Chapter 8

ILO Conventions and the BCII Bill

> Australia is a signatory to the International Labour Organisation's conventions, which provide for freedom—not just freedom of association—to collectively bargain. What you are alluding to is the attempt to criminalise normal bargaining activities, to effectively outlaw things that are associated with fundamental international legal rights—the law, in other words... This law, if it is not rejected, will actually criminalise working people's rights by any definition of international law, and that is just unheard of in a democracy.[1]

8.1 The committee's consideration of the Building and Construction Industry Improvement Bill in the light of International Labour Organisation (ILO) Conventions would normally be seen to be an academic exercise. However, provisions of the *Workplace Relations Act 1996* and several amendment bills introduced subsequently, have been found to contravene fundamental ILO Conventions in regard to freedom of association and the right to collective bargaining. Provisions of the bill now before the Senate are flawed in the same way. The BCII Bill goes even further in singling out a particular category of employees who will enjoy fewer rights than those employed in other industries, particularly in regard to their rights to bargain collectively for improvements to wages and conditions. This is the basic right proclaimed in the industrial laws of all OECD counties and western democracies.

8.2 The right to collective bargaining is a benchmark right which is recognised by ILO Conventions. There is some irony in the Government's claims to be restoring respect for the law through the implementation of the BCII Bill in view of the disregard it has for ILO Conventions, which form the basis of our national industrial laws. While the conventions are not binding on signatories to the ILO, it should not be expected that a country with Australia's tradition of support for the ILO should suddenly disregard them.

Background to the ILO

8.3 The ILO was established in 1919 by the League of Nations. In the aftermath of the First World War, there was a widely held view that the war had been caused by commercial rivalry between the leading powers. There appeared to be a clear correlation between the preservation of peace and improvements in employment conditions and social progress.

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1 Ms Sharan Burrows, *Hansard*, Canberra, 11 December, p.96

8.4 Principles established at this time sought to define rights of association, standards of living, wages and conditions along with the abolition of child labour in all countries. These principles were reconfirmed in 1944 with the Declaration of Philadelphia, which became an annex to the final constitution of the ILO.

Tripartite participation

8.5 As indicated by evidence referred to in other chapters of this report, the Government's long-standing aversion to tripartite arrangements is hardening. It is turning towards a unilateral approach, of which the BCII Bill is an example. Much of the evidence provided to the committee in relation to the BCII Bill (and in regard to several WR Amendment Bills dealt with recently by the Legislation Committee) raised concerns about the diminution of the tripartite process. This leads to shifts in bargaining power in favour of one principal stakeholder in the employment relationship which will lead to poor policy outcomes.[2] The ACTU reported its attempt to persuade the Government that most aspects of its bill were not relevant to the future of the industry:

> None of it deals with the real issues of concern for the industry. We proposed an alternative process to Mr Abbott's some time ago... It basically emphasised a tripartite approach involving the employers, governments at state and national levels and the unions looking at some of the issues in the industry to come up with a coherent and intelligent way of tackling them.[3]

8.6 The Government is unlikely to be influenced by consideration of ILO principles, or by the fact that from its inception, the ILO has recognised that the tripartite involvement of government, employers and employees in labour relations is critical for economic and social progress, both internationally and nationally. This principle was enunciated in response to suppression of workers and organised labour, either by totalitarian governments or by laws of the kind that existed in the United States before the New Deal. There was a crucial recognition of the unique roles that each of these participants played in achieving global economic growth and improved standards of living. This was recognised in the Philadelphia Declaration which states, as a core principle:

> the war against want requires to be carried on with unrelenting vigour within each nation, and by continuous and concerted international effort in which the representatives of workers and employers, enjoying equal status

2 Submission No.17, ACTU, Recommendation 1, para.218, 241, 244; Submission No.26, Australian States and Territories: QLD Government, p.56, paras.1-3; Submission No.26, Australian States and Territories: WA Government, paras.26-29 & paras.106-107, Submission No.27, CEPU, paras.10.1.9, 10.2.4, 10.5.1, 10.7.1; Submission No.37, CFMEU, Conclusion; Submission No.38, CPSU, para.15, Submission No.57, Victorian Trades Hall Council, Recommendation 1

3 Ms Sharan Burrows, *Hansard*, Canberra, 11 December 2003, p.83

> with those of governments, join with them in free discussion and democratic decision with a view to the promotion of the common welfare.[4]

