



**Australian Law Reform Commission Inquiry:
Traditional Rights and Freedoms – Encroachments by
Commonwealth Laws**

Submission of the Australian Institute of Employment Rights

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Background

1. The Attorney-General of the Commonwealth, Senator Brandis, has commissioned the Australian Law Reform Commission to consider whether “traditional rights, freedoms and privileges” are being encroached upon by Commonwealth law and, if so, whether those encroachments are justified.
2. The Inquiry is directed to a consideration of freedoms and rights in the context of human rights and workplace relations is to be one of the three key areas of focus of the Inquiry.
3. The ALRC has released an Issues Paper in relation to the Inquiry. The paper:

“...provides a brief explanation of each of the rights, freedoms and privileges listed in the [Terms of Reference](#), their origin and rationale, and how they are protected from statutory encroachment. For each one the ALRC asks the question: What criteria or principles should be used for determining when encroachment is justified? The Issues Paper also invites people to identify Commonwealth laws that unjustifiably encroach on traditional rights and freedoms, and to explain why the laws are not justified.”

4. This submission from the Australian Institute of Employment Rights is concerned with rights and freedoms in relation to workplace relations and in particular with encroachments by Commonwealth laws on freedom of association and the rights which flow from that fundamental human right, including:
 - The right of workers and employers to collectively bargain; and
 - The right of workers to strike and take other forms of industrial action in their economic and social interests.

The submission also argues in support of the important statutory protections that exist in relation to the right to membership of trade unions and the right to organise.

5. The principal legislation of the Commonwealth affecting these rights is the Fair Work Act 2009, as amended. The submission also references the Competition and Consumer Act 2010.
6. The submission primarily addresses the following two chapters of the Issues Paper:

4. Freedom of Association

Question 4–1 What general principles or criteria should be applied to help determine whether a law that interferes with freedom of association is justified?

Question 4–2 Which Commonwealth laws unjustifiably interfere with freedom of association, and why are these laws unjustified?

16. Authorising what would otherwise be a Tort

Question 16–1 What general principles or criteria should be applied to help determine whether a law that authorises what would otherwise be a tort is justified?

Question 16–2 Which Commonwealth laws unjustifiably authorise what would otherwise be a tort, and why are these laws unjustified?

About the Australian Institute of Employment Rights

7. The Australian Institute of Employment Rights (AIER) is an independent, not-for profit organization with the following objectives:

“Adopting the principles of the International Labour Organisation and its commitment to tripartite processes, the Australian Institute of Employment Rights will promote the recognition and implementation of the rights of employees and employers in a co-operative industrial relations framework.

In particular it will:

- (a) commission academic research
 - (b) hold conferences and seminars
 - (c) publish and disseminate publications
 - (d) contribute to public discourse on employment issues through the media, community debates and public forums
 - (e) provide training to industrial participants
 - (f) provide advice and other services to industrial participants and governments
 - (g) develop a Charter of Employment Rights for Australia
 - (h) promote models of workplace arrangements which promote economic efficiency while respecting employment rights and standards
 - (i) work co-operatively with academic and community organizations which share similar objectives
 - (j) encourage the participation of members who share similar objectives.”
8. The AIER is an organisation independent of government or any particular interest group and will implement these objectives with academic rigour and professional integrity.
9. The AIER includes employer and employee interests in its makeup, membership and operation. It is also fortunate to have included in its governance structure and advisory bodies representatives from the academic and legal fraternity.
10. AIER draws its basis for this submission from its belief that any system of industrial regulation must be founded in principles which reflect:

- (a) Rights enshrined in international instruments which Australia has willingly adopted and which as a matter of international law is bound to observe;
 - (b) Values which have profoundly influenced the nature and aspirations of Australian society and which are embedded in Australia's constitutional and institutional history of industrial/employment law and practice. In particular, values integral to what has been described as the "important guarantee of industrial fairness and reasonableness"¹; and
 - (c) Rights appropriate to a modern employment relationship which are recognised by the common law.
11. To this end the AIER has developed an instrument, *the Australian Charter of Employment Rights* ("the Charter")², based on the three sources of rights identified above which we believe to be both a unique and appropriate reference tool for examining the Fair Work legislation. A detailed outline of the development and uses of the Charter is contained in Annexure 1. A copy of the Charter of Employment Rights is contained at Annexure 2. AIER has utilised the Charter in developing this submission.

Employment Rights as Human Rights

12. The AIER approaches a consideration of employment rights through the lens of human rights, both individual and collective. In balancing competing rights in the workplace AIER argues in favour of the primacy of the collective rights of people to protect and enhance their economic and social welfare.
13. The AIER's Charter of Employment Rights elaborates on what those rights are and details the source, context and extent of those rights in Australia. The identified employment rights are based on the Australian experience, values and industrial law but are also firmly in line with rights as expressed by international treaties, covenants and conventions to which Australia has agreed to adhere.
14. In addition, we note that the Australian parliament now specifically takes into consideration the compatibility of proposed legislation with core human rights since the passage of the Human Rights (Parliamentary Scrutiny) Act 2011. The Explanatory Memorandum for each Bill must consider the compatibility of the Bill with identified international human rights instruments and the Human Rights parliamentary committee reports on the compatibility of proposed legislation with the observance of human rights.
15. The AIER supports this process believing that it assists in placing human freedoms and rights at the centre of consideration of any Bill, if the process is done fully in accordance with the spirit and intent of the 2011 Act.

¹ *New South Wales and Others v Commonwealth* [2006] HCA 52, per Kirby J at [523] – [525].

² Bromberg, M and Irving, M [eds], *Australian Charter of Employment Rights*, 2008.

16. The *Human Rights (Parliamentary Scrutiny) Act 2011* identifies human rights by reference to particular international instruments while also allowing for the consideration of the impact of other international instruments and jurisprudence. For our purposes the relevant international instruments identified by the Act are:

A. the International Covenant on Civil and Political Rights done at New York on 16 December 1966 ([1980] ATS 23), specifically Article 22 which provides:

1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.
2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.
3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention.

B. the International Covenant on Economic, Social and Cultural Rights done at New York on 16 December 1966 ([1976] ATS 5), specifically Article 8 which provides:

1. The States Parties to the present Covenant undertake to ensure:

- (a) The right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests. No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;
- (b) The right of trade unions to establish national federations or confederations and the right of the latter to form or join international trade-union organizations;
- (c) The right of trade unions to function freely subject to no limitations other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;
- (d) The right to strike, provided that it is exercised in conformity with the laws of the particular country.

2. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces or of the police or of the administration of the State.

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

17. As noted in the above United Nations Covenants, international obligations as regards employment rights also arise from the Conventions of the International Labor Organisation. Most relevant for this submission are the Freedom of Association and Protection of the Right to Organise Convention, 1948 No.87 and the Right to Organise and Collective Bargaining Convention, 1949, No.98. Australia has ratified both conventions.

18. The Fair Work Act 2009 includes as an object in section 3:

“providing workplace relations laws that are fair to working Australians, are flexible for businesses, promote productivity and economic growth for Australia’s future economic prosperity and **take into account Australia’s international labour obligations.**”

19. The ILO Conventions and the jurisprudence that has built up around them provide for the content of the right to freedom of association as it exists in relation to employment. The rights established by ILO Conventions and the content of these rights have a history and a context that give them their on-going relevance and importance. The ILO was formed after World War I as part of the Treaty of Versailles and its purpose and goals were reaffirmed in the Declaration of Philadelphia after World War II. It is after the horror of these events and the social and economic context surrounding them in the last century that the ILO was founded on the understanding that universal and lasting peace can be established only if it is based upon social justice.

