Australian Institute of Employment Rights

Justice @ Work: Free to Associate?

The Ron McCallum Debate 2015
Discussion Paper

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The Debate

The 5th Annual Ron McCallum Debate will explore the role of unions and employer organisations in the workplace relations system, our society and politics.

Freedom of association is a fundamental human right. It is also a right that is increasingly under threat. The union movement is in the public spotlight with the Trade Union Royal Commission continuing and mired in controversy. The Government has set up a double dissolution trigger with the Registered Organisations Bill being twice rejected by the Senate. Issues of freedom of association are being considered in the Australian Law Reform Commission's inquiry into traditional rights and freedoms.

The Debate will consider questions such as:

- How free are workers and employers to exercise their rights of association?
- What value does freedom of association continue to hold in the contemporary workplace here in Australia and globally?
- What interests are in conflict around freedom of association frameworks and what might better reconcile them?
- What are the possible implications for freedom of association from the Productivity Commission inquiry into the workplace relations system and the ALRC's Rights and Freedoms Inquiry?

Note: The purpose of this Background/Discussion paper is to inform the Ron McCallum Debate. It sets out the approach of the Australian Institute of Employment Rights (AIER) to the issues and proposes discussion questions that speakers and participants may wish to reflect upon and discuss during the debate. The paper represents the views of AIER and its authors and in no way represents the views of any participant.

About the AIER

The Australian Institute of Employment Rights 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.*

The AIER is an organisation independent of government or any particular interest group and seeks implement these objectives with academic rigor and professional integrity. 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.

AIER draws its basis for this paper from its belief that any system of industrial regulation must be founded in principles which reflect:

- Rights enshrined in international instruments which Australia has willingly adopted and which as a matter of international law is bound to observe;
- 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; and
- Rights appropriate to a modern employment relationship which are recognised by the common law.

To this end the AIER has developed an instrument, the Australian Charter of Employment Rights ("the Charter"), based on the three sources of rights identified above. We believe the Charter to be a unique and appropriate reference tool for examining the rights and responsibilities of employers and employees in Australia's workplace relations system, including freedom of association.

What is freedom of association, its origins and principles?

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.

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.

The right to freedom of association is found in the core Covenants of the United Nations:

- The United Nations 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.

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

  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.

International obligations as regards employment rights also arise from the Conventions of the International Labor Organisation. Most relevant in this context 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 and recognition of our international obligations are found in the objects of the Fair Work Act 2009:

> *"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."*

The ILO Conventions and the jurisprudence that has built up around them provide 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 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.

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 believes the ILO Conventions relating to freedom of association should be implemented as fully as possible.

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."

One of the key roles of the regulation of work is to address the power imbalance between employers and workers. Freedom of association is central to that goal.

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".

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 is freedom of association recognised in the Australian workplace relations system?

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 to create the Commonwealth of Australia in 1901.

Australia was an early supporter of an international approach to the setting and promotion of labor standards which began with the Treaty of Versailles and the formation of the ILO. 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. An international approach was supported to attempt to provide a level playing field for core labor rights.

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 representative organisations of employees and employers and was very successful in doing so.

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 industrial disputes. This work was done primarily through representative bodies of employers and employees, formed in accordance with the principle of freedom of association.

General Protections in Fair Work Act

The basic 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.

The General Protections, of which protection of freedom of association is part, are currently set out in Part 3-1 of the Fair Work Act. The Objects of this Part include:

> ***336 Objects of this Part***
>
> *The objects of this Part are as follows:*
>
> *(a) to protect workplace rights;*
>
> *(b) to protect freedom of association by ensuring that persons are:*

(i) free to become, or not become, members of industrial associations; and

(ii) free to be represented, or not represented, by industrial associations; and

(iii) free to participate, or not participate, in lawful industrial activities;

The specific provision protecting freedom of association is set out in s.346:

"346 Protection

A person must not take adverse action against another person because the other person:

(a) is or is not, or was or was not, an officer or member of an industrial association; or

(b) engages, or has at any time engaged or proposed to engage, in industrial activity within the meaning of paragraph 347(a) or (b); or

(c) does not engage, or has at any time not engaged or proposed to not engage, in industrial activity within the meaning of paragraphs 347(c) to (g).

Industrial activity is further defined [in part] as:

347 Meaning of engages in industrial activity

*A person **engages in industrial activity** if the person:*

(a) becomes or does not become, or remains or ceases to be, an officer or member of an industrial association; or

(b) does, or does not:

(i) become involved in establishing an industrial association; or

(ii) organise or promote a lawful activity for, or on behalf of, an industrial association; or

(iii) encourage, or participate in, a lawful activity organised or promoted by an industrial association; or

(iv) comply with a lawful request made by, or requirement of, an industrial association; or

(v) represent or advance the views, claims or interests of an industrial association; or

(vi) pay a fee (however described) to an industrial association, or to someone in lieu of an industrial association; or

(vii) seek to be represented by an industrial association; or…

It can immediately be seen that in Australian law, freedom of association is both a positive and a negative right; that is, a right to associate and a right not to do so. A negative 'right' not to associate is not found in the relevant international labor standards but has found its way into Australian law. This has significant implications.

