APPENDIX 1

Report by the
Electrical Trades Union concerning
the *Fair Work Bill 2008* and
Australia's international
obligations

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A. SUMMARY

Australia is a member of the International Labour Organisation and has ratified various ILO and UN conventions. Together these instruments protect basic industrial and human rights of Australian workers.

Until 1996, the ILO had little cause for complaint with Australia. However, following the election of the Howard Government and the amendment of the country's industrial laws, the ILO consistently found Australia in breach of international law and made repeated requests for amendment.

The current Bill provides an opportunity to address the ILO's concerns and again bring Australia into compliance with international law. However, it appears that the Rudd Government has chosen to refuse the ILO's requests, as the Bill remains in contravention of international labour law in the following areas:

- provisions which give primacy to enterprise level agreements and which restrict the level at which bargaining can occur;
- provisions which limit the contents of agreements;
- provisions which give insufficient protection to unionised workers who take industrial action in support of their rights under the conventions;
- provisions imposing limits on unions' right to organise;
- provisions which restrict the right to strike beyond the limits permitted by the conventions, including:
    - provisions which lift the protection of industrial action in support of:
        - multiple business agreements;
        - "pattern bargaining";
        - sympathy strikes;
        - matters that are not 'permitted';
        - strike pay.

- provisions which prohibit industrial action in case of danger to the economy, including through the introduction of compulsory arbitration at the initiative of the Minister;
- the penalties imposed for engaging in 'unprotected' industrial action; and
- the secret ballot provisions.

Further, at least two potential new breaches are introduced by the Bill, namely:

- the Bill's structure of requiring employers to by-pass unions and make and reach agreements directly with employees, even where a union exists at the workplace; and
- new restrictions on industrial action in situations of 'economic harm'.

The Bill also fails to repeal objectionable provisions of other legislation.

Significant amendments are now required to the Bill in order to make it conform to international law. This submission urges the Committee to:

- Recommend the amendments referred to in this submission; and
- Submit the Bill to the ILO for advice as to the Bill's compliance with Australia's international obligations.

B. AUSTRALIA'S INTERNATIONAL OBLIGATIONS

Australia is a member of the International Labour Organisation (**ILO**), an agency of the United Nations (**UN**). Australia has ratified a number of UN and ILO conventions which together form part of the core human rights enjoyed by Australian citizens. Foremost among these instruments are:

- ILO Convention No 87 *Freedom of Association and the Right to Organise Convention 1948*;
- ILO Convention No 98 *Right to Organise and Collective Bargaining Convention 1949; and*
- UN *International Covenant on Economic, Social and Cultural Rights (ICESCR) 1966*.

As a tripartite organization, the ILO concludes conventions and promulgates standards that are agreed by representatives of employers, employees and governments. The conventions and declarations adopted are designed to be used across a range of jurisdictions. As such, these standards are often drafted to protect fundamental rights, with the work of interpreting and adjudicating on these rights left to ILO supervisory bodies. Chris White usefully summarises the position:

> The ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR) (consisting of 20 expert jurists) and the tripartite Committee on the Freedom of Association (CFA) in their monitoring role make clear the obligations of member states. They give effect to the two main Conventions … Convention No 87 *Freedom of Association and the Right to Organise Convention 1948*, and Convention No 98, *Right to Organise and Collective Bargaining Convention 1949*. Both were ratified by the Whitlam government in 1973 and are binding. They were highlighted by the ILO *Declaration on the Fundamental Principles and Rights at Work 1998*, agreed to by the Howard government's Minister Reith.[1]

The cornerstone standards of the Conventions are the right of workers to freely form unions, for those unions to be able to effectively carry out their roles and for workers and their unions to enjoy the right to strike (Convention 87), and for free bargaining between employers and unions to be encouraged, at whatever level the parties choose and over the subject matters they choose (convention 98). The 1998 Declaration on the 'fundamental principles' referred to in the above quote is a

[1] Chris White, "The Right to Strike in Australia," (2005).

restatement of the core rights taking into account contemporary conditions. The ILO Director general noted in 2005 that:

> The fundamental principles and rights which are the subject of the Declaration seek to enable people 'to claim freely and on the basis of equality of opportunity their fair share of the wealth which they have helped to generate, and to achieve fully their human potential'. Freedom of association and the effective recognition of the right to collective bargaining are the foundation for a process in which workers and employers make claims upon each other and resolve them through a process of negotiation leading to collective agreements that are mutually beneficial. In the process, different interests are reconciled. For workers, joining together allows them to have a more balanced relationship with their employer. It also provides a mechanism for negotiating a fair share of the results of their work, with due respect for the financial position of the enterprise or public service in which they are employed. For employers, free association enables firms to ensure that competition is constructive, fair and based on a collaborative effort to raise productivity and conditions of work.[2]

Central to the international jurisprudence to which Australia is subject are thus the promotion of collective bargaining with worker organisations and the protection of the fundamental right to take industrial action so that bargains can be reached freely.

By virtue of ratification and adoption, Australia is obliged to take positive steps to give effect to these Conventions through its domestic law and practices.

Conventions 87 and 98 are set out at Appendix A to these submissions.

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[2] International Labour Office, Report of the Director General, Organising for social justice: Global report under the follow-up to the ILO declaration on fundamental principles and rights at work, International Labour Conference, 92nd Session 2004 Report I (B), p. 1.

C. THE WORKPLACE RELATIONS ACT 1996 AND INTERNATIONAL STANDARDS

It is difficult to overstate the extent to which Australia's industrial laws since 1996 have diverged from international standards. Eleven years of the Howard Government saw core principles of international labour law ignored or jettisoned. The ILO became accustomed to regular complaints about Australia's compliance, and over many years the ILO continually repeated its desire that Australia's laws once again conform with global norms.

Prior to the election of the Howard Government, the comparatively infrequent communications between the ILO and Australia did not suggest any significant non-compliance.[3] The years of the Howard Government, however, saw Australia's 'generally impressive compliance record … increasingly come under question' to the point where, in 1998, 'for the first time in the history of its membership of the ILO, Australia was asked to appear before the Conference Committee on the Application of Conventions and Recommendations to explain its non-compliance with the obligations under the Right to Organise and Collective Bargaining Convention.'[4] Australia has since been the subject of individual observations - all critical - and direct requests from the ILO's Committee of Experts more than once a year up until 2008.[5]

As the President of the ACTU said when addressing the ILO's 2006 conference:

> The Australian government is now a serial offender of the very principles that sit at the heart of decent work - core ILO standards. With the passage of the *Workplace Relations Amendment (WorkChoices) Act 2005* ("the WorkChoices Act"), Australia's longstanding failure to comply with its obligations under ILO Conventions 87 (Freedom of Association and Protection of the Right to Organise) and 98 (Right to Organise and Collective Bargaining) has been substantially exacerbated.
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> … The Committee of Experts' concerns about Australian compliance with Convention 87 have centred on the right to strike, an integral corollary of the right to bargain collectively. In particular, the Committee has been critical of Australian law in the following respects: industrial action cannot be taken in

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[3] Breen Creighton, 'The Ilo and the Protection of Fundamental Human Rights in Australia', *Melbourne University Law review*, 22, no. 2, 1997, 239; Jane Romeyn, "The International Labour Organisation's Core Labour Standards and the *Workplace Relations Act 1996*," (Canberra: Australian Parliamentary Library, 2007), 15, 17.

[4] Ibid.

[5] The various Individual Observations on the various conventions, together with all ILO documents and conventions referred to in this submission, are available at http://www.ilo.org/ilolex/english/.

> support of multi-employer agreements; the matters which may be the objectives of industrial action are restricted and do not extend to claims for strike pay or to issues related to demarcation disputes; all sympathy action, even in support of lawful industrial action is prohibited; and, prohibition of industrial action goes beyond essential services in the strict sense of the term. …
>
> In reviewing Australia's compliance with Convention 98, the Committee of Experts has been particularly critical of the following aspects of Australian law: the primacy given to individual over collective agreements; the level of collective bargaining; greenfields agreements; lack of protection against anti-union discrimination; and, restrictions on the subject matter of bargaining. As with Convention 87, the WorkChoices Act has shifted Australian law further away from compliance with the Convention and the addressing of the issues raised by the Committee of Experts.[6]

The Rudd government was elected in 2007 in the context of a large campaign around industrial relations. It has before it numerous comments from the ILO about existing industrial laws. It has the capacity to seek the ILO's advice on the Bill's compliance with the Conventions. The Fair Work Bill provides the opportunity to make Australia once again a state that acts in accordance with international law.

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[6] Australian worker delegate's speech to the ILO Committee on the Application of Standards at the International Labour Conference of the ILO, 6 June 2006, by Sharan Burrow, ACTU and ICFTU President. Available at http://evatt.labor.net.au/publications/papers/171.html, last accessed 4 January 2009.

D. THE FAIR WORK BILL'S RELATIONSHIP TO INTERNATIONAL STANDARDS

The CEACR ended its 2008 Individual Observation on Convention 87 for Australia as follows:

> The Committee has been informed by the Government of Australia, newly elected on 24 November 2007, that it is committed to making substantial amendments to Australia's Workplace Relations Act and its legislative framework and to addressing issues the Committee has raised with regard to the Building and Construction Industry Improvement Act 2005. ***The Committee expresses the hope that its comments will prove useful to the Government in its deliberations on legislative revision.*** (Emphasis added.)

The Senate Committee - and the Parliament as a whole - ought give strong consideration to the comments of the CEACR.

Australia has signed up to international covenants and treaties. We should comply with them. We have widespread public desire to see a change in the country's industrial relations laws and a Government that professes a desire to see Australia be a good international citizen. If the laws aren't amended now so as to conform with our international obligations, it is difficult to see when they will ever be changed.

The matters raised in this submission do not go to some minor technical non-compliance, or failure to meet some of the less significant conventions: rather, we are concerned with the core elements of the key foundational conventions themselves.

In summary, in the course of its various observations, the ILO has identified the following as breaches of Conventions 87 and 98:

- provisions which give primacy to individual over collective forms of agreements;
- provisions which give primacy to enterprise level agreements and which restrict the level at which bargaining can occur;
- provisions which limit the contents of agreements;
- provisions which give insufficient protection to unionised workers who take industrial action in support of their rights under the conventions;
- provisions imposing limits on unions' right to organise

- provisions which restrict the right to strike beyond the limits permitted by the conventions, including[7]:
    - provisions which lift the protection of industrial action in support of:
        - multiple business agreements (section 423(1)(b)(i));
        - "pattern bargaining" (section 439);
        - secondary boycotts and generally sympathy strikes (section 438);
        - negotiations over "prohibited content" (sections 356 and 436 of the WR Act in connection with the Workplace Relations Regulations 2006);
        - strike pay (sections 508 of the WR Act);
    - provisions which prohibit industrial action in case of danger to the economy (sections 430, 433 and 498 of the WR Act), including through the introduction of compulsory arbitration at the initiative of the Minister (sections 500(a) and 504(3) of the WR Act);
    - the penalties imposed for engaging in 'unprotected' industrial action;

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[7] The CEACR's 2008 Individual Observation on Convention 87 noted the following concerns with regards to the right to take industrial action enshrined in the *Freedom of Association and Protection of the Right to Organise Convention 1948 (No. 87)* Article 3 of the Convention. Right to strike. The Committee's previous comments concerned numerous discrepancies between the provisions of the WR Act - as amended by the Work Choices Act - and the Convention. In particular, the Committee had raised the need to amend the following provisions of the WR Act with a view to bringing them into conformity with the Convention: provisions which lift the protection of industrial action in support of: multiple business agreements (section 423(1)(b)(i)); "pattern bargaining" (section 439); secondary boycotts and generally sympathy strikes (section 438); negotiations over "prohibited content" (sections 356 and 436 of the WR Act in connection with the Workplace Relations Regulations 2006); strike pay (sections 508 of the WR Act); and provisions which prohibit industrial action in case of danger to the economy (sections 430, 433 and 498 of the WR Act) through the introduction of compulsory arbitration at the initiative of the Minister (sections 500(a) and 504(3) of the WR Act). Finally, the Committee had raised the need to amend section 30J of the Crimes Act 1914, which prohibits industrial action threatening trade or commerce with other countries or among States and section 30K of the Crimes Act 1914, prohibiting boycotts resulting in the obstruction or hindrance of the performance of services by the Australian Government or the transport of goods or persons in international trade. This list of contraventions provides a useful starting point for consideration of the Fair Work Bill. To the extent that they restrict the protections offered to workers who take industrial action in support of collective agreements, many of these contraventions are also breaches of the *Right to Organise and Collective Bargaining Convention 1949 (No98)*.

- the secret ballot provisions;
- section 30J of the Crimes Act 1914, which prohibits industrial action threatening trade or commerce with other countries or among States and section 30K of the Crimes Act 1914;
- sections 45D and 45E of the Trade Practices Act 1974 (see 1999 Individual Observation on Convention 87)

The Fair Work Bill is to be assessed in its own right against the Conventions and the ILO jurisprudence. However, it is also to be assessed as to how well it heeds the ILO's various comments and recommendations for amendment directed specifically at Australia: the Government is on notice as to the ILO's authoritative interpretations of the various conventions and is expected to remedy them. Accordingly, this submission is structured around a consideration of the Bill in light of each of the above areas in which breaches have previously been found.

Unfortunately, it appears that the Bill intentionally replicates many of the contraventions that have attracted such strong and protracted criticism from the highest levels of international labour law.

There are also at least two potential new breaches introduced by the Bill, namely the method of reaching agreements at a unionised workplace (in breach of Convention 98, discussed at section D. II. below) and new restrictions on industrial action (in breach of Convention 87, discussed at section D. IV. iii. below).

In the face of express requests to change certain provisions, the failure to make the amendments sought can only be regarded as an express rejection of the CEACR's requests. Unless the Senate - hopefully acting on the recommendations of this Committee - heeds the CEACR's 2008 comments, Australia is destined to snub the international legal community, continuing the process begun by the Howard Government.

I. The objects of the Act

Ratification of UN and ILO conventions imposes obligations on a country to give effect to the conventions pursuant to domestic law. A useful indication as to whether a piece of legislation is intending to do so is found in the objects of the Act. It is in the

Fair Work Bill's proposed objects, however, that one finds the first worrying signs that the current Government's intention is not to take heed of the CEACR's observations and amend the Act to give effect to Australia's international obligations, but instead to maintain Australia's distance from global law.

In 1993, the Industrial Relations Act was amended so as to have as one of its objects:

> s3(ii) *ensuring* that labour standards meet Australia's international obligations (emphasis added)

The 1996 amendments to the Act diluted the relevance of global laws, demoting them to the final objective and altering them to appear in the form still found in the current Act, namely:

> s3(n) *assisting in giving effect to* Australia's international obligations in relation to labour standards (emphasis added)

'Ensuring' compliance became 'assisting in giving effect to', representative perhaps of the changed attitude of the Howard Government.

