

Ministerial responses — Report 4 of 2023¹

1 This can be cited as: Parliamentary Joint Committee on Human Rights, Ministerial responses, *Report 4 of 2023*; [2023] AUPJCHR 36.



The Hon Mark Butler MP
Minister for Health and Aged Care

Ref No: MS23-000392

Mr Josh Burns MP
Member for Macnamara
Chair of the Parliamentary Joint Committee on Human Rights
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Dear Mr Burns MP,

I refer to the Parliamentary Joint Committee on Human Rights (the Committee), Biosecurity (Entry Requirements—Human Coronavirus with Pandemic Potential) Determination 2023 [F2023L00009], Report 2 of 2023; [2023] AUPJCHR 19 (the report).

I appreciate the important role of the Committee in scrutinising the implications of legislation on human rights, and respect the commitment of members in articulating concerns and seeking further information in the discharge of their duties. In my capacity as Minister for Health and Aged Care, I am focused on ensuring that the health of the Australian community is protected, but acknowledge the need to balance this against human rights.

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this year, on the basis of public health advice and epidemiological evidence, the requirements you wrote about were repealed.

I write to provide my response to the questions outlined by the Committee on page 44 of the report. I will respond to the questions in the order in which they were raised in the report, with each response provided below the listed question (in bold).

(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.

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:

- a 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.

I trust that this information is useful to the Committee in its consideration of this matter.

Thank you for writing on this matter.

Yours sincerely

Mark Butler

 / 2023



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23 March 2023

Secretariat
Parliamentary Joint Committee on Human Rights
Parliament House, Canberra ACT 2600

By email: human.rights@aph.gov.au

Dear Secretariat,

I refer to the email of Mr Josh Burns MP of 9 March 2023 seeking my advice in relation to the *Federal Court Legislation Amendment Rules 2022 [F2023L00033]*.

I respond to the Committee as follows.

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 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.

Yours sincerely

✓ **The Hon James Allsop AC**

ACCESS TO DOCUMENTS AND TRANSCRIPTS PRACTICE NOTE (GPN-ACCS)

General Practice Note

1. INTRODUCTION AND DEFINITIONS

- 1.1 This practice note provides guidance in respect of requests for access to documents contained in the court file relating to a proceeding in the Court,¹ and in respect of access to transcripts of a proceeding.
- 1.2 The practice note takes effect from the date it is issued and, to the extent practicable, applies to proceedings whether filed before, or after, the date of issuing.
- 1.3 The meaning of the following terms used in this practice note is set out below:

Access Applicant	means the person making the Request.
Directions Hearing	means a case management hearing.
Request	means a request for access to documents in the proceeding, being either a Party Request (ie. made by a party or a representative of a party to the proceeding) or a Non-Party Request (ie. made by any member of the public, or someone on behalf of the person who is not a party to the proceeding).
Unrestricted documents	means the documents in a proceeding listed in r 2.32(2) of the <i>Federal Court Rules 2011</i> (Cth) (“ Federal Court Rules ”).
Restricted documents	means the documents in a proceeding not mentioned in r 2.32(2) of the Federal Court Rules, and may include, for example: certain affidavits, exhibits, unsworn statements of evidence, subpoenaed material and confidential material.

¹ Note: the right to inspect or seek leave to inspect is not absolute, and relates to documents “in a proceeding”. This does not mean every document on a court file but does usually include filed documents such as applications, pleadings, notices and so on. “Court file” is defined in the Dictionary contained in the Federal Court Rules.

2. GENERAL APPROACH

- 2.1 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. This principle, which extends to questions of access to Court documents, is reflected in the *Federal Court of Australia Act 1976 (Cth)*² (“**Federal Court Act**”) and Federal Court Rules, particularly r 2.31 “Custody of Documents” and r 2.32 “Inspection of Documents”, and other rules in specialist areas (eg. bankruptcy, corporations, admiralty or criminal proceedings).
- 2.2 However, the principle of open justice is not absolute, and must be balanced with the 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.
- 2.3 “Interests of justice” is a broad concept that gives rise to many matters that the Court must consider when assessing a Request, including the interests of all parties (eg. 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.
- 2.4 This open justice approach requires parties to be mindful that (subject to the requirements of the Federal Court Act, the Federal Court Rules and the discretion of the Court), any document that they have filed in the Court may potentially be made available to any member of the public, including the media.
- 2.5 The Court is also 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. Also, 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.

