AUSTRALIAN SENATE

EMPLOYMENT, WORKPLACE RELATIONS,

AND EDUCATION REFERENCES COMMITTEE

Inquiry into the *Workplace Relations Amendment (Work Choices) Bill 2005*

Submission of:

INTERNATIONAL CENTRE FOR TRADE UNION RIGHTS

November 2005

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EXECUTIVE SUMMARY

ICTUR is an international body with a secretariat in London. It has established national committees around the world including in Australia. ICTUR works to promote and defend the rights of workers and 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 is recognised as an important international organisation and has been granted accredited status with both the United Nations and the International Labour Organisation (ILO).

In the review of any proposed legislation it is important to have regard to the international context in which industrial relations law operates. There are international standards which regulate the way in which national governments must approach the question of workplace relations. The international instruments the subject of this submission are instruments to which Australia is a signatory and include obligations which Australia has voluntarily accepted. There is therefore an obligation on Australia to ensure that the international law to which Australia has subscribed is met in domestic law and practice.

The relevant international law in question principally includes Conventions of the ILO which have been established through a tri-partite process involving representatives of employers, workers and governments. 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 to 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.

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

to also implement them fully and effectively. There is no room for selective application or enforcement.

It is against this background that ICTUR observes, and in this submission details, the manner in which the *Workplace Relations Act 1996* ("the 1996 Act") is already in breach of international law and how the *Workplace Relations Amendment (Work Choices) Bill 2005* ("the 2005 Bill") will, if enacted, compound existing breaches and put Australia in flagrant disregard of its obligations under international labour law.

As this submission details, there are a number of fundamental rights and obligations required by international labour law including:

- the right of workers to freely associate and collectivise in order to **effectively** collectively bargain with their employer;
- the right of both workers and employers to bargain freely – that is, without restriction as to the content of their agreements or as to the level at which agreement making takes place, i.e. whether single or multiple enterprise, sector or industry based;
- the right of workers to strike in furtherance of their interests;
- the right of workers to be effectively protected from arbitrary or unfair dismissal;
- the right of workers to enjoy access to the services of their union including the capacity of unions to enter workplaces for the purposes of protecting workers' interests and recruiting new members; and
- the right of workers not protected by collective bargaining to the benefit of tri-partite minimum wage fixing processes which ensure a minimum wage sufficient to enable a worker and his or her family to have a decent standard of living.

The 1996 Act does not fully or properly respect these fundamental rights and has been rightly criticised by the ILO Committee of Experts on the Application of Conventions and Recommendations on many occasions already for its failure. The ILO Committee of Experts has repeatedly found that the 1996 Act 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. If the 2005 Bill is enacted, Australia's non-compliance with these fundamental rights will be compounded to the extent that the effective operation of these rights will be either entirely extinguished or so severely prejudiced as to render them of little value.

The resultant further breaches of Australia's international obligations, in circumstances where Australia is already a recalcitrant offender, will cause outrage within the ILO and other international institutions. The most severe criticism can be expected from the ILO because there can be no doubt that upon the enactment of the 2005 Bill, Australia will be one of the most non-compliant western democracies of all of the ILO member states. Further, the Australian Government's steadfast defiance of unequivocal and repeated findings by the ILO Committee of Experts on the 1996 Act's lack of compliance with ILO Conventions is not only to be deplored but may ultimately provide a basis for Australia's expulsion from the ILO.

There is a fundamental disconnect between the policy which is driving Australia's industrial policy and Australia's international labour law obligations. International labour law is based, as Australia's industrial relations policies were formerly based, on the fundamental precept that in the usual case, an individual employee does not have equal bargaining power with his or her employer. As Justice Higgins once famously put it:

> *The power of the employer to withhold bread is a much more effective weapon than the power of the employee to refuse labour.*

With the enactment of the proposed legislation, the inferior individual bargaining capacity of a worker rather than the value of their actual contribution will be the substantial determinant of the wages paid and the conditions afforded. Neither as a matter of international labour law nor as a matter of fairness is that result acceptable.

For the reasons detailed in this submission, ICTUR urges the Senate Committee to recommend that the Government takes steps to comply with its international obligations

and introduce amending legislation which would bring the 1996 Act into compliance with Australia's international obligations. ICTUR also urges the Senate Committee to recommend that the Government desist from implementing the proposals in the 2005 Bill which, for the reasons outlined will compound Australia's breaches of its international obligations and do so in the most serious and unprecedented manner.

If enacted, the 2005 Bill will worsen Australia's breach of ILO standards in at least the following ways:

- The prohibitions on "pattern bargaining" in the 2005 Bill would result in an amplification of major breaches of ILO Conventions 87 and 98 identified by the ILO Committee of Experts, i.e. 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.
- The prohibition on the incorporation of a range of matters in workplace agreements which is likely to include, trade union training leave, mandating union involvement in dispute resolution and providing a remedy of unfair dismissal, represents a severe, unnecessary and impermissible restriction on collective bargaining and further compounds Australia's breach of ILO Convention 98.
- In further breach of the fundamental right to strike, the 2005 Bill proposes to: further 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.
- The scope of awards is further attenuated in the 2005 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 which is wholly inconsistent with Australia's obligation to promote and encourage collective bargaining.
- Under the 2005 Bill an Australian Workplace Agreements (AWAs) will wholly displace a collective agreement for the life of the AWA. The Bill severely curtails the efficacy of collective agreements vis-à-vis AWAs in flagrant disregard of both

Australia's obligations under ILO Convention No. 98 and previous findings of the ILO Committee of Experts.

- 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.
- The provisions of the Bill would place Australia in further breach of the letter and spirit of the ILO's Termination of Employment Convention by denying a remedy to employees who are employed by corporations with less than 100 employees and denying a remedy to employees who are employed by corporations with over 100 employees if their dismissal is for "operational reasons".
- The substantial weakening of the "no-disadvantage" test which serves to undermine collective bargaining.

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 *Workplace Relations Amendment (Work Choices) Bill* ("the 2005 Bill").

ICTUR makes this submission to assist the Senate Committee in its inquiry.

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 and correspondents 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, 2004 and 2005 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*, the *Workplace Relations Amendment (Codifying Contempt Offences) Bill 2003* the *Building and Construction Industry Improvement Bill 2003* and the *Workplace Relations Amendment (Right of Entry) Bill 2004*.

It is significant to note that the 1996 Senate inquiry submissions made by ICTUR in respect to the Bill that became 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 repeatedly 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.

The consequence of these several ILO findings for the present 2005 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.

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 representatives.

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;*
>
> *(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

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[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).

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.

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.

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

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 2005 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 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.

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[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).

1.3 The *Workplace Relations Act 1996*, the 2005 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. This has been established repeatedly by findings made by the ILO Committee of Experts.

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).

In 2005 the Committee of Experts again made a range of findings that highlighted the fact that the 1996 Act remains in fundamental breach of ILO Conventions (see Appendix A).

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 2005 Bill that would compound Australia's breaches of its international obligations and generate further wholly justified 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 2005 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 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.

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 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 industrial action in Australia particularly where these will almost certainly violate international human rights instruments.

ICTUR also notes that the content of the 2005 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 2005 Bill should also be rejected. **ICTUR believes that the case for legislation of this nature has clearly not been established and is entirely unjustifiable by reference to Australia's international obligations.**

2 AWARDS, COLLECTIVE AGREEMENTS & AWAs

2.1 Introduction

On the issue of collective bargaining the provisions of the 2005 Bill would, if given effect, significantly exacerbate the 1996 Act's flagrant breach of Australia's international obligations.

The ILO's Committee of Experts has recognised the bias of the 1996 Act towards individual workplace relations and has determined that this bias constitutes a clear breach of ILO standards which oblige the Australian Government to promote collective bargaining.

The root of the existing legislation's default lies in the primacy given to Australian Workplace Agreements (AWAs) over all modes of collective agreement making, including by way of consent awards and Certified Agreements. This section will examine the further diminution and subordination of collective bargaining through an analysis of the provisions of the 2005 Bill concerning awards, collective agreements and AWAs.

2.2 Background: The Importance of Collective Bargaining

Collective bargaining is a negotiating process where representatives of workers and employers or employer representatives endeavour to conclude an agreement, which will then govern the employment relationship between the workers and employers. Trade unions are the natural representatives of workers in the collective bargaining process. Collective bargaining can be contrasted to individual bargaining. Individual bargaining involves each worker acting alone and concluding an agreement in isolation from his or her fellow workers.

The central role of unions in collective bargaining reflects the inherent imbalance of bargaining power between individual workers and their employers. This imbalance can be attributed to the disparity of economic capacity between an employer and an individual worker.

Indeed, the true raison d'etre of the arbitration system in Australia for most of this century has been the amelioration of the effects of the imbalance of power inherent in the individual employment relationship. Our arbitration system achieved this primarily through the setting of fair and reasonable wages and conditions of employment through the instrument of comprehensive awards. It has long been recognised that unions and employers in Australia have been able to seek to have collectively bargained agreements made by the Australian Industrial Relations Commission ("the AIRC") of ("the Commission") as a consent award.

In preparing the ground for the concept of a wage fixation system based on human need in the Harvester case, Higgins J perceived a fundamental incompatibility between a "fair and reasonable" wage and the level of remuneration determined by "the usual, but unequal, contest, the 'higgling of the market' for labour, with the pressure for bread on one side, the pressure for profits on the other".[4] Higgins J effectively articulated the moral foundations of our arbitration system thus:

> *The power of the employer to withhold bread is a much more effective weapon than the power of the employee to refuse labour. Freedom of contract, under such circumstances, is surely misnamed; it should rather be called despotism in contract; and this court is empowered to fix a minimum wage as a check on the despotic power... The worker is in the same position, in principle, as Esau, when he surrendered his birthright for a square meal, or as a traveller, when he had to give up his money to a highwayman for the privilege of life.* [5]

Herein lies an elementary truism, which - no less in contemporary times - stands unshaken. In the words of the eminent jurist Otto Kahn-Freund: "there can be no employment relationship without a power to command and a duty to obey, that is without this element of subordination in which lawyers rightly see the hallmark of the 'contract of employment'".[6]

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4 *Ex parte H V McKay* (1907) 2 CAR 1 at 2-18.

5 *Federated Engine-Drivers and Firemen's Association of Australia v The Broken Hill Proprietary Co Ltd* (1911) 5 CAR 9 at 27.

6 0 Kahn-Freund, *Labour and the Law*, Stevens & Sons, London, 1972, p 2. Recent developments in the application of the law relating to the identification of the employment relationship suggests a greater willingness by the courts to extend this element of subordination or control to so-called independent contractors: see the decision of the Court of Appeal of New South Wales in Vabu v Commissioner of Taxation (1996) 33 ATR 537

Any analysis of the effect of the provisions of the 1996 Act and the 2005 Bill must proceed from a full appreciation of this most fundamental proposition concerning the unequal power relationship between individual employees, acting alone, and their employer. Contrary to the assertions of some of those who would support the 2005 Bill, there is no element of paternalism in this proposition; it merely demands recognition of the daily reality for the vast majority of workers in Australia.

Collective bargaining and collective agreement-making, whether implemented via consent awards or more recently through union-negotiated certified agreements, has traditionally functioned in Australia as the means by which workers are elevated to an approximate level of parity with employers at the bargaining table.

It is for very good reason then that International Labour Standards impose upon national governments a positive obligation to promote collective bargaining.

2.3 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 presupposes a range of conditions such as the right of workers to form and join trade unions, the right to protection from victimisation on account of trade union membership or activity, and the right of unions to take industrial action to promote and protect their interests of their members.

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

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

> *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 international obligation to promote and encourage collective bargaining was examined by the Committee on Freedom of Association in the context of a complaint against the Government of New Zealand brought by the New Zealand Council of Trade Unions ("the New Zealand Complaint").[9]

The New Zealand Council of Trade Union alleged that the *Employment Contracts Act* which came into effect in New Zealand in May 1991 (and which was later repealed) violated the principles of freedom of association in the collective bargaining process and by its restrictions on the right to strike.

The decision of the Committee on Freedom of Association in the New Zealand Complaint clearly endorsed the primacy of collective agreements and collective representation over individual agreements and individual representation. In its Final Decision at paragraph 254 the Committee concluded:

> *The Committee considers that problems of incompatibility between ILO principles on collective bargaining and the [Employment Contracts] Act stem in large part from the latter's underlying philosophy, which puts on the same footing (a) individual and collective employment contracts, and (b) individual and collective representation.*

The Committee found it impossible to reconcile the equal status given by the New Zealand Act to individual and collective contracts with the ILO principles on collective bargaining which provide for the encouragement and promotion of collective agreements. The Committee characterised the Act as in effect allowing collective bargaining by means of collective agreements rather than promoting and encouraging it.[10]

The New Zealand decision thus made it clear that legislation that puts collective bargaining on an equal footing with individual bargaining is in breach of ILO principles.

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8 Note that Australia has not ratified these latter instruments, ie. Convention No 154 and Recommendations No 94 and No 163.

9 Case No. 1698, A Complaint Against the Government of New Zealand.

10 Para 255, Final Decision.

ICTUR's previous submission to the Senate Inquiry into the Bill that became the 1996 Act argued that, by going further than the New Zealand legislation and giving primacy to individual bargaining and individual agreements, the provisions of the 1996 Act constituted a serious breach of Convention No. 98.

As is highlighted below, the ILO Committee of Expert's Report submitted to the 86th Session of International Labour Conference in June 1998 effectively vindicated ICTUR's stance in relation to the provisions of the 1996 Act.

2.4 Operation and Impact of the *Workplace Relations Act 1996* (Cth.) in relation to Collective Bargaining

Provisions of the 1996 Act dealing with Collective Bargaining

The 1996 Act established a clear bias in favour of individual bargaining which is entirely contrary to the ILO Convention No. 98.