The Fair Work Bill relevantly provides in the proposed new section 3:

> The object of this Act is to provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians by:
>
> (a) providing workplace relations laws that are fair to working Australians, are flexible for businesses, promote productivity and economic growth for Australia's future economic prosperity and *take into account* Australia's international labour obligations; …

The Bill helpfully treats the question of international obligations as part of the first object of the Act, but it is with grave concern that these obligations now only appear to be factors taken into account. 'Taking into account' is a far cry from the 1993 Labor government's desire to 'give effect to', and even weaker than the Howard Government's 'assisting in giving effect to.' 'Taking into account' potentially suggests that ILO standards must be considered *but don't need to be met*. When considered in the context of the Bill's other contraventions of international labour standards, it raises the question as to whether the change in the object of the Act reflects a more fundamental shift in attitude on the part of the Government.

II. Provisions which give primacy to individual over collective forms of agreements

Article 4 of Convention 98 provides:

> Article 4
>
> Measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements.

The purpose of article 4 is to require nation states to promote bargaining between employers and unions so as to reach collective agreements.

The emphasis on *collective* agreements has led the ILO to make a number of critical observations about Australian Workplace Agreements (AWAs). The ability of employers to offer 'take it or leave it' AWAs prior to commencement of employment - AWAs which would then supercede collective agreements and restrict union right of entry - was roundly condemned by the ILO. Its 2005 observation on Convention 98 found a number of AWA-related elements of the Act to be in breach of the Convention, also noting that:

> a special issue exists in this respect with regard to newly recruited workers because the WR Act enables employers to offer an "AWA-or-nothing" at the time of recruitment without this being considered as duress (see above); such workers will be unable to benefit from the provisions of a collective agreement until the expiry of their AWA. Thus, the Committee considers that section 170VQ(6) of the WR Act contains disincentives to trade union affiliation by unduly restricting the field of application of collective agreements. The Committee requests the Government to indicate in its next report any measures taken or contemplated to amend section 170VQ(6) of the WR Act so as to eliminate these disincentives and restrictions.

The Howard Government did amend the Act, but so as to clarify the supremacy of AWAs, not to bring the Act into line with the convention.

Of relevance to article 4, however, is not just the collective (as opposed to individual) nature of an agreement, but also that the agreement is with a *worker organization*. Recalling another ILO instrument, the Digest of Decisions of the Committee on Freedom of Association (**the Digest**) records that:

> 944. The Collective Agreements Recommendation, 1951 (No. 91), emphasizes the role of workers' organisations as one of the parties in collective bargaining; it

> refers to representatives of unorganized workers only when no organization exists.
>
> 945. The Collective Agreements Recommendation, 1951 (No. 91), provides that: "For the purpose of this Recommendation, the term 'collective agreements' means all agreements in writing regarding working conditions and terms of employment concluded between an employer, a group of employers or one or more employers' organisations, on the one hand, and one or more representative workers' organisations, or, in the absence of such organisations, the representatives of the workers duly elected and authorised by them in accordance with national laws and regulations, on the other." In this respect, the Committee has emphasized that the said Recommendation stresses the role of workers' organisations as one of the parties in collective bargaining. *Direct negotiation between the undertaking and its employees, by-passing representative organisations where these exist, might in certain cases be detrimental to the principle that negotiation between employers and organisations of workers should be encouraged and promoted.* (Emphasis added.)[8]

Accordingly, in its 2005 individual observation concerning Convention 98, the CEACR noted and requested as follows:

> Recalling that Article 4 requires measures to encourage and promote the full development and utilization of machinery for voluntary negotiation between employers or employers' organisations and workers' organisations, the Committee requests the Government to indicate in its next report any measures taken or contemplated to amend section 170LK(6)(b) [which concerned non-union agreements] so as to ensure that the right to trade union representation is effectively guaranteed and that negotiations with non-unionized workers can take place *only where there is no representative trade union in the enterprise*. [Emphasis added.]

To give effect to Convention 98, therefore, it is essential that Australian law promote both collective agreements and negotiations between employers and unions (where they exist in a workplace).

It must be acknowledged that the *Workplace Relations Amendment (Transition to Forward With Fairness) Act 2008 (No. 8, 2008)* has substantially transformed Australian law with respect to AWAs. However, the Bill raises three new concerns.

First, for the first time in Australian industrial history, agreements are no longer made with employee organisations i.e. unions. Whereas the Act currently envisages agreements being made between employers and unions (s328, 333) - agreements which would then be subsequently voted on by employees - the Bill envisages no such arrangements. Instead, single enterprise agreements are made when the

[8] ILO Committee on Freedom of Association, Digest of Decisions, 2006, 944-5.

employer puts them out to a vote by employees and the employees approve the agreement (s182(1)). This intention is confirmed by section 183 of the Bill:

> 183 Entitlement of an employee organisation to have an enterprise agreement cover it
>
> (1) After an enterprise agreement that is not a greenfields agreement is made, an employee organisation that was a bargaining representative for the proposed enterprise agreement concerned may give FWA [Fair Work Australia] a written notice stating that the organisation wants the enterprise agreement to cover it.
>
> (2) The notice must be given to FWA, and a copy given to each employer covered by the enterprise agreement, before FWA approves the agreement.

The involvement of the workers' organisation is not necessary to the concluding of a successful agreement, nor is it required before an agreement is put out to a vote of employees. This radical new way of conceiving the role of workers' organisations is directly contrary to the letter and spirit of article 4 of the Convention.

Also, significantly, the Bill removes worker organisations as parties to any agreement reached, another radical departure from industrial history and from legislation prior to the Howard Government.

In its 2007 observation on Convention 98, the CEACR:

> once again recalls that Article 4 of the Convention requires the encouragement and promotion of voluntary negotiations between employers or employers' organisations and workers' organisations. It therefore once again requests the Government to *take measures to ensure that employee collective agreements do not undermine workers' organisations* ***and their ability to conclude collective agreements***, and to indicate in its next report the measures taken or contemplated with a view to ensuring that negotiations with non-unionized workers take place only where there is no representative trade union in the enterprise. (Emphasis added.)

This clearly envisages encouraging unions making and concluding agreements, and discouraging employers agreeing directing with employees collectively when a union is present.

The Bill's impermissible downgrading of the role of workers' organisations is reflected in the objects of the Act: whereas prior to the Howard Government the Act had as one of its objects "(f) to encourage the organisation of representative bodies of employers and employees and their registration under this Act", the Bill *makes no mention of organisations* in its new objects.

These changes place the Bill in the unenviable position of in some respects being worse than the current Act: the current Act impermissibly enshrined union and non-union agreements as being of equal status, whereas the Bill enshrines no role for

organisations in the making and approving of agreements at all. In order to comply with Convention 98, significant amendments are required to reflect the fact that agreements are and ought to be struck between representative organisations and employers, and that organisations have a legitimate role in the framework of the agreement making structure of the Bill.

Secondly, the new bargaining provisions (Part 2-4 Div 3, Div 8), whilst welcome, do not in fact require agreement with the union where there is one. That is, contrary to the CEACR's direct request of Australia, the new legislation will permit the employer to negotiate non-union agreements even where a trade union exists in a workplace.

Thirdly, take-it-or-leave-it individual arrangements are not precluded by the legislation. The Bill envisages individual arrangements whereby an employer can negotiate directly with an employee or prospective employee for conditions which vary from the relevant award (s144) or enterprise agreement (s202). Indeed, it is compulsory to include a term in each enterprise agreement allowing for individual variation (s202). The Bill does not prohibit such individual arrangements being offered before employment starts. The Bill does prohibit third party (i.e. union) agreement before entering into any such arrangement (s144(5); 203(5)). The Bill imposes a 'better off overall' test for any such agreement, but this test is not assessed by any third party before the agreement is entered into, and nor is there any requirement to submit any such executed agreement to a third party for checking. Further, the 'better off overall' test by definition involves the trading off of the benefit of some clauses (e.g. penalty rates) for a different benefit (e.g. a higher hourly rate). It means that each individual term of an award ceases to be a firm legislative floor, but instead something that can be traded off.

Accordingly, especially in environments not regulated by union agreements, an employer could continue to use their disproportionate bargaining power to strike individual arrangements with employees that differ from the legislated minimum standard; further, there is no prohibition on these 'flexibility arrangements' being offered as a condition of employment. Although AWAs are no longer available, the Bill provides employers with a range of measures to offer prospective employees 'take it or leave it' individual contracts, which differ from the legislated minimum. Even if any such arrangement is contrary to the Award or agreement because it fails the 'better off overall' test, given the private nature of the transaction, there is no guarantee that such breach will ever be discovered. Unless the 'take it or leave it'

approach is prohibited, collective bargaining will not be encouraged, contrary to convention 98, and minimum wages will be able to traded off.

III. Provisions which give primacy to enterprise level agreements and which restrict the level at which bargaining can occur.

Since 1999, the CEACR has repeatedly advised Australia that its laws breach a fundamental aspect of Articles 3 and 4 of Convention 98. Article 4 is set out above. Article 3 provides:

> Article 3
>
> Machinery appropriate to national conditions shall be established, where necessary, for the purpose of ensuring respect for the right to organise as defined in the preceding Articles.

As the Digest makes plain:

> 988. 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.
>
> 989. The determination of the bargaining level is essentially a matter to be left to the discretion of the parties. Thus, the Committee does not consider the refusal by employers to bargain at a particular level as an infringement of freedom of association.
>
> 990. Legislation should not constitute an obstacle to collective bargaining at the industry level.[9]

Since 1996, the requirement that 'legislation should not constitute an obstacle to collective bargaining at the industry level' appears to have been a difficult concept for successive Australian governments to grasp. In 1998 in its Individual Observation on Convention 98, the CEACR observed:

> 5. The Committee notes that with respect to the levels of bargaining, a clear preference is given in the Act to workplace/enterprise-level bargaining, as evidenced in section 3(b), as noted above, as well as section 88A(d) which charges the Australian Industrial Relations Commission with exercising its functions and powers regarding awards in a manner "that encourages the

[9] ILO Committee on Freedom of Association, Digest of Decisions, 2006, 988-90.

> making of agreements between employers and employees at the workplace or enterprise level". …
>
> 6. The Committee recalls that, since the Convention contemplates voluntary collective bargaining, the choice of the bargaining level should normally be made by the partners themselves, and the parties "are in the best position to decide the most appropriate bargaining level" (see General Survey on freedom of association and collective bargaining, 1994, paragraph 249). The Committee requests the Government to review this issue and amend the legislation in the light of the requirements of the Convention.

In its 1999 Individual Observation concerning Convention 87, the CEACR noted that 'by linking the concept of protected industrial action to the bargaining period in the negotiation of single-business certified agreements, the Act effectively denies the right to strike in the case of the negotiation of multi-employer, industry-wide or national-level agreements, which excessively inhibits the right of workers and their organisations to promote and protect their economic and social interests.'

These provisions, however, remained essentially unchanged in the Act's various subsequent manifestations. Indeed, further restrictions were imposed in the form of prohibitions on 'pattern bargaining.' The CEACR commented again in its 2007 Observation concerning Convention 98 that the WR Act contravened a general principle of the conventions to which Australia is signatory:

> The Committee once again recalls that action related to the negotiation of multiple business agreements and "pattern bargaining" represents legitimate trade union activity for which adequate protection should be afforded by the law. The Committee further emphasizes that the choice of the bargaining level should normally be made by the parties themselves who are in the best position to decide this matter (see 1994 General Survey on freedom of association and collective bargaining, paragraph 249). … The Committee recalls that the level of collective bargaining should be decided by the parties themselves and not be imposed by law (see General Survey, op. cit., paragraph 249).

The Committee has elsewhere observed that:

> This does not imply that employers have to accept multi-employer bargaining but simply that the parties should be left free to decide for themselves on the means (including industrial action) to achieve particular bargaining objectives. The Committee therefore reiterates that workers and their organisations should be able to call for industrial action in support of multi-employer contracts.[10]

As is apparent, the obligations imposed by Convention 98 mirror those in convention 87: the freedom to bargain at a level of one's choice is complemented by a right to take industrial action in support of one's claims. Accordingly, in its 2007 observation concerning Convention 98 the CEACR also found wanting those sections which:

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[10] CFA report #295, Case 1698, para 259.

- lift the protection of industrial action in support of multiple business agreements (section 423(1)(b)(i));

- required the prior authorisation from the Employment Advocate for any multiple business agreement, and which prohibited such authorisation unless in the public interest (s332)

- lift the protection of industrial action in support of "pattern bargaining" (section 439)

- require the AIRC to suspend or terminate the bargaining period where pattern bargaining is occurring (431(1)(b) and 437);

- did not extend protections from anti- discrimination, in particular dismissals, to workers who take action in support of multiple business agreements

In addition to the previous changes it had requested, the Committee sought amendment to sections 423 and 431. (The Committee also requested more information on the operation of section 328(a), which allowed employers to choose who they wished to negotiate with, though stopped short of calling for changes.)

A comparison of the Act and the Bill show that key parts of the offending provisions will remain.

Primacy of enterprise level bargaining	
WR Act	FW Bill
3 Principal Object (d) ensuring that, as far as possible, the primary responsibility for determining matters affecting the employment relationship rests with the employer and employees at the workplace or enterprise level;	**3 Objects of this Act** (f) achieving productivity and fairness through an emphasis on enterprise-level collective bargaining underpinned by simple good faith bargaining obligations and clear rules governing industrial action. Part 2-4 **171 Objects of this Part** The objects of this Part are: (a) to provide a simple, flexible and fair framework that enables collective bargaining in good faith, particularly at the enterprise level, for enterprise

	agreements that deliver productivity benefits

It is clear that the Bill continues to maintain a preference for enterprise-level bargaining and does not envisage the parties choosing the most appropriate level at which to bargain. This contravention of Convention 98 is reflected in the restrictions on parties negotiating multiple business agreements and on so-called 'pattern bargaining.'

