

**National Interest Analysis [2013] ATNIA 2
with attachment on consultation**

**International Labour Organization Convention No. 138:
Convention concerning Minimum Age for Admission to Employment**

(Geneva, 26 June 1973)

[2013] ATNIF 2

NATIONAL INTEREST ANALYSIS: CATEGORY 1 TREATY

SUMMARY PAGE

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Nature and timing of proposed treaty action

1. The proposed treaty action is ratification of the *International Labour Organization (ILO) Convention No. 138: Convention concerning Minimum Age for Admission to Employment*, adopted at Geneva on 26 June 1973 (the Convention).
2. In accordance with its Article 12(2), the Convention entered into force generally on 19 June 1976, being 12 months after the date on which the ratifications of two ILO Members had been registered with the Director-General. Article 12(1) provides the Convention is binding only upon ILO Members that have registered their ratification with the Director-General of the International Labour Office.
3. It is proposed that Australia ratify the Convention as soon as practicable. Under Article 12(3), the Convention would enter into force for Australia 12 months after the date on which Australia's ratification is registered with the Director-General.
4. In accordance with Article 2(1) of the Convention, Australia will make a declaration upon ratification specifying the minimum age for admission to employment. No reservations will be made upon ratification and ratification will result in the denunciation of five out-dated ILO conventions Australia has previously ratified. After ratification, pursuant to Article 35 of the ILO Constitution, Australia may lodge a declaration concerning the application of the Convention to Norfolk Island, following consultations with the Norfolk Island authorities.

Overview and national interest summary

5. The primary purpose of the Convention is to ensure the effective abolition of child labour and to set the minimum age for admission to employment. There are three main tiers for the admission to employment: 15 years for employment; 13 to 15 years for light work (which is safe and does not affect children's schooling); and 18 years for hazardous work.
6. Ratification would greatly enhance Australia's standing in the international community and the ability to address labour rights issues authoritatively, particularly within the Asia-Pacific region where many children work.

Reasons for Australia to take the proposed treaty action

7. Ratification of the Convention would reflect Australia's recognition of the importance of young people participating in the workforce in a safe and appropriate manner without prejudicing their schooling or their capacity to receive such instruction. Furthermore, ratification would complement measures taken to implement the other core child labour convention Australia has already ratified – *ILO Convention No. 182: Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour* [2007] ATS 38, which was adopted at Geneva on 17 June 1999 and entered into force for Australia on 19 December 2007.

8. A key objective of Australia's engagement with the ILO is to provide policy leadership within the Asia-Pacific region in promoting international labour standards. While the Convention has been ratified by a high number of countries within the region, there remain significant problems with its implementation. The ILO estimates that there are 113 million child labourers in the Asia-Pacific region. Worldwide, there are 215 million child labourers, with 115 million involved in its worst forms.¹ Ratification would enable Australia to play a greater and more authoritative role in promoting better implementation of the Convention and measures to eliminate child labour in the region.

9. The Convention is one of the eight fundamental conventions reflected in the ILO's 1998 *Declaration on Fundamental Principles and Rights at Work* and its *Follow-up*. Ratification of the Convention at this time would strengthen Australia's credentials within the broader international community by ensuring it has ratified all eight fundamental conventions within the ILO's goal of 2015 for universal ratification of those conventions, as well as demonstrating its commitment to the fundamental principles and rights at work. The Convention has been ratified by 165 of the 185 ILO Members.

ILO

10. The ILO is a specialised agency of the United Nations with 185 Members. The ILO is tripartite in structure and has equal representation of governments, employer and worker representative organisations. One of the core functions of the ILO is to establish and monitor a code of international labour standards which are embodied in conventions, protocols and recommendations developed by the three representative groups. Conventions and protocols are legally binding on Members that ratify them. Together, the international labour code establishes minimum labour standards for workers in all types of industries and occupations throughout the world.

