AUSTRALIAN SENATE

EMPLOYMENT, WORKPLACE RELATIONS,

AND EDUCATION REFERENCES COMMITTEE

Inquiry into the *Building and Construction Industry Improvement Bill 2003*

Submission of:

INTERNATIONAL CENTRE FOR TRADE UNION RIGHTS

February 2004

A report prepared by ICTUR's Panel of Advocates:

- Professor Keith Ewing
- John Hendy QC
- Mordy Bromberg SC
- Anthony Lawrence
- David Chin
- Tony Slevin
- Mark Gibian

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EXECUTIVE SUMMARY

- It is untenable for the Australian Government to profess the aim of promoting respect for the "rule of law" in the building and construction industry by the introduction of a Bill which, if enacted, will compound Australia's breach of international labour law and exacerbate an apparent lack of respect for the "rule of law" at an international level.

- The introduction of this Bill flies in the face of Australia's recently announced Free Trade Agreement with the United States according to which, reportedly, Australia has reaffirmed its obligations as a member of the International Labor Organization (ILO), and its commitment to ensure that its domestic laws provide for labor standards consistent with internationally recognized labor principles.

- The ILO Committee of Experts has repeatedly found that the *Workplace Relations Act* 1996 contravenes fundamental ILO Conventions on freedom of association and the right to collective bargaining in a manner previously foreshadowed by ICTUR in several prior submissions to Senate Committees considering proposed industrial relations legislation in 1996, 1999 and 2000.

- **The 2003 Bill selectively and unfairly targets building industry workers with exclusion from basic and universally applicable labour standards.**

- It is absolutely fundamental that <u>all</u> workers should have <u>all</u> the rights and protections afforded under international labour law. The building and construction industry is not exempt from compliance with the fundamental rights to collective bargaining and to strike that are embodied in these ILO Conventions because these rights are general in nature; applicable to all employees without distinction within or between particular industries or segments of the economy (with the sole possible exceptions of public servants engaged in the administration of the State, and workers in essential services in

the strict sense of the term).

- The concept of "pattern bargaining" is simply a partisan pejorative way of describing a legitimate activity in which unions have always been engaged, ie. acting in solidarity with other workers to determine an industrial agenda.

- The right to engage in, and the right to take industrial action in the context of, "pattern bargaining" are, unequivocally, fundamental and universal human rights.

- If enacted, the present Bill will worsen Australia's breach of ILO standards in at least the following ways:

    1. The prohibitions on "pattern bargaining" in the present Bill would result in an amplification of major breaches of ILO Conventions 87 and 98 identified by the ILO Committee of Experts, ie. by further restricting the right of employees and their representatives to bargain and take industrial action in support of multi-employer or industry-wide collective agreements.

    2. The 2003 Bill would render project agreements unenforceable to the extent to which they relate to building employees, in circumstances where project agreements regulating industrial standards across a particular building site are particularly suited to and have been a common feature of the building industry, and in contravention of international labour standards requiring that the making of multi-employer collective bargaining agreements, such as project agreements, be left to the discretion of the industrial parties.

    3. In further breach of the fundamental right to strike, the 2003 Bill proposes to: render virtually all industrial action in the building and construction industry unlawful industrial action, restrict what kinds of industrial action can be "protected action" for the purposes of the *Workplace Relations Act* 1996; and impose an impracticable and obstructive scheme of secret ballots to approve protected industrial action.

4. The scope of awards is further attenuated in the 2003 Bill by a substantial reduction and prescription of "allowable award matters", thus further marginalising the role of awards in the processes of collective agreement making in the building and construction industry which is wholly inconsistent with Australia's obligation to promote and encourage collective bargaining.

5. Certified agreements in the building and construction industry will not be able to contain any provision which enables or encourages legitimate conduct by a shop steward or union official which may be considered to be an "objectionable provision" under the terms of the Bill; which is contrary to the principles of freedom of association and in particular, the rights guaranteed by Article 3 of ILO Convention No. 98.

6. There are other severe, unnecessary and impermissible restrictions on collective bargaining contained in the 2003 Bill, such as the introduction of an American-style union recognition ballot without, however, obliging the employer to recognise the union chosen by the employees and to bargain in good faith with that union.

7. The right of entry provisions in the Bill would reduce union access to workplaces in a way which would: further impair workers' freedom of association and the right to organise; undermine "right of entry" as a way of ensuring compliance with industrial instruments; and unjustifiably impede unions from operating effectively in both monitoring compliance and organising/recruiting.

8. The Building Code sought to be introduced by chapter 3 of the 2003 Bill is designed to put in place requirements which have not had the express approval of Parliament and which are likely to be utilised for purposes which would contravene Australia's international labour standards obligations.

- ICTUR therefore urges the Senate Committee to recommend that the Government takes steps to comply with its international obligations, **including its obligation to ensure that Australia's domestic laws conform to internationally recognised labour standards under the recent US-Australia Free Trade Agreement**, and to introduce amending legislation to comply with all relevant ILO Conventions, including Conventions 87 and 98.

- ICTUR also urges the Senate Committee to recommend that the Government desist from implementing the proposals in the present Bill that would compound Australia's breaches of its international obligations and generate further criticism from the supervisory bodies of the ILO.

1. INTRODUCTION

The International Centre for Trade Union Rights (ICTUR) welcomes this opportunity to respond to the Senate Employment, Workplace Relations and Education References Committee's inquiry into the provisions of the *Building and Construction Industry Improvement Bill* 2003 ("the 2003 Bill").

Having particular regard to paragraph 2(b) of the subject terms of reference, ICTUR makes this submission to assist the Senate Committee in its inquiry and report on the question "*whether the draft bill or any subsequent bill is consistent with Australia's obligations under international labour law*".

1.1 The International Centre for Trade Union Rights

ICTUR was established in 1987, and has its international headquarters and international secretariat in London. There are established national committees covering Europe, Africa, Asia, America, and Australasia. In 1993 ICTUR was recognised as an important international organisation and was granted accredited status with both the United Nations and the International Labour Organisation (ILO).

The objects of ICTUR include the defence of trade unions and the rights of trade unionists, and in that context to increase awareness of trade union rights and their violation. In performing these functions, ICTUR carries out its activities in the spirit of the United Nations Charter, the Universal Declaration of Human Rights, International Labour Organisation Conventions and Recommendations, and other appropriate international treaties. ICTUR works closely with other non-governmental organisations (ngo's) in the defence of human rights.

ICTUR works at several levels in the defence of trade union rights: international, regional and national. The Australian National Committee of ICTUR ("the Committee") was established in 1993. The Committee plays an important role in defending and advancing the rights of trade unionists, not only in Australia but also in the Asia-Pacific region. As a result,

the Committee has been accorded regional responsibility for Australia and the South-East Asia.

As part of its work in this field, the Committee made detailed submissions to the earlier Australian Senate inquiries in 1996, 1999, 2000 and 2003 on, respectively, what was then the Workplace Relations and Other Legislation Amendment Bill 1996 ("**the WROLA Bill**"), the Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill 1999 ("**the 1999 Bill**"), the Workplace Relations Amendment Bill 2000 ("**the 2000 Bill**"), and the Workplace Relations Amendment (Compliance with Court and Tribunal Orders) Bill 2003 and Workplace Relations Amendment (Codifying Contempt Offences) Bill 2003.

It is significant to note that the 1996 Senate inquiry submissions made by ICTUR in respect to the Bill that became the *Workplace Relation Act* 1996 ("the 1996 Act") were vindicated by subsequent findings of the Committee of Experts of the International Labour Organisation (ILO). As highlighted in Appendix B to this submission, the ILO Committee of Experts has found that the 1996 Act contravenes fundamental ILO standards on freedom of association and the right to collective bargaining in a manner foreshadowed by ICTUR in its 1996 Senate submissions.

In addition, the Senate inquiry submissions made by ICTUR in 1999 were further vindicated by a subsequent finding by the ILO Committee of Experts in March 2000 which reiterated its earlier observations that the 1996 Act contravenes fundamental ILO standards specifically in relation to the preference given to workplace/enterprise-level bargaining (Appendix B).

The consequence of these several ILO findings for the present 2003 Bill will be dealt with in the main body of these submissions.

1.2 The International Context

It is important to have regard to the international context within which industrial relations law operates. It is important in particular to recognise that workplace relations law is the subject of international regulation, and that there are international standards which regulate the way in

which national governments approach the question of workplace relations. Many of these international obligations have been voluntarily accepted by Australia, which as a result is under an obligation to ensure that these standards are met in domestic law and practice.

(a) The ILO

One of the most important sources of international law in the field of industrial or workplace relations is the International Labour Organisation (ILO) which was founded in 1919. **The ILO operates on the basis of a tripartite structure where representatives of workers and employers enjoy equal status with those of governments and where ILO standards are adopted with the support of unions, governments and employer reprersentatives.**

The ILO has produced a large number of conventions and recommendations: together these constitute a comprehensive international labour code. Australia became a member of the ILO in 1919. It has ratified most[1] of the key human rights Conventions. These include the *Freedom of Association and the Right to Organise Convention No 87* and the *Right to Organise and Collective Bargaining Convention No 98*. Both of these instruments were ratified in 1973.

In addition, respect for the principle of freedom of association is regarded as so important to the operation of the ILO that the obligation to do so is regarded as inherent in the fact of membership of the Organisation.

The importance of *Conventions Nos* 87 and 98 is reinforced by the *ILO Declaration on Fundamental Principles and Rights at Work* which was adopted at the International Labour Conference in 1998. This declares forcefully that:

> *... all Members [of the ILO], even if they have not ratified the Conventions in question, have an obligation, arising from the very fact of membership in the Organisation, to respect, to promote and to realise, in good faith, the principles which are the subject of those Conventions, namely:*
> *(a) freedom of association and the effective recognition of the right to collective bargaining;*
> *(b) the elimination of all forms of forced or compulsory labour;*

[1] Two core ILO Conventions that Australia has not ratified are Convention No 138 (minimum age) and Convention No 182 (worst forms of child labour).

(c) the effective abolition of child labour; and
(d) the elimination of discrimination in respect of employment and occupation.

The importance of ILO Convention No 87 in particular extends to, and for the purposes of, other international human rights treaties, such as the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). For example, Article 22(3) of the ICCPR provides that nothing in this article shall authorize States Parties to ILO Convention No 87 to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention.

(b) Australia and the ILO

It is difficult to exaggerate the importance of *Conventions Nos 87* and *98* or the reasons why they should be fully observed by Australia. So far as the former is concerned, we indicated that *Conventions Nos 87* and *98* and the principles which they embrace are regarded as two of the most important of all the ILO human rights instruments. Freedom of association and the right of collective bargaining are regarded internationally as among a select cluster of "core" labour standards that are prior to all other standards. These core standards form a subset of human rights as defined in the various instruments that make up the International Bill of Human Rights. The principle of freedom of association and the right of collective bargaining are derived from the *ILO Constitution* (and the *Declaration of Philadelphia* annexed to the *Constitution),* from *Conventions Nos 87* and *98* respectively, and from the *Declaration on Fundamental Principles and Rights at Work* of 1998. Australia has - **voluntarily** - accepted all three of these obligations, and may be regarded as bound three times over to accept these principles.

Indeed the 1998 Declaration was accepted by the present government. In 1999 the then Minister for Employment, Workplace Relations and Small Business, told the International Labour Conference of the ILO that:

The Declaration on Fundamental Principles and Rights at Work, which has the firm support of the Australian government, is a significant milestone on the road to reform of the standard-setting process. The Australian Government's workplace relations legislation reflects our

respect for the fundamental principles in the Declaration.[2]

However, as these submissions amply demonstrate, this statement of principle is totally contrary to the Australian Government's approach in practice to compliance with its obligations as a member of the ILO.

There is also now, apparently, a fourth basis on which Australia has voluntarily adopted the obligation to comply with relevant ILO Conventions. On 8 February 2004, a new bilateral free trade agreement between Australia and the United States was announced. Under this agreement, according to the Office of the United States Trade Representative, "*both parties reaffirm their obligations as members of the International Labor Organization (ILO), and shall strive to ensure that their domestic laws provide for labor standards consistent with internationally recognized labor principles.*"[3] The introduction of the 2003 Bill and the current state of the Commonwealth's labour legislation are fundamentally inconsistent with this aspect of the US-Australia Free Trade Agreement.