The relevant sections are:

Multiple business agreements	
WR Act	FW Bill
423 Initiation of bargaining period (1) This section applies in relation to a collective agreement that a person referred to in subsection (2) wants to try to make if the agreement, if made: (a) will be made under section 327 or 328; and (b) will not be: (i) a multiple□business agreement …	**413 Common requirements that apply for industrial action to be protected industrial action** Common requirements (1) This section sets out the common requirements for industrial action to be protected industrial action for a proposed enterprise agreement. Type of proposed enterprise agreement (2) The industrial action must not relate to a proposed enterprise agreement that is a greenfields agreement or multi-enterprise agreement. … **437 Application for a protected action ballot order** Who may apply for a protected action ballot order (1) A bargaining representative of an employee who will be covered by a proposed enterprise agreement, or 2 or more such bargaining representatives (acting jointly), may apply to FWA for an order (a protected action ballot order) requiring a protected action ballot to be conducted to determine whether employees wish to engage in particular protected industrial action for the agreement. (2) Subsection (1) does not apply if the proposed enterprise agreement is: (a) a greenfields agreement; or (b) a multi-enterprise agreement. **229 Applications for bargaining orders** Persons who may apply for a bargaining order (1) A bargaining representative for a proposed enterprise agreement may apply to FWA for an order (a bargaining order) under section 230 in relation to the agreement. Multi-enterprise agreements

	(2) An application for a bargaining order must not be made in relation to a proposed multi-enterprise agreement unless a low-paid authorisation is in operation in relation to the agreement.
s332 Authorisation of multiple-business agreements (1) An employer may apply to the Workplace Authority Director for an authorisation to make or vary a multiple□business agreement. (2) The regulations may set out a procedure for applying to the Workplace Authority Director for the authorisation. The Workplace Authority Director need not consider an application if it is not made in accordance with the procedure. (3) The Workplace Authority Director must not grant the authorisation unless he or she is satisfied that it is in the public interest to do so, having regard to: (a) whether the matters dealt with by the agreement (or the agreement as varied) could be more appropriately dealt with by a collective agreement other than a multiple□business agreement; and (b) any other matter specified in regulations made for the purposes of this subsection.	**186 When FWA must approve an enterprise agreement—general requirements** Basic rule (1) If an application for the approval of an enterprise agreement is made under section 185, FWA must approve the agreement under this section if the requirements set out in this section and section 187 are met. Requirements relating to the safety net etc. (2) FWA must be satisfied that: (a) if the agreement is not a greenfields agreement—the agreement has been genuinely agreed to by the employees covered by the agreement; and (b) if the agreement is a multi-enterprise agreement: (i) the agreement has been genuinely agreed to by each employer covered by the agreement; and (ii) no person coerced, or threatened to coerce, any of the employers to make the agreement; …

The basic principle of article 4 of Convention 98 remains contravened by the specific exclusion of multi-enterprise action from the definition of protected action (s413 and 417 of the Bill).

Even obtaining FWA's assistance by way of bargaining orders - which go no further than requiring good faith bargaining and do not permit industrial action - is prohibited unless it is a low-paid environment where workers are seeking their first agreement (s229).

The Fair Work Bill continues to deny immunity from industrial action and of the protections of anti-discrimination provisions to a worker or their representative chooses or seeks to bargain at a multi-employer level.

As far as approval of multi-enterprise agreements is concerned, although the 'public interest' test has been removed, there are now additional requirements for a multi-enterprise agreement not present for a single enterprise agreement, namely those in 186(2)(b). The reference to 'coercion' may seem innocuous, but if industrial action is used to seek a multi-enterprise agreement, and that action is not 'protected action' by virtue of sections 413 and 417, then an argument could be made that such industrial action amounted to coercion. 'Coercion' is not defined for the purposes of the section, but s186(2)(b) appears to be another legislative restriction on the right of parties to choose the level at which they wish to bargain.

As far as pattern bargaining is concerned, the sections are as follows:

'Pattern bargaining'	
WR Act	FW Bill
439 Exclusion--industrial action must not be in support of pattern bargaining claims Engaging in or organising industrial action is not protected action if: (a) the industrial action is for the purpose of supporting or advancing claims made by a negotiating party to a proposed collective agreement; and (b) the party is engaged in pattern bargaining in relation to the proposed collective agreement.	**408 Protected industrial action** Industrial action is protected industrial action for a proposed enterprise agreement if it is one of the following: (a) employee claim action for the agreement (see section 409); … **409 Employee claim action** Employee claim action (1) Employee claim action for a proposed enterprise agreement is industrial action that: … (d) meets the additional requirements set out in this section. … Industrial action must not be part of pattern bargaining (4) A bargaining representative of an employee who will be covered by the agreement must not be engaging in pattern bargaining in relation to the agreement.
421 Meaning of pattern bargaining What is pattern bargaining? (1) For the purposes of this Part, a course of conduct by a person is *pattern bargaining* if: (a) the person is a negotiating party to 2 or more proposed collective	**412 Pattern bargaining** Pattern bargaining (1) A course of conduct by a person is pattern bargaining if: (a) the person is a bargaining representative for 2 or more proposed enterprise agreements; and

agreements; and (b) the course of conduct involves seeking common wages or conditions of employment for 2 or more of those proposed collective agreements; and (c) the course of conduct extends beyond a single business. Exception: terms or conditions determined as national standards (2) The course of conduct is not pattern bargaining to the extent that the negotiating party is seeking, for 2 or more of the proposed collective agreements, terms or conditions of employment determined by the Full Bench in a decision establishing national standards. Exception: genuinely trying to reach an agreement for a single business or part of a single business (3) The course of conduct, to the extent that it relates to a particular single business or part of a single business, is not pattern bargaining if the negotiating party is genuinely trying to reach an agreement for the business or part. (4) For the purposes of subsection (3), factors relevant to working out whether the negotiating party is genuinely trying to reach an agreement for a single business or part of a single business include (but are not limited to) the following: (a) demonstrating a preparedness to negotiate an agreement which takes into account the individual circumstances of the business or part; (b) demonstrating a preparedness to negotiate a workplace agreement with a nominal expiry date which takes into account the individual circumstances of the business or part; (c) negotiating in a manner consistent with wages and conditions of employment being determined as far as possible by agreement between the employer and its employees at the level of the single business or part; (d) agreeing to meet face□to□face at reasonable times proposed by another negotiating party; (e) considering and responding to proposals made by another negotiating party within a reasonable time; (f) not capriciously adding or	(b) the course of conduct involves seeking common terms to be included in 2 or more of the agreements; and (c) the course of conduct relates to 2 or more employers. Exception—genuinely trying to reach an agreement (2) The course of conduct, to the extent that it relates to a particular employer, is not pattern bargaining if the bargaining representative is genuinely trying to reach an agreement with that employer. (3) For the purposes of subsection (2), the factors relevant to working out whether a bargaining representative is genuinely trying to reach an agreement with a particular employer, include the following: (a) whether the bargaining representative is demonstrating a preparedness to bargain for the agreement taking into account the individual circumstances of that employer, including in relation to the nominal expiry date of the agreement; (b) whether the bargaining representative is bargaining in a manner consistent with the terms of the agreement being determined as far as possible by agreement between that employer and its employees; (c) whether the bargaining representative is meeting the good faith bargaining requirements.

withdrawing items for bargaining. (5) Whenever a person seeks to rely on subsection (3), the person has the burden of proving that subsection (3) applies. (6) This section does not affect, and is not affected by, the meaning of the term "genuinely trying to reach an agreement", or any variant of the term, as used elsewhere in this Act.	(4) If a person seeks to rely on subsection (2), the person has the burden of proving that the subsection applies. Genuinely trying to reach an agreement (5) This section does not affect, and is not affected by, the meaning of the expression "genuinely trying to reach an agreement", or any variant of the expression, as used elsewhere in this Act.
431 Suspension and termination of bargaining periods--pattern bargaining Suspension or termination required for pattern bargaining (1) The Commission must, by order, suspend a bargaining period for a period specified in the order, or terminate the bargaining period, if: (a) a negotiating party, or a person prescribed by the regulations, applies to the Commission for an order under this section; and (b) another negotiating party is engaged in pattern bargaining in relation to the proposed collective agreement.	
497 Injunction against industrial action if pattern bargaining engaged in in relation to proposed collective agreement The Court may grant an injunction in such terms as the Court considers appropriate if, on application by any person, the Court is satisfied that: (a) industrial action in relation to a proposed collective agreement is being engaged in, or is threatened, impending or probable; and (b) the industrial action is or would be for the purpose of supporting or advancing claims made by a negotiating party to the proposed collective agreement; and (c) the party is engaged in pattern bargaining in relation to the proposed collective agreement.	**422 Injunction against industrial action if a bargaining representative is engaging in pattern bargaining** (1) The Federal Court or Federal Magistrates Court may grant an injunction on such terms as the court considers appropriate if: (a) a person has applied for the injunction; and (b) the requirement set out in subsection (2) is met. (2) The court is satisfied that: (a) employee claim action for a proposed enterprise agreement is being engaged in, or is threatened, impending or probable; and (b) a bargaining representative of an employee who will be covered by the agreement is engaging in pattern bargaining in relation to the agreement.

The key vices of 'WorkChoices' remain in the Bill. The removal of 'pattern bargaining' from the sphere of protected action has been transposed from section 439 to the new sections 408 and 409. The intent remains the same: industrial action cannot be protected action if engaged in across more than one workplace seeking common wages and conditions. This common intent is confirmed by the usage of the same terms (highlighted above in yellow) in the definitions of pattern bargaining (s421/412) and the terms granting the power to seek injunctions (s497/422).

Although the former s431, which allows for suspension of bargaining periods for 'pattern bargaining', does not appear to be replicated in the Bill, this ought not be seen as creating any new protection for 'pattern bargaining': instead, the Bill removes references to 'bargaining periods' altogether, and instead now talks only of suspension or termination of 'protected industrial action': see Part 3-3, Division 6. The removal of the former s431 is merely a reflection of the fact that pattern bargaining can never be 'protected industrial action' to be suspended or terminated by FWA. The intent to retain strong sanctions for 'pattern bargaining' is confirmed by the replication of the former s497 (as s422) in substantially the same terms, and indeed *expanding it* so that the Federal Magistrates Court is now also able to issue injunctions against pattern bargaining. In commenting on *inter alia* s497, the CEACR observed in 2007 that: 'the prohibitions noted above with regard to multi-employer agreements [and] "pattern bargaining" …. go beyond the restrictions which are permissible under the Convention.'[11]

The former Government seemed unable to accept the basic proposition that workers and employers had an internationally recognised right to choose the level at which they wished to bargain. So-called 'pattern bargaining' first became unlawful under the Howard Government. The ILO has since repeatedly urged (as noted above) that 'action related to the negotiation of multiple business agreements and "pattern bargaining" represents legitimate trade union activity for which adequate protection should be afforded by the law.' The Bill miserably fails to afford any such protection, and ignores the CEACR's recommendations from 2008 and before. Sections 408, 409, 412 and 422, together with the failure of the anti-discrimination provisions to extend to 'pattern-bargaining', instead have the Bill clearly contravening Convention 98.

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[11] CEACR: Individual Observation concerning Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) Australia (ratification: 1973) Published: 2007

IV. Provisions which limit the contents of agreements

The Conventions begin from the starting point of free bargaining: as a general rule, the parties are in the best position to know what ought be in their agreements, and external restrictions on the content of agreements need to be justified on an exceptional basis. The Digest thus records:

> 912. Measures taken unilaterally by the authorities to restrict the scope of negotiable issues are often incompatible with Convention No. 98; tripartite discussions for the preparation, on a voluntary basis, of guidelines for collective bargaining are a particularly appropriate method of resolving these difficulties.
>
> 913. Matters which might be subject to collective bargaining include the type of agreement to be offered to employees or the type of industrial instrument to be negotiated in the future, as well as wages, benefits and allowances, working time, annual leave, selection criteria in case of redundancy, the coverage of the collective agreement, the granting of trade union facilities, including access to the workplace beyond what is provided for in legislation etc.; these matters should not be excluded from the scope of collective bargaining by law …[12]

Notably, any imposed restrictions ought be by tripartite agreement voluntarily acceded to by the parties. Also of note is that matters generally relating to the employment relationship or the rights of unions are permissible subjects for inclusion in a collective agreement, even where those matters are covered by legislation.

As early as 1998, the CEACR in its Individual Observation concerning convention 98 raised concerns over the exclusion of strike pay as a negotiable matter. From 2006 onwards, the CEACR also expressed its concern about the effect of the *Electrolux* decision and the exclusion of bargaining fees from the range of permissible matters.[13] The current narrow restrictions - that terms must pertain to the 'employment relationship' (thereby excluding many 'social' clauses) and not be other 'prohibited content' - have drawn the ILO's opprobrium. Accordingly, in its 2007 observation concerning Convention 98 the CEACR noted:

> The Committee observes that the issues listed above as constituting "prohibited content" represent to a large extent the type of matters that have traditionally been subjects for collective bargaining. As a general rule, negotiation over such matters should be left to the discretion of the parties. In this respect, the Committee draws the Government's attention to its General Survey on freedom of association, 1994, where it has indicated that measures taken unilaterally by the authorities to restrict the scope of negotiable issues are often incompatible with the Convention and the free and voluntary nature of collective bargaining. In the event of doubt as to the matters falling within the purview of collective bargaining, tripartite discussions for the preparation, on a voluntary basis, of

[12] ILO Committee on Freedom of Association, Digest of Decisions, 2006, 912-3.

[13] *Electrolux Home Products Pty Ltd v Australian Workers' Union [2004] HCA 40*

> guidelines for collective bargaining could be a particularly appropriate method for resolving such difficulties (see General Survey, op. cit., paragraph 250). The Committee requests the Government to consider tripartite discussions for the preparation of collective bargaining guidelines and to indicate in its next report any measures taken or contemplated to amend the Workplace Relations Regulations, 2006, and to ensure that any "prohibited content" of collective agreements is in conformity with the principle of the free and voluntary nature of collective bargaining enshrined in Article 4 of the Convention.

The Bill does not comply with the Committee's request. No tripartite discussions have taken place to develop any guidelines. Further, the new provisions, set out below, are not 'in conformity with the principle of the free and voluntary nature of collective bargaining'.

