SENATE EMPLOYMENT, WORKPLACE RELATIONS AND EDUCATION LEGISLATION COMMITTEE

2005-2006 SUPPLEMENTARY BUDGET SENATE ESTIMATES HEARING 2 and 3 NOVEMBER 2005

EMPLOYMENT AND WORKPLACE RELATIONS PORTFOLIO

QUESTIONS ON NOTICE

Outcome 2: Higher productivity, higher pay workplace

Output Group: Workplace Relations Policy Group

Output: Safety, Compensation and International Branch

Question Number: W593-06

Question:
Senator Marshall asked at *Hansard* page 110: Can the department provide the Committee with a copy of the detailed practice and law report recently provided to the ILO Committee of Experts on compliance with convention 98?

Answer:

The report is attached.

INTERNATIONAL LABOUR OFFICE GENEVA

REPORT FORM

FOR THE

RIGHT TO ORGANISE AND COLLECTIVE BARGAINING CONVENTION, 1949 (No. 98)

The present report form is for the use of countries which have ratified the Convention. It has been approved by the Governing Body of the International Labour Office, in accordance with article 22 of the ILO Constitution, which reads as follows: "Each of the Members agrees to make an annual report to the International Labour Office on the measures which it has taken to give effect to the provisions of the Conventions to which it is a party. These reports shall be made in such form and shall contain such particulars as the Governing Body may request."

PRACTICAL GUIDANCE FOR DRAWING UP REPORTS

First reports If this is your Government's first report following the entry into force of the Convention in your country, full information should be given on each of the provisions of the Convention and on each of the questions set out in the report form. *Subsequent reports* In subsequent reports, information need normally be given only: (a) on any new legislative or other measures affecting the application of the Convention;	(b) in reply to the questions in the report form on the practical application of the Convention (for example, statistics, results of inspections, judicial or administrative decisions) and on the communication of copies of the report to the representative organisations of employers and workers and on any observations received from these organisations; (c) **in reply to comments by the supervisory bodies:** the report must contain replies to any comments regarding the application of the Convention in your country which have been made by the Committee of Experts on the Application of Conventions and Recommendations or by the Conference Committee on the Application of Standards.

Article 22 of the Constitution of the ILO

Report for the period 1 July 2003 to 30 June 2005 made by the Government of

AUSTRALIA

on the

RIGHT TO ORGANISE AND COLLECTIVE BARGAINING CONVENTION, 1949 (No. 98)

(Ratification registered on 28 February 1973)

This is a simplified report on Australia's compliance with Convention 98.

This Report incorporates information concerning changes that have occurred in the application of this Convention in the Commonwealth, New South Wales, Queensland, Western Australia, and the Northern Territory jurisdictions. The Australian Capital Territory reported no changes during the reporting period. Reports have not yet been received from the remaining jurisdictions (i.e. Victoria, South Australia, and Tasmania). Copies of their contributions will be forwarded to the ILO on receipt.

The information requested by the Committee of Experts in 2004 can be found in *Attachment 1* to this report.

This Report also includes the Australian Government's responses to additional issues raised by the Committee on the Application of Standards of the 93rd Session of the International Labour Conference (2005). Many of the issues are addressed in the body of the report and Attachment 1. The remainder are addressed in the additional report at *Attachment 2*.

The terms "Federal", "Commonwealth" and "Australian Government" refer to the federal Government of the Commonwealth of Australia.

NOTE: The full text of federal and State legislation can be downloaded from the internet site of the Australasian Legal Information Institute's: www.austlii.edu.au. Additionally, federal legislation and related material may be down loaded from www.comlaw.gov.au.

I. Please indicate whether effect is given to the Articles of the Convention:
(a) by customary law or practice, or
(b) by legislation.
In the first alternative, please indicate how effect is given to the Articles of the Convention.
In the second alternative, please give a list of the constitutional and legislative provisions or administrative or other regulations which give effect to the Articles of the Convention. Where this has not already been done, please forward copies of these various provisions, etc., to the International Labour Office with this report.

Please give any available information concerning the extent to which these laws and regulations have been enacted or modified to permit, or as a result of, ratification.

FEDERAL

Federal legislative reform

In the federal jurisdiction, the Convention is primarily given effect by the *Workplace Relations Act 1996* (Commonwealth) (WR Act) and the *Workplace Relations Regulations.* During the reporting period, the Government introduced, into the 40th and 41st Parliaments, a number of Bills seeking to amend the WR Act. Of those Bills, the following were enacted into law during the reporting period:

- Workplace Relations Amendment (Agreement Validation) Act 2004
  - http://www.workplace.gov.au/workplace/Category/Legislation/WRAct/WorkplaceRelationsAmendmentAgreementValidationAct2004.htm
- Workplace Relations Amendment (Codifying Contempt Offences) Act 2004
  - http://www.workplace.gov.au/workplace/Category/Legislation/WRAct/WorkplaceRelationsAmendmentCodifyingContemptOffencesAct2004.htm
- Workplace Relations Amendment (Improved Remedies for Unprotected Action) Act 2004
  - http://www.workplace.gov.au/workplace/Category/Legislation/WRAct/WorkplaceRelationsAmendmentImprovedRemediesforUnprotectedActionAct2004.htm
- Workplace Relations Amendment (Transmission of Business) Act 2004
  - http://www.workplace.gov.au/workplace/Category/Legislation/WRAct/WorkplaceRelationsAmendmentTransmissionofBusinessAct2004.htm
- Workplace Relations Amendment (Improved Protection for Victorian Workers) Act 2003
  - http://www.workplace.gov.au/workplace/Category/Legislation/WRAct/WorkplaceRelationsAmendmentImprovedProtectionforVictorianWorkersAct2003.htm
- Workplace Relations Amendment (Fair Termination) Act 2003
  - http://www.workplace.gov.au/workplace/Category/Legislation/WRAct/WorkplaceRelationsAmendmentFairTerminationAct2003.htm
- Workplace Relations Amendment (Protection for Emergency Management Volunteers) Act 2003
  - http://www.workplace.gov.au/workplace/Category/Legislation/WRAct/WorkplaceRelationsAmendmentProtectionforEmergencyManagementVolunteersAct2003.htm

Of those Acts, the following are the most significant in relation to the Convention:

- Workplace Relations Amendment (Agreement Validation) Act 2004 provides a legislative response to the 2 September 2004 High Court decision in *Electrolux Home Products Pty Ltd v AWU and Others* [2004] HCA 40 (*Electrolux*). Without the amending legislation, certified agreements containing provisions that did not pertain to the employment relationship would have been invalid.

  The Act provides that all agreements certified, varied or approved on or before 2 September 2004 are valid to the extent that they contain:

  - matters pertaining to the employment relationship or ancillary thereto; and
  - machinery provisions supporting such provisions.

  The non-pertaining matters in existing agreements remain invalid.

  The Act also provides a limited validation for industrial action taken on or before 2 September 2004 in support of matters that do not pertain to the employment relationship (non-pertaining claims). The validation provides that where industrial action would have been protected action, but for the fact that it was to support a non-pertaining claim, it will be taken to be protected action.

  The Act does not validate agreements or industrial action that may be invalid for reasons other than those related to the *Electrolux* decision.

- Workplace Relations Amendment (Codifying Contempt Offences) Act 2004 makes amendments in relation to the giving of evidence to the Australian Industrial Relations Commission; compliance powers in relation to the building industry; the quantum of penalties; extends disqualification from holding office in a registered organisation for persons convicted of certain serious offences to cases where the punishment involves a suspended sentence; and 'whistleblower' protections for members, officials and employees of registered organisations.

- Workplace Relations Amendment (Improved Remedies for Unprotected Action) Act 2004 confers an express power upon the Commission to grant interim orders under the WR Act, s 127. The Act

also makes minor amendments to s 127 to make it clear in that s 127 orders do not apply to protected industrial action.

- Workplace Relations Amendment (Transmission of Business) Act 2004, in broad terms, confers a new power upon the Commission to make orders, on application, moderating the way an employer becomes bound by a certified agreement when a business (or part of a business) has changed hands.

Other legislation
The Age Discrimination Act 2004 (Commonwealth), s 23, makes it unlawful for a registered organisation, the management of that organisation and members of registered organisations to discriminate against potential or existing members of the basis of their age. This provision supplements the WR Act, Sch 1B, s 142, which prohibits the rules of a registered organisation from discriminating against applicants or members on a number of specified grounds, including age.

