

Australia: free to associate?

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Opening the International Labour Organisation ('ILO') centenary year the Global Commission on the Future of Work released its *Work for a Brighter Future* report, advocating a 'human centred' approach to the future of work and calling for a global response to technology and changes to the world of work. The report recommends greater investment in worker capabilities and skills, the institutions of work, and sustainable jobs. Speaking at Australia's Monash University in early 2019¹ Greg Vines, ILO Deputy Director-General for Management & Reform said that Australia is generally on a 'good path' and may be looked to as an example by other countries preparing for the future of work. However, he noted there is still 'much more' to be done around freedom of association and strengthening the role of employer groups and unions.

Of particular importance to the ILO, freedom of association is essential to the tripartite structure of the Organisation and to free, democratic and participatory society. Freedom of Association is primarily understood by reference to the *Freedom of Association and Protection of the Right to Organise Convention* (No. 87) and the *Right to Organise and Collective Bargaining Convention* (No. 98). These Conventions guarantee workers the right to form and join trade unions and enjoy protection from discrimination resulting from union membership or activity. Further, the Conventions set out an obligation on member states to support and promote mechanisms for collective bargaining, and the right of workers, employers and their respective associations to engage in free and voluntary collective bargaining. Although not explicitly set out in either Convention it is also accepted that Convention 87 affords a right to take industrial action – or 'strike' – in support of social and economic interests.

The freedom to associate is fundamental to democratic society. Collective power may be used to directly further the economic and social interests of a population and enable the realisation of a range of other human rights and freedoms. The *International Covenant on Civil and Political Rights* ('ICCPR') and the *International Covenant on Economic, Social and Cultural Rights* ('ICESCR') set out the right of an individual to 'form and join trade unions for the protection of his [sic] interests'. Whilst the ICCPR and the ICESCR are expressed 'subject to the law of the land', this limitation is qualified in both instruments such that signatories of ILO Convention 87 may not take 'legislative measures which would prejudice, or apply the law in such a manner as would prejudice the guarantees provided for in that Convention.'

The authoritative nature of Conventions 87 and 98 is further supported by the high level of ratification they each enjoy — 155 and 166 ratifications respectively — and the special supervisory mechanisms they are afforded, namely the Committee on Freedom of Association ('CFA'), and the Fact-Finding and Conciliation Commission ('FFCC').

Australia is an ILO founding member state and significant donor to the Organisation. However, Australia's relationship with international human rights systems, including ILO labour standards has long been fraught. Australia's recent relationship with the ILO has been characterised by regular and repeated criticism from the ILO supervisory bodies. Central to this criticism are inconsistencies between Australian domestic labour law and the international standards pertaining to freedom of association by which Australia has freely and consistently agreed to be bound.

In accordance with the 1998 *Declaration on Fundamental Principles and Rights at Work*, Australia is obliged by virtue of its ILO membership to respect, promote and realise the principles of free association. Further, Australia has ratified both ILO Conventions 87 and 98; is a signatory to both the ICCPR and ICESCR; and has formally re-affirmed a commitment to these principles through the inclusion of labour clauses in various international trade agreements which require adherence to ILO Conventions. Despite international obligations, Australia has done little to promote or protect freedom of association, typically enacting legislation protective of a negative right *not* to associate.

Australian labour law is primarily set out by the *Fair Work Act 2009* (Cth) ('FW Act'). In 2009 the *Fair Work Bill 2008* (Cth) was subject to an urgent complaint to the CFA² which alleged the Bill replicated and expanded upon breaches of the rights to free association, collective bargaining and strike action previously identified by the ILO. In response the CFA requested the Australian Government review the bill to ensure conformity with international labour standards. These same issues are at the centre of Australian non-compliance today.

Critical to effective bargaining is the principle that collective instruments should be subject to free and voluntary negotiation, with the level and content of agreements determined by the parties. Whilst the FW Act does not prohibit agreement making beyond the enterprise level it does restrict the use of industrial action to enterprise level negotiations. Absent the coercive lever of industrial action, workers are stripped of the power to compel employers to negotiate agreements across multiple businesses or at an industry level. Faced with increasingly decentralised business models the enterprise focus of the FW Act often prevents employees and unions from entering negotiation with those entities ultimately responsible

for determining price and production variables. Further, the FW Act enables enterprise agreements to be made directly with employees, bypassing the role of trade unions. This reflects the preoccupation of Australian labour law with the right *not* to associate and fails to recognise the essential function of trade unions in balancing inherent power inequalities.