Content of agreements	
WR Act	FW Bill
357 Employer must not lodge agreement containing prohibited content (1) An employer contravenes this subsection if: (a) the employer lodges a workplace agreement (or a variation to a workplace agreement); and (b) the agreement (or the agreement as varied) contains prohibited content; and (c) the employer was reckless as to whether the agreement (or the agreement as varied) contains prohibited content. … (3) Subsection (1) is a civil remedy provision. **REG 2.8.7** **Matters that do not pertain to the employment relationship are prohibited content** (1) Subject to subregulation (2), a term of a workplace agreement is prohibited content to the extent that it deals with a matter that does not pertain to the employment relationship. …	**172 Making an enterprise agreement** Enterprise agreements may be made about permitted matters (1) An agreement (an enterprise agreement) that is about one or more of the following matters (the permitted matters) may be made in accordance with this Part: (a) matters pertaining to the relationship between an employer that will be covered by the agreement and that employer's employees who will be covered by the agreement; (b) matters pertaining to the relationship between the employer or employers, and the employee organisation or employee organisations, that will be covered by the agreement;

	(c) deductions from wages for any purpose authorised by an employee who will be covered by the agreement; (d) how the agreement will operate.
356 Prohibited content (1) For the purposes of this Act, each of the following is *prohibited content* : (a) a provision that requires or permits any conduct that would contravene Part 16, or that would contravene that Part if Division 2 of that Part were disregarded; (b) a provision that directly or indirectly requires a person: (i) to encourage another person to become, or remain, a member of an industrial association; or (ii) to discourage another person from becoming, or remaining, a member of an industrial association; (c) a provision that indicates support for persons being members of an industrial association; (d) a provision that indicates opposition to persons being members of an industrial association; (e) a provision that requires or permits payment of a bargaining services fee; (f) a matter specified in the regulations. **REG 2.8.5**	**186 When FWA must approve an enterprise agreement—general requirements** Basic rule (1) If an application for the approval of an enterprise agreement is made under section 185, FWA must approve the agreement under this section if the requirements set out in this section and section 187 are met. … Requirement that there be no unlawful terms (4) FWA must be satisfied that the agreement does not include any unlawful terms (see Subdivision D of this Division). **194 Meaning of unlawful term** A term of an enterprise agreement is an unlawful term if it is: (a) a discriminatory term; or (b) an objectionable term; or s4 **objectionable term** means a term that: (a) requires, has the effect of requiring, or purports to require or have the effect of requiring; or (b) permits, has the effect of permitting, or purports to permit or have the effect of permitting; either of the following: (c) a contravention of Part 3-1 (which deals with general protections); (d) the payment of a bargaining services fee.

… Terms providing for remedies for unfair dismissal (5) A term of a workplace agreement is prohibited content to the extent that it confers a right or remedy in relation to the termination of employment of an employee bound by the agreement for a reason that is harsh, unjust or unreasonable. (6) To avoid doubt, a term is not prohibited content under subregulation (5) to the extent that it provides a process for managing an employee's performance or conduct. … Terms allowing for industrial action (3) A term of a workplace agreement is prohibited content to the extent that it permits a person bound by the agreement to engage in or organise industrial action. … (1) A term of a workplace agreement is prohibited content to the extent that it deals with the following: … (g) the rights of an official of an organisation of employers or employees to enter the premises of the employer bound by the agreement;	(c) if a particular employee would be protected from unfair dismissal under Part 3-2 after completing a period of employment of at least the minimum employment period—a term that confers an entitlement or remedy in relation to a termination of the employee's employment that is unfair (however described) before the employee has completed that period; or (d) a term that excludes the application to, or in relation to, a person of a provision of Part 3-2 (which deals with unfair dismissal), or modifies the application of such a provision in a way that is detrimental to, or in relation to, a person; or (e) a term that is inconsistent with a provision of Part 3-3 (which deals with industrial action); or (f) a term that provides for an entitlement: (i) to enter premises for a purpose referred to in section 481 (which deals with investigation of suspected contraventions); or (ii) to enter premises to hold discussions of a kind referred to in section 484; other than in accordance with Part 3-4 (which deals with right of entry); or (g) a term that provides for the exercise of a State or Territory OHS right other than in accordance with Part 3-4 (which deals with right of entry). [NOTE: Parts of current Regulation 2.8.5 providing for 'prohibited' content are no longer replicated verbatim in the new Bill. However, it is not clear whether some or all of these terms are now covered by the new s172(1)(b)-(d).]
REG 2.8.6 Discriminatory terms (1) A term of a workplace agreement is prohibited content to the extent that it discriminates against an employee, who is bound by the agreement, because of, or for reasons including, race, colour, sex, sexual	**195 Meaning of discriminatory term** Discriminatory term (1) A term of an enterprise agreement is a discriminatory term to the extent that it discriminates against an employee covered by the agreement because of, or for reasons

preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin. (2) For the purposes of subregulation (1), a provision of an agreement does not discriminate against an employee or class of employees merely because: (a) it provides for a rate or rates of pay that comply with a rate or rates of pay that are contained in the Australian Pay and Classification Scale or a special Federal Minimum Wage that would otherwise apply to the employee or class of employees; or (b) it discriminates, in respect of particular employment, on the basis of the inherent requirements of that employment; or (c) it discriminates, in respect of employment as a member of the staff of an institution that is conducted in accordance with the teachings or beliefs of a particular religion or creed: (i) on the basis of those teachings or beliefs; and (ii) in good faith.	including, the employee's race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin. Certain terms are not discriminatory terms (2) A term of an enterprise agreement does not discriminate against an employee: (a) if the reason for the discrimination is the inherent requirements of the particular position concerned; or (b) merely because it discriminates, in relation to employment of the employee as a member of the staff of an institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed: (i) in good faith; and (ii) to avoid injury to the religious susceptibilities of adherents of that religion or creed. (3) A term of an enterprise agreement does not discriminate against an employee merely because it provides for wages for: (a) all junior employees, or a class of junior employees; or (b) all employees with a disability, or a class of employees with a disability; or (c) all employees to whom training arrangements apply, or a class of employees to whom training arrangements apply.
436 Exclusion--claims in support of inclusion of prohibited content Engaging in industrial action in relation to a proposed collective agreement is not protected action if it is to support or advance claims to include prohibited content in the agreement.	**409 Employee claim action** Employee claim action (1) Employee claim action for a proposed enterprise agreement is industrial action that: (a) is organised or engaged in for the purpose of supporting or advancing claims in relation to the agreement that are about, or are reasonably believed to be about, permitted matters; and … (d) meets the additional requirements set out in this section. … Unlawful terms (3) The industrial action must not be in support of, or to advance, claims to include unlawful terms in the agreement.

The Bill is to be acknowledged for its removal of the high penalties attached to the mere making of a demand for a prohibited/unlawful term (former s365). However, it remains the case that demands for such terms can be the subject of an application

for an order that industrial action stop, non-compliance with any such order itself being subject to penalties.

The Bill is also to be acknowledged for taking some steps towards a reduction of the list of matters that are prohibited/unlawful. Parts of Regulation 2.8.5 providing for 'prohibited' content are no longer replicated verbatim in the new Bill, but it is not clear whether some or all of these terms are now 'permissible matters' covered by the new s172(1)(b)-(d).

Likewise, the itemizing of non-permitted matters in legislation is preferable to them being found in regulations.

Nonetheless, despite these small steps, the Bill still fails to meet the standards of the Convention.

The Bill ignores the fundamental premise of the Convention that the parties themselves are best placed to decide the content of their agreements. The practice of restricting the content of agreements began with the Howard Government and was condemned. Instead of taking the opportunity to end this practice, the Bill instead entrenches it. The Bill has not heeded the CEACR's recommendations to Australia, but has instead continued to consider it permissible to dictate to parties the matters about which they may bargain. It remains the case that bargaining about non-permitted matters is not protected by law, is subject to orders from FWA and ultimately orders and penalties from courts, and the Bill's anti-discrimination provisions do not extend to someone who is dismissed or otherwise prejudiced for taking industrial action in support of non-permitted matters.

The Bill continues to exclude from agreements a large range of social matters about which the parties ought to be able to bargain. The *Electrolux* decision turned on its head a widespread assumption amongst industrial practitioners that parties were free to bargain over whatever matters they pleased. It thereafter became the case that matters of 'an academic, political, social or managerial nature' were no longer permissible in collective agreements, because such matters did not pertain to the employment relationship.[14] The Bill proceeds by adopting the 'matters pertaining to the employment relationship' test as the cornerstone of determining whether a

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[14] *Electrolux Home Products Pty Ltd v Australian Workers' Union [2004] HCA 40 at [60].*

matter is permissible (s172). It then expands upon that by including a legally novel phrase, namely 'matters pertaining to the relationship between the employer or employers, and the employee organisation or employee organisations' (s172). This additional phrase will hopefully render permissible many of the union-related matters that did not meet the former 'matters pertaining' test, such as collection of union fees or provision of information about unions. However, what it will not do is render permissible 'non-union' matters about which workers may wish to legitimately bargain. The following are examples of matters that are unlikely to be permissible under the Bill:

- terms concerning an employer's environmental practices;
- terms designed to assist in the fight against climate change;
- programs that regulate the composition of a workforce so as to increase the number of women;
- clauses prescribing a minimum number of apprentices, or that a certain number of apprentices should be drawn from amongst indigenous Australians; or
- restrictions on the proportion of contractors used at an enterprise.

The breadth of permissible subject matters envisaged by ILO conventions parallels the right to take industrial action, a right that extends to:

> [t]he occupational and economic interests which workers defend through the exercise of the right to strike do not only concern better working conditions or collective claims of an occupational nature, but also the seeking of solutions to economic and social policy questions and problems facing the undertaking which are of direct concern to the workers.[15]

Workers and unions should thus be able to exercise their rights to 'to support their position in the search for solutions to problems posed by major social and economic policy trends which have a direct impact on their members and on workers in general, in particular as regards employment, social protection and standards of living.'[16] It is not an unlimited right - ILO conventions would not sanction, for example, a political strike designed to depose a government - but it is clear that workers have

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[15] ILO Committee on Freedom of Association, Digest of Decisions, 2006, para 526.

[16] ILO Committee on Freedom of Association, Digest of Decisions, 2006, para 527.

a right to take action over the very questions whose 'academic, political, social or managerial nature' takes them outside of the range of permitted matters under the Bill.

The Bill also continues to prohibit the inclusion in agreements of:

- strike pay; and
- bargaining fees.

Again, both of these restrictions were introduced by the Howard government, and both have been condemned by the ILO. In its 2005 observation, the Committee recalled

> that in its previous comments it had raised the issue of strike pay as a matter for negotiation noting that although the mere fact that there are deductions for days on strike is not contrary to the Convention, it is incompatible with the Convention to impose such deductions in all cases (as under section 187AA) as, in a system of voluntary collective bargaining, the parties should be able to raise this matter in negotiations. The Committee notes that, according to the Government, it is reasonable to prevent improper demands for payment for periods where employees or unions that come within the norms of the system have taken industrial action. The Committee once again recalls that in a system of voluntary collective bargaining, the parties should be able to raise the matter of strike pay in negotiations and that by preventing them from doing so, the law unduly constrains the permissible scope of collective bargaining. The Committee therefore once again requests the Government to indicate in its next report any measures taken or contemplated to amend section 187AA in accordance with the above.

This request was repeated in 2007, referring to the new s507 and to bargaining fees. The former provisions concerning strike pay are now replicated in Part 3-3 Div 9 in substantially similar terms. The prohibition on bargaining fees is found in sections 194 and 4, set out above. These provisions suggest that the Government has seen fit to ignore the ILO's recommendations.

As the sections set out above disclose, the Bill also specifically prohibits the negotiation of 'better than legislative minimum' standards in the following areas:

- right of entry;
- industrial action; and
- unfair dismissal (at least as far as probationary periods are concerned, but potentially further depending on how one interprets 194(1)(d)).

The ILO has made it clear that 'matters which might be subject to collective bargaining include … the granting of trade union facilities, *including access to the workplace beyond what is provided for in legislation etc.*; *these matters should not be excluded from the scope of collective bargaining by law*' (supra; emphasis added). That is, at least with respect to right of entry, it is a clear requirement of Convention 98 that parties be able to negotiate terms more generous than the legislative minima. The Bill breaches the Convention in this respect. It is further submitted that the same logic applies to industrial action and unfair dismissal: if the parties wish to negotiate certain matters during an agreement, for example, and leave others to be the subject of further bargaining (including by industrial action) they should be so permitted. Similarly, it is thoroughly appropriate that parties be able to agree on the appropriate unfair dismissal provisions to apply in their workplace. Indeed, many agreements currently regulate this area. There is no logic - nor any practice consistent with the Convention - in restricting parties' ability to consensually bargain above the legislative minimum.

V. Provisions which give insufficient protection to unionised workers who take industrial action in support of their rights under the conventions.

Critical to the operation of the conventions is that adequate protection be afforded to workers who choose to exercise the rights they have under the Conventions. This includes the right to be protected from retribution by an employer, including dismissal or other prejudice. Effective bargaining can also only take place if proper protection is offered to workers.

Many of the ILO's observations about Australia in this respect have concerned the unfairness that operates at the time of recruitment when an employer offers an AWA on a 'take it or leave it' basis: the employee is thereby denied a swathe of rights, including the right to collectively bargain, to have their union visit them at work, and to be protected from refusal of employment because they sought a union agreement.

The Digest records the fundamental importance to the ILO of explicit legal protections for workers:

> 769. Anti-union discrimination is one of the most serious violations of freedom of association, as it may jeopardize the very existence of trade unions.

> 770. No person shall be prejudiced in employment by reason of trade union membership or legitimate trade union activities, whether past or present.
>
> 771. No person should be dismissed or prejudiced in employment by reason of trade union membership or legitimate trade union activities, and it is important to forbid and penalize in practice all acts of anti-union discrimination in respect of employment.
>
> 772. No one should be subjected to discrimination or prejudice with regard to employment because of legitimate trade union activities or membership, and the persons responsible for such acts should be punished.
>
> 773. Since inadequate safeguards against acts of anti-union discrimination, in particular against dismissals, may lead to the actual disappearance of trade unions composed only of workers in an undertaking, additional measures should be taken to ensure fuller protection for leaders of all organisations, and delegates and members of trade unions, against any discriminatory acts. [17]

As alluded to, this is more than a blanket prohibition on discriminating against someone because they are a union member: it goes further to ensure that all the other 'legitimate trade union activities' - collective bargaining, right of entry, right to take industrial action - are also protected.

Accordingly, Australia has been criticised for its failure to offer workers protection from sanction in the following respects:

- The exclusion of protection from unfair dismissals on the basis of the size or nature of the undertaking (2007 Individual observation on Convention 98);
- The exclusion of protection from unfair dismissals of workers who seek to negotiate multiple-business agreements (2007 Individual observation on Convention 98); and
- The exclusion of protection from unfair dismissals of workers who 'pattern bargain' (2007 Individual observation on Convention 98).

For the reasons set out elsewhere in this submission, the Bill continues to deny these protections to workers, and as such remains in contravention of international law.

Further, this submission also notes that questions have been raised as to whether the current Act complies with the convention concerning Termination of Employment at the Initiative of the Employer (Convention 158): *Individual Observation concerning Termination of Employment Convention, 1982 (No. 158) Australia*, *2008*. Concern

[17] ILO Committee on Freedom of Association, Digest of Decisions, 2006, 769-773.

has been raised as to whether Australia's exclusions of employees from the rights under the Convention is permissible. The Government has been asked to report in detail by 2009. This submission expresses concern that the exclusion from unfair dismissal protection of employees of businesses of up to 15 employees for 12 months is a contravention of Convention 158. All employees ought be entitled to protection from unfair dismissal, and the Bill requires amendment. The Bill may also require amendment in the other areas addressed by the ILO request. The Committee is urged to submit the Bill to the ILO for assessment of its conformity with Convention 158.