Proposed legislative changes
The reporting period covers, in part, the 40th and 41st Parliaments. The full text of the relevant Bills that were introduced, but either laid aside, rejected by the Senate, or lapsed (when the 40th Parliament was prorogued on 31 August 2004, prior to the 2004 federal election) are available on the website administered by the Department of Employment and Workplace Relations: www.workplace.gov.au. The website also contains supplementary material that explains the intended effect of the proposed legislation.
The following Bills, seeking to amend the WR Act, came before the 41st Parliament for consideration during the reporting period:

- Building and Construction Industry Improvement Bill 2005
- Building and Construction Industry Improvement (Consequential and Transitional) Bill 2005
- Workplace Relations Amendment (Better Bargaining) Bill 2005
- Workplace Relations Amendment (Extended Prohibition of Compulsory Union Fees) Bill 2005
- Workplace Relations Amendment (Fair Dismissal Reform) Bill 2004
- Workplace Relations Amendment (Right of Entry) Bill 2004
- Workplace Relations Amendment (Small Business Employment Protection) Bill 2004

The contents of these Bills are not discussed in any detail here because of the uncertain outcome of the Parliamentary process. Copies of each Bill, together with their explanatory memoranda, may be accessed from: www.workplace.gov.au.

NEW SOUTH WALES

The legislation that applies to the Articles of the Convention is:

- *Industrial Relations Act 1996* (NSW)

QUEENSLAND

- *Anti-Discrimination Act 1991* (Qld)
- *Anti-Discrimination Tribunal Rule 1993* (Qld)

II. Please supply available information concerning the customary law, practice, legislative provisions and regulations and any other measures the effect of which is to ensure the application *of each of the following Articles of the Convention*. In addition, please provide any indication specifically requested below under individual Articles.

If, in your country, ratification of the Convention gives the force of national law to its provisions
please indicate, in addition to the constitutional texts from which this effect is derived, any measures which may have been taken to give effect to those provisions

of the Convention which may require the intervention of the national authorities to ensure their application.

If the Committee of Experts or the Conference Committee on the Application of Standards has requested additional information or has made an observation on the measures adopted to apply the Convention, please supply the information asked for or indicate the action taken by your Government to settle the points in question.

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.

Please indicate how adequate protection against acts of anti-union discrimination in respect of their
employment is ensured to workers.

FEDERAL

There have been no changes since the previous report.

QUEENSLAND

The *Anti-Discrimination Act 1991* at section 7 (k) prohibits discrimination on the basis of trade union activity.

s7 Discrimination on the basis of certain attributes prohibited

The Act prohibits discrimination on the basis of the following attributes--

(k) trade union activity

The provisions of section 7(k) are qualified in circumstances where the *Industrial Relations Act 1999,* section 105 applies. These circumstances are outlined in sections 14, 15, 19 and 20.

s14 Discrimination in the pre-work area

(1) A person must not discriminate--

(a) in the arrangements made for deciding who should be offered work; or
(b) in deciding who should be offered work; or
(c) in the terms of work that is offered, including, for example, a term about when the work will end because of a person's age; or
(d) in failing to offer work; or
(e) by denying a person seeking work access to a guidance program, an apprenticeship training program or other occupational training or retraining program; or
(f) in developing the scope or range of such a program.

(2) Subsection (1) does not apply to discrimination on the basis of trade union activity if the *Industrial Relations Act 1999*, section 105 applies.

s15 Discrimination in work area

(1) A person must not discriminate--

(a) in any variation of the terms of work; or
(b) in denying or limiting access to opportunities for promotion, transfer, training or other benefit to a worker; or

(c) in dismissing a worker; or
(d) by denying access to a guidance program, an apprenticeship training program or other occupational training or retraining program; or
(e) in developing the scope or range of such a program; or
(f) by treating a worker unfavourably in any way in connection with work.

(2) Subsection (1) does not apply to discrimination on the basis of trade union activity if the *Industrial Relations Act 1999*, section 105 applies.

(3) In this section—

"dismissing" includes ending the particular work of a person by forced retirement, failure to provide work or otherwise.

s19 Discrimination by industrial, professional, trade or business organisation in pre-membership area

(1) An organisation of workers, employers or people who carry on an industry, profession, trade or business must not discriminate--
(a) in failing to accept a person's application for membership of the organisation; or
(b) in the arrangements made for deciding who may join; or
(c) in deciding who may join; or
(d) in the terms on which a person may join.

(2) Subsection (1) does not apply to discrimination on the basis of trade union activity if the *Industrial Relations Act 1999*, chapter 12, part 9, division 2, or part 10 applies.

s20 Discrimination by industrial, professional, trade or business organisation in membership area

(1) An organisation of workers, employers, or people who carry on an industry, profession, trade or business must not discriminate--
(a) in any variation of the terms of membership of the organisation; or
(b) in denying or limiting access to any benefit arising from the membership; or
(c) in depriving a person of membership; or
(d) by treating a person unfavourably in any way in connection with the membership.

(2) Subsection (1) does not apply to discrimination on the basis of trade union activity if the *Industrial Relations Act 1999*, chapter 12, part 9, division 2, or part 10 applies.

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.

Please indicate how adequate protection is ensured to workers' and employers' organizations against any acts of interference by each other.

FEDERAL

There have been no changes since the previous report.

QUEENSLAND

The objects of the *Industrial Relations Act 1999* include at section 3 (i):

"encouraging responsible representation of employees and employers by democratically run organisations and associations".

Provisions regulating the interaction of worker and employer organisations are contained in Section 420 and 421 of the *Industrial Relations Act 1999*.

The Queensland Industrial Relations Commission has the power to determine applications for the registration of employee organisations. There are strict requirements that the Commission must consider when determining whether an employee organisation is eligible to be registered. In considering such applications, the Commission must be satisfied that the applicant is free from control by or improper influence from an employer, an employer association or employer organisation. A registered organisation can be deregistered if the organisation is found to be not free from the control or influence of an employer or employer organisation.

The commission must also be satisfied that:

- there is no other organisation to which the applicant's members might belong, or could conveniently belong, that would effectively represent their interests under the Act;

- that the applicant's members who are not employees are either officers of the applicant organisation or independent contractors who, if they were employees, would be eligible to be members of the applicant's organisation.

- The practical effect of this is that an employer cannot be a member of an employee organisation.

Organisations are subject to the democratic control of members and are responsible to members through, for example, elections and audits. These arrangements are supervised by the Queensland Industrial Registry. An organisation may be deregistered if it fails to meet these requirements.

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.

Please indicate any action taken to give effect to Articles 3 and 4.

FEDERAL

There have been no changes since the previous reporting period.

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.

Please indicate to what extent the guarantees provided in the Convention apply to members of the armed forces and the police.

FEDERAL

There have been no changes since the previous reporting period.

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.

III. Please state whether courts of law or other tribunals have given decisions involving questions of principle relating to the application of the Convention. If so, please supply the text of these decisions.

FEDERAL

The following cases may, to varying degrees, have a bearing on the application of the Convention. Case summaries are included to assist understanding of the principal conclusions, but are not exhaustive. The only authoritative pronouncement of reasons is that contained in the full reasons for judgment.

- Hawker de Havilland Aerospace Pty Ltd (ACN 103 165 466) v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union [2005] FCA 804 (17 June 2005)

The union sought penalties and an injunction to stop the company from allegedly directing payments from a trust scheme operated by the company group to only non-union workers. Ryan J granted the union leave to lodge an amended claim and made consequential discovery orders. This effectively cleared the way for the unions' discrimination claim to proceed against the company. Ryan J also made some observations about the s 298M prohibition against inducements to cease membership of industrial associations etc.

- Sensis Pty Ltd v Members of the Full Bench of the Australian Industrial Relations Commission [2005] FCAFC 74 (12 May 2005)

The Federal Court of Australia held that the Australian Industrial Relations Commission had power to direct the appellant employer to allow employees to be represented by a union in bargaining negotiations for a s 170LK non-union certified agreement.

- Construction, Forestry, Mining and Energy Union v Coffs Harbour Hardwoods (Sales) Pty Ltd [2005] FCA 465 (22 April 2005)

The applicant union alleged that the respondent employer dismissed a number of employees for reasons prohibited by the WR Act, ss 298L(1)(a) and (l). Those provisions prohibit an employer from taking certain action on the basis that an employee is a member of a union, or is seeking better industrial conditions as a union member. The evidence demonstrated that the dismissals occurred as part of *bona fide* outsourcing arrangements.

- Automotive Foods, Metals, Engineering, Printing & Kindred Industries Union v Eaton Electrical Systems Pty Ltd [2005] FCA 2 (7 January 2005)

The applicant union secured an interim injunction preventing the respondent employer from proceeding with outsourcing some of its production. The injunction was granted on the basis that the employer's decision to outsource may have been made for the prohibited reason that the relevant staff were entitled to the benefit of an industrial agreement (s 298L(1)(h)).

- Woodside Petroleum (WA Oil) Pty Ltd v The Australian Institute of Marine and Power Engineers [2005] FCA 403 (8 April 2005)

It was alleged that the union threatened to take unprotected industrial action to coerce the employer, in breach of s 170NC, to make a new certified agreement for engineers on an oil platform. The Court accepted that an arguable case had been made that proposed industrial action by the union would not be

protected action because its notice of industrial action was ambiguous. The ambiguity was particularly concerning because it meant that safety implications of the proposed action remained unclear. An injunction was granted to stop the union from proceeding with a planned 24-hour strike at an offshore oil platform.