3. CONSIDERATIONS BEFORE MAKING A REQUEST

Freely Accessible Court Documents

- 3.1 Before making a Request, an Access Applicant should bear in mind that it may be possible to access a document in a proceeding or related information freely. For example, certain types of documents are available to be accessed by parties and non-parties without a fee through the Commonwealth Courts Portal (“**CCP**”).

² See s 17 – Exercise of jurisdiction in open court and in chambers.

- 3.2 Parties may access all documents in a proceeding through the CCP other than those that are confidential or otherwise restricted, subject to appropriate registration and other Court requirements. Further, they may opt-in to activity notifications via email from the CCP to “track” a case. These notifications advise when a new listing date is added, a document is lodged or an order has been uploaded. Non-parties may access judgments and orders through the CCP. A user-guide about effective use of the CCP is available on the Court’s website.
- 3.3 Further, certain information about a proceeding is available to anyone (without the need to register) through Federal Law Search (in the CCP), which provides case information, including:
- court events - past and future (when known);
 - a list of documents filed by parties;
 - orders of the Court (in full-text from 2004 - 2005);
 - dates relating to judgment delivery (when known), with links to judgments;
 - names of parties and lawyers.
- 3.4 The Federal Law Search database may also be relied upon to carry out certain required searches under legislative instruments,³ such as a required search in relation to bankruptcy. Further information on the Federal Law Search, checking the progress of cases and finding future listings is available on the Court website.

Obligations of the Access Applicant

- 3.5 Prior to making any Request, the Court expects that the Access Applicant will have acted on, or given careful consideration to:
- (a) whether the Request is the most efficient method possible to access the documents;
 - (b) whether the documents can more easily and cost effectively be obtained from an original or other source, if the Court is not such a source (eg. a report of a Government agency freely available on that agency’s website);
 - (c) framing the Request in a concise and accurate manner, drafted as narrowly as practicable to achieve the Access Applicant’s aim (eg. rather than requesting all affidavits on a file, requesting those relevant to a person or particular period of time);
 - (d) whether the Access Applicant anticipates that there may be a likelihood for controversy to arise due to the Request (for example, if the material sought is commercially sensitive, confidential or intended to be used in another proceeding) and if so, the Access Applicant should, where it is practical and appropriate to do so, consider seeking the relevant party’s views in relation to the Request.
- 3.6 The Court understands that it may not always be possible (for example due to urgency) or necessary to satisfy each of the above obligations.

³ The database may be relied upon for the purposes of a search in relation to: a bankruptcy notice (r 4.04 of the *Federal Court (Bankruptcy) Rules 2016* (Cth)); the Register of Caveats Against Arrest (r 39 and form 13 of the *Admiralty Rules 1988* (Cth)); the Register of Caveats Against Release (rr 51 and 52 and Forms 18 and 19 of the *Admiralty Rules 1988* (Cth)).

3.7 Equally, the Court recognises that the relative obligations of an Access Applicant will be influenced by the nature of the Request and the purpose underpinning the Request. By way of illustration only, a Request by a lawyer on behalf of a client to access a document for use in future litigation against the party that filed it may give rise to a greater obligation to undertake preliminary enquiries with that party than a similar Request by a journalist who seeks the document based on genuine public interest grounds.

4. ACCESS TO DOCUMENTS GENERALLY

4.1 This Part does not apply to transcripts. In respect of transcripts, see Part 6 of this practice note.

4.2 Generally, the inspection and removal of documents from the Court is governed by Division 2.4 of the Federal Court Rules. Whether a document in a proceeding can be inspected without leave is, in part, determined by whether the Access Applicant is a party or non-party, whether the document is an unrestricted document or a restricted document and whether there has been a directions hearing or hearing (see r 2.32 of the Federal Court Rules).