Apart from the fact that these are obligations voluntarily assumed, there are other reasons why Australia should be seen fully to comply with international obligations. Australia plays an important part in the community of nations: it is a highly respected nation internationally, it plays a leading part in the Commonwealth of Nations, and it has a leadership role regionally. As such it is important that Australia demonstrates leadership in the observance and application of international human rights instruments. If Australia fails in its international obligations, why should other countries not do the same? By what moral authority can Australia and other developed countries complain and criticise others for their failure to comply with international standards?

Leadership in the field of international human rights has many dimensions. But it is the obligation of good international citizenship to lead by example. This includes a willingness to ratify and accept international human rights instruments, and a willingness also to

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[2] Address to Plenary Session of the International Labour Conference, 87"' Session, Palais des Nations, Geneva, 9 June 1999.

[3] 'Free Trade "Down Under" – Summary of the U.S.-Australia Free Trade Agreement', 8 February 2004, website of the Office of the United States Trade Representative (www.ustr.gov).

implement them fully and effectively: there is no room for selective application or enforcement. Leadership also implies an obligation to lead by persuasion and pressure, to use diplomatic and economic opportunities to enhance the global commitment to human rights instruments: this is a role which can be performed only by those countries which themselves comply with their obligations. And leadership also implies a willingness to lead with others, to enable others - such as ngo's and trade unions - to work towards the promotion of human rights standards throughout the world.

(c) The Workplace Relations Act 1996, the 2003 Bill and Conventions Nos 87 and 98

It is against this background that ICTUR observes with great regret and concern that the 1996 Act remains in fundamental breach of ILO Conventions including, most notably, Convention Nos 87 and 98 and the fundamental human rights principles which they embrace.

An examination of the key provisions of the 1996 Act dealing with industrial action and multi-employer collective agreements is contained in Appendix A to these submissions; and an extended analysis of the ILO Committee of Experts findings in relation to these provisions is in Appendix B.

In summary, the ILO Committee of Experts found in 1998 that the 1996 Act contravened Convention No 98 by:

- **favouring single-business agreements over other levels of agreements;**

- failing to promote collective bargaining as required by Article 4 owing to the primacy of AWAs; and

- limiting the scope of negotiable issues. (ILO, Report of the Committee of Experts on the Application of Conventions and Recommendations, ILC 86th Session, Report III (Part 1A), pp 222 - 4).

In 1999 the ILO Committee of Experts expressed concern about the limits on the right to strike contained in the 1996 Act, said to be "a long and complicated statute". Three areas of particular concern were identified, namely:

- restrictions on the subject matter of strikes, **including the effective denial of the right to strike in the case of the negotiation of multi-employer, industry-wide or national-level agreements;**

- the prohibition of sympathy action; and

- restrictions beyond essential services.

In its Observations in 1999, the ILO Committee of Experts expressed the hope that the Australian government "will indicate in its next report measures taken or envisaged to amend the provisions of the Workplace Relations Act", "to bring the legislation into conformity with the requirements of the Convention" (ILO, Report of the Committee of Experts on the Application of Conventions and Recommendations, ILC 87th Session, Report III (Part 1A), pp 204-7).

Having carefully considered the Australian Government's detailed response to its previous observations, the Committee of Experts in 2000 again called upon the Government to:

- take measures to ensure that workers are adequately protected against discrimination based on negotiating a collective agreement **at whatever level;** and

- take steps to amend the 1996 Act to ensure that collective bargaining will not only be allowed, but encouraged**, at the level determined by the bargaining parties** (ILO, Report of the Committee of Experts on the Application of Conventions and Recommendations, ILC 88th Session 2000, Report III (Part 1A), pp 222-5).

ICTUR urges the Senate Committee to recommend that the government takes steps to comply with its international obligations, and to introduce amending legislation to comply with all relevant ILO Conventions, including Conventions Nos 87 and 98 and the Termination of Employment Convention.

ICTUR also urges the Senate Committee to recommend that the government desist from implementing the proposals in the 2003 Bill that would compound Australia's breaches of its international obligations and generate further criticism from the supervisory bodies of the ILO.

The 2003 Bill represents the Government's response to the Report of the Cole Royal Commission into the Building and Construction Industry ("the Royal Commission"). The Royal Commission recommendations, and the Government's response to them, have sought to emphasise a perceived need for cultural change involving the restoration of the "rule of law" within the industry.[4] Indeed, section 3(2)(b) of the 2003 Bill expressly states that it aims to achieve its objects by, inter alia, "*promoting respect for the rule of law*".

As highlighted above, the Australian Government is bound to implement legislation that conforms with the fundamental principles of international labour law. The 2003 Bill patently seeks to compound Australia's breach of international labour law with a litany of offending provisions. **It selectively and unfairly targets building industry workers with exclusion from basic and universally applicable labour standards.**

ICTUR therefore urges the Senate Committee to reject this Bill in its entirety and thereby avoid further disregard and loss of respect, by Australia, for the "rule of law" at an international level.

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[4] *Final Report of the Royal Commission into the Building and Construction Industry*, Vol 1, February 2003, at p 4; and *Workplace Express*, "Abbott confident on Cole", 29 June 2003.

Quite apart from the need to comply with ILO Conventions, ICTUR believes that there is in any event no need for additional legislation of the kind proposed by the government. In so far as this legislation proposes further restrictions on the freedom to bargain collectively and to strike in the building and construction industry, it is already the case that Australia now has one of the most restrictive regimes in the developed world. The level of strike activity has been and is now in steep decline, both here and in other countries. Indeed it has been reported that the levels of industrial action in Australia are at their lowest level since the end of the Second World War.

In terms of cost performance and productivity, international research has shown that the building and construction industry in Australia compares favourably to international equivalents.[5]

In this context there is a need for a strong and compelling reason for the introduction of additional restrictions on collective bargaining and industrial action in the building and construction industry, particularly where these will almost certainly violate international human rights instruments.

ICTUR also notes that the content of the 2003 Bill substantially reproduces some of the provisions in the 1999 Bill and the 2000 Bill that have previously been rejected by the Senate. For the reasons advanced in this submission, ICTUR urges that the 2003 Bill should also be rejected. **ICTUR believes that the case for additional, industry-targeted legislation in the terms of the 2003 Bill has not been established.**

[5] *Workplace Regulation, Reform and Productivity in the International Building and Construction Industry,* Royal Commission into the Building and Construction Industry, November 2002 Discussion Paper 15, p. 2.

2. AUSTRALIA'S INTERNATIONAL OBLIGATIONS IN RESPECT TO INDUSTRIAL ACTION AND COLLECTIVE BARGAINING

2.1 Introduction

In the areas of the right to strike and collective bargaining, both existing Australian law (including the 1996 Act) and the provisions of the 2003 Bill are in clear breach of Australia's international obligations. That this is so in respect of the 1996 Act is no mere assertion on the part of ICTUR: the ILO's Committee of Experts has made clear and unequivocal findings to this effect over a number of years, including most recently in 2000 (see Appendix B). The Committee can be expected to make further findings of breach if the provisions of the 2003 Bill dealing with pattern bargaining, the availability of protected action, freedom of association and union right of entry pass into law.

Moreover, the fundamental rights to collective bargaining and to strike are general in nature; applicable to all employees without distinction between or within particular industries or segments of the economy, with the sole possible exceptions of public servants engaged in the administration of the State, and workers in essential services in the strict sense of the term.[6]

There is no suggestion that building and construction industry employees are workers in essential services properly so called, nor that they are public servants in the administration of the State. It is absolutely fundamental that all workers should have all the rights and protections afforded under international labour law.

The Australian building and construction industry is not exempt from compliance with these fundamental rights and protections.

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[6] B Gernigon et al., "ILO principles concerning the right to strike", *International Labour Review*, Vol 137 (1998), No. 4, at p. 448; and B Gernigon et al., "ILO principles concerning collective bargaining", *International Labour Review*, Vol. 139 (2000), No. 1, at p. 39.

2.2 Sources and Nature of International Obligations in respect of Collective Bargaining

The range of rights and obligations which constitute the necessary elements of any effective system of collective bargaining are based on the Conventions, Recommendations and jurisprudence of the ILO which recognise a series of principles which pervade these submissions. Effective collective bargaining also presupposes a range of conditions including the right of unions to take industrial action to promote and protect the interests of their members (see 2.3 below).

The principal ILO instrument concerning collective bargaining is the Right to Organise and Collective Bargaining Convention No. 98 (1949) which Australia ratified in 1973. There is a broad international consensus that this Convention embodies a fundamental element of the "core" international labour standards.

There is a select cluster of "core" labour standards that are generally regarded as fundamental and prior to all other standards. These core standards are so regarded because they form a subset of internationally accepted human rights as defined in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights which collectively constitute the International Bill of Human Rights. The core standards were agreed upon as such in the Declaration of the World Social Summit in Copenhagen in 1995. In addition, a recent report of the ILO[7] identified the right of collective bargaining among a few labour standards that were of special importance from a humanitarian point of view.

The right to collective bargaining is one of these core standards.

This right, like other core standards such as the right to freedom of association, is a framework condition that is essential to the enjoyment of other labour standards. For example, working-time standards can only be meaningful in a situation where workers are

[7] ILO (1994), *The Social Dimensions of the Liberalisation of World Trade,* GB.261/WP/SLD/1 November, Geneva.

not forced to accept the working conditions unilaterally laid down by employers because their right to bargain collectively is not respected.

The ILO's Declaration of Philadelphia annexed to its Constitution provides in Chapter III that:

> *The Conference recognises the solemn obligations of the International Labour Organisation to further among the nations of the world programs which will achieve:*
>
> *(a) the effective recognition of the right of collective bargaining …*

Article 4 of Convention No. 98 deals specifically with collective bargaining and provides:

> *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 and employers' organizations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements.*

The encouragement and promotion of collective bargaining provided for by Convention No. 98 is further elaborated by Convention No. 154 and Recommendations No. 94 and No. 163.[8]

The extensive jurisprudence developed by supervisory bodies of the IL0[9] has elaborated upon the nature and extent of this right of collective bargaining. The ILO Committee on Freedom of Association has observed[10] that:

> *... the determination of the bargaining level is essentially a matter to be left to the discretion of the parties and ... legislation should not constitute an obstacle to collective bargaining at the industry level ...*
> *This does not imply that employers have to accept multi-employer bargaining but simply that the parties should be left free to decide for themselves on the means (including industrial action) to achieve particular bargaining objectives. The Committee therefore reiterates that workers and their*

[8] Note that Australia has not ratified ILO Convention No 154.
[9] The ILO Governing Body's Committee on Freedom of Association, and the Committee of Experts on the Application of Conventions and Recommendations.
[10] *Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO* (4th (revised) edition, International Labour Office, Geneva, 1996) (referred to henceforth as the *1996 Digest*), at para. 490 at pp. 103-104.

organisations should be able to call for industrial action in support of multi-employer contracts.[11]

Recently, in examining, the deficiencies of the 1996 Act in this regard, the ILO Committee of Experts has repeatedly asserted the right of unions to engage in (and to take industrial action in advancing) multi-employer or industry-level bargaining as a core international labour standard (see Appendix B).

