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|  | United Nations | CCPR/C/122/D/2300/2013 |
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**Human Rights Committee**

 Decision adopted by the Committee under the Optional Protocol, concerning Communication No. 2300/2013[[1]](#footnote-1)\*,[[2]](#footnote-2)\*\*

*Communication submitted by:* D. N. (on behalf of all members of the Atheist Foundation of Australia), represented by DLA Piper

*Alleged victims:* The author

*State party:* Australia

*Date of communication:* 4 June 2010 (initial submission)

*Document references:* Decision taken pursuant to rule 97 of the Committee’s rules of procedure, transmitted to the State party on 31 October 2013 (not issued in document form)

*Date of adoption of decision:* 6 April 2018

*Subject matter:* Right to advertise banners promoting atheism as a manifestation of freedom of religion

*Procedural issues:* Victim status; exhaustion of domestic remedies

*Substantive issues:* Freedom of expression; freedom of religion; non-discrimination; right to an effective remedy

*Articles of the Covenant:* 2(3); 19; and 26

*Articles of the Optional Protocol:* 1; 2 and 3

1. The author of the communications D. N., President of the Atheist Foundation of Australia (AFA), born on 26 February 1945.[[3]](#footnote-3) He claims, as representative of all the members of the AFA, to be a victim of violations by Australia of articles 2, paragraph 3, 19 and 26 of the International Covenant on Civil and Political Rights (“the Covenant”). The Optional Protocol entered into force for Australia respectively on 25 September 1991. The author is represented by counsel, DLA Piper Australia.

 The facts as presented by the author

2.1 The author is the President and a member of the Atheist Foundation of Australia Inc (AFA), established in 1970 under the name “the Rationalist Society”. The AFA is a volunteer incorporated association established in the State of South Australia, governed by a Constitution. It seeks to promote the ideas of atheism. The AFA is run by a Committee of management consisting of 19 people including a President (the author), a Vice-President, a treasurer, and a secretary.

2.2 The aims of the AFA are: (1) to encourage and to provide a means of expression for informed freedom of thought on philosophical and social issues; (2) to safeguard the rights of all non-religious people; (3) to serve as focal point for the fellowship of non-religious people; (4) to offer reliable information in place of superstition and to offer the methodology of reason in place of faith, so as to enable people to take responsibility for the full development of their potential as human beings; and (4) to promote atheism.

2.3 A bus advertising campaign promoting the ideas of atheism originated in London, UK, in October 2008, which was launched in response to substantial religious advertising on buses in London, and which proved very successful thanks to donations, which allowed for the funding of advertisement on 200 buses in London, and 600 buses across England, Scotland and Wales. Around 1,000 advertisements were also placed in the London underground. The advertisements had the following slogans:

 ‘*There’s probably no god. Now stop worrying and enjoy life’;*

‘*Why believe in god? Just be good for goodness’ sake*’.

2.4 Bus advertising campaigns promoting a similar atheist message were also run in Spain, Italy and Canada.

2.5 In October and November 2008, the author sought advertising services in Australia on buses on behalf of the AFA. The advertising was to occur in the capital cities of New South Wales, South Australia, Victoria, Queensland, Western Australia, Tasmania and the Australian Capital Territory. These services were sought from two separate advertising companies. The purpose of the advertising campaign was to promote the ideas of atheism, to provoke thought, and was also a response to advertising undertaken by major religions, in particular Christian religions.

2.6 The advertising campaign was planned to occur in January 2009, and the proposed advertisements were to have the following slogans:

*'You don't need a god to do good';*

*'There is no reliable evidence for any of the gods. Doing good is all that matters'.*

*'Atheism - Because there is no credible evidence';*

*'Celebrate Reason! Sleep in on Sunday mornings';*

*'Atheism - Celebrate reason!'.*

2.7 Both advertising companies that the author approached refused to provide the advertising services, and therefore, the author was denied the services in each of the States and the territory in which the services were sought. This was despite the author's readiness to be flexible on the wording of the slogans if necessary. One company did not give reasons to its refusal to allow the advertisements, and the other company indicated that it was due to the risk that the advertising could attract “negative criticism”.

