



The International Labour Organisation's core labour standards and the *Workplace Relations Act 1996*

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Executive summary

- Over the years since its foundation in 1919, the International Labour Organisation (ILO) has developed a comprehensive framework of minimum labour standards. During the 1990s, with the acceleration of globalisation and its associated competitive and economic pressures on labour markets, the ILO sought to reinvigorate its agenda. It did this by focusing on the implementation of what it identified as 'fundamental' conventions and their associated 'core' labour standards, and by promoting the concept of 'decent work'. It aimed to ensure that economic progress went hand in hand with social progress and was not achieved at the expense of fundamental human rights.
- The core standards identified by the ILO relate to the elimination of all forms of forced or compulsory labour, the abolition of child labour, freedom of association and recognition of the right to collective bargaining, the elimination of any discrimination in employment and occupation, and the recognition of equal remuneration for work of equal value.
- Australia has been a foundation and active member of the ILO. It encountered some compliance issues prior to 1996. However, the passage of the *Workplace Relations Act 1996* (Workplace Relations Act) and the further reforms implemented by the *Workplace Relations Amendment (Work Choices) Act 2005* resulted in significantly increased concerns for Australia's compliance with its international obligations under the ILO's fundamental conventions. Since 1997, there has been an ongoing process of dialogue between the Australian Government and the ILO's supervisory bodies over compliance issues.
- The ILO's supervisory bodies have been concerned that Australia's efforts to protect freedom of association and encourage and promote collective bargaining (Conventions Nos. 87 and 98) fall short of the standards required by these fundamental conventions. The lack of progress towards equal remuneration has also been a concern. More specifically, aspects of the Workplace Relations Act which have given rise to concerns are those provisions which: give primacy to individual over collective forms of agreement; restrict the level at which bargaining can occur; limit what may be included in a collective agreement; raise the potential for anti-union discrimination; place limitations on trade unions' rights to organise; and impose limits on strike action beyond those envisaged by Convention No. 87.
- The paper outlines the ILO's concerns and examines future prospects, including by assessing relevant Australian Labor Party (ALP) and Australian Greens' policy commitments. It concludes that while not without compliance issues, the ALP policy would appear to address a significant number of key areas of concern. The Greens' policy commitments suggest that they will seek to pressure the Labor Government to address the remaining areas of concern in relation to international obligations.

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Introduction

Australia does not have a bill of rights, but it has ratified a range of major international covenants and conventions which have been designed to provide a system of protection of fundamental human rights and standards.¹ These include international labour standards developed by the International Labour Organisation (ILO) and its member states to protect and promote rights at work. These standards provide a comprehensive range of labour obligations and binding international legal commitments.

This paper outlines the role of the ILO and its supervisory bodies in the development and implementation of international labour standards. It notes the continuing attempts of the ILO to refocus the attention of its member states on the adoption and implementation of a set of fundamental conventions and core labour standards in the context of the pressures of globalisation. It examines the ILO's concerns for the impact of the *Workplace Relations Act 1996* (Workplace Relations Act) on Australia's compliance with core labour standards. It also considers future prospects, including the potential for the Rudd Labor Government to address compliance issues.

Background

Foundation of the ILO

The ILO was founded in 1919, in the wake of the First World War. In 1919, the achievement of social justice was seen as an essential prerequisite for the maintenance of world peace. The ILO was entrusted with working towards this objective and was given the task of adopting international labour standards as its principal means of action. This vision was set out in the preamble to the ILO's constitution, which also identified priorities in carrying out this program:

... conditions of labour exist involving such injustice hardship and privation to large numbers of people as to produce unrest so great that the peace and harmony of the world are imperilled; and an improvement of those conditions is urgently required; as, for example, by the regulation of the hours of work including the establishment of a maximum working day and week, the regulation of the labour supply, the prevention of unemployment, the provision of an adequate living wage, the protection of the worker against sickness, disease and injury arising out of his employment, the protection of children, young persons and women, provision for old age and injury, protection of the interests of workers when employed in countries other than their own, recognition of the principle of equal

1. For further detail see H. Charlesworth, 'A Bill of Rights: An end to our solitude', in *Time for change: Australia in the 21st century*, T. Wright (ed.), Hardie Grant Books, Victoria, 2006, pp. 217–236.