20. The ILO’s fundamental principles include that labour is not a commodity, that freedom of expression and association are essential to sustained process and that poverty anywhere constitutes a danger to prosperity everywhere. It is from within the tradition of seeking social justice and providing for the ability of people to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity, that the AIER submits the ILO Conventions relating to freedom of association should be implemented as fully as possible.

21. The Fair Work Act was enacted before the requirement to subject legislation to scrutiny of its compliance with human rights. However, the ILO has considered provisions of the Fair Work Act and found parts of the Act to be incompatible with certain international rights and standards. These findings by the ILO are referenced in the course of the submission. The AIER emphasises that, as the Charter demonstrates, these human rights are not merely fabrications or formulations from

international instruments. Robust versions of such rights or analogues of them have been intrinsic to the Australian social, legal and democratic values and frameworks for over a century since Federation.

Freedom of Association

22. The ALRC Freedoms Inquiry proceeds from the position that freedom of association is a right recognised in Australia. The purpose of the inquiry is to examine laws that encroach on that right and whether that encroachment is justified. As mentioned above the content of the right to freedom of association in relation to the workplaces or the relationship between employers and workers is primarily found in International law and specifically within the Conventions and jurisprudence of the International Labor Organisation, notably the Freedom of Association and protection of the Right to Organise Convention, 1948 (No. 87) and the Right to Organise and Collective Bargaining Convention, 1949, (No. 98).
23. The Australian Charter of Employment Rights adopts the language of these international instruments, including as a core principle that:

“Workers have the right to form and join a trade union for the protection of their occupational, social and economic interests.”³
24. The AIER notes: “The right to form and join a trade union is a crucial human right. It forms the foundation on which many other rights of workers are built”.⁴
25. As noted above, freedom of association is the base from which other rights flow, in particular the right to collectively bargain and the right to strike. Without these other rights, the right of freedom of association is rendered meaningless. How these rights apply in practice is a matter which should be considered as a whole.
26. The right of workers to form and join unions and to exercise the rights inherent in union membership is recognised within Australian industrial law but the practical application of that right is subject to, we argue, considerable and unjustified encroachment by the laws of the Commonwealth.

Employment Rights in Australia

27. The Australian approach to defining and balancing the rights of workers and employers has been rooted in Australian history and the values and ideals which underpinned the federation of the former colonies and the creation of the Commonwealth of Australia in 1901.

³ Bromberg, M and Irving, M [eds], *op.cit.*p. 53.

⁴ Irving, M, in Bromberg, M and Irving, M [eds], *op.cit.*p. 55.

28. Australia was an early supporter of an international approach to the setting and promotion of labor standards which began with the Treaty of Versailles at the end of the First World War. Australia was a founding member of the International Labor Organisation and has ratified many of its key Conventions, including as mentioned above those relating to the right to organise and collective bargaining.
29. For most of our history, the emphasis in Australian industrial law and systems was on conciliation and arbitration, as empowered by our Constitution. The conciliation and arbitration system encouraged the formation of organisations of employees and employers.
30. The right to join a trade union has been recognized in Australian statute law since 1904. The *Conciliation and Arbitration Act* included a prohibition on dismissing any employee from their employment by reason merely of the fact that the employee is an officer or member of an organization or is entitled to the benefit of an industrial agreement or award.
31. For many years, the work of state and federal industrial tribunals focused on the prevention and settlement of disputes by the making of awards and determinations that established legal minimum wages and conditions of employment in various industries and occupations as well as by settling individual industrial disputes.
32. While these procedures inevitably involved a degree of collective bargaining, there was no statutory recognised right to collectively bargain or to take industrial action until the mid-1980s and the *Industrial Relations Reform Act* of 1993 enacted by the Hawke Labor Government.
33. All federal industrial legislation since 1993 has recognised collectively bargained outcomes as a key and enforceable element of industrial standards, underpinned by industry- and occupation-wide minimum terms awards. All such legislation has also established a very limited right to strike or take other forms of industrial action.

The Right to Collectively Bargain

34. By ratifying the above mentioned international conventions Australia has undertaken to guarantee “Measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers’ associations and workers’ organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements” (No 98, Article 4). There is considerable international jurisprudence which elaborates on the meaning of these and other Conventions.
35. Under current Commonwealth laws there is an emphasis on the need to prescribe, in technical terms, a variety of matters that constrain the bargaining process. These convoluted prescriptions

appear to be influenced by the emphasis on enterprise bargaining and/or inappropriate efforts to corral or restrain worker power in the bargaining process.

36. The Fair Work Act establishes a restricted statutory scheme of collective bargaining that includes the following unnecessary prescriptions:
- Limiting collectively bargaining to an enterprise level, except in certain circumstances;
 - Limiting the scope and content of collective agreements; and
 - Creating the potential for undermining union representation in bargaining.
37. The right to bargain collectively is contradicted by surrounding the process with controversy. Technical requirements can be used as a loose end and exploited to frustrate or avoid the bargaining process.
38. In a number of areas the legislation is out of step with international labour standards in particular in the areas of Freedom of Association and Protection of the Right to Organise Convention No.87 and Right to Organise and Collective Bargaining Convention No.98.
39. The emphasis within the Fair Work Act on enterprise level bargaining [see s.3(f), Objects at Part 2-4 and s. 186(2)(ii) and s.229(2)] is an unnecessary encroachment on the right to collectively bargain. The Fair Work Act set out a scheme whereby multi-employer agreements are only able to be registered or the process of bargaining attract protection under the Act if the employers agree to a multi-employer agreement. In contrast, “pattern bargaining” by employees is restricted. There is no corresponding restriction on “pattern” or industry-wide coordinated bargaining by employer or other representatives. The ILO’s Committee on Freedom of association has found that, “According to the principle of free and voluntary collective bargaining embodied in Article 4 of Convention 98 the determination of the bargaining level is essentially a matter to left to the discretion of the parties and, consequently, the level of negotiation should not be imposed by law, by decision of the administrative authority or by the case law of the administrative labor authority.”⁵
40. The Fair Work Act 2009 also restricts the contents of agreements which may be approved to those agreements which contain only permitted content. Permitted content is specified by section 172 of the Act:

“172 Making an enterprise agreement

Enterprise agreements may be made about permitted matters

- (1) An agreement (an enterprise agreement) that is about one or more of the following matters (the permitted matters) may be made in accordance with this Part:

⁵ ILO Committee on Freedom of Association, Report Australia (Case No. 2698) Report No.357 (Vol.XCIII, 2010, Series B No.2) para 220.

- (a) matters pertaining to the relationship between an employer that will be covered by the agreement and that employer's employees who will be covered by the agreement;
- (b) matters pertaining to the relationship between the employer or employers, and the employee organisation or employee organisations, that will be covered by the agreement;
- (c) deductions from wages for any purpose authorised by an employee who will be covered by the agreement;
- (d) how the agreement will operate."

41. The "matters pertaining" criteria arose from limits (or perceived limits) of the federal Government's power over industrial relations. Using the corporations' and other powers (and not the conciliation and arbitration power) the federal Government may now permit the making of agreements and awards that are not limited to matters pertaining to the employment relationship. An unnecessary restriction on the content and subject matter of bargaining has been perpetuated by importing that now anachronistic constitutional test into the regulation of a bargaining regime.