2.8 The author's complaint specifically concerns the States of New South Wales and South Australia, where the advertising company APN Outdoor Pty Limited[[4]](#footnote-4) refused the proposed advertising campaign in both states. APN Outdoor Pty Limited did not provide reasons for its refusal to allow the advertisements despite numerous attempts by the author to obtain this information. However, an email to the author from the company stated that in South Australia, “there are religious guidelines that cannot be breached”. The author highlights that advertising companies in South Australia have previously provided advertising services to persons of religious belief including one instance where a verse from the bible was advertised on buses.[[5]](#footnote-5)

2.9 The author and other members of AFA decided to complain to the respective State anti-discrimination bodies. However, of the States and the territory in which the author was denied the advertising services, a remedy was only potentially available in Victoria, Queensland, Western Australia, Tasmania and the Australian Capital Territory, which have adopted legislation prohibiting discrimination on the basis of religious belief/non-belief in the provision of goods and services. The author has accordingly pursued remedies in these States, and not in New South Wales and South Australia, where no remedy was available to the author or the AFA as no comparable legislation exists. In addition, no federal legislation currently prohibits discrimination on the basis of religious belief/non-belief.

2.10 On 9 December 2008, a settlement was reached in Tasmania. On 11 June 2009, a settlement was also reached in the Australian Capital Territory and in Victoria. The author notes that the terms of the settlements reached were agreed in a deed, and are confidential. He contends that a remedy has thus been obtained in respect of being denied the service in the States of Tasmania, Victoria, and the ACT.[[6]](#footnote-6)

2.11 A complaint was lodged by the AFA against APN Outdoor Pty Ltd before the Western Australian Equal Opportunity Commission, and was dismissed as “misconceived” under the *Equal Opportunity Act* on 21 September 2009. The Commission considered that the terms of the licence agreement existing between APN Outdoor Pty Ltd and the Public Transport Authority of Western Australia permits the installation of advertising posters on metropolitan buses, and that clause 7.2(b) of the Licence explicitly precludes APN from displaying any advertisement that is ‘political, religious or pornographic in nature, or that is likely to be considered offensive’. As no religious material is permitted to be displayed, the Commission determined that the AFA was not being treated less fairly than any other person/organisation, and thus that no discrimination occurred.

2.12 The AFA also lodged a complaint against APN Outdoor Pty Ltd before the Anti-Discrimination Commission of Queensland, which was rejected on 31 July 2009. The Commission considered that, under the Anti-Discrimination Act 1991, it lacked jurisdiction over the complaint as the act of discrimination occurred in New South Wales and not in Queensland. The author specifies[[7]](#footnote-7) that the Federal Court has no jurisdiction to hear an appeal of a decision from a State Human Rights/Anti-discrimination Commission. He adds that while a successful appeal to the High Court may have provided an effective remedy, it would be limited to the State from which the appeal originated, namely Queensland and Western Australia, but would not affect New South Wales and South Australia.

2.13 The author reiterates that there is no effective remedy in New South Wales nor South Australia, for lack of available legislation prohibiting discrimination in the provision of good and services in those States, and in the absence of federal Commonwealth legislation making such conduct unlawful. The author observes that neither the New South Wales Anti-Discrimination Board, nor the South Australia Equal Opportunity Commission would have jurisdiction to hear a complaint regarding discrimination on the ground of religion. A complaint to either body would be immediately rejected, and therefore futile.

*Available remedies in New South Wales* (NSW)

2.14 In NSW, the *Anti-Discrimination Act* 1977 (NSW) makes many forms of discrimination unlawful, including discrimination on the basis of race, sex and disability. There is no provision, which explicitly makes religious discrimination unlawful. Section 4(1) states that the definition of *“’race’ includes colour, nationality, descent and ethno-religious or national origin”*. Therefore, there is a prohibition against discrimination based on ‘ethno-religious’ attributes only. Although the NSW Administrative Decisions Tribunal has interpreted ‘ethno-religion’ so as to cover people of Jewish, Muslim or Sikh religion, this term does not encompass religious belief/non-belief, such as atheism.[[8]](#footnote-8)

2.15 In its 2008-2009 Annual report, the Anti-Discrimination Tribunal itself noted the shortcomings of the Anti-Discrimination Act. Under the heading ‘*Problems not covered under NSW Anti-Discrimination law*’, the Tribunal noted:

‘*Other problems not covered in the law include people who were treated unfairly because […] of their religion*.’