8.7 Accordingly, when the ILO charter was revised in 1944 it was given a constitution for the General Conference and Governing Body that balanced representation between government, employer and employees, as set out in Article 3 and 7,[5] and which is reaffirmed through the national consultation processes established in convention 144, Articles 2 and 3.[6] This principle is further elaborated on through Recommendation 113:

> Measures appropriate to national conditions should be taken to promote effective consultation and co-operation at the industrial and national levels between public authorities and employers' and workers' organisations, as well as between these organisations... .Such consultation and co-operation should have the general objective of promoting mutual understanding and good relations between public authorities and employers' and workers' organisations ... with a view to developing the economy as a whole or individual branches thereof, improving conditions of work and raising standards of living.[7]

8.8 The objective of developing mutual understanding and good relationships is fundamental for the establishment of an efficient and productive construction industry. Evidence was provided to the committee on the benefit of industrial relations models that supported partnership between tripartite industry participants to achieve high performance in the industry.[8] As the joint submission from the states and territories stated:

> a cooperative and collaborative approach to the industry provides an appropriate basis for reforming the industry. The approach in the Bill does not address the needs of the building and construction industry nor does it address the need for culture change in the industry. Instead the confrontationist model adopted will only serve to entrench negative practices.[9]

8.9 The committee majority echoes the views overwhelmingly expressed by industrial relations practitioners that the bill lacks a balance in its approach to industrial relations. Neither has nearly every Workplace Relations Amendment Bill introduced following the passage of the 1996 Act. The Government is unlikely to be

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4 Philadelphia Declaration Principle I (d)

5 Articles 3 & 7. *The ... General Conference ... shall be composed of four representatives of each of the Members, of whom two shall be Government delegates and the two others shall be delegates representing respectively the employers and the workpeople of each of the Members. The Governing Body shall consist of 28 representing governments, 14 representing the employers, and 14 representing the workers.*

6 ILO Convention 144

7 ILO Recommendation 113

8 Submission No.26, op. cit., pp.13-14, paras.22-25

9 Submission No.26, op. cit., p.14, para.25

moved by calls for a tripartite approach to industrial relations, all the more so if this is ILO policy. For the record, the Government will concede that unions have a legitimate role in establishing appropriate working conditions for the industry, particularly in relation to occupational health and safety, and workers' entitlements.[10] Off the record, the Government is unlikely to be turned from its goal of removing union influence from workplace agreement negotiation processes. The committee majority urges the Government to re-establish consultative processes with all participants in the industry to ensure their acceptance and involvement in any changes to laws. It does so in the knowledge that this process is the only way of achieving lasting productivity improvements. As the International Centre for Trade Union Rights (ICTUR) submitted in oral evidence to the committee:

> At the end of the day these conventions seek to balance competing interests and competing rights. In my view they generally achieve that. They achieve it through a very longwinded process involving all the relevant interest groups coming to a compromise on the issue. That is why we emphasise that these are standards that are not partisan in any particular direction. They have been the subject of rigorous scrutiny from all interested parties.[11]

Enforcing the conventions

8.10 Article 19 of the ILO Constitution sets out the obligations of members to enact domestic law in line with the conventions that have been adopted. Commonwealth and state parliaments have traditionally considered industrial relations legislation in the light of ILO conventions. The main process by which the ILO monitors compliance with its conventions is through the review of annual reports by governments to the International Labour Office in conformity with Article 22 of the Constitution.[12] Such reports are initially reviewed by a Committee of Experts, and, if they find that the conventions are not being fully complied with, the Committee addresses a comment, known as an 'observation', to the government and requests that amendments be made to the legislation. Observations are generally used in more serious or long-standing cases of failure to fulfil obligations.[13]

8.11 The ILO review process does not extend to draft legislation or to bills, and it has not been the usual practice of the Government to invite comment from the ILO on draft legislation.[14] DEWR provided internal advice that the legislation complies with

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10 Mr Chris Maxwell, *Hansard*, Melbourne, 21 May 2004, pp.23-24; Submission No.13, HIA, p.15

11 Mr Mordy Bromberg, *Hansard*, Melbourne, 19 May 2004, p.54

12 ILO Constitution Article 22 *'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 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.*

13 ILO website *Handbook of procedures relating to international labour Conventions and Recommendations - . Foot note 56<http://www.ilo.org/public/english/standards/norm/sources/handbook/hb7.htm>*

14 Submission No.21, Australian Government Agencies, p.28

Australia's obligations under ILO conventions. The committee notes that such internal advice as the Government believes it needs is easily obtained and will always approve the policy purposes of the Government. This applies almost equally to external advice as well, as Governments 'shop around' to find justification from 'independent' consultancies.