42. Further unions, employees and employers have in recent years been entering into deeds to circumvent the restrictions on content. During collective bargaining there are often concurrent negotiations about the content of the collective agreement and the content of the deed. An industrial relations system is flawed when it creates such contrivances.

43. Despite the provisions of section 172 (1) (a) and (b) – which themselves limit the content of agreements – the Act imposes further restrictions on content, even where that content may pertain to the employment relationship and/or the relationship between the employer and an employee organisation. Section 186 (4) also provides:

Requirement that there be no unlawful terms

- (4) FWA must be satisfied that the agreement does not include any unlawful terms (see Subdivision D of this Division).

Subdivision D provides:

"Subdivision D—Unlawful terms

"194 Meaning of unlawful term

A term of an enterprise agreement is an unlawful term if it is:

- (a) a discriminatory term; or

- (b) an objectionable term; or
- (c) if a particular employee would be protected from unfair dismissal under Part 3 2 after completing a period of employment of at least the minimum employment period—a term that confers an entitlement or remedy in relation to a termination of the employee’s employment that is unfair (however described) before the employee has completed that period; or
- (d) a term that excludes the application to, or in relation to, a person of a provision of Part 3 2 (which deals with unfair dismissal), or modifies the application of such a provision in a way that is detrimental to, or in relation to, a person; or
- (e) a term that is inconsistent with a provision of Part 3 3 (which deals with industrial action); or
- (f) a term that provides for an entitlement:
 - (i) to enter premises for a purpose referred to in section 481 (which deals with investigation of suspected contraventions); or
 - (ii) to enter premises to hold discussions of a kind referred to in section 484;
 other than in accordance with Part 3 4 (which deals with right of entry);
- or
- (g) a term that provides for the exercise of a State or Territory OHS right other than in accordance with Part 3 4 (which deals with right of entry).

44. This section of the Act deems certain terms to be unlawful. The definition of “unlawful terms” in the Act operates so as to bring within its scope matters that of themselves would not be unlawful or harmful in the absence of being so declared by the Act. This is in a number of instances an unjustified limitation on the rights of employers and employees to make agreements matters that in the ordinary course of events are not unlawful or even undesirable and which, on the contrary, may confer benefits on employees and employers.

45. Amongst other things, the definition of unlawful term precludes the ability of employers and employees

- to provide additional protections with regard to unfair termination of employment beyond that provided for by the Act, or
- to provide different or superior right of entry provisions to that provided for by the Act.

46. The AIER submits that these restrictions are unwarranted and unjustifiable encroachment on the freedom of employers and employees to make agreements about these matters which may suit their needs and provide benefits to employees and employers.

47. The Act at section 194 provides that so-called 'objectionable terms may not be included in agreements. The Act defines objectionable terms as follows:

“objectionable term means a term that:

- (a) requires, has the effect of requiring, or purports to require or have the effect of requiring; or
- (b) permits, has the effect of permitting, or purports to permit or have the effect of permitting;

either of the following:

- (c) a contravention of Part 3 1 (which deals with general protections);
- (d) the payment of a bargaining services fee.

48. This definition means that employers and employees cannot make agreements regarding the payment of a bargaining services fee nor take protected industrial action in relation to such a claim. The AIER submits that this is an unwarranted interference with the freedom of employers and employees to make agreements about matters that would otherwise not be unlawful or objectionable and which pertain to the employment relationship and/or the relationship between an employer and an employee organisation.

49. Consistent with International Labour Standards workers should be able to pursue any matters that are connected to their economic and social interests that can be progressed through work. The parties are in the best position to determine what is important to them and, where they can, reach agreement about it. Similar restrictions do not apply to parties in a non-industrial context. The same freedom to agree should be afforded to parties in employment.

50. Further recalling that measures taken unilaterally by authorities to restrict the scope of negotiable issues are often incompatible with Convention No.98, and that tripartite discussion for the preparation, on a voluntary basis, of guidelines for collective bargaining are a particularly appropriate method of resolving these difficulties, the Committee on Freedom of Association has requested the Australian Government to ...”review these sections, in full consultation with the social partners.”⁶

⁶ ILO Committee on Freedom of Association, Report Australia (Case No. 2698) Report No.357 (Vol.XCIII, 2010, Series B No.2) para 220.

51. AIER is also concerned there is the potential within the legislation for collective bargaining for employers to enter into agreements with employees directly even where a union exists and/or is involved in bargaining.
52. The ILO Committee of Experts on Freedom of Association has noted that s.172 of the FWA could “place employees, and organisations of employees, on equal footing with respect to the conclusion of agreements that are not greenfields agreements” – this being outside of the scope of Collective Agreements Recommendation (No.91) that stresses the role of worker’s organisations as one of the parties in collective bargaining and that direct negotiation between the undertaking and its employees, bypassing representative organisations, where these exist, might in certain cases, be detrimental to the principle that negotiation between employers and organisations of workers should be encouraged and promoted.⁷
53. The confusion about the role and status of workers organisations in bargaining under the Fair Work Act is a matter that has been the subject of substantial litigation. Much of this litigation has been brought through the ss228(1)(e)-(f), and specifically in relation to submitting agreements to ballot and direct dealing and communication with employees.⁸
54. FWA has found that there is no absolute requirement for the agreement of the bargaining agents prior to the conduct of a ballot.⁹
55. The situation regarding direct communication with employees during bargaining is still unclear with a firm statement of principles enunciated through recommendation by Drake SDP in *Australian Manufacturing Workers Union v Transfield Australia Pty Ltd*.¹⁰ However decisions since that time have derogated from these principles.
56. AIER submits in light of these decisions that the legislation does not protect the role of workers representatives in the bargaining process in the way that is recognised under International Labour Standards. This has allowed employers to utilise direct dealings and balloting as a tactic to frustrate bargaining and go around the union/s.¹¹
57. AIER submits that the following encroachments on the right to collectively bargain should be addressed through amending the Fair Work Act 2009 to:
- remove restrictions on bargaining beyond the enterprise.
 - remove restrictions on the content of bargaining

⁷ Ibid, para 216.

⁸ For a detailed summary of comparative good faith bargaining regimes see Forsyth A (2011) The Impact of ‘Good Faith’ obligation on Collective Bargaining Practices and Outcomes in Australia, Canada and the USA, *Canadian Labour and employment Law Journal* 16:1

⁹ *CFMEU v Tahmoor Coal Pty Ltd* [2010] FWAFB 3510 at para [30]

¹⁰ [2009] FWA 93 (14/08/09)

¹¹ Examples include Rio Tinto and recent BHP tactics in bargaining.

- clarify that all interactions, communications and correspondence in bargaining be conducted through the parties' chosen representatives.

Right to Strike

58. The right of a worker to strike (and take other forms of industrial action) for the protection and promotion of their economic and social interests is an intrinsic corollary of the right of association protected by ILO Convention No. 87.

59. AIER's Charter of Employment Rights provides that:

“Subject to compliance with their obligation to bargain in good faith, workers have the right to take industrial action and employers have the right to respond”.

