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Freedom of Association and Collectivity in Australia

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Abstract

Freedom of association is an internationally recognised human right, ILO fundamental principle and an essential ingredient for democracy. Despite international labour and human rights obligations and boasting a labour law system build around a "heart" of collective bargaining, Australia has been consistently subject to international criticism for failing to uphold the principles of free association.

This paper explores the extent to which Australian labour law is in violation of these principles. It concludes that, although appropriate and necessary, changes to affect full freedom of association are unlikely given the current legislative agenda, in particular the Fair Work (Registered Organisations) Amendment (Ensuring Integrity No.2) Bill 2019.

I. Introduction

The freedom of workers to act collectively in defending and furthering their social, political and economic interests is an internationally recognised human right. Serving to counter the inherent power imbalance between worker and employer, collective action through free association provides the necessary leverage for workers to defend, realise and further their rights as citizen workers. Freedom of association is a broad right consisting of three primary principles: the right to form and join independent organisations; the right of workers to negotiate the terms and conditions of work through a process of collective bargaining; and the right of workers to strike in support of social and economic interests.

This paper argues that the Australian workplace relations system fails to comply with Australia's obligations with regard to freedom of association at international law. This failing has contributed to record low wage growth; a dramatic decline in the instance of bargained enterprise agreements; increasing insecure work, and a significant number of employers engaged in the deliberate and systematic violation of minimum terms and conditions. Part II of this paper identifies the international instruments that articulate the right to freedom of association and explores Australia's obligations in terms of those instruments. Part II asserts that, in terms of freedom of association, the principles set out by the International Labour Organization (ILO) are an appropriate benchmark for Australian law and practice. In Part III, this paper will go on to assess free association at Australian law against accepted principles with reference to ILO and United Nations (UN) supervisory bodies. The conclusion is drawn here that Australian law does not comply with international labour and human rights obligations. Examining the Fair Work (Registered Organisations) Act (Ensuring Integrity Bill) 2019, Part IV of this paper goes on to argue that, whilst changes to Australian labour law are appropriate and necessary, the current

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legislative agenda of the Federal Government would suggest that full freedom of association is unlikely to be supported in the near future, to the detriment of working conditions.

II. Freedom of Association: International law and Australia

A. The International Labour Organization

Freedom of association forms the foundation of the ILO tripartite structure, has been described as the "heart of democracy" and is essential to achieving the objectives of the organisation.[1]

The 1998 Declaration on Fundamental Principles and Rights at Work committed member states,[2] through the fact of membership, to "promote and realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights",[3] including "freedom of association and the effective recognition of the right to collectively bargain".[4] Freedom of association was again highlighted in the 2008 Declaration on Social Justice for a Fair Globalisation and,[5] most recently, the 2019 Centenary Declaration for the Future of Work,[6] which stated the ILO must direct its efforts to "promoting workers' rights … with a focus on freedom of association and the effective recognition of the right to collective bargaining as enabling rights".[7]

The principle components of freedom of association are understood primarily by reference to the Freedom of Association and Protection of the Right to Organise Convention 1948 (Convention 87) and the Right to Organise and Collective Bargaining Convention 1949 (Convention 98). Creighton observes Conventions 87 and 98 are uniquely authoritative,[8] owing to their high levels of ratification – 155 and 167 ratifications respectively – and the special supervisory mechanisms they are afforded. In addition to the reporting requirements set out by the ILO Constitution and the Declaration on the Fundamental Principles and Rights at Work, freedom of association is subject also to a unique complaints mechanism comprised of the tripartite Committee on Freedom of Association (CFA), and the Fact-Finding and Conciliation Commission (FFCC), comprised of independent persons.

B. The United Nations

The United Nations (UN) recognises freedom of association as an international human right.[9] The International Covenant on Civil and Political Rights[10] (ICCPR) provides that "everyone shall have the right to freedom of association with others, including the right to form and join trade unions

[1] International Labour Office *Report III(1B): Giving globalization a human face (General Survey on the fundamental Conventions)* [*General Survey 2012*] (2 March 2012) [49].
[2] International Labour Organization [ILO] "Declaration on Fundamental Principles and Rights at Work" (adopted by the International Labour Conference, 86th Session, Geneva, 1998).
[3] Article 2.
[4] Article 2(a).
[5] ILO "Declaration on Social Justice for a Fair Globalization" (adopted by International Labour Conference, 97th Session, Geneva, 2008).
[6] ILO "Centenary Declaration for the Future of Work*"* (adopted by International Labour Conference, 108th Session, Geneva, 2019).
[7] Article II A(vi).
[8] Breen Creighton "Freedom of Association" in Roger Blanpain (ed) *Comparative Labour Law and Industrial Relations in Industrialised Market Economies* (11th ed, Wolters Kluwer, Alphen aan den Rijn, 2014) 315 [3].
[9] *Universal Declaration of Human Rights* GA Res 217A (III) (1948).
[10] International Covenant on Civil and Political Rights [ICCPR] 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976).

for the protection of his [sic] interests".[11] The International Covenant on Economic, Social and Cultural Rights[12] (ICESCR) reaffirms the right to join trade unions[13] and, additionally, provides an explicit right to strike.[14] Whilst the rights prescribed by the ICCPR and the ICESCR are expressed subject to the law of the land,[15] this limitation is qualified in both instruments such that:[16]

> Nothing in this article shall authorize States Parties to the International Labour Organization 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.