2.3 Sources and Nature of International Obligations in respect of Industrial Action

The right of workers to take industrial action has a number of sources in international law, which also delineate the scope of that right. For example, the *International Covenant on Economic, Social and Cultural Rights* (ICESCR), to which Australia is a party, expressly provides for the right to strike in Article 8. Indeed, article 8 of the ICESCR vitally underpins the constitutional validity of certain provisions of the 1996 Act that provide for protected industrial action, that is, as a partial (though inadequate) implementation of Australia's international obligations pursuant to the external affairs power.[12]

However, it is the extensive jurisprudence developed by supervisory bodies of the ILO that most clearly defines the right to strike under international law. The right to strike is not expressly provided for in the ILO's Constitution, nor in core conventions of the ILO such as Conventions No 87[13] or No 98.[14] However, the ILO supervisory bodies have "consistently taken the view that (the right to strike) is an integral part of the free exercise of trade union rights which are guaranteed by Conventions Nos. 87 and 98, and by the Constitution of the ILO".[15]

So the right to strike has been implied from one of the foundational principles of the ILO, ie. the principle of freedom of association. The ILO has consistently found that a right to

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[11] 295th Report, Case No. 1698, para. 259.
[12] *Victoria v The Commonwealth* (1996) 187 CLR 416 at 544-547.
[13] Freedom of Association and Protection of the Right to Organise.
[14] The Right to Organise and to Bargain Collectively.
[15] B Creighton, `Freedom of Association', in R Blanpain and C Engels (eds.), *Comparative Labour Law and Industrial Relations in Industrialized Market Economies, (5th* edition, Kluwer, Deventer, 1993), at *pp. 105-106.*

strike is an integral part of freedom of association. Without a right to strike, freedom of association is effectively nullified. In particular, it has been implied from the right of unions to organise their activities and formulate their programs, including furthering and defending the interests of workers, which is enshrined in Articles 2, 3, 8 and 10 of Convention No 87.

By Article 2, Convention No 87 provides that "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 authorization". Article 3 in turn provides that "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". Article 3 further provides that the public authorities "shall refrain from any interference which would restrict this right or impede the lawful exercise thereof".

It is important to recognise that the principle of freedom of association is considered so fundamental that Convention No 87 applies regardless of whether a country has ratified it; it applies simply by virtue of membership of the ILO.[16] Further, the jurisprudence developed on the basis of Convention No 87 also applies universally; all members of the ILO, including Australia, are therefore obliged to provide for the right to strike as determined through that jurisprudence.

As to the breadth or scope of the right to strike, in 1994 the ILO Committee of Experts stated (drawing, in part, on its own earlier observations):

> ... *the right to strike is one of the essential means available to workers and their organisations for the promotion and protection of their economic and social interests. These interests not only have to do with better working conditions and pursuing active demands of an occupational nature, but also with seeking solutions to economic and social policy questions and to labour problems of any kind which are of direct concern to the workers. The Committee's reasoning is therefore based on the recognised rights of workers' and employers' organisations to organise their activities and formulate their programs for the purpose of furthering and defending the interests of their members (Articles 3, 8 and 10 of*

[16] In fact, freedom of association has been described as "the *conditio sine qua non* of the tripartism that the Constitution of the ILO enshrines in its own structures and advocates for member States: without freedom of association, the concept of tripartism would be meaningless": see the *1996 Digest,* at p. 1.

> *Convention No. 87).*
> …
> *... the promotion and defence of workers' interests presupposes means of action by which the latter can bring pressure to bear in order to have their demands met.*
>
> *In light of the above, the Committee confirms its basic position that the right to strike is an intrinsic corollary of the right to organise protected by Convention No. 87.*[17]

In its 1998 Report to the Governing Body of the ILO marking the 50th anniversary of Convention 87, the ILO Committee of Experts berated the continued restrictions "on the means which can be used by workers' organisations for the furtherance and defence of their members' interests. This is particularly flagrant with respect to the right to strike."[18] The Committee of Experts held in 1983 that:[19]

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

If the right to strike is essential for the protection of the workers' interests on a broader front, it is *a fortiori* essential for the protection of their interests in relation to bargaining with their employer.[20]

It is clear from the above discussion that the right to strike under international law is a broad one, and that providing for the right is an obligation cast on all members of the ILO including Australia.

Unequivocally, the right to engage in and the right to take industrial action in the context of "pattern bargaining" are fundamental and universal human rights.

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[17] *Report of the ILO Committee of Experts on Freedom of Association and Collective Bargaining*, (International Labour Office, Geneva, 1994), (referred to henceforth as the *1994 General Survey)*, at paras. 147, 148 and 151 (emphasis added).
[18] *Committee of Experts' Report* to the 68th Conference, 1998, p.15.
[19] *General Survey*, 1983, para 200,205.
[20] J Hendy QC, "Industrial Action and International Standards" in K D Ewing ed., *Employment Rights at Work*, Institute of Employment Rights, 2001.

The concept of "pattern bargaining" is simply a partisan pejorative[21] way of describing a legitimate activity in which unions have always been engaged, ie. acting in solidarity with other workers to determine an industrial agenda.

2.4 Sources and Nature of International Obligations in respect of Freedom of Association

Aside from the ILO Conventions that are dealt with elsewhere in these submissions the key documents enshrining the universal right to freedom of association are well known. Article 23(4) of the United Nations Declaration of Human Rights of 1948 provides that:

> *Everyone has the right to form and join trade unions for the protection of his interests.*

The ICESCR similarly provides in Article 8(1) for:

> *The right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organisation concerned, for the promotion and protection of his economic and social interests.*

This Convention also provides in standard form:

> *No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others.*

This makes explicit that which may be properly inferred from the expression of the right in the UN Declaration and other similar instruments.

The International Covenant on Civil and Political Rights in Article 22 makes similar (but not identical) provision:

> *1. Everyone shall have the right to freedom of association with others, including the right to form*

[21] As acknowledged by Munro J in *Australian Industry Group v AFMEPKIU* (Print T1982, 16 October 2000) at [46].

and join trade unions for the protection of his interests.

2. *No restrictions are to be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the right and freedoms of others. This Article shall not prevent the imposition of restriction on members of the armed forces and of the police in their exercise of this right.*

3. *Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention.*

Labour rights and obligations, and in particular the right to strike, are further embodied in other international treaties and instruments. The European Union has the Charter of Fundamental Rights (which was approved at the Intergovernmental Conference in Nice, December 2000) now enshrined as Part II of the draft European Union Constitution (clause 28). The Council of Europe has enacted the European Convention on Human Rights and Fundamental Freedoms and the related European Social Charter of 1961 (and the Revised Social Charter of 1996).

Many other international instruments also provide for the right to strike.[22] None of these other instruments have application to Australia but they nonetheless relevantly express the standards, or at least the aspirations of states which would wish to be seen as democratic even if, in fact, some are not.

The Charter of the Organisation of American States 1948 (with 31 member states) makes clear in terms that the right to strike is a right included within freedom of association. Art.43(c) of the Charter provides:

> *Employers and workers, both rural and urban, have the right to associate themselves freely for the defence and promotion of their interests, including the right to collective bargaining and the workers' right to strike…*

Inter-American Charter of Social Guarantees (adopted by the 9th International Conference of

[22] The analysis immediately following is extracted from J Hendy QC, "Industrial Action and International Standards" in K D Ewing ed., *Employment Rights at Work*, Institute of Employment Rights, 2001.

American States, Bogota) 1948 provides for freedom of association and the right to join unions. Art.27 provides that "Workers have the right to strike. The law shall regulate the conditions and exercise of that right."

The Additional Protocol to the American Convention on Human Rights[23] in the Area of Economic, Social and Cultural Rights (The Protocol of San Salvador) 1988 links the right of union membership with the right to strike. Indeed, the language, though not beyond argument, implies that the right to strike is an extension of the right of union membership insofar as it protects and promotes the interest of workers. Article 8 provides:

> *The States Parties shall ensure the right of workers to organise trade unions and to join the union of their choice for the purpose of protecting and promoting their interests. As an extension of that right, trade unions shall be permitted to establish national federations or confederations, or to affiliate with those that already exist, as well as to form international trade union organisations and to affiliate with that of their choice. All these organisations shall be permitted to function freely. The State Parties shall also ensure the right to strike. The exercise of the rights set forth above may be subject only to restrictions established by law, provided that such restrictions are characteristic of a democratic society and necessary for safeguarding public order or for protecting public health or morals or the rights and freedoms of others. Members of the armed forces and the police and of other essential public services shall be subject to limitations and restrictions established by law.*

The North American Agreement on Labour Co-operation ("NAALC") was signed in August 1992 by the Presidents of the USA and of Mexico and the Prime Minister of Canada and took effect from 1st January 1994. It is the "side-agreement" dealing with labour rights to the North American Free Trade Agreement ("NAFTA") of 17th December 1992. It sets out 11 "labour principles" of which the first three are as follows:

1. Freedom of association and protection of the right to organise.
2. The right to bargain collectively.
3. The right to strike.

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[23] However, the American Convention on Human Rights (22nd November 1969) does not expressly provide a right to strike. It is not known whether the supervisory bodies have held that a right to strike is to be implied. However, since the certain purposes of the freedom to associate is specified and these purposes necessarily involve activity (such as prayer, or the playing of sport), it is difficult to imagine that freedom to associate for labour purposes does not include the right to activity essential to labour associations. Art.16(1) provides that: "Everyone has the right to associate freely for ideological, religious, political, economic, labour, social, cultural, sports or other purposes."

These three rights are plainly inter-related. There does not yet appear to be jurisprudence from the supervisory bodies on the inter-relationship between them[24].

Convention 1 on Labour Standards, 1966, of the League of Arab States 1945 recognises the right of association in trade unions (Art.76) and the right to strike in cases of labour dispute subject to the requirement of preservation of public order and non use of the strike weapon during conciliation or arbitration to resolve the dispute.

These instruments demonstrate the widespread acceptance of important labour rights including the right of workers to bargain collectively, the obligation upon contracting States to promote collective bargaining and the right of access to the workplace for trade union representatives.

The Conventions of the ILO specifically provide for the right to form and join trade unions and make express provision against anti-union discrimination. The principal relevant Conventions of the ILO in this respect are Conventions Nos 87 and 98. The relevant terms of these Conventions, and the extensive associated jurisprudence, are dealt with elsewhere in these submissions. Suffice it to note at this point that ILO jurisprudence makes clear that the right to union membership is not restricted to the right to hold a membership card. The right to membership also involves the right, through union membership, to protection of the members' interests by the union including the right to take strike action in the last resort. This right to union membership expressly involves the right of employees' representative unions to participate in collective bargaining and the obligation of member States to encourage and promote collective bargaining.

2.5 Sources and Nature of International Obligations in respect of Union Right of Entry

The ILO's Freedom of Association and Protection of the Right to Organise Convention No

[24] For a discussion see L. Compa "NAFTA's Labour Side Agreement Five years On: Progress and Prospects for the NAALC", (1999) 7 C.L.E.L.J. 1-30; and R.J.Adams, "Using the North American Agreement on Labour Co-operation to Achieve Industrial Relations Reform", (1999) 7 C.L.E.L.J. 31-44.

87 provides, in Article 11:

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

Article 8, paragraph 2 of Convention No 87 provides:

> *The law of the land shall not be such as to impair ... the guarantees provided for in this Convention.*

Convention No 87 was ratified by Australia on 28 February 1973. This means that Australia is obliged in international law to take all necessary and appropriate measures to ensure that workers can freely exercise the **right to organise.** The right to organise is derived from the right to **freedom of association.** Australia is also bound in international law to ensure that its laws do not impair the right to organise.

In interpreting the principles of freedom of association and the right to organise, the Freedom of Association Committee of the Governing Body of the ILO has held that:

> *Workers' representatives should enjoy such facilities as may be necessary for the proper exercise of their functions, including the right of access to workplaces.*[25]

In its 1994 General Survey, the ILO's Committee of Experts stated:

> *Freedom of Association implies that workers' and employers' organisations should have the right to organise their activities in full freedom and formulate their programs with a view to defending all of the occupational interests of their members, while respecting the law of the land. This includes in particular ... the right of trade union officers to have*
> …
> *access to places of work and to communicate with management ... and in general, any activity involved in the defence of members' rights.* [26]

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[25] *Freedom of Association - Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO,* Fourth (revised) edition, International Labour Office, Geneva, paragraph 957 [See 234th Report, Case no. 1221, paragraph 114, and Shaw, JW & CG Walton, "A Union's Right of Entry to the Workplace" (1994) XS) 546

[26] 2 General Survey of the Reports of the Freedom of Association and the Right to Organise Convention and the Right to Organise and Collective Bargaining Convention, 1994, ILO, paragraph 128. See also Submission of ICTUR to the Senate Economics References Committee Inquiry into the Workplace

The right to organise is not limited to action in relation to existing members of unions. The Freedom of Association Committee has also held that:

> *Governments should guarantee access of trade union representatives to workplaces, with due respect for the rights of property and management, so the trade unions can communicate with workers, in order* ***to apprise them*** *of the potential advantages of unionization.*[27]

In summary, international law recognises that the right to freedom of association is a fundamental human right. It also recognises that the right to organise is an important corollary of freedom of association - it provides a practical way of ensuring that freedom of association is not violated. Equally, the right of unions to access the workplace is recognised as a significant part of the right to organise. Australia has acknowledged these principles and bound itself to them in international law.