60. The right to take industrial action is a key industrial and human right:

“The right to strike is essential in any meaningful system of collective bargaining. Fair and balanced bargaining requires all parties to have a comparable measure of bargaining strength. Without at least the threat of industrial action, workers do not sit as equals with employers at the bargaining table. The realistic prospect of workers taking industrial action is the difference between collective bargaining and collective beseeching”.¹²

61. As cited in the International Confederation of Trade Unions' recent comprehensive consideration of the international jurisprudence on the rights to strike, in the 1994 General Survey on Freedom of Association the Committee of Experts stated:

“147. As early as 1959, the Committee expressed in its General Survey the view that the prohibition of strikes by workers other than public officials acting in the name of the public powers "... may sometimes constitute a considerable restriction of the potential activities of trade unions ... There is a possibility that this prohibition may run counter to Article 8, paragraph 2, of the Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87)". This position was subsequently reiterated and reinforced: "a general prohibition of strikes constitutes a considerable restriction of the opportunities opened to trade unions for furthering and defending the interests of their members (Article 10 of Convention No. 87) and of the right of trade unions to organize their activities"; "the right to strike is one of the essential means available to workers and their organizations for the promotion and protection of their economic and social interests. These interests not only have to do with better working conditions and pursuing collective demands of an occupational nature, but also with seeking solutions to economic and social policy questions and to labour problems of any kind which are of direct concern to the workers". The Committee's reasoning is therefore based on the recognized right of workers' and employers' organizations to organize their activities and to formulate their programmes for the purposes of furthering and defending the interests of their members (Articles 3, 8 and 10 of Convention No. 87).”

¹² McCallum, R, Chin, D and Gooley, A, in Bromberg, M and Irving, M [eds], op.cit.p. 97

148. 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 a traditional economic relationship, one of the means of pressure available to workers is to suspend their services by temporarily withholding their labour, according to various methods, thus inflicting a cost on the employer in order to gain concessions... [early on the Committee was led] to the view that the right to strike is one of the essential means available to workers and their organizations to promote their economic and social interests."¹³

62. Prior to 1993, there was no formal recognition in Australia of a right to strike. Even so, resort to strikes and industrial action was an engrained feature of Australian industrial relations. The Australian system of compulsory conciliation and arbitration was developed in the context of seeking to avoid protracted industrial disputes. It is a system that encouraged the settling of industrial disputes using industrial laws and systems and discouraged strikes by employees and discouraged employers from recourse to the common law of torts. This approach began to unravel in the 1980s with the Dollar Sweets and Mudginberi¹⁴ disputes whereby some Australian employers sought recourse to the common law courts to seek injunctions and damages in response to industrial action. Under common law applicable in Australia, strike action had been regarded as an economic or industrial tort and those engaging in strike action could be and were subject to the imposition of heavy sanctions including damages in relation to interference with employment and other contracts.
63. At about the same time, Australia's failure to formally recognise and protect the right to strike also began to attract criticism from the ILO.¹⁵ The 1993 Industrial Relations Act sought to encourage collective bargaining at the workplace and at the same time introduce some limited protection of the right to strike in Australia. The Act provided immunity from civil liability under the law of torts for striking employees and their unions in limited circumstances. This was done explicitly in response to international criticism of Australian industrial law, as indicated by the Minister's second reading speech and the Explanatory Memorandum for the Bill. Section 170PA of the amended Act identified specific sources of international law that gave rise to an obligation to protect the right to strike.¹⁶
64. The validity of the Industrial Relations Act 1988 as amended was challenged by a number of States. In *Victoria v Commonwealth*, the High Court held that the provision of a right to strike was a valid

¹³ International Trade Union Confederation (ITUC), *The Right To Strike And The ILO: The Legal Foundations* March 2014. And Report of the Committee of Experts on the Application of Conventions and Recommendations, General Survey on Freedom of Association and Collective Bargaining, Report III (Part 4B), International Labour Conference, 81st Session, 1994 (General Survey 1994), p.66, para.148.

¹⁴ The Dollar Sweets dispute was dealt with in the common law courts of Victoria as a tort relating to picketing. The Mudginberri dispute which saw significant damages awarded against the union was taken under the then Trade Practices Act.

¹⁵ Dalton, R and Groom, R, *The Right to Strike in Australia: International Treaty Obligations and the External Affairs Power*, Melbourne Journal of International Law, Vol 1 - 2000

¹⁶ Ibid.

exercise of the Commonwealth's external affairs power.¹⁷ It did so on the basis of Article 8 (1) of the International Covenant on Economic, Social and Cultural Rights of the United Nations referred to above.¹⁸ The Court also considered other sources of this right, including the Conventions of the International Labour Organisation ratified by Australia, but found they did not explicitly state a right to strike. While neither of the relevant Conventions explicitly state a right to strike, international jurisprudence has clearly established that the right to take industrial action flows inevitably from the right to organise and bargain and the right to freedom of association.¹⁹

65. The Fair Work Act 2009 continues the limited immunity from civil action in respect to industrial action undertaken by workers and their unions. It provides limited immunity in the following terms:

“415 Immunity provision

- (1) No action lies under any law (whether written or unwritten) in force in a State or Territory in relation to any industrial action that is protected industrial action unless the industrial action has involved or is likely to involve:
 - (a) personal injury; or
 - (b) wilful or reckless destruction of, or damage to, property; or
 - (c) the unlawful taking, keeping or use of property.
- (2) However, subsection (1) does not prevent an action for defamation being brought in relation to anything that occurred in the course of industrial action.

66. It will be noted that the immunity is provided by s.417 is provided only in respect to industrial action [as defined] that is “protected industrial action” as provided for by the Act and not otherwise. The effect of the limitations [as outlined below] is such that the law of the Commonwealth does not provide adequate protection of the internationally recognised human right of employees to take industrial action, including strike action.

67. Conversely available tort actions at common law have their antecedents in judicial perceptions of the role of law in relation to conflicts of economic interests virtually unchanged since the 19th century. The terms of reference of this inquiry appear to beg the question entirely of the appropriateness of some torts being applied currently to Australia's industrial and democratic settings. The rationale of torts such as conspiracy, intimidation or procurement of breach of contract is anachronistic and should be revisited as a socially acceptable rationale for a contemporary economic wrong, breach of which is enforceable at civil law. The inherent interest protected, by that notion of economic wrong, makes little concession to any conflicting public

¹⁷ (1996) 187 CLR 416, 452-7, cited in Dalton and Groom, op cit.

¹⁸ Dalton and Groom, op cit.

¹⁹ International Trade Union Confederation (ITUC), *The Right To Strike And The ILO: The Legal Foundations* March 2014. See also: Shae McCrystal, Sydney Law School Legal Studies Research Paper No. 10/18 February 2010, *The Fair Work Act 2009 (Cth) and the Right to Strike*.

interest associated with rights to collective action, of freedom of association in pursuit of collective economic interest untrammelled by master /servant ideology and principles. As Owens and Riley observed: "Strikes, boycotts and pickets have always been susceptible to common-law action in the past. The system of conciliation and arbitration set up to regulate industrial disputation meant that such actions were relatively rare. The new regulatory framework imposes none of those disincentives or impediments to litigation."²⁰