Examples and manifestations of this bias follow:

(a) New objects in subsections 3(b) and (c) emphasise that employers and employees take "primary responsibility" for their relationship at the workplace and/or enterprise level.

(b) Previous object in subsection 3(e) "encouraging the organisation of representative bodies of employers and employees and their registration under the Act" is replaced by new object 3(g) which does not encourage organisations.

(c) Section 152 accords preference to state employment agreements (including individual contracts) over awards and, in effect, over the collective bargaining options contained in the 1996 Act.

(d) The Certified Agreement options introduced in Part VIB of the 1996 Act accommodate non-union agreements (section 170LK), whereas Convention No. 98 does not comprehend non-union bargaining.

(e) Indeed section 170LK agreements do not require any degree of bargaining whatsoever, collective or otherwise since all that is required of an employer is that it has an agreement with "a valid majority of persons employed at the time whose employment will be subject to the agreement" (section 170LK(1)). Even organisations authorised to represent employees are entitled only to "meet and confer" with the employer about the agreement (section 170LK(5)).

(f) Australian Workplace Agreements were introduced as a form of individual agreement-making[11] which prevail over all collective bargaining processes by, for example, making AWAs:

(i) operate to the exclusion of any federal award that would otherwise apply to the employee's employment (section 170VQ(1));

(ii) override state awards and agreements (section 170VQ(4)); and

(iii) operate to the exclusion of any certified agreement that would otherwise apply to the employee's employment, except that a certified agreement may prevail over an AWA to the extent of any inconsistency where:

- the certified agreement is in operation at the time the AWA comes into operation;
- the AWA comes into operation while the certified agreement is still in its "nominal period", that is, its nominal expiry date has not passed; and
- the certified agreement does not expressly allow a subsequent AWA to operate to the exclusion of the certified agreement or to prevail over the certified agreement to the extent of any inconsistency (section 170VQ(6)).

It is submitted that the 1996 Act further undermined the relevance of collective bargaining by attenuating the scope of matters that may be regulated by awards. It thus

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[11] AWAs have been described by a leading Australian industrial law expert as "nothing more than a bunch of individual agreements": R McCallum, 'Australian Workplaces, the Rise of Contractualism and Industrial Citizenship', Speakers' Notes from the Fourth Annual Labour Law Conference titled "Employment Contracts: Their Role in Industrial Relations?", ACIRRT, University of Sydney, 1996 at p 2.

restricted unjustifiably those matters that can be the subject of award-based consent agreements between unions and employers.

Additionally, hitherto long established instruments known as paid rates awards, which were created almost exclusively as a result of collective bargaining agreements between unions and employers were abolished (section 89A(3)).

The result of the 1996 Act is that a collective agreement cannot be enshrined in an award (either a minimum rates or paid rates award) to the extent that it contains terms other than the 20 specified allowable matters.[12] Of course such an agreement could be reflected in the terms of a certified agreement; however this erosion of the award system clearly has the effect of limiting the scope of collective agreement making options for unions.

It is instructive to observe that the change in the set of choices in agreement-making introduced by the 1996 Act was achieved by undermining and subordinating the two main streams of collective agreement-making: awards and certified agreements.

2.5 ILO Committee of Experts' Findings - Convention 98

ICTUR's previous submission to the Senate Committee's Inquiry into the Bill that became the 1996 Act exposed the failure of that legislation to meet Australia's international obligations on the right to collective bargaining. The views expressed by ICTUR at that time on the failure of the 1996 Bill to encourage and promote collective bargaining are reflected in subsequent findings by the ILO Committee of Experts of substantial breaches by Australia of the requirements of Convention 98.

In a Report[13] to the 86th Session of the International Labour Conference held in June 1998 the Committee of Experts on the Application of Conventions and Recommendations the Committee found that the 1996 Act fails to accord with Convention No. 98 in the following ways:

- **The Act fails to promote collective bargaining as required under Article 4 of the Convention No. 98**

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12 See "allowable award matters" under section 89A(2).

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

This failure is most obviously evident in the primacy afforded to AWAs. In this regard the Committee observed that:

> *This emphasis on direct employee-employer relations is particularly evident in Part VID of the Act regarding Australian workplace agreements (AWAs), which are defined in section 170VF: "an employer and employee may make a written agreement, called an Australian workplace agreement, that deals with matters pertaining to the relationship between an employer and an employee". This part promotes AWAs, which are essentially individual in nature, over collective agreements, through simpler filing requirements in comparison with the collective certification procedure, the advice and assistance of the Employment Advocate and giving AWAs primacy over federal awards and state awards or agreements, and over certified agreements, unless the certified agreement is already in operation when the AWA comes into operation (section 170VQ). Once there is an AWA in place, a collective agreement certified under the Act cannot displace it. In addition, under Part AV of the Act, providing for the extension of the provisions of the Act to the State of Victoria, when a collective employment agreement ceases to be in force, it is replaced by "an individual employment agreement with the same terms" (section 516). The Committee concludes that primacy is clearly given to individual over collective relations through the AWA procedure. The Committee considers that the provisions of the Act noted above do not promote collective bargaining as required under Article 4 of the Convention. It, therefore, requests the Government to indicate in its next report any steps taken to review these provisions of the Act and to amend it to ensure that it will encourage collective bargaining as required by Article 4 of the Convention.* [14]

- **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 requested "the Government to review this issue and amend the legislation in the light of the requirements of the Convention".[15]

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[14] At p. 223.
[15] At p. 224.

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), this protection is not afforded with respect to the negotiation of multiple-business agreements. The Committee also note 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.* [16]

The Act is inconsistent with the principle of voluntary collective bargaining in that it limits the scope of negotiable issues.

The Committee observed that:

> *... the combined effect of ss. 166A, 187AA and 187AB is to prohibit the issue of strike pay being raised as a matter for negotiation. Considering that in general the parties should be free to determine the scope of negotiable issues (see General Survey, op. cit., paragraph 250), the Committee requests the Government to review and amend these provisions to ensure conformity with the Convention.* [17]

The Committee also expressed concern about section 170LL of the 1996 Act by requesting clarification as to whether it permits an employer of a new business to choose

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16 Ibid.
17 Ibid.

which organisation to negotiate with prior to employing any persons. In this context the Committee noted that the choice of bargaining agent should be made by the workers themselves.[18]

Most recently, in mid-2005 the ILO Committee of Experts observed that the ability of employers under the current provisions of the 1996 Act to offer new employees a job conditional on signing an AWA, and to require existing employees to sign AWAs in order to receive wage increases, was contrary to ILO Convention No 98: ILO (2005), Report of the Committee of Experts on the Application of Conventions and Recommendations, 93rd Session, ILC, 2005.[19] The ILO Committee of Experts has thus determined that the 1996 Act fails to provide adequate protection against anti-union discrimination to workers who refuse to negotiate an AWA and insist on having their terms and conditions of employment governed by collective agreements.

As a stark indication of the Government's actual level of commitment to the stated principal object of the 2005 Bill of "assisting in giving effect to Australia's international obligations in relation to labour standards" (section 3(n)), rather than remedy the breach of Convention No. 98 in this regard the 2005 Bill defiantly asserts that an employer may legitimately require an employee to make an AWA as a condition of employment (section 104(6)).

These findings by the ILO Committee of Experts, especially when taken together with the more recent findings of the Committee concerning the failures of Australian law on the issue of industrial action (which is examined elsewhere in these submissions) are highly damaging to Australia's international reputation and standing.

The central submission ICTUR makes is that the provisions of the 2005 Bill will inevitably take Australia further down the path of non-compliance with its international legal obligations. An examination of the provisions of the 2005 Bill dealing with collective agreements and awards will reveal the extent to which enactment of this

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18 Ibid.

19 (http://www.ilo.org/ilolex/gbe/ceacr2005.htm).

measure would exacerbate Australia's breaches of its international obligations in relation to the fundamental right to collective bargaining.

2.6 The Provisions of the 2005 Bill

Awards

The 2005 Bill proposes amendments to the 1996 Act which would have the effect of further marginalising the scope and role of awards in the processes of collective agreement making.

It is proposed to delete from the existing list of allowable award matters in section 89A(2) the following items (clause 116):

- classifications of employees and skill-based career paths (section 89A(2)(a)),
- rates of pay generally (such as hourly rates and annual salaries), rates of pay for juniors, trainees or apprentices, and rates of pay for employees under the supported wage system (section 89A(2)(c));
- piece rates (section 89A(2)(d));
- annual leave (section 89A(2)(e)),
- long service leave (section 89A(2)(f)),
- personal carer's leave, including sick leave, family leave, bereavement leave, and compassionate leave. (section 89A(2)(g)),
- parental leave (section 89A(2)(h));
- certain monetary allowances (section 89A(2)(j));
- casual loadings (section 89A(2)(k));
- redundancy pay in relation to a termination of employment by an employer of less than 15 employees and is voluntarily elected by an employee (section 89A(2)(m)); and
- notice of termination (section 89A(2)(n)).

The proposed definition of "redundancy pay" (see proposed section 116(4)) which limits redundancy pay to situations where there is a termination of employment "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 where the termination may be said to be at the initiative of the employee. In the case of *Lawrence v Clutha Developments Pty Ltd* 1985 AILR paragraph 283, the Federal Court of Australia concluded that "retrenchment" within the meaning of the relevant award involved the "cutting back of employment" directly at the employer's own decision and not by the decision of the employee, even where the employee's decision arose out of an inducement to leave the employment. The proposed exclusion would result in the exclusion of a matter 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* (1992) 46 IR 371 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.

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 Commission'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 Bill ICTUR noted the failure of that Bill to preserve the Commission'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 2005 Bill. There is simply no reasonable justification for curtailing the powers of the Commission to regulate employees' rights on termination of employment in awards.

Further there is no warrant for excluding employees employed by employers with 15 or less employees from an entitlement to redundancy pay (see proposed section 116(4)).

Proposed section 116B of the 2005 Bill seeks to render a range of matters not allowable including:

- transfers from one type or employment to another type of employment;
- the number or proportion of employees that an employer may employ in a particular type of employment;
- prohibitions on an employer employing employees in a particular type of employment;
- restrictions on the range or duration of training arrangements;
- restrictions on the engagement of independent contractors and requirements relating to the conditions of their engagement;
- restrictions on the engagement of labour hire workers, and requirements relating to the conditions of their engagement;
- union picnic days,
- the right of a union to represent an employee in a dispute settling procedure, unless it is the employee's chosen representative,
- dispute resolution training leave;
- trade union training leave;
- the maximum or minimum hours of work for regular part-time employees,
- tallies.

ICTUR considers that the further attenuation of the scope of awards as proposed in the 2005 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 a collective agreement.

2.7 Certified agreements and AWAs

The supremacy of AWAs

The critical threat to collective bargaining appears in Part VB of the 2005 Bill.

The proposed section 100A of the Bill seeks to abolish the limited priority which certified agreements currently enjoy over AWAs which come into operation during the currency of pre-existing certified agreements. The present section 170VQ(6), which the 2005 Bill would repeal, affords a limited priority to certified agreements over AWAs "to the extent of any inconsistency" in circumstances where:

- the certified agreement is in operation at the time the AWA comes into operation;
- the nominal expiry date of the certified agreement is after the date on which the AWA comes into operation; and
- the certified agreement does not expressly allow a subsequent AWA to wholly exclude the certified agreement or to prevail over it to the extent of any inconsistency.

The effect of proposed section 100A is that a pre-existing certified agreement will be automatically and wholly displaced by any subsequent AWA which come into operation (even before the nominal expiry date of the certified agreement) for the life of the AWA.

The Bill thus severely curtails the efficacy of certified agreements vis-a-vis AWAs. Under the proposed provisions an existing certified agreement would be wholly displaced by a subsequent AWA.

Moreover, one of the most profound and alarming changes to be introduced by the 2005 Bill is the repeal of the no-disadvantage test for the approval of AWAs under which AWAs can generally only be approved if they do not result in a reduction in the overall terms and conditions of employment of those employees covered by an AWA under a relevant Federal or State award and any other relevant Federal or State law. The illusory reassurance contained in section 101B of the 2005 Bill actually provides that an AWA

may expressly exclude or modify a range of so-called “protected award conditions”. These conditions are in reality afforded no such protection.

AWAs would be permitted to descend below the overall floor of minimum terms and conditions of employment enshrined in awards. This is because the proposed section 101B(2)(c) provides that those protected award provisions have effect “subject to any terms of the workplace agreement that expressly exclude or modify all or part of them.”

This means that AWAs may abolish common award rights such as loadings for overtime and shift work, penalty rates, rest breaks, annual leave loadings, and other allowances. Indeed such “protected award conditions” may lose that status (with effect that they may be undercut by an AWA even without express provision in the AWA) by a stroke of the Executive’s Regulation-making pen (section 101B(3)).

This constitutes a substantial escalation in the supremacy of AWAs over collective means of regulating employment conditions. Clearly, this would enhance the primacy of individual over collective agreements and awards leading to a further breach of Australia’s fundamental obligation to promote collective bargaining.

To further promote and encourage the supremacy of AWAs over certified agreements, it appears that the Government will legislate by Regulation to prohibit, amongst other things, any clause in a workplace agreement that seeks to prohibit the offering of AWAs (section 101F). Although not expressly stipulated in the 2005 Bill, the Government’s WorkChoices document released in October 2005 identifies terms prohibiting AWAs as “prohibited content” (at page 23).

The 2005 Bill goes so far as to make it an offence, punishable by a substantial fine, to seek to include a term containing prohibited content in the course of negotiations for an AWA or a collective agreement (section 101M).

