. This right includes the freedom to seek, receive and impart information and ideas of all kinds, either orally, in writing or print, in the form of art, or through any other media of an individual's choice.[56] The United Nations (UN) Human Rights Committee has noted the important status of this right under international human rights law.[57]

2.51 The right to freedom of expression extends to the communication of information or ideas through any medium, including written and oral communications, the media, public protest, broadcasting, artistic works and commercial advertising.[58] A free, uncensored and unhindered press is essential to ensure freedom of opinion and expression, and the enjoyment of other civil and political rights.[59]

2.52 The right to freedom of expression may be subject to limitations that are necessary to protect the rights or reputations of others,[60] national security,[61] public

56 International Covenant on Civil and Political Rights, article 19(2).

57 UN Human Rights Committee, *General comment No. 34: Article 19: Freedoms of opinion and expression*, CCPR/C/GC/34 (2011) [2]–[3].

58 International Covenant on Civil and Political Rights, article 19(2).

59 UN Human Rights Committee*, General Comment No. 34, Article 19: Freedoms of opinion and expression* (2011) [13].

60 Restrictions on this ground must be constructed with care. For example, while it may be permissible to protect voters from forms of expression that constitute intimidation or coercion, such restrictions must not impede political debate. See UN Human Rights Committee, *General Comment No. 34: Article 19: Freedoms of Opinion and Expression* (2011) [28].

61 Extreme care must be taken by State parties to ensure that treason laws and similar provisions relating to national security are crafted and applied in a manner that conforms to the strict requirements of paragraph 12(3) of the International Covenant on Civil and Political Rights. It is not compatible with paragraph 3, for instance, to invoke such laws to suppress or withhold from the public information of legitimate public interest that does not harm national security or to prosecute journalists, researchers, environmental activists, human rights defenders, or others, for having disseminated such information. See UN Human Rights Committee, *General Comment No. 34: Article 19: Freedoms of Opinion and Expression* (2011) [30].

order, or public health or morals.[62] Additionally, such limitations must be prescribed by law, be rationally connected to the objective of the measures and be proportionate.[63]

Committee's initial view

2.53 The committee noted that restricting access to certain court documents prior to a hearing, including access by journalists, engages and limits the right to freedom of expression. The committee considered further information was required to assess the compatibility of this measure with this right, and as such sought the Chief Justice's advice in relation to:

(a) what is the objective behind preventing people who are not parties to a proceeding from inspecting certain documents in the proceeding until after the first directions hearing or the hearing;

(b) is restricting such access likely to be effective to achieve that objective; and

(c) is this a proportionate way to achieve that objective. In particular, are there any safeguards in place or any less rights restrictive ways to achieve the objective (for example, allowing non-parties to apply for access; allowing decisions to be made on a case-by-case basis).

2.54 The full initial analysis is set out in *Report 2 of 2023*.

Chief Justice's response[64]

2.55 The Chief Justice advised:

(a) What is the objective behind preventing people who are not parties to a proceeding from inspecting certain documents in the proceeding until after the first directions hearing or the hearing?

The principle of "open justice", including justice being seen to be done and ensuring that nothing is done to discourage the making of fair and accurate reports of proceedings, is an overarching principle which guides the Court in its judicial and procedural operations. However, the principle of open justice is not absolute, and must be balanced with the

62 The concept of 'morals' here derives from myriad social, philosophical and religious traditions. This means that limitations for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition. See UN Human Rights Committee, *General Comment No. 34: Article 19: Freedoms of Opinion and Expression* (2011) [32].

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

64 The Chief Justice's response to the committee's inquiries was received on 23 March 2023. This is an extract of the response. The response is available in full on the committee's website.

need of the Court to act at all times in the "interests of justice" and avoid prejudice to the administration of justice or other potential harm.

"Interests of justice" is a broad concept that gives rise to many matters that a Court must consider when assessing a request for access, including the interests of all parties (e.g. questions of confidentiality and privacy), the community, the application of any Commonwealth law, and any reasonably necessary requirements to ensure the just and fair administration of justice. Further, the Court must consider whether a request may be unreasonably burdensome on the administration of justice.

It is not the objective of the Federal Court, nor the amendment to subrule 2.32(2) of the *Federal Court Rules 2011* pursuant to the *Federal Court Legislation Amendment Rules 2022* (which subrule must be read as part, and in the context, of the whole rule, especially subrule 2.32(4)), to prevent in all circumstances people who are not parties to a proceeding from inspecting documents in a proceeding until after the first directions hearing or a hearing (whichever comes first).

The objective of the amendment to subrule 2.32(2) (as part of rule 2.32) is to protect the administration of justice through the protection of the legitimate rights and interests of parties to proceedings in the Court. It is contrary to the administration of justice for respondents to learn of the case made against them, whether through the media or other publication, before they are served and before they have a reasonable opportunity to protect their legitimate interests and rights by seeking properly-founded suppression or non-publication orders. The amendments to subrule 2.32(2) are about ensuring that the Rules of the Court are not used, knowingly or innocently, as an instrument of injustice.