This incorporation of Convention 87 in both instruments indicates that the international principles of freedom of association as set out in Convention 87, and the related commentary of the ILO supervisory bodies, provide a "touchstone" for the interpretation and application of the ICCPR and the ICESCR.[17]

C. Australian Recognition of International Obligations

As an ILO member state, Australia is obliged to respect, promote and realise the principles of free association,[18] and has recommitted itself to those principles by way of ratifying both Conventions 87 and 98. In addition, Australia is signatory to both the ICCPR and ICESCR and has thus undertaken to guarantee the rights provided by those Covenants. Absent a constitutionally enshrined bill of rights, the recognition and protection of human rights in Australia relies almost exclusively on legislation or administrative action.[19] International human rights standards to which Australia has subscribed should be recognised as the benchmark for rights domestically. However, at Australian law, international obligations conferred by way of covenant or treaty are not automatically binding and must be implemented by an Act of Parliament. The Fair Work Act 2009 (Cth) (FW Act) fails to incorporate Australia's international obligations with regard to freedom of association, providing instead the "freedom to choose whether *or not* to join and be represented by a union or participate in collective activities" and "collective bargaining at the *enterprise* level".[20]

Despite Australian domestic law failing to implement international standards, Australia's international obligations have been formally recommitted by the Federal Government in various trade agreements which affirm Australia's obligations as an ILO member state, and commit explicitly to the principles of freedom of association and collective bargaining.[21] Whatever the

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[11] Article 22.

[12] International Covenant on Economic, Social and Cultural Rights [ICESCR] 993 UNTS 3 (opened for signature 16 December 1966, entered into force 3 January 1976).

[13] Article 8 1(a).

[14] Article 8 1(d).

[15] Article 8 1(c), 1(d).

[16] ICCPR art 22 (3); and ICESCR art 8 (3).

[17] Colin Fenwick "Minimum Obligations with Respect to Article 8 of the International Covenant on Economic, Social and Cultural Rights" in Audrey Chapman and Sage Russell (eds) *Core Obligations: Building a Framework for Economic, Social and Cultural Rights* (Intersentia, Cambridge, 2002) 53, at 61–62.

[18] ILO, above n 1, art 2.

[19] Colin Fenwick "Workers' Human Rights in Australia" (August 2006) Social Science Research Network <www.ssrn.com> at 2.

[20] Fair Work Act 2009 (Cth) [FW Act], s 30B 9(a)(ii)–(iii) (emphasis added).

[21] See Australia – United States Free Trade Agreement [2005] ATS 1 (signed 18 May 2004, entered into force 1 January 2005), ch 18; and Comprehensive and Progressive Agreement for Trans-Pacific Partnership [2018] ATNIF 1 (signed 8 March 2018, entered into force 30 December 2018), s 51(h).

efficacy of these clauses in practice,[22] at face value, they serve to legitimise Australia's international obligations. These obligations are further acknowledged by the Federal Government and monitored through the processes of the Parliamentary Joint Committee on Human Rights (PJCHR), whose role it is to scrutinise legislative instruments and report on their compatibility with Australia's human rights obligations. Among the instruments that form the PJCHR terms of reference are the ICCPR and the ICESCR. Thus, the PJCHR is required to report on potential violations to the right of freedom of association as protected by the ICCPR and ICESCR and informed by ILO Convention 87.

Given Australia's voluntary international obligations to uphold the principles of freedom of association as set out in Conventions 87 and 98, it is entirely appropriate that Australian law protects the right to freedom of association as understood in terms of the ILO Conventions and the jurisprudence of the CFA. This paper will now move to assess the current state of Australian federal labour law against the internationally accepted principles of freedom of association.

III. Freedom of Association at Australian Law

A. The Right to Form and Join Autonomous, Independent Organisations

The primary object of Convention 87 is to protect the autonomy and independence of worker and employer organisations from public authority with regard to their establishment, activity and dissolution.[23] This is achieved by Member States undertaking to give effect to prescribed principles,[24] and "to take all necessary and appropriate measures to ensure that workers and employers may exercise freely the right to organise".[25] While Australian labour law has been primarily drafted to protect an individual negative right *not* to associate, these provisions have been effectively utilised by trade unions for protecting the interests of their members.[26] Creighton observes that whilst this negative right is not an aspect of Convention 87, its inclusion at law is not necessarily contrary to ILO principles.[27] Convention 87 provides that all:[28]

> … [w]orkers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their choosing without previous authorisation.

