

CHAPTER 3

Human Rights and the International Labour Organisation

3.1 The Committee received evidence from numerous submitters, including the Law Council of Australia (Law Council), the Australian Council of Trade Unions (ACTU) and the Maritime Union of Australia about the human rights implications of the bills, with many submitters arguing that the bills have severe adverse impacts on human rights in Australia. The Committee took note of other Parliamentary inquiries into the proposed bills and their potential engagement of international legal instruments and human rights law. Significant concerns were raised by the Parliamentary Joint Committee on Human Rights (PJCHR) and the Senate Standing Committee for the Scrutiny of Bills (Scrutiny of Bills Committee), that the bills would have a negative impact on human rights in Australia.

3.2 The Committee heard that Australia's numerous obligations under International Labour Organisation (ILO) conventions were under threat by the bills, and that ILO obligations were critical in maintaining fairness in the Australian industrial relations system. Some submitters, like the ACTU suggested that Australia's reputation overseas as a champion of human rights and therefore workers' rights is directly threatened by the legislation.

3.3 While these concerns were rebutted by the Minister for Employment (the Minister), the Government argued that it would determine the extent to which it engaged human rights law in Australia, and that it was not necessarily concerned that the bills infringed obligations in force due to ILO Conventions to which Australia is a party. A list of ILO Conventions in effect in Australia is available at Appendix 3.

Criticism of the bills

3.4 The Law Council of Australia argued the bills feature numerous contraventions of common law rights and privileges, including:

the burden of proof, the privilege against self-incrimination, the right to silence, freedom from retrospective laws and the delegation of law making power to the executive.¹

3.5 The Law Council agreed with the concerns of the Scrutiny of Bills Committee, that the bills would negatively impact numerous rights currently guaranteed in Australian law. Further, the Law Council submitted the Committee should wait for a response from the Minister to the concerns raised in the Scrutiny of Bills Committee alter digest, before tabling its final report.²

Human Rights, Scrutiny and the pursuit of legitimate objectives

3.6 The Committee notes that potential engagement of human rights is required pursuant to the *Human Rights (Parliamentary Scrutiny) Act 2011*, to be justified in the

1 Law Council of Australia, *Submission 17*, p .2.

2 Law Council of Australia, *Submission 17*, p .2.

statement of compatibility, to accompany the bills through the Parliamentary process. The Attorney-General's Department has also created a flowchart that guides Commonwealth Agencies and Departments in how to comply with human rights law in Australia, available at Appendix 4. The PJCHR has provided, through its Practice Note 1, details of the process for assessing engagement of human rights law by bills and proposed legislative instruments:

In line with the steps set out in the assessment tool flowchart (and related guidance) developed by the Attorney-General's Department, the committee would prefer for statements to provide information that addresses the following three criteria where a bill or legislative instrument limits human rights:

1. whether and how the limitation is aimed at achieving a legitimate objective;
2. whether and how there is a rational connection between the limitation and the objective; and
3. whether and how the limitation is proportionate to that objective.³

Legitimate objective

3.7 The Committee does not accept the Government's contention that the re-establishment of the ABCC is required, and does not accept that the former ABCC increased the performance of the building or construction sector, or that it provided any economic benefits to either workers or to the community at large.⁴ The Government submitted:

The need to re-establish the ABCC, underpinned by provisions put in place in 2005, is clear. While the ABCC existed, the performance of the building and construction sector improved. During its period of operation, the ABCC provided economic benefits for consumers, higher levels of productivity, less days lost to industrial action and a respect for the rule of law.⁵

3.8 The Law Council suggested that the information gathering powers proposed by the bills are generally reserved for law enforcement or intelligence agencies. They argue the intrusive and extraordinary nature of the powers increase the need for evidentiary proof of consistent problems within the building and construction industry.⁶ Furthermore, the Council highlight the need for adequate safeguards for such extensive powers:

It is also critical that if shown to be necessary, such powers are introduced with strict safeguards (such as judicial oversight of the issue of examination notices) to guard against the misuse or overuse of such powers.⁷

3 Parliamentary Joint Committee on Human Rights, *Practice Note 1*, p.2.

4 Minister for Employment, *Submission 1*, p. 3.

5 Minister for Employment, *Submission 1*, p. 3.

6 Law Council of Australia, *Submission 17*, p. 4.

7 Law Council of Australia, *Submission 17*, p. 4.

3.9 The Committee notes that submitters, including the ACTU disagreed; arguing that there was no evidence to suggest that industrial disputes in the building and construction industry were at historic levels, or that since the ABCC was abolished there has been a rise in industrial disputes.⁸ Further, the ACTU argued that the rate of industrial disputes remains low relative to historic levels.⁹

3.10 The use of statements without evidence does not satisfy the requirement that engagement of human rights in Australia must be in pursuit of a legitimate objective. Given the Committee does not accept evidence from the Minister about increases in delays or illegal activity in the building and construction sector, the engagement of human rights by the bills cannot be justified. The Committee firmly believes that no legitimate objective exists, and that the only objective pursued by the bills is the fundamental interference of the human rights of workers in the building and construction industry.