2.16 The NSW Law reform Commission has also recommended that religion be included as a ground of prohibited discrimination in the Anti-Discrimination Law.[[9]](#footnote-9)

2.17 Similarly to the Australian Human Rights Commission, the Anti-Discrimination Board, established under the Anti-Discrimination Act, has some investigative powers under the Act, including in the field of religious or political conviction. However, the Board can only make inquiries and recommendations, and, as such, does not offer an effective remedy, since the Anti-Discrimination Act does not make discrimination on the basis of religion unlawful. Accordingly the author concludes that he does not have an effective remedy at his disposal in NSW.

*Available remedies in South Australia*

2.18 The *Equal Opportunity Act* 1984 (SA) is the primary piece of anti-discrimination legislation in operation in South Australia. It makes unlawful certain forms of discrimination on the basis of sex, sexuality, marital status, pregnancy, and race. Section 5(1) of the Equal Opportunity Act provides that ‘*race of a person means the nationality, country of origin, colour or ancestry of the person’.* No reference is made to discrimination on the basis of religious belief/non-belief, nor is such discrimination made unlawful in any other Act in that State.

2.19 The Australian Human Rights Commission has also observed that ‘*Anti-discrimination laws in South Australia (…) do not deal with discrimination on the ground of religion*’. In 2009, the *Equal Opportunity Act* was amended to make discrimination on the basis of religious appearance or dress unlawful in certain areas of activity, including employment.[[10]](#footnote-10) This section is intended to make unlawful discrimination on the basis of, for example, the wearing of the hijab by Muslim women, the turban by Sikh men, or a cross worn by some Christians. However, the South Australian Government explained that the purpose of the amendment was simply to ensure that people who dress or present themselves in a particular way for religious purposes are not debarred from participating in school or work activities; and that the scope of legislative amendments was deliberately narrow, in that they do not make unlawful discrimination that is not related to a person’s physical expression of their religious beliefs. Therefore, if a person was discriminated against on the basis of their religious belief alone, and such was not connected to their appearance, they would not be able to seek redress under the *Equal Opportunity Act*. Consequently, the author claims that he had no effective remedy at his disposal in South Australia.

 *Available remedies at the federal level*

2.20 Although a range of anti-discrimination legislation exists at the federal level, no legislation prohibits discrimination on the basis of religious belief/non-belief in the provision of goods and services. Existing legislation includes the *Racial Discrimination Act* 1975 (Cth); the *Sex Discrimination Act* 1984 (Cth); the *Disability Discrimination Act* 1992 (Cth); the *Age Discrimination Act* 2004 (Cth); and the *Workplace Relations Act* 1996 (Cth). Under these Acts, there are some minor protections against discrimination on the basis of religious belief/non-belief. For example, if a religious group can also be classified as a race, the prohibition in the *Racial Discrimination Act* may apply. Similarly, victims of religious discrimination may be able to resort to the *Workplace Relations Act* if the discrimination occurred in employment. Despite these minor protections, religion alone is not an attribute for which it is unlawful to discriminate in many areas, including the provision of goods and services. Because of such gap, no action can be commenced in a federal jurisdiction regarding discrimination on the basis of religion within the field of the provision of goods or services. This fact, combined with the lack of State legislation in New South Wales and South Australia, has left victims of religious discrimination in those states without legal protection or enforceable remedy.

2.21 The author claims that he has no federal remedy to exhaust. Under the *Australian Human Rights Commission Act* 1986 (Cth), the Commission has the power to receive complaints from people or groups alleging unlawful discrimination. If a complaint is referred to the President of the Commission, the President must inquire into the complaint, and try to conciliate the complaint. The President also has the power to terminate the complaint, in which case any person affected may apply to the Federal Court or the Federal Magistrates Court. If the Commission decides to investigate the complaint, it must report to the Minister, where it is of the opinion that the act or practice in question is inconsistent with, or contrary to any human right, or impairs equality or opportunity, and that it is not appropriate to endeavour to effect a settlement, or the Commission has endeavoured without success to effect such a settlement. Every report made to the Minister must be tabled in each House of Parliament. The author refers to the Human Rights Committee’s determination that the Commission’s findings do not constitute an effective remedy, as the Government would be free to disregard them.[[11]](#footnote-11)