Although it applies equally to employers and employees, freedom of association has primarily been seen as an employee right, benefit and protection. It was envisioned as a means by which employees

can collectively exercise some countervailing power in the workplace and to equalize their bargaining position vis-à-vis their employer.

However, the perception as well as the practical effect of this right is changing. As the Productivity Commission's recent draft report notes:

> *Interestingly, given the historic objective of the protections, they have also been used for some time to guarantee the right not to join a union (Stewart 2013), and have been used in cases to allege adverse action by union officials.* [i]

The Fair Work Act protects the exercise of freedom of association, as part of its General protections provisions. These protections are also being increasingly utilised by individuals to protect individual workplace rights, rather than collective rights, as the Productivity Commission Draft report also notes:

> *While originally intended to safeguard unions and their members, the protections have gradually broadened to cover a range of behaviours adversely affecting individuals in the workplace (Winckworth 2011). In addition to protecting freedom of association, the stated objects of the general protections include protecting workplace rights, providing protection from workplace discrimination, and providing effective relief for persons who have been discriminated against, victimised or otherwise adversely affected by contraventions of the protections (s. 336).* [ii]

The General protections provisions have been of concern to some employers and employer organisations.

Collective bargaining and right to take industrial action

Inherent in the right of freedom of association in the workplace are the rights to collective bargaining and to take industrial action. The right to bargain collectively is linked to the right to take industrial action which is foundational to lessening the excess of power the employer may otherwise generally be able to exert. Both rights are intrinsic to fundamental and universal human rights.While the Fair Work Act recognises both rights, it does so in a limited way.

The Fair Work Act establishes a restricted statutory scheme of collective bargaining that includes the following limitations:

- Limiting collectively bargaining to an enterprise level, except in certain circumstances;
- Limiting the scope and content of collective agreements; and
- Enabling the fragmenatation of bargaining units thereby undermining union representation in bargaining.

The emphasis within the Fair Work Act on enterprise level bargaining is a barrier to genuine collective bargaining. According to the principle of free and voluntary collective bargaining embodied in Article 4 of Convention 98 the determination of the bargaining level should be left as a matter for the discretion of the parties. Consequently the level of negotiation should not be imposed by decision of the administrative authority. Nor should it be an unfettered prerogative of an employer conglomerate to decide upon the configuration of the employee cohort to be subject to bargaining from time to time.

The Fair Work Act 2009 also restricts the contents of agreements which may be approved to those agreements which contain only permitted content, including "matters pertaining to the employment

relationship", the content of which is restrictively construed by the court. There is further restriction on the content of bargaining by the exclusion of "unlawful terms". 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 ILO's Committee on Freedom of Association has called on the Australian government to review collective bargaining provisions:

> *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 requests the Government to …review these sections, in full consultation with the social partners…*[iii]

The Fair Work Act places significant limits on employees and employers pursuing agreements. These limitations and restrictions fall most heavily on employees and unions. Employees have only limited rights to take protected industrial action in support of an agreement. For example, industrial action:

- May only be taken during bargaining periods;
- May not be taken in respect of multi-employer agreements;
- Must only be in support of approved claims;
- Must be taken only after a ballot in which more than 50% of employees must vote;
- Can only be taken with notice to the employer;
- Must only be directed at the primary employer [secondary boycotts are not allowed].

These restrictions breach international labour standards that exist to provide the conditions enabling workers, that is, over 11 million Australians, to protect and enhance their social and economic interests.

Similarly, secondary boycotts are considered part of legitimate industrial action by the ILO's expert committees and Australia's restrictions have been found by the ILO to breach ILO conventions:

> "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) [now the Competition and Consumer Act 2010] 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." [iv]

The secondary boycotts provisions of the Consumer and Competition Act extend to prohibit strike and industrial action even in circumstances where the issues pertain to genuine industrial issues and where the original industrial action being supported is lawful. Such absolute prohibitions are excessive restrictions in contemporary work settings conducive to labour user's "shape-changing"

That capacity is noteworthy also because 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, less draconically, almost four decades ago. 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.

AIER believes that the role of unions in providing collective voice and promoting fairness to employees is of central importance to both employees and employers and ultimately to the economic success of enterprises and the economy as a whole.

Questions for discussion

- What are the implication of the changing role of unions and employer organisations now that Australia's industrial relations system is no longer founded on conciliation and arbitration?
- Does the Fair Work Act adequately protect freedom of association for employees and employers? Should Australia more fully implement the ILO Conventions on Freedom of Association?
- Is the established regulatory framework for enterprise bargaining well adapted to contemporary employment and labour use settings.

What value does freedom of association continue to hold in the contemporary workplace and society?