- Employment Advocate v Barclay Mowlem Construction Limited [2005] FCA 16 (20 January 2005)

The applicant alleged that the respondent company unlawfully discriminated against a subcontractor by refusing to engage its services, for reasons that breached the freedom of association provisions in the WR Act. An inference was drawn that the impugned action was taken for the prohibited reasons set out in s 298L(1)(b), (h) and (j). The respondent was ordered to pay a $6,000 fine: Employment Advocate v Barclay Mowlem Construction Limited [2005] FCA 431 (19 April 2005).

- Electrolux Home Products Pty Ltd v Australian Workers' Union [2004] HCA 40 (2 September 2004)

One requirement for certification of a proposed workplace agreement is that it must be about matters pertaining to the employment relationship (s 170LI). By majority judgment, the High Court affirmed that every substantive clause must relevantly pertain to the employment relationship for the agreement to be certifiable. A clause providing for a bargaining agent's fee, payable to a negotiating union by all employees (including non-members), was held not to pertain to the employment relationship. It was further held that industrial action taken to support claims that did not relevantly pertain could not be 'protected action' under the WR Act. See also: Wesfarmers Premier Coal Limited v The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union (No 2) [2004] FCA 1737 (23 December 2004), currently under appeal; Australian Nursing Federation (Print PR956575), AIRC FB (18 March 2005); Transport Workers' Union of Australia v Australian Air Express and Anor (Print PR959284), AIRC FB (24 June2005).

- ANZ Banking Group Limited v Finance Sector Union of Australia – Victorian and Tasmanian Branch (Print PR951766), AIRC FB, 8 September 2004

The appellant bank failed in its bid to block an FSU 'walk-through' of the bank's Melbourne head office to investigate pay issues. An AIRC Full Bench refused leave to appeal, but observed that the location of interviews undertaken pursuant to s 285B(3)(c) was not entirely at the employer's discretion.

- Woolworths Queensland Supermarket Certified Agreement 2004 (Print PR951532), AIRC, Richards C (31 August 2004)

A number of provisions in a proposed certified agreement concerned with union recognition, union membership dues and union meetings were held not to be 'objectionable provisions' for purposes of the WR Act, ss 170LU(2A) and 298Z.

- BCG Contracting Pty Ltd v The Construction, Forestry, Mining & Energy Union of Workers [2004] FCA 981 (29 July 2004)

French J held that right of entry for union officials under the West Australian industrial legislation remained valid, even though there was no right of entry for discussion purposes under the federal WR Act, as all employees were on Australian Workplace Agreements (AWAs).

- Construction, Forestry, Mining & Energy Union v Anglo Coal ((Moranbah) North Management) Pty Ltd [2004] FCA 604 (13 May 2004)

A number of employees were stood down during a bargaining period that involved union members taking protected industrial action by reporting for work but declining to work their full shifts. Dowsett J accepted that the stand-downs were motivated by the operational requirements of the mine. In those circumstances, s 170MU(1), which provides that an employer is not to dismiss an employee etc. for engaging in protected industrial action, was not engaged. In any event, the employer's conduct was clearly authorised by s 170MU(2).

- Victorian Association of Forest Industries (Print PR939097), AIRC FB (9 October 2003)

A Full Bench of the Commission held that the WR Act, Divn 11A, Pt IX, does not impose any obligation on a permit holder seeking to exercise the right of entry conferred by s 285B to particularise the breach suspected by the permit holder.

- Hadgkiss v Blevin [2004] FCA 697 (1 June 2004); [2004] FCA 917 (13 July 2003)

The Construction, Forestry, Mining and Energy union and two of its officials were ordered to pay penalties and compensation for breaching the WR Act, s 298P(3), by threatening to: cause the dismissal of an employee; injure the employee in his employment; and alter his position as an employee to his prejudice, because he did not choose to join the union.
The union was ordered to pay a penalty of $5,500, and a penalty of $1,100 was imposed on each official. The union was required to reimburse the employer $193.63 in respect of union fees paid. The respondents were also ordered to jointly and severally compensate the employee for lost wages.

- ANF v Alcheringa Hostel Incorporated [2004] FCA 375 (6 April 2004)

The respondent employer admitted that it had dismissed the applicant employees for a number of 'prohibited reasons' proscribed by the WR Act, ss 298L(1)(a), (h), (i), (j) and (l). The applicant employees were reinstated to their former positions, and their employer was ordered to pay a penalty of $3,400 to the applicant union.

- Construction, Forestry, Mining and Energy Union v Ensham Resources Pty Ltd (Print PR943725), AIRC FB (23 February 2004)

A Full Bench held that the existence or terms of a certified agreement could not derogate from the statutory rights of entry of permit holders. In particular s 170LY(1) did not apply to deprive the award of application at the workplace for the purpose of s 285C(1)(a).

- National Union of Workers v ALDI Foods Pty Limited (Print PR943894, AIRC FB, 23 February 2004

A Full Bench held that exclusive AWA coverage at a workplace effectively ousted statutory rights of entry for the purpose of holding discussions pursuant to s 285C. Section 170VQ(1) relevantly provides that AWAs operate 'to the exclusion of any award that would otherwise apply to the employee's employment'.

- Anglo Coal (Capcoal Management) Pty Liminted v The Construction, Forestry, Mining & Energy Union [2003] FCA 1073 (8 October 2003)

Cooper J held that the respondent unions did not engage in unlawful, coercive conduct, by serving multiple s 170MO notices (of impending industrial action), but subsequently not proceeding with the notified action in approximately 50 per cent of cases. The giving of the notices did not constitute unlawful, illegitimate or unconscionable means to apply pressure to make an agreement.

- Australian Meat Industry Employees Union v Belandra Pty Ltd [2003] FCA 910 (29 August 2003)

The respondent, who was 'usually an employer', was declared to have contravened the freedom of association provisions in the WR Act by engaging in conduct of the kind referred to in s 298K(1)(c) and (d), for prohibited reasons set out in s 298L(1)(a) and (h). In particular, the respondent refused to employ a number of former employees, and in so doing, altered their positions prejudicially. The respondent failed to rebut the presumptions that the conduct occurred because the employees were entitled to the benefit of an industrial instrument, or because they were members of a union.

- Office of the Employment Advocate re Mechanical Maintenance Solutions (MMS) Maintenance Fabrication Workshop and Site Certified Agreement 2000-2003 (Print PR935155), AIRC FB (27 August 2003)

The provision of a certified agreement committing the employer wherever possible when employing labour to 'contact' suitably qualified unemployed union members first was not objectionable under s 298Z. An AIRC Full Bench noted that a clause giving preference in employment to union members offends Pt XA if it requires or permits an employer to refuse to employ non-unionists by virtue of their not being members of a union. That was not the case here.

- Automotive, Foods, Metals, Engineering, Printing and Kindred Industries Union v Australian Health & Nutrition Association Limited [2003] FCA 590 (13 June 2003)

The applicant union alleged that an employee, Draper, was dismissed on 8 November 2002 for the prohibited reasons that he was: a union member and delegate, and an employee dissatisfied with his terms and conditions of employment (s 298L(a), (l)). Gyles J accepted that the Draper had instead been dismissed because he had harassed other employees at the workplace. His Honour found that the investigation of the harassment claims and the decision to terminate were *bona fide*.

Decisions may be downloaded from the Australian Legal Information Institute's website: http://www.austlii.edu.au/. For decisions of the Commission, however, go to www.airc.gov.au. The website of the Department of Employment and workplace relations, www.wagenet.gov.au contains the full text of Australian federal awards, agreements, decisions, variations and selected decision summaries.

NEW SOUTH WALES

In 2005 there was a case involving Appaloosa Pty Ltd (which operates a stationary warehouse), EL Blue (a labour hire firm), and the National Union of Workers (NUW).

After experiencing financial difficulties, Appaloosa decided to no longer employ its warehouse staff, deciding instead to use staff supplied (and employed) by EL Blue. Existing Appaloosa staff were offered employment with EL Blue, however offer was contingent upon signing an Australian Workplace Agreement. Appaloosa staff who refused to sign an AWA were to be terminated. Appaloosa staff were employed pursuant to the relevant NSW common rule award.

Whilst some staff signed AWAs, eight did not, and were threatened with termination, and allegedly victimised.

The NUW brought action in the NSW Industrial Relations Commission to stop the threatened terminations and seek redress for victimisation.

The Minister intervened in broad support of the NUW, and submitted that the Commission had jurisdiction to deal with matter and make such orders as it saw fit.

After hearing submissions and witness evidence, further conciliation took place between the parties, with settlement being reached on 25 July. The basis of the settlement was a new enterprise agreement between the NUW and EL Blue. Workers would be able to choose between the Agreement and an AWA, and would not be terminated.

IV. Please supply any general observations which may be considered useful with regard to the manner in which the Convention is applied.

FEDERAL

There have been no changes since the previous report.

V. Please indicate the representative organizations of employers and workers to which copies of the present report have been communicated in accordance with article 23, paragraph 2, of the Constitution of the International Labour Organization[1]. If copies of the report have not been communicated to representative organizations of employers and/or workers, or if they have been communicated to bodies other than such organizations, please supply information on any particular circumstances existing in your country which explain the procedure followed.