8.12 The Government has provided evidence that there is a 'continuing dialogue' with the ILO in relation to WRA legislation. However, the committee has been advised that dialogue is an inaccurate description of the communication that the Government has with the ILO: that in fact the ILO has used the strongest mechanisms it has, in the form of observations, to admonish the Government over its failure to draft legislation supporting the implementation of ILO conventions. The most recent report from the Australian Government resulted in the following observations in relation to the Workplace Relations Act which are likely to be applied to the provisions of the BCII bill:

> 'Workers' organizations should be able to take industrial action in support of multi-employer agreements; providing in legislation that workers cannot take action in support of a claim for strike pay is not compatible with the Convention;
>
> Prohibiting industrial action that is threatening to cause significant damage to the economy goes beyond the definition of essential services in the strict sense of the term.… The Committee requests once again the Government to amend the provisions of the Act, to bring it into conformity with the Convention.
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> The Committee recalls once again that a general prohibition on sympathy strikes could lead to abuse and that workers should be able to take such action, provided the initial strike they are supporting is lawful.[15]

8.13 It would be surprising if similar comments are not made about the BCII Bill if it becomes law. The committee notes that the ILO, unlike the WTO, does not have powers to compel countries to comply with its rulings.[16] The Government makes only an acknowledgement of receipt of observations. The communications do not attract public attention. There are no sanctions to be feared by the Government in Australian courts, or in international courts and tribunals. As the committee was told:

> The history of challenging domestic law on the basis of international instruments is not altogether a happy one. Clearly much of the bill would infringe the international instruments to which Australia is a party.[17]

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15 CEACR: Individual Observation concerning Convention No. 87, Freedom of Association and Protection of the Right to Organise, 1948 Australia (ratification: 1973) Published: 2003

16 Ms Stephanie Mayman, *Hansard*, Perth, 16 March 2004, p.75

17 Mr Marcus Clayton, *Hansard*, Melbourne, 19 May 2004, p.105

ILO views on pattern bargaining

8.14 The provisions in the BCII Bill prohibiting pattern bargaining are contrary to ILO conventions. The ILO has recognised the right of workers and employers to enter into collective bargaining arrangements through Philadelphia Declaration III (e), which provides for:

> The effective recognition of the right of collective bargaining, the cooperation of management and labour in the continuous improvement of productive efficiency, and the collaboration of workers and employers in the preparation and application of social and economic measures.

8.15 This principle has been further developed through Convention 98 which supports the right of collective bargaining:

> 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.[18]

8.16 Freedom of association and the right of collective bargaining are 'core' labour standards that form a subset of human rights defined in the International Bill of Human Rights.[19] Freedom of association and the right to collectively organise are one of eight fundamental conventions that:

> are a precondition for all the others in that they provide for the necessary implements to strive freely for the improvement of individual and collective conditions of work.[20]

8.17 The BCII Bill would restrict the rights of employers and employees in the construction industry to establish appropriate agreements by democratically elected officials which meet the needs of all industry participants.[21] The committee received advice from a range of submissions and witnesses about the likely observations that the ILO would issue in relation to breaches of Conventions which support the right of employees to collectively bargain.[22]

> However, what I would say is that those ILO conventions assert, as part of international law, that employees and their representatives have the right to

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18 Convention 98, Article 4

19 Submission No.77, ICTUR, Section 1.2 (b)

20 International Labour Standards <http://www.ilo.org/public/english/standards/norm/whatare/fundam/index.htm>

21 Submission No.36, CEPU Plumbers Division, p.12, section 14

22 Submission No.26, Australian States and Territories: NSW Government, para.24, Submission No.57, Victorian Trades Hall Council, paras.45-52; Submission No. 77, ICTUR, Exec Summary para.1; Mr Doug Cameron, *Hansard*, Sydney, 3 February 2004, p.118; Ms Stephanie Mayman, *Hansard*, Perth, 16 March 2004, pp.65, 75; Mr John Sutton, *Hansard*, Sydney, 2 February 2004, p.60; Mr David Chin, *Hansard*, Melbourne, 19 May 2004, p.45

> engage in collective bargaining. This bill, which I think stultifies collective bargaining, certainly has the capacity to go against the spirit of these conventions.[23]