These requirements of international law are also recognised, at least in principle, in the 1996 Act as it currently exists. Section 3 sets out the objects of the Act, providing:

> *The principal object of this Act is to provide a framework for cooperative workplace relations which promotes the economic prosperity and welfare of the people of Australia by:*
> …
> *e) providing a framework of rights and responsibilities for employers and employees, and their organisations, which supports fair and effective agreement-making and ensures that they abide by awards and agreements applying to them; and*
> *f) ensuring freedom of association, including the rights of employees and employers to join an organisation or association of their choice, or not to join an organisation or association; and*
> …
> *k) assisting in giving effect to Australia's international obligations in relation to labour standards.*

Relations and Other Legislation Amendment Bill 1996, paragraph 79.

[27] 3 *Freedom of Association - Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO,* Fourth (revised) edition, International Labour Office, Geneva, paragraph 954 [See 284th Report, Case No. 1523, paragraph 195].

In addition to the basic rights of freedom of association and the right to organise, the object described in paragraph (f) indicates another important purpose of a legislation which regulates the access of unions to workplaces: right of entry is a mechanism for monitoring compliance with industrial instruments. A proper system of entry is important for ensuring that workers rights are not abused.

3. THE PROVISIONS OF THE 2003 BILL

3.1 Introduction

Rather than rectifying the extensive breaches of Australia's international obligations to provide for the right to strike and the right of collective bargaining, the Government, having repeatedly failed to broadly implement its industrial agenda by amending the 1996 Act, now seeks through the provisions of the 2003 Bill to further restrict such rights, albeit in a particular industry. The net effect of these provisions will be to take Australia even further out of compliance with our international obligations. Of particular concern in this respect are the provisions of the 2003 Bill dealt with in this part of the submissions.

3.2 Chapter 5, Part 2 - "Pattern bargaining"

The concept of "pattern bargaining" is simply a partisan pejorative way of describing a legitimate activity in which unions have always been engaged, ie. acting in solidarity with other workers to determine an industrial agenda. The purpose of pattern bargaining may be to try and improve industrial conditions across an industry or industry sector. There is nothing fundamentally objectionable with that approach to collective barghaining. That approach is entirely in keeping with international labour standards and with what is a guaranteed international human right.

Section 56 of the 2003 Bill would expressly prohibit the Australian Industrial Relations Commission (AIRC) from certifying an agreement unless it is satisfied that it did not result from pattern bargaining.

The 2003 Bill largely repeats the definition of "pattern bargaining" that was proposed in the 2000 Bill. It is an extremely broad definition that encompasses all conduct that involves seeking common wages or conditions of employment and that extends beyond a single business (s 8(1)) except, inter alia, to the extent that a person engaged in such conduct is "*genuinely trying to reach agreement on the matters that are the subject of the conduct*" (s 8(2)).

In order to achieve the requisite degree of such "genuine trying", it has been held that a party making common claims beyond a single employer must not do so in a way that denies individual negotiating parties (ie. relevant single businesses, or parts thereof) opportunity to concede, or to modify by agreement, such claims; and must not advance such common claims in a way that effectively seeks agreement from or through entities that are not the negotiating party to whom industrial action or the relevant bargaining period is directed.[28]

Nevertheless, so long as a union makes a genuine effort to have each employer concede the benefit sought, the AIRC has held that a common (industry-wide and/or national level) set of demands for conditions of employment, or for timing of negotiating rounds and outcomes is not sufficient in itself to establish that a party is not genuinely trying to reach agreement.[29]

However, section 62 of the 2003 Bill further prescribes conduct that is indicative of a party "genuinely trying to reach an agreement". Such conduct is said to include, among numerous indicia, not refusing to meet with one or more of the other negotiating parties or with representatives of a negotiating party: s 62(k) and (l). This level of prescription about what does or does not constitute "pattern bargaining" previously has been considered and rejected by Parliament, particularly with reference to the amending bill that became the *Genuine Bargaining Act* 2002.[30] ICTUR submits that this approach once again ought to be rejected.

Moreover, section 67 of the 2003 Bill would, as a practical matter, virtually negate any prospect of unions making and/or pursuing common claims even with the intention of genuinely trying to reach agreement with each employer or single business. This is so because the Federal Court would be empowered to grant an injunction restraining a union from engaging in "pattern bargaining" (ie. including making common claims) if it is satisfied that the union "*is engaging, has engaged or is proposing to engage in pattern bargaining in respect of building employees*"; and may so injunct a union "*whether or not the defendant has previously engaged in*

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[28] *Australian Industry Group v AFMEPKIU* (Print T1982, per Munro J, 16 October 2000) at [49].
[29] Ibid., at [46].
[30] Section 170MW(2) was ultimately amended to include a broead refernce to "genuinely trying to reach agreement" with a note referring to the aforesaid decision of Munro J (see above n 28) as an indication of how the power to suspend or terminate a bargaining period might be applied.

conduct of that kind" and "*whether or not there is an imminent danger of substantial damage to any person if the defendant engages in conduct of that kind*": s 67(1) and (4).

The breadth of s 67 is likely to render the making common claims, of itself, a sufficient basis for attracting injunctive relief on the basis that it either constitutes or is at least indicative of a person "*proposing to engage in pattern bargaining*". For all practical purposes the actual manner in which such common claims might in fact be pursued by a negotiating union would be thus rendered otiose.

These provisions (combined with section 83 of the 2003 Bill and 170MW of the 1996 Act) would also allow the bargaining period to be suspended or terminated in cases of pattern bargaining, and preclude protected action altogether on the basis that a union has failed to comply with an order or direction of the AIRC in relation to negotiations.

Section 67 of the 2003 Bill would render project agreements unenforceable to the extent to which they relate to building employees. Project agreements regulating industrial standards across a particular building site are and have been a common feature of the building industry. Project agreements are particularly suited to the nature of that industry. The prevalence of project agreements in this industry and the widespread support of them by both employers and unions well demonstrate the practicality and desirability of common industrial conditions across a building site where that is considered by the industrial parties to be appropriate. It is for the industrial parties to determine whether particular terms and conditions should apply commonly across a building site. International labour standards require that the making of multi-employer collective bargaining agreements, such as project agreements, be left to the discretion of the industrial parties.

The 2003 Bill would further compound the major breaches of *Conventions 87* and *98* highlighted by the ILO Committee of Experts in its 1998, 1999 and 2000 findings (see Appendix B). The 2003 Bill limits freedom of association in the building and construction industry by constraining the activities of unions to form links and develop solidarity beyond the limits of the single workplace in order to improve industrial conditions across an industry or industry sector. There is nothing fundamentally objectionable with that

approach to collective bargaining. It is entirely in keeping with what is the international norm and with what is required by international labour standards.

The 1996 Act has already been condemned by the Committee because of the excessive restrictions it places on industrial action in pursuit of multi-employer or industry-wide agreements. These provisions would place further, unwarranted restrictions on industrial action in support of such agreements, despite these observations by the Committee of Experts, and earlier findings of the Committee on Freedom of Association to the effect that workers and their organisations should be able to take strike action to obtain multi-employer bargaining outcomes.[31] On this issue the Committee on Freedom of Association has also observed that:

> *... the determination of the bargaining level is essentially a matter to be left to the discretion of the parties and ... legislation should not constitute an obstacle to collective bargaining at the industry level ...*
>
> *This does not imply that employers have to accept multi-employer bargaining but simply that the parties should be left free to decide for themselves on the means (including industrial action) to achieve particular bargaining objectives. The Committee therefore reiterates that workers and their organisations should be able to call for industrial action in support of multi-employer contracts.*[32]

Provisions which prohibit or constrain strikes if they are concerned with the issue of whether a collective employment contract will bind or be negotiated with more than one employer are clearly contrary to the principles of freedom of association and the right to strike.

3.3 Chapter 5, Part 1 – "Allowable Award Matters"

The 2003 Bill would have the effect of further marginalising the scope and role of awards in the processes of collective agreement making in the building and construction industry.

Compared with the existing list of allowable award matters in s. 89A(2) of the 1996 Act, the

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[31] *1996 Digest*, para. 490 at pp. 103-104.
[32] 295th Report, Case No. 1698, para.259.

following items are deleted from s 51(2) of the 2003 Bill:

- skill-based career paths,
- the times within which ordinary hours of work are perfromed ,
- bonuses (other than for outworkers),
- long service leave,
- notice of termination, and
- jury service.

Other items on the existing list of allowable award matters are recast with greater specificity and prescription, such as the replacement of "allowances" with provision for monetary allowances for expenses incurred in the course of employment, responsibilities or skills not taken into account in the wage rate, or disabilities associated with work in particular conditions or locations (s 51(2)(j)).

The proposed replacement of "redundancy pay" with payments in relation to termination that is "on the initiative of the employer" and "on the grounds of operational requirements" may have the effect of excluding from awards payments made in circumstances of voluntary redundancy and the myriad circumstances in which employees' positions become redundant notwithstanding "operational requirements". This would result in the exclusion of matters from regulation by award for which there is simply no justification.

It was recognised in *Australian Teachers Union v Minister for Education of Victoria & Ors*[33] that offers of voluntary redundancy packages may involve significant unfairness. In this case, the offers had been attended by pressure, confusion, stress and lack of communication by the employer. Employees were asked to lodge expressions of interest which were claimed to be non-binding. However, such expressions of interest were used as one criterion upon which a person was declared "excess". This exposed employees categorised as such to real insecurity of employment.

[33] (1992) 46 IR 371.

Together with the proposed removal of "notice of termination"' from the allowable award matters, this potential exclusion of voluntary redundancy payments is part of a general restriction on the AIRC's power to include measures to ameliorate the harsh effects of termination of employment through award-based protections.

In it submissions to the Senate Committee inquiry into the 1996 Act, ICTUR noted the failure of that legislation to preserve the AIRC's power to include in awards the full range of matters required by the Termination of Employment Convention. ICTUR reiterates that submission in respect to the 2003 Bill. There is simply no reasonable justification for curtailing the powers of the AIRC to regulate employees' rights on termination of employment in awards.

A new provision is introduced that would render, inter alia, the following items not allowable (s 51(4)):

- transfers between locations,
- training or education (except in relation to leave and allowances for trainees or apprentices),
- recording of hours of work,
- accident make-up pay,
- the right of a union to represent an employee in a dispute settling procedure, unless it is the employee's chosen representative,
- transfers from one type of employment to another,
- the number or proportion of employees that can be employed in a particular type of employment or classification,
- direct or indirect prohibitions on employing employees in a particular type of employment or in a particular classification,
- the maximum or minimum hours of work for regular part-time employees.

The significance of the list of allowable award matters goes beyond the prescription of minimum standards, as many awards have traditionally been made by consent and are in

truth a form of collective bargaining. Thus, to the extent that the 2003 Bill reduces the scope of a certain type of collective agreement, it impermissibly interferes in the scope of collective bargaining, which ought to be determined by the parties themselves. As has previously been observed from the point of view of ILO Convention No. 98, the right to voluntary collective bargaining under Article 4 requires respect for the autonomy of the negotiating parties. In this regard, the ILO Committee of Experts "*considers that measures taken unilaterally by the authorities to restrict the scope of negotiable issues are often incompatible with the Convention*…".[34]

Therefore, ICTUR considers that the further attenuation of the scope of awards as proposed in the 2003 Bill is wholly inconsistent with Australia's obligation to promote and encourage collective bargaining. The effect of this attenuation of awards is to diminish the viability and attractiveness of awards as an instrument to reflect the terms of collective agreements.