Properly understood freedom of association should be seen as a human right with a social outcome. By definition, it is a right that must be expressed collectively [you can't associate on your own]. It is also intended to have a social effect. By allowing employees to act collectively in the workplace it is intended that their individual, group and social outcomes can be improved. Freedom of association is intended allow the formation of unions of employees and through those collective bodies to improve their position in employment and in society. Individual living standards are improved, classes or groups of employees have enhanced rights and dignity at work and general social living standards for employees are enhanced.

The existence of collective organisations of workers can be shown to lead to improvements in the level of wealth in society and its better and fairer distribution. This activity benefits whole societies. The OECD and IMF have recently acknowledged and propounded that union membership and

collective bargaining lead to reductions in income inequality and are positive for societies as a whole, including economically.

Income and wealth inequality in Australia has been increasing over recent decades.[v] The developments in employment relations mentioned above have serious consequences for inequality in our society. Research published in 2015 by two IMF researchers has pointed strongly to falling union membership rates as a significant contributor to inequality in income shares in societies:

> *While causality is difficult to establish, the decline in unionization appears to be a key contributor to the rise of top income shares. This finding holds even after accounting for shifts in political power, changes in social norms regarding inequality, sectoral employment shifts (such as deindustrialization and the growing role of the financial sector), and increases in education levels… We also find that deunionization is associated with less redistribution of income and that reductions in minimum wages increase overall inequality considerably.*[vi]

The OECD commented in its Employment Outlook 2004 [Chapter 3] :

> *High union density and bargaining coverage, and the centralisation/co-ordination of wage bargaining tend to go hand-in-hand with lower overall wage inequality. There is also some, albeit weaker, evidence that these facets of collective bargaining are positively associated with the relative wages of youths, older workers and women. On the other hand, the chapter does not find much evidence that employment of these groups is adversely affected.*
>
> *No robust associations are evident between the indicators of wage bargaining developed in this chapter and either the growth rate of aggregate real wages or non-wage outcomes, including unemployment rates.*[vii]

In 2015, the OECD went further, contending that increasing inequality has social as well as economic impacts:

> *Beyond its impact on social cohesion, growing inequality is harmful for long-term economic growth. The rise of income inequality between 1985 and 2005, for example, is estimated to have knocked 4.7 percentage points off cumulative growth between 1990 and 2010, on average across OECD countries for which long time series are available. The key driver is the growing gap between lower-income households – the bottom 40 per cent of the distribution – and the rest of the population.*[viii]

This view has not always been the prevailing one, or reflected in the law. Prior to the legalization of unions in the UK in the early 1800s, unions and collective action by workers were seen as illegitimate restraints of trade and an impingement on the property rights of employers.

While unions were legalized in the UK and Australia during the 1800s, disputes over the nature and form of employment contracts persisted. The great strikes of the 1890s in Australia were both about the level of wages and conditions and whether 'freedom of contract' – that is an employer's ability to deal directly with individual employees – or the 'union rate' – applying equally to all employees – would prevail.

When considered as a collective and a social right, a negative right of freedom of association makes no sense. It simply gives individuals the right to opt out of the collective for their own reasons. This may be seen as an exercise of freedom of conscience but equally and more frequently is likely to be in reality 'free riding' that is, taking the benefits of collective action without being prepared to

contribute. Those opting out make no contribution to the general welfare at the level of the enterprise or society as a whole.

The Charter of Employment Rights includes recognition of reciprocal rights to a workplace free of discrimination bullying or harassment generally and specifically such conduct based on union membership or participation in collective activity. That recognition extends to the converse, non-membership or such participation. However, in AIER's view, notwithstanding the way the Fair Work Act's general protections provisions are expressed, there is no moral equivalence between the positive right of freedom of association and a negative right not to associate. One has a positive social benefit, the other does not.

A negative right not to associate does not appear in core labor standards adopted by the ILO. It makes no sense in the context of an objective and a value which stresses the positive values and outcomes of collective action at a group and societal level.

Some of these issues appeared to have been resolved in Australia by the time of Federation. Governments in the States legislated to allow industrial tribunals or wages boards to make determinations or awards that provided a 'common rule' in a range of occupations and industries. This system flowed into the national arena as the Conciliation and Arbitration Act [and other laws] which provided for the settlement of interstate industrial disputes by the making of federal awards applying in particular industries.

The disputes of the 1890s had a strong echo in during the WorkChoices era, during which the legislation allowed the making of individual statutory agreements between employers and employees, subject to certain minimum terms and conditions. In this legislative environment, freedom of association was severely challenged. A collective approach was constantly under challenge from the employers' ability to make individual deals with their employees.

Individual statutory agreements do not exist under the Fair Work Act, which is largely based on collective enterprise bargaining established on a foundation of modern industry and occupational awards.