The Court is mindful of the need to adopt procedures that afford the same protections to all parties and to guard against the abuse of its procedures. When commencing proceedings, applicants are able to take steps to protect confidential information in their own interests. As a matter of fairness, it is necessary to ensure that respondents (and in some instances third parties) are afforded the same opportunity. Additionally, applicants are able to make allegations that have not been scrutinised by respondents. Publication of claims and allegations before respondents have been given an opportunity to raise any claim that the Court's procedures are being used improperly also creates the possibility of unfairness and opportunities for abuse.

Subrule 2.32(2) establishes the first directions hearing or hearing (whichever is earlier) as the point in time at which non-parties are—in the absence of other orders—generally permitted to inspect

unrestricted documents. As such, it is the default rule. Subrule 2.32(2) must not however, be considered in isolation. Subrule 2.32(2) must be considered in conjunction with subrule 2.32(4). Subrule 2.32(4) provides that a person may apply to the Court for leave to inspect a document that the person is not otherwise entitled to inspect. The effect of the operation of these two subrules is that, prior to a first directions hearing or hearing (whichever is earlier), a non-party will require leave of the Court to inspect such documents. Non-parties are therefore not necessarily prevented from inspecting documents prior to the earlier of the directions hearing or hearing by rule 2.32. Non-parties, including the media, before a first directions hearing or hearing (whichever is earlier) may still inspect documents at this time. The amendments to subrule 2.32(2) do however mean that such inspection is by leave of the Court. In many, if not most cases, the originating processes will be available upon application before the first directions hearing or hearing (whichever is earlier), if application for access is made.

Subrule 2.32(4) was not subject to recent amendments. Leave of the Court has long been required for non-parties to access restricted documents. The effect of the amendments to subrule 2.32(2) is simply to extend that requirement for leave for a limited period of time, and require access by leave regulated by a practice note (as to which, see below).

The Federal Court has not expanded the processes or basis of suppression or non-publication orders through the amendment to subrule 2.32(2). The amendment does not enable a party to simply avoid embarrassment through suppression or non-publication orders. Further, the Court expects parties to lodge any application seeking suppression or non-publication orders promptly.

On 10 February 2023, the Federal Court introduced an amended practice note, the *Access to Documents and Transcripts Practice Note (GPN-ACCS)* which provides detailed guidance in respect of access to documents in the court file relating to a proceeding in the Court, including by non-parties and the media, and including guidance on access to originating process before the first directions hearing.

Without going into too much detail, the processing of such requests by a non-party involves the following:

- coordination by the National Operations Registry in conjunction with the Director of Public Information and assisted by Court and Tribunal staff from within each Registry;

- an initial assessment to determine whether the relevant proceeding has been allocated to a judge;
- consultation with the parties to determine whether the originating application and supporting material have been served on the respondent or respondents;
- the provision of a reasonable opportunity for the parties to file an application seeking suppression or non-publication orders; and
- in the ordinary course of events the grant of leave to access the document by a Registrar.

Where an application for a suppression or non-publication order is made, this will be quickly allocated to a judge for consideration. Nothing in the practice note is intended to remove any entitlement of any interested person (including the media) to be heard on the application for a suppression or non-publication order.

If leave is granted to inspect an otherwise restricted document, then, in the ordinary course of events and subject to any order of the Court, a Registrar will grant leave for the inspection of that document pursuant to subsequent requests.

The practices outlined within the practice note ensure applications for leave to inspect documents are considered promptly and efficiently by the Court. A copy of the practice note is attached.

(b) Is restricting such access likely to be effective to achieve that objective?

Yes. The restriction provided by subrule 2.32(2) (when read in the context of the whole rule, including subrule 2.32(4)) is an essential element of a practice that ensures that non-parties can only access court documents prior to a first directions hearing or hearing (whichever is earlier) by seeking leave of the Court and having that application considered on a case-by-case basis.

Subrule 2.32(2) as amended is highly effective in meeting the objectives outlined in response to your first question. It is also highly effective in enabling the Court to act in the "interests of justice", whilst avoiding prejudice to the administration of justice or other potential harm, including to the rights and interests of respondents (and in some instances third parties).

(c) Is this a proportionate way to achieve that objective? In particular, are there any safeguards in place or any less rights restrictive ways to achieve the objective (for example, allowing non-parties to apply for access; allowing decisions to be made on a case-by-case basis)

Yes, subrule 2.32(2) is a proportionate way to achieve that objective. As outlined in the response to your first question, subrule 2.32(2) must not be considered in isolation, but must be considered as part of the whole rule, especially in conjunction with subrule 2.32(4). The Court has not created a blanket prohibition on access to documents by a non-party prior to a first directions hearing or a hearing (whichever is earlier). The restriction provided by subrule 2.32(2) is an essential element of a practice that ensures that non-parties can only access court documents prior to a first directions hearing or hearing (whichever is earlier) by seeking leave of the Court and having that application considered on a case-by-case basis. That case-by-case assessment will be founded on two questions: whether the originating process has been served, and whether it contains material that gives rise to a properly-founded application for suppression.