Rational connection between limitations of rights and the objective

3.11 Similarly, the Committee does not accept there is a rational connection between the engagement of human rights and the objective, given the objective itself is illegitimate and non-existent.

3.12 The provisions of the bill, including the human rights implications discussed below clearly demonstrate that the investigative and coercive powers proposed by the bills are draconian and unnecessary. The Committee does not accept that any rational connections exist due to the complete lack of evidentiary support for the Government's claims. The limitation would not achieve the objective, as the objective is based on false statements and misinformation.

Proportionality of objective

3.13 The Committee notes that any human rights engaged by legislation must be proportionate to the objective and, 'limitations on rights must go only as far as necessary to achieve a legitimate aim.'¹⁰ The analysis provided by the Scrutiny of Bills Committee and PJCHR demonstrate the disproportionality of the engagement of rights, and provide further evidence that the bills should be opposed in their entirety. The ACTU submitted that, in light of the ILO's observations in respect to how the ABCC operated (and restricted the rights of workers), the inclusion in the Statement of Compatibility that 'the Bill will enhance workers' right to freedom of association', to be 'highly objectionable'.¹¹

8 ACTU, *Submission 14*, p. 26.

9 ACTU, *Submission 14*, p. 26.

10 Attorney-General's Department, *Flowchart for Assessing the Human Rights Compatibility of Bills and Legislative Instruments*, at <http://www.ag.gov.au/RightsAndProtections/HumanRights/PublicSector/Documents/Flowchart.pdf>, accessed 24 March 2014.

11 ACTU, *Submission 14*, p. 24.

3.14 The Committee agrees that the contention by the Government that the bills would enhance workers' rights is both false and deliberately misleading, given the negative consequences for human and therefore, workers' rights discussed below.

Committee view

3.15 The Committee disagrees that the limitations are legitimate, rationally connected or proportionate. The Committee disputes the assertions made by the Government that specific legislation is required for the building and construction industry.

3.16 The Committee agrees that the engagements of rights by the bills are excessive and dangerous, and represent an effort to undermine the ability of workers to unite and organise under international and Australian law.

3.17 The Committee accepts the criticism of the explanatory memorandum and statement of compatibility, and takes the view that if they are to be of any use to either the Parliament or the courts, significantly more detail is required.

Engagement of human rights in the bills

3.18 The PJCHR expressed its concern with the potential engagement of numerous rights in the bills and has written to the Minister seeking additional information relating to the bill's engagement of numerous human rights instruments, including:

...the right to equality and non-discrimination, the right to freedom of association and to engage in collective bargaining, the right to freedom of assembly, the right to freedom of expression, the right to privacy, the right to a fair hearing, and the prohibition against self-incrimination.¹²

3.19 The PJCHR noted that while the bills give effect to the recently elected government's commitment to re-establish the Australian Building and Construction Commission (ABCC), the bills largely replicate provisions previously enforced in Australian legislation, by removing the changes made by the 2012 Act.

3.20 While each bill is accompanied by a statement of compatibility, the PCJHR found the statement accompanying the main bill notes the engagement of:

- The right to freedom of association;¹³
- The right to just and favourable conditions of work (including the right to safe and healthy working conditions);¹⁴
- The right to a fair trial;¹⁵

12 Parliamentary Joint Committee on Human Rights, *Second Report of the 44th Parliament*, p. 1.

13 Article 22 of the International Covenant on Civil and Political Rights (ICCPR) and article 8 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), as cited by the Parliamentary Joint Committee on Human Rights, *Second Report of the 44th Parliament*, p. 5.

14 Article 7 of the ICESCR, as cited by the Parliamentary Joint Committee on Human Rights, *Second Report of the 44th Parliament*, p. 5.

15 Article 14 of the ICCPR, as cited by the Parliamentary Joint Committee on Human Rights, *Second Report of the 44th Parliament*, p. 5.