8.18 The committee sees a serious weakness in the proposed legislation for the construction industry in that it should provide a framework for the equal participation in industrial relations by all participants in the industry in line with international best practice. Instead, it provides for heavy penalties for misconduct for employees, while exempting employers from the rigours of the law. This is one of many instances of such discrimination in the bill.[24] It makes for very bad legislation and, with these provisions included, is unworthy of Parliament's consideration:

> My concern with this legislation is that it really deals much more with trade union conduct and employee conduct in an asymmetrical manner than it deals with employer conduct. The fact that the building commission does not have any powers, as I read them, over wages and employee entitlements is an instance of this. The fact that all industrial action is deemed unlawful is another instance of this. I am simply saying that good legislation has to be balanced, has to be workable and has to have discretions reposed in bodies so that they can act in an independent manner.[25]

8.19 The committee majority notes that the Government and those who support its legislation take a narrow interpretation of the requirements of the ILO Conventions, claiming that measures to restrict collective bargaining to individual workplaces do not contravene the Convention:

> HIA further submits that the requirements of Convention 98 with respect to collective bargaining have in no way been contravened. Collective bargaining is still possible but it will be rightly based on the premise of individual business units. Article 4 of this Convention states that "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." How can widespread enforcement of pattern bargaining by the CFMEU be seen as in any sense 'voluntary'? HIA submits that the coercion into signing a pattern bargained arrangement in itself contravenes this Article.[26]

8.20 What this fails to acknowledge is that ILO Conventions are not written as black letter law is written: as clauses to be interpreted by courts or circumvented through legal argument. They cannot be 'written down' or subject to narrow interpretation. They can, however, be violated through disregard of the principles they embody, and

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23 Professor Ronald McCallum, *Hansard*, Sydney, 2 February 2004, p.2

24 Mr John Sutton, *Hansard*, Sydney, 2 February 2004, p.73; Professor Ronald McCallum, *Hansard*, Sydney, 2 February 2004, pp.5-6; Submission No.37, CFMEU, p.21, para. 4.1

25 Professor Ronald McCallum, *Hansard*, Sydney, 2 February 2004, p.11

26 Submission No.13, HIA, p.13

this is what the Government has done in this legislation. Nor can the argument about the alleged CFMEU enforcement of pattern bargaining be taken as justification for disregarding ILO conventions, even if this charge was valid.

8.21 The ILO does not force either employers or employees to establish a particular type of agreement. It establishes the principal that such agreements should be determined by the parties affected, who should be free to establish how they will meet their bargaining objectives.[27]

> It is one of the reasons why the conventions are deliberately not prescriptive, because the conventions take the view that, as far as possible, matters should be left to the bargaining parties as to what is contained in whatever agreement eventuates from that process.[28]

8.22 The committee majority believes that the Government should revise the legislation to restore to the AIRC the powers which it has lost in recent years, to allow arbitration and conciliation between employers and employees. The committee is concerned that the introduction of a third party to the bargaining process to enforce a bargaining process that does not suit the needs of employers and employees will force inefficient and costly processes on the industry.[29]

Freedom of Association

8.23 The committee notes the arguments of the Government and industry employer groups that the WRA and the proposed building and construction bill contain legal protection for freedom of association in line with the intent of the ILO clauses, but notes also that this is a curious inversion of the normal meaning of the term. The committee has criticised elsewhere, in its legislation scrutiny role, the semantic ploys and rhetorical devices used by the Government to put misleading 'spin' on legislative intentions, as in the short titles given to bills. These signal such objectives as to provide more jobs and better pay, and to 'protect' Victorian workers. Such outcomes cannot be assured, and are sometimes intended to disguise the real objectives of the bill. In the same spirit, the Government provides in this legislation for protection of workers who wish not to be represented by unions in their pursuit of better pay and working conditions. It would be more accurate to describe this as 'freedom of disassociation', which is covered by current workplace relations legislation, and does not need to be reissued through the BCII Bill:

> I think the debate internationally is inconclusive as to whether there is a freedom to not associate. The Workplace Relations Act already deals, through section 298, with the kinds of impediments you speak of. Coercing someone to join a union is already a breach of section 298.[30]

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27 Submission No.77, ICTUR, Section 2.2

28 Mr Tony Lawrence, *Hansard*, Melbourne, 19 May 2004, p.55

29 Professor Ronald McCallum, *Hansard*, Sydney, 2 February 2004, pp.6-8

30 Mr Mordy Bromberg, *Hansard*, Melbourne 19 May 2004, p.52

8.24 The committee majority has no criticism to make of section 298. However, not everyone is assisted by. The committee heard from witnesses representing the trades sub-contractors who are members of the Christian Brethren Fellowship. The beliefs of this religious group allow them no association with organisations beyond those who live by their creed. While the freedom not to associate may appear to be tailor made to suit this sect, or others like them, a difficulty may arise in their relations with other contractors because of their opposition to EBAs. In these circumstances lead project contractors may come to the conclusion that their participation in a project may require more delicate negotiation than they have time to make. The result would be that some minority groups may be excluded from sections of the industry by their own rules, and in the case of builders may be advised to stay with the bungalow and town house market.