remuneration for work of equal value, recognition of the principle of freedom of association, the organisation of vocational and technical education and other measures.²

In 1944, the ILO Conference adopted the *Declaration of Philadelphia*, which was subsequently incorporated into the ILO's constitution. Importantly for the work of the ILO, the Declaration established the principle of the primacy of social objectives over those of economic policy and marked a shift in emphasis to the protection of fundamental rights of the individual. It made the ILO responsible for promoting basic human rights in the workplace, including the principle that:

... all human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity ... it is the responsibility of the International Labour Organisation to examine and consider all international and fiscal policies and measures in the light of this fundamental objective.³

Originally part of the League of Nations, the ILO became an agency of the United Nations (UN) in 1946.

How the ILO works⁴

The ILO is the only tripartite UN agency. It brings together representatives of governments, employers and workers to shape its policies and programmes. The ILO considers that this arrangement allows it to incorporate practical knowledge about employment and work into its agenda and outputs.

The member states of the ILO meet at the International Labour Conference in June of each year, in Geneva. Two government delegates, an employer delegate and a worker delegate represent each member state. Technical advisors assist the delegations, which are usually headed by Cabinet Ministers who take the floor on behalf of their governments.

2. Preamble to the Constitution of the International Labour Organisation, 1919. Also see M.Humblet and M. Zarka-Martres, 'ILO standards policy', in International Labour Office, *International labour standards: a global approach*, 1st edn., Geneva, 2001, pp. 1–15.

3. 'Declaration concerning the aims and purposes of the International Labour Organisation' (Declaration of Philadelphia), contained in the *Annex to Constitution of the International Labour Organisation*, <http://www.ilo.org/ilolex/english/iloconst.htm>, accessed 25/9/2007.

4. This section is largely based on information available on the ILO's website. For further information about how the ILO works, see International Labour Organisation, 'About the ILO', <http://www.ilo.org>, accessed 7/9/2007; and International Labour Office, *Rules of the game: a brief introduction to international labour standards*, Geneva, 2005. For further information see B. Creighton and A. Stewart, *Labour law: An introduction*, 4th edn., Federation Press, Sydney, 2005, pp. 66–73.

The Governing Body is the executive council of the ILO and meets three times a year in Geneva. It comprises 56 members, of whom 28 represent governments, 14 represent workers and 14 represent employers. Ten of the 28 government seats are reserved for the states of 'chief industrial importance'.⁵ The Governing Body takes decisions on ILO policy and establishes the programme and the budget, which it then submits to the Conference for adoption.

The International Labour Office is the administrative arm of the ILO. It is headed by the Director General who is elected by the Governing Body for a renewable term of five years. The Office is answerable to the Governing Body through the Director General.

Creating international labour standards

The ILO formulates instruments that set minimum standards for basic labour rights. These instruments are generally conventions, which are legally binding international treaties that may be ratified by member states. However, the ILO also uses other mechanisms to establish important standards or principles, such as declarations adopted by its conference (for example, the 1944 Declaration of Philadelphia, and the 1998 Declaration on Fundamental Principles and Rights at Work).

The ILO also formulates recommendations, which serve as non-binding guidelines that complement its conventions.

International labour standards generally result from international concern that action needs to be taken on a particular issue. As a first step, the Governing Body agrees to put an issue on the agenda of a future International Labour Conference. The International Labour Office then prepares a report that analyses the laws and practices of member states with regard to the issue. The report is circulated to member states and to workers' and employers' organisations for comment and is discussed at the International Labour Conference. A second report is then prepared by the Office with a draft instrument for comment and submitted for discussion at the following Conference, where the draft is amended as necessary and proposed for adoption. This double discussion process gives Conference participants time to examine the draft instrument and provide comments.

A two-thirds majority of votes by delegates is required for an international labour standard to be adopted. This has a number of benefits, as Creighton and Stewart note. It means that:

... a standard cannot be adopted in the face of concerted opposition from government delegates. It also means that a standard is unlikely to be adopted in the face of the concerted opposition of employer or union delegates ... This sometimes means that standards which are adopted represent the 'lowest common denominator' ... On the other hand, it also means

5. Constitution of the International Labour Organisation, Article 7.

that those standards which are adopted have a unique authority by virtue of the fact that they have received a significant measure of acceptance with all three constituencies.⁶

In 2003, the ILO began using an integrated approach to improve the coherence, relevance and impact of its standards-related activities. This approach involves developing a plan of action, including a package of tools to address a specific subject. These tools may include conventions, recommendations and other types of instruments, promotional measures, technical assistance, research, dissemination of knowledge and inter-agency cooperation.

