

**SUPPLEMENTARY SUBMISSION NO. 3.1**  
**TT on 12 March 2013**



AUSTRALIAN CHAMBER OF  
COMMERCE AND INDUSTRY

7 June 2013

Ms Katie Ellis  
Acting Inquiry Secretary  
Joint Standing Committee on Treaties  
Parliament House  
Canberra ACT 2600

By Email: [Katie.Ellis.Reps@aph.gov.au](mailto:Katie.Ellis.Reps@aph.gov.au)

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Dear Ms Ellis,

The Australian Chamber of Commerce and Industry thanks the Committee for its request. Please find attached the relevant advice from the International Organisation of Employers as per the Committee's request.

I can be contacted directly on (03) 9668 9950 to discuss this matter further at your convenience.

Yours sincerely,

**DANIEL MAMMONE**  
Director of Workplace Policy  
Director of Legal Affairs  
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International Organisation of Employers  
Organisation Internationale des Employeurs  
Organización Internacional de Empleadores

Geneva, 6 June 2013

Mr Peter Anderson  
Chief Executive  
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AUSTRALIA  
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Dear Mr Anderson,

**Australian Government Proposed Treaty Ratification Action -  
ILO Convention No. 138**

Thank you for your request for feedback on this matter.

This is not a formal legal opinion but an informed analysis based upon the information on how within the ILO supervisory machinery compliance with a ratified convention could be seen given previous recommendations of the ILO and in particular, the pronouncement by the Committee of Experts on the Application of Conventions and Recommendations (Committee of Experts) on ILO Convention No. 138.

We have had an opportunity to read the Australian Chamber of Commerce and Industry's (ACCI) written analysis of those provisions contained in its submission to the Parliamentary Joint Standing Committee on Treaties in addition to the relevant National Interest Analysis ([2013] ATNIA 2) prepared by the Australian Government in addition to other relevant materials.

Once Australia has ratified Convention No. 138, and based on the analysis contained in both the ACCI submission and the NIA prepared by the Australian Government, there is a real possibility that a complaint could be made before the ILO supervisory bodies. From the terms of the existing Australian national and state based legal framework, it appears that Australia's ratification of ILO Convention No. 138 could give rise to the complaint procedures initiation before the ILO supervisory mechanisms. A valid complaint could lead to a request that the Australian Government bring its legislation (or that of the Australian States and Territories) in compliance with the ratified ILO Conventions.

The IOE endorses the position outlined by ACCI which highlights that ratification of the ILO Convention No. 138 could lead to a potential finding of non-compliance by the relevant supervisory bodies. As is present in this case, there can be significant risk of ratification action when the structure of a nation's domestic law is not in common form to the

Convention. The heavy reliance by the Australian Government on exemptions to fit within the terms of the Convention reinforces this fact. Experience suggests there is also a risk of expansionary interpretations of the Committee of Experts that compound that risk. Based on the observations of the Committee of Experts, it is likely that there is an expectation that Australia, should it ratify Convention No. 138, would need to progressively restructure its legal frameworks to minimize the possibility of adverse ILO rulings.

Based on the IOE's extensive involvement in the ILO representing employers, the IOE does not agree with the assertions by officials representing the Australian Government that Australia and its social partners have been disadvantaged in its formal or informal interactions with the ILO (or its constituent organs) as a result of not ratifying the Convention. On the contrary, private Australian employers would risk being the subject of a union (worker) complaint for alleged convention breach by governments which would impose significant and associated risks to reputation.

The IOE also points out that a complaint made against a government for breach of an ILO Convention can include allegations concerning the conduct of a private sector employer as the subject of that complaint.

In conclusion, the IOE affirms and endorses the analysis and risks identified by ACCI in its submission to the Parliamentary Joint Standing Committee on Treaties.

Please contact me if I can be of any further assistance.

~~Yours~~ sincerely,

**Brent H. WILTON**  
*Secretary-General*