The term "worker" is to be understood expansively to include all workers across sectors, industries and contractual status.[29] Australian labour law fails to reflect the broad application of this right; anchored in contract, labour rights in Australia are typically only extended to those workers engaged as employees under a common law contract of service. The effect of this distinction is that an increasing number of workers classified as independent contractors or engaged through third-party entities such as labour hire providers or indirectly via complex supply

[22] Tham and Ewing argue such clauses are cynically enacted and will likely result in a deterioration of labour standards for non-United States parties, see Joo-Cheong Tham and Keith Ewing "Labour Clauses in the TPP and TTIP: A Comparison without a Difference" (2016) 17 Melbourne Journal of International Law 1.
[23] *General Survey 2012*, above n 1, at [55].
[24] *Freedom of Association and Protection of the Right to Organise* (1948) ILO Convention No 87 [Convention 87], art 1.
[25] Article 11.
[26] See 1998 Waterfront dispute: *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia* (1998) 195 CLR 1.
[27] Breen Creighton "The ILO and the Protection of Fundamental Human Rights" (1998) 22 MULR 239, at 247.
[28] Convention 87, art 2.
[29] *General Survey 2012*, above n 1, at [53].

chains are denied minimum conditions and rights at work.[30] The consequence of this for freedom of association is that growing numbers of workers engaged as independent contractors have no recourse to collective bargaining or the coercive power of industrial action. McCrystal identifies that,[31] while collective bargaining is possible for independent contractors within the confines of the *Competitions and Consumer Act 2010* (Cth) (*CC Act*), where a public benefit is demonstrated, this approach is severely limited in that it does not allow the exercise of collective or market power and bargained outcomes must be voluntary and, as such, cannot be enforced.

Australian labour law further limits effective freedom of association through "casual" or hourly work contracts. Approximately 25 per cent of the Australian workforce[32] is engaged on a casual or hourly basis. Given the insecurity that attaches to hourly engagements, casual employees are unlikely to command the power to affect their working conditions directly and, as such, are particularly dependent on collectively bargained outcomes. However, casual employees are unlikely to be effectively represented in collective bargaining processes, with financial insecurity posing a significant barrier to union participation. Figures indicate only 4.8 per cent of casual employees are union members, compared to 19.2 per cent for permanent employees.[33]

Protection from anti-union discrimination is essential for free association;[34] the right of workers to join trade unions and participate in industrial activity free from the consequences of anti-union discrimination is an essential element to effective freedom of association. Where workers cannot be confident of adequate protection from dismissal or other means of reprisal resulting from their undertaking union activity, they cannot freely associate or act in their own interests. The CFA describes the act of anti-union discrimination as "one of the most serious violations of freedom of association, as it may jeopardize the very existence of trade unions".[35]

Workers are protected from anti-union discrimination under the FW Act adverse action provisions.[36] Notably, these provisions were enacted utilising the Federal Government external affairs power,[37] with the Fair Work Act Explanatory Memorandum citing several ILO conventions dealing with discrimination and equal employment rights.[38] The omission of Convention 98 from this list indicates both an acknowledgment that Australian labour law operates in contravention of Conventions 87 and 98, and a lack of political will to bring Australia into conformity with international labour standards.[39]

[30] For discussion, see Tess Hardy "Watch this Space: Mapping the Actors Involved in the Implementation of Labour Standards Regulation in Australia" in John Howe, Anna Chapman and Ingrid Landau (eds) *The Evolving Project of Labour Law: Foundations, Development and Future Research Directions* (Federation Press, Alexandria (NSW), 2017) 145.

[31] Shae McCrystal "Organising Independent Contractors: The Impact of Competition Law" in Judy Fudge, Shae McCrystal and Kamala Sankaran (eds) *Challenging the Legal Boundaries of Work Regulation* (Hart Publishing, Oxford, 2012) 139, at 151–4.

[32] Sushi Das, with David Campbell "Fact check: Has the rate of casualisation in the workforce remained steady for the last 20 years?" (12 July 2018) ABC News <www.abc.net.au>.

[33] Iain Campbell *On-call and related forms of causal work in New Zealand and Australia* (ILO, Conditions of Work and Employment Series No 102, 2018) at 26.

[34] See Convention 98, art 1.

[35] ILO "Compilation of decisions of the Committee on Freedom of Association" [CFA Compilation] (6th ed, 2018) at [1072].

[36] FW Act, pt 3-1.

[37] Australian Constitution, s 51(xxix).

[38] Explanatory Memorandum, Fair Work Bill 2009 (Cth), at [2251].

[39] Part IV of this paper will discuss moves to distance Australian law further still from international standards and human rights law.

The FW Act sets out to protect freedom of association by ensuring persons are free to become – or not become – members of industrial associations; have their interests represented – or not – by industrial associations; and are free to participate – or not – in lawful industrial activities.[40] Protection is afforded against a range of actions including dismissal, injuring a person in their employment, detrimentally altering their position or discriminating between them and other employees,[41] and extends beyond the common law contract of employment, covering prospective employees, and contractors alike. At face value, these protections appear comprehensive, however, they have been interpreted by the High Court of Australia such that extraordinary weight is afforded to employer evidence as to the reason behind the action in question. In *Barclay*,[42] Mr Barclay, an employee who acted also as President of the union sub-branch, was dismissed after emailing general advice to union members at the site. The email was composed in response to concerns raised by four members claiming to have been asked to falsify documents as part of an audit process. Fearing reprisal, the members requested not to be identified. The High Court acknowledged that Mr Barclay was "bound to respect confidences",[43] but accepted the employer explanation that the decision to dismiss was not made because Mr Barclay had sent the email in an industrial capacity, but because his actions in sending the email, rather than reporting the allegations to management and his subsequent refusal to name the complaining members, breached workplace policy. This approach was reaffirmed in *BHP Coal*,[44] wherein the High Court held the dismissal of an employee for holding a sign reading "No Principles SCABS No Guts" during a union-organised protest was valid. In this case, it was accepted that his actions were misconduct, in that the sign was offensive and in violation of the organisation's code of conduct and expected behaviour policies.