3.4 Other restrictions on collective bargaining and the autonomy of bargaining parties

The 1996 Act currently requires the AIRC to delete from an award or collective agreement any "objectionable provision". Objectionable provisions are defined to mean a provision which requires or permits the contravention of the freedom of association provisions in the Act.

However, the proposed provisions amend the definition of "objectionable provisions" in a manner that is inconsistent with Convention No. 98. The definition of "objectionable provisions" is extended to include, inter alia, provisions in a collective agreement or an award which indicate support for persons being members of a "building association" or trade union, and provisions which require a person to encourage others to become or remain members of a trade union: s 7(1) of the 2003 Bill.

The proposed provisions, if enacted, will impose legislative constraints on the range of matters which may be negotiated by employers and employees and their unions in

[34] The *1994 General Survey,* at para 250.

contravention of the principle of voluntary negotiation of collective agreements. That is, collective agreements may not contain "objectionable provisions" as defined. Nor may they (other than certified agreements) require an employer to provide the same terms and conditions to all of its employees and independent contractors. The definition also includes clauses containing bargaining fees to be paid to unions.

As noted by the ILO Committee of Experts in 1983:

> *The principle of voluntary negotiation of collective agreements, and thus the autonomy of the bargaining parties, is a fundamental aspect of Convention No. 98.*
>
> *While machinery and procedures are established in many countries by legislation, they must be designed to facilitate bargaining between the two sides of industry and leave them free to reach their own settlements.*[35]

As noted elsewhere in these submissions (Appendix B), constraints on the ability of the direct parties to negotiate have been considered to conflict with Australia's obligations under ILO Convention No. 98.

The *1994 General Survey* noted at para 250:

> *The Committee considers that measures taken unilaterally by the authorities to restrict the scope of negotiable issues are often incompatible with the Convention…*

In particular, legislative interference in the matters able to be negotiated in collective agreements has been considered to impinge upon the rights guaranteed in Article 4 of Convention No. 98 in relation to: exclusion of working time; ban on the inclusion of secondary boycott clauses; the ability to provide for a system of collection of union dues; legislative amendment of collective agreements.[36]

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[35] *Report of the ILO Committee of Experts on Freedom of Association and Collective Bargaining*, (International Labour Office, Geneva, 1983), (referred to henceforth as the *1983 General Survey)*, at paras 303-304.

[36] Digest of decisions and principles of the Freedom of Association Committee of the ILO, 1996, paras 806-811.

Any provision in a certified agreement or award which for example, recognises the rights of shop stewards or trade union officials, and any provisions which provide for their involvement in the workplace and recruitment of members, could be considered to be an indication of support for membership of a trade union.

At the core of the activities of a shop steward or union official, is a requirement that he or she "encourages another person to become, or remain, a member" of a trade union. Therefore, any provision in a certified agreement which enables or encourages such legitimate conduct by a shop steward or official may be considered to be an "objectionable provision". Such effect would be clearly contrary to the principles of freedom of association and in particular, the rights guaranteed by Article 3 of Convention No. 98.

Generally, chapter 7 of the 2003 Bill targets the building industry with more onerous provisions and substantially higher penalties for offences set out in Part XA of the 1996 Act. It is a feature of the Bill throughout that penalties have been substantially increased from the existing provisions in the Act.

The prohibition on strike pay (sections 136-137 of the 2003 Bill) was an aspect of the current 1996 Act that was taken up and criticised by the ILO Committee of Experts in its observations made on Convention 98 in 2000, with effect that that it is incompatible with the Convention for legislation to impose such deductions in all cases (such as under section 187AA of the 1996 Act). In a system of voluntary collective bargaining, the parties should be able to raise this matter in negotiations.

Section 47 of the 2003 Bill contains a similar restriction on pay where occupational health and safety action is taken.

There are other severe and impermissible restrictions on collective bargaining contained in the 2003 Bill. In particular, section 64 would require that before a union could give notice of initiating a bargaining period a secret ballot of employees would need to approve the giving of such notice. The voting process must be fair and the regulations can prescribe additional requirements that must be complied with. Not only does this restraint impact on the

capacity to take protected action but section 59 of the 2003 Bill requires the AIRC to decline to certify a building agreement unless a section 170MI notice has been given. In essence these provisions would require a union to obtain the express authorisation of employees (including its members) before it can proceed to collectively bargain in relation to the workplace in question. This proposal challenges the traditional role of registered organisations as the industrial representatives of their members and those employees eligible to become members. The proposal introduces an American-style union recognition ballot without, however, obliging the employer to recognise the union chosen by the employees and to bargain in good faith with that union. On any view the proposal severely restricts the current capacity of building industry unions to participate in collective bargaining.

Part 2 of chapter 5 of the 2003 Bill also contains a number of restrictions as to what might be included in a certified agreement. These appear to similarly interfere with the principle of voluntary negotiation of collective agreements, in particular: sections 54, 55(3) and objectionable provisions picked up by section 57.

3.5 Chapter 6 – Industrial Action

Rather than rectifying the extensive breaches of Australia's international obligations to provide for the right to strike, the Government seeks through the provisions of the 2003 Bill to further restrict the capacity of employees and industrial organisations in the building industry to exercise their right to strike. The net effect of the Bill will be to take Australia even further out of compliance with our international obligations regarding the right to strike. In particular, the Bill proposes to:

- Render virtually all industrial action in the building and construction industry unlawful industrial action;

- Restrict what kinds of industrial action can be "protected action" for the purposes of the *1996 Act*;

- Impose an impracticable and obstructive scheme of secret ballots to approve

protected industrial action.

Industrial Action Rendered Unlawful

The 2003 Bill proposes to render unlawful virtually any industrial action in relation to building work which falls within the power of the Commonwealth Parliament to proscribe unless the industrial action is "excluded action": s 73. "Building industrial action" is broadly defined and will be unlawful if, among other things, it is "industrially motivated". That is, if the industrial action is motivated by purposes which include supporting or advancing claims against an employer in respect of the employment of employees, advancing the industrial objectives of an industrial association or disrupting the performance of work: s 72.

Any person who engages in "unlawful industrial action" could be liable for a civil penalty: s 74. The ABC Commissioner or any person affected by the contravention can commence proceedings in an appropriate court for an order imposing a pecuniary penalty: s 227(1). The provision is a "Grade A Civil Penalty" under which the maximum pecuniary penalty would be $110,000 for a body corporate (including an industrial association) and $22,000 for an individual: s 227(2).

At present, there is very limited provision in any Commonwealth legislation for the taking of industrial action itself to attract a penalty. Industrial action will only attract a penalty if undertaken in particular circumstances or for particular purposes proscribed by legislation. For example, penalties may be imposed by breaches of the secondary boycott provisions of the *Trade Practices Act* 1974, although not on an individual: see sections 76-77. Penalties may also be imposed if industrial action is undertaken during the nominal term of an agreement or with the intent to coerce a person into making, varying or terminating a certified agreement: see *1996 Act*, sections 170MN and 170NC.

The 2003 Bill also substantially changes the process by which unions can be made liable to pay for damages arising from the taking of industrial action and further alters the consequences for unions who fail to promptly pay damages ordered against them. By section 77 of the 2003 Bill an inspector nominated by the ABC Commissioner is empowered

to assess damages arising from industrial action. That assessment is treated as prima face evidence of the amount of damage actually suffered. The usual process whereby an applicant carries the onus of proof in relation to its claimed loss is thus substantially altered. Additionally, by section 215 of the 2003 Bill, the registration of a union registered under the Workplace Relations Act can be cancelled for a failure to promptly pay a judgment debt. Under that section deregistration would follow upon an administrative act by the Industrial Registrar. At present, deregistration of a registered organisation could only occur in prescribed circumstances which involve the exercise of the judgment and discretion of the Federal Court.

Further, union officials may be disqualified from continuing to hold office in a union where they have been involved in a contravention of the proposed Act: section 217. Participation in industrial action which is held to be unprotected will be a contravention of the proposed Act.

The proposed provisions of the Bill constitute an unprecedented and unwarranted escalation of the penalties and consequences associated with the taking of industrial action in the building industry. The proposed penalties are substantial and could be imposed on individual members or officers of a union as well as the union itself. The very existence of a union may be threatened by the taking of industrial action given that such action may readily lead to deregistration.

These consequences need to be appreciated in their proper context. It is not easy, even for the most law abiding and well intentioned union, to ensure that industrial action taken by it and its members is protected industrial action and not unlawful industrial action. The technicalities and ambiguities associated with the taking of protected industrial action are numerous. Industrial jurisprudence since the enactment of the Workplace Relations Act is replete with litigation where genuine attempts to take protected industrial action have been challenged on the basis that the conduct involved did not meet the strictures required by the Act. Reasonable minds differ as to what is the proper interpretation of various provisions in the Act which regulate protected action. Some eight years after the enactment of the Workplace Relations Act the uncertainty and ambiguity continues. There are at least two

cases currently before the High Court (*AMWU v Electrolux Home Products Pty Ltd*; and *Emwest Products Pty Ltd v AMWU*) where a final pronouncement as to the meaning of provisions relevant to the concept of protected action remain pending.

For reasons described below, the 2003 Bill contains further restrictions and imposes further substantial prescriptions upon the taking of protected industrial action. This will make the taking of protected action in the building industry more complex than it already is and because of the additional ambiguities and legal uncertainties which will thereby be created, industrial action taken by building unions and building workers intended to be protected and lawful action will be subject to a host of likely challenges.

The existence of these ambiguities and uncertainties together with the extended penalties and other consequences (including deregistration and disqualification from office) for the taking of industrial action will greatly inhibit the exercise of the right to strike implied in ILO Convention No. 87. Even the restricted right to strike left by the 2003 Bill will, in practical terms, be more illusory than real.

Further, the ILO Committee of Experts has addressed the imposition of penalties for taking industrial action in the following terms:

> *The Committee considers that sanctions for strike action should be possible only where the prohibitions in question are in conformity with the principles of freedom of association. Even in such cases, both excessive recourse to the courts in labour relations and the existence of heavy sanctions for strike action may well create more problems than they resolve.*[37]

Further Restrictions on Protected Industrial Action contained in the 2003 Bill

The 2003 Bill seeks to impose even greater restrictions upon what may constitute "protected action" for the purposes of the 1996 Act. Industrial action in relation to building work will only avoid being "unlawful industrial action" if it is "excluded action": s 73. "Excluded action" includes all industrial action which is "protected action" for the purposes of the 1996 Act, but the Bill seeks to impose further limitations.

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[37] The *1994 General Survey*, at para 177.

Firstly, the purposes for which industrial action can be taken would be narrowed so that industrial action would not be protected action under the Bill if undertaken for the purpose of advancing claims ***any of*** which relates to a matter which does not pertain to the relationship between the employer and employees: s 78. Presently, under the *1996 Act*, industrial action may be protected so long as it is taken for the purpose of supporting or advancing claims made in respect of a proposed agreement whether or not each claim made would ultimately be capable of inclusion in the agreement: see section 170ML and *AMWU v Electrolux Home Products Pty Ltd* (2002) 118 FCR 177.

Secondly, the 2003 Bill would tighten the prohibition on engaging in industrial action in concert with non-protected persons. Under the Bill, industrial action would lose its protected status if it is engaged in concert with any person or union (a "protected person") who is not either a union that is a negotiating party to an agreement, a member of the union who will be subject to the agreement or an officer or employee of that union: s 79(1)(b). Industrial action will lose protection if even one of the organisers of the industrial action is not a "protected person": s 79(1)(b). The major change to the notion of action in concert with non-protected persons seems to be based on the inclusion of the words "for the action". Currently, two unions pursuing their own separate claims can act together so long as each is taking protected action in relation to their claim. The change sought to be introduced by the 2003 Bill seems to be aimed at negating that capacity. These provisions would further restrict the capacity of trade unions in the building industry to organise and participate in industrial action to advance their industrial interests and the interests of their members.