68. AIER considers that the provision of limited immunity from civil action under the common law of torts is and will always be an inadequate means of protecting the right of workers to take industrial action, including the right to strike. This approach effectively treats the underlying common law 'right' of freedom from interference with contractual relationships as a core freedom and treats protection from common law actions for injunctions and damages for workers who collectively exercise their rights to protect and enhance their economic and social interests as a privilege or exception rather than a fundamental human right. The Fair Work Act authorizes action that would otherwise be a tort as per section 16 of the Discussion Paper. The AIER submits that not only is it justified to limit the common law right to tort action in favour of the right to collectively engage in industrial action, but that the current laws do so inadequately.
69. The right to strike is a fundamental human and employment right in relation to employment and industrial matters and should take precedence over commercial and property rights.
70. AIER submits that the limitations on immunity such as are provided by the Fair Work Act are unjustified and should be removed so that an effective right to strike is provided to employees in Australia. The Fair Work Act also provides other limitations on the taking of industrial action, unrelated to considerations of tort immunity, which should also be removed. These are detailed below. The effect of these limitations also impinges on the right of employees and employers to collectively bargain in good faith and exercise their rights to freedom of association.
71. As will be seen below, the Fair Work Act provides limited immunity for industrial action only in respect to industrial action by employees and employers in a bargaining period, that is, when the parties are engaged in collective bargaining. The Act provides no immunity at all for any other type of industrial action. However, the Act places a number of strict limitations on the immunity provided during bargaining periods – in the submission of the AIER, these limitations are unwarranted and unjustified and should be removed as they are unnecessary encroachments on the freedom of employees and employers to bargain in good faith in a manner that suits them.
72. While the Fair Work Act 2009 was enacted prior to the Human *Rights (Parliamentary Scrutiny) Act 2011* and was therefore not subject to the compatibility tests required by that Act, the Act has been amended twice since the passage of the 2011 Act and those amendments have been subject to compatibility testing.

²⁰ Rosemary J. Owens and Joellen Riley, *The law of work*, Oxford University Press, 2005, p.545.

73. The Explanatory Memorandum for the Fair Work Act Amendment Bill 2013 noted that the Bill had been considered in relation to the following in respect to Freedom of Association:

“Right to freedom of association

Article 22 of the ICCPR protects the right to freedom of association, including the right to form and join trade unions. Article 8(1) of the ICESCR protects:

- the right to form and join trade unions;
- the right of trade unions to function freely subject to necessary limitations in the interests of national security, public order or the protection of the rights and freedoms of others; and
- the right to strike, provided it is exercised in conformity with the laws of the particular country.

The ILO Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) protects the rights of employees and employers to establish and join organisations for furthering and defending their interests, and the right of those organisations to organise their activities and formulate their programmes.”²¹

74. Thus the Explanatory Memorandum, and the Parliament, has acknowledged formally the existence of the right to strike as it exists in international law. This right is recognised as needing to be exercised in conformity with the laws of each country, but international jurisprudence recognises that such laws cannot take away the fundamental right to strike.²²

75. The right to strike can be considered as being derived from a specific reference to such a right in an international instrument, such as that found in Article 8(1) of the ICESCR noted above. It can also be considered as being derived from international instruments providing for the right of freedom of association and the right to organise and collectively bargain, even if those instruments do not explicitly provide for a right to strike. International jurisprudence supports the view that a right to strike does flow from these instruments.²³

76. The question of the right to strike being an inherent part of freedom of association has recently been considered by the Supreme Court of Canada on appeal. Canada has a Charter of Rights and

²¹ 2010-2011-2012-2013 The Parliament of The Commonwealth of Australia, Senate, Fair Work Amendment Bill 2013, Revised Explanatory Memorandum, page 7.

²² Shae McCrystal , Sydney Law School Legal Studies Research Paper No. 10/18 February 2010 The Fair Work Act 2009 (Cth) and the Right to Strike, pp 3-4

²³ International Trade Union Confederation (ITUC) The Right To Strike And The ILO: The Legal Foundations, op cit and Shae McCrystal , Sydney Law School Legal Studies Research Paper No. 10/18 February 2010 The Fair Work Act 2009 (Cth) and the Right to Strike, op.cit

Freedoms, section 2 (d) of which provides a right of freedom of association [but not an explicit right to strike].²⁴

77. The Supreme Court in January 2015, held that legislation which denied a right to strike to public sector employees contravened section 2 (d) of the Canadian Charter. In their decision, the majority of the Court held that:

*“The right to strike is an essential part of a meaningful collective bargaining process in our system of labour relations. The right to strike is not merely derivative of collective bargaining, it is an indispensable component of that right. Where good faith negotiations break down, the ability to engage in the collective withdrawal of services is a necessary component of the process through which workers can continue to participate meaningfully in the pursuit of their collective workplace goals.” This crucial role in collective bargaining is why the right to strike is constitutionally protected by s. 2 (d).*²⁵

78. AIER submits that the current absence of a primary right to strike and the restrictions provided by the current limited immunity provisions of the 2009 Act, and other limitations on the right to strike in the Act as set out below, do not properly provide protection of the right to strike as recognised by international law.

Unjustified limitations on industrial action

79. The Australian Government has been put on notice that a number of provisions of the Fair Work Act infringe on the right regarding freedom of association as set out in the ILO’s Freedom of Association and Protection of the Rights to Organise Convention No.87 including:

- The provisions of ss408 – 411 that effectively prohibit sympathy strikes and general secondary boycotts. The secondary boycott provisions of the Competition and Consumer Act 2010 (formerly the Trade Practice Act 1974) also still remain in force;
- The removal of protected industrial action in support of multiple business agreements in s. 413(2);
- Pattern bargaining remains unprotected unless the parties are genuinely trying to reach agreement (s.409(4) and s 412). It in effect remains unprotected given the impact of the threat of litigation;
- Industrial action is unprotected if it is in support of unlawful terms;
- The provisions of s.423, s.424 and s.426 which allow for the suspension or termination of industrial action where it may cause significant economic harm are cast too broadly. As is

²⁴ https://zoupio.lexum.com/calegis/schedule-b-to-the-canada-act-1982-uk-1982-c-11-en#!fragment/Fundamental_Freedoms_1683

²⁵ Saskatchewan Federation of Labour v. Saskatchewan, 2015 SCC 4, 2015-01-30: <http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/14610/index.do>

the provision under s.431 that allows for the Minister to terminate industrial action without reference to the parties or to any process.²⁶

80. AIER notes that the government has been asked to review the practical application of these provisions in conjunction with the social partners with a view to bringing them in to full conformity with the Convention.²⁷
81. Further the ILO Committee of Freedom of Association has previously determined that the conditions 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. In reviewing the provisions of the Fair Work Act the Committee found that the requirement for a decision by over half of all the workers involved in order to declare a strike is excessive and asked for this provision to be reviewed.²⁸
82. AIER submits that the following limitations on taking protected industrial action constitute unwarranted and unjustified encroachments on the right of employees to strike.
83. *Bargaining periods.* Section 413 of the FW Act sets out the common requirements for industrial action to be protected. This includes requirements that the industrial action:
- must not relate to a proposed enterprise agreement that is a greenfields agreement or multi enterprise agreement – this is an unjustified encroachment on the taking of industrial action in respect to particular forms of agreement, for example, a multi-employer agreement
 - Must not occur before the nominal expiry date of an enterprise agreement – this restricts the immunity to industrial action occurring in a bargaining period and prevents any industrial action while an agreement is in force, even if the action is about a matter or an issue not covered by the enterprise agreement
84. *Permitted matters.* The Act provides that industrial action by employees in relation to an agreement is only protected industrial action if it is in relation to ‘permitted matters’. The issues relating to the definition of permitted matters are dealt with above in relation to collective bargaining. AIER submits that this is an unjustified encroachment on the freedom of employers and employees to reach agreement about any and all matters of importance to them and to take protected industrial action in support of relevant claims:

“408 Protected industrial action

Industrial action is protected industrial action for a proposed enterprise agreement if it is one of the following:

²⁶ ILO Committee on Freedom of Association, Report Australia (Case No. 2698) Report No.357 (Vol.XCIII, 2010, Series B No.2) paras 213 – 229.