VI. Provisions imposing limits on unions' right to access workplaces

Convention 87 provides the following protection:

> PART II. PROTECTION OF THE RIGHT TO ORGANISE
>
> Article 11
>
> Each Member of the International Labour Organisation for which this Convention is in force undertakes to take all necessary and appropriate measures to ensure that workers and employers may exercise freely the right to organise.

It also provides the following with respect to domestic law:

> Article 8
>
> 1. In exercising the rights provided for in this Convention workers and employers and their respective organisations, like other persons or organised collectivities, shall respect the law of the land.
>
> *2. The law of the land shall not be such as to impair, nor shall it be so applied as to impair, the guarantees provided for in this Convention.* (Emphasis added.)

Australia is thus obliged to 'take all necessary and appropriate measures' to ensure workers are able to effectively exercise their right to organise.

Access to workplaces is a vital part of this fundamental right. Without an effective right of entry, workers' representatives are unable to properly do their job, and as such workers are unable to freely organise. The ILO has held that:

> 1106. For the right to organize to be meaningful, the relevant workers' organisations should be able to further and defend the interests of their members, by enjoying such facilities as may be necessary for the proper exercise of their functions as workers' representatives, including access to the workplace of trade union members. [18]

In its 1994 General Survey of Freedom of Association and Collective Bargaining, the ILO reported that:

> 128. Freedom of association implies that workers' and employers' organisations should have the right to organize their activities in full freedom and formulate their programmes with a view to defending all of the occupational interests of their members, while respecting the law of the land. This includes in particular the right to hold trade union meetings, the right of trade union officers to have access to places of work and to communicate with management, certain political activities of organisations, the right to strike and, in general, any activity involved in the defence of members' rights.[19]

This right extends not just to communicate with existing members:

> 1103. Governments should guarantee the access of trade union representatives to workplaces, with due respect for the rights of property and management, so that trade unions can communicate with workers in order to apprise them of the potential advantages of unionization. [20]

It is clear, therefore, that right of entry to a workplace is a fundamental aspect of the core provisions of the convention, but something about which parties ought to be able to bargain:

> 913. Matters which might be subject to collective bargaining include the type of agreement to be offered to employees or the type of industrial instrument to be negotiated in the future, as well as wages, benefits and allowances, working time, annual leave, selection criteria in case of redundancy, the coverage of the collective agreement, the granting of trade union facilities, including access to the workplace beyond what is provided for in legislation etc.; these matters should not be excluded from the scope of collective bargaining by law. [21]

In 2007, the CEACR made a detailed Individual Direct Request of the Australian Government concerning the right of entry provisions in the Act. The relevant part of the request was as follows:

> 2. Workplace access. (i) The Committee notes that the International Confederation of Free Trade Unions (ICFTU), in its communication dated 12 July 2006, raises its concern that the new law severely curtails the right of union representatives to visit workplaces, thereby restricting their ability to advise employees of their rights and to recruit members. According to the ICFTU, the

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[18] ILO Committee on Freedom of Association, Digest of Decisions, 2006, 1106.

[19] ILO General Survey of Freedom of Association and Collective Bargaining, 1994.

[20] ILO Committee on Freedom of Association, Digest of Decisions, 2006, 1103.

[21] ILO Committee on Freedom of Association, Digest of Decisions, 2006, 913.

> WR Act, as amended, includes a rigid set of requirements for unions seeking to enter workplaces and imposes a lifetime ban on visiting workplaces for union officials who breach the new laws. The Committee observes, in this respect, that, pursuant to the amendment of the WR Act by the Work Choices Act, the right of entry of trade union representatives to the workplace in order to meet with workers has become subject to a special permit requirement (section 740 WR Act), which may be refused (and can also be revoked or suspended) in certain cases including: if the official has been convicted of an offence against an industrial law; or if the official has been ordered to pay a penalty under the WR Act or any other industrial law (sections 742(2)(b) and (d), WR Act). Moreover, the Registrar has discretion to refuse the permit if he or she is not satisfied that the applicant is "a fit and proper person" having regard to any matter that the Registrar considers relevant in this respect (section 742(1) and (2)(h) of the WR Act). The Committee draws the Government's attention to its General Survey of 1994 wherein it has indicated that the right of trade union officers to have access to places of work and to communicate with management is a basic activity of trade unions, which should not be subject to interference by the authorities (see General Survey of 1994 on Freedom of Association and Collective Bargaining, paragraph 128). The Committee considers that the restrictive conditions set for granting the permit could constitute a serious obstacle to the exercise of this right given that the WR Act contains a multitude of prohibitions accompanied by heavy fines or a conviction, sometimes for acts which should not constitute offences under Convention Nos. 87 and 98. The Committee therefore requests the Government to reply, in its next report, to the comments made by the ICFTU in this respect and to indicate any measures taken or contemplated to amend this section of the WR Act.
>
> (ii) The Committee further notes that the permit gives the holder the right to enter premises for the purposes of holding discussions with "eligible employees", i.e. employees who: (i) carry out work covered by an award or collective agreement that is binding on the permit holder's organization; and (ii) are members of the permit holder's trade union or are eligible to become a member of this trade union (section 760, WR Act). The Committee observes that section 760 has the effect of preventing discussions with employees who are covered by an AWA (instead of an award or collective agreement), even if they are trade union members. The Committee is of the view that a trade unionist should not be limited in discussions at the workplace only to eligible employees, but should also be able to apprise workers of the potential advantages of unionization or of coverage by a collective agreement instead of an AWA. It therefore requests the Government to indicate in its next report the measures taken or contemplated to amend this section so as not to artificially restrict the group of employees with whom a trade union representative may discuss.

These requests for information and amendments went unheeded by the Federal Government, prompting a further Individual Direct Request in 2008:

> Federal jurisdiction. The Workplace Relations Act (WR Act) 1996. 1. The Committee recalls that its previous comments concerned the need to lift the restrictive conditions set for granting a permit allowing trade union representatives to have entry to the workplace in order to meet with workers (sections 740, 742(1), (2)(b), 2(d) and (2)(h)). The Committee notes the Government's indication that the WR Act gives union officials a legally enforceable right to enter workplaces even if the employer does not wish to allow them access so as to give a reasonable opportunity to communicate with members and investigate genuine breaches of relevant industrial instruments, including AWAs.
>
> The Committee recalls that the WR Act contains a right of entry of trade union representatives to the workplace subject to a special permit requirement (section

740 of the WR Act) which may be refused (or revoked or suspended) in certain cases including in case the official has been convicted for an offence against an industrial law, or ordered to pay a penalty under the WR Act or any other industrial law (section 742(2)(b) and (d) of the WR Act). The Committee notes in this regard that the WR Act contains a multitude of prohibitions accompanied by heavy fines or a conviction, sometimes for acts which should not constitute offences under Conventions Nos 87 and 98. Moreover, the Registrar has discretion to refuse the permit if he or she is not satisfied that the applicant is "a fit and proper person" having regard to any matter that the Registrar considers relevant in this respect (section 742(1) and (2)(h) of the WR Act). Furthermore, the permit gives the holder the right to enter premises for the purposes of holding discussions with "eligible employees", i.e. employees who: (i) carry out work covered by an award or collective agreement that is binding on the permit holder's organization; and (ii) are members of the permit holder's trade union or are eligible to become a member of this trade union (section 760 of the WR Act). Thus, section 760 has the effect of preventing discussions with employees who are covered by an AWA even if they are trade union members.

The Committee recalls that the right of trade union officers to have access to places of work and to communicate with management is a basic activity of trade unions, which should not be subject to interference by the authorities. Moreover, a trade unionist should not be limited in discussions at the workplace only to eligible employees, but should also be able to apprise workers of the potential advantages of unionization or of coverage by a collective agreement instead of an AWA. The Committee therefore once again requests the Government to indicate any measures taken or contemplated to amend sections 742(1), (2)(b), 2(d) and (2)(h) and 760 of the WR Act so as to lift the restrictive conditions set for granting a permit giving right of entry to the workplace and ensure that the group of workers with whom a trade union representative may meet at the workplace is not artificially restricted.

Leaving aside those parts of the requests that relate to AWAs, the ILO clearly remains concerned that sections 740 and 742 breach the convention. It is apparent, however, that despite being on notice as to the ILO's concerns, the Government has not addressed them. A comparison of the Act with the Bill demonstrates this.

Right of access to workplaces	
WR Act	FW Bill

740 Issue of permit (1)An organisation may apply to a Registrar for the issue of a permit to an official of the organisation. The application must be in writing. (2)The Registrar may issue a permit to the official named in the application. (3)The permit: (a)must include any conditions that are imposed by the Registrar under section 741; and (b)must include any conditions that are applicable under section 770 at the time of issue. …	**512 FWA may issue entry permits** FWA may, on application by an organisation, issue a permit (an entry permit) to an official of the organisation if FWA is satisfied that the official is a fit and proper person to hold the entry permit.

741 Imposition of permit conditions at time of issue (1) At the time of issuing a permit, a Registrar may impose conditions that limit the circumstances in which the permit has effect. Note: For example, the conditions could limit the premises to which the permit applies or the time of day when the permit operates. **(2) In deciding whether to impose conditions, a Registrar must have regard to the matters specified in subsection 742(2).**	**515 Conditions on entry permit** (1) FWA may impose conditions on an entry permit when it is issued. (2) In deciding whether to impose conditions under subsection (1), FWA must take into account the permit qualification matters. (3) FWA must record on an entry permit any conditions that have been imposed on its use (whether under subsection (1) or any other provision of this Part). (4) If FWA imposes a condition on an entry permit after it has been issued, the permit ceases to be in force until FWA records the condition on the permit.
742 Permit not to be issued in certain cases *Official not a fit and proper person* (1) A Registrar must not issue a permit to an official unless the Registrar is satisfied that the official is a fit and proper person to hold the permit. (2) For the purposes of subsection (1), the Registrar must have regard to the following matters: (a) whether the official has received appropriate training about the rights and responsibilities of a permit holder; (b) whether the official has ever been convicted of an offence against an industrial law; (c) whether the official has ever been convicted of an offence against a law of the Commonwealth, a State, a Territory or a foreign country, involving: (i)entry onto premises; or (ii)fraud or dishonesty; or (iii)intentional use of violence against another person or intentional damage or destruction of property; (d)whether the official, or any other person, has ever been ordered to pay a penalty under this Act or any other industrial law in respect of conduct of the official;	**513 Considering application** (1) In deciding whether the official is a fit and proper person, FWA must take into account the following permit qualification matters: (a) whether the official has received appropriate training about the rights and responsibilities of a permit holder; (b) whether the official has ever been convicted of an offence against an industrial law; (c) whether the official has ever been convicted of an offence against a law of the Commonwealth, a State, a Territory or a foreign country, involving: (i) entry onto premises; or (ii) fraud or dishonesty; or (iii) intentional use of violence against another person or intentional damage or destruction of property; (d) whether the official, or any other person, has ever been ordered to pay a penalty under this Act or any other industrial law in relation to action taken by the official; (e) whether a permit issued to the official under this Part, or under a similar law of the

(e)whether any permit issued to the official under this Part, or under the repealed Part IX, has been revoked or suspended or made subject to conditions; (f)whether a court, or other person or body, under a State or Territory industrial law or an OHS law, has cancelled, suspended or imposed conditions on a right of entry for industrial or occupational health and safety purposes that the official had under that law; (g)whether a court, or other person or body, under a State or Territory industrial law or an OHS law, has disqualified the official from exercising, or applying for, a right of entry for industrial or occupational health and safety purposes under that law; (h)any other matters that the Registrar considers relevant. Note: Part VIIC of the *Crimes Act 1914* includes provisions that, in certain circumstances, relieve persons from the requirement to disclose spent convictions and require persons aware of such convictions to disregard them. *Banning order or disqualification applies under this Part* (3) A Registrar must not issue a permit to an official: (a) during a disqualification period specified by a Registrar under section 744; or (b) if the issue is prevented by a Commission order under section 770 or 772. *Disqualification etc. applies under State law* (4)A Registrar must not issue a permit to an official at a time when: (a)a suspension, imposed by a court or other person or body, applies under a State or Territory industrial law or an OHS law to a right of entry for	Commonwealth (no matter when in force), has been revoked or suspended or made subject to conditions; (f) whether a court, or other person or body, under a State or Territory industrial law or a State or Territory OHS law, has: (i) cancelled, suspended or imposed conditions on a right of entry for industrial or occupational health and safety purposes that the official had under that law; or (ii) disqualified the official from exercising, or applying for, a right of entry for industrial or occupational health and safety purposes under that law; (g) any other matters that FWA considers relevant. (2) Despite paragraph 85ZZH(c) of the Crimes Act 1914, Division 3 of Part VIIC of that Act applies in relation to the disclosure of information to or by, or the taking into account of information by, FWA for the purpose of making a decision under this Part. **514 When FWA must not issue permit** FWA must not issue an entry permit to an official at a time when a suspension or disqualification, imposed by a court or other person or body: (a) applies to the official's exercise of; or (b) prevents the official from exercising or applying for; a right of entry for industrial or occupational

	industrial or occupational health and safety purposes that the official has under that law; or (b)a disqualification, imposed by a court or other person or body, prevents the official from exercising, or applying for, a right of entry for industrial or occupational health and safety purposes under a State or Territory industrial law or an OHS law.	health and safety purposes under a State or Territory industrial law or a State or Territory OHS law.

The yellow highlighting notes the copied phrasing of the Act and the Bill, with the remainder of the sections being substantially similar. In the face of a request for amendment from the ILO, the Government has instead decided to retain those elements of the right of entry regime that most clearly offend the core provisions of Convention 87, namely:

- A permit system, with the permit granted by an authority (then the Registrar, now FWA) on the basis of a 'fit and proper person' test (s512);

- The prospect of de facto lifetime bans for breaches of industrial laws (s513). To recall once more, the ILO considers that 'the conditions set for granting the permit could constitute a serious obstacle to the exercise of this right given that the WR Act contains a multitude of prohibitions accompanied by heavy fines or a conviction, sometimes for acts which should not constitute offences under Convention Nos. 87 and 98'. As detailed elsewhere, many of these offences contrary to conventions 87 and 98 remain in the Act, especially with regards to industrial action.

With respect to AWAs, this submission notes that until AWAs are finally abolished (which will not be for some years yet) right of entry will continue to be unfairly restricted.

With respect to right of access to workplaces, the Bill is in contravention of Convention 87.