11. The ILO supervises the implementation of conventions and protocols by Members who are parties to those instruments, most notably through the Committee of Experts on the Application of Conventions and Recommendations. Australia has been a

¹ International Labour Organization, "Accelerating action against child labour", Global Report under the follow-up to the ILO Declaration on the Fundamental Principles and Rights at Work, 2010

Member of the ILO since its establishment in 1919 and has ratified 58 out of the ILO's 189 conventions. Fifty of the conventions remain in force for Australia.

Obligations

12. Article 1 of the Convention obliges each Member to pursue a national policy designed to ensure the effective abolition of child labour and to raise progressively the minimum age for admission to employment to a level consistent with the fullest physical and mental development of young persons.

13. Article 2 of the Convention requires each Member to specify, in a declaration appended to its ratification, a minimum age of admission to employment not less than the age of compulsory schooling and, in any case, not less than 15 years of age. Members are obligated not to admit any person under that age to employment in any occupation, except in accordance with Articles 4 to 8 of the Convention. It is proposed that Australia will specify a minimum age of 15 years.

14. Article 3 provides that the minimum age for admission to any type of employment which is likely to jeopardise the health, safety or morals of young persons (known as hazardous work) shall be 18 years. This may be reduced to 16 years under certain conditions, including that the health, safety and morals of the young persons concerned are fully protected and the provision of adequate specific instruction or vocational training (Article 3(3)). It is proposed that Australia will rely on Article 3(3) to authorise young persons from the age of 16 to perform certain types of hazardous work (refer to paragraph 28 below).

15. Article 4 permits Members to exclude from the application of the Convention limited categories of employment in which special and substantial problems of application arise. Members that avail themselves of this provision must indicate in the first report on the application of the Convention submitted under Article 22 of the ILO Constitution any categories that have been excluded and the reasons for their exclusion. It is proposed that Australia will exclude certain categories of employment under Article 4 (refer to paragraph 29 below).

16. Article 6 specifies that the Convention does not apply to work done by children and young persons in schools or as part of their schooling.

17. Article 7 permits Members to allow for persons aged 13 to 15 years to perform light work which is: (a) not likely to be harmful to their health and development; and (b) not such as to prejudice their attendance at school (including vocational training) or their capacity to benefit from the instruction received. Members are required to determine the activities in which employment may be permitted and the conditions under which the work is performed.

18. Article 8 provides for exceptions to the minimum age requirements for young persons of any age to participate in artistic performances or otherwise work in the entertainment industry, with appropriate safeguards.

19. Article 9 requires that all necessary measures be taken to ensure an effective enforcement regime with respect to the requirements of the Convention, including the provision of appropriate penalties.

20. Under Article 10 of the Convention, Australia's ratification of the Convention will result in the denunciation of the following conventions Australia has already ratified:

- *Convention No. 7: Convention Fixing the Minimum Age for Admission of Children to Employment at Sea*, adopted at Geneva on 9 June 1920, ratified by Australia on 28 June 1935, [1935] ATS 14;
- *Convention No. 10: Convention concerning the Age for Admission of Children to Employment in Agriculture, as modified 9 October 1946*, adopted at Geneva on 16 November 1921, ratified by Australia on 24 December 1957, [1957] ATS 17;
- *Convention No. 58: Convention Fixing the Minimum Age for the Admission of Children to Employment at Sea (Revised 1936)*, adopted at Geneva 24 October 1936, ratified by Australia on 11 June 1992, [1993] ATS 3;
- *Convention No. 112: Convention concerning the Minimum Age for Admission to Employment as Fishermen*, adopted at Geneva on 19 June 1959, ratified by Australia on 15 June 1971, [1972] ATS 7; and
- *Convention No. 123: Convention concerning the Minimum Age for Admission to Employment in Underground Mines*, adopted at Geneva on 22 June 1965, ratified by Australia on 12 December 1971, [1972] ATS 20.