The essential frailty of the capacity to take protected industrial action is further highlighted by the fact that, even under the current legislative regime, and given that a union can only take protected action in concert with its members, a finding that a participant in the industrial action (who was thought to be a member) was in fact ineligible for membership and thus not a member can render unlawful, action which otherwise would have been protected.

Thirdly, the 2003 Bill seeks to prevent any industrial action prior to the nominal expiry date of any agreement. Industrial action would not be protected if engaged in for the purpose of advancing claims in respect of employees whose employment is, in any respect, subject to an agreement: s 80. At present, industrial action may be protected if taken during the nominal term of an agreement if it relates to matters which are not covered by the agreement whose nominal expiry date has not yet passed: see *Emwest Products Pty Ltd v AMWU* (2002) 117 FCR 588.

Fourthly, the 2003 Bill seeks to impose a mandatory cooling-off period on parties taking building industrial action. Section 81(1) would impose a mandatory 21 day cooling-off period that applies 14 days after industrial action has been notified to commence, regardless of whether industrial action has been taken on each or any of those 14 days. Any industrial action taken during this 21 day period would not be protected action unless a certificate is issued by the AIRC. Unless the AIRC intervenes, any industrial action would have to cease 14 days after it commenced.

These provisions of the 2003 Bill focus attention on the unacceptably narrow nature of the right to take industrial action which presently exists under Commonwealth industrial legislation and intend to further restrict the capacity of trade unions and their members in the building industry to exercise the right to strike. If the new provisions are added to those already found in the 1996 Act, then the conditions which would have to be fulfilled for unions to take protected industrial action would be manifestly unreasonable and would substantially limit the means of action open to trade unions. The 2003 Bill, if enacted, would impinge on the right to strike implied in ILO Convention No 87 to a far greater extent that is already the case.

Requirement for Secret Ballots

In addition to the extensive new restrictions on the right to take protected industrial action in the building industry set out above, the Bill also seeks to introduce a complex set of requirements for holding compulsory secret ballots as a further precondition to taking or organising protected industrial action. Under the provisions of the Bill, any industrial action

will not be protected action unless the action was authorised by means of a secret ballot as set out in Division 2 of Part 3 of the Bill: s 82(a).

The stated object of the provisions is "to establish a transparent process which allows employees directly concerned to choose, by means of a fair and democratic ballot, whether to authorise building industrial action": clause 85(1). In truth, the provisions would, if enacted, have the effect of imposing unprecedented and excessive constraints on the ability of a trade union in the building industry to organise or take effective or timely industrial action. At present, no requirements exist for secret ballots to precede industrial action for that action to acquire protection. The only requirement imposed by the *1996 Act* is that industrial action is duly authorised in accordance with the rules of the union: section 170MR.

In order to take protected industrial action, a union, or an employee with the support of a prescribed number of employees, must make an application to the AIRC for a ballot to be held: s 87. There are detailed requirements concerning the matters that must be included in the application for an order, including the questions to be put to the employees, the nature of the proposed industrial action and the types of employees to be balloted: s 88. Various pieces of documentation must be filed with the application and a copy of the application given to the other party: ss 89 and 90.

The Commission would be required to act quickly in determining an application for a ballot: s 93. However, the Commission is not to determine an application for a ballot order unless satisfied that that a copy of the application has been served on various parties and those parties have been given a reasonable opportunity to make submissions: ss 93(2) and 94. The Commission must not grant an application for a ballot order unless it is satisfied that the applicant has, during the bargaining period, genuinely tried to reach agreement with the employer and is continuing to do so: s 97.

If the Commission grants the application for a ballot order, the order must specify various matters dealing with the conduct of the ballot, including the employees to be balloted, the voting method, the timetable for the ballot, the person authorised to conduct the ballot and the question or questions to be put to the employees: s 99. The Commission would have

powers to order that certain information be provided to enable the roll of voters to be prepared: s 101. There are provisions allowing for the addition and removal of persons' names from the roll before the ballot is conducted and for applications to be made for variations to the ballot order: ss 104 and 105.

Only an "authorised ballot agent" could conduct the ballot, being the Australian Electoral Commission or another person named by the AIRC: ss 109 and 116. Certain information must be included on the ballot paper, including a statement that the voter is free to choose whether or not to support the action: s 110. The industrial action will only be authorised if a prescribed percentage of persons on the roll vote in the ballot, more than 50% voted to approve the action and the action is taken within 30 days of the date of the declaration of the results of the ballot: s 114. The union would ordinarily be liable for the cost of holding a ballot: s 118 and 119.

It is evident even from this brief overview that the secret ballot provisions of the 2003 Bill place extremely onerous requirements on those wishing to take industrial action. They also provide fertile ground for employers to obstruct and delay the exercise of the tightly constrained "right" to take protected action under the Bill. There can be little argument that if these provisions are enacted it would amount to an unacceptable interference with the right of unions to organize and take industrial action and the right of unions to regulate their own internal affairs, in breach of Article 3 of ILO Convention 87.

It is true that ILO supervisory bodies have, in the past, taken the view that mandatory pre-strike ballots do not necessarily conflict with the principle of freedom of association. However, they have also maintained that the legal procedures for declaring a strike, such as secret ballots:

- should be reasonable;
- should not place substantial limitations on the means of action open to trade unions;
- should not be so complicated as to make it practically impossible to declare a legal strike;

- are acceptable only when they are intended to promote democratic principles within trade union organisations.[38]

The secret ballot provisions of the Bill violate each of these principles. They are unnecessarily complicated and inflexible; indeed, they seem to be intended to frustrate the right to take industrial action by laying a series of trip wires over which unions will inevitably fall. In providing employers with rights to oppose the holding of a ballot (and therefore delay the industrial action), they go far beyond any objective of promoting democratic decision-making within unions; such matters are of minimal concern to employers, and should be primarily matters for internal union governance.

In fact, the extent of the detailed procedural requirements contained in the provisions reveals their true purpose – they are all about so narrowly confining the right to strike that its exercise is in most cases impossible, and where possible is of little or no practical effect. The secret ballot provisions of the Bill will result in no higher standard of democratic decision-making in trade unions than are already attained, through the measures currently taken by unions to consult with their members over whether industrial action should be taken.

Other Provisions

A number of miscellaneous provisions contained in the 2003 Bill also seriously impinge upon the right to strike and are undesirable. The Bill proposes to reinforce the power of the AIRC to make orders that industrial action stop or not occur. In a similar fashion to section 127 of the 1996 Act, clause 129 confers a power on the AIRC to order that industrial action cease. The proposed provision reinforces section 127 by conferring an express power to make an interim order even if the AIRC has not formed a view as to whether the industrial action is protected action or not. The stated purpose of this proposal is to encourage the making of an interim order in time to prevent the building industrial action from commencing. This constitutes a further constraint on industrial action commencing even if that industrial action is protected.

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[38] *1996 Digest*, paras. 498-499 at p. 105; and the *1994 General Survey* at para 170.

Section 138 of the 2003 Bill would restrict the capacity of industrial parties to give only one notice of industrial action under section 170MO of the 1996 Act. That restriction would potentially severely restrict the capacity to take industrial action and, in particular, protected industrial action. Its consequence would likely be that a section 170MO notice of industrial action would need to notify of a campaign of ongoing action in order that all prospective industrial action could be covered and protected by the single notice. That would severely restrict the capacity of unions to flexibly engage in an industrial campaign and thereby restrict the effectiveness of any such campaign. This provision would also likely generate challenges to comprehensive section 170MO notices that give notice of industrial action not then in contemplation.

The 2003 Bill proposes to exclude industrial action from the operation of section 166A of the 1996 Act if taken by a federally registered union in the building industry: s 139. Section 166A of the 1996 Act operates to prevent recourse to the ordinary courts where an industrial dispute is being dealt with by the AIRC, at least for a period of 72 hours. The removal of this circuit-breaker is discriminatory in only applying in circumstances of industrial action taken by a union. It, together with other provisions such as provisions designed to facilitate the assessment of damages caused by industrial action (s 77), is likely to encourage recourse to the ordinary courts in the context of an industrial dispute and exacerbate rather than diminish industrial disputation.

3.6 Chapter 9 - Union Right of Entry

Part IX of the 1996 Act currently regulates entry and inspection of premises by organisations registered under that Act. Part IX provides for limited rights of entry in accordance with an elaborate and restrictive permit system administered by the AIRC. The basic features of that system are:

(a) Holders of permits issued by the Registrar are entitled, in certain circumstances, to either:

(i) investigate suspected breaches of the Act, awards, orders of the Commission and certified agreements which are in force and binding on the relevant organisation by inspecting documents, workplaces and interviewing certain employees (section 285B); or

(ii) hold discussions with employees who are members, eligible to be members or arecovered by awards which bind the organisation (section 285C).

(b) Permit holders must give 24 hours' notice of entries for these purposes (section 2851)(2)) and can be required to show their permits (section 2851)(1)).

(c) Inspections can only occur during work hours and, in the case of interviews/discussions, during employees' breaks (sections 285B and 285C).

(d) Permit holders cannot enter residential parts of premises without permission (section 2851)(3)).

(e) Permit holders must not intentionally hinder or obstruct any employer or employee (section 285E(l)). A person who fails to comply with any of these requirements can have their permit revoked (section 285A), be restrained from or ordered to perform certain conduct, or be fined up to $2,000 for individuals or $10,000 for organisations (section 285F).

A person who fails to comply with any of the above requirements can have their permit revoked (section 285A), be restrained from or ordered to perform certain conduct, or be fined up to $2,000 for individuals or $10,000 for organisations (section 285F).

In summary, the 1996 Act already provides for a heavily regulated scheme of access to workplaces for union representatives. On previous occasions, ICTUR has submitted that the current provisions of the Act contravene the principle of freedom of association in a number of respects.

Schedule 13 of the 2003 Bill contains substantial changes to the current right of access regime which would result in a more stringent and heavily regulated system of access to the workplace. The system proposed in the 2003 Bill is a far more complex, legalistic and restrictive regime. The proposed system has the following additional features:

- There are greater restrictions on who may obtain a permit. Permits may only be issued to officers of a union, whereas the current provisions allow employees of a union to also hold a permit. Before being granted a permit the applicant must meet strict criteria.

- The powers of revocation of a permit are expanded with the grounds being expanded to include the nebulous concepts of frivolous or vexatious purpose and unreasonable exercise of the right.

- The exercise of the right of entry is to be monitored by the proposed Australian Building and Construction Commissioner. The ABC Commissioner is given the right to commence proceedings against the union officer. Each time the right of entry is exercised the officer must provide a notice of entry to the occupier and the ABC Commissioner.

- Where the right is exercised to investigate a suspected breach the breach must be particularised in the notice.

- Where documents are sought in relation to a breach those documents may only relate to members of a union. Documents relating to non members may only be accessed by order of the AIRC.

- Where the right to talk to employees is exercised and recruitment is involved the officer must set out in the notice that recruitment is the purpose. Entry for the purpose of recruitment may only occur at 6 monthly intervals.

- The employer may nominate the room in which any interviews with employees may occur and may specify what route will be taken to get to that room.

- Entry to the premises of small businesses is even more restricted with requirements that a union already have a member at the site. Employers may seek certificates as conscientious objectors and thereby exclude the right of entry.

- A myriad new financial penalties are proposed against union officers who breach the provisions. These penalties are in addition to the revocation of permits provisions.

- The new provision purport to override the right of entry afforded by State legislation to officers of State registered unions

The provisions in Chapter 9 of the 2003 Bill would thus reduce union access to workplaces in a way which would:

- further impair workers' freedom of association and the right to organise;

- undermine "right of entry" as a way of ensuring that industrial instruments are complied with; and

- unjustifiably impede unions from operating effectively in both monitoring compliance and organising/recruiting.