VII. Provisions which restrict the right to strike beyond the limits permitted by the conventions.

The international instruments to which Australia is signatory, and the jurisprudence of the ILO, recognise the right to take industrial action. As Chris White notes:

> The jurisprudence from the committees provide the principles for the expected implementation of what is required to protect the right to strike, integral to uphold these human rights Conventions. … The UN's *Universal Declaration of Human Rights* and their international covenants contain important obligations for freedom of association for union purposes. Article 8, paragraph 1(d) of the … *International Covenant on Economic, Social and Cultural Rights (ICESCR)* of 1966, (agreed to by Australia in 1975) provides for "The right to strike, provided it is exercised in conformity with the laws of the particular country". [22]

Unlike the ICESCR, ILO conventions do not expressly refer to a right to strike. However, the committees responsible for interpreting them are clear that an effective right is a necessary component of the conventions' core protected freedom: the right to organise and bargain freely. If workers and their unions are unable to withdraw their labour, then there is no effective right to organise. As Creighton and Stewart state:

> Neither the Freedom of Association and Protection of the Right to Organise Convention 1948 (No. 87) nor the Right to Organise and Collective Bargaining Convention 1949 (No. 98) makes any *express* reference to the right to strike. However, the right to strike is taken to be an integral part of the Principles of Freedom of Association developed by the Governing Body's Committee on Freedom of Association, and is taken as read into Articles 3, 8 and 10 of Convention No 87.75 By contrast, a right to strike in support of economic and social interests *is expressly protected* by the UN International Covenant on Economic, Social and Cultural Rights.[23]

The Conventions thus provide that industrial action is a legitimate means for workers to promote and defend their economic interests. For the ILO:

> the right to strike is one of the essential means available to workers and their organisations for the promotion and protection of their economic and social interests. These interests not only have to do with better working conditions and pursuing collective demands of an occupational nature, but also with seeking solutions to economic and social policy questions and to labour problems of any kind which are of direct concern to the workers.[24]

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[22] Chris White, 'The Right to Strike in Australia', 2005. Available at http://evatt.org.au/publications/papers/143.html, last accessed 18 August 2008.

[23] Breen Creighton and Andrew Stewart, *Labour Law: An Introduction*, Sydney, Federation Press, 2005, 315.

[24] ILO Committee on Freedom of Association, Digest of Decisions, 2006, para 522; 1994 General Survey on Freedom of Association and Collective Bargaining, 147.

Most obviously, this right extends to workers seeking better wages and conditions. However, some breadth is tolerated by the Conventions when it comes to the purpose or objective of a strike. First, there is an important 'freedom of speech' component to the right: it extends to actions designed to register a protest against a government's policy, though not to 'purely political' strikes.[25] In some cases, the right has been treated as a question of civil and political rights, especially when protests are directed against undemocratic regimes.[26] Secondly, however, as alluded to earlier, beyond the question of a mere 'protest strike', the ILO has also made it clear that:

> [t]he occupational and economic interests which workers defend through the exercise of the right to strike do not only concern better working conditions or collective claims of an occupational nature, but also the seeking of solutions to economic and social policy questions and problems facing the undertaking which are of direct concern to the workers.[27]

In its 1994 General Survey of Freedom of Association and Collective Bargaining, the ILO reported at para 165:

> In the view of the Committee, organisations responsible for defending workers' socio-economic and occupational interests should, in principle, be able to use strike action to support their position in the search for solutions to problems posed by major social and economic policy trends which have a direct impact on their members and on workers in general, in particular as regards employment, social protection and the standard of living. [28]

Some restrictions and limitations on the right are generally accepted: strikes in the essential services sector, for example, or during a state of emergency, can be restricted. Notwithstanding the ability to impose certain restrictions, it is clear that the recognised right to strike cannot be limited to disputes that can be resolved by entering into a collective agreement. That is, unlike the situation under Australian law, it is not permissible to restrict strikes only to 'bargaining periods': international law considers workers are able to exercise their right irrespective of whether an agreement is in force.

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[25] ILO Committee on Freedom of Association, Digest of Decisions, 2006, paras 528-9.

[26] Novitz, Tonia, *International and European Protection of the Right to Strike,* Oxford University Press, Oxford, 2003, Ch2

[27] ILO Committee on Freedom of Association, Digest of Decisions, 2006, para 526.

[28] See too ILO Committee on Freedom of Association, Digest of Decisions, 2006, para 527.

Further, industrial action at a supra-enterprise level is legitimate: the ILO 'Committee has stated on many occasions that strikes at the national level are legitimate in so far as they have economic and social objectives and not purely political ones'.[29]

This clearly puts Australian law at odds with ILO conventions. As Romeyn notes:

> In Australia, under the common law, all industrial action is unlawful as it constitutes a breach of contract and/or a tort. Concerns had been expressed by the Committee of Experts about limitations on industrial action in Australia as far back as 1989 and 1991. In 1993, the Keating Government's industrial relations reforms, under the *Industrial Relations Reform Act 1993*, partially addressed these concerns by giving workers seeking to negotiate an enterprise agreement under federal law a right to take protected action in support of their claims. Such action was protected in that employers were prevented from taking common law action against the involved employees.[30]

The introduction of protected action, however, was by no means sufficient to bring Australia into alignment with international law. As Fenwick and Landau note:

> ... the ILO's supervisory bodies have criticised this regime, repeatedly emphasising that the right to strike should not be limited to industrial disputes that are likely to be resolved through the signing of a collective agreement. The right to strike extends to enabling workers to express their dissatisfaction through industrial action with economic and social policy matters that affect their interests.[31]

Under the Howard Government, the restrictions on industrial action grew. Ultimately, a number of specific sections of the Act drew criticism from the ILO, with their 2007 General Observation concerning Convention 98 regarding Australia containing yet another request:

> The Committee once again requests the Government to indicate in its next report the measures taken or contemplated so as to amend the following provisions of the WR Act - as amended by the Work Choices Act - so as to bring them into conformity with the Convention: provisions which lift the protection of industrial action in support of multiple business agreements (section 423(1)(b)(i)), "pattern bargaining" (section 439); secondary boycotts and generally sympathy strikes (section 438), negotiations over "prohibited content" (sections 356 and 436 WR Act in connection with the Workplace Relations Regulations, 2006), strike pay (sections 508, WR Act); and provisions which prohibit industrial action in case of danger to the economy (sections 430, 433 and 498, WR Act) through the introduction of compulsory arbitration at the initiative of the Minister (section 500(a) and 504(3), WR Act). It also requests, once again, the Government to take measures to amend sections 30J and 30K

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[29] ILO Committee on Freedom of Association, Digest of Decisions, 2006, para 541.

[30] Romeyn, "The International Labour Organisation's Core Labour Standards and the *Workplace Relations Act 1996*," 33.

[31] C Fenwick and I Landau, 'Workchoices in International Perspective', *Australian Journal of Labour Law*, 19, 2006, 128.

> of the Crimes Act, 1914, so as to bring them into full conformity with the Convention.

When taken together with other observations made by the ILO, it is apparent that the following provisions do or may contravene Conventions.

i. Provisions which lift the protection of industrial action

- multiple business agreements (section 423(1)(b)(i));
- "pattern bargaining" (section 421, 439);

As noted above, the Bill has retained the prohibition on taking industrial action in support of multiple business agreements and "pattern bargaining". As such, the ILO's previous observations about the Act apply with equal force to the Bill: the Bill breaches Conventions 87 and 98.

- secondary boycotts and generally sympathy strikes (section 438 sections 45D and 45E of the Trade Practices Act 1974;

The restriction on permissible industrial action to action taken in support of a single enterprise agreement, taken with the failure to repeal sections 45D and 45E of the Trade Practices Act, mean secondary boycotts and sympathy strikes generally remain unlawful.

- negotiations over "prohibited content" (sections 356 and 436 of the WR Act in connection with the Workplace Relations Regulations 2006);
- strike pay (sections 508 of the WR Act);

As noted above, the continued restrictions on the content of collective agreements, together with the prohibition on taking industrial action in support of such content, render the Bill in contravention of the Conventions.

ii. Prohibition on industrial action during the life of an agreement

The conventions to which Australia is signatory prohibit the restriction of the right to strike to periods of negotiation of a collective agreement. As noted in the Digest:

> 484. The right to strike should not be limited solely to industrial disputes that are likely to be resolved through the signing of a collective agreement; workers and their organisations should be able to express in a broader context, if necessary, their dissatisfaction as regards economic and social matters affecting their members' interests. [32]

Nonetheless, the impermissible restrictions imposed by the Act are retained in the Bill:

[32] ILO Committee on Freedom of Association, Digest of Decisions, 2006, 484.

Industrial action during agreements	
WR Act	FW Bill
440 Exclusion—industrial action must not be taken until after nominal expiry date of workplace agreements or workplace determinations Engaging in or organising industrial action in contravention of section 494 or 495 is not protected action.	**413 Common requirements that apply for industrial action to be protected industrial action** … No industrial action before an enterprise agreement etc. passes its nominal expiry date (6) The person organising or engaging in the industrial action must not contravene section 417 (which deals with industrial action before the nominal expiry date of an enterprise agreement etc.) by organising or engaging in the industrial action.
494 Industrial action etc. must not be taken before nominal expiry date of collective agreement or workplace determinations (1) From the day when: (a) a collective agreement; or (b) a workplace determination; comes into operation until its nominal expiry date has passed, an employee, organisation or officer covered by subsection (2) must not organise or engage in industrial action (whether or not that action relates to a matter dealt with in the agreement or determination). … *Civil remedy provisions* (4) Subsections (1) and (3) are civil remedy provisions.	**417 Industrial action must not be organised or engaged in before nominal expiry date of enterprise agreement etc.** No industrial action (1) A person referred to in subsection (2) must not organise or engage in industrial action from the day on which: (a) an enterprise agreement is approved by FWA until its nominal expiry date has passed; or (b) a workplace determination comes into operation until its nominal expiry date has passed; whether or not the industrial action relates to a matter dealt with in the agreement or determination. Note: This subsection is a civil remedy provision (see Part 4-1). (2) The persons are: (a) an employer, employee, or employee organisation, to whom the agreement or determination applies; or (b) an officer of an employee organisation to which the agreement or determination applies, acting in that capacity. 20

To the extent that the right to strike remains denied during the life of an agreement - a restriction first introduced by the Howard Government - the Bill is in contravention of the Conventions.

iii. Provisions which restrict the discretion of the Commission to order industrial action cease and which prohibit industrial action in case of harm to the economy, including of third persons not connected with the dispute

The Conventions permit the restriction of industrial action when it endangers society or when certain minimum service levels are not being met. As noted in the Digest:

> 564. Compulsory arbitration to end a collective labour dispute and a strike is acceptable if it is at the request of both parties involved in a dispute, or if the strike in question may be restricted, even banned, i.e. in the case of disputes in the public service involving public servants exercising authority in the name of the State or in essential services in the strict sense of the term, namely those services whose interruption would endanger the life, personal safety or health of the whole or part of the population. …
>
> Situations and conditions under which a minimum operational service could be required
>
> 606. The establishment of minimum services in the case of strike action should only be possible in: (1) services the interruption of which would endanger the life, personal safety or health of the whole or part of the population (essential services in the strict sense of the term); (2) services which are not essential in the strict sense of the term but where the extent and duration of a strike might be such as to result in an acute national crisis endangering the normal living conditions of the population; and (3) in public services of fundamental importance. [33]

The Conventions also permit arbitration where disputes have become intractable and no resolution is in sight. Thus in its 1994 general survey, the ILO observed that:

> 258. As regards arbitration imposed by the authorities at their own initiative, the Committee considers that it is difficult to reconcile such interventions with the principle of the voluntary nature of negotiation established in Article 4 of Convention No. 98. However, it has to recognize that there comes a time in bargaining where, after protracted and fruitless negotiations, the authorities might be justified to step in when it is obvious that the deadlock in bargaining will not be broken without some initiative on their part. …

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[33] ILO Committee on Freedom of Association, Digest of Decisions, 2006, 565, 606.

> 259. In the Committee's opinion, it would be highly advisable that the parties be given every opportunity to bargain collectively, during a sufficient period, with the help of independent facilitators (mediator, conciliator, etc.) and machinery and procedures designed with the foremost objective of facilitating collective bargaining. Based on the premise that a negotiated agreement, however unsatisfactory, is to be preferred to an imposed solution, the parties should always retain the option of returning voluntarily to the bargaining table, which implies that whatever disputes settlement mechanism is adopted should incorporate the possibility of suspending the compulsory arbitration process, if the parties want to resume negotiations.[34]

It is clear, therefore, that the right to strike afforded by the Conventions is not unlimited, and that member states including Australia may legislate to avoid emergencies caused by industrial action. However, the ILO has on many occasions considered the provisions in Australia's laws, which allow for the termination of industrial action, and found them wanting. Section 430(3)(c)(ii), for example, set out below, provides an additional gloss on the ILO conventions, allowing the removal of a right to strike not just where such action would 'endanger the life, personal safety or health of the whole or part of the population', but also where it may threaten 'to cause significant damage to the Australian economy or an important part of it'. Section 498 allows for the unilateral removal by the Minister of the right to strike on similar grounds (dealt with further in the next section of this submission). Section 433 *mandates* the suspension of a bargaining period where it is threatening to cause economic harm to a third person not party to a dispute.

In its 2008 General Observation, the Committee considered these sections again, and noted that it had previously drawn these matters to the Government's attention. The CEACR considered the Government's response that 'the provisions prohibiting industrial action in case of danger to the economy (sections 430, 433 and 498 of the WR Act) through the introduction of compulsory arbitration at the initiative of the Minister (sections 500(a) and 504(3) of the WR Act) do not lead to a blanket prohibition of industrial action.' The CEACR nonetheless concluded that:

> The Committee notes with regret the Government's statement that it is not intending to adopt amendments along the lines of the Committee's previous comments. … The Committee once again urges the Government to indicate in its next report the measures taken or contemplated so as to bring its law and practice into conformity with the Convention on all the points raised above and to continue to provide information on the impact of the Work Choices Act both in law and in practice on the Government's obligation to ensure respect for freedom of association.

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[34] ILO General Survey of Freedom of Association and Collective Bargaining, 1994, 258-259.

In the face of these express findings, the Rudd Government has retained these objectionable provisions, and in at least one respect introduced a new contravention of the Convention.

