AUSTRALIAN SENATE

EMPLOYMENT, WORKPLACE RELATIONS,

AND EDUCATION REFERENCES COMMITTEE

Inquiry into the *Workplace Relations Amendment (Right of Entry) Bill 2004*

Submission of:

INTERNATIONAL CENTRE FOR TRADE UNION RIGHTS

February 2005

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CONTENTS

		Page
EXECUTIVE SUMMARY		3
1.	**Introduction**	
1.1	*The International Centre for Trade Union Rights*	5
1.2	*The International Context*	6
2.	**Australia's International Obligations in respect of Collective Bargaining, Freedom of Association and Union Right of Entry**	
2.1	*Introduction*	14
2.2	*International Obligations in respect of Collective Bargaining*	14
2.3	*International Obligations in respect of Freedom of Association*	16
2.4	*International Obligations in respect of Union Right of Entry*	20
3.	**The Provisions of the Bill**	
3.1	*Introduction*	23
3.2	*Restrictions on collective bargaining and the autonomy of bargaining parties*	23
3.3	*Union right of entry*	24
3.4	*Conclusion*	31
APPENDIX A - ILO Committee of Experts' Findings on Australia's compliance with Conventions No 87 and 98		
1.	*Introduction*	33
2.	*The 1998 Committee of Experts Report*	33
3.	*The 1999 Committee of Experts Report*	34
4.	*The 2000 Committee of Experts Report*	35
APPENDIX B – ICTUR Panel of Advocates		39

EXECUTIVE SUMMARY

- The *Workplace Relations Amendment (Right of Entry) Bill 2004* ("the Bill") will, if enacted, compound Australia's breaches of international labour law and exacerbate an apparent lack of respect for the rule of law at an international level.

- The introduction of the Bill flies in the face of Australia's recently announced Free Trade Agreement with the United States according to which 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, 2000, 2003 and 2004.

- It is absolutely fundamental that <u>all</u> workers should have <u>all</u> the rights and protections afforded under international labour law. 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).

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

    1. Certified agreements will not be able to contain any provision which relates to union right of entry. This represents a severe, unnecessary and impermissible restriction on collective bargaining which is contrary to the principles of freedom

of association and in particular, the rights guaranteed by Article 3 of ILO Convention No. 98.

2. 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 terms of monitoring compliance with industrial instruments and organising/recruiting.

- 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 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 Bill.

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, 2003 and 2004 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"), the *Workplace Relations Amendment (Compliance with Court and Tribunal Orders) Bill* 2003, the *Workplace Relations Amendment (Codifying Contempt Offences) Bill* 2003 ("the 2003 Bills") and the *Building and Construction Industry Improvement Bill 2003* ("the BCII Bill").

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 A 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 A).

The consequence of these several ILO findings for the 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 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;*
> *(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,

[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).

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 the 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]

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

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 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 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

[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).

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 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..

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 Bill that would compound Australia's

breaches of its international obligations and generate further criticism from the supervisory bodies of the ILO.

As highlighted above, the Australian Government is bound to implement legislation that conforms with the fundamental principles of international labour law. The Bill patently seeks to compound Australia's breach of international labour law with a litany of offending provisions.

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

Australia is also bound to implement in good faith the obligations under other international human rights instruments by which it has elected to be bound. These include in particular the relevant provisions of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). As noted, the ICCPR protects freedom of association, including the right to form and join trade unions. As a matter of general principle countries must take positive steps to implement obligations such as these. Indeed, Australia is bound by separate, specific duties to respect, to protect and to fulfill these human rights obligations. In other words, Australia must do more than merely provide a framework within which these rights can be exercised without legal or other hindrance. Rather, Australia must take positive steps to facilitate the exercise of these rights, whether by legislative or administrative means. Applying these principles here, it is clear that the Bill will put Australia in breach of these human rights obligations. Far from facilitating the exercise of the right of freedom of association the Bill will further constrain trade unions in the exercise of their right of freedom of association and the right of each individual member.

Quite apart from the need to comply with ILO Conventions and other international human rights obligations, 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 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 this context there is a need for a strong and compelling reason for the introduction of additional restrictions on collective bargaining and union right of entry particularly where these will almost certainly violate international human rights instruments. The Australian Government has not demonstrated any such strong and compelling reason.

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

2. AUSTRALIA'S INTERNATIONAL OBLIGATIONS IN RESPECT TO COLLECTIVE BARGAINING, FREEDOM OF ASSOCIATION AND UNION RIGHT OF ENTRY

2.1 Introduction

In the areas collective bargaining, freedom of association and union right of entry both existing Australian law (including the 1996 Act) and the provisions of 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 A). The Committee can be expected to make further findings of breach if the provisions of the Bill dealing with collective bargaining, freedom of association and union right of entry pass into law.

Moreover, the fundamental rights to collective bargaining and freedom of association 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.[4]

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

[4] 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.

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[5] 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 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:

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

> *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.[6]

The extensive jurisprudence developed by supervisory bodies of the IL0[7] has elaborated upon the nature and extent of this right of collective bargaining. The ILO Committee on Freedom of Association has observed[8] 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 he able to call for industrial action in support of multi-employer contracts.*[9]

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

[6] Note that Australia has not ratified ILO Convention No 154.
[7] The ILO Governing Body's Committee on Freedom of Association, and the Committee of Experts on the Application of Conventions and Recommendations.
[8] *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.
[9] 295th Report, Case No. 1698, para. 259.