The refusal of the High Court to afford protection in *Barclay* and *BHP Coal*, despite recognising the industrial nature of the activities in which the employees were engaged, suggests that the FW Act adverse action provisions are inadequate and may only serve to protect against the most obvious and explicit forms of direct action taken by an employer. The seeming requirement to have the decision-maker name industrial activity as the reason for their taking adverse action, and their corresponding ability to defend a claim simply by offering alternate reasons, severely undermines the intentions of these provisions.[45]

B. The Promotion of Free and Voluntary Collective Bargaining

Collective bargaining is:[46]

> … a fundamental right recognised by member States from the very fact of their membership in the ILO, and which they have an obligation to respect, promote and to realise in good faith.

Article 4 of Convention 98 sets out two critical elements: firstly, that appropriate measures be implemented by public authorities to encourage and promote collective bargaining; and, secondly, that negotiation for collective instruments be conducted voluntarily.

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[40] FW Act, s 336(1)(a).
[41] FW Act, s 342.
[42] *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* (2012) 248 CLR 500.
[43] At [30].
[44] *Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd* (2014) 253 CLR 243.
[45] See Joellen Riley "General Protections: Industrial Activities and Collective Bargaining" in Shae McCrystal, Breen Creighton and Anthony Forsyth (eds) *Collective Bargaining Under the Fair Work Act* (Federation Press, Alexandria (NSW), 2018) 162.
[46] ILO, above n 2, art 2.

In 2009, the ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR) noted with "interest" and "satisfaction" that collective bargaining at the enterprise level was at the "heart" of the newly enacted FW Act.[47] The objects of the FW Act include "achieving productivity and fairness through an emphasis on enterprise-level collective bargaining underpinned by simple good faith bargaining obligations and clear rules governing industrial action".[48] This was a clear departure from the previous Workplace Relations Amendment (Work Choices) Act 2005 (Cth), which promoted individual Australian Workplace Agreements (AWAs) over collectively negotiated instruments in clear violation of ILO principles. AWAs were given legal priority over collective agreements and could be offered as a condition of employment.[49] The following discussion demonstrates that, apart from removing individual statutory agreements, the FW Act has done little to improve the ILO conformity of Australian labour law in terms of collective bargaining.

Critically, in accordance with Convention 98, voluntary negotiation should occur "between employers or employers' organisations and *workers' organisations*".[50] Collective bargaining under the auspices of the FW Act is internationally unique, in that it occurs between employers and their employees. Unions have been stripped of their status as parties to agreements at Australian law and may act only in the capacity of a bargaining representative for their members. Having done so, unions might seek to be "covered" by a negotiated agreement and thus be afforded limited rights in seeking to have its terms enforced on behalf of its membership. The FW Act affords unions status as the default bargaining representative for members;[51] however, employers are not required to notify relevant unions of negotiations and members are not formally advised of the need to alert their union. The 2012 post-implementation review of the FW Act identified that this combination of circumstances was failing the policy intention of the scheme, with negotiations commencing and, in some cases concluding, with neither the knowledge nor involvement of relevant unions. In response, the recommendation was made that bargaining notices be lodged with the FWC and published on the Commission's website;[52] this recommendation was not taken up.[53] This is a critical failing of the FW Act in promoting collective bargaining in accordance with Australia's international obligations, with the effect of undermining the power and purpose of what is and must be interpreted as a collective right.

The level at which collective agreements are negotiated should be determined by the parties to the negotiation, the CFA has said:[54]

> According to the principle of free and voluntary collective bargaining embodied in Article 4 of Convention No. 98, the determination of the bargaining level is essentially a matter to be left to the discretion of the parties and, consequently the level of negotiation should

[47] CEACR *Observation concerning Convention No 98 (Australia)* (International Labour Office, 2009).
[48] FW Act, s 3(f).
[49] Colin Fenwick "Workers' Human Rights in Australia" in Colin Fenwick and Tonia Novitz (eds) *Human Rights at Work* (Hart Publishing, 2010) 41, at 68; and for further discussion of the inconsistencies of AWAs and ILO Convention No 98, see Colin Fenwick and Ingrid Landau "Work Choices in International perspective" (2006) 19 AJLL 127.
[50] Convention 98, art 4 (emphasis added).
[51] FW Act, s 174(3).
[52] Ron McCallum, Michael Moore and John Edwards *Towards More Productive and Equitable Workplaces: An Evaluation of the Fair Work Legislation* (Attorney-General's Department, Australian Government, 2012) at 145.
[53] Rosalind Read "The Role of Trade Unions and individual Bargaining Representatives" in Shae McCrystal, Breen Creighton and Anthony Forsyth (eds) *Collective Bargaining Under the Fair Work Act* (Federation Press, Alexandria (NSW), 2018) 69, at 75.
[54] ILO *Case No 1887 (Argentina)* (1998), at [103].

> not be imposed by law, by decision of the administrative authority or by the case-law of the administrative labour authority.