Please indicate whether you have received from the organizations of employers or workers concerned any observations, either of a general kind or in connection with the present or the previous report, regarding the practical appreciation of the provisions of the Convention or the application of the legislation or other measures implementing the Convention. If so, please communicate the observations received, together with any comments that you consider useful.

[1] Article 23, paragraph 2, of the Constitution reads as follows: "Each Member shall communicate to the representative organisations recognised for the purpose of article 3 copies of the information and reports communicated to the Director-General
in pursuance of articles 19 and 22."

In accordance with the provisions of Article 23 of the ILO Constitution, copies of this report have been forwarded to the Australian Chamber of Commerce and Industry (ACCI) and the Australian Council of Trade Unions (ACTU).

In addition, the ACCI and ACTU were invited to comment on the application of this Convention, on the understanding that any comments provided would be taken into account in the preparation of this report. No comments were received prior to the finalization of this report.

Any observations received from these organisations will be forwarded to the Office.

ATTACHMENT 1

RESPONSES TO OBSERVATIONS, AND DIRECT REQUESTS (2004)

OBSERVATIONS

FEDERAL

Articles 1 and 4 of the Convention. 1. Protection against anti-union discrimination in the framework of collective bargaining. *… The Committee … requests the Government indicate in its next report all measures, taken or envisaged, to revise sections 170CC, 170WG and 298L of the WR Act so that sufficient protection is provided against all acts of anti-union discrimination (committed at the time of recruitment, during employment, and for the wide categories of workers excluded from the scope of section 170CK, at the time of dismissal) against workers who refuse to negotiate an AWA and insist on having their terms and conditions of employment governed by collective agreements.*

2. Protection against anti-union discrimination in case of negotiation of multiple business agreements. *… The Committee once again requests the Government to indicate … any measures taken or contemplated to amend sections 170LC(6) of the WR Act so as to ensure that workers are adequately protected against discrimination for negotiating a collective agreement at whatever level the parties deem appropriate and that employers' and workers' organizations have a free choice as to the level at which they wish to negotiate collectively.*

The Government notes the Committee's observations and refers the Committee to the Government's statement in response to the Committee of Experts' Observation on Convention 98, provided to the Committee on the Application of Standards of the International Labour Conference, 93rd Session, May – June 2005, Geneva. This statement is appended as *Attachment 3*.

In its statement, the Government noted that many of the Committee's observations in relation to Australian Workplace Agreements (AWAs) appear to be underpinned by a view that AWAs are inherently anti-union. This is not the case. The fact that parties may choose to enter into individual agreements does not prevent them from being active members of a union. It is also open to individuals to have a union act as their bargaining agent in negotiating an AWA.

Article 4 requires measures for the encouragement and promotion of collective bargaining to be taken **'where necessary'**, and that such measures are to be **'appropriate to national conditions'**. In this regard, the Committee might be wise to note that collective bargaining has been the norm in Australia for more than a century, and continues to be.

The Workplace Relations Act (WR Act) does not give primacy to individual bargaining over collective bargaining. The Act provides additional machinery to facilitate individual bargaining as an alternative to collective bargaining, where that is what the parties want.

Access to individual bargaining provides the parties with another choice. There is nothing in Convention 98 to suggest this is inappropriate. We do not support the view that Article 4 of the Convention imposes an unqualified obligation to promote collective bargaining at the expense of all other forms of bargaining. Accordingly, in the language of Article 4, the WR Act is consistent with Australia's 'national conditions' and Australia is not in breach of that article.

Existing employees
The WR Act provides employees with appropriate protections against anti-union discrimination, most prominently through its extensive provisions protecting freedom of association. The freedom of association provisions, for example, protect a person from dismissal, or being otherwise prejudiced in their employment, for engaging in union activities.

The Government accordingly rejects the Committee's view "that situations in which workers who refuse to give up the right to collective bargaining are denied a wage increase amount to anti-union discrimination contrary to Article 1 and constitute an obstacle to collective bargaining contrary to Article 4 of the Convention".

In its observations, the Committee notes that no anti-union discrimination was found in a case 'in which employees had been required to sign AWAs in order to receive a wage increase, thereby giving up their right to collective bargaining'. As noted by the Committtee, it was clear that the existing collective agreement would continue to operate for those employees who did not accept the offer of individual agreements.

It is not correct to suggest that such employees were 'denied a wage increase' because of anti-union discrimination. The WR Act, s 170VPA(1)(e), requires AWAs to be offered in the same terms to all comparable employees. Wage increases for employees choosing to remain on the collective agreement would take effect in accordance with that agreement. Following expiry of its nominal expiry date, the employees remaining on the collective agreement would also retain the right to initiate a bargaining period with a view to negotiating a replacement collective agreement.

Termination of employment
The Committee suggests that for certain categories of employment termination due to refusal to negotiate an AWA is not covered by the provisions in the WR Act. This is not the case. While there is no express reference to this situation, the freedom of association provisions prohibit discriminatory action taken because an employee:

- is, has been, proposes to become or has at any time proposed to become an officer, delegate or member of an industrial association (s 298L(1)(a)); and/or
- is entitled to the benefit of an industrial instrument (s 298L(1)(h)).

Terminating the employment of an existing employee for refusing to negotiate an AWA may breach this provision. Remedies for breach include reinstatement and compensation.

Importantly, the interaction between ss 170CK and 170CC has been removed with the introduction of the *Workplace Relations Amendment (Fair Termination) Act 2003*, which commenced operation on 27 November 2003. The legislation has been relevantly amended so no class of employees is excluded from the anti-discrimination protections conferred by s 170CK.

Multi-employer agreements
The Government notes the Committee's views regarding multi-employer agreements, but reiterates its earlier view stated in response to a similar observation made in respect of the preceding reporting period.

Articles 2 and 4 of the Convention. Protection against acts of interference in the framework of collective bargaining. *The Committee … requests the Government indicate in its next report any measures taken or contemplated to amend section 170LJ(1)(a) of the WR Act so as to establish appropriate guarantees against employer interference in the selection of a bargaining partner. In particular, the Committee would suggest the establishment of a mechanism for the rapid and impartial examination of allegations of acts of interference in the context of the selection of a bargaining partner, and the adoption of safeguards like objective and pre-established representativeness requirements.*

The Government notes the views of the Committee regarding this matter. The Government, however, rejects any suggestion that the agreement-making framework facilitates 'employer interference' in the selection of a bargaining partner in a way that may interfere in the functioning of trade unions. In that respect, the Government relies on its statement made in response to a similar observation during the preceding reporting period.

The view that ss 170LJ(1)(A) and 170NB(1) allow employers to 'shop around' amongst unions disregards the overall agreement-making scheme established by the WR Act, Pt VIB. The employer is clearly not at large to select a negotiating partner in a vacuum, and without reference to the wishes of its employees. To be certified, a proposed agreement must have the support of a 'valid majority' of the

employees to which it will apply. The employees therefore clearly have an opportunity to participate in the agreement-making process.

Section 170MI relevantly enables an organisation of employees to initiate a bargaining period to negotiate a proposed agreement, without reference to the wishes of the employer. By notifying a bargaining period, the organisation is then able to take protected industrial action to support claims for a single business agreement, subject to meeting certain procedural requirements.

Section 170NA empowers the Australian Industrial Relations Commission to conciliate matters arising during negotiations for a certified agreement. In *Sensis Pty Ltd v Members of the Full Bench of the Australian Industrial Relations Commission* [2005] FCAFC 74 (12 May 2005), the Full Court held that the Commission had the power to direct the appellant employer to allow employees to be represented by a union in bargaining negotiations for a s 170LK non-union certified agreement.

The Act also contains provisions preventing an employer from discriminating between union members and non-members, or between members of different unions, either during negotiations for an agreement, or after the agreement has been certified. These provisions extend the freedom of association principles in Part XA, and facilitate the full participation of all relevant employees in the agreement-making process.

This is particularly important in the Australian workplace relations environment, where union membership is generally low (around 23 per cent of all employees as at August 2003 – see Australian Bureau of Statistics (ABS), *Employee Earnings and Trade Union Membership*, 6310.0, August 2003) and differs significantly across industries and sectors.

The agreement-making framework is tailored to meet the particular national conditions specific to the Australian workplace relations environment. That framework establishes a series of checks and balances that promotes a fair system of bargaining at the workplace level, and enables the participation of all relevant employees in the agreement-making process. In doing so, it cannot be said to facilitate 'employer interference' in the selection of a bargaining partner in a way that may interfere in the functioning of trade unions.

The Government also notes that, a collective agreement may be made with more than one industrial association. As at 31 March 2005, around 11 per cent of union agreements were made with more than one union.

Article 4 of the Convention. 1. Relationship between AWAs and collective agreements.
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 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 Committee also requests the Government provide information on the evolution of affiliation levels since the adoption of the WR Act.

The Government notes the Committee's observations, but restates its position explained above in the Government's response to the observations regarding application of Articles 1 and 4 of the Convention.