However, developments in industrial law have changed the basis on which the collective industrial mechanisms operate in Australia. For example:

- The making of an award is no longer the outcome of an industrial dispute between representative organisations of employers and employees. Award making is a statutory function of the Fair Work Commission, dictated and directed by legislation [for example, with regard to periodic reviews of awards].
- Annual wage reviews no longer require an application by unions to vary an existing award – it is a legislated duty of the Commission [albeit with input from interested parties, including collective organisations of employers and employees].
- Enterprise bargaining does not actually require the existence of a collective with which to bargain – all agreements are between an employer and that employer's employees. The employer is required to bargain in good faith with bargaining representatives appointed by their employees. These may or may not include unions and if no such bargaining representatives are appointed, employers may simply propose the terms of an agreement to their employees and have them vote on it on a 'take it or leave it' basis.
- Even access to dispute settling has changed: award based disputes cannot be arbitrated; even agreement based disputes can only be arbitrated if the agreement gives the Commission the power to do so.

- Award and agreement enforcement [always a grey area] is a function now often carried out bureaucratically, through the Fair Work Ombudsman rather than by unions and often on behalf of individuals.

Unions and employer organisations also seek to exercise political power and influence outside the workplace. Sections of the union movement do so explicitly through their affiliation with the Australian Labor Party. Employer organisations and unions also engage in lobbying, public political debate, and advertising in the interests of their members.

Questions for discussion

- To what extent does Australian society still value freedom of association in 2015?
- Is collectivism still a core value in our modern industrial society?
- What are the implications for the rise of individualism in industrial relations?

Is freedom of association under threat?

Freedom of association remains under challenge in 21st century Australia.

Across various parts of our society freedom of association is under threat. Numerous state governments have sought to restrict legitimate protest activities.[ix] Serious concerns have been raised about the extent of restrictions under national security laws and laws targeting organised crime.[x] It is within this broader context that we should consider the status of freedom of association in the industrial relations arena.

In the workplace relations environment, the decline in in last few decades of union membership poses a challenge to exercising freedom of association. In practical terms, the level of collectivism is declining as union density declines. In Australia, the decline in unionisation has been steady and dramatic when viewed over the longer term. In the mid-1980s, 50 per cent of males and nearly 40 per cent of females were union members in their main job.[xi] The proportion of workers who are union members has declined steadily ever since, although absolute numbers have fallen less dramatically.

The year 2013 saw the lowest proportion of union membership in the history of the current statistical series published by the Australian Bureau of Statistics.[xii] According to the ABS, in August 2013 (the latest figures available), just 17 per cent of all employees were trade union members in relation to their main job. Trade union membership was higher in the public sector (42 per cent of all employees) than in the private sector (12 per cent of employees).

Despite this decline, 1.7 million Australian workers were union members, which is still a significant interest group.

In 2013, significant union membership exists only in the public sector, whereas 88 per cent of private sector employees are unrepresented by any union. The position is worse for the most precarious of employees – that is, casual, temporary and other similar employees. Only 6 per cent of employees without leave entitlements were union members in 2013.

The degree of unionisation can be seen as the practical expression of the exercise of freedom of association. A declining level of unionisation suggests that the right is not being exercised. There are obviously a number of factors at work here, but among the most significant of these is the decline in the role of collective organisations of both employees and employers in the industrial relations processes as described above.

While the freedom of association legislative provisions have not changed significantly, attitudes and policies have moved the focus of industrial relations away from the collective and towards the individual worker. Both major political parties have played a role in this transition. Support for collective approaches to industrial relations are muted at best and overtly hostile at worst.

Some employers prefer to deal with workers individually; others see wisdom in collective approaches. The result in the 2007 election, fought in significant part on the Howard Government's WorkChoices policies, suggests that the Australian people support fairness and equity in workplace relations, including collective rather than individual approaches.

Changing nature of work

The changing nature of work also has implications for the ability of workers to exercise freedom of association rights. The fragmentation of work that is occurring through casualisation, the use of labour hire and contractors makes collective action by workers more difficult.

New on-demand business models, like Uber and AirTasker, are pointing the way to how the use of technology can further erode freedom of association rights. Under these models, there is no place of work that workers share. The relationship between the worker and capital is mediated through technology. These businesses have also so far shown clear resistance to enabling workers to talk to each other or make any form of collective demand. Access to work is completely in the hands of the owners of the technology.

Of course at one level this type of work in not new. Piece-work has a long history and the struggles of those engaged in piece-work for protections other employees have taken for granted must be remembered as the world of work changes.

Current government initiatives

The current Coalition Government, whilst promising little change in industrial laws during its first term [now in its last year] has nevertheless embarked on a number of inquiries that have implications for a second term agenda, including in relation to policies that impact on freedom of association. A number of these are likely to have significant implications for freedom of association.

Mooted changes include:

- Policy and legislative changes which may flow from the inquiry by the Productivity Commission;
- Recommendations arising from the Australian Law Reform Commission inquiry into traditional rights and freedoms which include industrial relations rights;
- Legislative changes to create a Registered Organisations Commission for the closer supervision of unions, so far twice rejected by the Senate; and
- Potential implications from the findings of the Trade Union Royal Commission.