*Summary of remedies attempted, and outcome*

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| **Jurisdiction** | **Body** | **Date complaint lodged** | **Outcome** |
| **Australian Capital territory (ACT)** | ACT Hunan Rights Commission  | 11 June 2009 | Settlement reached |
| **Victoria** | Victorian Equal Opportunity and Human Rights Commission  | 11 June 2009 | Settlement reached |
| **Queensland** | Queensland Anti-Discrimination Commission | 11 June 2009 | Complaint rejected |
| **Western Australia** | Western Australian Equal Opportunity Commission | 11 June 2009 | Complaint dismissed |
| **Tasmania** | Tasmanian Anti-Discrimination Commissioner | On or around 9 December 2008 | Settlement reached |

No complaint was lodged in New South Wales nor in South Australia

 The complaint

3.1 The author makes this complaint on behalf of all members of the AFA. He submits that the discrimination in effect was against all these individuals, acting collectively through the AFA.

3.2 The author claims that through its failure to implement Commonwealth legislation, which makes discrimination on the basis of religious belief/non-belief unlawful, the State party has breached its obligations under the Covenant. In addition, a further breach exists through the lack of effective remedies, in circumstances where such discrimination has occurred. The author’s complaint deals, in particular, with the failure of New South Wales, South Australia and the Federal Government to protect against religious discrimination and provide an effective remedy.

3.3 The author believes that the AFA was refused the advertising services due to the atheist beliefs of its members. Accordingly, the author is of the view that there has been discrimination on the basis of religious/non-religious belief, in breach of article 26, in light of the State party’s failure to implement legislation which prohibits such conduct, and which guarantees to all persons equal and effective protection against discrimination on the ground of religion. Members of the AFA, the author included, have lodged domestic complaints in the Australian States where discrimination on the basis of religion is unlawful. However, no such law makes discrimination on the basis of belief/non-belief unlawful in NSW and South Australia, nor is there federal legislation to that effect.

3.4 As an alternative argument, the author claims, under article 19 of the Covenant, that while it was a private party (advertising company) which breached his protected right to freedom of expression by denying him access to advertising services, the State party has failed to enact legislation making such breaches unlawful. Accordingly, the author submits that the State party has failed to adequately protect his right to freedom of expression guaranteed in article 19, and to provide him with an effective remedy.

3.5 Therefore, by failing to declare discrimination on the basis or religion, and breaches of freedom of expression unlawful, the State party has deprived the authors of their protected right to an effective remedy.

3.6 The author further contends that the State party has failed to provide victims of discrimination on the basis of religious belief/non-belief with an effective remedy in New South Wales and South Australia, due to the lack of relevant state and federal legislation. The author argues that by failing to implement legislation which prohibits discrimination, and guarantees to all persons equal and effective protection against discrimination on the ground of religion, the State party has breached its obligation to provide the author with an effective remedy under article 2, paragraph 3 (a) .

 3.7 The author specifies that should the Committee determine that no violation of article 26 occurred, it should find a violation of article 2(3).

 3.8 The author requests that the Committee issues a recommendation that the State party provide the author with an effective remedy, by amending its laws, or enacting new legislation, to make discrimination on the basis of religious belief or non-belief unlawful. As religious belief includes theistic, non-theistic and atheistic beliefs, which are protected under article 18 of the Covenant,[[12]](#footnote-12) any such legislation should specify that the protection extends to all such types of beliefs.

 State party’s observations on admissibility and merits

4.1 On 18 July 2014, the State party submitted that the communication is inadmissible, because the author is not an individual, as required by article 1 of the Optional Protocol. The State party refers to the Committee’s jurisprudence,[[13]](#footnote-13) to stress that the Optional Protocol only entitles individuals to submit communications. In the present case, the author’s submissions give rise to the argument that the communication wholly concerns the interests of the Atheist Foundation of Australia Inc. (the AFA) as an organisation, rather than the author as individual. Despite the fact that the communication has been submitted in the author’s name as an attempt to satisfy the requirements of the Optional Protocol, it is clear from the facts and the circumstances surrounding the complaint that the author has not been personally affected, as an individual, by the alleged violation. The AFA Inc. cannot make a valid complaint under the Optional Protocol, and Mr. D.N. is only presented in his capacity as the President of that organisation. The State party adds that the complaints brought before in several Australian States and Territories, before Equal Opportunity and Human Rights Commissions were by the AFA Inc., rather than in the name of the author.