The WR Act does not give primacy to individual bargaining over collective bargaining. It provides additional machinery to facilitate individual bargaining as an alternative to collective bargaining, where that is what the parties want.

The Committee's observation implies that AWAs are inherently anti-union. This is not the case. Parties may choose to enter into individual agreements and be active members of a union. It is also open for individuals to have a union act as their bargaining agent in negotiating an individual agreement.

Statistics on union membership

Part VID of the WR Act, which deals with Australian Workplace Agreements (AWAs), was inserted into the Act by Act No 60 of 1996, Sch 10(3), and commenced on 12 March 1997.

The following table summarises the trend in trade union membership from 1998 onwards.

Year	% of all employees who are trade union members
August 1997	N/A
August 1998	28.1
August 1999	N/A
August 2000	24.7
August 2001	24.5
August 2002	23.1
August 2003	23.0
August 2004	22.7

Source: Australian Bureau of Statistics, *Employee Earnings and Trade Union Membership*, 6310.0.
NB: data was collected on an annual basis from 2000 onwards. Figures are not available for the years 1999 and 1997.

***Article 4 of the Convention**. **2. Collective agreements with non-unionized workers.** … The Committee notes that, according to the Government, section 170LK is in conformity with the Convention because individual workers are entitled under section 170LK(4) to request that they be represented by a trade union of which they are members in "meeting and conferring" with the employer. The Committee notes that the outcome of such request for trade union representation appears to be uncertain as section 170LK(6)(b) provides that the right of workers to be represented by trade unions will cease if any of the conditions stipulated in section 170LK(4) cease to be met. Thus, as noted by ACTU, even where workers are initially entitled to be represented by trade unions in negotiations, the employer may subsequently avoid any union involvement by unilaterally changing the scope and content of the negotiations (so that section 170LK(4)(b) no longer applies) or by simply declaring that it does not any longer wish to pursue an agreement under section 170LK …*

The Committee requests the Government to indicate in its next report any measures taken or contemplated to amend section 170LK(6)(b) 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.

The Government notes the Committee's observations but disagrees that amendments to s 170LK(6)(b) are required to ensure compliance with Article 4.

The Government believes that the Committee's reference to 'collective negotiations over individual agreements' is incorrect. Agreements certified under s 170LK are collective agreements, made directly between an employer and its employees at the single-enterprise level, with the support of at least a valid majority of those employees: s 170M.

The Government disagrees with the observation that the conditions referred to in s 170LK(4) can be manipulated by the employer to avoid any subsequent union involvement in the agreement-making process, eg. by unilaterally changing the scope and content of negotiations.

The scope of a single-business certified agreement is prescribed to some extent by law: it must relevantly apply to a single business or part thereof. If a s 170LK certified agreement is proposed to apply to only part of a single business, additional certification criteria apply to ensure that employees are not unfairly excluded from coverage: s 170LU(8).

The Government accepts that there are many reasons why an employer may legitimately wish to discontinue negotiations for a collective agreement. However, the observation that 'a request for trade union representation may lead to the partial or total abandonment of negotiations' ignores the dynamics

and practical realities of the agreement-making process. If an employer, for whatever reason, no longer wishes to pursue an agreement under s 170LK, that decision in no way affects the ability of an employee association to notify a bargaining period, with all that entails, against the employer. It is accordingly incorrect to suggest that the provisions of s 170LK somehow establish a disincentive to request union representation.

The WR Act, Pt VIB, underpins voluntary negotiation between employers or employers' organisations and workers' organisations, as required by Article 4. It also provides, amongst other things, machinery for voluntary negotiations directly between employers and their employees. Access to collective bargaining directly between an employer and its employees provides parties with another choice. There is nothing in the Convention to suggest this is inappropriate. The agreement-making scheme is therefore considered 'appropriate to national conditions', and, in the Government's view, does not breach Article 4 of the Convention.

***Article 4 of the Convention**. **3. Collective bargaining level.** … The Committee … requests the Government to indicate in its next report any measures taken or contemplated to amend section 170LC(4) so as to eliminate the requirement of prior approval of multiple business agreements by the AIRC.*

The Government notes but disagrees with the Committee's observations. In particular, the Government believes that employees and employers should be able to choose the most appropriate form of agreement for their particular circumstances. The Australian Government is committed to ensuring that primary responsibility for determining matters affecting the employment relationship rests with employers and employees at the workplace level. This is reflected in part of the principal object of the WR Act (s 3(b)).

The Government does not believe that this object is inconsistent with its obligations under the Convention. In the Government's view, Article 4 does not require the promotion of collective bargaining at the industry level in preference to collective bargaining at the enterprise or workplace level. The Government reiterates that extending protected status to industrial action taken to support the negotiation of multi-employer agreements would discourage single business agreements, and have the potential to encourage disputation about matters extraneous to the immediate parties and over which they have no power to agree.

The Government disagrees with the observation that the public interest test prescribed by s 170LC(4) allows the Australian Industrial Relations Commission 'full discretion to deny approval'. The discretion to regard 'any other matters that the Full Bench considers relevant' is conditioned by the object of the Act, which is set out in part above.

Moreover, the public interest test requires the Commission to regard specifically 'whether the matters dealt with by the agreement could be more appropriately dealt with by an agreement, other than a multiple-business agreement' under Pt VIB. It is clear that the 'public interest' test does not apply 'criteria such as compatibility with general or economic policy of the government or official directives on wages and conditions of employment', as suggested. The criteria under the 'public interest' test are objective criteria established by law, and applied by an independent tribunal.

In practice, the WR Act facilitates bargaining at a range of levels, in accordance with the wishes of the parties to such agreements. The level of negotiation is not imposed by the law. The 'public interest' test that applies in relation to multiple-employer agreements in no way imposes agreement upon the parties or otherwise impinges upon the voluntary nature of negotiations. In addition, the 'public interest' test is appropriate to national conditions insofar as it is necessary to give effect to the government's object as described above. For these reasons, it is the Government's view that the imposition of the 'public interest' test does not involve contravention of Article 4.

***Article 4 of the Convention**. **4. Negotiations over strike pay.** … The Committee … 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 … requests the Government to indicate in its next report any measures taken or contemplated to amend section 187AA in accordance with the above.*

The Government notes the observation raised by the Committee, and that salary deductions for days on strike give rise to no objection from the point of view of freedom of association principles. The Government disagrees that s 187AA unduly constrains the permissible scope of collective bargaining in breach of Article 4. In doing so, the Government relies on its earlier statement provided in response to a similar observation during the preceding reporting period.

The Government restates its view that demands for strike pay are contrary to public policy. Accordingly, it is reasonable to prevent improper demands for payment for periods where employees or unions that come within the norms of the system (and, in the case of unions, have accepted those norms through their registration as organisations in the federal system) have taken industrial action. This view is consistent with the terms of Article 4 of the Convention, which provide that the implementation of voluntary collective bargaining may be satisfied by measures appropriate to national conditions.

Article 4 of the Convention. ***5. Greenfields agreements.*** *… The Committee considers that being an exceptional situation, "greenfields" agreements should not have the same duration as freely negotiated certified agreements. The Committee therefore … requests the Government to indicate in its next report any steps taken or contemplated to amend section 170LL of the WR Act so that the choice of bargaining agent can be made by the workers themselves, including in the case of a new business.*

The Government notes the Committee's observation, but restates its view that the provisions dealing with greenfields agreements do not breach Article 4 of the Convention. In that respect, the Government relies on its statement provided in response to a similar observation during the preceding reporting period.

The Government notes that greenfields agreements have the same *maximum term* as other certified agreements, but that the *actual term* of certified agreements is otherwise left for determination between the parties. In the case of greenfields agreements, the maximum nominal expiry date prescribed under s 170LT(10) has an additional function of providing certainty for new businesses.

The fact that a greenfields agreement or another agreement to which one union is a party is in place does not prevent individual employees from joining another union covering the nature of the work they perform if they so choose, or prevent unions exercising their rights and fulfilling their obligations under the WR Act and representing the interests of their members, for example, right of entry.

WESTERN AUSTRALIA

The Committee requests the Government to indicate in its next report whether the concept of unfair dismissal encompasses anti-union dismissals and to indicate any further measures taken or contemplated so as to afford full protection against anti-union discrimination at the time of recruitment, during employment and at the time of dismissal, and provide for specific remedies and penalties where there has been anti-union discrimination.

The *Industrial Relations Act 1979* (WA) (IR Act) provides protection against dismissal on the grounds of the anti-union discrimination through Section 29, which allows employees to lodge a claim for unfair dismissal should they feel their dismissal was harsh, oppressive or unfair. The remedies available to employees are re-instatement or re-employment in the first instance or if that is not possible, or compensation of up-to 6 months remuneration

In August 2002, the scope of the existing objects of the IR Act were widened to include six additional objects, one of which was to promote the principles of freedom of association and the right to organise.

The majority of Western Australian employees are also covered by the unlawful termination provisions in the Commonwealth *Workplace Relations Act 1996* which provides protection against anti-union dismissals.