Productivity Commission Inquiry Draft Report

The Productivity Commission's Draft Workplace Relations Framework report traces the history and the development of general protections in relevant federal industrial legislation, including protections regarding freedom of association.

The Draft Report notes a number of issues raised with the Commission regarding the operation of the general protections in the Act. The report notes:

> *The general protections are aimed at protecting workplace rights, freedom of association and non-discrimination in the workplace. Intrinsically, such protections have a valid role as:*
>
> - *discrimination against any party based on factors unrelated to their work performance is both inefficient and contrary to well established social norms*
> - *the realistic capacity for collective action by employees must address any attempts by employers or other parties to subvert this through covert measures (such as disadvantaging union members or employee representatives).*" [xiii]

The Draft report comes to some interim conclusions with limited scope:

> *There is a reasonable presumption that many of the protections have positive impacts. For example, it would be hard to justify adverse action against an employee because they were or were not a union member. Removing any such protection would widen the scope for employers or unions to abuse any power they might have, with damaging consequences for the efficiency of labour markets. The main issue for these kinds of protections, then, is not their inherent validity, but whether there are problems associated with uncertainty about their application, the compliance costs they might entail, any unintended behavioural responses by employers and employees, and the processes by which disputes are resolved...*
>
> *...Some limited further reform of the general protections is needed to restore greater balance between the needs of employers and employees and to strengthen the ex-ante filters around such cases. Reforms are needed both to the architecture of protections, as well as to arrangements concerning their practical implementation…* [xiv]

As an interim conclusion, without detailing the proposed changes, the PC's Draft Report concludes:

> *Given the complexities around this set of protections, and the diversity of views about the many and varied legal aspects that underpin them, it is useful to return to first principles and consider what the general protections are trying to achieve.*
>
> *The historical foundations of the protections lie in a legitimate desire to provide safeguards of freedom of association, in all its various guises. Across time, the gradual addition of protected matters, together with the introduction of concepts such as workplace rights and adverse action, have broadened the scope of the protections considerably.*
>
> *The importance of balance and a common sense approach should be emphasised, as should the economic impacts of such protections in addition to their legal interpretations. In this regard, the High Court judgment in the Barclay case and, in particular, its emphasis on subjective intentions is, across time, likely to provide much needed clarity about Part 3-1 cases.*
>
> *As emphasised above, the general protections provide valid safeguards against adverse actions, and their long historical lineage underscores their necessity. But this is certainly a case where the 'devil is in the detail' and, where some further improvement is possible to what is in principle a desirable set of protections*. [xv]

However, other draft recommendations of the Commission are likely to have the effect of impinging on the right to freedom of association, including the

The Commission's proposal for the creation of 'enterprise contracts'. In summary, these:

> *… introduce a new statutory arrangement that would provide a 'safe harbour' agreement to vary awards. Such an arrangement could have features of enterprise and individual agreements but avoid the elements that are a disincentive to their use. The new hybrid — an 'enterprise contract' — could vary the award for a class, or a particular group of employees…*
>
> *As a safeguard, employees could choose to opt out and return to a pre-existing arrangement (for example, the award) after a specified period (for example, 12 months) or choose to stay with the enterprise contract. This would provide an incentive for employers to ensure that the enterprise contract does not undercut wages and conditions.*[xvi]

The Draft Report suggests how these instruments may operate:

> *The enterprise contract could be a statutory agreement that follows a template, and that would apply to a class of employees (for example, level 1 retail employees), or a group of employees. Templates are a common means of making individual agreements under past and current workplace laws.*
>
> *... Employers would not be required to use the templates provided by the FWC, but any alternative form that they formulated would still need to meet the safety net and other terms specified in the regulations. Employers would deal directly with employees rather than be required to adopt the more elaborate processes of enterprise agreements*. [emphasis added] [xvii]

The AIER Charter of Employment Rights, recognises that fairness, balance and pragmatic experience in industrial bargaining justify inclusion of a right to the effect that : *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*. In the view of the AIER, the words underlined above indicate that the concept of enterprise contracts undermines of the principles of freedom of association and collective bargaining. Employers avoid their obligation to "adopt the more elaborate processes of enterprise agreements" – in other words their obligation to bargain in good faith with their employees, including through unions where they exist. Moreover the proposal would provide an incentive for employers to freeze collective bargaining or extant agreements or frustrate negotiation of a replacement, as happened in the Comalco Weipa contract experiment.

ALRC Traditional Rights and Freedoms inquiry

The Australian Attorney General has asked the Australian Law Reform Commission to inquire into and report on

- the identification of Commonwealth laws that encroach upon traditional rights, freedoms and privileges; and
- a critical examination of those laws to determine whether the encroachment upon those traditional rights, freedoms and privileges is appropriately justified.