4.2 The State party adds that the author has failed to show that he has been personally affected by an alleged violation of the Covenant; he has not demonstrated how he, as opposed to and separate from the AFA Inc., has been directly affected by the alleged violation. The Committee indicated in the past that “a person can only claim to be a victim in the sense of article 1 of the Optional Protocol if he or she is actually affected.”[[14]](#footnote-14). In the present case, the only effect of the factual scenario presented has been the AFA’s inability to secure advertising services to promote the organisation. As the AFA Inc.’s Constitution shows, one of the organisation’s key aims is to promote atheism; the author noted that one of the present activities of the AFA is to organise a bus advertising campaign. The only alleged effect that this communication outlines was one experienced by the AFA Inc. as an organisation, rather than by the author as individual.

4.3 In several States and Territories, the AFA Inc. was able to secure bus advertising services after the organisation brought complaints before the relevant Equal Opportunity and Human Rights Commissions in those jurisdictions.[[15]](#footnote-15) Consequently the AFA Inc. has received several remedies for the decision of private companies which had the effect of restricting the organisation’s interests. The State party reiterates that it is the alleged constraints of the organisation’s interests which constitute the basis for the complaint before the Committee, and that the author is not a victim within the meaning of article 1 of the Optional Protocol.

4.4 Alternatively, on the merits, the State party submits that the author has not sufficiently substantiated that he personally suffered discrimination on the basis of his religion. He has provided no evidence to show how the refusal of private companies to provide services is connected to the author’s atheism. Consequently, the State party is of the view that the latter has failed to substantiate the claim that discrimination on the basis of religious belief or non-belief has occurred. The author has not set out how the impugned conduct was discriminatory under article 26, but merely relied on the fact that there is no federal legislation to prohibit religious discrimination in the provision of goods and services as the basis of his claim. According to the State party, absence of federal legislation is not, in itself, sufficient to establish a claim of discrimination.

4.5 The requirement for equal protection under the law without discrimination, under article 26, relates to the substance of the laws as well as their application. In the present case, the author has not been subjected to any distinction, exclusion, restriction or preference on the basis of his atheism, which has the purpose or effect of nullifying or impairing the recognition, enjoyment, or exercise of his rights and freedoms in an unequal footing with all persons. In order to establish a breach of article 26, the author would need to show (a) that he was subjected to a distinction, exclusion, restriction or preferential treatment on a prohibited ground; and (b) that such differential treatment was not legitimate, i.e. that it was not based on reasonable and objective criteria, and that is was not proportional to the aim to be achieved.

4.6 Further, the State party submits that the facts, as alleged, do not show that the private advertising companies’ decisions to refuse the advertising service sought by the AFA were based on the beliefs of the AFA Inc. From the facts, it appears that the private companies approached by the AFA Inc. applied the same advertising services standards that are applied to each and every company that seeks to purchase their services.

4.7 In the jurisdictions where complaints were settled, this was done confidentially. The author has not shown any evidence that a violation of the relevant legislative provisions in those jurisdictions had occurred. In other jurisdictions, the complaints were dismissed (Western Australia), or rejected (Queensland), the author has not given any evidence to show discrimination in the reasoning behind the decision of the private companies to refuse the advertising services when approached by the AFA Inc.

4.8 Finally, concerning effective remedies, the State party submits that article 2 of the Covenant cannot be invoked on its own. As the author has not substantiated a violation of his protected rights under the Covenant, the issue of an effective remedy does not arise. Furthermore, any remedy for religious discrimination would need to be sought by the AFA Inc. rather than by the author as an individual.

 Author’s comments on the State party’s observations

5.1 On 19 January 2015, the author responded to the State party’s observations. Concerning admissibility, he submits that he has been personally affected as a victim of a violation of articles 2, 19 and 26 of the Covenant, and that he is a duly authorised representative of certain individual members of the Atheist Foundation of Australia (AFA); that each individual was a victim, through the conduct complained of, and who was unable to seek a remedy for the breach of their rights under the Covenant.

5.2 The author stresses that he presents the communication on his own behalf, as an individual, and also as representative of all the members of the AFA. The discrimination in effect was against all members, acting collectively through the AFA. While the author acted in his capacity as the President of the AFA when seeking the advertising services, he did so also an atheist individual. Consequently, when both companies denied the services, the companies also denied the author his own right to manifest and/or express his personal atheist view, albeit that he was seeking to express those views in community with the other individual members of the AFA. The act of seeking advertising should be seen as a medium for allowing the author to express his atheist views, and, when denied the means, he was clearly being discriminated on the basis of his atheist views, along with the members of the AFA whom he represents. Any individual must have the freedom to express their religion or beliefs, whether or not they are acting in their personal capacity or as the president of an organisation.