- The right to freedom of assembly;¹⁶
- The right to freedom of expression;¹⁷ and
- The right to privacy.¹⁸

3.21 The PJCHR noted the government's claim in the statement of compatibility that any limitations on the rights engaged by the bills are, 'compatible with human rights because to the extent that it may limit human rights, those limitations are reasonable, necessary and proportionate.'¹⁹

3.22 The PJCHR criticised the statement of compatibility and the explanatory memorandum generally. The PJCHR noted the documents made assertions and statements of fact that are not supported by evidence or data.²⁰ The Senate Standing Committee for the Scrutiny of Bills (Scrutiny of Bills Committee) also criticised the explanatory memorandum, noting that:

...generally, the explanatory memorandum is regrettably brief and uninformative, for the most part repeating the provisions of the bill. For example, the explanatory memorandum frequently notes that various provisions are modelled on or similar to provisions contained in the FW Act, but without any detail about the extent of similarities or whether there are salient differences.

A comprehensive explanatory memorandum is an essential aid to effective Parliamentary scrutiny (including the scrutiny undertaken by this committee) as it greatly assists people to understand the legislative proposal and it may also be an important document used by a court to interpret the legislation under section 15AB of the *Acts Interpretation Act 1901*.²¹

3.23 The Scrutiny of Bills Committee made numerous additional comments in its report on the bills, tabled in the Senate on 11 December 2013, including the inclusion in the bills of provisions relating to the potential:

- Exclusion of judicial review rights;
- Delegation of legislative power;
- Trespass on personal rights and liberties;
- Delegation of legislative power;

16 Article 21 of the ICCPR, as cited by the Parliamentary Joint Committee on Human Rights, *Second Report of the 44th Parliament*, p. 5.

17 Article 19 of the ICCPR, as cited by the Parliamentary Joint Committee on Human Rights, *Second Report of the 44th Parliament*, p. 5.

18 Article 17 of the ICCPR, as cited by the Parliamentary Joint Committee on Human Rights, *Second Report of the 44th Parliament*, p. 5.

19 Parliamentary Joint Committee on Human Rights, *Second Report of the 44th Parliament*, p. 5.

20 Parliamentary Joint Committee on Human Rights, *Second Report of the 44th Parliament*, pp 5-6.

21 Senate Standing Scrutiny of Bills Committee, *Alert Digest No. 9 of 2013*, p. 18.

- Undue dependence upon insufficiently defined powers;
- Broad discretionary powers;
- Merits review; and
- Penalties.²²

3.24 The ACTU also noted the ILO's analysis of the operation of the ABCC. In the Concluding Observations on Australia's Fourth Periodic Report in 2009, criticised the effect of the ABCC on workers in the building and construction industry. Specifically, the ILO contended the rights to organise and freedom of association are engaged inappropriately:

The Committee is concerned that provisions of the Building and Construction Industry Improvement Act 2005 seriously affect freedom of association of building and construction workers, by imposing significant penalties for industrial actions, including six months of incarceration. The Committee is also concerned that before workers can lawfully take industrial action at least 50 per cent of employees must vote in a secret ballot and a majority must vote in favour of taking the industrial action which unduly restricts the right to strike, as laid down in article 8 of the Covenant and ILO Convention No. 87 (1948) concerning Freedom of Association and Protection of the Right to Organise (art.8)²³

Australia's commitment to International Labour Organisation conventions

3.25 The Committee also heard extensive evidence from some submitters, such as the Australian Council of Trade Unions (ACTU) and the Maritime Union of Australia (MUA) that suggested the bills, if enacted, could result in the abrogation of ILO instruments relating to rights to employment. The criticism related to the engagement by the bills of the Freedom of Association and Protection of the Right to Organise Convention (No. 87) (the Convention), and the likely interference with the rights in the Convention to participate in the trade union movement. The Convention has been in force in Australia since 28 February 1973.²⁴

3.26 The MUA argued the bills, if passed, would amount to the abrogation of Australia's international legal obligations under the Convention. Specifically, the MUA contended that the ILO had previously found the previous Act (*Building and Construction Industry Improvement Act 2005*) (Cth) contravened numerous ILO instruments, including:

- The Labour Inspection Convention 1947 (No. 81);
- The Freedom of Association and Protection of the Right to Organise Convention 1947 (No. 87); and

22 Senate Standing Scrutiny of Bills Committee, *Alert Digest No. 9 of 2013*, pp 3 to 18.

23 Committee on Economic, Social and Cultural Rights, Forty-Second Session, Geneva, 4–22 May 2009 at [19], as cited in ACTU, Submission 14, p. 24.