²⁷ CEACR Report 2010

²⁸ CFA Report Australia (Case No. 2698) Report No.357 (Vol.XCIII, 2010, Series B No.2) para 220

- (a) employee claim action for the agreement (see section 409);
- (b) employee response action for the agreement (see section 410);
- (c) employer response action for the agreement (see section 411).

409 Employee claim action

Employee claim action

- (1) Employee claim action for a proposed enterprise agreement is industrial action that:
 - (a) is organised or engaged in for the purpose of supporting or advancing claims in relation to the agreement that are only about, or are reasonably believed to only be about, **permitted matters**; and...

85. *Protected Action Ballots.* The Act provides that industrial action is not protected unless a ballot of employees has been taken to determine if those employees wish to participate in the proposed industrial action. The Act provides that a majority of employees ballot must vote in the ballot and a majority of those voting must support the taking of the proposed action:

“459 Circumstances in which industrial action is authorised by protected action ballot

- (1) Industrial action by employees is authorised by a protected action ballot if:
 - (a) the action was the subject of the ballot; and
 - (b) at least 50% of the employees on the roll of voters for the ballot voted in the ballot; and
 - (c) more than 50% of the valid votes were votes approving the action; ...”

86. *Pattern bargaining.* The Act also provides that industrial action is not protected if it relates to pattern bargaining:

“Industrial action must not be part of pattern bargaining

- (4) A bargaining representative of an employee who will be covered by the agreement must not be engaging in pattern bargaining in relation to the agreement.”

Pattern bargaining is defined as:

Pattern bargaining

- (1) A course of conduct by a person is pattern bargaining if:
 - (a) the person is a bargaining representative for 2 or more proposed enterprise agreements; and
 - (b) the course of conduct involves seeking common terms to be included in 2 or more of the agreements; and
 - (c) the course of conduct relates to 2 or more employers.

87. The Act prevents employees from taking protected industrial action around pattern bargaining but does not prevent employers seeking common terms of employment in two or more agreements so long as they are not taking industrial action [which is unlikely in any event]. Thus this provision limits only the ability of employees to seek agreements with industry wide terms and conditions and as such is an unjustified encroachment on the freedom of employees to take industrial action.

88. The FW Act also provides the power to the courts to grant injunctions stopping pattern bargaining:

“422 Injunction against industrial action if a bargaining representative is engaging in pattern bargaining

- (1) The Federal Court or Federal Magistrates Court may grant an injunction on such terms as the court considers appropriate if:
 - (a) a person has applied for the injunction; and
 - (b) the requirement set out in subsection (2) is met.
- (2) The court is satisfied that:
 - (a) employee claim action for a proposed enterprise agreement is being engaged in, or is threatened, impending or probable; and
 - (b) a bargaining representative of an employee who will be covered by the agreement is engaging in pattern bargaining in relation to the agreement.”

89. The provisions set out in the preceding paragraphs indicate the substantial limitations on the provision of immunity provided by the FW Act in respect to the taking of industrial action even during a bargaining period – which is the only instance in which this limited immunity is available. The AIER submits that:

- These limitations are unwarranted and unjustifiable restrictions of the freedoms that ought to be available to employers and employees during bargaining
- Do not provide a reasonable right to strike or take industrial action in regard to collective bargaining

- Mean that there is no right to strike generally available to employees in Australia – only a limited right to take protected industrial action in certain circumstances during bargaining periods.

90. *Termination of unprotected industrial action during agreement life.* As shown above certain limited immunity from civil action is provided by the Fair Work Act in relation to bargaining for collective agreements. No other immunity is provided by the Act in relation to other industrial action, regardless of the circumstances or merits of the action.

91. Not only does the Act not provide any form of immunity for genuine industrial action generally, it effectively makes any non protected industrial action unlawful. The Act provides that if unprotected industrial action is happening, probable or being organised, that the Fair Work Commission “**must make an order** that the industrial action stop, not occur or not be organised” for a period:

“418 FWA must order that industrial action by employees or employers stop etc.

- (1) If it appears to FWA that industrial action by one or more employees or employers that is not, or would not be, protected industrial action:
 - (a) is happening; or
 - (b) is threatened, impending or probable; or
 - (c) is being organised;

FWA must make an order that the industrial action stop, not occur or not be organised (as the case may be) for a period (the stop period) specified in the order.

- (2) FWA may make the order:
 - (a) on its own initiative; or
 - (b) on application by either of the following:
 - (i) a person who is affected (whether directly or indirectly), or who is likely to be affected (whether directly or indirectly), by the industrial action;
 - (ii) an organisation of which a person referred to in subparagraph (i) is a member.”

92. This provision of the Act thus means that all industrial action other than protected industrial action as prescribed is prohibited, notwithstanding the circumstances or merits of the action. This provision infringes on the freedom of employees to exercise their right to strike. They are also subject to civil actions at common law.

93. The FWC also has the power to suspend or terminate even action that is protected industrial action in certain circumstances.

“423 FWA may suspend or terminate protected industrial action—significant economic harm etc.

Suspension or termination of protected industrial action

- (1) FWA may make an order suspending or terminating protected industrial action for a proposed enterprise agreement that is being engaged in if the requirements set out in this section are met.

Requirement—significant economic harm

- (2) If the protected industrial action is employee claim action, FWA must be satisfied that the action is causing, or is threatening to cause, significant economic harm to:
 - (a) the employer, or any of the employers, that will be covered by the agreement; and
 - (b) any of the employees who will be covered by the agreement.
- (3) If the protected industrial action is:
 - (a) employee response action; or
 - (b) employer response action;

FWA must be satisfied that the action is causing, or is threatening to cause, significant economic harm to any of the employees who will be covered by the agreement.”

94. The FW Act also gives the Minister the power to terminate protected industrial action in certain circumstances:

“431 Ministerial declaration terminating industrial action

- (1) The Minister may make a declaration, in writing, terminating protected industrial action for a proposed enterprise agreement if the Minister is satisfied that:
 - (a) the industrial action is being engaged in, or is threatened, impending or probable; and
 - (b) the industrial action is threatening, or would threaten:
 - (i) to endanger the life, the personal safety or health, or the welfare, of the population or a part of it; or

- (ii) to cause significant damage to the Australian economy or an important part of it.”

95. *Rights of state employees to strike if it affects corporations.* The FW Act only applies with respect to federal system employers and employees as defined. It does not cover employees remaining in state systems. However, the Act gives the FWC the ability and the necessity to stop industrial action by state employees in certain circumstances:

“419 FWA must order that industrial action by non national system employees or non national system employers stop etc.

Stop orders etc.

- (1) If it appears to FWA that industrial action by one or more non national system employees or non national system employers:
 - (a) is:
 - (i) happening; or
 - (ii) threatened, impending or probable; or
 - (iii) being organised; and
 - (b) will, or would, be likely to have the effect of causing substantial loss or damage to the business of a constitutional corporation;

FWA must make an order that the industrial action stop, not occur or not be organised (as the case may be) for a period specified in the order.

96. The AIER submits that this is an unwarranted interference in the freedom of non-national system employees to take industrial action that would otherwise not be unlawful under State industrial law.