5.3 The author adds that the fact that a person chooses to exercise their rights through collective action should not be a bar to one person claiming a violation of their rights. The Committee has recognized, in its case law, that “there may be cases where an individual might be viewed as being the representative of other members of an organisation. Such was the case in Hartikainen v. Finland, where the General Secretary of Free Thinkers in Finland was held competent to submit a communication on behalf of the other individual members, as individuals rather than on behalf of the organisation itself”.[[16]](#footnote-16) Accordingly, the Committee found the communication admissible, but sought further details of the individuals that the author represented, and evidence of the author’s authority to act on their behalf. The author submits that if the Committee so requests, he is able to submit information as to his authority to act as the representative of members of the AFA. The author further submits that the Committee also determined in the past that, where an action was taken by a Government against a company, an individual who is personally affected by the action may nevertheless submit a complaint.[[17]](#footnote-17) The Committee also stated that “there is no objection to a group of individuals who claim to be similarly affected, collectively, to submit a communication about alleged breaches of their rights”. [[18]](#footnote-18) According to the author, an individual claim such as the present communication, can ultimately connect to a wider notion of group identity that may manifest itself in the form of genuinely collective complaints.

5.4 The author clarifies that one of the AFA’s goal is to express and manifest the atheism of the individual members of the AFA, acting collectively. The author’s wish to express his atheism merely coincides with the interests of the AFA. The Committee has stressed that the beneficiaries of the rights recognised by the Covenant are individuals, but that the freedom to manifest one's religion or belief, under article 18 of the Covenant, may be enjoyed in community with others, and that “the fact that the competence of the Committee to receive and consider communications is restricted to those submitted by individuals does not prevent such individuals from claiming that actions or omissions that concern legal persons and similar entities amount to a violation of their own rights.”[[19]](#footnote-19).

5.5 As for his standing as a victim, the author submits that he has suffered direct material and moral harm; and that he also represents other members of the AFA who have themselves suffered material and moral harm. The author had himself sought, and been directly refused advertising services due to his atheist views, and the atheist views of the AFA members, although he showed readiness to be flexible on the wording of the slogans.

5.6 On the merits, the author reiterates his previous submissions, and stresses that the refusal of services amounted to discrimination on the basis of the author’s atheism; that the slogans on the advertisements sought primarily to express the individual members of the AFA’s atheism, and to promote the message of a lack of belief in a god or gods, and the benefit for humanity to accept that point of view. The State party interpreted “promotion of atheism” narrowly, which fails to recognise that this was an atheist expression of the AFA members’ freedom of expression of religion/belief, not only in the non-existence of a deity, but also in the need to express this belief and to educate others.

5.7 As for rational connection, the author stresses that the denial of advertising services by private companies is directly linked to the author’s atheist views. The essence of the author’s complaint is the failure of the State party to provide a legislative framework that protects against discrimination, as opposed to the refusal of private companies to provide services. The State party, in its submission, has not denied that there is no law rendering discrimination in the basis of religious belief/non-belief unlawful either in New South Wales, South Australia, or at federal level. It is the inability of the author to secure a remedy which evidences a failure by the State party.

5.8 Regarding the State party’s argument that the author would need to establish an illegitimate differential treatment on the basis of a prohibited ground compared to others, the author stresses that article 26 does not rely solely on considerations of a comparator. Rather, it imposes a positive obligation upon the State party to prohibit discrimination through its laws, and to ensure equal and effective protection on the grounds listed, including religion and belief. In any event, the relevant comparator is demonstrated in the present case, as a private company has previously accepted and displayed advertising promoting Christian beliefs and Christian religious activity. As such, the author and members of the AFA were treated differently from other individuals who sought advertising services. Because of the failure of the State party to implement the necessary legislation, a private company is lawfully able to act in a manner, in the provision of goods or services or in other areas of public life, which prefers one religion or belief to another.

5.9 For these reasons, the author reiterates that he was deprived of his rights under article 26, and article 19, which includes religious discourse. It has also denied the author his right to an effective remedy, by failing to enact laws that protect individuals against both discrimination on the basis of religious belief, and breaches of the right to freedom of expression.