24 International Labor Organisation, C087 – *Freedom of Association and Protection of the Right to Organise Convention*, 1958, (No. 87)

- The Right to Organise and Collective Bargaining Convention 1949 (No. 98).²⁵

3.27 The ACTU noted that while Australia is subject to numerous international obligations, the failure to abide by human rights obligations would have significant impacts on the promotion and protection of human rights, and also on Australia's reputation. The ACTU agreed with the MUA that the previous Act, upon which the bills are based, was found to constitute a serious breach of Australia's obligations under ILO instruments, as described above.²⁶

3.28 The ACTU argued the ILO supervisory committees (the Tripartite Committee on Freedom of Association and the Committee of Experts on the Application of Conventions and Recommendations) held that the original Act breached Australia's international obligations. Those committees specifically criticised:

- Provisions that rendered some industrial action 'unlawful';
- The imposition of penalties and sanctions on workers and unions that engaged in 'unlawful industrial action';
- The unenforceability of project agreements;
- The National Code of Practice for the Construction Industry and associated guidelines;
- The investigative and enforcement powers of the ABCC;
- The absence of proportionality with respect to offences prescribed under the Act; and
- The focus of the ABCC on investigating and prosecuting workers and trade union officials.²⁷

3.29 The Minister for Employment rebutted the arguments put forward by submitters, such as the MUA and ACTU. The Minister suggested the issues raised by the PJCHR and the Scrutiny of Bills Committee relating to Australia's obligations under ILO conventions were under consideration, however:

Senator Abetz: The ILO's views are always of interest to us, but we in Australia will determine for ourselves what our law ought to be. The ILO's interpretation of certain conventions is always interesting and we will take it into account but, at the end of the day, I think Australians want to be the determinants of their own legislative framework.²⁸

3.30 Further, the Minister argued that, with respect to the operations of the ILO conventions in Australia, 'What our obligations are under international law is often a

25 Maritime Union of Australia, *Submission 12*, p. 9.

26 Australian Council of Trade Unions, *Submission 14*, p. 22.

27 Australian Council of Trade Unions, *Submission 14*, p. 22.

28 Senator the Hon Eric Abetz, Minister for Employment, *Proof Committee Hansard*, 12 March 2014, p. 47.

matter of interpretation. We will make up our own minds as to what those requirements are.²⁹

Proposed discrimination against employees and employers in the building and construction industry

3.31 The PJCHR noted that while its mandate was to ensure legislation complies with international human rights obligations, the bills give rise to a number of human rights concerns. Specifically, the PJCHR questioned whether the introduction of a separate legislative regime that would apply to one group of workers and employers raises issues of equality and non-discrimination, in respect of Australia's international human rights obligations.³⁰

3.32 Much of the analysis provided by the PJCHR relates primarily to two of the seven international human rights instruments contained in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*, namely:

- International Covenant on Economic, Social and Cultural Rights done at New York on 16 December 1966 ([1976] ATS 5) (ICESCR); and
- International Covenant on Civil and Political Rights done at New York on 16 December 1966 ([1980] ATS 23) (ICCPR).³¹

3.33 The PJCHR noted the inclusions of the government's view in the explanatory memorandum that the bills are necessary on the grounds the building and construction industry is distinctive and requires a distinctive policy response for economic reasons.³² The explanatory materials also suggests that since the abolition of the ABCC:

Standards of behaviour [in the building and construction industry] have declined. The industry has returned to the 'bad old days' where disputes are violent and there exists thuggery and disregard for the rule of law.³³

Ministerial powers

3.34 The Law Council submitted that clause 120 would permit inappropriate delegation of legislative authority. The clause proposes to allow a Minister to make rules by legislative instrument, specifically to determine whether someone is an authorised applicant for the purposes of obtaining an order 'relating to a contravention of a civil remedy provision'.³⁴

29 Senator the Hon Eric Abetz, Minister for Employment, *Proof Committee Hansard*, 12 March 2014, p. 47.

30 Parliamentary Joint Committee on Human Rights, *Second Report of the 44th Parliament*, p. 6.

31 *Human Rights (Parliamentary Scrutiny) Act 2011*, s3

32 Parliamentary Joint Committee on Human Rights, *Second Report of the 44th Parliament*, p. 8.

33 Parliamentary Joint Committee on Human Rights, *Second Report of the 44th Parliament*, p. 8.

34 Law Council of Australia, *Submission 17*, p .2.

3.35 The Law Council shared the concerns of the Scrutiny of Bills Committee, who questioned why the power would need to be set by regulation, opposed to being determined by the Parliament in the bills. The Law Council submitted it is not clear why anyone other than the ABC Commissioner should have the power under the bills to designate authorised persons.