Collective bargaining under the FW Act is focussed at an enterprise level. While agreement-making beyond this level is not prohibited, industrial action in support of agreements other than those for a single enterprise is. Absent the coercive lever of industrial action, workers are stripped of the power to compel employers to negotiate beyond the enterprise. The FW Act does provide a mechanism through the low-wage bargaining stream[55] whereby employers in enterprises with no history of agreements may be compelled to engage in bargaining for a multi-employer agreement;[56] however, no recourse to industrial action is available in support of employee claims, and no agreements have been made under this stream. Increasingly decentralised business models, coupled with the enterprise focus of the FW Act, works to prevent unions entering negotiations with those entities ultimately responsible for determining price and production variables. For example, where the government sets pricing for disability and aged care services, private providers are limited in their ability to negotiate wages and conditions for employees.

One consequence of single enterprise bargaining has been record-low wage growth.[57] The OECD recently observed "bargaining systems that coordinate wages across sectors tend to be linked with lower wage inequality".[58] Additionally, research undertaken by the Centre for Future Work indicates a statistical link between reduced strike activity and the deceleration of wage growth.[59] In order to address the issue of rising inequality and stagnating wages, Australia must embrace the full principles of freedom of association and implement mechanisms to facilitate industry-level bargaining and, where necessary, industrial action to support claims at this level.

In accordance with ILO principles, free and voluntary collective bargaining extends to the content of agreements, where agreements may be made to address broadly defined conditions of work.[60] In this sense:[61]

> … "conditions of work" covers not only traditional working conditions (the working day, additional hours, rest periods, wages, etc.), but also subjects that the parties decide freely to address, including those that are not normally included in the field of terms and conditions of employment in the strict sense (promotion, transfer, dismissal without notice, etc).

The FW Act limits the allowable content of enterprise agreements to those matters "pertaining to the employment relationship".[62] This limitation is problematic in that it is confusing, nuanced and difficult to apply in any practical sense. For example:[63]

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[55] FW Act, s 243.
[56] FW Act, ss 262–263.
[57] See generally, Andrew Stewart, Jim Stanford and Tess Hardy (eds) *The Wages Crisis in Australia: What it is and what to do about it* (University of Adelaide Press, Adelaide, 2018).
[58] Workplace Express *Industry-wide Bargaining a Cure for Wage Stagnation: OECD* (6 July 2018) <www.workplaceexpress.com.au>.
[59] Jim Stanford "Historical Data on the Decline in Australian Industrial Disputes" (The Australia Institute Centre for Future Work, Briefing Note, 30 January 2018) <www.futurework.org.au>.
[60] B Gernigon, A Odero, and H Guido "ILO Principles Concerning Collective Bargaining" (International Labour Office, Geneva, 2000) at 33.
[61] *General Survey 2012,* above n 1, at [215].
[62] FW Act, ss 172 and 186.
[63] Renee Burns "Australia: free to associate" (2019) 26(2) ICTUR International Union Rights 21, citing "*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.

> … 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.

Since the commencement of the FW Act, the CEACR have twice noted the difficulties around the notion of matters pertaining,[64] and requested the provisions be reviewed in consultation with the social partners to expand the scope of bargaining.

The CEACR have also been critical of the prohibition of "unlawful" content.[65] Under the FW Act, unlawful content includes extending unfair dismissal protections or right of entry provisions beyond those provided by the Act, and clauses allowing for strike pay or union bargaining fees.[66] The CEACR has repeatedly noted:[67]

> … legislation or measures taken unilaterally by the authorities to restrict the scope of negotiable issues are often incompatible with the Convention, and that tripartite discussions for the preparation, on a voluntary basis, of guidelines for collective bargaining are a particularly appropriate method of resolving these difficulties.

In the building and construction industry, the permissible scope of agreements is further limited. The Code for the Tendering and Performance of Building Work 2016 (Cth) provides general restrictions on the content of agreements for enterprises tendering for Commonwealth projects. These restrictions include clauses that impose limits on the right of the enterprise to manage its business or improve productivity, discriminate against classes of employees or subcontractors, or are inconsistent with the "freedom of association" provisions of the code. These restrictions are broadly defined and are in direct violation of Australia's international obligations with regard to upholding the right to freedom of association. [68]

One disturbing trend in collective bargaining under the FW Act has been the willingness of employers to apply for the termination of enterprise agreements after their nominal expiry date.[69] The termination of "expired" agreements in this sense forces the workforce back onto the conditions of the relevant award, consequently diminishing the bargaining position they previously enjoyed. McCrystal argues that, as the majority of applications under this section are presented as an opportunity to break a deadlock in bargaining, this provision is facilitating a form of compulsory arbitration in direct violation of the right to freedom of association.[70]

[64] CEACR *Direct Request concerning Convention No. 98 (Australia)* (International Labour Office, 2011); and CEACR *Direct Request concerning Convention No. 98 (Australia)* (International Labour Office, 2013).
[65] CEACR *Observation concerning Convention No. 98 (Australia)* (International Labour Office, 2016); and CEACR *Observation concerning Convention No. 98 (Australia)* (International Labour Office, 2019).
[66] FW Act, ss 186(4), 194, 353 and 470–475.
[67] CEACR *Observation concerning Convention No. 98 (Australia)* (International Labour Office, 2016); and CEACR *Observation concerning Convention No. 98 (Australia)* (International Labour Office, 2019).
[68] For further discussion, see Parliamentary Joint Committee on Human Rights *Report 2 of 2018* (Parliament of Australia, 2018).
[69] FW Act, s 225.
[70] Shae McCrystal "Termination of Enterprise Agreements under the Fair Work Act 2009 (Cth) and Final Offer Arbitration" (2018) 31 AJLL 131.