The principle of free and voluntary collective bargaining is further offended by the FW Act whereby the content of negotiated instruments is restricted to matters 'pertaining to the employment relationship'. In a practical sense this limitation is problematic in that the scope of 'matters pertaining' is confusing and nuanced; casual conversion terms have been rejected for restricting the employer's right to engage independent contractors, but distinguished from permitted clauses limiting the use of labour hire, held to encourage the engagement of permanent employees.³ The CEACR has been critical of the 'matters pertaining' requirement and also the Act's prohibition of 'unlawful content' including strike pay, union bargaining fees and the extension of unfair dismissal or union right of entry provisions beyond the terms of the Act.

Whilst not explicitly provided by either Convention 87 or 98 the right to 'strike', or engage in industrial action, has always been regarded by the CFA as a fundamental right of workers to be utilised as a means of defending their economic interests. The right to strike at international law is supported by the ICESCR through explicit acknowledgement and references to Convention 87 as the authority on the substance of that right. ILO standards do not support industrial action of a 'purely political' nature but do recognise that the occupational and economic interests of workers extend beyond better working conditions to include seeking solutions to economic and social policy matters of direct concern to workers.

The ability to influence economic and social policy matters is limited in Australia through the prohibition of sympathy strikes and secondary boycotts under the FW Act and the *Competition and Consumer Act 2010* (Cth) ('CCA'). In accordance with ILO principles sympathy action is legitimate when undertaken in support of lawful industrial action, and essential to the broader democratic voice of workers. The position at Australian law has been subject to regular criticism by the CEACR, who in 2016 requested 'once again' that all appropriate measures be taken to review the provisions of the FW Act and CCA to bring the law into full conformity with Convention 87.

Industrial action is inherently unlawful at Australian common law and may give rise to actions in contract or tort. 'Protected' industrial action provisions were first introduced to shield workers and their organisations from such claims in 1993⁴ by virtue of the Federal

Government's external affairs power and relied specifically on the ICESCR, the ILO Constitution, and Conventions 87 and 98. Under the FW Act protected industrial action is limited to circumstances in which parties are engaged in bargaining *and* genuinely trying to reach agreement for a collective enterprise-level instrument. Once an enterprise agreement has been made the parties are then prohibited from engaging in industrial action during the life of that agreement, irrespective of whether the issue in dispute is addressed by its terms. The CFA provides that prohibitions on industrial action during the life of an agreement must be accompanied by impartial and rapid mechanisms by which complaints regarding the interpretation or application of agreements may be resolved. Contrary to this requirement, the FW Act contains no mechanism for compulsory arbitration and does not require parties in negotiating industrial instruments to agree to the arbitration of disputes. The level at which agreements may be negotiated with the support of industrial action has been held in contravention of the right to strike. In its closing observations of 2009, the UN Committee on Economic, Social and Cultural Rights (CESCR) expressed concern with Australian non-compliance, recommending Australia 'lift the restrictions on "pattern bargaining" [sic] [and] the pursuit of multi-employer agreements'.

The utility of Industrial action is diminished in the Australian context by the low threshold for terminating or suspending action. Under the terms of the FW Act industrial action may be suspended or terminated in response to economic concerns. Further, industrial action is prohibited in circumstances prejudicing or threatening trade and commerce with other countries or among States under the *Crimes Act 1914* (Cth). International labour standards hold that such limitations are only permitted in relation to essential services – strictly defined – or in situations endangering life, or the personal safety or health of the whole or part of the population. The threshold for terminating or suspending industrial action on economic grounds has been the subject of multiple direct requests by the CEACR, urging that Australian law in this area be brought into full conformity with international labour standards.

Australia's repeated failure to bring domestic law in line with the international standards to which it is bound represents a failure not just to workers but to democracy more broadly. Currently, the Australian Government is preparing to reintroduce legislation that increases the regulation of trade unions beyond that of any other sector.⁵ This Bill was subject to human rights scrutiny in 2017 and found incompatible with the right to freedom of association.⁶ Australian domestic law denies workers the right to take industrial action in support of any number of otherwise legitimate claims, limiting genuine worker voice and democratic participation. It is this limitation of the collective power of workers and the

function of their organisations that is central to Australia's non-compliance with international labour standards. Declining union membership, coupled with limitations on the exercise of worker power has contributed to increasing inequality, stagnant wage growth and the dramatic decline of Australian private sector bargaining. These trends must be reversed if Australia hopes to realise the vision of a participatory, fair and human centred future of work.

¹ Greg Vines, 'Work for a brighter future: A view from the ILO' (Presentation, Monash University, 5 March 2019).

² *Complaint against the Government of Australia presented by the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (CEPU)*, Document Vol XCIII, 2010, Series B, No. 2, Report 357, Case 2698 (CFA Report, Case 2698).

³ "*Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union*", known as the *Australian Manufacturing Workers' Union (AMWU) v Visy Board Pty Ltd* [2018] FWFB 8.

⁴ *Industrial Relations Reform Act 1993* (Cth).

⁵ *Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2017*.

⁶ Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Report 12 of 2017* (2017) 113-136.