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:

> *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 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.[10] 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…*

The Inter-American Charter of Social Guarantees (adopted by the 9th International Conference of 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[11] in the Area of

[10] 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.

[11] 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."

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.

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[12].

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.

[12] 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.

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.

2.4 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 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.*[13]

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.* [14]

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.*[15]

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[13] *Freedom of Association - Digest of decisions and principles of the Freedom ofAssociation 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

[14] 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 Relations and Other Legislation Amendment Bill 1996, paragraph 79.

[15] 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 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.*

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 BILL

3.1 Introduction

Rather than rectifying the extensive breaches of Australia's international obligation the Government, having repeatedly failed to broadly implement its industrial agenda by amending the 1996 Act, now seeks through the provisions of the Bill to further restrict the rights of collective bargaining, freedom of association and union right of entry. The net effect of the Bill 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 Bill dealt with in this part of the submissions.

3.2 Restrictions on collective bargaining and the autonomy of bargaining parties

The Bill provides that the Australian Industrial Relations Commission ("the AIRC") must not certify a federal certified agreement that contains union right of entry provisions: see proposed s170LU(2B).

The proposed provision, if enacted, will impose a legislative constraint on the range of matters which may be negotiated by employers and employees and their unions in contravention of the principle of voluntary negotiation of collective agreements.

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.*[16]

As noted elsewhere in these submissions (Appendix A), constraints on the ability of the direct parties to negotiate have been considered to conflict with Australia's obligations under

[16] *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.

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.[17]

3.3 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).

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

(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 1 of the 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 Bill is a far more complex, legalistic and restrictive regime. The proposed system has the following additional features:

- There is the requirement that the Registrar be satisfied that the applicant for a permit is a fit and proper person. This is a fetter on unions' selecting their officials

and hence their rights to organise.

- The powers of revoking, suspending or imposing conditions on a permit are expanded, and fixed minimum periods of disqualification are imposed.

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

- The burden of proving the existence of reasonable grounds for suspecting a breach is on the union official. In a practical sense, this may permit employers to resist entry.

- 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 official 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.

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

- The new provisions purport to override the right of entry afforded by State legislation to officials of State registered unions.

The provisions in the 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 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 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 …'*[18]

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

[18] *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.

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.

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

The provisions in the Bill 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 practical 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 provisions go well beyond the balancing of rights of unions to represent their members and the rights of occupiers of premises and employers to conduct their businesses without undue interference or harassment andconfer 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 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 Bill. 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 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 a suspected breach (unless the document is an AWA or related document). The 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 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 AIRC 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 Bill and lead to the terms of a permit being restricted. The effect of this is that even if an employer or occupier do not have reasonable grounds for refusing entry, a permit holder can be punished for pressing his or her claim to right of entry. The fact that the employer or occupier could 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 on the basis that the request is unreasonable, 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 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 1996 Act already contains mechanisms for dealing with inappropriate conduct by permit holders.

In summary, the regime proposed by the amendments set out in the 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 would 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. By limiting the ability of unions to enter and inspect inorder to ensure compliance with industrial instruments the Bill will substantially reduce the strength and efficacy of Australian labour law. Moreover, it will do so without any proposed balance to this by way of increased government supervision, inspection and enforcement of the 1996 Act.

The net effect of the amendments contained in the Bill will be a serious contravention of Australia's obligations under international law.

3.4 Conclusion

Australian law already fails to accord anything like adequate recognition to the rights of collective bargaining and freedom of association (see Appendix A). The Bill, if enacted, would impose even greater restrictions on the right of trade unions and their members to organise and collectively bargain and would severely undermine the role of trade unions in ensuring compliance with industrial instruments 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 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 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 it should withdraw the Bill immediately.

APPENDIX A

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

1. Introduction

ICTUR's comprehensive submissions to the Senate Committee's Inquiries into the WROLA Bill, the 1999 Bill, the 2000 Bill, the 2003 Bills and the BCII 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[19] 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

[19] *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".[20]

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.*[21]

3. The 1999 Committee of Experts Report

Following a submission lodged by the ACTU in August 1998, the Committee found in its Report[22] 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

[20] At p. 224.
[21] Ibid.
[22] *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.*[23]

- 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".[24] 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 ...*[25]

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*

[23] Id., at p. 205.
[24] Ibid.
[25] 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.[26] In confirming the manifold breaches of ILO standards 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

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

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,[27] 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 Bill.

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

APPENDIX B

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 *Workplace Relations Amendment (Right of Entry) Bill 2004* 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:

- Mr Mordy Bromberg SC, a 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, an industrial barrister practising at the Victorian bar at Joan Rosanove Chambers, and Secretary of the Australian National Committee.

- Mr David Langmead, an industrial barrister practising at the Victorian bar at Douglas Menzies Chambers, and a member of the Executive of the Australian National Committee.

- Mr Colin Fenwick, Director, Centre for Employment and Labour Relations Law, Melbourne Law School, the University of Melbourne and a member of the Executive of the Australian National Committee.