C. Right to Strike

Whilst not explicitly provided by Conventions 87 and 98, the right to strike has always been regarded by the Committee on Freedom of Association as a "fundamental right of workers and their organizations … in so far as it is utilized as a means of defending their economic interests".[71] The right to strike is said to be implied in the right of workers and their organisations to "organise their administration and activities and to formulate their programmes",[72] and the understanding that the objective of workers' organisations is to further and defend the interests of workers.[73] It should be noted that ILO principles support the right to strike only where such action remains peaceful. The acceptance of the right to strike is evidenced by its inclusion in the ICESCR.[74] For the purposes of this discussion, the term "strike" should be understood to refer to various forms of industrial action.

Industrial action is inherently unlawful at Australian common law and may give rise to actions in contract or tort. Typically, industrial action will give rise to a legal basis for termination on the grounds of a repudiatory breach of contract, in this context it is also possible, although not common, for an employee to be sued for damages for loss resulting from the breach.[75] The act of organising industrial action may also invite actions in tort, particularly by way of contractual interference, conspiracy by illegal means or intimidation. These actions are significant in that they facilitate damages against not just individuals responsible for industrial campaigns, but also the trade unions for which they are acting.[76] The CFA has noted that the "cumulative effect of such provisions could be to deprive workers of the capacity lawfully to take strike action to promote and defend their economic and social interests".[77]

Right to strike provisions were first introduced into Australian workplace relations law by the Industrial Relations Reform Act 1993 (Cth); shielding industrial action from common law actions when taken in support of enterprise level collective agreements. These provisions were enacted by virtue of the Federal Government external affairs powers,[78] and relied specifically on the ICESCR, the ILO Constitution and Conventions 87 and 98.[79] Protected industrial action under the FW Act is unacceptably limited. Under the FW Act, protected industrial action may only be taken where parties are engaged in bargaining for a collective enterprise-level agreement. This approach limits a range of legitimate actions under ILO standards and is at the heart of Australia's ILO compliance issue.[80]

Freedom of association principles regarding the right to strike stop short of protecting industrial action that is "purely political",[81] but do recognise that workers' occupational and economic interests are not limited to:[82]

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[71] CFA Compilation, above n 35, at [751].
[72] Convention 87, art 3.
[73] Article 10.
[74] ICESCR, art 8 1(d).
[75] Andrew Stewart *Stewart's Guide to Employment Law* (6th ed, Federation Press, Alexandria (NSW), 2018) at [18.6].
[76] At [18.7].
[77] *Report of the Committee on Freedom of Association (277th Report):Case No 1511 (Australia)* (Official Bulletin of the International Labour Office LXXIV B(2), 1991) at [236].
[78] Australian Constitution, s 51(xxix).
[79] In *Victoria v The Commonwealth* (1996) 187 CLR 416, the High Court upheld these provisions on the basis of art 8(d) of the ICESCR, stating that, as no explicit right to strike was prescribed by ILO Conventions, they could not be used as the basis of the provisions.
[80] Shae McCrystal *The Right to Strike in Australia* (Federation Press, Alexandria (NSW), 2010) at 241.
[81] CFA Compilation, above n 35, at [761].
[82] At [758].

> … better working conditions or collective claims of an occupational nature, but also [extend to] the seeking of solutions to economic and social policy questions and problems…which are of direct concern to the workers.

Under the FW Act, protected action may only be taken in support of negotiating enterprise level agreements — no action may be taken in support of the broader economic and social issues. This limitation is not consistent with ILO standards. The CFA has said:[83]

> The right to strike should not be limited solely to industrial disputes that are likely to be resolved through the signing of a collective agreement; workers and their organizations should be able to express in a broader context, if necessary, their dissatisfaction as regards economic and social matters affecting their members' interests.

Further, the FW Act prohibits industrial action during the life of an enterprise agreement. This prohibition stands irrespective of whether the issue in dispute is addressed within the agreement or not. This unduly restricts the ability of workers to defend their interests and is not compliant with ILO standards. The CFA provides that, where strikes are prohibited while an agreement is in force, the restriction:[84]

> … must be compensated for by the right to have recourse to impartial and rapid mechanisms, within which individual or collective complaints about the interpretation or application of collective agreements can be examined.

Contrary to this requirement, the FW Act contains no mechanism for compulsory arbitration, nor does it require parties to agree to the arbitration of disputes.[85]

Under international principles, sympathy strikes and secondary boycotts are a valid exercise of workers' collective power. The CFA have noted "[a] general prohibition of sympathy strikes could lead to abuse and workers should be able to take such action provided the initial strike they are supporting is itself lawful".[86] Sympathy strikes are prohibited at Australian law by the FW Act and the secondary boycott provisions of *the CC Act*.[87] In 2019, the CEACR observed that it had previously asked the Australian Government to review the provisions 'with a view to bringing them into full conformity with the Convention' and requested, "once again":[88]

> …the Government, in light of its comments above and in consultation with the social partners, to review the above-mentioned provisions so as to ensure that they are not applied in a manner contrary to the right of workers' organizations to organize their activities and carry out their programmes in full freedom