The application of international labour standards

ILO member states are required to submit any convention adopted at the International Labour Conference to their national competent authority(s)—generally their parliament(s)—for the enactment of relevant legislation or other action, including ratification. They are required to do this:

... within the period of one year at most from the closing of the session of the Conference, or if it is impossible owing to circumstances to do so within the period of one year, then at the earliest practicable moment and no later than 18 months from the closing of the session of the Conference ...⁷

If the member state does not obtain the consent of the competent authority (or authorities), then no further obligation rests on the member except in relation to reporting requirements.⁸

Ratified conventions become binding one year after the date of ratification, and remain binding until denounced under established procedures. Ratification is a formal procedure whereby a state accepts the convention as a legally binding instrument. Ratified conventions have the effect of a treaty in international law. Ratification obliges the country concerned to maintain its law and practice in conformity with the convention. Once it has ratified a convention, a country is subject to the ILO's regular supervisory system responsible for ensuring that the convention is applied.

Most of the ILO's standards are drafted with provision for some flexibility in their application—recognising the considerable diversity of member nations' cultural, legal and institutional arrangements and stages of development. For example, standards on minimum wages do not require member states to set a specific minimum wage, but to establish a system and the machinery to determine minimum wage rates appropriate to their economic development. Other standards include flexibility clauses allowing states to lay down temporary standards that are lower than those normally prescribed, to exclude certain categories of workers from the application of a convention, or to apply only certain parts of the instrument. Ratifying countries are usually required to make a declaration to the Director

6. *ibid.*, p. 68.

7. Constitution of the International Labour Organisation, Article 19(5)(b).

8. *ibid.*, Article 19(5)(e).

General of the ILO if they exercise any of the flexibility options, and to make use of such clauses only in consultation with the social partners (that is, representatives of employers and workers).

The supervision of international labour standards

Member states are required to report to the ILO on the measures they have taken to give effect to ratified conventions, according to the type of instrument and the schedule notified by the International Labour Office.

Every two years governments must submit reports detailing the steps they have taken in law and practice to apply any of the eight fundamental and four priority conventions⁹ that they have ratified. For all other conventions, reports must be submitted every five years; except for conventions that have been shelved (these are no longer supervised on a regular basis). Reports on the application of conventions may also be requested at shorter intervals. In addition, each year a general survey is conducted on one or more conventions or recommendations relating to a particular subject and all member states are required to report, irrespective of whether they have ratified the instruments concerned. Representative worker and employer organisations have the opportunity to comment before government reports are sent to the ILO.

Conventions are not only of influence in the countries where they have been ratified. Governments that have not ratified conventions may use them as guidance when developing their labour legislation. Member states also have an obligation to report on unratified conventions at appropriate intervals as requested by the Governing Body. Representative worker and employer organisations have the opportunity to comment on these reports. A streamlined annual reporting process applies to any of the fundamental conventions that governments have not ratified.¹⁰

The ILO's supervisory bodies—the Committee of Experts on the Application of Conventions and Recommendations (Committee of Experts or CEACR) and the Conference Committee on the Application of Standards (CCAS)—regularly examine these reports to assess the application of standards in member states. The Governing Body is also empowered to require member states to report on the obstacles preventing or delaying ratification of nominated conventions.

9. Fundamental and priority conventions are defined in the following section.

10. Reporting requirements for the fundamental conventions were defined in ILO, *Declaration on fundamental principles and rights at work and its follow-up*, http://www.ilo.org/dyn/declaris/DECLARATIONWEB.static_jump?var_language=EN&var_pagename=DECLARATIONFOLLOWUP, accessed 25/9/2007.

The Committee of Experts is composed of 20 eminent jurists appointed by the Governing body for three-year terms. Its role is to provide an impartial and technical evaluation of the state of application of the ILO's standards.¹¹

The annual report of the Committee of Experts, usually adopted in December, is submitted to the International Labour Conference the following June, where it is examined by the Conference Committee on the Application of Standards. The Conference Committee is a standing committee of the Conference and is made up of government, employer and worker delegates. It examines the Committee of Experts' report, selects observations for discussion and may invite governments referred to in the report to respond before the Conference Committee.