In essence, the 2003 Bill seeks to further constrain a scheme that confers an already limited right of access. The ILO has recognised that access to the workplace must occur in the context of "due respect for the rights of property and management". An element of balance is required. The provisions of the Bill, however, are unbalanced and would result in an access regime which is excessively geared in favour of employers and occupiers, in particular those who wish to deny workers' representatives proper access. If passed, the

2003 Bill would see Australia commit serious breaches of its obligations concerning freedom of association in international law.

A Full Bench of the AIRC has recognised the importance of union right of entry in the following terms:

> *There is no doubt that the right of entry and inspection of records [work, equipment, documents etc] are 'a vital part of the process of enforcement of awards, which in turn are at the very heart of the system of conciliation and arbitration …* [39]

In terms of ensuring compliance with industrial instruments, it is doubtful whether there is any meaningful difference between providing a service to members and being a "quasi-inspector" at the workplace. An important reason why people join a union is to enlist the protection of a collective organisation with the necessary skills to ensure that their human rights and industrial rights are not contravened. The *service* which members seek is, therefore, to ensure compliance with industrial instruments - in order to provide this service, unions require the ability to inspect workplaces and workplace records. As outlined above, this right is recognised in international law.

Freedom of association can only be a practical reality for persons who are not members of unions if neither they nor relevant unions are inhibited from making appropriate contact with the other so that a person can make an informed choice about becoming a member of a union.

Consequently, ICTUR submits that the provisions for right of entry should be such as to permit unions to perform the legitimate function of providing industrial services to their members, including monitoring and enforcing compliance with industrial instruments, and should not inhibit unions from involvement with non-union members which will allow those people to properly evaluate their decision about whether or not to become a member.

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[39] *AFAP v East-West Airlines Ltd* (1992) 40 IR 426 at 427-8; *AFAP v Ansett Transport Industries (Operations) Pty Ltd (No. 2)* (1991) 36 IR 219 at 220 per Gray J.

The 2003 Bill would entrench an inefficient distinction between the functions of holding discussions and investigating breaches of industrial requirements.

The provisions in Chapter 9, would seriously compromise the aim of effective monitoring and enforcement of industrial instruments. The proposed new provisions give employers and occupiers potentially easy means of avoiding scrutiny where it is suspected that a breach has occurred by rejecting the explanations of permit holders about potential breaches which they have reason for suspecting. Its effect would be that entry would no longer in fact be a right but would be subject to the discretion of the employer or occupier, the very persons who are supposed to be the subject of scrutiny to ensure that they are complying with relevant industrial instruments. The proposed provision goes well beyond "due respect for the rights of property and management" and confer powers on employers and occupiers to remove themselves from proper scrutiny.

In addition to this, the proposed system is excessively formalised, legalistic, and impractical. The fact that the 2003 Bill contains a raft of formal requirements and, in particular, a time limit on the life of invitations confers a range of technical grounds which employers might seek to use to deny permit holders entry to their premises. It is also excessive to require that if an employer or occupier asks a permit holder for particulars of the suspected breach of an industrial instrument which they are seeking to investigate, the permit holder must identify the provision of a particular instrument which they think is breached. The web of industrial regulation under the 1996 Act is complex, and that complexity will be exacerbated by the 2003 Bill in the context of the building and construction industry. There is no justification for requiring union officials to provide quasi-legal explanations to potentially hostile employers about the alleged breaches they wish to investigate and to confer a barely limited right of refusal to the employer.

The 2003 Bill would also limit the material which a permit holder can inspect. The current provision allows for the inspection of documents which are kept on the premises in question and are relevant to suspected breach (unless the document is an AWA or related document). The 2003 Bill would require that the documents relate to the employment of

union members. Access to non-members documents can only be obtained by order of the AIRC.

ICTUR submits that the proposed provisions could result in the concealment of breaches of industrial instruments. There may be cases where documents relating to non-union members are relevant, indeed crucial, to verifying whether a breach has occurred - an example of this would be an investigation into whether an employer is discriminating against employees on the basis of their union membership. The proposed amendments could make a proper investigation in these circumstances impossible. ICTUR submits that the current requirement - that a document be relevant to the investigation in question - is the appropriate criterion.

While it is possible that this provision could operate benignly in some cases, the proposal is excessive because it gives even greater control on the presence and conduct of the representatives of organisations to employers or occupiers. The provision tends to transform the provisions from ones which facilitate compliance to a rigorously disciplined system of control for unions which contravenes the freedom of association of their members and their right to organise. Again, it goes well beyond what is required to ensure "due respect for the rights of property and management" recognized by the ILO.

The 2003 Bill neglects access to workplaces as an important means of ensuring that employers abide by awards and agreements applying to them. At the same time, it introduces a much stricter regime of restrictions and penalties for contravention of the proposed right of entry provisions. The 1996 Act already provides for the revocation of permits in certain circumstances

There is no compelling evidence that the current provisions are not operating properly so as to justify the changes which are proposed.

Nevertheless, the proposed provisions would give the Commission more punitive powers against permit holders and unions by allowing various limitations to be imposed on the exercise of powers under a permit. For example, continuing to seek entry if an

employer does not accept a permit holder's attempt to give particulars in an entry notice about a suspected breach may be acting improperly under the Chapter and lead to the terms of a permit being restricted. The effect of this is that even if an employer or occupier does not have reasonable grounds for refusing entry, a permit holder can be punished for pressing their claim to right of entry - the fact that the employer or occupier could themselves conceivably be prosecuted for refusing entry will be of no practical benefit to such a permit holder. Equally, if a permit holder resists an employer's request for a meeting to be held in a particular meeting area and travel by a particular route specified by the employer, that resistance could result in a restriction being placed on the person's permit.

While ICTUR recognises that unions have a responsibility to ensure the proper conduct of their officers and employees, the 2003 Bill seeks to impose burdens which could not practicably be met by most corporations (of whatever type) and appears to be more concerned with severely circumscribing the rights of permit holders than with ensuring a fair framework within which employers and unions can operate.

The effect of the 2003 Bill will be to give employers and occupiers a means of seeking to remove themselves from any scrutiny whatsoever for potentially trifling alleged misconduct. The 1996 Act already contains mechanisms for dealing with inappropriate conduct by permit holders.

In summary, the regime proposed by the amendments set out in Chapter 9 of the 2003 Bill would drastically reduce the circumstances in which a union or other organisation could enter a workplace, without providing any alternative or preferable means for monitoring compliance with and facilitating enforcement of industrial instruments. The Bill would introduce changes which would perpetuate and exacerbate breaches of workers' freedom of association - whether or not members of a union - and which seriously curtail unions' right to organise. The proposed regime lacks balance - it does not provide for a framework which would permit employers, occupiers and workers' representatives to discharge their respective functions in an environment which is regulated by neutral and fair rules. It is unfairly biased in favour of employers and occupiers. The

Bill would in fact inhibit unions from providing the services for which their members have contracted, and would also restrict the access of employees who are not union members to unions so that they can make informed choices about membership and representation. The net effect of the amendments contained in Chapter 9 will be a serious contravention of Australia's obligations under international law.

3.7 Other provisions

The Building Code sought to be introduced by chapter 3 of the 2003 Bill will allow the Minister to issue codes of practice which would be binding upon building industry participants including building employees, building employers and unions. The Bill does not regulate or qualify the content of the Building Code and it would appear that the Minister has a wide discretion over its subject mater.

Part 3 of chapter 4 of the 2003 Bill also contemplates regulations prescribing an accreditation scheme for persons who wish to enter into Commonwealth building contracts with the Commonwealth or Commonwealth authorities. Very wide powers of inspection and investigation are provided by section 237(3) and also by section 241 for the purpose of ascertaining compliance with the Building Code and/or the accreditation scheme.

It would appear that these mechanisms are intended by the government as a means of setting, and encouraging observance of, additional policy objectives of the government. The Commonwealth Government currently has a Code of Conduct. That Code has no legislative force. Its content includes a wide range of industrial relations requirements which are reflective not of the 1996 Act but are in essence reflective of the Coalition's industrial relations agenda. If the current Code were to be given legislative force it would result in further and additional breaches of Australia's international labour standards obligations.

ICTUR opposes these provisions because it is likely that they are designed to put in place requirements which have not had the express approval of Parliament and which are likely to be utilised for purposes which would contravene Australia's international labour standards obligations.

ICTUR also expresses concern about the so-called "accountability" provisions in the 2003 Bill including in relation to statements of donations (section 212 and 213) and disclosure of commissions (section 214). It is likely that this level of interference with the internal operations of unions will offend ILO Conventions.

Additionally, ICTUR is concerned about the abrogation of the right to silence in the context of the proposal for the ABC Commissioner's powers to obtain information (section 203).

3.8 Conclusion

Australian law already fails to accord anything like adequate recognition to the right to strike (see Appendices A and B). The 2003 Bill, if enacted, would impose even greater restrictions on the right of trade unions and their members to organise, collectively bargain or undertake industrial action in the building industry. Following the ILO Committee of Experts' findings that the present state of the law in Australia breaches Conventions 98 and 87, it seems clear that the current package of proposed reforms in relation to the building industry will almost certainly lead to another rebuke from the ILO.

The truth is that if the Bill were to be enacted into law in its present form, then the restrictions placed on the capacity of trade unions, their members and employees in the building industry will be greater than ever before and the power of employers will be enhanced accordingly. If the Government is at all serious about ensuring that Australia meets its international obligations with respect to freedom of association and the right to bargain collectively and to strike, it should withdraw the 2003 Bill immediately.

APPENDIX A

Operation and impact of the Workplace Relations Act 1996 in relation to industrial action and pattern bargaining

The 1996 Act provides for a limited right to take "protected" industrial action in support of claims made during a "bargaining period" in the negotiation of a certified agreement (section 170ML). The Act then confers immunity from common law liability on those taking such industrial action (section 170MT).

However, there are significant limitations on the protection offered by these provisions (all of which involve some infringement of the ILO's jurisprudence on the right to strike), including the following:

- the subject matter about which protected industrial action may be taken is limited in its scope to those matters that may be covered by a certified agreement, ie. matters pertaining to the relationship between employers and employees (section 170LI(1));

- ***there is no provision for the taking of multi-employer or industry-wide industrial action (protected action may only be taken during a bargaining period for the negotiation of a certified agreement "in relation to employees who are employed in a single business or part of a single business" (section I 70MI(l));***

- there is no scope for the taking of protected action by the increasing number of Australian workers who are engaged as independent contractors;

- industrial action is not protected if it is engaged in or organised with a "non-protected person", ie. if it involves a secondary boycott (section 170MM); and

- the bargaining period, on which the right to take protected action depends, may be

suspended or terminated in a wide range of circumstances which may involve a breach of ILO standards (section 170MW(2) to (7)).[40]

Further, the 1996 Act failed to remove existing legal restrictions on the taking of industrial action, and imposed additional restrictions, as follows:

- the Act did nothing to remove - and actually extended the scope of - the residual liability under the common law and statutory provisions such as sections 45D and 45E of the *Trade Practices Act 1974* (Cth.) potentially faced by unions and employees in respect of the taking of anything other than protected industrial action. The relevant ILO supervisory bodies have repeatedly found that these provisions contravene freedom of association. In March 2000 the ILO Committee on Freedom of Association reported on the 1998 Patrick's waterfront dispute and requested the Australian Government to *"take necessary measures, including amending the Trade Practices Act, to ensure that workers are able to take sympathy action provided the initial strike they are supporting is lawful"*;[41]

- The forms of civil liability under the *Trade Practices Act 1974*, combined with possible criminal liability under sections 30J and 30K of the *Crimes Act 1914* (Cth.), involve exposure to injunctions, fines, damages, and even deregistration of unions in certain circumstances;

- the Act also handed employers a new weapon, ie. the capacity to obtain orders from the Commission under section 127 of the 1996 Act to stop or prevent unions and employees from taking or continuing to take "unprotected" industrial action. Section 127 has proven to be a highly effective remedy for employers, enabling them in many cases to obtain orders that unions cease taking, or not commence, unprotected industrial action.

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[40] As amended by the *Genuine Bargaining Act* 2002.

[41] ILO, *320th Report of the Committee on Freedom of Association*, Geneva, March 2000, p 59 at para 235; see also the *1994 Report* at paras 177-178, and the Committee of Experts' 1999 report referred to in Chapter 3.