No further measures to provide protection against anti-union dismissals are considered necessary at this time.

DIRECT REQUESTS

FEDERAL

Article 1 of the Convention. *Workplace Relations Amendment (Termination of Employment) Act 2001 (No. 100 of 2001) … The Committee requests that Government to transmit in its next report information on the exact provisions which have been amended and their content.*

A copy of the *Workplace Relations Amendment (Termination of Employment) Act 2001 (No. 100 of 2001),* which fully particularizes the exact provisions that have been amended, is available on the ComLaw website:
http://www.comlaw.gov.au/ComLaw/Legislation/Act1.nsf/0/B0972D755FC5BDE3CA256F72000D2071?OpenDocument

In this context it is also relevant to note the commencement of the *Workplace Relations Amendment (Fair Termination) Act 2003*, on 27 November 2003. This legislation relevantly amended the WR Act so that no class of employees is excluded from the anti-discrimination protections conferred by s 170CK of the WR Act.

Also, the *Workplace Relations Regulations 1996,* Regulation 30BG, prescribed a schedule of costs for s 170CJ(5A) of the WR Act from 12 February 2004. Section 170CJ(5A) relevantly provides that a schedule of costs may be prescribed in relation to items of expenditure likely to be incurred in respect of an application to the Commission under s 170CE, and a proceeding in respect of an application under s 170CE.

Article 2. *The Committee recalls that under Article 2 of the Convention, acts which are designed to supports workers' organizations by financial or other means with the object of placing such organizations under the control of employers or employers' organizations are deemed to constitute acts of interference. It requests the Government to ensure that this Article is full implemented in the future.*

The Government notes the Committee's views and request. The Government reiterates its views provided in response to a similar request during the preceding reporting period.

The provisions of the WR Act, s 189, have been repealed and replaced by the *Workplace Relations Amendment (Registration and Accountability of Organisations) Act 2002*, which received Royal Assent on 14 November 2002. The new arrangements commenced on 12 May 2003.

The WR Act, Sch 1B, Ch 2, s 20, are the relevant replacement provisions. Chapter 2 deals with the *registration and cancellation of registration* of organisations. It introduces a new provision prohibiting conduct to prevent the formation or registration of unions and empowers the Federal Court of Australia to impose appropriate orders and penalties: ss 21 to 24.

Chapter 2 of Schedule 1B to the WR Act now deals with the registration and cancellation of associations. In relation to enterprise associations, s 20(1B) provides that the Commission must take into account whether any of the costs or expenses of an association are met by an employer when considering whether the association is free from control by, or improper influence from the employer. Section 20(1A) makes it clear that the mere holding of an interest in an enterprise in question by members of the association is not, in itself, sufficient to determine that the enterprise association breaches the requirement in paragraph 20(1)(b). Rather, the focus is on whether the enterprise association is *free from control by, or improper influence from* the person or organisation.

The WR Act, Sch 1B, s 30(1)(b)(iii) relevantly provides for cancellation of registration (on application by an organisation or person interested or by the Minister), if, *inter alia,* the Commission has satisfied itself that the organisation is not free from control by, or improper influence from, a person or body referred to in ss 19(1)(b) or 20 (1)(b), as the case requires. The consequences of cancellation of registration are set out in s 32 to Sch 1B.

The Government is satisfied for the time being that these provisions ensure that enterprise associations enjoy adequate protection against acts of interference.

Article 4. *1. The Committee recalls that the parties should 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 (see General Survey on freedom of association and collective bargaining, 1994, paragraph 259). The Committee requests the Government to keep it informed of the decisions taken by the AIRC in the future on the basis of section 170MWA of the WR Act.*

To the Government's knowledge, there have been no reported decisions of the AIRC during the reporting period concerning the operation of the WR Act, s 170MWA.

Article 4. *2. Collective bargaining in the higher education sector. The Committee therefore requests the Government to indicate in its next report any steps taken or contemplated to amend section 33-15 of the Higher Education Support Bill or the HEWRRs so as to eliminate any obstacles to collective bargaining and bring them into conformity with Article 4 of the Convention.*

The Committee of Experts on the Application of Conventions and Recommendations requested the Australian Government indicate any steps taken or contemplated to amend section 33-15 of the *Higher Education Support Bill* or the Higher Education Workplace Relations Requirements (HEWRRs) so as to eliminate any obstacles to collective bargaining and bring them into conformity with *Article 4* of the *Right to Organise and Collective Bargaining Convention, 1949 (No. 98)* (the Convention).

On 23 June 2005 the Government introduced the *Higher Education Legislation Amendment (Workplace Relations Requirements) Bill 2005* to amend section 33-15 of the now *Higher Education Support Act 2003* (the HES Act) Act. The Government believes that, when amended, section 33-15 of the HES and the HEWRRs, which were announced on 29 April 2005, do not present any obstacles to collective bargaining, and are therefore not in contravention to *Article 4* of the Convention.

Article 4 of the Convention does not impose an unqualified obligation to promote collective bargaining at the expense of all other forms of bargaining. Rather, *Article 4* requires measures for the encouragement and promotion of collective bargaining to be taken 'where necessary' and that such measures are to be 'appropriate to national conditions'.

The *Workplace Relations Act 1996* (the WR Act) protects voluntary negotiations between employers or employers' organisations and workers or workers' organisations by prohibiting coercion in relation to the making of a certified agreement. It also prohibits duress in relation to the making of an Australian Workplace Agreement (AWA).

The legislative provisions in the WR Act which relate to the making of AWAs must be viewed in the context of the Australian system. The legislation provides for collective agreements to be made through collective bargaining. The provision for AWAs does not diminish the option of collective agreement making. The WR Act provides a range of choices to employees and employers regarding the most appropriate form of bargaining for their particular circumstances.

The Government believes that, having regard to the national legislative and regulatory framework in Australia, this approach is consistent with Article 4 of the Convention.

In this Australian context, the amendment to section 33-15 of the HES Act and the HEWRRs are consistent with the bargaining provisions of the WR Act. They provide incentives for universities to further progress workplace reform. This reflects the Government's commitment to encouraging a more productive and internationally competitive higher education sector. By utilising the flexibilities available under the WR Act, universities will be able to attract and retain high performing staff, recognise and reward performance and innovation, and develop flexible working arrangements that allow institutions and employees to quickly respond to change.

In addition, in 2002 the Federal Court of Australia upheld the legality of the Government providing funding incentives to stimulate reform in higher education workplaces.[2]

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2 *National Tertiary Education Industry Union v Commonwealth of Australia and Another* [2002] FCA 441

The HEWRRs emphasise choice for employees and universities and encourage universities and their employees to use bargaining to tailor working arrangements to their particular needs and circumstances. In doing so, section 33-15 of the HES Act and the HEWRRs simply outline the range of options available to employees and universities.

In short, section 33-15 of the HES Act and the HEWRRs provide university employees with genuine choice about their preferred form of industrial instrument – whether it is an individual arrangement such as an AWA or a collective agreement negotiated with either unions or other employees. Consistent with the WR Act, the HEWRRs do not give preference to one form of bargaining over another. This is a matter for employees and employers. In fact, the HEWRRs encourage all universities with collective agreements to continue to negotiate and use collective agreements. The HEWRRs also encourage universities to offer all employees an AWA. Employees are free to decline the offer of an individual arrangement in preference of a collective agreement and *vice-versa*, whichever is their preference.

Therefore, the Government does not believe it necessary to make any further amendments to section 33-15 of the HES Act or the HEWRRs as it views them as already consistent with *Article 4* of the Convention.

***Article 4**. 3. Union fees. The Committee observes that these provisions lead to a situation where non-trade union members benefit from advantageous provisions in collective agreements without having to affiliate to trade union affiliation and involvement in trade union activities. The Committee therefore requests the Government to amend the Workplace Relations Amendment (Prohibition of Compulsory Union Fees) Act 2003 so that the matter of agency fees can be freely negotiated by the parties themselves and not be legislatively imposed.*

The Government notes the Committee's view on bargaining agency fees, but disagrees that the operation of the *Workplace Relations Amendment (Prohibition of Compulsory Union Fees) Act 2003* involves breach of Article 4.

The *Workplace Relations Amendment (Prohibition of Compulsory Union Fees Act)* ensures that agency fees can be freely negotiated by the parties on a contractual basis. The amendments do not prevent people from making voluntary contributions, provided there is no coercion or misrepresentation involved. The amended provisions do not prevent an industrial association from enforcing payment of a bargaining services fee that is payable to the association under a contract for bargaining services.

These provisions reinforce principles of freedom of association established by the WR Act, Pt XA, ensuring that:

- persons are free to choose the type of representation they wish during workplace negotiations and are not forced into a situation of *de-facto* union membership;
- persons are not discriminated against or victimized because they are, or are not, members or officers of industrial associations.