Exclusion of judicial review rights

3.36 The Scrutiny of Bills Committee's argued that exclusions from the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (ADJR Act) should be avoided is critical, as the removal of judicial review rights (as proposed by the bills) would severely diminish the capacity for individuals to seek review of a decision. The removal of this right, while consistent with the other industrial relations legislation could result in the loss of the ability of workers to seek judicial review, where appropriate:

...the effect that decisions made under the *Building and Construction Industry (Improving Productivity) Act 2013* will be excluded from the application of the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act). No rationale is provided in the explanatory memorandum, though it is noted that the predecessor legislation (which is repealed when this bill commences) was also excluded. The explanatory memorandum also notes that decisions made under the *Fair Work Act 2009* and the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* are excluded from review under the ADJR Act.

The committee continues its practice of expecting a justification for excluding the operation of the ADJR Act. The ADJR Act is beneficial legislation that overcomes a number of technical and remedial complications that arise in an application for judicial review under alternative jurisdictional bases (principally, section 39B of the *Judiciary Act*) and also provides for the right to reasons in some circumstances. The proliferation of exclusions from the ADJR Act is to be avoided.³⁵

Rights to equality and non-discrimination

3.37 As discussed previously, the PJCHR stated that the bills' engagement of the rights to equality and non-discrimination may not be necessary or appropriate, given the lack of evidence provided in the explanatory memorandum. Importantly, the PJCHR noted the bills would involve the prohibition of certain forms of industrial activities that would apply to specific aspects of the building and construction industry. The bills would also create significant investigative powers, civil penalties and criminal offences only applicable to employers and employees who fall within the building industry.

3.38 While the PJCHR recognised the permissibility of targeted legislation to affect social or economic activity, it questioned the legitimacy of whether the bills

35 Senate Scrutiny of Bills Committee, *Alert Digest No 9 of 2013*, p 2.

single out particular groups of workers, while subjecting them to different penalties and offences.³⁶

3.39 The PJCHR argued that the right to equality and non-discrimination, guarantees equal protection under the law and prevents the discrimination of persons on the basis of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or 'other status'.³⁷ The PJCHR suggested the latter category would apply to persons (both employers and employees) engaged in the building industry. Further, the PJCHR noted all workers are entitled, under international legal instruments, to the same rights at work,³⁸ including freedom of association and trade union rights.

Right to freedom of association and right to form and join trade unions

3.40 The PJCHR noted the potential engagement of the aforementioned right, contained in Article 22 of the ICCPR, specifically that limitations on this right are permissible only where they are both prescribed by law and 'necessary in a democratic society in the interest of national security or public safety, public order, the protection of public health or morals, or the protection of the rights and freedoms of others'.³⁹

3.41 The PJCHR stated that Article 8 of the ICESCR also guarantees the right to form and participate in trade unions as well as ensuring the rights of trade unions to:

Function freely subject to no limitations other than those prescribed by law and which are necessary for the purposes set out above, and the right to strike. As with Article 22 of the ICCPR, Article 8 provides that no limitations on the rights are permissible if they are inconsistent with the rights contained in ILO Convention No. 87.⁴⁰

3.42 The ACTU noted the ILO's previous analysis of the operation of the ABCC under the 2005 Act. In the *Concluding Observations on Australia's Fourth Periodic Report* in 2009, the ILO criticised the effect of the ABCC on workers in the building and construction industry and contended the right to organise and freedom of association were adversely engaged, in contravention of international law:

The Committee is concerned that provisions of the *Building and Construction Industry Improvement Act 2005* seriously affect freedom of association of building and construction workers, by imposing significant penalties for industrial actions, including six months of incarceration. The Committee is also concerned that before workers can lawfully take industrial action at least 50 per cent of employees must vote in a secret ballot and a majority must vote in favour of taking the industrial action

36 Parliamentary Joint Committee on Human Rights, *Second Report of the 44th Parliament*, p. 7.

37 Parliamentary Joint Committee on Human Rights, *Second Report of the 44th Parliament*, p. 11.

38 Parliamentary Joint Committee on Human Rights, *Second Report of the 44th Parliament*, p. 11.

39 Article 22 of the ICCPR, as cited in the Parliamentary Joint Committee on Human Rights, *Second Report of the 44th Parliament*, p. 12.