The 2005 Bill also introduces a procedure for current anti-AWA provisions to be removed from workplace agreements. The proposed section 101K states that the Employment Advocate “must vary the agreement so as to remove that [prohibited]

content" on application by "any person", which include an employer bound by the offending agreement, or on the Employment Advocate's initiative (section 101G). This provision for expunging prohibited content, including anti-AWA provisions, was thought to be necessary, notwithstanding the proposed provision which would render void all prohibited content in agreements whether certified before, on or after the commencement of the 2005 Bill. This heavy-handed approach to anti-AWA provisions is indicative of the zealotry which the drafters of this Bill have brought to the task of subordinating collective agreements.

It is clear that the aim and likely effect of the prohibition of anti-AWA provisions is to foster more AWAs that would have the effect of displacing pre-existing collective agreements.

The ban against anti-AWA provisions also offends the principle of voluntary collective bargaining in so far as it further limits the scope of negotiable issues. This would clearly compound Australia's breach of ILO standards, as evidenced by the ILO Committee of Experts finding concerning the exclusion of strike pay as a matter for negotiation in the 1996 Act.

The 2005 Bill painstakingly erects a notion that minimum conditions in current awards and current collective agreements will be protected, and that the collective industrial relations system will continue for those who want to remain in that system. But it is a mere façade.

Once an employee enters into an AWA (which they may be effectively forced to do in a variety of circumstances including in order to obtain a wage rise) they can never return to the relative safety of the award. Proposed section 103R of the 2005 Bill provides that an award and collective agreement have no effect for the period from the termination of an AWA until the employee agrees to another AWA (or collective agreement). That is, once an AWA is terminated, the employee does not go back onto the existing award, but rather falls on the rocks of the five basic minimum "Australian Fair Pay and Conditions Standards" in the 2005 Bill, until they agree to another AWA. This has the important consequence that in "negotiating" a subsequent AWA, the employee cannot use or trade-

off their previous award conditions to gain other benefits simply because those award conditions are lost forever.

The insidious impact of AWAs upon the capacity to collectively bargain is already manifest and will be substantially enhanced by the proposed amendments. To be effective, collective bargaining requires both unity of purpose and action by employees working together to a common end to overcome the imbalance in bargaining power between the employer and any single employee. A workplace regulated by AWAs defeats this objective in a number of respects.

Once AWAs dominate the workplaces, it is unlikely that the employees will ever again have a capacity to combine and take protected action to improve their terms and conditions of employment. That is so because employees subject to AWAs will not be able to take protected action in support of the making of certified agreements during the term of their AWA and because in all likelihood the AWA of each employee will expire on different dates there will be no practical or effective capacity to combine. This is the effect of the current Act.

The proposed amendments go further. The amendments would allow the undermining of collective action which has successfully put in place an existing certified agreement. Despite making an agreement with the union and its employees to apply specific terms and conditions to its workforce, an employer is now given the opportunity to avoid its agreed obligations and enter into an AWA with any individual employee and thereby relieve itself of the very obligations it has agreed to observe. Thus on the day after the employer has given its solemn agreement to the making of and certification of the collective agreement, the employer will nevertheless be legally entitled to go from one employee to the next and exclude itself from the obligations accepted by it in the making of the collective agreement.

An employer intent on undermining and destroying collective representation and collective bargaining is now to be given every opportunity to do so. It may be the case that in order to move existing employees off the collective agreement and onto an AWA an employer will need to offer incentives. However, the long term benefits for the

employer will be substantial and the long term cost for the employees not readily appreciated. Once AWAs dominate the workplace collective bargaining will no longer be available as a practical mechanism to address improving future terms and conditions of employment.

Independent empirical research on individualised workplaces in Britain and Australia (that is, workplaces with minimal union presence and a majority of the non-managerial workforce employed on individual employment contracts) has found that they demonstrate very little evidence of actual negotiation between employer and employee. These workplaces lack both procedural fairness for employees and mechanisms for voicing their concerns, and are marked by very high levels of employee turnover. This research includes the following publications:

- Deakin, S. 1999, 'Organisational change, labour flexibility and the contract of employment in Great Britain', in Employment Relations: Individualisation and Union Exclusion, eds S. Deery & R. Mitchell, Federation Press, Sydney, pp. 130–152;
- Deery, S. & Walsh, J. 1999, 'The character of individualised employment arrangements in Australia: A Model of 'Hard' HRM', in Employment Relations: Individualisation and Union Exclusion, eds S. Deery & R. Mitchell, Federation Press, Sydney, pp. 115–128;
- Deery, S. & Walsh, J. 1998, The character of individualised employment arrangements in Australia: Unitarism, Unilateralism and Utilitarianism, Department of Management Working Paper No. 10, University of Melbourne [Online];[20]
- Deery, S., Walsh, J. & Knox A. 1999, The non-union workplace in Australia: Bleak House or human resource innovator?, Department of Management Working Paper in Human Resource Management, Employee Relations and Organisational Studies No. 2, University of Melbourne [Online];[21].

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[20] http://www.management.unimelb.edu.au/Research/papers/wpdm10.pdf [2005, Aug 23].
[21] http://www.management.unimelb.edu.au/Research/papers/wph2.pdf [2005, Aug 23]

- Mitchell, R. & Fetter, J. 2002, Human resource management and the individualisation of Australian industrial relations, Centre for Employment and Labour Relations Law Working Paper No. 25, University of Melbourne [Online].[22]

In a recent submission to a Senate inquiry into workplace agreements, Professor Andrew Stewart has usefully summarised the results of objective analysis of actual agreements. He concluded that workers on AWAs are generally paid less than comparable workers on union-negotiated agreements: Stewart, A. 2005, Submission to Senate Employment, Workplace Relations and Education References Committee Inquiry into Workplace Agreements, Sydney, 8 August [Online].[23]

There are a range of other proposed provisions in Schedule 8 of the 2005 Bill which are designed to diminish the role of certified agreements and inhibit the intervention of unions. We deal with some of these provisions next.

Other Concerns - Certified Agreements

There are a number of other provisions contained in the 2005 Bill which will have the effect of diminishing the existing machinery for collective bargaining in direct contravention of Australia's obligation to promote collective bargaining under ILO Convention No. 98.

Proposed section 96D which enables an employer to make a "greenfields" agreement relating to a new business which effectively binds all prospective employees who are yet to be employed by the employer flies in the face of the concept of collective bargaining. It effectively enables an employer to unilaterally bind its prospective employees by "negotiating" a collective agreement with itself. This process simply does not answer to the term "collective", nor to any recognised concept of "bargaining".

The power to authorize multiple-employer collective agreements is removed from the Full bench of the Commission and placed in the hands of the Employment Advocate, and

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22 http://www.law.unimelb.edu.au/celrl/assets/Working%20Papers/celrl-wp25.pdf [2005, Aug 23].

23 http://www.aph.gov.au/Senate/committee/eet_ctte/indust_agreements/submissions/sub012.pdf [2005, Aug 25]

the Government is given sweeping scope to make regulations expanding the circumstances in which authorization of these agreements must be denied (proposed section 96F). Any expansion of these circumstances would certainly result in further breach of the principle that the voluntary nature of collective bargaining upheld by ILO Convention No. 98 necessarily entails the parties having an unfettered choice as to the particular bargaining level, whether single-business, industry wide or national.

Other Concerns - AWAs

ICTUR's submission to the Senate Inquiry into the Bill which became the 1996 Act warned that a range of the then proposed processes and procedures associated with the making of AWAs were inappropriate. Those concerns are referred to and relied upon without being repeated here. In the main these concerns were not taken up in the amendments made to the Bill. Insofar as some of the concerns there expressed, for instance the lack of independent scrutiny by the AIRC found some expression in the Act, the proposed amendments now intend a reversal. Those matters and other concerns are here identified.

To a limited degree under the 1996 Act, the AIRC is given a role in scrutinizing the making of AWAs. The proposed amendments will remove the Commission's current role of approving proposed AWAs referred to it by the Employment Advocate. The proposed amendments will in fact remove any effective vetting procedure for AWAs. AWAs are deemed to be "made" and "approved" when they are signed (and witnessed) and dated by the employer and the employee (sections 96G and 98C). AWAs come into operation on the day the agreement is lodged with the Employment Advocate, even if the employer has failed to take reasonable steps to ensure that the employees concerned had ready access to the agreement at least 7 days before, or to provide employees with an information statement informing them of their rights to a bargaining agent (section 100(2)).

A number of verification and due process provisions are also proposed to be removed. There will no longer be an obligation on an employer to provide a statutory declaration as currently required by section 170VO(l) of the 1996 Act. The limited verification process

which exists is thus removed. Whilst it is intended that the Act continue to impose limited obligations upon an employer such as the provision of an information statement to the employee, how will the Employment Advocate know that this has been complied with? How will the Employment Advocate be satisfied that the employee has genuinely consented to the terms and conditions in the AWA? There is no mechanism by which the Employment Advocate can be satisfied of these and other matters. In fact, proposed section 99B(5) expressly provides that the Employment Advocate is not required to consider whether any of the employer's obligations in making an AWA have been met, nor is it required to determine whether the contents of the AWA meets the requirements of the Act, such as whether the so-called protected award conditions have been excluded by an AWA.

A major change to the AWA provisions by the removal of the current obligation upon employers to offer an AWA in-the same terms to all comparable employees unless there are fair and reasonable circumstances why that should not occur. The repeal of this obligation will allow employers to discriminate between employees performing the same or comparable work. Women and migrant workers in particular will be most affected. The repeal encourages the application of differential terms and conditions of employment to employees performing the same work. Whilst any differential should be based on fairness, the proposed repeal further emphasizes the broad intent of the AWA provisions, namely, that the individual bargaining capacity of a worker rather than the value of their actual contribution, be a substantial determinant, of the wages paid and the conditions afforded.

3 INDUSTRIAL ACTION AND SECRET BALLOTS FOR PROTECTED ACTION

3.1 Introduction

In the area of the right to strike, both existing Australian law (including the 1996 Act) and the provisions of the 2005 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. The Committee can be expected to make further findings of breach if the provisions of the 2005 Bill dealing with industrial action and secret ballots pass into law.

3.2 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* expressly provides for the right to strike in Article 8. However it is the extensive jurisprudence developed by supervisory bodies of the ILO[24] 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[25] or No 98.[26] 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'.[27]

So the right to strike has been implied from one of the foundational principles of the ILO, i.e. the principle of freedom of association. In particular, it has been implied from the right of unions to organise their activities and formulate their programs, including

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24 The ILO Governing Body's Committee on Freedom of Association, and the Committee of Experts on the Application of Conventions and Recommendations.

25 Freedom of Association and Protection of the Right to Organise.

26 The Right to Organise and to Bargain Collectively.

27 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.

furthering and defending the interests of workers, which is enshrined in Articles 3, 8 and 10 of Convention No 87.

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.[28] 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 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. That being said, the Committee emphasises that the right to strike cannot be considered as an absolute right: not only may it be subject to a general prohibition in exceptional circumstances, but it may be governed by provisions laying down conditions for, or restrictions on, the exercise of this fundamental right.*[29]

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28 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 *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 p. 1.

29 *Report of the ILO Committee of Experts on Freedom of Association and Collective Bargaining*, (International Labour Office, Geneva, 1994), paras. 147, 148 and 151 (emphasis added).

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. A consideration of current Australian law and the proposals in the 2005 Bill, vis-à-vis the internationally enshrined right to strike, now follows.

3.3 Operation and Impact of the *Workplace Relations Act 1996* (Cth.) in relation to Industrial Action

3.4 Provisions of the 1996 Act dealing with Industrial Action

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, i.e. matters pertaining to the relationship between employers and employees (section 170LI(1));
- there is no scope for the taking of protected action by the increasing number of Australian workers who are engaged as independent contractors;
- 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 170MI(1));
- industrial action is not protected if it is engaged in or organised with a 'non-protected person', i.e. 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(1) and (3)).

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. These forms of civil liability, 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, i.e. the capacity to obtain orders from the Commission under section 127 of the Act to stop or prevent unions and employees from taking or continuing to take 'unprotected' industrial action. The early experience under this provision suggested that there was still some scope for unprotected industrial action to be taken, so long as it was not so illegitimate as to warrant the making of a section 127 order;[30] although such action would still be unlawful at common law. Employers also encountered difficulties in enforcing section 127 orders in the Federal Court.[31] However the Commission has since adopted a more restrictive approach to the provision, significantly narrowing the capacity of unions to engage in any form of unprotected action.[32] The result is that 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.

The 1996 Act also failed to address another major deficiency of Australian law relating to industrial action, i.e. 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

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30 *Coal and Allied Operations Pty Ltd v Automotive Food, Metals, Engineering, Printing and Kindred Industries Union* (1997) 73 IR 311.

31 See A Forsyth, 'A New Handbrake on Industrial Action … Or Not? A Note on Cases Relating to Section 127 of the Workplace Relations Act 1996 (Cth)', (1998) 11 *Australian Journal of Labour Law* 153.

32 See for example *Appeal by CEPU against section 127 order – AG Coombs Fire Protection* (Print Q1727).

(other than in relation to a certified agreement), which amounts to a breach of the rights embodied in Convention No 87.[33]

3.5 ILO Committee of Experts' Findings – Convention No 87

ICTUR's comprehensive submission to the Senate Committee's Inquiry into the Bill that became the 1996 Act pointed to the total failure of that legislation to meet Australia's international obligations on the right to strike. The views expressed by ICTUR at that time are reflected in recent findings by the ILO Committee of Experts of substantial breaches by Australia of the requirements of Convention No 87.

Following a Submission lodged by the ACTU in August 1998, the Committee found in its Report[34] 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:

Excessively restrict the subject matter of strikes 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.*[35]

Further, the Committee found that prohibitions on industrial action over strike pay and demarcation issues also place excessive limits on the subject matter of strikes.[36]

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

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33 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).

34 *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.

35 *Id.*, at p. 205.