Case law developments

In *Electrolux Home Products Pty Ltd v The Australian Workers' Union and Others* [2004] HCA 40 (2 September 2004) (Electrolux) the High Court considered the effect of 'bargaining agent's fees' clauses in certified agreements. The decision was largely concerned with the types of clauses which may be included in certified agreements, as prescribed by s 170LI. By majority, the Court held that:

- certified agreements can contain only matters which pertain to the relationship between employers and employees 'in their capacity as such';
- provision for the collection of bargaining agent's fees from employees by employers is not a matter pertaining to the employment relationship and therefore may not be included in certified agreements;
- any certified agreement that contains matters that do not pertain to the employment relationship is invalid; and

- any industrial action taken in support or advancement of a proposed agreement which includes non-pertaining matters is not protected action.

The Government's legislative response to the Electrolux decision, is the Workplace Relations Amendment (Agreement Validation) Act 2004. This Act retrospectively validates certain certified agreements whose validity has been brought into question following the Electrolux decision, but does not affect the invalid status of bargaining agent's fees clauses in certified agreements.

***Article 4**. 4. Statistical data. The Committee notes … that AWAs seem to have been applied to 2 per cent of the non-farm employees since their introduction six years ago and requests the Government to keep it informed in this respect*

The Office of the Employment Advocate (OEA) had between March 1997 (when AWA provisions in the legislation came into effect) and the end of June 2005, approved a total of 709,417 Australian workplace agreements (AWAs).

In the two years since 1 July 2003 the OEA had approved 356,886 AWAs; 205,865 in the 12 months to the end of June 2005.

On 23 March 2005, the Australian Bureau of Statistics (ABS) released final estimates from its *Survey of Employee Earnings and Hours, Australia, May 2004* (ABS Cat. No.6306.0). The survey was conducted in May 2004, and included questions about award and agreement coverage. The survey covered all employing organisations in Australia (public and private sectors) except: enterprises primarily engaged in agriculture, forestry and fishing; private households employing staff; and foreign embassies, consulates, etc. It reports that:

- 20.0 per cent of employees had pay set by award only;
- 38.3 per cent of employees had pay set by registered collective agreement;
- 2.6 per cent of employees had pay set by unregistered collective agreement;
- 2.4 per cent of employees had pay set by registered individual arrangement (AWAs);
- 31.2 per cent of employees had pay set by unregistered individual arrangement; and
- 5.4 per cent of employees had individual arrangements as the working proprietor of an incorporated business. (Prior to 2004, working proprietors of incorporated businesses were classified to unregistered individual arrangements.)

The May 2004 Labour Force estimate of Australian employees was 9 669 500.

Statistical information may be downloaded from the website of the Australian Bureau of Statistics: www.abs.gov.au.

ATTACHMENT 2

SUPPLEMENTARY REPORT TO THE COMMITTEE OF EXPERTS ON THE APPLICATION OF CONVENTION 98, IN LIGHT OF DISCUSSIONS IN THE COMMITTEE ON THE APPLICATION OF STANDARDS, JUNE 2005

Scope of the Report

This Report:

- addresses issues raised by the Worker spokesperson and Worker members in the Committee on the Application of Standards of the 93rd Session of the International Labour Conference (2005) (the Applications Committee) that have not been addressed elsewhere in the Article 22 Report; and

- outlines the rationale and purpose of the Australian Government's workplace relations reforms in the light of Australia's obligations under Convention 98.

The Report has been prepared in response to a request by the Applications Committee that the Australian Government provide a detailed report to the Committee of Experts in the following terms:

> "The Committee requested the Government to provide a detailed report to the Committee of Experts on all elements relating to the application of the Convention [i.e. Convention 98], in both law and practice, including the discussion held in the present Committee, taking into account all matters relating to the impact of the legislation on the effective recognition of the right to collective bargaining, and the measures adopted or envisaged by the Government. The Committee also requested the Government to provide copies of all draft laws that might relate to the application of the Convention. The Committee requested the Committee of Experts to examine the elements of the debate on this case. The Government should consider requesting the advice of the Office in this respect." (Source: the Provisional Record of the deliberations by the Committee on the Application of Standards [22 Part 2, pp.52-56]).

Provision of draft laws

It is not possible for the Australian Government to provide a copy of draft legislation to the Committee of Experts. Provision of draft legislation prior to its formal public release or introduction into Federal Parliament would contravene Cabinet-in Confidence rules and is prohibited by law.

Copies of the proposed legislation will be provided to the Committee of Experts once it is introduced into Parliament.

Issues raised by the Worker members

Issues raised by the Worker spokesperson

The Worker spokesperson referred to a range of issues raised by the Committee of Experts in the 2004 Observation and Direct Request relating to Convention 98. All of these issues have been addressed in the substantive Article 22 Report, particularly in Attachment 1.

Issues raised by the Worker member of France

The Worker member of France argued that the operation of the federal Workplace Relations Act results in de facto denial of the right to organize. The Worker member alleged that this is the case where promises of a job or pay rise are "dependent on the employee renouncing her or his right to collective bargaining".

The Australian Government disagrees strongly with the member's claim. The member's observations appear to be underpinned by a view that individual agreements are inherently anti-union. This is not the case. The fact that parties may choose to enter into individual agreements does not prevent them from being active members of a union. It is also open for individuals to have a union act as their bargaining agent in negotiating an Australian workplace agreement.

The Workplace Relations Act provides protection against anti-union discrimination in agreement making. The Act prohibits coercion in relation to the making of a collective certified agreement, and prohibits duress in relation to the making of an individual Australian workplace agreement.

Issues raised by the Worker member of the United Kingdom

The Worker member of the United Kingdom did not raise any issues directly related to Australian workplace relations legislation.

Issues raised by the Worker member of Australia

Higher education funding and building industry arrangements

The Worker member of Australia referred to the Australian Government's higher education funding arrangements, and to proposed new workplace relations arrangements for the building industry. These arrangements were said to be contrary to Convention 98 as they allegedly fail to encourage collective bargaining, actively discourage collective bargaining, and restrict the autonomy of the negotiating parties. There are also restrictions on the content of agreements, which cannot include provisions such as mandatory payroll deduction of union fees.

Higher education funding

Claims that the Australian Government's Higher Education Workplace Relations Requirements (HEWRRs) breach Convention 98 are wrong. While the HEWRRs require universities to offer Australian workplace agreements, they do not prevent universities from entering into collective agreements.

In general, workplace relations in the higher education sector is characterised by overly detailed and prescriptive collective agreements; significant constraints on collective and individual flexibilities due to the automatic involvement and heavy influence of third parties; and the lack of choice in agreement making. Universities should not be constrained in rewarding, to the greatest extent possible, the best teachers and the best researchers.

The HEWRRs will remove these constraints, provide choice in bargaining options, and assist universities to become productive, efficient, flexible and competitive. They will assist universities to attract, reward and retain high performing staff.

Building industry

The Australian Government disagrees with the Worker member's comments on arrangements relating to the building industry. The comments relate to the National Code of Practice for the Construction Industry (the National Code), which is a set of principles that describe good practice in respect of workplace relations, occupational health and safety, procurement and security of payment in the construction industry. The National Code covers the responsibilities of Australian Government agencies as clients, project managers, contractors, industrial associations and employers.

The National Code provides that all parties to construction projects funded by the Australian Government must comply with the provisions of applicable awards and workplace arrangements that have been certified, registered or otherwise approved under the relevant industrial relations legislation, and all legislative requirements.

Under the National Code all parties have the right to freedom of association. This means that parties are free to join or not to join industrial associations of their choice and that they are not to be

discriminated against or victimised on the grounds of membership or non membership of an industrial association. A person cannot be forced to pay a fee to an organisation if not a member.

A party to a construction project must not, directly or indirectly, pressure or coerce another party to enter into, or to vary or to terminate a workplace arrangement. Nor may they pressure or coerce them about the parties to and/or the contents or the form of their workplace arrangements. This does not prevent action sanctioned by relevant industrial relations legislation.

Project agreements incorporating site-wide payments, conditions or benefits may be negotiated where the strategy has first been authorised by the Principal. However, the integrity of individual enterprise agreements must be maintained. This means project agreements cannot override the workplace arrangements of individual contractors, subcontractors, consultants and suppliers, nor may they provide conditions which by their nature have effect beyond the duration of the project. While there may be provisions in a relevant workplace arrangement that enable the parties to the arrangement to encompass provisions in a project agreement, there shall be no double counting of "over award" payments.

Such agreements should be developed, where possible, in consultation with the subcontractors working on the project. The agreements shall be certified or otherwise approved under the relevant industrial relations legislation.

These provisions do not place unreasonable restrictions on bargaining by parties to construction projects, nor do they discourage collective bargaining. Rather, they provide a framework within which parties can enter into workplace agreements that are to their mutual benefit while protecting the rights of both workers and employers. They will help to ensure compliance in practice with Convention 98.

Restrictions on the range of negotiable matters under agreements

The Worker member of Australia alleged that employers and employees are prohibited from negotiating matters the Committee of Experts considers should be left to the parties, such as strike pay. She referred to a Bill before Parliament to prohibit the inclusion in collective agreements of right of entry provisions.

This issue is addressed in the main body of the Article 22 report.