Secondary boycotts legislation

97. Industrial action including strike action is also prohibited where it would constitute an offence under the secondary boycotts provisions of the Competition and Consumer Act 2010 [the former Trade Practices Act]. The Act provides:

“Secondary boycotts for the purpose of causing substantial loss or damage

- (1) In the circumstances specified in subsection (3) or (4), a person must not, in concert with a second person, engage in conduct:
 - (a) that hinders or prevents:

(i) a third person supplying goods or services to a fourth person (who is not an employer of the first person or the second person); or

(ii) a third person acquiring goods or services from a fourth person (who is not an employer of the first person or the second person); and

(b) that is engaged in for the purpose, and would have or be likely to have the effect, of causing substantial loss or damage to the business of the fourth person.

Note 1: Conduct that would otherwise contravene this section can be authorised under subsection 88(7).

Note 2: This section also has effect subject to section 45DD, which deals with permitted boycotts.”

98. Certain boycott action is allowed:

“Situations in which boycotts permitted

Dominant purpose of conduct relates to employment matters--conduct by a person

(1) A person does not contravene, and is not involved in a contravention of, subsection 45D(1), 45DA(1) or 45DB(1) by engaging in conduct if the dominant purpose for which the conduct is engaged in is substantially related to the remuneration, conditions of employment, hours of work or working conditions of that person or of another person employed by an employer of that person.

Dominant purpose of conduct relates to employment matters--conduct by employee organisation and employees

(2) If:

(a) an employee, or 2 or more employees who are employed by the same employer, engage in conduct in concert with another person who is, or with other persons each of whom is:

(i) an organisation of employees; or

(ii) an officer of an organisation of employees; and

(b) the conduct is only engaged in by the persons covered by paragraph (a); and

(c) the dominant purpose for which the conduct is engaged in is substantially related to the remuneration, conditions of employment, hours of work or working conditions of the employee, or any of the employees, covered by paragraph (a);

the persons covered by paragraph (a) do not contravene, and are not involved in a contravention of, subsection 45D(1), 45DA(1) or 45DB(1) by engaging in the conduct.”

99. Secondary boycotts legislation has been used to stop industrial action and win damages against unions, most notably in the Mudginberri dispute in 1985. Secondary boycotts are considered part of legitimate industrial action by the ILO’s expert committees:

“The reference to ‘strike action’ within the jurisprudence of the ILO refers to all forms of industrial activities that can be undertaken by workers in order to further their interests as long as the action taken remains peaceful. Therefore in the ILO context, the phrase ‘strike action’ encompasses total withdrawals of labour, partial withdrawals of labour, work bans, secondary boycotts, go slow campaigns, work to rule campaigns (work in strict accordance with the terms of any industrial instruments) or wild cat strikes (labour withdrawals without prior authorisation from a relevant union)...

“ILO standards do not limit the concept of ‘workers interests’ solely to the interests of workers in their employment conditions at a particular enterprise. Instead ILO standards recognise a broader concept of collectivism, whereby workers should be able to take strike action in support of other workers, providing that the strike action they are supporting is itself lawful. However, sympathy action cannot be protected industrial action under the FW Act and the Trade Practices Act 1974 (Cth) secondary boycott regime expressly outlaws sympathy action. These provisions have been criticised by the Committee of Experts over a number of years on the grounds that general prohibitions of sympathy strikes can lead to abuse and are inconsistent with the Freedom of Association Conventions.”²⁹

100. AIER submits that the secondary boycotts provisions of the Act are an unjustified and unwarranted interference with the right to strike in the circumstances where the issues pertain to genuine industrial issues and where the original industrial action being supported is lawful.
101. Moreover the framing of the prohibition on secondary boycotts and the "dominant purpose" defence of some conduct is anachronistic in contemporary employment settings. Labour hire, contracting out of services, and supply chain gymnastics by corporations obscurely related to primary employer were either non-existent or not of much significance when the secondary boycott legislation was framed. The retention of anachronistic wording about the relevant right/duties relationship covered by the offence exacerbates its curtailment of employee rights to take collective action to support a worker’s direct economic interest against highly resourced but fragmented employment entities.

The right to organise

102. ILO principles, statements and the two named above Conventions also set out the right of workers to form and join unions and the right to organise generally.

²⁹ Shae McCrystal , Sydney Law School Legal Studies Research Paper No. 10/18 February 2010 The Fair Work Act 2009 (Cth) and the Right to Strike, op.cit, p. 9, 13-14

103. The General Protections in Part 3.1 of the Fair Work Act, carry on the intent of the provisions first found in the Conciliation and Arbitration Act to prevent adverse action, including dismissal, for being a member of, or engaging in the lawful activities of, a trade union.
104. Section 361 effectively reverses the onus of proof in relation to adverse action. A reverse onus has been a long-standing feature of the previous freedom of association and unlawful termination protections and reflects the fact that it can be very difficult for an applicant to prove the reason for the respondent's action.³⁰ The AIER submits the continuation of a reversal of onus of proof in these circumstances is warranted and justifiable.
105. From freedom of association comes the right to organise. This does not just relate to the rights of existing union members to be and remain union members but also to the right of existing worker organisations to organise currently unorganized workers.
106. Under the Workplace Relations Act 1996, the right of unions to seek to meet with unorganized workers for discussions was severely limited. The 2009 Fair Work Act and the 2013 Fair Work Amendment Act made some improvements to the right of registered organisations to enter workplaces for the purpose of discussions with workers. The EM for the 2013 Bill noted:

“Right of entry

The amendments made by Schedule 4 of the Bill engage the right to freedom of association and the rights of people to form organisations to represent their interests. Of particular relevance in the right of entry context is guidance provided by the Committee on Freedom of Association established by the Governing Body of the International Labour Organisation in its 336th Report at paragraph 108 that:

... Governments should guarantee access of trade union representatives to workplaces with due respect for the rights of property and management, so that trade unions can communicate with workers....

Part 3-4 of the FW Act provides a framework for right of entry for officials of organisations and empowers the FWC to deal with the misuse of rights and disputes.

The object of Part 3-4 is to balance:

- the right of organisations to represent their members in the workplace, hold discussions with potential members and investigate suspected contraventions;

³⁰ Anna Chapman, “Adverse Action, Discrimination and the Reverse Onus of Proof: Exploring the Developing Jurisprudence”, Conference Paper: Australian Labour Law Association Annual Conference 2012.

- the right of employees and TCF award workers to receive, at work, information and representation from officials of organisations; and
- the right of occupiers of premises and employers to go about their business without undue inconvenience.

The amendments made by Schedule 4 of the Bill will encourage parties to reach agreement as to how entry by permit holders to workplaces is to be facilitated. The amendments assist organisations in circumstances where agreement has not been possible by:

- providing for interviews and discussions to be held in rooms or areas agreed by the occupier and permit holder, or in the absence of agreement, in any room or area in which one or more of the persons who may be interviewed or participate in the discussions ordinarily take meal or other breaks and is provided by the occupier for that purpose;
- facilitating assistance with transport and accommodation for permit holders at remote sites; and
- limiting the amounts that an occupier can charge a permit holder for provision of accommodation or transport at remote sites to cost recovery.

107. The relevant section of the right of entry provisions of the FW Act now provide:

“484 Entry to hold discussions

A permit holder may enter premises for the purposes of holding discussions with one or more employees or TCF award workers:

- (a) who perform work on the premises; and
- (b) whose industrial interests the permit holder’s organisation is entitled to represent; and
- (c) who wish to participate in those discussions.