8.25 Such cases would be rare. The committee majority takes the view that it is the right to collective bargaining which is most under threat in this legislation. The committee sees particular dangers in this provision for the reason that it may be used by unscrupulous employers to strenuously discourage union membership on the proposed grounds, even though this may be against the law.

8.26 The committee believes that, far from affirming freedom of association, it is more likely that it may be compromised by enactment of this legislation. This is particularly in relation to Article two of convention 87 which states that workers have the right to organise and adopt rules for their organisation. This states:

> Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation.
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> Workers' and employers' organisations shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities and to formulate their programmes.[31]

8.27 The committee is critical of the BCII provisions that will prevent employees from taking lawful industrial action because of the highly complicated processes that must be established for bargaining and undertaking secret ballots. The bill places many restrictions on the processes that workers can use to organise themselves. Secret ballot provisions are unduly complex and are likely to prevent ordinary workers, union officials or indeed employers from using such provisions, and increase the administrative burdens for employers, unions and individual employees. It is expected that the bill will result in both employers and employees requiring the support of specialists such as industrial lawyers, adding considerably to their costs and time in pursuing the usual bargaining process. The effect of such complicated provisions, rather then encouraging the active participation of individual employers and

31 C87 Freedom of Association and Protection of the Right to Organise Convention, 1948, Part 1, Article 2 and Article 3.

employees in the bargaining process, will require the active participation of lawyers in all future industrial relations activities. [32]

> The problem is the hoops that would need to be jumped through... Take the situation in Victoria. I think there are about 3,000 or 4,000 individual enterprise agreements in Victoria. If this regime were imposed, I think it would be practically impossible for the union and the workers of each of those employers to go through the process here in order to reach protected action. If they took industrial action, it would not be protected and therefore would be unlawful.[33]

8.28 The committee is also concerned that employers have sought to select which employee representatives they will negotiate with.[34] It recommends that the legislation is revised to enforce the rights of employees to select their representatives for the purposes of negotiating agreements with employer representatives. The Government should take into account the 1998 ILO CEACR Observation which states:

> The Committee requests clarification regarding section 170LL of the Act which appears to permit an employer of a new business to choose which organisation to negotiate with prior to employing any persons. The Committee recalls that the choice of bargaining agent should be made by the workers themselves; section 170LL appears to allow the employer to preselect the bargaining partner on behalf of the potential employees, regardless of whether or not that union will ultimately be truly representative of the workers finally employed.[35]

8.29 The purpose of current provisions is to exclude or discourage union participation from negotiations for enterprise bargaining agreements (EBAs). The committee majority is of the view that the Government regards union involvement in EBA negotiations, even when conducted on the worksite and with no apparent connection with other similar enterprises, as a variation of pattern bargaining. The Government would take the view that union workplace organisers have an incorrigible tendency to 'exchange notes' across worksites. Its preferred position, which it would find impossible to legislate for, would probably be to exclude union organisers or representatives from negotiating parties.

8.30 The issue of freedom of association has also arisen in relation to negotiations with the United States of America over the proposed free trade agreement. There has been some frank criticism of the attitude and performance of the Australian Government by the United States Labor Advisory Committee (LAC) in its report to

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32 Submission No.77, ICTUR, Sections 3.4 & 3.5; Mr Chris Maxwell, *Hansard*, Melbourne, 21 May 2004, p.25; Mr Lachlan Riches, *Hansard,* Sydney, 3 February 2004, pp.72-73

33 Mr Marcus Clayton, *Hansard*, Melbourne, 19 May 2004, p.100

34 Submission No.107, CFMEUWA, pp.15-18

35 CEACR: Individual Observation concerning Convention No. 98, Right to Organise and Collective Bargaining, 1949 Australia (ratification: 1973) Published: 1998, para.9

the trade representative of the President, who is responsible for negotiating the free trade agreement on behalf of the United States Government.