40 Article 8(3) of the ICESCR, as cited in the Parliamentary Joint Committee on Human Rights, *Second Report of the 44th Parliament*, p. 12.

which unduly restricts the right to strike, as laid down in article 8 of the Covenant and ILO Convention No. 87 (1948) concerning Freedom of Association and Protection of the Right to Organise (art.8)⁴¹

Right to organise and bargain collectively

3.43 The PJCHR noted the bills, while resurrecting many features of the previous legislation would also require the examination of ILO criticism of the original act. Specifically, the PJCHR noted that the ILO Committee on Freedom of Association and the ILO Committee on the Application of Conventions and Recommendations (CEACR) made numerous criticisms of section 26 of the 2005 Act, namely:

The Committee emphasizes that according to the principle of free and voluntary collective bargaining embodied in Article 4 of Convention No. 98, the determination of the bargaining level is essentially a matter to be left to the discretion of the parties and, consequently, the level of negotiation should not be imposed by law, by decision of the administrative authority or by the case law of the administrative labour authority [see Digest, op. cit., para. 851]. The Committee therefore requests the Government to take the necessary steps with a view to revising section 64 of the 2005 Act so as to ensure that the determination of the bargaining level is left to the discretion of the parties and is not imposed by law, by decision of the administrative authority or the case law of the administrative labour authority. The Committee requests to be kept informed in this respect.⁴²

3.44 The PJCHR stated that the right to organise includes the right to bargain collectively, and is guaranteed by Article 22 of the ICCPR and Article 8 of the ICESCR. The ILO supervisory bodies, having taken the view the previous legislation was not consistent with the right to bargain collectively, lends great support to the arguments that the newer bill would have the same effect. The primary bill also introduces provisions allowing for unenforceability agreements⁴³ that would be unenforceable if made with the intention of standardising employment conditions for employees working across multiple sites. The PJCHR questioned whether the inclusion of the unenforceability agreements prevents workers from organising and bargaining collectively.

Right to freedom of assembly and freedom of expression

3.45 The PJCHR raised the inclusion in the statement of compatibility of the proposed unlawful picketing provision, found in clause 46 of the bill, and its restriction on the right to freedom of assembly:

However, even if the proposed prohibition of certain types of picketing were justified as a legitimate restriction on the freedom of assembly and other relevant rights, that is not sufficient. If some groups are permitted to

41 ACTU, *Submission 14*, p. 24.

42 Parliamentary Joint Committee on Human Rights, *Second Report of the 44th Parliament*, p. 15.

43 Parliamentary Joint Committee on Human Rights, *Second Report of the 44th Parliament*, p. 13.

exercise a right to a greater extent than others, then issues of discrimination in relation to the right arise.

As set out above, both the ICCPR and ICESCR guarantee the fulfilment of the rights in the respective Covenants without discrimination, which would include discrimination on the basis of status as a worker in a particular industry. The statement of compatibility does not explicitly address the issue of discrimination in the fulfilment of rights, in relation to this right or other rights.⁴⁴

3.46 Further, the PJCHR noted no justification is provided as to why picketing should be made illegal by the bills, but only in respect of the building and construction industry. The PJCHR queried why non-building workers and unions would not be subject to the same information gathering powers or penalties as those involved in the building industry, and suggested this distinction made by the bills questions whether there is an objective and reasonable basis for the distinction.⁴⁵

Right to privacy – coercive information-gathering powers

3.47 The Law Council of Australia submitted that it had significant concerns relating to Chapter 7, especially relating to the ABC Commissioner's investigative and coercive powers. The Law Council argued that the powers listed in the bill put numerous common law rights and privileges at risk.⁴⁶

3.48 The PJCHR noted that Chapter 7 of the primary bill confers significant powers on the ABCC. These include the creation of a criminal offence for failing to cooperate with an investigation by the Commissioner if a person is aware of or has evidence of a contravention by a building industry participant or is capable of giving evidence otherwise relevant to an investigation.⁴⁷ With respect to the proposed coercive powers, the PJCHR argued that:

These powers and associated provisions give rise to significant human rights concerns because of their breadth, the deployment of coercive powers in relation to civil wrongdoing rather than serious criminal offences, their application only to one part of the workforce, the limited procedural safeguards restricting and monitoring their use, the abrogation of the right of persons not to incriminate themselves, and the significant maximum penalty available for a failure to cooperate.⁴⁸

3.49 The PJCHR also suggested that on the basis of the explanatory materials provided by the Government, the powers are necessary to enable information gathering and to enable the identification of persons involved in unlawful industrial action. The PJCHR agreed that such powers, to the extent that they mirror the coercive