Removal of right to strike on economic grounds	
WR Act	FW Bill
430 Suspension and termination of bargaining periods—general powers of Commission *Suspension or termination required if certain circumstances exist* (1) Subject to subsection (9), the Commission must, by order, suspend or terminate a bargaining period if, after giving the negotiating parties an opportunity to be heard, it is satisfied that any of the circumstances set out in subsections (2), (3) (7) and (8) exists or existed. *Circumstance—industrial action endangering life etc.* (3) A circumstance for the purposes of subsection (1) is that: (a) industrial action to support or advance claims in respect of the proposed collective agreement is being taken, or is threatened, impending or probable; and (b) that industrial action is adversely affecting, or would adversely affect, the employer or employees of the employer; and (c) that industrial action is threatening, or would threaten: … (ii) to cause significant damage to the Australian economy or an important part of it.	**424 FWA must suspend or terminate protected industrial action—endangering life etc.** Suspension or termination of protected industrial action (1) FWA must make an order suspending or terminating protected industrial action for a proposed enterprise agreement that: (a) is being engaged in; or (b) is threatened, impending or probable; if FWA is satisfied that the protected industrial action has threatened, is threatening, or would threaten: … (d) to cause significant damage to the Australian economy or an important part of it.
433 Suspension of bargaining periods—significant harm to third party *Suspension if industrial action threatens significant harm to a person* (1) The Commission must, by order, suspend a bargaining period for a period specified in the order if: (a) industrial action is being	**426 FWA must suspend protected industrial action—significant harm to a third party** Suspension of protected industrial action (1) FWA must make an order suspending protected industrial action for a proposed enterprise agreement that is being engaged in if the requirements set

taken in respect of the proposed collective agreement; and (b) an application for the bargaining period to be suspended under this section is made to the Commission by or on behalf of: (i) an organisation, person or body directly affected by the action (other than a negotiating party); or (ii) the Minister; and (c) the Commission considers that the action is adversely affecting the employer or employees of the employer; and (d) the Commission considers that the action is threatening to cause significant harm to any person (other than a negotiating party); and (e) the Commission considers that the suspension is appropriate, having regard to: (i) whether suspending the bargaining period would be contrary to the public interest or inconsistent with the objects of this Act; and (ii) any other matters that the Commission considers relevant. (2) For the purposes of paragraph (1)(d), in considering whether the action is threatening to cause significant harm to a person, the Commission may have regard to the following: (a) if the person is an employee—the extent to which the action affects the interests of the person as an employee; (b) the extent to which the person is particularly vulnerable to the effects of the action; (c) the extent to which the action threatens to: (i) damage the ongoing viability of a business carried on by the person; or (ii) disrupt the supply of goods or services to a business carried on by the person; or (iii) reduce the person's capacity to fulfil a contractual obligation; or (iv) cause other economic loss to the person; (d) any other matters that the	out in this section are met. Requirement—adverse effect on employers or employees (2) FWA must be satisfied that the protected industrial action is adversely affecting: (a) the employer, or any of the employers, that will be covered by the agreement; or (b) any of the employees who will be covered by the agreement. Requirement—significant harm to a third party (3) FWA must be satisfied that the protected industrial action is threatening to cause significant harm to any person other than: (a) a bargaining representative for the agreement; or (b) an employee who will be covered by the agreement. (4) For the purposes of subsection (3), FWA may take into account any matters it considers relevant including the extent to which the protected industrial action threatens to: (a) damage the ongoing viability of an enterprise carried on by the person; or (b) disrupt the supply of goods or services to an enterprise carried on by the person; or (c) reduce the person's capacity to fulfill a contractual obligation; or (d) cause other economic loss to the person.

Commission considers relevant.	

The Government has chosen essentially to replicate provisions the ILO has found to contravene Convention 98. More disturbingly, however, a new provision is included in the Bill, one which seeks to drastically widen the circumstances in which mere 'economic harm' may be relied upon to remove the right to strike. The new s423 reads in part:

> **423 FWA may suspend or terminate protected industrial action—significant economic harm etc.**
>
> Suspension or termination of protected industrial action
>
> (1) FWA may make an order suspending or terminating protected industrial action for a proposed enterprise agreement that is being engaged in if the requirements set out in this section are met.
>
> Requirement—significant economic harm
>
> (2) If the protected industrial action is employee claim action, FWA must be satisfied that the action is causing, or is threatening to cause, significant economic harm to:
>
> (a) the employer, or any of the employers, that will be covered by the agreement; and
>
> (b) any of the employees who will be covered by the agreement.
>
> …

This new provision flies directly in the face of the clear expression of the rights afforded by Convention 87. As set out in the Digest:

> 592. By linking restrictions on strike action to interference with trade and commerce, a broad range of legitimate strike action could be impeded. While the economic impact of industrial action and its effect on trade and commerce may be regrettable, such consequences in and of themselves do not render a service "essential", and thus the right to strike should be maintained.

It must be remembered that successful strike action will *by definition* cause economic harm: it is designed to bring pressure to bear on an employer to reach an agreement, and conversely the employees are prepared to forego their wages for the period of the industrial action. On one reading, the new s423 appears likely to render *all* successful industrial action unlawful. This provision, newly drafted by the Rudd Government, would almost certainly put Australia in further breach of international law. This submission urges the Committee to remove sections 423, 424(1)(d) and 426 from the Bill.

iv. Provisions restricting the right to strike through the introduction of compulsory arbitration at the initiative of the Minister

First introduced by the Howard Government's WorkChoices, these provisions have been the subject of repeated requests for amendment by the ILO. Without any right of hearing or any means of recourse, the Minister can arbitrarily declare a bargaining period ended and remove the right to strike. Disturbingly, despite being put on notice by the ILO that they contravene international law, the provisions find themselves essentially reprinted in the Bill.

Removal of right to strike by Minister	
WR Act	FW Bill
498 Minister's declaration *Making of declaration* (1) The Minister may make a written declaration terminating a specified bargaining period, or specified bargaining periods, if the Minister is satisfied that: (a) industrial action is being taken, or is threatened, impending or probable; and (b)the industrial action is adversely affecting, or would adversely affect, the employer or employers who are negotiating parties, or employees of the employer or employers; and (c) the industrial action is threatening, or would threaten: (i) to endanger the life, the personal safety or health, or the welfare, of the population or of part of it; or (ii) to cause significant damage to the Australian economy or an important part of it. (2)The declaration takes effect on the day that it is made. …	**431 Ministerial declaration terminating industrial action** (1) The Minister may make a declaration, in writing, terminating protected industrial action for a proposed enterprise agreement if the Minister is satisfied that: (a) the industrial action is being engaged in, or is threatened, impending or probable; and (b) the industrial action is threatening, or would threaten: (i) to endanger the life, the personal safety or health, or the welfare, of the population or a part of it; or (ii) to cause significant damage to the Australian economy or an important part of it. (2) The declaration comes into operation on the day that it is made. …

500 Application of Division This Division applies if a bargaining period has been terminated: (a) on the ground set out in subsection 430(3)… **504 Content of workplace determination** (1) The workplace determination must contain terms that, in the opinion of the Full Bench, deal with the matters at issue. (2) The workplace determination comes into operation on the day on which it is made. (3) The workplace determination must contain a term specifying a nominal expiry date for the determination that is no later than 5 years after the date on which the determination commences operating.	**266 When FWA must make an industrial action related workplace determination** Industrial action related workplace determination (1) If: (a) a termination of industrial action instrument has been made in relation to a proposed enterprise agreement; … FWA must make a determination (an industrial action related workplace determination) as quickly as possible after the end of that period. Termination of industrial action instrument 19 (2) A termination of industrial action instrument in relation to a proposed enterprise agreement is: … (b) a declaration under section 431 terminating protected industrial action for the agreement.

These draconian provisions are indicative of the worrying trend under the former Government of restricting fundamental rights by executive act. That these recent provisions remain not only ensures a continuing breach of the convention, but signifies a disturbing willingness on the part of the current Government to place executive power to suspend fundamental rights in the hands of a Minister. These sections must be removed to ensure compliance with the Conventions.

v. The secret ballot provisions

The 1994 General Survey of Freedom of Association and Collective bargaining sets out the position under the conventions:

> 170. In many countries legislation subordinates the exercise of the right to strike to prior approval by a certain percentage of workers. Although this requirement does not, in principle, raise problems of compatibility with the Convention, the ballot method, the quorum and the majority required should not be such that the exercise of the right to strike becomes very difficult, or even impossible in practice. The conditions established in the legislation of different countries vary considerably and their compatibility with the Convention may also depend on factual elements such as the scattering or geographical isolation of work centres or the structure of collective bargaining (by enterprise or industry), all of which require an examination on a case by case basis. If a member State deems it appropriate to establish in its legislation provisions which require a vote by workers before a strike can be held, it should ensure that account is taken only

> of the votes cast, and that the required quorum and majority are fixed at a reasonable level. [35]

This reflects a broader principle that the 'legal procedures for declaring a strike should not be so complicated as to make it practically impossible to declare a legal strike'. [36]

The previous Government relied on the national discretion offered by the Conventions to assert that Australian law was compliant with international standards. In its 1999 General Observation, the CEACR specifically considered the Australian provisions. Their conclusion was unequivocal:

> The Committee notes that the recently added Part VIB of the Act institutes a mandatory system of pre-strike ballots, consisting of numerous stages. In the view of the Committee, the complex and lengthy procedures mandated in the Act make it extremely difficult, and in many cases impossible from a practical point of view, to declare a legal strike, or to declare a strike in a timely manner. The Committee notes that harsh penalties can be imposed on an organization of employees or an officer or employee of the organization for inciting, encouraging or assisting a member of an organization to participate in a strike where there has not been a pre-strike ballot, including cancellation or suspension of the organization's registration (sections 73(3), 97C, 97K). In addition, with respect to the threshold that must be met for a pre-strike ballot to be declared successful (a majority of those entitled to vote) (section 97C), the Committee recalls that if a member State deems it appropriate to establish in its legislation provisions which require a vote by workers before a strike can be held, it should ensure that account is taken only of the votes cast, and that the required quorum and majority are fixed at a reasonable level. Furthermore, section 97E provides that a pre-strike ballot may be forced by an employer on a test of his or her belief that a strike is likely to occur. A ballot may also be forced by someone who believes he or she is likely to be affected by the strike. This provision, as well as section 97F which gives the Minister and the Commission broad powers to force a ballot, in the view of the Committee, restrict legitimate strike action.

The CEACR complained again in its 2001 General observation of 'a complex and lengthy mandatory pre-strike ballot procedure which makes it difficult, if not impossible, to declare a legal strike or to declare a strike in a timely manner, and which allows people other than the workers and their organisations to force a ballot'.

The provisions currently in the Act differ in some respects from those considered by the CEACR, but the core concerns remain. Yet again, however, the Government has chosen not to remove or modify the objectionable secret ballot provisions in accordance with the ILO's request, but instead essentially replicate them. The

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[35] ILO General Survey of Freedom of Association and Collective Bargaining, 1994, 170.

[36] ILO Committee on Freedom of Association, Digest of Decisions, 2006, 548.

lengthy provisions are not set out in this submission, but suffice it to say that the following objectionable provisions remain, often in the same terms as the Act:

- The removal of protected action status in the absence of a secret ballot (s445 Act/ s409(2) Bill)
- The requirements for 'numerous stages' before a ballot can be taken (Part 9 Div 4 Subdiv B-D/ Ch3 Div 8 Subdiv B-C)
- The majority requirement, whereby action must be approved not just by a majority of those who vote, but a majority of those eligible must vote as well (s478(1)/ s459(1))
- The harsh sanctions that may be imposed for engaging in action unsupported by a pre-strike ballot

Chapter 3 Division 8 of the Bill is in contravention of Convention 87.

vi. Section 30J of the Crimes Act 1914, which prohibits industrial action threatening trade or commerce with other countries or among States and section 30K of the Crimes Act 1914

The Government has not sought to repeal these sections, nor given any indication that they intend to do so, despite repeated ILO findings that they contravene Convention 87.

VIII. Strike pay

As noted above, the CEACR has condemned the prohibition on including 'strike pay' as a matter to be negotiated in collective agreements. Over and above this, however, the ILO has repeatedly noted that the restrictions on taking industrial action in support of a claim for strike pay, restrictions first introduced by the Howard Government, contravene the Convention. However, these provisions appear to have been effectively replicated in the new Bill, with Part 9 Div 9 now finding expression in Part 3-3 Div 9 in substantially similar terms. Until this Division is repealed, the Bill remains in contravention of the Conventions.

IX. Secondary boycotts and sympathy action generally

Sections 45D and 45E of the Trade Practices Act have not been repealed, thereby ensuring Australia remains in breach of international law. Further, given that the focus on enterprise-level bargaining has been sharpened under the Bill, the taking of 'sympathy strikes' appears almost certain to remain unlawful and subject to sanction, and thus in contravention of Conventions 87 and 98. Amendments are required to ensure that legitimate sympathy action is lawful. As noted in the Digest

> 534. A general prohibition of sympathy strikes could lead to abuse and workers should be able to take such action provided the initial strike they are supporting is itself lawful. [37]

X. Penalties

The Committee noted in its 2007 general observation the 'heavy pecuniary penalties' that apply for the taking of unprotected action. Unfortunately, the sanctions for taking unprotected industrial action and exercising rights permitted under the Conventions appear to have been substantially replicated in the new Bill, with the Chapter 4-1 Civil Remedies confirming that workers and their unions remain exposed to:

- Orders from FWA and penalties and sanctions for breach thereof;
- Court order and the enforcement thereof; and
- Other substantial monetary penalties

These amount to undue restrictions on the rights afforded by the Conventions.

[37] ILO Committee on Freedom of Association, Digest of Decisions, 2006, 534.

E. CONCLUSION

The CEACR has previously reminded Australia that ILO Conference Committee requests copies of any proposed legislation from any state so that it can examine the Bill for conformity with the Convention. For the reasons outlined in this submission, it appears that the Rudd Government has most likely not submitted the Bill to the ILO for comment, nor acceded to the ILO's requests for amendments, as many aspects of the Bill are in breach of the Convention.

Significant amendment is now required to the Bill in order to bring it into line with international law.

This submission urges the Committee to:

- Recommend the amendments referred to in this submission; and
- Submit the Bill to the ILO for advice as to the Bill's compliance with Australia's international obligations.

APPENDIX A - TEXT OF CONVENTIONS 87 AND 98

C87 Freedom of Association and Protection of the Right to Organise Convention, 1948

Convention concerning Freedom of Association and Protection of the Right to Organise (Note: Date of coming into force: 04:07:1950.)

Convention:C087
Place:(San Francisco)
Session of the Conference:31
Date of adoption:09:07:1948
Subject classification: Freedom of Association
Subject classification: Collective Bargaining and Agreements
Subject: Freedom of Association, Collective Bargaining, and Industrial Relations
Status: Up-to-date instrument This instrument is one of the fundamental conventions.

