

**National Interest Analysis [2022] ATNIA 9
with attachment on consultation**

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

adopted at Geneva on 26 June 1973

[2022] ATNIF 10

NATIONAL INTEREST ANALYSIS: CATEGORY 1 TREATY

SUMMARY PAGE

**International Labour Organization Convention No. 138:
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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 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 of the International Labour Office. Article 12(1) provides the Convention is binding only upon ILO Members that have registered their ratification with the Director-General.
3. It is proposed that Australia ratify the Convention as soon as practicable. Under Articles 12(1) and 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 or work as 15 years. No reservations will be made upon ratification and ratification will result in the denunciation of three out-dated ILO conventions Australia has ratified (refer to paragraph 20 below).

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 work likely to jeopardise the health, safety or morals of young persons (noting this may be reduced to 16 years in certain circumstances outlined in paragraph 14 below).
6. Ratification would greatly enhance Australia's standing in the international community and the ability to address labour rights issues authoritatively, including modern slavery issues, 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. It would also 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 48.7 million child labourers in the Asia-Pacific region. Worldwide, there are 160 million child labourers, with 79 million involved in hazardous work.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 ten 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 this fundamental convention within the ILO's goal of universal ratification of fundamental conventions, as well as demonstrating its commitment to the fundamental principles and rights at work. The Convention has been ratified by 175 of the 187 ILO Members.

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 or work to a level consistent with the fullest physical and mental development of young persons.

13. Article 2(1) of the Convention requires each Member to specify, in a declaration appended to its ratification, a minimum age of admission to employment or work not less than the age of compulsory schooling and, in any case, not less than 15 years of age (Article 2(3)). Under Article 2(1), 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. As noted above, 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 or work which is likely to jeopardise the health, safety or morals of young

¹ International Labour Organization and United Nations Children's Fund, "Child Labour: Global Estimates 2020, Trends and the Road Forward", 2021

persons (known as hazardous work) shall be 18 years. This may be reduced to 16 years on the condition that the health, safety and morals of the young persons concerned are fully protected and that they have received adequate specific instruction or relevant 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 years 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. Article 4(2) further requires Members to state in subsequent reports its domestic legal position and practice on the excluded categories and extent to which effect of such categories has been or is proposed to be given. 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 in schools for general, vocational or technical education or in training institutions. Article 6 also provides that Convention does not apply to work done by persons aged at least 14 years: (a) carried out in accordance with conditions prescribed by competent authorities; (b) after consultation between employer and worker organisations; and (c) where the work forms an integral part of a school or institutional training course, training program approved by competent authorities or guidance or orientation designed to facilitate choice of occupation or a line of training.

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

18. Article 8 provides for exceptions to the minimum age requirements established in Article 2 in individual cases for young persons to participate in artistic performances via permits which limit the number of hours and prescribe the conditions in which such employment or work is allowed.

19. Article 9 requires that all necessary measures be taken by the competent authority of Members 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. 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. 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. 112 and 123 will take effect immediately upon its ratification of the Convention, and denunciation of Convention No. 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 was registered with the Director-General in 2023, the Convention would enter into force for Australia one year later, and the first report would be due on 1 September 2025.

Implementation

23. 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 workplace health and safety (WHS), education and youth.

24. Between 2018 and 2020 states and territories advised the Commonwealth that their laws comply with the Convention and that they support ratification, noting that New South Wales only provided in-principle support at that time (see paragraphs 41-55 for details of consultations with States and Territories). States and Territories were further advised of the Commonwealth's intention to progress ratification of the Convention on 9 August 2022 and given the opportunity to provide feedback.

25. Although the Office of International Law in the Attorney-General's Department has expressed reservations that some State and Territory laws do not meet the minimum age requirements of Article 3 of the Convention in respect of hazardous work (see paragraph 29 below), in most fundamental respects, the combination of law and practice at the Commonwealth, State and Territory levels achieve broad overall compliance with Australia's obligations under the Convention.

26. 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 persons under 18 years from performing certain types of hazardous work. A strong compliance regime for compulsory education, WHS and other relevant legislation is in place in each jurisdiction, with the provision of penalties as appropriate.

27. 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, consistent with the Convention) and strong WHS 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. The International Labour Office has indicated that other ILO Members (for example, the United Kingdom) have utilised this approach to demonstrate compliance with the Convention.

28. All States and Territories have indicated that they comply with the Convention taking into account their reliance on provisions which recognise national laws and regulations and the consultative role of employer and employee organisations in shaping national labour standards.

29. In relation to hazardous work, Article 3(3) permits Members to allow persons from the age of 16 years to perform hazardous work in certain situations. While legislation prevents young persons in Australia from performing the worst forms of hazardous work until they are 18 years, 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 years, consistent with existing State and Territory legislation.

30. In some States and Territories the law alone does not preclude persons under the age of 16 years from engaging in hazardous work; however the combination of WHS laws, compulsory schooling and sector specific requirements, significantly restrict the

circumstances where such persons can do so. The Commonwealth is also committed to working with States and Territories to align these laws with the Convention.

30. 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 years 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).

31. 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 compulsory education. WHS and other relevant laws continue to apply to children working in these categories of employment.

32. As noted in paragraph 18 above, Article 8 provides exceptions to the minimum age requirements established in Article 2 in individual cases for young persons to participate in artistic performances via permits. These permits are provided to young persons in Australia so 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, consistent with the Convention requirements). WHS and child welfare legislation also regulates the work of children in this industry.

Costs

33. There are no costs associated with the ratification of the Convention.

Regulation Impact Statement

34. The Office of Best Practice Regulation, Department of Prime Minister and Cabinet, 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, if the Governing Body of the ILO considers necessary, it shall present the International Labour Conference with a report on the working of the Convention and shall examine whether the question of its revision in part or in full 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 affected 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 2026 (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

Economic and International Labour Branch
Workplace Relations Group
Department of 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 a meeting in April 2022. All State and Territory governments have made available advice indicating that their law and practice is consistent with the Convention.
45. State and Territory Governments have been advised of the Convention through the Standing Committee on Treaties' (SCOT) Schedule of Treaty Action, most recently ahead of the SCOT meeting held 18 November 2021.
46. On 9 August 2022, the Minister for Employment and Workplace Relations, the Hon Tony Burke MP, wrote to State and Territory industrial relations Ministers seeking confirmation of their support to ratify the Convention.

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 Employment and Workplace

Relations, the Australian Council of Trade Unions (ACTU) and the Australian Chamber of Commerce and Industry (ACCI). These organisations are, respectively, the worker and employer organisations that represent Australia in the ILO.

53. The ACTU and ACCI support Australia's ratification of the Convention.