8.31 The Labor Advisory Committee has reported that Australia's laws contain a number of onerous restrictions on workers' right to freedom of association and their right to organise and bargain collectively. It states that many of these restrictions were created by the *Workplace Relations Act 1996*, which constituted a major restructuring of Australia's labor laws and has been criticised repeatedly by the ILO, the US State Department, and the International Confederation of Free Trade Unions (ICFTU). The report continues:

> The fairly recent enactment of the WRA shows that problems with workers' rights in Australia are not the result of insufficient enforcement resources or the inheritance of outdated labor legislation from another era – they are the result of a conscious and recent decision in the Australian government to restrict the fundamental rights of workers.[36]

8.32 The Labor Advisory Committee reported with disapproval that the Workplace Relations Act allows employers to choose a union to bargain with before it has even employed any workers, through 'greenfield agreements'; that these agreements can last for up to three years, and effectively deny workers the right to choose their own bargaining representative for that length of time. The ILO had twice criticised this provision and requested that the Australian government review and amend the Act to eliminate this problem. According to the ICFTU, the WRA also makes it much harder for unions to get into workplaces to organise workers, further depriving workers of their ability to freely join the union of their choosing.[37] These are observations of industrial relations experts from the United States, a country regarded as being at the leading edge of the free market in labour. Australia, which for many years – indeed for most of the post-war era – has a strong record of support for the ILO and the rights of trade unions, is now criticised for being backward by a country with a chequered labour relations history. The irony of this is not lost on the committee.

Right of Entry

8.33 The Government has stated that the right of entry provisions are in line with ILO conventions, particularly Convention 135,[38] and that employers have the right to conduct their business without undue interference or harassment.[39] Freedom of Association principles of the ILO include the right for employees to communicate amongst themselves and to engage them in the process of industrial relations both at a local and national level.[40]

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36 Mr George Becker, *Report of the Labor Advisory Committee for Trade Negotiations and Trade Policy (LAC)*, March 12, 2004, p.6

37 ibid.

38 Submission No.21, Australian Government Agencies, p.30, para.173

39 BCII Explanatory Memorandum, p.15, para.68

40 Submission No.77, ICTUR Section 2.5

8.34 The committee accepts that directives about how and when employee representatives can meet members or to recruit members will restrict the rights of union officials. Restrictions on their rights to communicate with members, and to investigate issues on their behalf, is contrary to Article 3 of ILO Convention No. 98, and is likely to result in further observations by the ILO.[41] The committee supports the legitimate rights of unions to maintain these relationships.[42] The new restrictions on right of entry place too much weight on the rights of employers and give too little protection to employees' representatives to exercise their proper functions. These are to monitor the implementation of agreements that they are party to, including the payment of employee entitlements.[43] This is especially true for the more vulnerable members of the workforce including apprentices who, while they are not often union members, often request the assistance of unions when issues of OH&S or employee entitlements arise.[44]

> There are clear similarities between the right of entry provisions. These effectively prevent a union official from going about their lawful duty, which is to go onto work sites without causing undue disruption to the work and to recruit—which means to encourage workers to join unions. That is the rightful, recognised, international principle...We as international participants in the ILO recognise that principle, but we seem to consider in our laws or in the proposed bill that that will be removed.[45]

8.35 The proposed use of trespass provisions as a deterrent to union representation on worksites is an iniquitous abuse of the legislative process. The committee notes the MBA's frustration at a magistrate refusing to treat right of entry dispute as a criminal matter.[46] It is clearly not a criminal matter, and this assumption underlines the danger of injecting into industrial law the notions underlying both commercial and criminal law. The failure of the Cole royal commission, and the drafters of the BCII Bill, to recognise that industrial law involves the recognition of an industrial contest and the need to negotiate agreements, is at the bottom of impatient claims for the application of black-letter law. The committee notes advice it received from a legal practitioner at its Perth hearings:

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41 ibid., Executive Summary para.5

42 Submission No.17, ACTU, p.18, para.111; Submission No.29,Labor Council of NSW, p.2, para.6; Submission No.37, CFMEU, p.84; Submission No.40, CFMEU Mining and Energy Division, p.7; Submission No.57, Victorian Trades Hall Council, p.18, para.81; Submission No.62, Queensland Council of Unions p.4, paras.27-29