21. The denunciation of these conventions is a corollary to Australia's ratification of the Convention, which supersedes conventions previously adopted by the International Labour Conference dealing with child labour in specific industries. Australia's denunciation of ILO Convention Nos. 58, 112 and 123 will take effect immediately upon its ratification of the Convention and denunciation of Convention Nos. 7 and 10 will take effect one year after ratification of the Convention, in accordance with the relevant provisions of the respective Conventions.

22. Under Article 22 of the ILO Constitution, each ILO Member must submit an annual report to the International Labour Office on the measures it has taken to give effect to the conventions to which it is a Party, at the discretion of the Governing Body of the ILO. The Governing Body determines which conventions are to be reported on in any given year. Under the current reporting schedule, Members are required to report on the implementation of each ratified fundamental convention to the ILO Committee of Experts on the Application of Conventions and Recommendations on a three-year cycle from the date the convention enters into force for that Member. For the Convention, the first report would be due on 1 September in the year after the Convention enters into force for Australia. For example, if Australia's ratification were deposited with the Director-General in 2013, the Convention would enter into force for Australia one year later, and the first report would be due on 1 September 2015.

Implementation

23. Law and practice at the Commonwealth, State and Territory levels is consistent with Australia's obligations under the Convention. All State and Territory governments

have advised that their jurisdictions comply with the Convention (see paragraphs 41-55 for details of consultations with States and Territories).

24. Implementation of the Convention falls primarily within the jurisdiction of the States and Territories. The Commonwealth has jurisdiction for matters covered by the Convention in relation to social security and workplace relations as well as policy responsibilities concerning occupational health and safety (OHS), education and youth.

25. There is no Commonwealth legislation which prescribes a minimum age for admission to employment or work in Australia, and the minimum age specified in State and Territory legislation varies between jurisdictions. In practice, the minimum age for admission to employment in Australia is generally determined by State and Territory compulsory education legislation which requires children to remain in school or approved education until they turn at least 15 (the age at which children generally complete Year 10), and in most cases until they turn 17 years. Most State and Territory jurisdictions have legislated more specific rules regarding the employment of children within child employment or child welfare legislation. Legislation is also in place to protect young persons under 18 years from performing hazardous work. A strong compliance regime for compulsory education, OHS and other relevant legislation is in place in each jurisdiction, with the provision of penalties as appropriate.

26. Whilst the exact manner in which the Convention will be implemented differs between State and Territory jurisdictions, common across all jurisdictions is the general prohibition of children of compulsory school age from working during school hours (with limited exceptions) and strong OHS legislation which places a duty of care on all employers to maintain a safe and healthy workplace for their employees, including young employees. This is underpinned by Australia's robust social security system which ensures children do not regularly need to work to supplement family incomes, as well as a commitment to education at all levels of government. Australia intends to rely on this combination of law and practice to implement its obligations under Article 2 of the Convention. Advice from the International Labour Office indicates that other ILO Members (for example, the United Kingdom) have utilised this approach in order to demonstrate compliance with the Convention.

27. The Commonwealth and all States and Territories have indicated that they comply with the Convention, taking into account their reliance on the exclusions permitted under Articles 3 and 4 of the Convention. These represent common forms of 'flexibility provisions' which are drafted into ILO conventions to enable Members to ratify the conventions when national circumstances would have otherwise posed obstacles to compliance.

28. In relation to hazardous work, Article 3(3) permits Members to allow young persons from the age of 16 to perform certain types of hazardous work. While legislation prevents young persons in Australia from performing the worst forms of hazardous work until they are 18, there are occasions when children from 16 years may perform work that still may be considered hazardous under the Convention. This may include situations where young persons work on a construction site or farm, or commence an apprenticeship. Accordingly, it is proposed that Australia will rely on Article 3(3) to authorise certain types

of hazardous work by young persons from the age of 16, consistent with existing State and Territory legislation.