4.3 In relation to restricted documents, access will generally be given where documents have been read in open Court.

Lodging a Request

4.4 Depending on whether an Access Applicant is a party or a non-party, the respective Request form available on the Court's website should be used to make the Request.

4.5 The Court prefers to receive a Request electronically, via email. Information about how to make a Request by email or how to otherwise contact the relevant registry is available on the Court's website.

Request by a Party

4.6 Subject to any order or direction of the Court and certain exceptions (regarding privilege and confidentiality), a party may inspect any document in the proceeding (rr 2.31 and 2.32(1) of the Federal Court Rules).

4.7 A party may apply to the Court for leave to inspect a document that the party is not otherwise entitled to inspect (r 2.32(4) of the Federal Court Rules).

Request by a Non-Party

4.8 Subject to any order or direction of the Court and certain exceptions (regarding confidentiality and restriction from publication), a non-party may inspect the "unrestricted" documents set out in r 2.32(2) of the Federal Court Rules after the first directions hearing or hearing (whichever is earlier). These include documents such as originating applications, pleadings (or particulars of pleadings), certain formal notices and reasons for judgment.

4.9 Any document in a proceeding falling outside the categories set out in r 2.32(2) of the Federal Court Rules is, essentially, a "restricted" document. A non-party always requires the leave of the Court to inspect such documents (r 2.32(4) of the Federal Court Rules).

4.10 Prior to the first directions hearing or hearing (whichever is earlier), a non-party will require leave of the Court to inspect any document (r 2.32(4) of the Federal Court Rules).

Non-party Requests for Unrestricted Documents Prior to the First Directions Hearing or Hearing

4.11 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. That is because 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 or before they have a reasonable opportunity to protect their legitimate interests by seeking properly founded suppression or non-publication orders. However, the Court does expect parties to lodge any application seeking suppression or non-publication orders promptly.

4.12 Recognising the importance of accurate reporting of court proceedings, r 2.32(2) does not expand the processes or basis of suppression or non-publication, or merely enable a party to avoid embarrassment. It is about ensuring that the rules of the Court are not used, knowingly or innocently, as an instrument of injustice.

4.13 A non-party may still inspect unrestricted documents prior to the first directions hearing or hearing, provided leave of the Court is obtained (r 2.32(4) of the Federal Court Rules).

4.14 Applications for leave to inspect unrestricted documents prior to the first directions hearing or hearing can be made by email to Document.Inspections@fedcourt.gov.au and by utilising the same form as all other non-party Requests. Information about how to make a Request by email is available on the Court's website. Such a Request will be an application within the meaning of r 2.32(4).

Access by media

4.15 Requests from the media are flagged for coordination by the National Operations Registry (“NOR”) in conjunction with the Director Public Information and assisted by Court and Tribunal staff from within each Registry.

4.16 An initial assessment is then made to determine whether the proceeding to which the Request relates has been allocated to a judge.

Allocated matters

4.17 Where the relevant proceeding has been allocated to a judge, the NOR will, in consultation with chambers, promptly consult with the parties to determine whether the originating application and supporting material (or other documents which have been filed to commence the proceeding) have been served on the respondent or respondents.

4.18 Once the relevant documents which initiated the proceeding have been served on the respondent or respondents, the parties have had a reasonable opportunity to file an application seeking a suppression or non-publication order, and no party has filed such an application, then, in the ordinary course of events, a Registrar will grant leave for the inspection of the documents pursuant to the Request.

- 4.19 If any party files an application seeking a suppression or non-publication order prior to leave being granted pursuant to r 2.32(4), the NOR will, in consultation with chambers, list the matter for a directions hearing to hear the application. Nothing in this practice note is intended to remove any entitlement of any interested person to be heard on that application. Unless the Court makes an order at that directions hearing preventing a non-party inspecting unrestricted documents, the documents may be inspected pursuant to the Request.
- 4.20 If leave is granted to inspect an unrestricted 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.