For the purpose of the inquiry 'laws that encroach upon traditional rights, freedoms and privileges' can include those law that:

- interfere with freedom of association;
- authorise the commission of a tort…

With respect to freedom of association, the ALRC's *Interim Report* considered a range of submissions, including from the AIER, the ACTU and academics and lawyers which submitted that a range of provisions of the Fair Work Act were unnecessary and unjustified limitations on freedom of association and right that flowed from it. The *Interim Report* refers to the source of the right to freedom of association being in the main from the international instruments referred to above.

The limitations identified were submitted to be limitations with respect to:

- restrictions on the right to strike,
- limitations on bargaining, including regarding the scope and content of agreements
- limitations with respect to industrial action, including limitations on multi-employer and industry wide bargaining and other requirements for industrial action and
- union access to workplaces [right of entry].

The *Interim Report* also considers the impact of requirements for the registration of organisations of employers and employees.

The *Interim Report* noted:

> *5.82 The Fair Work (Registered Organisations) Act 2009 (Cth) includes requirements for the registration and operation of trade unions and other similar organisations. Registered organisations are required to meet the standards set out in the Act in order to gain the rights and privileges accorded to them under the Act and under the Fair Work Act.*
>
> *5.83 These standards are intended, among other things, to ensure that employer and employee organisations are representative of and accountable to their members, and are able to operate effectively; and provide for the democratic functioning and control of organisations.*
>
> *5.84 By requiring registration and prescribing rules for employer and employee organisations, the Fair Work (Registered Organisations) Act can be interpreted as interfering with freedom of association. For example, the statement of compatibility with human rights for the Fair Work (Registered Organisations) Amendment Bill 2012 (Cth) stated that it is arguable that the amendments in the Bill are limiting insofar as they all effectively restrain individuals from forming industrial organisations in any way they wish. In particular the amendments which would enhance the requirements for disclosure of remuneration, expenditure and pecuniary interests of officials under the rules of registered organisations limit the rights set out in Articles 3 and 8 of ILO Convention 87.*
>
> *5.85 However, from another perspective, provisions of the Fair Work (Registered Organisations) Act, which enhance the financial and accountability obligations of employee and employer organisations, to ensure that the fees paid by members of such organisations are used for the purposes intended, and that the officers of such organisations use their positions for proper purposes, are not inconsistent with freedom of association.*
>
> *5.86 The ILO Committee of Experts on the Application of Conventions and Recommendations has stated, with regard to the ability of governments to intervene in employee or employer organisations:*

> Legislative provisions which regulate in detail the internal functioning of workers' and employers' organizations pose a serious risk of interference which is incompatible with the Convention. Where such provisions are deemed necessary, they should simply establish an overall framework within which the greatest possible autonomy is left to the organizations for their functioning and administration. The Committee considers that restrictions on this principle should have the sole objective of protecting the interests of members and guaranteeing the democratic functioning of organizations. Furthermore, there should be a procedure for appeal to an impartial and independent judicial body against any act of this nature by the authorities.

5.87 The Explanatory Memorandum to the Fair Work (Registered Organisations) Amendment Bill 2012 (Cth), which increased the financial and accountability obligations of registered organisations and their office holders, stated that the limitations which the Bill placed on the right to freedom of association fell within the express permissible limitations in the ICCPR and the ICESCR 'insofar as they are necessary in the interests of public order and the protection of the rights and freedoms of others'. Relevantly, parties to decisions made by the General Manager of Fair Work Australia under the Bill's amendments are entitled to review of such decisions by impartial and independent judicial bodies. Further, the amendments in the Bill are permissible insofar as they are prescribed by law, pursue a legitimate objective (protecting the interests of members and guaranteeing the democratic functioning of organizations), are rationally connected to that objective and are no more restrictive than is required to achieve the purpose of the limitation."

The Interim Report made no specific recommendations with respect to freedom of association. The report calls for further submissions and notes that following the Productivity Commission's final report later this year a further consideration of these issues may be necessary:

> *5.131 Workplace relations laws in Australia have been subject to extensive local and overseas criticism on the basis of lack of compliance with ILO Conventions concerning freedom of association and the right to organise. However, the extent to which obligations under ILO Conventions engage the scope of common law or traditional understandings of freedom of association may be contested.*
>
> *5.132 A Productivity Commission inquiry, due to report in November 2015, is examining the performance of the Australian workplace relations framework. In undertaking this inquiry, the Productivity Commission has been asked to review the impact of the workplace relations framework on matters including: unemployment, underemployment and job creation; fair and equitable pay and conditions for employees; small businesses; and productivity, competitiveness and business investment.*
>
> *5.133 As it is not expected that the Productivity Commission inquiry will focus on concerns that the existing workplace relations framework may unjustifiably interfere with the right to freedom of association, further review of this aspect of the framework may be desirable.*

The *Interim Report* also briefly considered the impact of the laws of tort as they apply to industrial action. Industrial action is a right in itself under international instruments and a right that flows from freedom of association. The *Interim Report* notes:

17.63 Statutes protect industrial action that might otherwise amount to a tort. The limited immunity provided to 'protected industrial action' is unusual in that it applies to individuals or non-government groups such as employee or employer associations.