43 Submission No 26, Australian States and Territories: WA Government, p.75, para.65; Submission No.37, CFMEU, pp.80-81; Submission No.53, Action Construction, p.1; Submission No.55, Attachment; Submission No.72, CEPU Plumbing Division Queensland, p.11, paras.50-53; Submission No.85, CFMEUQ, p.6

44 Submission No.55A, CFMEU; Submission No.99, CEPU Engineering and Electrical Division WA, pp.3-4

45 Ms Stephanie Mayman, *Hansard*, Perth, 16 March 2004, p.76

46 Submission 12a, MBA, p.22, para.9.5.2

> .... under the federal and state laws there are rights of entry. If those rules are followed then the right of entry is a lawful right of entry; if they are not it is an unlawful right of entry. Technically, I suppose that in some cases it is a trespass, but in most cases it is simply a breach of the right of entry provisions...I thought that the right of entry provisions in the federal act and also the right of entry provisions in the Western Australian act had been designed to get away from the use of police act and Crimes Act provisions. They have been designed to return issues of right of entry to the industrial arena, as opposed to the criminal arena. That has always been my understanding.[47]

8.36 Of serious concern to the committee majority is the proposals by industry employer groups to ban right of entry to union officials who are seeking to investigate occupational health and safety concerns.[48] The committee accepts that there are few resources available to the industry to police occupational health and safety in the industry and such proposals are likely to increase the numbers of injuries and deaths on construction sites which are already one of the most dangerous work places in Australia. Further discussion on occupational health and safety is to be found in chapter 6.[49]

8.37 The complexity of current right of entry provisions in the Workplace Relations Act and right of entry laws enacted under state legislation are sufficient to keep legal minds occupied. The right of entry provisions under the BCII Bill will increase uncertainty and the likelihood of increased industrial disruption to the industry.[50] The committee majority believes that a uniform approach to right of entry for all workers, as currently provided for in the Workplace Relations Act, is more likely to be acceptable than a law which places intolerable restrictions on the employees in a particular industry. Construction workers should have access to the same rights and protections that are available to workers in all other sectors of the economy.[51]

8.38 The committee notes that there are powers available to the AIRC to cancel right of entry permits when an abuse of the system has occurred.[52] The committee majority believes there should be a review into how the AIRC enforces the provisions

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47 Mr Alan Drake-Brockman, *Hansard*, Perth 16 March, p.91

48 Submission No.13, HIA, p.12; Submission No.14, ACCI, p.3, para.10, p.42, para.163, Submission No.33b, WACCI, pp7-8

49 Submission No. 27, CEPU, p.36, para.7.8.3; Submission No.72, CEPU Plumbing Division Queensland, p.11, para.54, p.14, para.68; Submission No.99, CEPU Engineering and Electrical Division, WA, p.5, para.18, p.6, paras.20-31

50 Submission No.21, Australian Government Agencies, p.24, para.130; Submission No.14, ACCI, p.17, para.51; Submission No.26, Australian States and Territories, p.18, para.44; Australian States and Territories: WA Government p.67, para.19

51 Submission No.21, Australian Government Agencies, p.24, paras.130 & 132, Submission No.67, Victorian Council for Civil Liberties, p.6, para.21(d); Submission No.69, Slater and Gordon, p.6, para.7

52 Submission No.26, Australian States and Territories, p.41, para.152; Submission No.37, CFMEU, p.83; Submission No.82, Mr John O'Connor, pp.13-14

of current industrial laws to address concerns raised by the Master Builders Association and to ensure a balanced right of entry process that encourages the resolution of disputes.[53] This manner of collaborative management of a problem is preferable to introducing specific restrictions on some unions in contravention of ILO principles and conventions.

The right to strike

8.39 The committee has been provided with evidence on rights to strike established through the International Covenant for Economic, Social and Cultural Rights and in ILO conventions.[54] The committee accepts advice from the ICTUR that:

> the right to strike ought to be respected. The right to strike is not an unlimited right. The right to strike is limited to action taken in furtherance of industrial claims: for instance, it is limited to action, by the Workplace Relations Act, which does not involve damage to property or defamation. There are a number of other such limitations that I think you will find in section 170MT of the Workplace Relations Act.[55]

8.40 As discussed above, the unduly complex requirements for prestrike ballots will either prevent industrial action, or they will prolong those which occur. It is unclear from the legislation how employees would return to work after agreeing to a strike in accordance with the secret ballot provisions. In particular, it is unclear from the proposed legislation what processes could be used to finalise a dispute once a prestrike ballot has occurred, because the normal relationships and negotiation processes between employer and employee representatives would no longer be available for fast resolution of a dispute.[56]

> ...I would not support all of the components of the legislation. One thing that sticks out to me, and I have been doing this job for 30 years, is that having a secret ballot is absolutely insane. What happens if they actually vote to go on strike? How the hell do you get them back?[57]

8.41 The ILO view is that it is up to employees to arrange how they will organise themselves, which has been discussed above. The committee notes that employees who have any concerns over democratic processes within unions in relation to strike action have access to section 136 under the Workplace Relations Act. The use of strike action can be seen as the exercise of economic power by both unions and employers through a bargaining process.