As discussed in Part II B of this paper, the FW Act prohibits industrial action taken in support of multi-enterprise agreements or to pursue common terms in different agreements across different

[83] At [766].
[84] At [768].
[85] McCrystal, above n 80, at 245, citing *Woolworths Ltd t/a Produce and Recycling Centre v SDA* [2010] FWAFB 1464.
[86] CFA Compilation, above n 35, at [770].
[87] Competition and Consumer Act 2010 (Cth), ss 45D, 45DA and 45DB. Similar provisions in the previous Trade Practices Act 1974 (Cth) were also subject to CEACR and CFA criticism.
[88] CEACR *Observation concerning Convention No. 87 (Australia)* (International Labour Office, 2019).

employers – known as pattern bargaining.[89] This denial of industrial action as a tool to facilitate bargaining at the industry level is in direct violation of freedom of association principles. In its closing observations of 2009, the UN Committee on Economic, Social and Cultural Rights (CESCR) expressed concern with Australian non-compliance, recommending Australia "should lift the restrictions on 'pattern barging' [sic] [and] the pursuit of multi-employer agreements".[90]

In addition to limiting the circumstances in which protected industrial action may be taken, Australian labour law undermines the utility of industrial action by setting a low threshold for the termination or suspension of such action. The CEACR has been critical of the ability to suspend or terminate industrial action under the FW Act in response to economic concerns.[91,92] In accordance with ILO principles, the termination or suspension of industrial action is only permitted in relation to essential services – strictly defined – or in situations endangering life, personal safety or health of the whole or part of the population; the impact of industrial action on trade and commerce should not be grounds for the termination of agreements. The Australian Council of Trade Unions (ACTU) has argued that these provisions can be used by employers to have industrial action terminated rather than to make bargaining concessions.[93] Repeatedly, the CEACR has requested these provisions be reviewed so as to bring the FW Act provisions into conformity with Australia's international obligations.[94]

Further restrictions to industrial action are imposed by the Crimes Act 1914 (Cth), in circumstances where industrial action is held to prejudice or threaten trade or commerce with other countries or among the States;[95] or where boycotts or the threat of boycotts result in the obstruction or hinderance of the transport of goods or the conveyance of passengers in trade or commerce with other countries or among the States.[96] These provisions have been subject to consistent criticism by the CEACR since 1993.[97] In its 2016 observation, the CEACR, noting the conclusions and recommendations of the CFA in Case No. 2698, recalled that these provisions do not conform to international standards, whereby:[98]

> … the right to strike may be restricted or prohibited only when it is related to essential services in the strict sense of the term, that is where the interruption would endanger the life, personal safety or health of the whole or part of the population; in the public service only for servants exercising authority in the name of the State; or in situations of acute national or local crisis …

The committee noted that the operation of these provisions could impede a "broad range of legitimate strike action … by linking restrictions on strike action to interference with trade and commerce",[99] and requested "once again":[100]

[89] McCrystal, above n 80, at 246; and FW Act, ss 408–413.
[90] *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Australia* UN Doc E/C.12/AUS/CO/4 (22 May 2009) at [19].
[91] CEACR *Observation concerning Convention No. 87 (Australia)* (International Labour Office, 2016); and CEACR *Observation concerning Convention No. 87 (Australia)* (International Labour Office, 2019).
[92] FW Act, ss 423, 424(1)(d), 431, 426 and 419.
[93] CEACR *Observation concerning Convention No. 87 (Australia)* (International Labour Office, 2016);
[94] CEACR, above n 92.
[95] Crimes Act 1914 (Cth), s 30J(1).
[96] Section 30K (d).
[97] CEACR *Direct Request concerning Convention No. 87 (Australia)* (International Labour Office, 1993).
[98] CEACR, above n 92.
[99] CEACR, above n 92.
[100] CEACR, above n 92.

> … the Government … take all appropriate measures, in the light of its previous comments and in consultations with the social partners, to review the abovementioned provisions of the Fair Work Act, the Competition and Consumer Act and the Crimes Act with a view to bringing them into full conformity with the Convention.

IV. The Future for Freedom of Association in Australia

Speaking on the ILO *Work for a Brighter Future* report, ILO Deputy Director-General for Management & Reform, Greg Vines, expressed optimism that, following the 2019 federal election, the Australian government – be it either Liberal Coalition or Labor – would move to bring Australian law into closer conformity with ILO standards on freedom of association.[101] It would seem, however, such optimism was misplaced; shortly following its return to power, the Coalition Government reintroduced the previously defeated Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2019 (Cth) (EI Bill).[102] Following a shock defeat in the Senate,[103] the amended Fair Work (Registered Organisations) Amendment (Ensuring Integrity No.2) Bill 2019 (Cth) (EI2 Bill) was pushed through the lower house in late 2019,[104] and is expected to go before the Senate in early 2020.

In accordance with ILO principles:[105]

> The right of workers' organizations to elect their own representatives freely is an indispensable condition for them to be able to act in full freedom and to promote effectively the interests of their members. For this right to be fully acknowledged, it is essential that the public authorities refrain from any intervention which might impair the exercise of this right, whether it be in determining the conditions of eligibility of leaders or in the conduct of the elections themselves.