36 *Ibid.*

take such action, provided the initial strike they are supporting is lawful'.[37] 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 …*[38]

Restrict the taking of industrial action beyond permissible limits on strikes in essential services:

The Committee considered the circumstances in which the 1996 Act allows the bargaining period (on which the taking of protected industrial action depends) to be suspended or terminated, i.e. where industrial action is threatening to endanger the life, personal safety, health or welfare of the population, or where it is threatening to cause significant damage to the Australian economy or an important part of it. The Committee found that 'prohibiting industrial action that is threatening to cause significant damage to the economy goes beyond the definition of essential services accepted by the Committee'.[39] It also repeated previous requests made to the Government to repeal sections 30J and 30K of the *Crimes Act* dealing with boycotts affecting interstate or international trade and commerce.[40]

Recent Observations

The 2005 Report of the Committee on the Application of Standards in its Ninety-third Session dealing with information and reports on the application of Convention No 98 stated as follows:

> *The Committee noted the statement by the Government representative and the debate that followed. The Committee recalled that the Committee of Experts*

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37 *Ibid.*
38 *Id.*, at p. 206.
39 *Id.*, at p. 205.
40 *Id.*, at pp. 206-207.

> *had been making comments for several years on certain provisions of the Workplace Relations Act, particularly in relation to the exclusion from the scope of the application of the Act of certain categories of workers, the limitations on the scope of union activities covered by protection against anti-union discrimination and the relationship between individual contracts and collective agreements*: [see International Labour Conference, Provisional Record, Ninety-third Session, Geneva. 2005, 22 Part Two p 14].

Further, the 2005 Report of the ILO Committee of Experts again found that the 1996 Act remains in fundamental breach of ILO Conventions [see Appendix A].

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,[41] and enjoyed international respect for having done so. However they did not seem to trouble the then Minister for Workplace Relations, who commented that the Committee's findings were 'not relevant to the Australian workplace' and that 'blindly adopting the observations of the committee would be a disaster for Australia'.[42] The then Minister's, and the Government's, obvious disregard for ILO standards is evident not only from those comments, but (of greater concern) is all too apparent from the provisions of the 2005 Bill dealing with industrial action.

3.6 The Provisions of the 2005 Bill

Industrial Action

Rather than rectifying the extensive breaches of Australia's international obligation to provide for the right to strike, the net effect of the amendments contained in the 2005 Bill will be to take Australia even further out of compliance with our international obligations regarding the right to strike. Of particular concern in this respect are the following provisions of the Bill.

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

42 Hon. Peter Reith MP, Minister for Employment, Workplace Relations and Small Business, *ILO Wrong on Australia's Workplace Relations Act* (Press Release), 12 March 1999.

Section 111 Orders

The Bill proposes to 'strengthen' the remedies against unprotected industrial action currently available under section 127 of the Act. The Bill would provide an expanded range of circumstances in which employers could obtain 'return to work' orders under section 111, covering situations where unprotected industrial action is happening, threatened, impending or probable, or is being organized.[43] These orders extend to non-federal system employees. In any of above circumstances the Commission must make an order,[44] although it would not be required to specify the particular industrial action that might be the subject of the order.[45] Orders could be obtained not only by those directly affected by the unprotected industrial action, but also by other parties who are indirectly affected.[46] Providing for the ability of parties who are only indirectly rather than directly affected to seek such orders represents a wholly unjustifiable and unacceptable curtailment of the right to strike. The Commission would be required to deal with an application for an order under section 127 within 48 hours, and to issue an **interim** order if it has been unable to deal with an application within that period of time.[47]

Further, under proposed section 112 of the 2005 Bill the Minister is empowered to make a written declaration terminating a bargaining period if the Minister is satisfied that industrial action is threatening or would threaten to endanger the life, personal safety or the health, or the welfare of the population or part of it or cause significant damage to the Australian economy or an important part of it. This places a very broad discretionary power in the hands of the Minister to terminate a bargaining period pursuant to which protected industrial action is either being taken or is being threatened.

In summary, these provisions amount to an unacceptable encroachment upon the right to strike. They would add to the already extensive array of legal options open to employers in Australia to stop or prevent unprotected industrial action. They would also unduly

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43 Proposed section 111(1).
44 Proposed sections 111 (1) and (2).
45 Proposed section 111(9).
46 Proposed section 111(4).
47 Proposed section 111 (6)-(8); unless 'it would be contrary to the public interest to make such an interim order'.

interfere with the capacity of independent judicial and quasi-judicial bodies to determine issues on their merits, by removing from such bodies any discretion as to whether civil liability should flow from the taking of unprotected action. The ILO has already criticized the use of civil liability against strike action under Australian law, as potentially depriving workers of the capacity lawfully to take strike action to promote and defend their social and economic interests.[48] If enacted, the provisions of the Bill dealing with section 111 orders, and the Ministerial discretion to terminate a bargaining period will add further weight to that criticism, as will the proposal to remove section 166A from the Act.[49]

'Pattern Bargaining'

The 2005 Bill[50] proposes to insert a new, negative definition of 'pattern bargaining' in the Act. This provision (combined with others in Schedule 1 of the Bill) would allow the bargaining period to be terminated in cases of pattern bargaining, and provide a basis for the refusal of an application for a protected action ballot[51] to authorise industrial action. Under the Bill, certain circumstances would not be regarded as pattern bargaining, i.e. where a negotiating party is seeking terms and conditions that accord with Full Bench national standards.

These provisions of the Bill would further compound the major breach of Convention 87 highlighted by the ILO Committee of Experts in its March 1999 findings. 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.[52] These provisions would place further, unwarranted restrictions on strikes in support of such agreements, despite these observations by the Committee of Experts, and earlier

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48 *1996 Digest*, para. 594, at pp. 121-122.

49 Section 166A requires parties wishing to obtain common law relief in respect of industrial action to first obtain a certificate from the Commission, which has 72 hours within which to try to stop the industrial action, including through the exercise of its conciliation powers. The removal of section 166A would provide employers with a more direct route to civil remedies against unions, and result in many matters that might otherwise have been resolved in the Commission proceeding to litigation.

50 Proposed section 106B.

51 See Part 4.2 below on the proposed provisions dealing with secret ballots for protected industrial action.

52 See Part 3.2 above.

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.[53] 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.*[54]

Further Limits on Protected Industrial Action

The Bill seeks to impose even greater limits on the right to take protected industrial action. First, industrial action is not protected if it is engaged in to support or advance claims to include prohibited content in a proposed collective agreement: see proposed section 108A. Secondly, industrial action is not protected if a party is engaged in pattern bargaining in relation to the proposed certified agreement: see proposed section 108D. Thirdly, industrial action engaged in by a person who is a member of a union, is not protected action unless the union complies with any applicable order or direction given by the Commission: see proposed section 108H.

These provisions of the 2005 Bill focus attention on the unacceptably narrow nature of the right to take industrial action as matters currently stand. 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.[55] When combined with the proposed new requirements for secret ballots, these limits would also mean that the legal procedures for taking protected action would be so complicated as to make it

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53 *1996 Digest*, para. 490 at pp. 103-104.
54 295th Report, Case No. 1698, para. 259.
55 *1996 Digest*, para. 498 at p. 105.

practically impossible to take any form of legal industrial action in Australia.[56] The amended legislation would therefore impinge on the right to strike implied in ILO Convention No 87 to a far greater extent than is already the case.

The Committee on Freedom of Association has observed as follows:

> *The conditions that have to be fulfilled under the law in order to render a strike lawful should be reasonable and in any event not such as to place a substantial limitation on the means of action open to trade union organisations.*[57]

Suspension or Termination of Bargaining Periods

The 2005 Bill[58] proposes to expand the grounds for suspension or termination of bargaining periods under section 170MW of the 1996 Act. First, the Bill would enable a bargaining period to be suspended by the Commission in order to establish a cooling off period during which parties may attempt to settle the matters at issue between them: see proposed section 107I. Secondly, the bargaining period would have to be terminated where a party has engaged in 'pattern bargaining'[59] (as well as where existing grounds for termination are satisfied, such as where a party is not genuinely trying to reach agreement, or there is non-compliance with the Commission's orders or directions, etc.): see proposed sections 107G and 107H. And finally, interim orders suspending or terminating bargaining periods will also be made available: see proposed section 107G(5).

This broadening of the circumstances in which a bargaining period can be suspended or terminated flies in the face of the ILO Committee of Experts' findings on the existing provisions of the 1996 Act, which it considered prohibit industrial action in a manner that exceeds permissible limits on industrial action in essential services.[60] As with many other provisions of the 2005 Bill dealing with industrial action, the effect of these provisions will be to compound Australia's non-compliance with Convention No 87.

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56 *Id.*, para. 499 at p. 105.
57 *1996 Digest*, para. 498.
58 Schedule 1.
59 See Part 4.1.2 above.
60 See Part 3.2 above.

Secret Ballots for Protected Action

In addition to the extensive new restrictions on the right to take protected industrial action,[61] the Bill also seeks to introduce a complex set of requirements for the holding of compulsory secret ballots as a further precondition to the taking or organising of protected action. The process for conducting a secret ballot under the Bill can be summarised as follows.[62]

- **Application to Commission for Secret Ballot Order**

  Either a union, or an employee or employee can apply to the Commission during a bargaining period for an order for the holding of a 'protected action ballot'. There are detailed requirements for the matters that must be included in the application for an order, such as the question or questions to be put to the relevant employees in the ballot, details of the types of employees to be balloted and any other details required by the Rules of the Commission: see proposed section 109C. In addition, certain material must also accompany the application and this includes:

  (a) a copy of the relevant bargaining period notice;
  (b) a copy of the particulars that accompanied the bargaining period notice;
  (c) if the applicant is a union, written notice of authorization;
  (d) a declaration that the industrial action to which the application relates is not for the purpose of supporting or advancing claims to include prohibited content in the proposed agreement: see proposed section 109D.

- **Consideration of Application by Commission**

  The Commission would be required to act quickly in determining an application for a ballot order (i.e. within two working days). However, a wide range of

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61 See Part 4.1 above.

62 The most relevant provisions are found in Schedule 12, Item 22 of the Bill, which would insert a new Division 8A in Part VIB of the 1996 Act.

parties could appear in the Commission and make submissions about the application, including the applicant, the employer, the ballot agent, or individual employees: see proposed section 109I.

Before granting an application for a ballot order, the Commission would have to be satisfied (inter alia) that: there is a bargaining period; that the applicant has genuinely tried to reach agreement with the relevant employer; that the applicant is not engaging in pattern bargaining: see proposed section 109L.

- **Conduct of Ballot**

  If the Commission decides to grant the application, the ballot order must specify certain matters dealing with the conduct of the ballot. The Commission would also have powers to order that certain information be provided, to enable the roll of voters to be prepared. Only employees of the relevant employer who would be subject to the proposed agreement could be included on the roll for a protected action ballot (if the applicant for a ballot is a union, the employees must also be members of that union). There are provisions allowing for the addition or removal of persons' names from the roll before the ballot is conducted, and for applications to be made for the variation of ballot orders.

  Only an authorised ballot agent could conduct a protected action ballot. The ballot paper must contain certain information, including a statement that the voter's vote is secret and the voter is free to choose whether or not to support the proposed industrial action, the types of employees to be balloted and the questions to be put: see proposed section 109Y. For industrial action to be considered authorised by a protected action ballot, at least 50% of those on the roll must vote in the ballot, and more than 50% of those voting must approve the taking of the protected action.

It is clear even from this brief overview that the secret ballot provisions in the Bill place onerous requirements on those wishing to take protected industrial action. They also

provide fertile ground for employers to obstruct and delay (through litigation)[63] the exercise of the tightly constrained 'right' to take protected action under the Act. There can be little argument that these provisions (if enacted) would amount to an unacceptable interference with the right of unions to regulate their own internal affairs, in breach of Article 3 of ILO Convention No 87.

It is true that the 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.[64] 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;[65] and**
- **are acceptable, and do not involve any violation of the principle of freedom of association, only when they are intended to promote democratic principles within trade union organisations.**

The secret ballot provisions of the 2005 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.

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63 This has unquestionably been the experience in Britain, where 'detailed balloting rules have provided the most fertile of all our restrictions for employers to challenge the legality of industrial action. It is not the failure to hold a ballot which has been a problem, so much as the detailed technical requirements which must be complied with.': see K D Ewing, *Australia's Standing in International Labour Law*, (Sir Richard Kirby Lecture, Industrial Relations Society of Victoria, 25 August 1999), at pp. 11-12.

64 The Committee of Experts found as much in the course of deciding that the ballot provisions of the *Trade Union Act 1984* (U.K.) did not violate Convention 87.

65 *1996 Digest*, paras. 498-499 at p. 105.

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 in the Bill will result in no higher standards of democratic decision-making in unions than are already attained, through the measures currently taken by unions to consult with their members over whether industrial action should be taken.

Summary

Australian law already fails to accord anything like adequate recognition to the right to strike. Far from rectifying this failure to comply with international labour standards, the 2005 Bill would result in an even greater degree of non-compliance than is presently the case. Following the ILO Committee of Experts' findings that the present state of the law breaches Convention No 87, it seems clear that 'the current package of proposed reforms will almost certainly lead to another rebuke, again calling into question an earlier judgment that Australia is "a good global citizen"'.[66]

The truth is that if the 2005 Bill in its present form becomes law, then the restrictions placed on the capacity of unions and workers to take industrial action 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 in respect of the right to strike, it should withdraw the 2005 Bill immediately.

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[66] See Ewing, above note 56, at p. 10 (footnotes omitted).

4 TERMINATION OF EMPLOYMENT

4.1 Sources and Nature of International Obligations in Respect of Termination of Employment

The sources of international obligations in respect of termination of employment are to be found in ILO Conventions and Recommendations. The Convention concerning Termination of Employment at the Initiative of the Employer (Convention No.158) ("the Termination of Employment Convention") and the Recommendation concerning Termination of Employment at the Initiative of the Employer (Recommendation No.166) ("the Termination of Employment Recommendation") were adopted by the ILO on 22 June 1982.