29. In relation to light work (Article 7), there is no minimum age specified for such work in State or Territory legislation. Australia will rely on Article 4 to exclude from the application of the Convention those limited categories of light work where children under 13 may work either pursuant to legislation or where they commonly work in practice. The exact categories of employment to be excluded can differ between jurisdictions but all include the following: work in a family enterprise (for example, a market stall, a shop or a farm); delivery work (for example, delivering newspapers or pamphlets in a local neighbourhood); light domestic duties (for example, lawn mowing, babysitting, light household chores); and volunteer work (for example, collecting money or selling items for a registered charity, sporting organisation or not-for-profit organisation).

30. These categories of employment are all those which by their nature have been considered by Australian communities and governments as appropriate and safe ways for children to develop a work ethic and earn pocket money. Their exclusion in no way brings into question the Commonwealth, State and Territory governments' commitment to the abolition of child labour or indeed to compulsory education. OHS and other relevant laws continue to apply to children working in these categories of employment.

31. As noted in paragraph 18 above, Article 8 permits young persons of any age to participate in artistic performances or otherwise work in the entertainment industry, subject to certain conditions. Young persons in Australia are permitted to work for such purposes so as long as this is in accordance with compulsory education legislation which prohibits children of compulsory school age from working during school hours (subject to Ministerial exemption in exceptional circumstances). OHS and child welfare legislation also regulates the work of children in this industry.

Costs

32. There are no costs associated with the ratification of the Convention, as existing Commonwealth, State and Territory laws and practices comply with the provisions of the Convention.

Regulation Impact Statement

33. The Office of Best Practice Regulation, Department of Finance and Deregulation, has been consulted and has confirmed that a Regulation Impact Statement is not required.

Future treaty action

34. No future treaty action is expected to arise out of the ratification process for the Convention. Pursuant to Article 16 of the Convention, at such times as it may consider necessary, the Governing Body of the ILO shall present the International Labour Conference with a report on the working of the Convention and shall examine whether the question of its revision should be placed on the Conference agenda. There are presently no proposals to revise or amend the Convention before the Governing Body. Proposals to

amend existing labour standards occur very rarely and are typically effected by the adoption of a new convention, which would in turn be subject to ratification by Members.

35. Any proposal to take binding treaty action in respect of an instrument arising out of a revision of the Convention would be subject to Australia's domestic treaty-making procedures, including tabling and consideration by the Joint Standing Committee on Treaties.

Withdrawal or denunciation

36. Article 13(1) of the Convention provides that a Member may denounce the Convention during a twelve-month interval after the expiration of ten years from the date of the entry into force of the Convention. If this right is not exercised, Members will be bound for another period of ten years and thereafter may denounce the Convention at the expiration of each successive ten-year period (Article 13(2)). Such denunciation would take effect one year after the registration of the act of denunciation with the Director-General (Article 13(1)).

37. The ten-yearly interval for denunciation of an ILO Convention is a standard period and is included in nearly all ILO Conventions.

38. The next opportunity to denounce the Convention would be in the 12 months following 19 June 2016 (the next ten-yearly interval after the date of entry into force of the Convention generally).

39. Article 17 of the Convention provides that if the ILO Conference adopts a new convention that revises this Convention in whole or in part, ratification of the new convention shall entail the immediate denunciation of this Convention unless otherwise specified.

40. Any action to denounce the Convention, or ratify a replacement convention, would be subject to Australia's domestic treaty-making procedures.

Contact details

International Labour Standards Section
Workplace Relations Policy Group
Department of Education, Employment and Workplace Relations