17.64 So far as the common law is concerned, Professors Breen Creighton and Andrew Stewart write, 'virtually all industrial action would be unlawful as a tort, a breach of contract and, frequently, a crime'. Relevant torts might include trespass, private nuisance, conspiracy and intentional interference with a contract.

17.65 Creighton and Stewart note that, unlike the United Kingdom, Australia has 'little history of legislative protection against common law liability for industrial action'. However, there is now some protection…

17.66 The immunity in Australia originally had the object of encouraging parties to bring their disputes within the new industrial relations and dispute resolution framework of 1993. This new framework represented a 'shift away from conciliation and arbitration in favour of formalised enterprise bargaining', an essential element of which is said to be 'the capacity of the participants in the process to elect to take industrial action in order to exert pressure upon the other parties'. This in turn calls for legislative protection against common law liability. The overall object of the scheme is that disputes proceed in an orderly, safe and fair way, without duress; that parties are properly and efficiently represented; and that undue risks to those caught up in the dispute are minimised.

17.67 The appropriate scope of the immunity is the subject of considerable debate. The statutory limitations on this immunity affect other rights, particularly freedom of association."

The *Interim Report* makes no specific conclusions with regard to industrial torts.

Proposed Registered Organisation Commission

The current Government has presented to the Parliament legislation imposing greater accountability on organisations registered under the *Fair Work (Registered Organisations) Act*. The Senate has rejected the Bill twice creating a double dissolution trigger for the Government.

According to the Bill's Explanatory Memorandum:

Broadly, the Bill will:

· establish an independent watchdog, the Registered Organisations Commission (the Commission), to monitor and regulate registered organisations with enhanced investigation and information gathering powers;

· amend the requirements on officers' disclosure of material personal interests (and related voting and decision making rights) and change grounds for disqualification and ineligibility for office;

· strengthen existing financial accounting, disclosure and transparency obligations under the RO Act by putting certain rule obligations on the face of the RO Act and making them enforceable as civil remedy provisions; and

· increase civil penalties and introduce criminal offences for serious breaches of officers' duties as well as new offences in relation to the conduct of investigations under the RO Act.

The Commission will be headed by the Registered Organisations Commissioner (the Commissioner), who will assume the investigations, enforcement advice and assistance responsibilities of the General Manager of the Fair Work Commission in relation to registered organisations. While the Commission will be established in the Office of the Fair Work Ombudsman, it will have a high degree of independence. The Commissioner will have independence in the exercise of his or her functions and powers and in his or her ability to direct staff in relation to the performance of those functions.

In order to ensure that the Commissioner has sufficient power to monitor compliance with the RO Act, the Commissioner's investigation and information gathering powers have been modelled on those in the Australian Securities and Investments Commission Act 2001. These powers will enable to Commissioner to efficiently and effectively undertake its compliance functions.

The amendments that provide for the disclosure of material personal interests, increased accounting and disclosure obligations, criminal offences for serious breaches of officers' duties and increased civil penalties broadly mirror those that apply to companies and their directors under the Corporations Act 2001 and have been adapted to align with the RO Act framework.[xviii]

As noted in the *Interim Report* of the Australian Law Reform Commission, undue interference in the affairs of employer and employee organisations has been found to be a breach of the terms of the relevant ILO Conventions. Freedom of Association requires that organisations be allowed to manage their own affairs without inappropriate interference from government or other external bodies.

In Australia, however, in order for organisations to participate in the federal industrial relations system [and in some, but not all, State systems], they had to become registered organisations. To become registered organisations they have to have rules and those rules must conform to the requirements of the relevant Act as varied from time to time.

It is fair to say that the requirements of the Act have become steadily more onerous and more comprehensive over time, especially with regard to financial accounting and disclosure and with regard to election of office bearers. Until the post WW2 period, unions were largely free to conduct their own elections. Today, all elections for officer bearers are conducted by the Australian Electoral Commission.

Financial accountability has also progressively been tightened, including by the former Labor Government in the wake of the Health Services Union of Australia's (HSUA) financial scandals.

Freedom of association and the right to organise implies the necessity of a practical right of entry to workplaces. This has traditionally been provided by the Act, but is now tightly regulated as a result of union officials being required to pass a 'fit and proper person' test in order to obtain and retain a right of entry permit.

The Act prescribes tight parameters on the exercise of the right of entry and rigid penalties for breaches of rights provided by the Act, including the suspension or removal of permits and substantial fines for proven misconduct or breaches of the Act. The Act gives the Fair Work Commission significant power to control the activities of union officials in carrying out their rights of entry.