In adopting these instruments, the ILO recognised that workers must be protected against arbitrary and unjustified dismissal. The Termination of Employment Convention provides this protection by requiring:

(a) that "the employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service" [Article 4];

(b) that "the employment of a worker shall not be terminated for reasons related to the worker's conduct or performance before he is provided an opportunity to defend himself against the allegations made, unless the employer cannot reasonably be expected to provide this opportunity" [Article 7];

(c) that "a worker who considers that his employment has been unjustifiably terminated shall be entitled to appeal against that termination to an impartial body, such as a court, labour tribunal, arbitration committee or arbitrator" [Article 8: para.1];

(d) that the bodies referred to in Article 8 are "empowered to examine the reasons given for the termination and the other circumstances relating to the case and to render a decision on whether the termination was justified" [Article 9: para.1];

(e) that a worker should "not have to bear alone the burden of proving that the termination was not justified" [Article 9: para.2];

(f) that if the bodies referred to in Article 8 find that the termination was unjustified and they are not empowered or they do not find it practicable to order reinstatement they must be "empowered to order payment of adequate compensation or such relief as may be deemed appropriate" [Article 10];

(g) that workers' representatives be consulted over measures be taken to avert or at least minimise as far as possible termination of employment on the grounds of economic, technological and structural change and to mitigate the adverse effects of any terminations [Article 13];

(h) that, where the employer contemplates terminations for reasons of an economic, technological, structural or similar nature, he shall notify, in accordance with national law and practice, the competent authority thereof as early as possible, giving relevant information, including a written statement of the reasons for the terminations, the number and categories of workers likely to be affected and the period over which the terminations are intended to be carried out [Article 14].

The Termination of Employment Convention has been ratified by Australia and entered into force on 26 February 1994. The Convention can be accurately characterized as creating and requiring a balanced and fair process of examination and adjudication that should be easily accessible to all workers to whom it applies. It recognises that a right of appeal against an arbitrary and unjustified dismissal is intrinsic to the rights of a worker.

It is important to note that the Convention expressly applies to all branches of economic activity and to all employed persons [Article 2.1]. A Member State may [Article 2.2] exclude limited classes of employees from the all or some of the provisions of the Convention, namely:

(a) workers engaged under a contract of employment for a specified period of time or a specified task;

(b) workers serving a period of probation or a qualifying period of employment, determined in advance and of reasonable duration;

(c) workers engaged on a casual basis for a short period.

It is also permissible, subject to certain conditions, to exclude categories of employed persons whose terms and conditions of employment are governed by special arrangements which as a whole provide protection that is at least equivalent to the protection afforded under the Convention [Article 2.4] and other limited categories of employed persons in respect of which special problems of a substantial nature arise in the light of the particular conditions of employment of the workers concerned or the size or nature of the undertaking that employs them [Article 2.5]. Where the latter exclusion is made, the scheme of the Convention is that the exclusion should, after the Member State concerned makes its first report to the ILO on compliance with the Convention, only be narrowed, and not widened [Article 2.6].

4.2 Impediments to Employees' Rights Already Contained in the 1996 Act

The 1996 Act already contains a range of provisions which discourage employees from pursuing their legitimate rights in respect of unlawful dismissal and unlawful termination and as such run entirely contrary to the Termination of Employment Convention. These have been the subject of previous submissions by ICTUR to the Senate Employment, Workplace Relations and Education Reference Committee in 1996 and 1999. These provisions include:

(a) the exclusion in section 170CC(1)(d) is broader than that allowed by the Termination of Employment Convention in that it excludes "employees whose terms and conditions of employment are governed by special arrangements providing particular protection in respect of termination of employment either generally or in particular circumstances", as opposed to employees "whose terms and conditions are governed by special arrangements which as a whole provide protection that is at least equivalent to the protection afforded under the Convention". Section 170CC(1)(d) operates to exclude from the operation of the unfair dismissal and unlawful termination provisions employees who have access to provisions that provide protection against unlawful termination notwithstanding that that protection is not "at least equivalent to the protection afforded under the Convention".

(b) the exclusion in section 170CC(1)(e) is broader than that allowed by the Termination of Employment Convention in that it refers to "employees in relation to whom the operation of the provisions causes or would cause substantial problems …", as opposed to "employed persons in respect of which special problems of a substantial nature arise …". The words of exclusion in the Termination of Employment Convention are clearly designed to be more limiting than those in section 170CC(1)(e).

(c) The Act requires workers who allege that their employment has been terminated harshly, unjustly or unreasonably and without notice or payment in lieu of notice to initiate two separate proceedings. One set of proceedings pursuant to section 170CE of sub-division B in respect of the employee's harsh, unjust or unreasonable termination of employment and another set of proceedings in the Federal Court of Australia pursuant to section 170CP of sub-division C for unlawful termination of employment on certain grounds and for payment of the required period of notice. Such a bifurcation of proceedings arising out of the same fact situation, i.e. the termination of the employee's employment, cannot be justified. It is costly, unnecessary and wasteful of limited public resources and discourages workers from pursuing their legitimate rights.

(d) The imposition of a filing fee pursuant to Regulation 30BD(1) for the lodgment of applications pursuant to sub-division B acts to discourage workers from pursuing their legitimate rights.

(e) The incorporation of a power to award costs against an employee (ss 170CJ, 170CS) again acts to discourage employees from pursuing their legitimate rights especially in circumstances where employers are generally in a far superior financial position.

(f) Exclusion of dependent contractors

The Full Court of the Federal Court of Australia handed down a decision in 1998 that highlights an area in which the 1996 Act is in clear breach of international law.

In *Konrad v Victoria Police (State of Victoria) & Anor*[67] Justices Ryan, North and Finkelstein unanimously held that the unfair dismissal provisions of the previous *Industrial Relations Act 1988* ("the 1988 Act") (Division 3 of Part VIA) applied to "all workers whether or not in a relationship of employer and employee recognised by the common law."[68] This is because, it was held, the purpose of the Division was to give effect to the Termination of Employment Convention, and the expressions "employed person" and "worker" in that Convention do not bear their common law meaning.[69]

The central question before the Court in *Konrad* was whether a Victorian police officer could access the unfair dismissal provisions of the 1988 Act in the light of precedent decisions which established that police officers were not common law employees of the Crown.[70]

Justice Finkelstein wrote the principal decision and held that the police officer in question could access those provisions. In his decision Justice Finkelstein provided a detailed and extensive analysis of the history and jurisprudence associated with the terms "worker" and "employee" as found in the Termination of Employment Convention. In coming to his view, which was the view shared by the Full Court, Justice Finkelstein stated:

> *In my view, bearing the foregoing factors in mind, I can see no reason why the word "employee" when used in Division 3 should be confined to its common law meaning. If it was so confined, it would bring about the following unintended consequences. In the first place, it would exclude from the operation of the Division persons who are just as vulnerable and in need of protection as common law employees. In the second place, adopting a narrow meaning of the word "employee" would place Australia in breach of its obligations under the* [Termination of Employment] *Convention which it ratified. In the third place, a narrow construction of the word "employee*

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67 (No. VG 44 of 1998, Federal Court of Australia, Ryan, North & Finklestein JJ, unreported, 6 August 1999).

68 *Id.* at pp 7-8 per Ryan J.

69 *Id.* at p 27 per Finkelstein J. See also B Creighton, "Employment Security and Atypical Work in Australia", *Comparative Labour Law Journal*, Vol 16, 1995, pp 285-31 6.

70 The main decisions in this regard are: *Commonwealth v Quince* (1944) 68 CLR 227, and *Attorney-General for New South Wales v Perpetual Trustee Company (Ltd)* (1955) 92 CLR 113.

> *would defeat the object of the Division which is to give effect to the Convention.'* [bold emphasis added].[71]

This is significant because the 1996 Act clearly adopted a narrow meaning of the word "employee", at least with respect to proceedings pursuant to section 170CE of sub-division B in respect of the employee's harsh, unjust or unreasonable termination of employment.[72] To access this set of proceedings an applicant must be a "Federal award employee" (or a Commonwealth public sector employee or Territory employee).[73] Employees covered by a federal award are invariably common law employees because the AIRC's award-making power is limited to the prevention and settlement of "industrial disputes"[74] which are defined as disputes "about matters pertaining to the relationship between employers and employees".[75]

When applied to the 1996 Act the Federal Court's analysis in *Konrad* serves to highlight Australia's breach of the Termination of Employment Convention. The 1996 Act excludes from unfair dismissal proceedings dependent and vulnerable workers who otherwise fall outside the widely criticised common law notion of employee.[76] These workers are also excluded from the statutory unfair dismissal regimes of the States. Australia has a clear obligation to provide appropriate redress for unfair dismissal to a broadly defined and inclusive category of all persons who perform work or labour for others.[77]

4.3 The provisions of the 2005 Bill

Under the 2005 Bill**, section** 3 of the 1996 Act, which sets out the Act's principal object, is to be replaced. The revised paragraph 3(g) provides:

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71 *Id.* at 28.

72 It would appear that access to proceedings for *unlawful* (as opposed to harsh, unjust and unreasonable) termination of employment in the Federal Court of Australia under ss.170CP of sub-division C is open to the broader concept of "employee", including so-called "dependent contractors", mainly because there is no requirement for Federal award coverage in respect of those proceedings. Also, the combination of ss 170CB(5) and 170CD(2) effectively imports the meaning of "employee" as expressed in the Termination of Employment Convention for the purposes of this set of proceedings.

73 Section 170CB(1).

74 See ss 111(1)(b) and 89A.

75 Section 4(1).

76 See the comments of Finkelstein J in *Konrad* at 27.

77 *Id.* at 28.

> *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: …(g) assisting in giving effect to Australia's international obligations in relation to labour standards.*

Notwithstanding that object, the Bill not only continues the existing non-compliance of the 1996 Act with the Termination of Employment Convention, but also seriously compounds the non-compliance in several ways, listed below. In listing these, one also needs to bear in mind the proposition that article 2(6) of the Termination of Employment Convention does not allow for subsequent exclusions once the first article 22 report has been made by a ratifying country[78].

The 100 employees exclusion

The 2005 Bill proposes to exclude access to a remedy for the termination of an employee's employment that is harsh, unjust or unreasonable where the employer employed 100 employees or fewer at the time of the employee's dismissal [item 113, proposed subsection 170CE(5E)].

The exclusion of a remedy to employees of employers with up to 100 employees is in breach of Australia's international obligations on at least two grounds. First, it is inconsistent with Article 2 of the Termination of Employment Convention, which only permits very limited exemptions from the remedies to be provided under the Convention (such employees are not within a limited category of employed persons in respect of which 'special problems of a substantial nature arise (etc)'). Secondly, it is inconsistent with the principle underlying the Convention that grounds of exemption not be widened after the Member State's first report on implementation.

It is no answer to non-compliance that such employees will continue to be able to seek remedies from a court for dismissal or threatened dismissal on various discriminatory grounds (existing section 170CK, *Employment not to be terminated on certain grounds*).

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[78] Refer: Bills Digest No. 36 1998-99 Workplace Relations Amendment (Unfair Dismissals) Bill 1998 http://www.aph.gov.au/Library/pubs/BD/1998-99/99bd036.htm; citing Creighton B. "The Workplace Relations Act in International Perspective', Australian Journal of Labour Law, April 1997, pp 31-49, at 42.

While that may assist Australia's compliance with Article 5, it does not conform to Article 4.

The ILO Committee of Experts in its recent report made reference to this proposed change as it then manifested itself in provisions of the Workplace Relations Amendment Bill 1997. The committee requested that the government "ensure that employees of small businesses are adequately protected as required by the Convention, and to inform it of any steps taken in this regard." More recently, the Report of the Committee on the Application of Standards made reference to the fact "that the Committee of Experts had been making comments for several years on certain provisions of the Workplace Relations Act, particularly in relation to the exclusion from the scope of application of the Act of certain categories of workers." (see pp 43-44 of this submission).

Clearly, proposed subsection 170CE(5E) operates to restrict employees' access to the unlawful dismissal jurisdiction in a manner not permitted by the Termination of Employment Convention and would therefore operate in breach of that Convention.

Six Months Qualifying Period

Proposed s170CE(5B)(a) extends the current three month qualifying period of employment before new employees (other than apprentices and trainees) can access an unfair dismissal remedy under the Act to six months. This runs counter to the view (mentioned above) that article 2(6) of the Termination of Employment Convention does not allow for subsequent exclusions once the first article 22 report has been made. The effect of this proposed amendment would be to disentitle a significant number of employees from access to rights protected under the Convention.

The exclusion of seasonal workers

The 2005 Bill proposes to exclude access to a remedy for the termination of an employee's employment that is harsh, unjust or unreasonable where the dismissed employee is in one of the excluded classes of employee in section 170CBA, as amended by items 89 to 98 (which will include a 'seasonal worker' – item 91, proposed new paragraph 170CBA(1)(g), item 96, proposed new subsections s170CBA(6A) – (6C)];

Maintaining the exclusions in existing section 170CBA and the addition of 'seasonal workers' entrenches non-compliance with Article 2 of the Termination of Employment Convention because the classes in the section, as amended, are not consistent with the permitted exemptions.

The 'operational reasons' exclusion

The 2005 Bill proposes to exclude access to a remedy for the termination of an employee's employment that is harsh, unjust or unreasonable where the dismissal was for 'genuine operational reasons or for reasons that **include** genuine operational reasons', i.e., genuine 'reasons of an economic, technological, structural or similar nature relating to the employer's undertaking, establishment, service or business, or to a part of the employer's undertaking, establishment, service or business' [item 112, proposed new subsections 170CE(5B) and (5C)].