 Issues and proceedings before the Committee

 Consideration of admissibility

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 As required under article 5 (2) (a) of the Optional Protocol, the Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement.

6.3 The Committee takes note of the author’s claim that the Atheist Foundation of Australia (AFA) was refused the advertising services by the company APN Outdoor Pty Limited in the States of South Australia and New South Wales, due to the atheist beliefs of the AFA’s members, which constituted discrimination on the basis of religious/non-religious belief, in breach of article 26. The Committee notes from the information before it that in several States and territories, the AFA was actually able to secure the advertisement of their slogans on buses. As far as the States of New South Wales and South Australia are concerned, the Committee notes the author’s assertion that advertising companies in South Australia have previously provided advertising services to persons of religious belief, including one instance where the author reports having seen a verse from the bible advertised on buses, and that another company refused the advertisement with the argument that “there are religious guidelines that cannot be breached”. However, the author has not provided further evidence or information supporting these assertions, or other information that would otherwise sufficiently demonstrate that the advertisements were refused as a result of their atheistic message. Under these circumstances, the Committee considers that the author has not sufficiently substantiated his claim that he was a victim of discrimination on the ground of religion or belief. The Committee concludes that the author has failed to sufficiently substantiate his claims under article 26, for purposes of admissibility.

6.4 The Committee further takes note of the author’s claims under article 19. The Committee concludes, however, that the author has failed to sufficiently substantiate this claim for purposes of admissibility, and declares it inadmissible under article 2 of the Optional Protocol.

6.5. The author has also claimed that, in violation of article 2 (3) of the Covenant, the State party failed to implement legislation that prohibits discrimination on the basis of belief/non-belief in the States of South Australia and New South Wales, as well as federal legislation, which guarantees to all persons equal and effective protection against such discrimination, thus failing to afford him and other members of the atheist community an effective remedy. In light of its previous conclusions on the substantive provisions invoked by the author, and recalling its jurisprudence that article 2(3) can be invoked by individuals only in conjunction with other substantive articles of the Covenant, the Committee considers that the author’s claims under article 2(3) are inadmissible under article 3 of the Optional Protocol.

7. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible under articles 2 and 3 of the Optional Protocol;

(b) That the decision be transmitted to the State party and to the author.

**Annex:**

**Separate opinion of Committee Members Mr. Christof Heyns and Mr.Yuval Shany (dissenting)**

1. We have reservations about the finding of the Committee that the communication is inadmissible because of a lack of substantiation.
2. The communication specifically concerns the refusal by an advertising company in the States of New South Wales and South Australia to place advertisements on busses with an atheist message from the Atheist Foundation of Australia (AFA) of which the authors are members. It should be noted that the complaint is based articles 2 (3), 19 and 26 of the Covenant – article 18 is not invoked.
3. As noted by the Committee, as part of a national campaign, the AFA approached the company with a request to place their advertisements, which was denied. The company stated that in South Australia “there are religious guidelines that cannot be breached”. No further reasons were given. According to the author – and this is not denied by the State party – advertising companies in South Australia have previously provided advertising services to persons of religious belief, including one instance where a verse from the Bible was placed on the busses. (para 6.3) No remedy to challenge this decision is available on the State or federal level. (paras 2.8 and 2.9)
4. It seems highly probable that the refusal to carry the advertisements was motivated by concerns about its anti-religious contents. The limited response given was to that effect, and the fact that no further explanation was given in the context of a highly visible national campaign around this issue, strengthen that conclusion. It may have been helpful if the authors have insisted on further reasons from the company concerned, but under the circumstances it seems difficult to come to a conclusion other than it was the offensive contents of the advertisements that led to the refusal to place them on bases. The author can hardly be expected to show what the real motivation was, and the company, in whose purview this information falls, cannot take shelter behind their silence. The fact remains that the authors were not able to exercise their freedom of expression whereas other actors disseminating advertisements with more traditional religious contents were able to do so.
5. The state party is required to positively ensure the exercise of rights under the Covenant, [1] and should take appropriate measure to prevent impairment of enjoyment of rights due to acts committed by private actors. Advertising in public, even if organized and carried out by private companies, is a sphere of activity directly impinging on the exercise of freedom of expression, and it is up to the State party to take appropriate measure to ensure that this freedom is not restricted in a manner that is not necessary or proportional, and that all those seeking to exercise their freedom of speech are equally protected by the law. In the absence of clear explanation by Australia, it is difficult for us to accept that it has shown for admissibility purposes, that it has taken appropriate measure to ensure the exercise of the authors’ rights. The fact that there is no remedy available on state of federal level makes the situation all the more intolerable at this stage of the proceedings.
6. In Arenz and others v Germany,[2] the Committee has held that a case brought to it concerning the expulsion by a political party of members based on their membership of the Church of Scientology was inadmissible for lack of substantiation. That case, however, is different from the one currently under consideration, in that it also concerned the freedom of association (and arguably dissociation) of political parties by autonomously determining their membership. The case currently under consideration also deals with the conduct of a private party, but what is at stake is the control exercised by the private party of advertising space on busses – neutral platforms for messages to the public from diverse and sometimes opposing sources.
7. In our opinion the complaint should have been admitted.