44 Parliamentary Joint Committee on Human Rights, *Second Report of the 44th Parliament*, pp. 15-16.

45 Parliamentary Joint Committee on Human Rights, *Second Report of the 44th Parliament*, p. 16.

46 Law Council of Australia, *Submission 17*, p. 4.

47 Parliamentary Joint Committee on Human Rights, *Second Report of the 44th Parliament*, p. 17.

48 Parliamentary Joint Committee on Human Rights, *Second Report of the 44th Parliament*, p. 18.

powers provided to the ACCC under the *Trade Practices Act 1974* are 'deemed to be necessary to bring about greater harmony in the industry and higher levels of productivity.'⁴⁹

3.50 However, the PJCHR also argued that:

- The powers proposed under clause 61 (that would compel attendance and the production of documents and information) are unusual in the context of industrial relations legislation in Australia;
- Neither the explanatory memorandum nor the statement of compatibility with human rights provides any information about the extent of the use of similar powers under the previous or current Acts and does not provide an assessment as to whether they were necessary for the achievement of the purpose of the legislation;
- It does not consider the explanatory material as having proven that the provisions are reasonable and proportionate, and that if the compulsory examination notices power is to remain in the bill, additional safeguards are required;
- The provisions, as drafted, engage Article 2(1) of the ICCPR, article 2(2) of the ICESR and article 8 of the ISCESR, as they apply higher penalties and a stronger enforcement regime to building industry participants than would apply to non-building industry participants.⁵⁰

Right to privacy – disclosure of information

3.51 The PJCHR discussed whether proposed clause 61(7) of the primary bill, that provides for the ABCC to compel the disclosure of evidence, is not limited by any provision in any other legislation that prohibits the disclosure of information.⁵¹ The PJCHR noted that:

Previous non-disclosure or secrecy provisions reflect legislative decision[s] that seeks to ensure that the intrusion on personal privacy necessary for achieving the legislative purpose is not excessively broad. This is achieved by providing that information obtained through the use of coercive information-gathering powers may be disclosed only to those involved in the administration of the law in question or for the purposes of related legislation.⁵²

3.52 The PJCHR does not accept that the measure is reasonable and proportionate,⁵³ due to the lack of information provided in the statement of

49 Parliamentary Joint Committee on Human Rights, *Second Report of the 44th Parliament*, p. 19.

50 Parliamentary Joint Committee on Human Rights, *Second Report of the 44th Parliament*, p. 22.

51 Parliamentary Joint Committee on Human Rights, *Second Report of the 44th Parliament*, p. 23.

52 Parliamentary Joint Committee on Human Rights, *Second Report of the 44th Parliament*, p. 23.

53 Parliamentary Joint Committee on Human Rights, *Second Report of the 44th Parliament*, p. 24.

compatibility. The PJCHR suggested that the clause does not take into account the balance in existing legislation between private and other interests.

Right to privacy – powers of entry into premises

3.53 The PJCHR noted proposed clause 72 of the primary bill provides the authorised officers' powers to enter businesses and residential premises for the purpose of compliance measures.⁵⁴ The PJCHR argued that the powers of entry proposed by the bill raise compatibility issues with respect to the right to privacy guaranteed by Article 17 of the ICCPR.

3.54 The Scrutiny of Bills Committee also raised concerns about the right to privacy noting:

Clause 72 does not permit forced entry and the inspector must reasonably believe that there is information or a person relevant to a compliance purpose at the premises. However, entry is authorised regardless of whether consent is given and there is no requirement for a warrant to be sought.

...

It appears that the explanatory material do not contain a compelling justification of departure from the general principle ... that authorised entry to premises be founded upon consent or a warrant.⁵⁵

Right to a fair hearing – imposition of a burden of proof on the defendant

3.55 The PJCHR noted clause 57 of the primary bill provides for a reverse onus of proof in court applications for contraventions on the proposed prohibition of unlawful picketing, as contained in clause 47.⁵⁶ This would also apply in to other civil remedy provisions found in chapter 6 of the primary bill, and provides that such actions were allegations where persons took actions with a particular intent, and the intent being contravention of the clause or provision.

3.56 Further, the PJCHR noted the statement of compatibility acknowledged the effect of the provisions is to require defendants to discharge their legal burden, to prove that on the balance of probabilities they did not take the action in question or with that intent. The PJCHR argued the imposition of a burden of proof on a defendant in civil proceedings engages the right to a fair hearing, as contained in Article 14(1) of the ICCPR.