The current Government has sought to take the requirements on employee organisations to a new level, investing a proposed Registered Organisations Commissioner with new investigative powers and new penalties in line with those in the Corporations Act.

AIER supports the existence and maintenance of independent, self-governing organisations of employers and employees. Australian industrial regulation closely regulates the affairs of registered organisations.

Employee organisations in particular must be independent of external influence and thoroughly democratic in their operation. Their primary role must be to advance the industrial and social interests of their members. Union officials must act only in the best interests of their members and not in their own personal, family or financial interest. Ethical standards of elected officials must be high and disclosure of relevant information to union members should be the norm.

Failures of union officials to live up to high standards brings the union movement into disrepute and invites further regulation by governments, some with hostile motives. Periodic inquiries into the alleged misuse of union funds, resources or powers have led to further legislative restrictions on the functioning of registered organisations.

Trade Union Royal Commission

It remains to be seen what the findings of the Trade Union Royal Commission's final report may lead to in the way of further legislation with regard to the affairs of registered organisations.

As noted above, the former-Abbott Government came to power promising a stronger compliance regime directed principally at unions [although employer organisations are also captured by the proposed new provisions]. The first report of the TURC provided no justification for compliance provisions over and above those enacted by the previous Government in response to the HSUA scandal, let alone support for the provisions of the twice-defeated Bill of the present Government.

In its second year, the investigations of the Royal Commission have led to a number of arrests of union officials but in itself this means that the alleged offences are ones that can be dealt with under existing industrial and other legislation, including the criminal code. Offences by officials of the HSUA have been dealt with in the Fair Work Commission, the Federal Court and the criminal courts.

Nevertheless, it can be expected that the final report of the Royal Commission is likely to be used by the Coalition Government as support for its Registered Organisations Bill at the very least and possibly to further restrictions on the activities of unions and union officials.

More significantly the Royal Commission has the potential to damage the reputation of unions and undermine their role in not just the workplace relations system but as an important part of Australia's democratic landscape.

AIER supports a strong and independent union movement in which workers are free to associate to advance their political, social and economic interests.

Proposals to further impinge on freedom of association must be judged as to their intent and their effect. If the intent is to weaken the ability of employees to form and join unions in the legitimate pursuit of the interests, such legislation must be opposed.

It is in the interests of employees and society as a whole to have strong democratic organisations of employees which are fully representative of and which properly pursue the best interests of their members.

Anti-worker organisations which seek to weaken unionism as well as those union officials who misuse their positions both damage freedom of association and its benefits.

Questions for discussion

- To what extent does the union movement itself and the decline in unionism pose a threat to freedom of association?
- Is there a role for free-lancers unions?
- What are the potential implications from the current inquires into various aspects of the workplace relations system for freedom of association?
- Global respect for both tripartite representation in policy formation about labour relations and for freedom of association is founded upon the need to strike balances between capital and labour as factors in production and regulatory intervention by government. Does the growth in inequality and the decline in the labour factor share point to a need for remedial measures to strengthen labour voice?

Endnotes

[i] Productivity Commission 2015, WORKPLACE RELATIONS FRAMEWORK DRAFT REPORT, p 242

[ii] Ibid,

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

[iv] 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, p. 9, 13-14

[v] Greenville, J., Pobke, C. and Rogers, N. 2013, Trends in the Distribution of Income in Australia, Productivity Commission Productivity Commission Staff Working Paper, March, Canberra

[vi] Florence Jaumotte and Carolina Osorio Buitron, *POWER from the PEOPLE Finance & Development March 2015*, pp 29-31. This article summarises a forthcoming paper from these IMF researchers on this subject.

[vii] Organization for Economic Cooperation and Development (OECD), OECD Employment Outlook, OECD Paris, 2004, p. 130

[viii] OECD, In It Together: Why Less Inequality Benefits All, OECD Publishing, 2015

[ix] See http://www.abc.net.au/news/2015-04-21/farmers-rally-over-fracking-fears-in-wa/6409888; http://rightnow.org.au/topics/bill-of-rights/after-democracy-victorias-new-anti-protest-laws/; http://hrlc.org.au/tasmanias-proposed-anti-protest-laws-will-breach-international-human-rights-law/

[x] See Australian Law Reform Commission, Interim Report Traditional Rights and Freedoms, Chapter 5, 2015, http://www.alrc.gov.au/publications/alrc127

[xi] ABS, 6325.0, Trade Union Members, Australia, August 1996, p. 5

[xii] ABS, 6310.0, Employee Earnings, Benefits and Trade Union Membership, Australia, August 2013 [Note: there are differences in the methodology of collecting union membership data between the earlier and later ABS publications.]

[xiii] Draft Report, p 254

[xiv] Ibid, p 259

[xv] Ibid, p 264-5
[xvi] Ibid, Chapter 17
[xvii] Ibid, p 621-2
[xviii] Fair Work (Registered Organisations) Amendment Bill 2014 - C2014B00132