The General Conference of the International Labour Organisation,

Having been convened at San Francisco by the Governing Body of the International Labour Office, and having met in its Thirty-first Session on 17 June 1948;

Having decided to adopt, in the form of a Convention, certain proposals concerning freedom of association and protection of the right to organise, which is the seventh item on the agenda of the session;

Considering that the Preamble to the Constitution of the International Labour Organisation declares "recognition of the principle of freedom of association" to be a means of improving conditions of labour and of establishing peace;

Considering that the Declaration of Philadelphia reaffirms that "freedom of expression and of association are essential to sustained progress";

Considering that the International Labour Conference, at its Thirtieth Session, unanimously adopted the principles which should form the basis for international regulation;

Considering that the General Assembly of the United Nations, at its Second Session, endorsed these principles and requested the International Labour Organisation to continue every effort in order that it may be possible to adopt one or several international Conventions;

adopts this ninth day of July of the year one thousand nine hundred and forty-eight the following Convention, which may be cited as the Freedom of Association and Protection of the Right to Organise Convention, 1948:

PART I. FREEDOM OF ASSOCIATION

Article 1

Each Member of the International Labour Organisation for which this Convention is in force undertakes to give effect to the following provisions.

Article 2

Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation.

Article 3

1. Workers' and employers' organisations shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities and to formulate their programmes.

2. The public authorities shall refrain from any interference which would restrict this right or impede the lawful exercise thereof.

Article 4

Workers' and employers' organisations shall not be liable to be dissolved or suspended by administrative authority.

Article 5

Workers' and employers' organisations shall have the right to establish and join federations and confederations and any such organisation, federation or confederation shall have the right to affiliate with international organisations of workers and employers.

Article 6

The provisions of Articles 2, 3 and 4 hereof apply to federations and confederations of workers' and employers' organisations.

Article 7

The acquisition of legal personality by workers' and employers' organisations, federations and confederations shall not be made subject to conditions of such a character as to restrict the application of the provisions of Articles 2, 3 and 4 hereof.

Article 8

1. In exercising the rights provided for in this Convention workers and employers and their respective organisations, like other persons or organised collectivities, shall respect the law of the land.

2. The law of the land shall not be such as to impair, nor shall it be so applied as to impair, the guarantees provided for in this Convention.

Article 9

1. The extent to which the guarantees provided for in this Convention shall apply to the armed forces and the police shall be determined by national laws or regulations.

2. In accordance with the principle set forth in paragraph 8 of Article 19 of the Constitution of the International Labour Organisation the ratification of this Convention by any Member shall not be deemed to affect any existing law, award, custom or agreement in virtue of which members of the armed forces or the police enjoy any right guaranteed by this Convention.

Article 10

In this Convention the term *organisation* means any organisation of workers or of employers for furthering and defending the interests of workers or of employers.

PART II. PROTECTION OF THE RIGHT TO ORGANISE

Article 11

Each Member of the International Labour Organisation for which this Convention is in force undertakes to take all necessary and appropriate measures to ensure that workers and employers may exercise freely the right to organise.

PART III. MISCELLANEOUS PROVISIONS

Article 12

1.In respect of the territories referred to in Article 35 of the Constitution of the International Labour Organisation as amended by the Constitution of the International Labour Organisation Instrument of Amendment 1946, other than the territories referred to in paragraphs 4 and 5 of the said article as so amended, each Member of the Organisation which ratifies this Convention shall communicate to the Director-General of the International Labour Office with or as soon as possible after its ratification a declaration stating:

a) the territories in respect of which it undertakes that the provisions of the Convention shall be applied without modification;

b) the territories in respect of which it undertakes that the provisions of the Convention shall be applied subject to modifications, together with details of the said modifications;

c) the territories in respect of which the Convention is inapplicable and in such cases the grounds on which it is inapplicable;

d) the territories in respect of which it reserves its decision.

2. The undertakings referred to in subparagraphs (a) and (b) of paragraph 1 of this Article shall be deemed to be an integral part of the ratification and shall have the force of ratification.

3. Any Member may at any time by a subsequent declaration cancel in whole or in part any reservations made in its original declaration in virtue of subparagraphs (b), (c) or (d) of paragraph 1 of this Article.

4. Any Member may, at any time at which the Convention is subject to denunciation in accordance with the provisions of Article 16, communicate to the Director-General a declaration modifying in any other respect the terms of any former declaration and stating the present position in respect of such territories as it may specify.

Article 13

1. Where the subject-matter of this Convention is within the self-governing powers of any non-metropolitan territory, the Member responsible for the international relations of that territory may, in agreement with the government of the territory, communicate to the Director-General of the International Labour Office a declaration accepting on behalf of the territory the obligations of this Convention.

2. A declaration accepting the obligations of this Convention may be communicated to the Director-General of the International Labour Office:

a) by two or more Members of the Organisation in respect of any territory which is under their joint authority; or

b) by any international authority responsible for the administration of any territory, in virtue of the Charter of the United Nations or otherwise, in respect of any such territory.

3. Declarations communicated to the Director-General of the International Labour Office in accordance with the preceding paragraphs of this Article shall indicate whether the provisions of the Convention will be applied in the territory concerned without modification or subject to modifications; when the declaration indicates that the provisions of the Convention will be applied subject to modifications it shall give details of the said modifications.

4. The Member, Members or international authority concerned may at any time by a subsequent declaration renounce in whole or in part the right to have recourse to any modification indicated in any former declaration.

5. The Member, Members or international authority concerned may, at any time at which this Convention is subject to denunciation in accordance with the provisions of Article 16, communicate to the Director-General a declaration modifying in any other respect the terms of any former declaration and stating the present position in respect of the application of the Convention.

PART IV. FINAL PROVISIONS

Article 14

The formal ratifications of this Convention shall be communicated to the Director-General of the International Labour Office for registration.

Article 15

1. This Convention shall be binding only upon those Members of the International Labour Organisation whose ratifications have been registered with the Director-General.

2. It shall come into force twelve months after the date on which the ratifications of two Members have been registered with the Director-General.

3. Thereafter, this Convention shall come into force for any Member twelve months after the date on which its ratifications has been registered.

Article 16

1. A Member which has ratified this Convention may denounce it after the expiration of ten years from the date on which the Convention first comes into force, by an act communicated to the Director-General of the International Labour Office for registration. Such denunciation shall not take effect until one year after the date on which it is registered.

2. Each Member which has ratified this Convention and which does not, within the year following the expiration of the period of ten years mentioned in the preceding paragraph, exercise the right of denunciation provided for in this Article, will be bound for another period of ten years and, thereafter, may denounce this Convention at the expiration of each period of ten years under the terms provided for in this Article.

Article 17

1. The Director-General of the International Labour Office shall notify all Members of the International Labour Organisation of the registration of all ratifications, declarations and denunciations communicated to him by the Members of the Organisation.

2. When notifying the Members of the Organisation of the registration of the second ratification communicated to him, the Director-General shall draw the attention of the Members of the Organisation to the date upon which the Convention will come into force.

Article 18

The Director-General of the International Labour Office shall communicate to the Secretary-General of the United Nations for registration in accordance with Article 102 of the Charter of the United Nations full particulars of all ratifications, declarations and acts of denunciation registered by him in accordance with the provisions of the preceding articles.

Article 19

At such times as it may consider necessary the Governing Body of the International Labour Office shall present to the General Conference a report on the working of this Convention and shall examine the desirability of placing on the agenda of the Conference the question of its revision in whole or in part.

Article 20

1. Should the Conference adopt a new Convention revising this Convention in whole or in part, then, unless the new Convention otherwise provides:

a) the ratification by a Member of the new revising Convention shall ipso jure involve the immediate denunciation of this Convention, notwithstanding the provisions of Article 16 above, if and when the new revising Convention shall have come into force;

b) as from the date when the new revising Convention comes into force this Convention shall cease to be open to ratification by the Members.

2. This Convention shall in any case remain in force in its actual form and content for those Members which have ratified it but have not ratified the revising Convention.

Article 21

The English and French versions of the text of this Convention are equally authoritative.

C98 Right to Organise and Collective Bargaining Convention, 1949

Convention concerning the Application of the Principles of the Right to Organise and to Bargain Collectively (Note: Date of coming into force: 18:07:1951.)

Convention:C098
Place:Geneva
Session of the Conference:32
Date of adoption:01:07:1949
Subject classification: Freedom of Association
Subject classification: Collective Bargaining and Agreements
Subject: **Freedom of Association, Collective Bargaining, and Industrial Relations**
Status: Up-to-date instrument This instrument is one of the fundamental conventions.

The General Conference of the International Labour Organisation,

Having been convened at Geneva by the Governing Body of the International Labour Office, and having met in its Thirty-second Session on 8 June 1949, and

Having decided upon the adoption of certain proposals concerning the application of the principles of the right to organise and to bargain collectively, which is the fourth item on the agenda of the session, and

Having determined that these proposals shall take the form of an international Convention,

adopts this first day of July of the year one thousand nine hundred and forty-nine the following Convention, which may be cited as the Right to Organise and Collective Bargaining Convention, 1949:

Article 1

1. Workers shall enjoy adequate protection against acts of anti-union discrimination in respect of their employment.

2. Such protection shall apply more particularly in respect of acts calculated to--

(a) make the employment of a worker subject to the condition that he shall not join a union or shall relinquish trade union membership;

(b) cause the dismissal of or otherwise prejudice a worker by reason of union membership or because of participation in union activities outside working hours or, with the consent of the employer, within working hours.

Article 2

1. Workers' and employers' organisations shall enjoy adequate protection against any acts of interference by each other or each other's agents or members in their establishment, functioning or administration.

2. In particular, acts which are designed to promote the establishment of workers' organisations under the domination of employers or employers' organisations, or to support workers' organisations by financial or other means, with the object of placing such organisations under the control of employers or employers' organisations, shall be deemed to constitute acts of interference within the meaning of this Article.

Article 3

Machinery appropriate to national conditions shall be established, where necessary, for the purpose of ensuring respect for the right to organise as defined in the preceding Articles.

Article 4

Measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements.

Article 5

1. The extent to which the guarantees provided for in this Convention shall apply to the armed forces and the police shall be determined by national laws or regulations.

2. In accordance with the principle set forth in paragraph 8 of Article 19 of the Constitution of the International Labour Organisation the ratification of this Convention by any Member shall not be deemed to affect any existing law, award, custom or agreement in virtue of which members of the armed forces or the police enjoy any right guaranteed by this Convention.

Article 6

This Convention does not deal with the position of public servants engaged in the administration of the State, nor shall it be construed as prejudicing their rights or status in any way.

Article 7

The formal ratifications of this Convention shall be communicated to the Director-General of the International Labour Office for registration.

Article 8

1. This Convention shall be binding only upon those Members of the International Labour Organisation whose ratifications have been registered with the Director-General.

2. It shall come into force twelve months after the date on which the ratifications of two Members have been registered with the Director-General.

3. Thereafter, this Convention shall come into force for any Member twelve months after the date on which its ratification has been registered.

Article 9

1. Declarations communicated to the Director-General of the International Labour Office in accordance with paragraph 2 of Article 35 of the Constitution of the International Labour Organisation shall indicate --

a) the territories in respect of which the Member concerned undertakes that the provisions of the Convention shall be applied without modification;

b) the territories in respect of which it undertakes that the provisions of the Convention shall be applied subject to modifications, together with details of the said modifications;

c) the territories in respect of which the Convention is inapplicable and in such cases the grounds on which it is inapplicable;

d) the territories in respect of which it reserves its decision pending further consideration of the position.

2. The undertakings referred to in subparagraphs (a) and (b) of paragraph 1 of this Article shall be deemed to be an integral part of the ratification and shall have the force of ratification.

3. Any Member may at any time by a subsequent declaration cancel in whole or in part any reservation made in its original declaration in virtue of subparagraph (b), (c) or (d) of paragraph 1 of this Article.

4. Any Member may, at any time at which the Convention is subject to denunciation in accordance with the provisions of Article 11, communicate to the Director-General a declaration modifying in any other respect the terms of any former declaration and stating the present position in respect of such territories as it may specify.

Article 10

1. Declarations communicated to the Director-General of the International Labour Office in accordance with paragraph 4 or 5 of Article 35 of the Constitution of the International Labour Organisation shall indicate whether the provisions of the Convention will be applied in the territory concerned without modification or subject to modifications; when the declaration indicates that the provisions of the Convention will be applied subject to modifications, it shall give details of the said modifications.

2. The Member, Members or international authority concerned may at any time by a subsequent declaration renounce in whole or in part the right to have recourse to any modification indicated in any former declaration.

3. The Member, Members or international authority concerned may, at any time at which this Convention is subject to denunciation in accordance with the provisions of Article 11, communicate to the Director-General a declaration modifying in any other respect the terms of any former declaration and stating the present position in respect of the application of the Convention.

Article 11

1. A Member which has ratified this Convention may denounce it after the expiration of ten years from the date on which the Convention first comes into force, by an act communicated to the Director-General of the International Labour Office for registration. Such denunciation shall not take effect until one year after the date on which it is registered.

2. Each Member which has ratified this Convention and which does not, within the year following the expiration of the period of ten years mentioned in the preceding paragraph, exercise the right of denunciation provided for in this Article, will be bound for another period of ten years and, thereafter, may denounce this Convention at the expiration of each period of ten years under the terms provided for in this Article.

Article 12

1. The Director-General of the International Labour Office shall notify all Members of the International Labour Organisation of the registration of all ratifications, declarations and denunciations communicated to him by the Members of the Organisation.

2. When notifying the Members of the Organisation of the registration of the second ratification communicated to him, the Director-General shall draw the attention of the Members of the Organisation to the date upon which the Convention will come into force.

Article 13

The Director-General of the International Labour Office shall communicate to the Secretary-General of the United Nations for registration in accordance with Article 102 of the Charter of the United Nations full particulars of all ratifications, declarations and acts of denunciation registered by him in accordance with the provisions of the preceding articles.

Article 14

At such times as it may consider necessary the Governing Body of the International Labour Office shall present to the General Conference a report on the working of this Convention and shall examine the desirability of placing on the agenda of the Conference the question of its revision in whole or in part.

Article 15

1. Should the Conference adopt a new Convention revising this Convention in whole or in part, then, unless the new Convention otherwise provides,

a) the ratification by a Member of the new revising Convention shall ipso jure involve the immediate denunciation of this Convention, notwithstanding the provisions of Article 11 above, if and when the new revising Convention shall have come into force;

b) as from the date when the new revising Convention comes into force, this Convention shall cease to be open to ratification by the Members.

2. This Convention shall in any case remain in force in its actual form and content for those Members which have ratified it but have not ratified the revising Convention.

Article 16

The English and French versions of the text of this Convention are equally authoritative.