3.57 The PJCHR shared the concerns of the Scrutiny of Bills Committee, who argued that:

Although it may be accepted that a person's intent is a matter peculiarly known to the person, intentions and motivations (whether lawful or unlawful) may be difficult to prove as they will not necessarily be reflected

54 Parliamentary Joint Committee on Human Rights, *Second Report of the 44th Parliament*, p. 25.

55 Senate Scrutiny of Bills Committee, Alert Digest No 9 of 2013, pp 13-14, as cited in Parliamentary Joint Committee on Human Rights, *Second Report of the 44th Parliament*, p. 25.

56 Parliamentary Joint Committee on Human Rights, *Second Report of the 44th Parliament*, p. 27.

in objective evidence. That is, although peculiarly within a person's knowledge, matters of intention may nonetheless remain difficult to prove. In this respect it is noted that the explanatory materials do not indicate why, in practice, it is considered that a person will, in this context, be able to produce evidence of a lawful intention. **As such the committee seeks the Minister's further advice as to the justification for, and fairness of, the proposed approach.**⁵⁷

Prohibition against self-incrimination

3.58 The Law Council argued the objective pursued by the Government does not justify the removal of the prohibition against self-incrimination. The Law Council submitted:

These coercive information gathering powers, and special inspection powers, put a number of common law rights and privileges at risk. For example, clause 102 expressly removes the privilege against self-incrimination by providing that a person is not excused from providing information to the ABC Commissioner because to do so would contravene another law or might tend to incriminate or otherwise expose the person to a penalty or other liability. This is a clear breach of the right to silence and the privilege against self-incrimination which is recognised under common law and international law as fundamental right.. Although there are some protections in subclause 102(2) that protect against the use of information disclosed to the ABC Commissioner from being used in certain other proceedings, these limited protections do not appear to be a sufficient safeguard against the misuse of this power and of the information obtained, particularly when the circumstances in which these powers can be exercised is expansive and the thresholds for exercising the powers is low.⁵⁸

3.59 The PJCHR noted clause 102(1) engages the right to protection from self-incrimination. Specifically, the right is engaged by the inclusion in the bill of the powers to issue:

- examination notices under clause 61;
- requests made by authorised Federal Safety Officers or inspectors who have entered premises under clause 74(1); and
- notices under clause 77(1) that would be issued by an authorised officer to produce records of documents.⁵⁹

3.60 Further, the PJC argued that:

Proposed new section 102(1) of the main bill provides that a person is not excused from providing information or documents in response to certain

57 Senate Scrutiny of Bills Committee, Alert Digest No 9 of 2013, p 14, as cited in Parliamentary Joint Committee on Human Rights, *Second Report of the 44th Parliament*, p. 27.

58 Law Council of Australia, *Submission 17*, p. 4.

59 Parliamentary Joint Committee on Human Rights, *Second Report of the 44th Parliament*, pp 27-28.

requests for that information or material, on the ground that to do so would contravene any other law or might tend to incriminate the person or otherwise expose the person to a penalty or other liability.⁶⁰

3.61 The PJCHR acknowledged the statement of compatibility with human rights relied on a recommendation from the 2003 Cole Royal Commission that the right to refuse to comply on self-incrimination immunity grounds should be removed, 'subject to the provision of use and derivative use immunity in both criminal and civil matters.'⁶¹ The PJCHR undertook to write to the Minister to ascertain whether the abrogation of the privilege (against self-incrimination) is justifiable in light of the experiences of the former ABCC and the Fair Work Building Industry Inspectorate.⁶²

Committee view

3.62 The Committee does not accept the assertion made by the Minister to the effect that the government will pick and choose at its discretion which of Australia's human rights obligations it will respect and the circumstances in which it will respect them. The Committee agrees with the criticism of the PJCHR and the Scrutiny of Bills Committee that the explanatory memorandum and statements of compatibility are not sufficient for the purposes of Parliamentary inquiry.

3.63 Given the additional misgivings of the MUA and the ACTU, the Committee agrees there is no clearly demonstrated need for the legislation. The Committee notes that previous legislation under which the ABCC was established, failed to meet requirements under ILO instruments that are meant to protect the interests of both employers and employees to freely participate in the Australian industrial relations system.

5.1 The Committee accepts that, on the balance of evidence provided by the PJCHR and the Scrutiny of Bills Committee, there are significant questions relating to the proposed powers of the bills and how they affect Australia's human rights legislative framework.

60 Parliamentary Joint Committee on Human Rights, *Second Report of the 44th Parliament*, p. 28.

61 Parliamentary Joint Committee on Human Rights, *Second Report of the 44th Parliament*, p. 29.

62 Parliamentary Joint Committee on Human Rights, *Second Report of the 44th Parliament*, pp 28-29.