> Generally our view is that if you are talking about economic coercion by the exercise of a right to strike then that is legitimate. It is accepted as

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53 Submission No.26, Australian States and Territories: WA Government, p.79, para.85; Submission No.90, QMBA, p.14, para.48; Submission No.106, MBAWA, p.8

54 Mr Mark Gibian, *Hansard*, Melbourne, 19 May 2004, p.45

55 Mr Mordy Bromberg, *Hansard*, Melbourne, 19 May 2004, p.50

56 Ms Stephanie Mayman, *Hansard,* Perth, 16 March 2004, p.76

57 Mr Glen Simpson, *Hansard*, Brisbane, 24 February 2004, p.27

> legitimate under international law. That is collective bargaining. That is what it is about. An employer has the right to impose economic coercion through lockouts and the employees collectively can strike as a means of imposing economic coercion on employers, as long as that is done as part of a bargaining process for reaching collective agreements.[58]

8.42 The committee majority accepts this view. However, it understands the Government's tendency to be captive to obsolete rhetoric. Strike ballots were supposed to be the answer to the once prevailing view that real workers would happily stay at work if it was not for the militant union 'bosses'. Such a provision as this was intended as a curb on union 'bosses'. In fact, as union leaders admit, much of their time is spent dampening the enthusiasm of their members for industrial action. This provision should be resisted by all parties interested in maintaining industrial harmony. It presents serious potential problems for both employers and unions.

Rights against self incrimination

8.43 A fundamental tenet of common law is the right of an individual not to incriminate themselves. While the government has provided plausible reasons for overriding this principal of law in the case of anti-terrorism legislation, the committee has not been provided with evidence that workers in the building and construction industry represent a threat comparable to that of terrorist organisations. The removal of their basic legal right not to incriminate themselves is another characteristic of a law intended to discriminate against a particular segment of the workforce. The committee heard evidence from legal practitioners in its Melbourne hearings on this issue, the first from an industrial lawyer, and the second from a representative of the Victorian Council for Civil Liberties:

> It is...repressive to set up an industrial relations industry-specific body with coercive powers to compel the production of documents and compel answers to questions on oath without the privilege against self-incrimination. Those powers are normally reserved for terrorists and organised crime and suchlike.[59]

> In relation to the privilege against self-incrimination ...we would say that is an indefensible departure from basic human rights. We have had in our criminal justice system that privilege—that is, I can refuse to answer a question if it will expose me to prosecution or punishment...is a fundamental tenet of our system..... there are limited areas where you might justify abrogating that privilege, but this is not one of them. There is nothing very special or exceptional about the alleged criminal activity in these areas.[60]

8.44 The committee's strong views on the request for the Building Industry Taskforce to be given powers similar to statutory bodies like the ACCC, ASIC and the

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58 Mr Mordy Bromberg, op. cit., p.51

59 Mr Marcus Clayton, *Hansard*, Melbourne, 19 May 2004, p.101

60 Mr Chris Maxwell, *Hansard*, Melbourne, 21 May 2004, pp.23-24

ATO is expressed in chapter 3. Suffice to say here that it is appropriate that regulatory bodies such as the police, ATO and DIMIA continue to investigate and prosecute any infringement of Australia's taxation and criminal laws as they affect participants in the construction industry. There are sufficient powers available to these regulators, including the right to gather evidence, and it is not appropriate to provide such powers to compel individuals to provide self-incriminating information.[61]

8.45 The powers sought for the ABC Commissioner in relation to information gathering should be more clearly defined to ensure that the rights of the individual are clearly established. Only in this way can the Senate ensure that workers in the industry do not have lesser legal rights in comparison with the rest of the workplace.[62]

61 Submission No.36, CEPU, pp.16-17; Mr Chris Maxwell, ibid., p.32

62 Mr Chris Maxwell, ibid.