The 1996 Act also failed to address another major deficiency of Australian law relating to industrial action, ie. the absence of a general right to strike at the national level, or a right to take protest action or action in support of the social and economic interests of workers (other than in relation to a certified agreement), which amounts to a breach of the rights embodied in Convention No 87.[42]

[42] See *1996 Digest,* paras. 480 and 482, at p. 102. That the legal restrictions on industrial action (eg. section 127 of the 1996 Act) can be used to thwart protest action by workers is illustrated by the decision of French J of the Federal Court of Australia in *CEPU v Commissioner Laing of the Australian Industrial Relations Commission and Anor*. [1998] 1410 FCA (4 November 1998).

APPENDIX B

ILO Committee of Experts' findings on Australia's compliance with Conventions No 87 and 98

1. Introduction

ICTUR's comprehensive submissions to a Senate Committee's Inquiries into the WROLA Bill, the 1999 Bill, and the 2000 Bill pointed to the total failure of that legislation to meet Australia's international obligations on the right to strike and the right to collective bargaining. The views expressed by ICTUR at those times are reflected in recent findings by the ILO Committee of Experts of substantial breaches by Australia of the requirements of Conventions No 87 and 98.

2. The 1998 Committee of Experts Report

In a Report[43] to the 86th Session of the International Labour Conference held in June 1998 the Committee of Experts on the Application of Conventions and Recommendations found that the 1996 Act fails to accord with Convention No. 98, inter alia, in the following way:

The Act contravenes the principle of voluntary bargaining by favouring single business agreements over multi-business agreements.

The Committee noted that ILO jurisprudence recognised the principle that the voluntary nature of collective bargaining upheld by Convention No. 98 necessarily entails the parties having an unfettered choice as to the particular bargaining level, whether single-business, industry-wide or national. The Committee referred to the statement in the ILO General Survey on freedom of association and collective bargaining in 1994 (paragraph 249) that the parties "are in the best position to decide the most appropriate bargaining level" and

[43] *Report of the Committee of Experts on the Application of Conventions and Recommendations,* 86th Session, ILC, 1998, Report III (Part 1A), at pp. 222-224.

requested "the Government to review this issue and amend the legislation in the light of the requirements of the Convention".[44]

More particularly, the Committee noted that:

> *...with respect to the levels of bargaining, a clear preference is given in the Act to workplace/enterprise-level bargaining, as evidenced in section 3(b), as noted above, as well as section 88A(d) which charges the Australian Industrial Relations Commission with exercising its functions and powers regarding awards in a manner "that encourages the making of agreements between employers and employees at the workplace or enterprise level". Regarding certified agreements, Part VIB of the Act sets out a series of provisions facilitating single-business agreements, and giving them priority over multiple-business agreements. Section 170L states that the object of the part "is to facilitate the making, and certifying by the Commission, of certain agreements, particularly at the level of a single business or part of a single business". Preference for enterprise-level bargaining is also evidenced in sections 170ML and 170MU which, as noted above, provide some protection in the case of industrial action taking place during the bargaining period for certified agreements. However, due to section 170LC(8)* [sic]*, this protection is not afforded with respect to the negotiation of multiple-business agreements. The Committee also notes that a multiple-business agreement can only be certified pursuant to section 170LC if it is found to be "in the public interest to certify the agreement" taking into consideration whether matters could be more appropriately dealt with in a single-business agreement. In short, the determination of what level of bargaining is considered appropriate is placed in the hands of the Commission, which is mandated to give primary consideration to single-business agreements and to use the criterion of "the public interest". The Committee is of the view that conferring such broad powers on the authorities in the context of collective agreements is contrary to the principle of voluntary bargaining.*[45]

3. The 1999 Committee of Experts Report

Following a submission lodged by the ACTU in August 1998, the Committee found in its Report[46] released in March 1999 that Australian law restricts the right to strike contrary to Convention No 87, through provisions of the 1996 Act and other legislation that, inter alia:

- excessively restrict the subject matter of strikes

[44] At p. 224.
[45] Ibid.
[46] *Report of the Committee of Experts on the Application of Conventions and Recommendations*, 87th Session, ILC, 1999, Report III (Part 1A), at pp. 204-207.

The Committee observed that:

> *… by linking the concept of protected industrial action to the bargaining period in the negotiation of single-business certified agreements, the Act effectively denies the right to strike in the case of the negotiation of multi-employer, industry-wide or national-level agreements, which excessively inhibits the right of workers and their organizations to promote and protect their economic and social interests.*[47]

- Prohibit sympathy or secondary industrial action

The Committee noted that sympathy or secondary industrial action does not have protected status under the 1996 Act, and in this respect observed 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".[48] In relation to the prohibitions on "secondary boycotts" in the *Trade Practices Act* 1974 (Cth), the Committee observed:

> *... with regret that the recent amendments to the Act maintain the boycott prohibitions and render unlawful a wide range of sympathy action. ... With respect to the elevated penalties that may be imposed under the Act, the Committee recalls that (a) sanctions should only be imposed where there are violations of strike prohibitions or restrictions that are in conformity with the principles of freedom of association; and (b) sanctions should not be disproportionate to the seriousness of the violation ... The Committee expresses the firm hope that the Government will amend the legislation accordingly ...*[49]

4. The 2000 Committee of Experts Report

At this point it is instructive to note that the Senate Committee had the opportunity to consider the 1998 and 1999 ILO Committee of Experts findings in the context of its inquiry into the 1999 Bill. After acknowledging ICTUR's submission on the importance of Australia complying with international human rights instruments, the majority report stated:

> *The majority of the Committee understands the concern expressed in terms of Australia's*

[47] Id., at p. 205.
[48] Ibid.
[49] Id., at p 206.

> *compliance with the ILO conventions but notes that the ILO has not made a final judgment on whether Australia's industrial relations legislation is in breach of any convention. The Department of Employment, Workplace Relations and Small Business informed the Committee at its public hearing in Canberra on 1 October that while the ILO had made an observation and expressed concerns, dialogue between the Government and the ILO is continuing.*
> *… A majority of the Committee considers that it is inappropriate to comment on this matter until discussions between Australia and the ILO have been finalised.*

ICTUR disagrees with the assertion that the 1998 and 1999 pronouncements of the ILO Committee of Experts outlined above were in any way equivocal or conditional upon further "dialogue" with the Government.

In ICTUR's submission, this Committee should take into account the working methods of the ILO Committee of Experts in deciding whether to comment on this matter. While it is generally true that the Commitee of Experts prefers to engage in dialogue with countries concerning their compliance with ratified Conventions, it has well known and distinct means of doing so. In particular, it distinguishes between the method of a "direct request", and an "individual observation". A direct request is a first step toward dialogue with a country. Importantly, the Committee of Experts *does not publish* the content of its direct requests to governments - it merely reports that it has submitted a request. By contrast, more serious issues are the subject of published individual observations. The very fact that its comments on a country are published suggests the seriousness with which the matter is viewed. While it does not preclude further dialogue with a country, it is a real indication that the Committee considers the non-compliance with international standards to be a serious matter. It is important in this context that the findings and observations of the Committee of Experts in relation to Australia have been in the form of "individual observations". This suggests that while the Government may have considered that it was engaged in ongoing dialogue with the ILO Committee of Experts, that committee views seriously Australia's non-compliance with Conventions 87 and 98. The fact that the Committee of Experts had made its comments on more than one occasion supports this view.

However, if there was any doubt about the finality of those findings in 1998 and 1999 (there was not), the matter has certainly been laid to rest with the more recent reiteration of the Committee of Experts' views on Australia's non-compliance in 2000.

With reference to the "detailed discussion" that took place between the Committee of Experts and the Australian Government on the matter, the Committee in 2000 repeated its call upon the Government to:

- take measures to ensure that workers are adequately protected against discrimination based on negotiating a collective agreement ***at whatever level;*** and

- *take steps to amend the 1996 Act to ensure that collective bargaining will not only be allowed, but encouraged,* **at the level determined by the bargaining parties** (ILO, Report of the Committee of Experts on the Application of Conventions and Recommendations, *ILC 88th Session 2000, Report III (Part 1A), pp 222 - 5).*

We set out part of the Committee of Experts' relevant findings as follows:

> *"In a previous observation, the Committee raised the following issues of concern with respect to the [1996] Act: primacy is given to individual over collective relations through the AWA procedures, thus collective bargaining is not promoted;* **preference is given to workplace/enterprise-level bargaining;** *the subjects of collective bargaining are restricted; an employer of a new business appears to be able to choose which organization to negotiate with prior to employing any persons. The Committee notes the Government's report and its submissions before the Conference Committee setting out the various ways in which collective bargaining is still provided for and taking place, including concerning multiple businesses, and the various safeguards in the AWA procedures.* **Furthermore, where the Act does provide for collective bargaining, clear preference is given to workplace/enterprise-level bargaining. The Committee, therefore, again requests the Government to take steps to review and amend the Act to ensure that collective bargaining will not only be allowed, but encouraged, at the level determined by the bargaining parties.**" (emphasis added).

The various reports of the Committee of Experts outline above were further reinforced by the report of the Committee on Freedom of Association in respect to the 1998 Patrick's waterfront dispute.[50] In confirming the manifold breaches of ILO standards

[50] ILO, *320th Report of the Committee on the Freedom of Association*, Geneva, March 2000.

that occurred during that dispute, the Committee noted the Committee of Experts' call on the Government in its March 2000 Report to amend the 1996 Act to encourage collective bargaining at the level determined by the bargaining parties and itself recommended that the Government take measures to ensure AWAs do not undermine the right to bargain collectively (at paras 240-241).

These findings by the ILO Committee of Experts are acutely embarrassing for Australia, which has traditionally maintained a high level of observance of ILO standards,[51] and enjoyed international respect for having done so. The Government's obvious disregard for ILO standards is evident not only from its refusal to implement the unequivocal findings of the ILO Committee of Experts, but such disregard is all too apparent from the provisions of the 2003 Bill dealing with the building and construction industry.

[51] B Creighton, "The ILO and the Protection of Fundamental Human Rights in Australia', (1998) 22 *Melbourne University Law Review* 239, at p. 278.

APPENDIX C

The Panel of Advocates

ICTUR, together with the Australian National Committee, has closely monitored the effect of legislative changes brought about by the *Workplace Relations Act 1996* and of subsequent statutory amendments and proposals concerning the regulation of industrial relations in Australia. The Australian National Committee determined to report upon the *Building and Construction Industry Improvement Bill* 2003 and present a submission to the Australian Senate's Employment, Workplace Relations, and Education Committee. For that purpose a Panel of Advocates was constituted consisting of:

- Professor Keith Ewing, Professor of Labour Law at Kings College, University of London.

- Mr John Hendy QC, a leading Queen's Counsel practising in labour law in the United Kingdom and at the New South Wales bar; Visiting Professor in the School of Law of King's College, London; Senior fellow in the Law School, University of Kent; Chairman of the Institute of Employment Rights; and a Vice-President and past President of ICTUR.

- Mr Mordy Bromberg SC, a leading senior counsel practising at the Victorian bar at Douglas Menzies Chambers and an international Vice-President and President of the Australian National Committee.

- Mr Anthony Lawrence, a leading industrial barrister practising at the Victorian bar at Douglas Menzies Chambers, and Secretary of the Australian National Committee.

- Mr David Chin, an industrial barrister practising at the Sydney bar at H B Higgins Chambers, and Vice-President of the Australian National Committee.

- Mr Tony Slevin, an industrial barrister practising at the Sydney bar at H B Higgins Chambers, and an Assistant Secretary of the Australian National Committee.

- Mr Mark Gibian, an industrial barrister practising at the Sydney bar at H B Higgins Chambers, and a member of the Executive of the Australian National Committee.

The Panel of Advocates wishes to acknowledge the assistance in the preparation of this submission given by:

- Colin Fenwick, Senior Lecturer, Centre for Employment and Labour Relations Law, Melbourne Law School, the University of Melbourne.