Unallocated matters

- 4.21 Where the relevant proceeding has not been allocated to a judge, the NOR will promptly consult with the parties to determine whether the originating application and supporting material (or other documents which have been filed to commence the proceeding) have been served on the respondent or respondents.
- 4.22 Once the relevant documents which initiated the proceeding have been served on the respondent or respondents, the parties have had a reasonable opportunity to file an application seeking a suppression or non-publication order, and no party has filed such an application, then, in the ordinary course of events, a Registrar will grant leave for the inspection of the documents pursuant to the Request.
- 4.23 If any party files an application seeking a suppression or non-publication order prior to leave being granted pursuant to r 2.32(4), the NOR will expedite the allocation of the matter to a judge and, in consultation with chambers, list the matter for a directions hearing to hear the application. Nothing in this practice note is intended to remove any entitlement of any interested person to be heard on that application. Unless the Court makes an order at that directions hearing preventing a non-party inspecting unrestricted documents, the documents may be inspected pursuant to the Request.
- 4.24 If leave is granted to inspect an unrestricted 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.

Access by non-media

- 4.25 Requests by non-parties (other than the media) will generally be referred for consideration by the case managing judge at the first directions hearing.

Consideration of Requests Generally

- 4.26 Some Requests are not straightforward, and the Court may require further information from an Access Applicant or certain steps to be taken by the Access Applicant before making a decision about the Request. It is therefore in the interests of the Access Applicant to include important relevant information in the Request, so as to minimise delays in considering the Request.

- 4.27 In considering a Request, the Court will consider a range of factors, including (but not limited to):
- (a) whether the Access Applicant is a party or non-party;
 - (b) whether the documents fall initially within a restricted or unrestricted category;
 - (c) the context surrounding, and purpose underpinning, the Request;
 - (d) the nature of the documents sought (eg. whether the documents have been admitted into evidence or read out in open court, whether the documents are confidential, restricted from publication, the subject of legal privilege, contain scandalous material etc);
 - (e) the principles set out in Part 2 of this practice note, including whether the Request may result in an undue burden on the Court.
- 4.28 If, in the opinion of the Court, circumstances warrant it - including due to the nature of the documents in question (eg. potential confidentiality issues arise), then the Court may require the Access Applicant to communicate with relevant persons or parties connected with the documents in the proceeding about the Request, inviting such parties to comment on the Request (or the Court may do so itself).
- 4.29 The Court will take a practical approach to processing a Request by, for example, wherever it is practicable to do so, determining any simple aspect of a Request and releasing any documents approved, while a more complex part of the Request is awaiting determination. This may not be possible in all such circumstances.
- 4.30 While the Court will endeavour to process a Request as soon as practicable, Access Applicants should note that the time that it takes to process a Request may depend on many variables, including:
- (a) how much, and what type, of information has been provided by the Access Applicant to allow the Court to properly understand the Request;
 - (b) how broad the Request is (and how many documents are sought);
 - (c) whether the documents sought are contained within paper or electronic court files or current or completed files, and whether a completed file is archived (as, for example, certain Native Title files are required to be) in which case the Request may also involve liaison between the Court and the National Archives of Australia;
 - (d) whether the matter needs to be referred to a Registrar and/or a Judge; and
 - (e) whether obtaining the views of other parties or persons may be necessary.

Applicable Fees

- 4.31 On making a Request, the Access Applicant must pay the fee for inspection of the documents and any applicable fees if copies are requested.⁴ Photocopying fees may be exempted only if the person liable to pay is entitled to a general or financial hardship exemption in the

⁴ The current fees for the request, production of and copying of Court file documents are set out in Schedule 1, Item 123 of the *Federal Court and Federal Circuit and Family Court Regulations 2012* (Cth), which is available on the Court's website.

proceedings generally.⁵ Information on how to make payment of the Request fee (which may be paid online) is available on the Court's website.

The Court's Response to a Request

- 4.32 The Court may approve or refuse a Request (either in whole or in part) and may approve a Request subject to any conditions that the Court may consider appropriate (see generally r 2.31 of the Federal Court Rules).
- 4.33 Once the Court has made a decision on the Request, the Access Applicant will be notified about the outcome of the decision. Depending on the circumstances, this will usually occur via email.
- 4.34 If a Request is approved and the relevant fee has been paid, the Court will provide the documents in the manner that it considers will be the most efficient and cost-effective. This will often be in electronic form via email. However, in some circumstances it may be more appropriate to provide the documents in person at the registry of the Court.