 [1] General Comment 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant (2004), para. 8.

 [2] Comm. No. 1138/02, Arenz v Germany , Views of the Committee of 24 March 2004.

1. \* Adopted by the Committee at its 122nd session (12 March-6 April 2018). [↑](#footnote-ref-1)
2. \*\* The following members of the Committee participated in the examination of the present communication: Yadh Ben Achour, Ilze Brands Kehris, Ahmed Amin Fathalla, Olivier de Frouville, Christof Heyns, Yuji Iwasawa, Ivana Jelic, Bamariam Koita, Marcia V.J. Kran, Duncan Laki Muhumuza, Photini Pazartzis, Mauro Politi, José Manuel Santos Pais, Yuval Shany and Margo Waterval. The text of an individual opinion by Committee members Yuval Shany and Christofer Heyns is annexed to the present Views. [↑](#footnote-ref-2)
3. A valid power of attorney is on file, signed by the author (D. N.) only. [↑](#footnote-ref-3)
4. A second company is involved, but not relevant to the States which are the subject of the present complaint. [↑](#footnote-ref-4)
5. No more details provided. [↑](#footnote-ref-5)
6. It appears from pictures available on the Foundation’s website that the AFA was able to advertise on buses banners promoting atheism in Tasmania in 2010 (with the slogan: “Atheism, celebrate reason!”); and in Melbourne in 2012 (with the slogan: “If God exists, I hope he has a good excuse – Woody Allen-”) <http://atheistfoundation.org.au/> date accessed: 15 December 2017. [↑](#footnote-ref-6)
7. Responding to requests from the Secretariat on the availability of appeals of this decision. [↑](#footnote-ref-7)
8. *A obo V & A Department of School Education* [1999] NSWADT 120, 55-60. [↑](#footnote-ref-8)
9. NSW Law reform Commission report 92 (1999)- *Review of the Anti-Discrimination Act* 1977 (NSW), 6 April 1999. [↑](#footnote-ref-9)
10. *Equal Opportunity Amendment Act* 2009 (SA), Part 5B, sections 85T (1) and (7), and 85V. [↑](#footnote-ref-10)
11. C.v. Australia No 900/1999, par. 7.3. [↑](#footnote-ref-11)
12. The author refers to General Comment No. 22. [↑](#footnote-ref-12)
13. C. v. Italy, No. 163/1984; RT v. Canada, No 104/1981; Lubicon Lake Band v. Canada, No. 167/1984, Hartikainen v. Finland, No. 40/1978; S.M. v. Barbados, No 502/1992; and Lemagna v. Australia, No. 737/1997. [↑](#footnote-ref-13)
14. Mauritian women’s case, No. 35/1978. [↑](#footnote-ref-14)
15. See note 6 above. [↑](#footnote-ref-15)
16. A. Conte and R. Burchill, “Defining civil and political rights: the jurisprudence of the Human Rights Committee” (2nd ed. (2009), at p. 24, speaking of Erkki Hartikainen v. Finland, Communication No. 40/1978, par. 3-4. [↑](#footnote-ref-16)
17. Singer v. Canada, No. 455/1991, par. 11.2. [↑](#footnote-ref-17)
18. Lubicon Lake Band v. Canada, supra note 10. [↑](#footnote-ref-18)
19. General Comment No. 31, par. 9. [↑](#footnote-ref-19)