Article 4 of the Termination of Employment Convention recognises that it is legitimate for employment to be terminated where there is a valid reason connected with the operational requirements of an employer's undertaking, establishment or service. Article 4 provides as follows:

> *The employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service.*

Under Article 7 the employment of a worker is not to be terminated for reasons related to the worker's conduct or performance before he or she is provided an opportunity to defend himself or herself against the allegations made, unless the employer cannot reasonably be expected to provide this opportunity.

The difficulty created by the 2005 Bill, however, is that proposed subsections 170CE(5B) and (5C) operate on the basis that no application for a remedy may be made where the employee's employment was terminated for reasons that *include* genuine operational reasons.

In other words, although an employer would have been liable for unfair dismissal on other grounds applying to the employee's dismissal (for example, an unfair perception that the employee did not have 'the right attitude'), if the employer can show that there were genuine operational reasons, no remedy can be pursued. The employee might challenge the genuineness of the claimed operational reasons, but if they exist, even though the employer may have selected the employee for termination because of the other, unfair grounds, no application may be pursued.

Proposed section 170CEE will operate to require the AIRC in such cases (that jurisdiction will only be available in any event where the employer had more than 100 employees at the relevant time) to decide on the existence of genuine operational reasons before proceeding any further. If they exist, the AIRC will not be able to examine the claims that the alleged unfair grounds for dismissal actuated the employer's selection of the employee for dismissal as against other employees who were not dismissed. There is nothing in the 2005 Bill to suggest that the genuineness of the operational reasons can be called into question where the employer used those reasons to dismiss an employee to whom the employer was unfairly hostile.

Such a situation contravenes Article 4 of the Termination of Employment Convention which requires a valid reason for the dismissal, and Article 8.1 which provides that 'a worker who considers that his employment has been unjustifiably terminated shall be entitled to appeal against that termination to an impartial body …'.

Compounding Effect of Exclusion of State Remedies

It should be noted that the non-complying provisions are not confined to the existing Federal system. As a consequence of the legislation taking over, as far as possible, State industrial relations jurisdictions (see item 9, proposed section 7C) , unfairly dismissed employees who are employed by constitutional corporations who currently have access to relief from State tribunals will be precluded from access to those tribunals. Although it is unclear exactly how many employees will be denied those existing State remedies, it will be a very considerable figure.

Curtailment of Right to Elect to Proceed to Arbitration or to Hearing by a Court

Under, proposed section 170CFA (8), if an employee whose employment has been terminated does not elect to proceed to arbitration by the AIRC or to a hearing by a Court within seven days, the Commission "must not" extend that period. The seven day period is a remarkably short time for the making of an election in circumstances where the applicant may not have ready access to technical advice about the implications of proceeding further. The proposal to remove the Commission's existing power to extend the period has the effect of denying an applicant's rights in circumstances where there might be extenuating circumstances (for example, serious illness) which might have persuaded the Commission to grant an extension. Such a result is not in keeping with the spirit of the Convention.

The Repeal of Provisions Giving Effect to Articles 12 and 13 of the Convention

The existing Act gives effect to Articles 12 and 13 of the Termination of Employment Convention by empowering the AIRC to make orders relating to severance allowances or other separation benefits – Article 12 - and to consultation about the termination of 15 or more employees – Article 13. These provisions are found in existing Part VIA, *Minimum entitlements of employees*, Division 3, *Termination of Employment*, Subdivision D, *Commission orders giving effect to Articles 12 and 13 of Convention*, sections 170FA – 170FE.

Under the 2005 Bill Subdivision D is to be repealed (item 144). The provisions of the Convention may be given effect by a variety of means consistent with national practice (Convention, Article 1), but in the absence of such means, the Member State must give effect to them by laws or regulations (i.e., the present position). There do not appear to be any proposed provisions to replace those that give effect to Article 12 of the Convention. Australia will be in breach of Article 12 without an appropriate mechanism for giving effect to its requirements.

That obligation is partly met by existing subdivision E (*Commission orders after employer fails to consult trade union about terminations*) but under the proposed amendments, the operation of this provision is to be restricted (see below). Existing

section 170GA allows the AIRC to deal with the situation where an employer has decided to terminate the employment of 15 or more employees for reasons of an economic, technological, structural or similar nature, or for reasons including such reasons but has failed, before terminating the employment., to consult the trade unions of which the employees were members.

Under existing subsection 170GA(2), the AIRC may make whatever orders it thinks appropriate, in the public interest, to put the employees whose employment was terminated, and each trade union, in the same position as nearly as can be done as if the employer had met the consultation obligations.

The range of orders that the AIRC may make is, however, to be considerably limited by the inclusion of a proposed new subsection 170GA(2) – item 146. The AIRC will not be able to make orders for reinstatement, withdrawal of a termination notice, payment of severance pay and disclosure of certain information without certain safeguards. However, the exclusion of power to award severance pay means that section 170GA will no longer support Australia's obligations under Art 12.

5 UNION RIGHT OF ENTRY

5.1 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.*[79]

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*
> …

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79 *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

> *access to places of work and to communicate with management ... and in general, any activity involved in the defence of members' rights.* [80]

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.*[81]

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.

5.2 The 1996 Act

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.*

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[80] 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.

[81] 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. 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 are covered 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.

5.3 The 2005 Bill

Schedule 1 of the 2005 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 2005 Bill is a far more complex, legalistic and restrictive regime. The proposed system has the following additional features:

(a) The Registrar is able to impose conditions that limit the permit;

(b) There is the requirement that the Registrar be satisfied that the applicant for a permit is a fit and proper person, by reference to a number of considerations which collectively set a high standard in an industrial relations context. This is a fetter on unions' selecting their officials and hence their rights to organise;

(c) The powers of revoking, suspending or imposing conditions on a permit are expanded, and the grounds for doing so are expanded;

(d) Cancellation of permits is mandated in certain circumstances, regardless of any other factors;

(e) Fixed minimum periods of disqualification are imposed;

(f) A suspected breach can only be investigated if the breach affects a member of the inspecting union;

(g) Where the right is exercised to investigate a suspected breach the breach must be particularised in the notice. The requirements for information to be included in notices of entry is to be prescribed by regulations;

(h) 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;

(i) Fourteen days' notice must be given of a request to inspect documents held at another location;

(j) 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;

(k) Occupational health and safety can be used to deny entry. This gives the employer the opportunity to misuse the provision and delay the entry;

(l) 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;

(m) Entry onto premises used for residential purposes is absolutely prohibited. Many workers are employed in residential environments such as community–based residential care units for the disabled;

(n) There is no right of entry for discussion purposes where all employees are on AWAs.

(o) Entry to investigate a breach of an AWA is only allowed if the employee party to the AWA provides written consent;

(p) 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.

(q) The limit of the size of penalties is trebled;

(r) Damages can be awarded against persons contravening provisions;

(s) The new provisions purport to override the right of entry afforded by State legislation, including occupational heath and safety legislation, to officials of both Federally and State registered unions.

The provisions in the 2005 Bill would thus reduce union access to workplaces in a way which would:

(a) further impair workers' freedom of association and the right to organise;

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

(c) unjustifiably impede unions from operating effectively in both monitoring compliance and organising/recruiting.

In essence, the 2005 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 2005 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 …'*[82]

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.

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

The provisions in the 2005 Bill would seriously compromise the aim of effective monitoring and enforcement of industrial instruments. The proposed new provisions give

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[82] *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.

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 could be delayed or denied at 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 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 2005 Bill contains a raft of formal requirements and presents a range of technical grounds which employers might seek to use to deny or delay permit holders entry to their premises. The web of industrial regulation under the 1996 Act is complex, and that complexity will be exacerbated by the 2005 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.

The 2005 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 2005 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.

It goes well beyond what is required to ensure "due respect for the rights of property and management" recognized by the ILO.

The 2005 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. Those circumstances are sufficient and have not proved to be deficient in practice.

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. While ICTUR recognises that unions have a responsibility to ensure the proper conduct of their officers and employees, the 2005 Bill 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 and grounds for dealing with inappropriate conduct by permit holders.

In summary, the regime proposed by the amendments set out in the 2005 Bill would 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 2005 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 2005 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 in order to ensure compliance with industrial instruments the 2005 Bill will substantially reduce the strength and efficacy of Australian labour law.

The net effect of the amendments contained in the 2005 Bill will be a serious contravention of Australia's obligations under international law.

6 AUSTRALIA'S INTERNATIONAL OBLIGATIONS IN RESPECT TO MINIMUM WAGES

6.1 The Conventions

The principal ILO conventions governing minimum wages are C26 Minimum Wage-Fixing Machinery Convention 1928 and C135 Minimum Wage Fixing Convention 1970. Both have been ratified by Australia. The most relevant provisions of each are set out below.

C26 Minimum Wage-Fixing Machinery Convention 1928 ratified by Australia on 09/03/31.

Article 3 states that Member countries are free to decide the nature and form of minimum wage-fixing machinery:

> *2. Provided that--*
>
> *(1) before the machinery is applied in a trade or part of trade, representatives of the employers and workers concerned, including representatives of their respective organisations, if any, shall be consulted as well as any other persons, being specially qualified for the purpose by their trade or functions, whom the competent authority deems it expedient to consult;*
>
> *(2) **the employers and workers concerned shall be associated in the operation of the machinery,** in such manner and to such extent, but in any case **in equal numbers and on equal terms**, as may be determined by national laws or regulations;*
>
> *(3) minimum rates of wages which have been fixed shall be binding on the employers and workers concerned **so as not to be subject to abatement by them by individual agreement,** nor, except with general or particular authorisation of the competent authority, by collective agreement.*

C 131 Minimum Wage Fixing Convention 1970 ratified by Australia 15/06/1973

Article 1

> *1. Each Member of the International Labour Organisation which ratifies this Convention undertakes to establish a system of minimum wages which covers all groups of wage earners whose terms of employment are such that coverage would be appropriate.*
> *2. The competent authority in each country shall, in agreement or after full consultation with the representative organisations of employers and workers*

concerned, where such exist, determine the groups of wage earners to be covered.

Article 2

1. *Minimum wages shall have the force of law and* ***shall not be subject to abatement****, and failure to apply them shall make the person or persons concerned liable to appropriate penal or other sanctions.*
2. *Subject to the provisions of paragraph 1 of this Article,* ***the freedom of collective bargaining shall be fully respected.***

Article 3

The elements to be taken into consideration in determining the level of minimum wages shall, so far as possible and appropriate in relation to national practice and conditions, include--

(a) ***the needs of workers and their families****, taking into account the general level of wages in the country, the cost of living, social security benefits, and the relative living standards of other social groups;*

(b) *economic factors, including the requirements of economic development, levels of productivity and the desirability of attaining and maintaining a high level of employment.*

Article 4

2. *Provision shall be made, in connection with the establishment, operation and modification of such machinery, for full consultation with representative organisations of employers and workers concerned or, where no such organisations exist, representatives of employers and workers concerned.*
3. *Wherever it is appropriate to the nature of the minimum wage fixing machinery, provision* shall also be made for the direct participation in its operation of--

(a) ***representatives of organisations of employers and workers*** *concerned or, where no such organisations exist, representatives of employers and workers concerned,* ***on a basis of equality;***

(b) *persons having recognised competence for representing the general interests of the country and appointed after full consultation with representative organisations of employers and workers concerned, where such organisations exist and such consultation is in accordance with national law or practice.*

The provisions of the two Conventions strongly support the social partnership or tripartite model of wage determination. Emphasis is placed upon the necessity of equal representation of employers and workers on bodies and mechanisms established to

determine wage fixation, as well as on the ability of such parties to be able to participate in the wage setting process.

Article 3 of C131 outlines the elements to be taken into consideration in determining the level of minimum wages. Article 3(a) and (b) effectively mandate that there needs to be a balance between the requirements of equity and economics when considering minimum wage rates.

6.2 The Australian Fair Pay Commission, Minimum Wages & International Obligations

The Australian government's proposal to replace the Australian Industrial Relations Commission with an Australian Fair Pay Commission (AFPC) will bring Australia into conflict with its obligations under C131 The Minimum Wage Fixing Convention 1970.

Part 1A of the 2005 Bill outlines the role and structure of the AFPC.

Proposed section 7J of the 2005 Bill sets out the wage setting parameters of the AFPC, it states that the main objective of the body **in performing its wage setting function** "is to promote the economic prosperity of the people of Australia having regard to: the capacity of the unemployed and low paid to obtain and remain in employment; employment and competitiveness across the economy; providing a safety net for the low paid; and providing minimum wages for junior employees, employees with disabilities, employees to whom training arrangements apply, and to ensure those categories are competitive in the labour market.

There are a number of problems with this provision. First it appears that the wage-fixing criteria as in meeting the needs of the low paid is subordinate to other objectives namely economic ones. Secondly, it makes the low-paid bear the burden of the problem of unemployment by privileging the employment and labour force participation of the unemployed and those outside the workforce ahead of securing adequate incomes for those working. This raises the spectre of the development of the working poor as exists in the United States. The interaction of wage fixing and the social welfare system then become critical and one cannot be addressed independently of the other, a point which is made in C131 3 (a). Third, as Howe illustrates the legislation removes the word

"effective" before safety net, indicating that a safety net does not have to adequately provide enough remuneration to cover a workers' basic needs.[83] This conflicts with the preamble of C131 which states that a wage-fixing mechanism should provide protection against unduly low wages. It further ignores Article 3 (a) which implies that an "effective" rather than just a safety net is required if it is to meet the basic needs of workers and their families.