5. RESEARCH REQUESTS

- 5.1 Requests for access to Court data or information for the purposes of research can broadly be divided into two categories:
 - (a) statistical information readily generated by the Court's case management system; and
 - (b) more detailed research projects requiring access to Court data, files or other records, either within a single registry or across multiple registries.
- 5.2 Generally speaking, where it has the resources to do so, the Court will endeavour to assist with research requests from government agencies associated with legal services and policy development, and requests associated with academic research projects that are sponsored and supervised by recognised tertiary institutions.
- 5.3 The Court's current policy in respect of research requests is available on the Court's website.

6. TRANSCRIPTS

- 6.1 For the purpose of this Part:

Authorised Transcript Provider means any Authorised Transcript Provider, authorised to provide transcripts for the Court. Contact details of the Court's Authorised Transcript Providers is available on the Court's website.

Transcript Request Form means the approved form set by the Authorised Transcript Provider, to be lodged directly with the relevant Authorised Transcript Provider. Copies of the form are available from the Authorised Transcript Provider's

⁵ See regulation 2.04(2) *Federal Court and Federal Circuit and Family Court Regulations 2012* (Cth).

website and contact details of the relevant Authorised Transcript Providers is available on the Court's website.

- 6.2 Copyright in all transcripts belongs to the Commonwealth of Australia and, subject to the Federal Court Rules and any order or direction of the Court, transcripts cannot be shared between parties or distributed to any other recipients. It should also be noted that a party or person must not use a recording device for the purpose of making a transcript or record of the evidence or submissions at a hearing (r 6.11(3) of the Federal Court Rules).
- 6.3 A party or non-party (including the media) may purchase the whole, or a part, of a transcript in a proceeding from the Court's Authorised Transcript Provider, unless the Court has ordered or directed that a transcript:
- (a) is, in whole or in part, confidential or the subject of restrictions on access; or
 - (b) may not be published or reproduced without leave of the Court.⁶
- 6.4 Subject to such restrictions, a transcript will be provided if a formal request for a transcript is submitted to the Court's Authorised Transcript Provider using the approved form and after payment of the relevant charge set by the Authorised Transcript Provider.⁷ The various forms of the Authorised Transcript Provider can be accessed via the Court's website.

7. FURTHER INFORMATION AND RESOURCES

- 7.1 Further information about access to documents and transcript requests is available on the Court's website. Otherwise, general queries concerning the matters noted in this practice note should be raised with your local registry. Contact details for your local registry are available on the Court's website.
- 7.2 Further information to assist litigants, including a range of helpful guides, is also available on the Court's website. This information may be particularly helpful for litigants who are representing themselves.

J L B ALLSOP
Chief Justice
10 February 2023

⁶ See relevantly, Part VAA of the Federal Court Act generally in respect of suppression and non-publication orders.

⁷ See also 2.32(5) of the Federal Court Rules.




The Hon Tony Burke MP
Minister for Employment and Workplace Relations
Minister for the Arts
Leader of the House

Reference: MS23-000172

Mr Josh Burns MP
Chair
Parliamentary Joint Committee on Human Rights
Parliament House
CANBERRA ACT 2600

By email: human.rights@aph.gov.au

Dear Chair


I refer to your correspondence of 9 February 2023 regarding the Parliamentary Joint Committee on Human Rights *Report 1 of 2023*, requesting information about issues identified in relation to the *Fair Entitlements Guarantee Regulations 2022* (TCF Regulations).

I draw the Committee's attention to the Australian Government's commitment to extend eligibility under the *Fair Entitlements Guarantee Act 2012* (FEG Act) to migrant workers, as part of its election commitment to implement the recommendations of the Migrant Workers' Taskforce. The Government will consider whether to extend eligibility under the TCF Regulations to migrant workers in the context of the implementation of this commitment.

I provide the following responses to the Committee's request for advice.

- 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.

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.

I trust this information is of assistance.

Yours sincerely

THE HON TONY BURKE MP

9/3/2023