ATTACHMENT ON CONSULTATION

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CONSULTATION

Consultation with State and Territory governments

41. There has been consultation with State and Territory governments on the Convention at both the Ministerial and officials' levels.
42. States and Territories were provided with the opportunity to comment on the draft texts of the Convention and to provide information for inclusion in the briefing for the Australian delegation to the International Labour Conference in 1972 (when the Convention was first discussed) and 1973 (which was the Conference at which the Convention was adopted).
43. The possible ratification of the Convention has been discussed on numerous occasions between the Commonwealth, States and Territories since it was adopted in 1973.
44. The status of Australia's compliance with the Convention and prospects of ratification has been regularly discussed at the annual meetings of Commonwealth, State and Territory officials responsible for ILO matters. Most recently, the Convention was considered at annual meetings held in October 2010, September 2011 and September 2012. Regular teleconferences were also held throughout 2011 and 2012.
45. Briefing on the Convention was provided to the Standing Committee on Treaties for the meetings of 5 October 2011, 15 May 2012 and 4 October 2012.
46. On 20 March 2011, the then Minister for Employment and Workplace Relations, Senator Chris Evans (the former Minister), wrote to State and Territory workplace relations ministers seeking their agreement to consider four conventions for ratification in the 2011-2012 biennium, including the Convention. All State and Territory ministers agreed to these Conventions.
47. On 14 July 2011, the former Minister wrote to State and Territory workplace relations ministers seeking advice on their support for ratification of the Convention and an assessment on law and practice in their respective jurisdictions. The current Minister for Employment and Workplace Relations, the Hon Bill Shorten MP, also wrote to relevant jurisdictions on 22 August 2012 where requested advice was still outstanding.

48. All State and Territory governments have made available advice indicating that their law and practice is consistent with the Convention. Furthermore, seven of the eight governments have formally provided their support for Australia's ratification of the Convention. The Victorian Government has raised no objection to Australia's ratification of the Convention but is yet to provide formal advice of support for ratification.

49. The Convention was discussed at the Workplace Relations Ministers' Council (WRMC) meeting of 10 August 2011 and the first meeting of the Council of Australian Governments Select Council on Workplace Relations (replacing the WRMC) on 6 July 2012.

Norfolk Island

50. Article 35 of the ILO Constitution provides that where the subject matter of a convention is within the self-governing powers of a non-metropolitan territory of a Member, that Member shall bring the relevant convention to the attention of government of the territory as soon as possible after ratification, with a view to its implementation by the territory. Thereafter the Member, with the agreement of the government of the territory, may lodge a declaration accepting the obligations of the relevant convention on behalf of the territory.

51. The *Norfolk Island Act 1979* provides that the Norfolk Island legislature has legislative competence over 'child, family and social welfare' and also (together with the Commonwealth) legislative competence over 'labour and industrial relations, employees' compensation and occupational health and safety'. Accordingly, consistent with established practice, the Government will consult the Norfolk Island authorities following ratification of the Convention and, subject to their agreement, may lodge a declaration accepting the obligation of the Convention on behalf of Norfolk Island.

Other consultation

52. The proposed treaty-action has been discussed at meetings of the International Labour Affairs Committee (ILAC) of the National Workplace Relations Consultative Council on a periodic basis since the Convention was adopted by the ILO in 1973. The ILAC comprises the Commonwealth Department of Education, Employment and Workplace Relations, the Australian Council of Trade Unions (ACTU), the Australian Chamber of Commerce and Industry (ACCI) and the Australian Industry Group (Ai Group). These organisations are, respectively, the worker and employer organisations that represent Australia in the ILO. Most recently, the Convention has been discussed at the ILAC meetings of 1 November 2010, 25 February 2011, 3 May 2011, 14 October 2011, 9 March 2012 and 12 October 2012.

53. The ACTU supports Australia's ratification of the Convention.

54. The ACCI and the Ai Group do not support Australia's ratification of the Convention. ACCI and Ai Group have expressed the view that there are no urgent domestic policy reasons to warrant ratification of the Convention at this time. Further, as

many jurisdictions do not have dedicated child employment legislation covering the entire scope of the Convention, ACCI and Ai Group have indicated their concern that the ILO may in time question aspects of Australia's implementation of the Convention.

55. The Department has discussed extensively these issues with the social partners at ILAC since 2010. As outlined in paragraphs 7–9 above, there are compelling reasons that warrant ratification at this time. The Department has also indicated to the ACCI and Ai Group that Australia can demonstrate compliance with the Convention and that utilisation of the flexibility provisions under Article 3 and Article 4 of the Convention addresses concerns in this regard (see paragraphs 23-31 above).