This problem is further exacerbated by the emphasis on the safety net as an instrument to ameliorate the problem of unemployment rather than as a means to ensure that a wage is sufficient to keep a worker above the poverty line. The provisions subvert both the spirit and the intention of C131 which is to ensure that workers' receive adequate remuneration for their labour, that the remuneration is able to meet their basic needs and that of their families, and that the primary objective of a wage-fixing mechanism is to protect vulnerable, low-paid and disadvantaged workers from exploitation. As Lee points out:

> *The key purpose of a minimum wage system is social – to prevent labour exploitation and poverty. This means the minimum wage should provide sufficient purchasing power to enable a worker to have a basic standard of living*.[84]

This social function of the minimum wage was made explicit in the 1907 *Harvester* decision. In determining a standard based on the "normal needs of the average employee, regarded as a human being living in a civilised community", Justice Higgins concluded that the wages should provide food, water and clothing and "a condition of frugal comfort by current human standards", and be sufficient to support a male worker, his wife and three children. The proposition that a person's wages should permit them to live and work in dignity has not less force 98 years after its enunciation by the first president of the Commonwealth Court of Conciliation and Arbitration.

Australia and New Zealand were the first countries to develop minimum wage regulation.[85] The key principle underpinning the *Harvester* decision, the notion that labour is not a tangible commodity and that labour markets are qualitatively different

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83 John Howe (2005) *AFPC will lack independence, wages will go down,* quoted in Workplace Express, Thursday 3rd November.

84 Chang –Hee Lee, "The Minimum Wage" *Asian Labour Update,* Industrial Relations Specialist, East Asia Multidisciplinary Advisory Team, ILO, Bangkok (undated).

85 Ibid.

than other markets, is reflected in International Labour Organisation Conventions, and in the International Covenant on Economic, Cultural and Social Rights. This principle should be maintained as the underpinning of wage determination in Australia.

In addition to the Minimum Wage Fixing Convention 1970 these provisions conflict with Australia's obligations under Article 7(a)(i) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) which provides that all workers, as a minimum, should receive fair wages and equal remuneration for work of equal value without distinction of any kind. While many of these instruments accept that wages may differ according to a country's stage of development, or as a result of the state of the economy, none imply that the former should be subordinated entirely to the latter, balance and fairness are required. The Australian government's policy deliberately seeks to create a working poor in order to curb unemployment. This is in breach of all human rights principles and of the relevant ILO conventions; on its own terms, it is morally objectionable.

Proposed sections 7P and 7Y of the 2005 Bill deal with the appointment of the Chair and other Commissioners. The Chair is required to "have a high level of skills and experience in business or economics". The Commissioners must have experience in one or more of the following areas: business, economics, community organisations, and workplace relations. The latter two are not defined in the 2005 Bill thus there is nothing to stop the government appointing a person from the Centre for 'Independent' Studies, or from the Institute of 'Public' Affairs, as persons fulfilling these requirements. Most of the Board, committee, and membership of the H R Nicholls Society would believe themselves to have experience in the area of industrial relations, yet the members of that organisation are extremely hostile to unions, the current industrial relations system and the concept of the minimum wage. The 2005 Bill needs to be clear about the constitution of the AFPC, it should be spelt out what organisations/interest groups and others **must** be represented on the body.

This is in stark contrast with the body that the Government claims the AFPC is modelled upon, the British Low Pay Commission (LPC). Established under the *National Minimum*

Wage Act 1998, the LPC consists of 9 members who have been appointed with a desirability of securing a balance between:

(a) members with knowledge or experience of trade unions or matters relating to workers generally;
(b) members with knowledge or experience of employers' associations or matters; and
(c) members with other relevant knowledge or experience (such as academics in the field of economics and industrial relations).

Currently the LPC is chaired by Adair Turner, Vice Chairman, Merrill Lynch Europe, a Visiting Professor at the London School of Economics and a member of the Economic and Social Research Council; two Professors of Industrial Relations, one from the London School of Economics, and the other from the University of Cambridge; two union officials, one is the Trade Union Congress (TUC) Chief Economist and Head of the TUC's Economic and Social Affairs Department, the other is Deputy General Secretary of Community, and formerly held the position of General Secretary of the Knitwear, Footwear and Apparel Trades Union; the final three members are from business or business related organisations, such as the International Organisation of Employers, the second is Chairman of Food Trade Association Management, and also member of Careers Scotland Supervisory Board and a member of Employment Tribunals Scotland, and the last is a Board Member of Group Human Resources Director and previously Organisation and Management Development Director, for Whitbread PLC.

Nowhere in the 2005 Bill does it specify that one of the Commissioners must be from a workers' representative organisation. There is nothing to guarantee that the tripartite requirement manifest in C131 and in the LPC will be followed. In effect, not only does proposed sections 7P and 7Y ensure inadequate representation for workers, there is no guarantee that workers organisations such as unions will be able to participate in the wage fixing machinery even at a minimal level such as appearing to give evidence as under proposed section 7K, the AFPC, in performing its wage-setting functions, "may inform itself in any way it thinks appropriate". ICTUR believes that the 2005 Bill must reflect Australia's obligations under C131.

Article 4(2) of C131 requires that all the social partners be consulted regarding the establishment, operation and modification of wage-fixing machinery. As stated above, there is nothing in the 2005 Bill that ensures tripartite consultation. Indeed, indications to date demonstrate contempt towards tripartite consultation. For example, prior to delivering its *WorkChoices* booklet, the Government met with representatives from the peak business organisations before detailing its plans to the public, no union or worker representatives were invited to attend this briefing. This is a clear breach of Article 2 and Article 3(2) (1) of C131.

6.3 Determining the Minimum Wage

Currently, under section 88B (2) of the 1996 Act the AIRC must ensure that a safety net of fair minimum wages and conditions of employment is established and maintained, having regard to the following:

(a) the need to provide fair minimum standards for **employees** in the context of living standards generally prevailing in the Australian community;

(b) economic factors, including levels of productivity and inflation, and the desirability of attaining a high level of employment;

(c) when adjusting the safety net, the needs of the low paid.

Section 88B is notable for its dual social and economic requirements which are in conformity with the obligations under Article 3(a) and (b) of C131. A reading through any of the AIRC's Safety Net decisions provides evidence of detailed discussion and analysis of economic factors; studies referred to include academic material, Treasury forecasts, Access Economics research, the Productivity Commission reports, as well as reports from international bodies such as the OECD and the World Bank. The AIRC also takes evidence from the ACTU, ACOSS and other stakeholders, and must weigh these factors to determine the most appropriate safety net increase. The process is analytical, fair, balanced and open.

By contrast, (as discussed above) proposed section 7J removes any requirements regarding fairness and subordinates social goals to economic. This problem is further exacerbated by proposed section 7K which provides that the AFPC may determine the timing, frequency, and scope of wage reviews, the manner in which wage reviews are to

be conducted (see below) and when decisions are to come into effect. In addition, the AFPC can inform itself in any way it thinks fit for the purposes of performing its wage setting function, including undertaking or commissioning research, consulting with any other person or organisation, and by monitoring and evaluating the impact of its decisions.

These sections are so broad and meaningless that it is unclear what precise functions the AFPC must engage in to perform its duties. As the requirements are so imprecise and optional it can be assumed that the AFPC can also choose to ignore research that does not fit with the current economic orthodoxy, or consultation with groups that are not deemed popular with the current government. As legislation, the 2005 Bill is poor law, there is no clear criteria outlining the functions of the AFPC, no clear requirements concerning evidentiary material, no procedural fairness requirements, and no mandated timelines in which the AFPC should compete its reviews. Indeed there are four sections covering the structure and function of the AFPC and over a dozen dealing with the appointment, remuneration, extraneous employment, and the resignation and removal of commissioners. The adhoc or crude nature of the AFPC raises serious issues about its legitimacy and impartiality.

6.4 Legitimacy, transparency and objectivity: Independence and the AFPC

One of the virtue's of the AIRC is its independence from the government of the day. Although not a chapter III court, the AIRC is somewhat analogous to the Administrative Appeals Tribunal. Its President has judicial status which plays a critical role in ensuring that the Commission operates fairly and is trusted by the public to engage in wage determination in an impartial manner. The judicial status of the President further ensures that proceedings are conducted effectively, are transparent and inclusive of all stakeholders[86] and has the requisite separation from the influence of the executive.

Unfortunately this independence is not replicated in the AFPC. Most disturbing is the fact that all the Commissioners have limited tenure including the Chair. This is likely to undermine the independence of members of the AFPC and public confidence in the

[86] Howe, above n 1.

fairness of the minimum wage review process. As Howe points out, "independent thinking is encouraged by job security – that's the rationale behind judicial appointments being until retirement".[87] Appointing members for short periods will undermine confidence in the AFPC and contribute to the perception that only members who do the Government's bidding are likely to be re-appointed. This is particularly so given the Government's strong public statements criticising the AIRC and its consistent intervention in safety net cases supporting the position of the business sector. ICTUR believes that members appointed for short fixed term periods are unlikely to be seen as bringing significant independence to their decision-making.

[87] Ibid 1.

APPENDIX A

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[88] 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 requested "the Government to review this issue and amend the legislation in the light of the requirements of the Convention".[89]

More particularly, the Committee noted that:

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88 *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.

89 At p. 224.

> *...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.*[90]

3. The 1999 Committee of Experts Report

Following a submission lodged by the ACTU in August 1998, the Committee found in its Report[91] 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:

(a) excessively restrict the subject matter of strikes

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*

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90 Ibid.

91 *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.

> *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.*[92]

(b) 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".[93] 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 ...*[94]

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 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*

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92 Id., at p. 205.
93 Ibid.
94 Id., at p 206.

> *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 Committee 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.[95] 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 collective bargaining at the level determined by the bargaining parties and

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

itself recommended that the Government take measures to ensure AWAs do not undermine the right to bargain collectively (at paragraphs 240-241).

5. The 2005 Observation

More recently, the Report of the ILO Committee on the Application of Standards included the following statement:

> *The Committee noted the statement by the Government representative and the debate that followed.* ***The Committee recalled that the Committee of Experts had been making comments for several years on certain provisions of the Workplace Relations Act, particularly in relation to the exclusion from the scope of application of the Act of certain categories of workers, the limitations on the scope of union activities covered by protection against anti-union discrimination and the relationship between individual contracts and collective bargaining.*** [International Labour Conference, Provisional Record, Ninety-third Session, Geneva, 2005: 22 Part Two p14] (emphasis added).

6. The 2005 Committee of Experts' Report

Further, as previously mentioned the 2005 Report of the ILO Committee of Experts on the Application of Conventions and Recommendations[96] again found that the 1996 Act was in serious breach of ILO Conventions in a number of respects. The findings of the Committee of Experts are set out below.

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[96] Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III (Part 1A), International Labour Conference, 93rd Session, 2005.

Australia

Right to Organise and Collective Bargaining Convention, 9949 (No. 98) (ratification: 1973)

The Committee takes note of the Government's reports as well as the comments of the Australian Council of Trade Unions (ACTU) and the Australian Chamber of Commerce and Industry (ACCI) as well as the Government's observations thereon.

Federal jurisdiction

The Committee recalls that its previous comments concerned the conformity of several provisions of the Workplace Relations Act, 1996 (WR Act) with the Articles of the Convention. Noting that the WR Act applies also to the State of Victoria, the Northern Territory and the Australian Capital Territory the Committee's comments on the WR Act, as set out below, are also relevant with respect to these jurisdictions.

Articles 1 and 4 of the Convention. Protection against anti-union discrimination in the framework of collective bargaining, 1. Protection against anti--union discrimination in case of refusal to negotiate an Australian Workplace Agreement (AWA). As to the particular notion of "Australian Workplace Agreement" (AWA), the Committee refers to the clarifications provided in its 1997 observation on the application of the Convention by Australia. The Committee notes that its previous comments concerned the issue of protection against anti-union discrimination tinder the WR Act. The Committee takes note of the Government's statement that full protection against all acts of anti-union discrimination and for all categories of workers is provided under the combined provisions of: (1) section 170CK of the WR Act, which applies in case of anti-union dismissals; (2) Part XA of the WR Act, in particular sections 298.K and 298L which provide to all workers and in relation to a broader range of conduct, including not only conduct resulting in the termination of employment, but also threatened conduct; and (3) section 170WG(1) of the WR Act which prohibits the application of duress against an employee in connection with an AWA. The Committee takes note in this respect of several court rulings communicated by the Government. The Committee also notes, however, that the abovementioned sections do not seem to provide adequate protection against anti-union discrimination (at the time of recruitment, during employment or, for certain wide categories of workers, at the time of dismissal) to workers who refuse to negotiate an AWA and insist on having their terms and conditions of employment governed by collective agreements, contrary to *Articles 1 and 4* of the Convention.

Firstly, with regard to discrimination at the time of recruitment, the Committee notes that section 298L of the WR Act does not include a refusal to negotiate an AWA among the prohibited grounds of anti-union discrimination at the time of hiring. According to both the ACTU and the Government, the courts found that an employer offering new employees a job conditional on signing an AWA did not apply duress, as, in that case, there was no pre-existing relationship between the parties (*Maritime Union of Australia v. Burnie Port Corporation Pty. Ltd.* (2000) 101 IR 435), while the Employment Advocate has repeatedly held that where an employee is offered a position with a new employer conditional upon

entering into an AWA this will not, without more, amount to duress under section 170WG(l) of the WR Act. The Committee recalls that the protection provided for in the Convention covers both the time of recruitment and the period of employment, including the time of work termination (see General Survey of 1994 on freedom of association and collective bargaining, paragraph 210). The Committee considers that sections I70WG(I) and 298L of the WR Act and the relevant national practice do not appear to afford adequate guarantees against anti-union discrimination at the time of recruitment and cannot be considered as measures to promote collective bargaining.