Note 1: A permit holder, or the organisation to which the permit holder belongs, may be subject to an order by the FWC under section 508 if rights under this Subdivision are misused.

Note 2: A person must not refuse or unduly delay entry by a permit holder, or intentionally hinder or obstruct a permit holder, exercising rights under this Subdivision (see sections 501 and 502).

Note 3: Under paragraph 487(1)(b), the permit holder must give the occupier of the premises notice for the entry. Having given that notice, the permit holder may hold discussions with any person on the premises described in this section.

108. AIER supports the intention of the Act to encourage right of entry for the purpose of discussions with workers who are not union members. As the ILO Committee of Freedom of Association has noted this is necessary for communication with workers and obviously relevant to the freedom to form and join unions and the right to organise as set out in ILO Conventions which Australia has ratified. The current Act achieves a balance between the rights and freedoms of unions and workers to organise and the rights of employers.

Conclusion

109. The AIER submits that freedom of association and its associated rights of collective bargaining and the right to strike must be more fully realised in Australian law. Laws of the Commonwealth, including the Fair Work Act and the secondary boycott provisions of the Competition and Consumer Act, unjustifiably encroach on freedom of association rights. The right to form and join trade unions for the promotion and protection of collective economic and social interests is a right that goes to the heart of creating a socially justice society and allowing the freedom for people to pursue their material well-being.

Annexure 1:

The Australian Charter of Employment Rights - Overview

In 2007, the AIER published the Australian Charter of Employment Rights (attached with this submission).

The Charter is founded in principles which reflect:

- (a) Rights enshrined in international instruments which Australia has willingly adopted and which as a matter of international law is bound to observe;
- (b) Values which have profoundly influenced the nature and aspirations of Australian society and which are embedded in Australia's constitutional and institutional history of industrial/employment law and practice. In particular, values integral to what has been described as the "important guarantee of industrial fairness and reasonableness"³¹; and
- (c) Rights appropriate to a modern employment relationship which are recognised by the common law.

The Charter's purpose is to unravel the complexity of the regulation of workplace relations and re-define it by identifying the fundamental values which good workplace relationships and good law made to enhance such relationships must be based upon.

The Charter of Employment Rights and the book which accompanies it, *An Australian Charter of Employment Rights*, is the work of eminent workplace relations practitioners from both the academic and legal communities who are independent of any stakeholders with vested interests. A list of those persons involved is included in the Annexures.

The Charter has been through a rigorous assessment process. It was circulated in draft format and public comment was invited and taken during the period March to September 2007. An online survey was developed in order to receive feedback on its content. Public forums were held in Sydney and Melbourne.

The Charter was circulated to a large (in excess of 2000) number of human resources practitioners via the Australian Human Resource Institute (AHRI) publication HR monthly.

Formal consultations regarding the content of the Charter were held with representatives of every major Australian political party.

In his report from the NSW Government Inquiry into options for a new National Industrial Relations system, Professor George Williams, developed a set of principles that he believed should found a new

³¹ *New South Wales and Others v Commonwealth [2006] HCA 52*, per Kirby J at [523] – [525].

national system. Williams cited a number of Australian and overseas sources used to develop the principles and gave particular emphasis to AIER's Charter of Employment Rights.

The Charter has become a blueprint for assessing government policy, for legislative reform, for company practice and for education about workplace rights. AIER recommends the Charter be used in this manner by this Inquiry as a blueprint of factors that would need to be in place in order to promote more security in Australia's workplace relationships.

The Institute encourages all Australian workplaces to adopt and apply the Charter. To assist in this, the Institute has published the *Australian Standard of Employment Rights*, which converts the ten Charter rights into a practical form that can be applied in every workplace.

Our experience tells us that the Charter is being used on a daily basis as a resource by practitioners, managers, tribunal members, academics and even teachers who are utilising the Charter's companion resource for secondary schools, Workright, to inform 14 and 15 year old students about their rights and responsibilities in the workplace.

Annexure 2:

The Australian Charter of Employment Rights

Recognising that: improved workplace relations requires a collaborative culture in which workers commit to the legitimate expectations of the enterprise in which they work and employers provide for the legitimate expectations of their workers.

And drawing upon: Australian industrial practice, the common law and international treaty obligations binding on Australia, this Charter has been framed as a statement of the reciprocal rights of workers and employers in Australian workplaces.

1. Good faith performance

Every worker and every employer has the right to have their agreed terms of employment performed by them in good faith. They have an obligation to co-operate with each other and ensure a “fair go all round”.

2. Work with dignity

Recognising that labour is not a mere commodity, workers and employers have the right to be accorded dignity at work and to experience the dignity of work. This includes being: treated with respect recognised and valued for the work, managerial or business functions they perform provided with opportunities for skill enhancement and career progression protected from bullying, harassment and unwarranted surveillance.

3. Freedom from discrimination and harassment

Workers and employers have the right to enjoy a workplace that is free of discrimination or harassment based on:

- race, colour, descent, national, social or ethnic origin
- sex, gender identity or sexual orientation
- age
- physical or mental disability
- marital status
- family or carer responsibilities
- pregnancy, potential pregnancy or breastfeeding
- religion or religious belief
- political opinion
- irrelevant criminal record
- union membership or participation in union activities or other collective industrial activity
- membership of an employer organisation or participation in the activities of such a body
- personal association with someone possessing one or more of these attributes.

4. A safe and healthy workplace

Every worker has the right to a safe and healthy working environment. Every employer has the right to expect that workers will co-operate with, and assist, their employer to provide a safe working environment.

5. Workplace democracy

Employers have the right to responsibly manage their business. Workers have the right to express their views to their employer and have those views duly considered in good faith. Workers have the right to participate in the making of decisions that have significant implications for themselves or their workplace.

6. Union membership and representation

Workers have the right to form and join a trade union for the protection of their occupational, social and economic interests.

Workers have the right to require their union to perform and observe its rules, and to have the activities of their union conducted free from employer and governmental interference. Every worker has the right to be represented by their union in the workplace.

7. Protection from unfair dismissal

Every worker has the right to security of employment and to be protected against unfair, capricious or arbitrary dismissal without a valid reason related to the worker's performance or conduct or the operational requirements of the enterprise affecting that worker. This right is subject to exceptions consistent with International Labour Organization standards.

8. Fair minimum standards

Every worker is entitled to the protection of minimum standards, mandated by law and principally established and maintained by an impartial tribunal independent of government, which provide for a minimum wage and just conditions of work, including safe and family-friendly working hours.

9. Fairness and balance in industrial bargaining

Workers have the right to bargain collectively through the representative of their choosing. Workers, workers' representatives and employers have the obligation to conduct any such bargaining in good faith. Subject to compliance with their obligation to bargain in good faith, workers have the right to take industrial action and employers have the right to respond.

Conciliation services are provided where necessary and access to arbitration is available where there is no reasonable prospect of agreement being reached and the public interest so requires. Employers and workers may make individual agreements that do not reduce minimum standards and that do not

undermine either the capacity of workers and employers to bargain collectively or the collective agreements made by them.

10. Effective dispute resolution

Workers and employers have the right and the obligation to participate in dispute resolution processes in good faith, and, where appropriate, to access an independent tribunal to resolve a grievance or enforce a remedy. The right to an effective remedy for workers includes the power for workers' representatives to visit and inspect workplaces, obtain relevant information and provide representation.