Right of union officials to enter workplaces

The Worker member of Australia alleged that once an employer has signed all employees onto individual contracts a union no longer enjoys the statutory right to visit employees in the workplace regardless of union membership in the workplace (ALDI Foods v NUW). The case is reported at National Union of Workers v ALDI Foods Pty Limited (Print PR943894, AIRC FB, 23 February 2004.

Right of entry laws give union officials a legal right to enter workplaces, even if the employer does not wish to allow them access. The Australian Government considers that such laws have an appropriate place in the workplace relations framework by allowing union officials a reasonable opportunity to communicate with their members, or to investigate genuine breaches of relevant industrial instruments or laws where the affected employee(s) are union members.

Workplace Relations Amendment (Right of Entry) Bill, 2004

The Bill before Parliament referred to by the Worker member of Australia is the *Workplace Relations Amendment (Right of Entry) Bill, 2004* (the Bill). The Bill proposes to amend the Workplace Relations Act to enhance the right of entry system to clearly spell out parties' rights and responsibilities, and limit scope for State law to be used to circumvent Federal requirements. The Bill provides a framework that balances the right of unions to represent their members in the workplace, hold discussions with potential members and investigate suspected breaches of industrial laws and instruments, with the rights of employers and occupiers of premises to conduct their business without undue interference or harassment.

The Bill:

- strengthens the provisions for dealing with the issue, suspension and revocation of right of entry permits;

- imposes a “fit and proper person” requirement for union officials seeking a right of entry permit;

- more clearly sets out the rights and obligations of union officials, employers and occupiers of premises; and

- empowers the Australian Industrial Relations Commission (Commission) to deal with abuses of the right of entry system.

The Bill does not impinge upon any right of entry provided for under occupational health and safety legislation.

As the Bill provides for a fair and balanced statutory framework for right of entry to workplaces by trade union officials the Australian Government considers that the exclusion of such provisions from collective agreements is reasonable and in accord with Australia’s obligations under Convention 98.

Issues raised by the Worker member of Pakistan

The Worker member of Pakistan raised issues relating to alleged anti-union discrimination and failure of the Workplace Relations Act to encourage collective bargaining.

These issues have been addressed elsewhere in the Article 22 Report.

Issues raised by the Worker member of New Zealand

The comments by the Worker member of New Zealand make reference to historical developments in New Zealand concerning the impacts of its legislation on unions and collective bargaining. There are no issues relevant to Australian legislation that require a response from the Australian Government.

ATTACHMENT 3

COMMITTEE OF EXPERTS' OBSERVATION ON CONVENTION 98: AUSTRALIAN GOVERNMENT STATEMENT TO THE COMMITTEE ON THE APPLICATION OF STANDARDS JUNE 2005

Thank you Chairman

My name is Ted Cole. I represent the Australian Government in this case.

Since 1998 the Committee of Experts has published a number of comments on Australia's federal workplace relations legislation and the implementation of Convention 98. These comments have been the subject of ongoing dialogue between the Australian Government and the Committee of Experts. Given the lengthy consideration by the Australian Government to the issues raised by the Committee it is disappointing that more progress has not been made towards resolving them.

The Committee of Experts' observations go to detailed technical issues regarding the interpretation of federal legislation and the scope of Convention 98. The Committee's views are based on the proposition that Article 4 of the Convention imposes an unqualified obligation to promote collective bargaining at the expense of all other forms of bargaining. The Australian Government does not agree with that view.

Article 4 requires measures for the encouragement and promotion of collective bargaining to be taken **'where necessary'**, and that such measures are to be **'appropriate to national conditions'**.

In this regard, collective bargaining has been the norm in Australia for more than a century, and continues to be. The Workplace Relations Act does **not** give primacy to individual bargaining over collective bargaining. The Act provides additional machinery to facilitate individual bargaining as an alternative to collective bargaining, where that is what the parties want.

Under the Workplace Relations Act, individual agreement, like collective agreement making, is on top of a comprehensive safety net of minimum wages and conditions negotiated through a process involving collective bargaining.

Access to individual bargaining provides the parties with another choice. There is nothing in Convention 98 to suggest this is inappropriate. Promoting collective bargaining does not entail restricting the availability of individual bargaining.

It must be noted that Australian employees are predominantly covered by collective agreements. To illustrate this, 20 per cent of all Australian employees rely on the award safety net, 40.9 per cent are covered by collective agreements, and 39.1 per cent of employees are covered by individual agreements.

Australia's system of conciliation and arbitration has a well-established and substantial element of collective bargaining. A number of features of the Australian industrial relations system serve to support collective bargaining:

- Firstly, participation in the formal system set up by the Workplace Relations Act is voluntary – workers, employers and their representative organisations are free to negotiate and make agreements outside the formal system.

- Secondly, the Australian industrial relations system has been, and continues to be, predominantly based on collective bargaining.

- Thirdly, the system continues to provide machinery for the negotiation of collective agreements.

- Fourthly, Australia has mature, sophisticated and well-resourced trade unions and employer organisations able to inform members of their rights and obligations and to represent these members in collective bargaining or individual bargaining with equal facility.

- And finally, an employee who chooses to bargain individually may arrange to be represented by a bargaining agent, such as a trade union, during negotiations.

As collective bargaining has been the historical norm in Australia, the provision of individual agreements as a choice, among the several forms of bargaining instruments cannot reasonably be considered to contravene Convention 98. Accordingly, in the language of Article 4, the Workplace Relations Act is consistent with Australian 'national conditions' and Australia is not in breach of that article.

The Committee of Experts' ongoing criticism of individual workplace agreements as a form of agreement-making illustrates its particular interpretation of Convention 98 and its opposition to individual bargaining arrangements. For example, in its 2004 Observations, the committee considered that the provisions of the Workplace Relations Act concerning individual agreements and collective certified agreements may operate to create disincentives for workers to join unions.

In making this observation, the Committee of Experts mistakenly believed that collective bargaining could only take place with union involvement. Under the provisions of the Workplace Relations Act, collective bargaining can and does take place between employers and their employees, whether or not they are union members, and whether or not unions are involved.

Many of the Committee's observations in relation to individual agreements imply that they are inherently anti-union. Specifically, the Committee considers that the offer and acceptance of individual agreements is an act of anti-union discrimination, in breach of Article 1. This is not the case. Parties may choose to enter into individual agreements and be active members of a union. It is also open for individuals to have a union act as their bargaining agent in negotiating an individual agreement.

As reflected in Australia's various reports to the ILO, the Workplace Relations Act provides protection against acts of anti-union discrimination.

Account needs to be taken of the overlap between the Freedom of Association provisions, and the provisions of s.170CK of the Workplace Relations Act which prohibit termination of employment on the grounds of union membership. The Committee considers that termination due to refusal to negotiate an individual agreement is not covered by the Freedom of Association provisions. This is not the case.

While there is no express reference to this situation in the Workplace Relations Act, the Freedom of Association provisions prohibit discriminatory action on the grounds that an employee is entitled to the benefit of an industrial instrument. Terminating an employee for refusing to negotiate an individual agreement is a breach of these provisions. Remedies for employees subject to such a breach include reinstatement and the payment of compensation.

The Freedom of Association provisions also protect a person against dismissal or otherwise being prejudiced for engaging in union activities, consistent with Article 1 of the Convention.

Article 1 is designed to provide workers with protections against anti-union discrimination. The Australian Government submits that the Workplace Relations Act does this, through extensive provisions protecting Freedom of Association.

Certain observations made by the Committee of Experts have little regard for the context in which developments and statements criticised by the Committee occurred or were made. An example is the Committee's reference to the Container Terminals case before the Australian Industrial Relations Commission.

The Committee fails to explain that this was an unfair dismissal case. The individual affected was a union official who had frequently absented himself from work. He volunteered a statement in support

of reinstatement that he would give up union activities. This was peripheral to the Australian Industrial Relations Commission's consideration of the case. Importantly, in this case the Commission ordered the reinstatement of the employee in question.

The Committee considers that the absence of protected action in pursuit of a multi-employer agreement amounts to anti-union discrimination. This is not the case. Agreements are not reached only as a result of industrial action. Where parties, including employers, cannot take protected action, they may still avail themselves of other remedies under the WR Act, if they consider they are discriminated against in relation to the negotiation of a multiple business agreement.

The Australian Government reiterates that the Workplace Relations Act does not give primacy to individual bargaining over collective bargaining. The Act provides additional machinery to facilitate individual bargaining as an alternative to collective bargaining where that is what the parties want.

The Australian Government considers that individual workplace agreements play an important role in providing workplace flexibility and a greater range of agreement options for employers and employees. The Australian Government calls upon the Committee of Experts to reconsider its opposition to individual agreements in the light of the information we have provided, and the arguments we have previously presented concerning the interpretation of Convention 98.

The Australian Government recognises that the matters raised by the Committee of Experts reflect the difficulties inherent in understanding the technical complexity of Australia's workplace relations framework, which is unique.

The Australian Government stands ready to work with the ILO, with a view to resolving outstanding issues by helping it to understand Australia's industrial arrangements.