Secondly, the Committee notes with regard to discrimination during employment, that according to both the ACTU and the Government, the courts found no anti-union discrimination in a case in which employees had been required to sign AWAs in order to receive a wage increase, thereby giving up their right to collective bargaining; as a result, those who chose to remain on the collective agreement received inferior conditions (*Australian Workers' Union v. BHP Iron-Ore Pty Ltd.* (2001) FCA 3). The Committee notes that according to the Government, the Court found that in this case, there was no evidence of pressure by the employer, who had made offers of individual agreements to all employees, as it was clear that the existing collective instruments would continue to operate for those employees who did not accept the offer of individual agreements. The Committee understands from the above that the finding that there was no discrimination, was based on the fact that there would be no dismissals; however, the issue of anti-union discrimination in the course of employment was not addressed. The Committee recalls that *Article 1(2)(b)* of the Convention covers, in addition to dismissal, acts which "otherwise" prejudice a worker by reason of union membership or because of participation in union activities (see General Survey, op: cit., paragraph 212). It considers that situations in which workers who refuse to give up the right to collective bargaining are denied a wage rise amount to anti-union discrimination contrary to *Article 1* and constitute an obstacle to collective bargaining contrary to Article 4 of the Convention.

Furthermore, the Committee notes with concern from the Government's report that in another case the Australian Industrial Relations Commission (AIRC) held that an employer would not be in breach of either section 170CK or section 298K by relying on an undertaking given by an employee to "not involve himself in union activities forever" and that such an undertaking could be enforced by the employer (*Container Terminals Australia Limited v, Toby,* 24 July 2000). The Committee considers that enforcing an undertaking not to be involved in union activities forever amounts to a clear act of anti-union discrimination, contrary to *Article 1* of the Convention and certainly does not constitute a measure to encourage and promote collective bargaining.

Thirdly, with regard to discrimination at the time of termination of employment, the Committee notes that whereas refusal to negotiate in connection with an AWA is provided as a prohibited ground for dismissal in section 170CK(2)(g), such refusal is not a prohibited ground for dismissal under section 298L. As a result, the wide categories of workers who are excluded from the scope of section 170CK by virtue of section 170CC (employees on contracts of employment for a specified period of time or a specified task, employees on probation or engaged on a casual basis, those "in relation to whore the operation of the provisions causes or would cause substantial problems because of (i) their particular conditions of employment; or (ii) the size or nature of the undertakings in which they are

employed", and those whose remuneration falls below a certain threshold), do not seem to be protected against anti-union dismissals if they refuse to negotiate an AWA (thereby insisting on having their conditions and terms of employment governed by collective agreements). The Committee considers that these provisions are contrary to Article 1 of the Convention and constitute an obstacle to collective bargaining contrary to *Article 4*.

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

2. *Protection against anti-union discrimination in case of negotiation of multiple business agreements.* The Committee recalls that in its previous comments it had expressed concern at the exclusion from the scope of section 170ML, by section 170LC(6) of the WR Act, of industrial action taken with regard to the negotiation of multiple business agreements which was therefore not considered as "protected action" and was not covered by legal immunity. The Committee notes that this exclusion means that workers negotiating a multiple business agreement are not protected from anti-union dismissals under section 170MU and that, if they undertake industrial action, this might be regarded as coercion under section 170NC and would not appear to afford them the protection provided for lawful trade union activities under sections 298K and 298L(l)(n). The Committee takes note of the Government's statement that, although the provisions of the Act are directed towards facilitating agreement at the enterprise or workplace level, the parties are free to negotiate and make multiple employer agreements outside the formal system if they so choose, and the Act expressly contemplates such bargaining. The Committee notes, however, that according to ACTU such agreements outside the formal system would be difficult to enforce and could not be adequately negotiated because any industrial action taken would be unlawful in common law. The Committee therefore observes that, by not affording adequate protection against anti-union discrimination during the negotiation of multi-employer agreements, the WR Act introduces obstacles to such negotiation. The Committee recalls in this respect that in its previous comments it had emphasized that the choice of the bargaining level should normally be made by the partners themselves and that the parties "are in the best position to decide the most appropriate bargaining level" (see General Survey op cit paragraph 249) The Committee once again requests the Government to indicate in its next report any measures takers or contemplated to amend sections 170LC(6) of the WR Act so as to ensure that workers are adequately protected against discrimination for negotiating a collective agreement at whatever level the parties deem appropriate and that employers' and workers' organizations have a free choice as to the level at which they wish to negotiate collectively.

Articles 2 and 4. Protection against acts of interference in the framework of collective bargaining. The Committee notes that section 170LJ(1)(a) enables an employer to make an agreement "with one or more organisations of employees" where each organization has "at least one member" employed in the single business and is entitled to represent the industrial interests of the member in relation to work that will be subject to

the agreement. It appears to the Committee that the effect of this provision read together with the non-discrimination provision in section 170NB(l) (which requires that in negotiating an agreement, an employer must not discriminate between employees who are members of an organization and those who are not members, or between those who are members of a particular organization and others who are members of a different one) is that collective bargaining in the name of all workers may take place regardless of the representativeness of a trade union in the particular undertaking and of the wishes of the employees. The Committee notes in this respect that, according to the ACTU, these provisions allow employers to "shop around" amongst unions to see whether they can gain an advantage by dealing with one union over another. The Committee notes that the provisions of section 170LJ(1)(a) in conjunction with those of section 170NB might enable an employer to unduly influence the choice of workers as to the trade union that should represent them in negotiations thereby enabling the employer to interfere in the functioning of trade unions, contrary to Article 2 of the Convention. It also recalls that the determination of representative trade unions should be based on objective and pre-established criteria so as to avoid any possibility of partiality and abuse (see General Survey, op. sit., paragraph 97). The Committee therefore requests the Government to indicate in its next report any measures taken or contemplated to amend section170LJ(1)(a) of the WR Act so as to establish appropriate guarantees against employer interference in the context of the selection of a bargaining partner. In particular, the Committee would suggest the establishment of a mechanists for the rapid and impartial examination of allegations of acts of interference in the context of the selection of a bargaining partner, and the adoption of safeguards like objective and pre-established representativeness requirements.

Article 4. Measures to promote free and voluntary collective bargaining. 1. Relationship between AWAs and collective agreements. The Committee recalls that in its previous comments it had noted that under section 170VQ(6)(c) of the WR Act, once an AWA is in place, it operates to the exclusion of a certified collective agreement (unless the latter was already in operation and until its expiry, according to section 170VQ(6)(a)(i) and (ii) or if the certified collective agreement expressly allows a subsequent AWA to operate to its exclusion, according to section 170VQ(6)(a)(iii)). It further notes that according to the Government, if an AWA has not passed its nominal expiry date, it excludes the application of a certified collective agreement which has taken effect in the meantime, even where the collective agreement contains more favourable terms and conditions of employment (section 170VQ(6)(b) of the WR Act). The Committee is of the view that the fact that a collective agreement which is subsequent to an AWA may prevail over it only after the expiration of the duration of the AWA, constitutes discrimination with regard to workers who may wish to join a union during their employment, since such workers will not be able to profit from any favourable provisions of the collective agreement despite their affiliation. It also notes that a special issue exists in this respect with regard to newly recruited workers because the WR Act enables employers to offer an "AWA-or-nothing" at the time of recruitment without this being considered as duress (see above); such workers will be unable to benefit from the provisions of a collective agreement until the expiry of their AWA Thus the Committee considers that section 170VQ(6) of the WR Act contains disincentives to trade union affiliation by unduly restricting the field of application of collective agreements. The Committee requests the Government to indicate in its next

report any measures taken or contemplated to amend section 170VQ(6) of the WR Act so as to eliminate these disincentives and restrictions. The Committee also requests the Government to provide information on the evolution of affiliation levels since the adoption of the WR Act.

2. *Collective agreements with non-unionized workers*. The Committee observes that whereas section I70LJ is entitled "Agreement with organisations of employees", section 170LK is entitled “Agreement with employees” without any reference to workers' organizations. Section 170LKII) provides that “[t]he employer may make [an] agreement with a valid majority of the persons employed at the time whose employment will be subject to the agreement". Section 170LH requires the AIRC to certify agreements made by corporations either with trade unions or directly with employees. It appears to the Committee that (as also noted by ACTU), these provisions allow for collective negotiations over individual agreements to take place directly with employees, even where unions exist in an enterprise. The Committee notes that, according to the Government, section 170LK is in conformity with the Convention because individual workers are entitled under section 170LK(4) to request that they be represented by a trade union of which they are members in "meeting and conferring" with the employer. The Committee notes that the outcome of such request for trade union representation appears to be uncertain as section 170LK(6)(b) provides that the right of workers to be represented by trade unions will cease if any of the conditions stipulated in section 170LK(4) cease to be met. Thus, as noted by ACTU, even where workers are initially entitled to be represented by trade unions in negotiations, the employer may subsequently avoid any union involvement by unilaterally changing the scope and content of the negotiations (so that section 170LK(4)(b) no longer applies) or by simply declaring that it does not any longer wish to pursue an agreement under section 170LK. The committee considers that if there is a possibility in the law that a request for trade union representation may lead to the partial or total abandonment of negotiations, then the law establishes a disincentive to request such representation. Recalling that Article 4 requires measures to encourage and promote the full development and utilization of machinery for voluntary negotiation between employers or employers' organizations and workers' organizations, the Committee requests the Government to indicate in its next report any measures taken or contemplated to amend section 170LK(6)(b) so as to ensure that the right to trade union representation is effectively guaranteed and that negotiations with non-unionized workers can take place only where there is no representative trade union in the enterprise.

3. *Collective bargaining level*. The Committee takes note of a long list of multiple business agreements certified by the AIRC, which is provided by the Government in its report. However, the Committee also notes from the Government's report that during the reporting period the AIRC refused two applications to certify a multiple-business agreement on public interest grounds because the agreement applied to a number of employees whose operations were substantial and the matters would be more appropriately dealt with by single business agreements. The Committee recalls that section 17 01,C(4) of the WR Act provides that the AIRC must not certify a multiple-business agreement unless it is satisfied that it is in the public interest to do so, having regard to: (a) whether the matters dealt with therein could be more appropriately dealt with by agreement other than a multiple-business agreement; and (b) any other matter that the AIRC considers relevant. The Committee considers that approval should be refused only if the collective agreement

has a procedural flaw or does not conform to the minimum standards laid down by general labour legislation; if legislation allows the authorities fill discretion to deny approval (as seems to be the case under section 170LC(4)(b) of the WR Act) or stipulates that approva must be based on criteria such as compatibility with general or economic policy (in this case, the public interest), it in fact makes the entry into force of the collective agreement subject to prior approval, which is a violation of the of autonomy of the parties (see General Survey, op. cit., paragraph 251). The Committee therefore requests the Government to indicate in its next report any measures taken or contemplated to amend section 170LC(4) so as to eliminate the requirement of prior approval of multiple business agreements by the AIRC.

4. *Negotiations ever strike pay*. The Committee further recalls that in its previous comments it had raised the issue of strike pay as a matter for negotiation noting that although the mere fact that there are deductions for days on strike is not contrary to the Convention, it is incompatible with the Convention to impose such deductions in all cases (as under section 187AA) as, in a system of voluntary collective bargaining, the parties should be able to raise this matter in negotiations. The Committee notes that, according to the Government, it is reasonable to prevent improper demands for payment for periods where employees or unions that come within the norms of the system have taken industrial action. The Committee once again recalls that in a system of voluntary collective bargaining, the parties should be able to raise the matter of strike pay in negotiations and that by preventing them from doing so, the law unduly constrains the permissible scope of collective bargaining, The Committee therefore once again requests the Government to indicate in its next report any measures taken or contemplated to amend section 187AA in accordance with the above.

5. *Greenfields agreements.* The Committee recalls that in its previous comments it had referred to the pre-selection by an employer of a bargaining partner before workers are employed according to section 170LL of the WR Act ("greenfelds agreements") and had noted that this is permissible only for a first agreement and that since the Act permits the duration of any agreement to be up to three years (section 170LT(10)) section 170LL potentially prejudices the workers' choice of bargaining agent for a considerable period. The Government states in its report that the Committee's that three years is a considerable period is a substantive judgement and expresses the view that it would take three years for a new business to get established, and that it is a reasonable amount of time to provide for "greenfelds agreements". The Committee notes that its view that restrictions on collective bargaining for three years are too long is shared by other supervisory bodies like the Committee on Freedom of Association (see *Digest of decisions and principles of the Freedom of Association Committee*, 4th edition, 1996, paragraph 887). It also notes that this view is implicitly shared by the Government itself as section 170LT(10) prohibits a duration of more than three years for (freely negotiated) certified collective agreements. The Committee considers that being an exceptional situation, “greenfields agreements” should not have the same duration as freely negotiated certified agreements. The Committee therefore once again requests the Government to indicate in its next report any steps taken or contemplated to amend section 170LL of the WR Act so that the choice of bargaining can be made by the workers themselves, including in the case of a new business.

These and earlier findings by the ILO Committee of Experts are acutely embarrassing for Australia, which has traditionally maintained a high level of observance of ILO standards,[97] 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 2005 Bill.

[97] 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 R*elations 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 (Work Choices) Bill 2005* 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 S.C. a senior counsel practising at the Victorian Bar and an international Vice-President and President of the Australian National Committee.
- Mr Anthony Lawrence, an industrial barrister practising at the Victorian Bar and Secretary of the Australian National Committee.
- Mr David Chin, an industrial barrister practising at the Sydney Bar and Vice-President of the Australian National Committee.
- Mr David Langmead, an industrial barrister practising at the Victorian Bar and a member of the Australian National Committee.
- Mr Mark Gibian, an industrial barrister practising at the Sydney Bar and a member of the Executive of the Australian National Committee.
- Ms Carol Andrades, a consultant with the law firm Ryan, Carlisle Thomas, Lawyers and a member of the Australian National Committee.
- Mr Giri Sivaraman, a solicitor with the law firm Maurice Blackburn Cashman and a member of the Australian National Committee.
- Ms Anne O'Rouke, an academic at Monash University and a member of the Australian National Committee.