In direct violation of these principles, the EI2 Bill expands the grounds by which persons may be disqualified from holding office in a registered organisation to include "designated findings". Designated findings include convictions or pecuniary penalty orders for contraventions of workplace law.[106] The result of this new ground is such that disqualification may be triggered by breaches such as violating workplace health and safety right of entry provisions; the late filing of financial reports; or unprotected industrial action. This circumstance is in clear violation of freedom of association principles, the CFA having stated:[107]

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[101] Greg Vines "Work for a brighter future: A view from the ILO" (Presentation, Monash University, Australia, 5 March 2019).
[102] See Renee Burns, Anthony Forsyth and Mark Perica "Submission of the Australian Institute of Employment Rights to the Senate Education and Employment Legislation Committee Inquiry into the Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2019".
[103] Brett Worthington and Amy Greenbank "Federal Government's crackdown on unions rejected by Senate after One Nations sides with Opposition" (29 November 2019) ABC News <www.abc.net.au/news>.
[104] Workplace Express "Integrity Bill #3 reaches Senate after passing House" (5 December 2019) <www.workplaceexpress.com.au>.
[105] CFA Compilation, above n 35, at [589].
[106] Designated laws would include: Fair Work Act 2009, Fair Work (Registered Organisations) Act 2009, Building and Construction Industry (Improving Productivity) Act 2016, as well as federal and state work health and safety laws.
[107] CFA Compilation, above n 35, at [627].

> The loss of fundamental rights, such as the ban on standing for election to any trade union office and any political or public office, could be justified only with reference to criminal charges unconnected with trade union activities, and are [sic] serious enough to impugn the personal integrity of the individual concerned.

That "designated findings" include the contravention of civil penalty provisions is particularly concerning, given Australian labour law, as discussed above, already does not comply with freedom of association principles. Thus, the EI2 Bill has the effect of creating a regime of additional sanctions for union officials engaging in conduct, such as unprotected industrial action, that is otherwise allowable under international law. The CFA have stated that the imposition of sanctions on unions for leading a legitimate strike constitutes a "grave violation of the principles of freedom of association".[108]

Further, the EI Bill conflates the actions of individuals and organisations, such that an official may be disqualified for "multiple failures to prevent contraventions etc by the organisation" in circumstances where they may not have been involved in or had knowledge of the offending conduct, unless they could show they took "reasonable steps to prevent the conduct".[109]

The proposed amendments also introduce designated findings as a ground for the deregistration of a union. The CFA have stated that:[110]

> … to deprive many workers of their trade union organizations because of a judgement that illegal activities have been carried out by some leaders or members constitutes a clear violation of the principles of freedom of association.

The EI2 Bill empowers the Federal Court to order trade unions to be put into administration in circumstances where the organisation or part of the organisation has ceased to "function effectively".[111] Circumstances in which an organisation (or part) will be taken to have ceased to function effectively include where the Court is satisfied that its officers have, on multiple occasions, breached designated laws.[112] Should an administrator be appointed, they will have power to "perform *any* function, and exercise *any* power that the organisation or part, or any officers could perform or exercise if it were not under administration".[113] These provisions amount to a direct violation of the right of unions to organise their internal administration and activities and to formulate their own programs without interference. The CFA has stated that:[114]

> The placing of trade union organizations under control involves a serious danger of restricting the rights of workers' organizations to elect their representatives in full freedom and to organize their administration and activities.

The amendments proposed by the EI2 Bill represent an unacceptable assault on Australian workers' right to freedom of association and are in direct violation of Australia's labour and human rights obligations under international law. The effect of these amendments, if passed, would be to tie up union resources in court actions and distract and prevent trade unions from

[108] At [951].
[109] Proposed s 223(3)(c).
[110] CFA Compilation, above n 35, at [995].
[111] Fair Work (Registered Organisations) Amendment (Ensuring Integrity No.2) Bill 2019 (Cth), sch 3.
[112] Proposed s 323(4)(a).
[113] Proposed s 323F(1) (emphasis added).
[114] CFA Compilation, above n 35, at [662].

effectively representing the interests of their members. Australian labour law is a "no-cost jurisdiction", as such, unions finding themselves subject to actions under these amendments – even in circumstances where those actions were vexatious or lacking merit – would be left to foot the bill.

V. Conclusion

Given Australia's various voluntarily-accepted obligations at international law to uphold the principles of freedom of association, it is entirely appropriate that Australian law protects the right to free association as understood in terms of the ILO Conventions and the jurisprudence of the tripartite CFA. Current Australian law has been the subject of repeated criticism by ILO and UN supervisory bodies for failing to uphold these principles.

Given the imperfect state of worker rights at Australian law, it has been increasingly difficult over time for unions to organise and work for their members: union right of entry laws have become increasingly restrictive; rising insecurity and casualisation of work have increased the number of workers for which joining their union may be out of reach; the decentralisation of business structures has insulated lead firms and price-setters from collective bargaining efforts; collective power is completely dismantled where Australian workers are very often not represented at all in agreement making; and restrictive strike law has neutered the coercive power of labour.

A genuine recommitment to freedom of association principles is necessary to rebalance workplace relations, improve the quality of work and address the issue of stagnate wage growth in Australia. Federal Government proposals contained in the EI2 Bill fail to address the issue of declining worker power, and the subsequent deteriorating conditions of work. Instead, the EI2 Bill threatens to further restrict the human rights of the Australian workers, dismantle their collective voice, and entrench deteriorating conditions of work.