The Federal Court has encouraged non-parties, including the media, to apply for access by seeking leave of the Court pursuant to subrule 2.32(4). Detailed guidance is provided on how such applications are made, handled and considered within the *Access to Documents and Transcripts Practice Note*.

As has already been detailed, a non-party, including the media, may still inspect unrestricted documents prior to the first directions hearing or hearing (whichever is earlier), provided leave of the Court is obtained pursuant to subrule 2.32(4).

There are no fees associated with an application for leave to inspect a document and such an application can be considered on the papers without need to appear in Court. A non-party seeking leave of the Court to inspect a document only needs to complete a short access request form. The same form is used for both non-party requests requiring leave of the Court and those that do not require leave of the Court.

The Access to Documents and Transcripts Practice Note provides the detail as to how a non-party may make a request for these documents and the processes put in place by the Court to ensure those requests are considered promptly and efficiently.

Concluding comments

International human rights legal advice

Right to freedom of expression

2.56 In relation to the objective behind preventing people who are not parties to a proceeding from inspecting certain documents until after the first directions hearing or the hearing, the Chief Justice advised that this is to protect the administration of justice through the protection of the legitimate rights and interests

of parties to court proceedings. The Chief Justice stated that it is contrary to the administration of justice for respondents to learn of the case made against them, whether through the media or other publication, before they are served and before they have a reasonable opportunity to protect their interests and rights by seeking suppression or non-publication orders. The Chief Justice noted that the court rules already provide that a person may apply to the court for leave to inspect a document that the person is not otherwise entitled to inspect, meaning that prior to a first directions hearing or hearing (whichever is earlier), a non-party will be able to inspect such documents with leave of the Court. The Chief Justice stated that the effect of the amendments is to extend that requirement for leave for a limited period of time, and to require access by leave as regulated by a practice note. In this regard, the Chief Justice stated that this amendment balances the principle of open justice with the need of the court to act in the interests of justice, and to avoid prejudice to the administration of justice or other potential harm. Protecting the administration of justice through protecting the legitimate rights and interests of parties to court proceedings would constitute a legitimate objective for the purposes of international human rights law.

2.57 As to whether restricting such access is likely to be effective to achieve that objective, the Chief Justice stated that the restriction, read in its context, ensures that non-parties can only access court documents prior to a first directions hearing or hearing where they have sought leave of the court and that application has been assessed on a case-by-case basis. The Chief Justice also stated that the amendment is highly effective in enabling the court to act in the interests of justice, while avoiding prejudice to the administration of justice or other potential harm, including to the rights and interests of respondents (and in some instances third parties). This measure would therefore appear to be rationally connected to the stated objective.

2.58 As to whether this a proportionate way to achieve that objective, the Chief Justice stated that this amendment does not establish a blanket prohibition on access to documents by a non-party prior to a first directions hearing or hearings. Rather, it ensures that non-parties can only get early access to court documents by seeking leave of the court and having that application considered on a case-by-case basis. The Chief Justice stated that this assessment will be founded on two questions: whether the originating process has been served, and whether it contains material that gives rise to a properly-founded application for suppression.

2.59 The Chief Justice also stated that the Federal Court has encouraged non-parties, including the media, to apply for access by seeking leave of the court, and noted that detailed guidance is provided on how such applications are made, handled and considered within the *Access to Documents and Transcripts Practice Note*. The Chief Justice stated that no fees are associated with such an application, and that a non-party seeking leave of the court to inspect a document only needs to complete a short access request form. The Chief Justice further stated that the Practice Note provides detail as to the processes to ensure that such requests are

considered promptly and efficiently. Having regard to this additional information, it appears that the measure constitutes a proportionate means by which to achieve the stated objective. As such, it appears that these rules are compatible with the right to freedom of expression.

Committee view

2.60 The committee thanks the Chief Justice for this response. The committee considers that, by providing that a person who is not a party to a Federal Court proceeding cannot inspect certain court documents until after the first directions hearing or the hearing (whichever is earlier), this measure limits the right to freedom of expression.

2.61 The committee considers that, having regard to the detailed information provided by the Chief Justice, particularly the fact that non-parties, including the media, are able to apply to the court to obtain access to court documents prior to the first hearing, this measure is compatible with the right to freedom of expression.

Suggested action:

2.62 The committee recommends that the statement of compatibility with human rights be updated to include the information provided by the Chief Justice.

2.63 The committee considers that its concerns have been addressed and makes no further comment in relation to this legislative instrument.

Mr Josh Burns MP

Chair