If there are any problems in the application of standards, the ILO generally seeks to assist countries through dialogue with the government concerned, as well as providing advice and technical assistance. In this context, dialogue between the ILO and the government concerned may involve 'direct requests' or 'observations'.

The Committee of Experts often makes *unpublished* direct requests to governments, pointing to apparent problems in the application of a standard and giving the country concerned time to respond and tackle these issues.¹²

Observations are assessments of a government's compliance with a convention, which are *published* in the report of the Committee of Experts. They generally only occur when the Committee is not satisfied with the progress of the closed process of dialogue through direct requests. It should be noted that observations are not legal determinations and are not finally binding. Only the International Court of Justice can provide a definitive view of the meaning of a convention. However, observations are authoritative in the sense that they represent the considered views of a panel of eminent jurists elected for the purpose of providing an impartial, technical evaluation of the application of the ILO's conventions. The reports of the Committee of Experts provide the basis for discussion at the Conference Committee on the Application of Standards.

Representation and complaint procedures can also be initiated for states that fail to comply with conventions they have ratified.

Representations may be made by organisations of employers or workers. The Governing Body decides whether or not to receive a representation. Where appropriate, a representation

11. For some years, the Chair of the Committee has been Justice Robyn Layton of the South Australian Supreme Court.

12. Note that the distinction between published and unpublished direct requests has been breaking down with the advent of the Internet. While requests are not published in the ILO's hard copy reports, information on direct requests is now available through the ILO's Database of International Labour Standards (ILOLEX) on its website (<http://www.ilo.org/iloex>), accessed 20/9/2007.

may be referred to the Committee on Freedom of Association, or it may be examined by a tripartite committee of the Governing Body and result in a published report of the committee's assessment of compliance. The Governing Body will make findings and may decide to pass such a report to the Committee of Experts for follow-up. The Governing Body can also establish a Commission of Inquiry to deal with the matter as a complaint.

Complaints may be filed by member states that have ratified the relevant convention, or by a delegate to the Conference, or be referred by the Governing Body (as above). Where complaints concern trade union rights, they may be referred to the Committee on Freedom of Association. Complaints are generally investigated by a Commission of Inquiry, conducted by a panel of eminent jurists. Where a Commission of Inquiry is held, the ILO publishes its report and the government can either accept the recommendations, or appeal to the International Court of Justice. Where a member state fails to carry out recommendations of a Commission of Inquiry within the time specified, the Governing Body may recommend to the Conference 'such actions it may deem wise and expedient to secure compliance'.¹³ This could include recommending the application of diplomatic and trade pressures or the use of media and public opinion to focus attention on the issue.

A special procedure—the Committee on Freedom of Association (CFA)—reviews complaints concerning violations of freedom of association, whether or not a member state has ratified the relevant conventions. This is because the principles of freedom of association are considered to be guaranteed under the ILO Constitution to which member states are bound, irrespective of ratification of conventions. The CFA is a Governing Body committee. If it finds that there has been a violation of freedom of association standards or principles, it issues a report through the Governing Body and makes recommendations on how the situation could be remedied. Governments are subsequently requested to report on the implementation of such recommendations.

Targeting core labour standards through fundamental conventions

The mid to late 1990s marked a new phase for the ILO, which sought to reposition itself in the multilateral arena and re-establish its credibility as an influential international agency. It did this by refocusing the attention of its member states on the implementation of a set of core labour standards contained in conventions identified as fundamental. These instruments were concerned with the protection of fundamental human rights that were seen to attain heightened importance in the context of globalisation. The ILO has been successful in having its revised agenda endorsed by a number of international organisations. Key steps leading to the adoption of this approach are outlined at [Appendix A](#).

The ILO's *Declaration on Fundamental Principles and Rights at Work*, which was accepted at the 1998 International Labour Conference, recognised that:

13. Constitution of the International Labour Organisation, Article 33.

... all Members, even if they have not ratified the Conventions in question [that is, the fundamental conventions], have an obligation arising from the very fact of membership in the Organisation, to respect, to promote and to realise, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions.

This Declaration has been recognised as marking 'a new and important step in the ongoing struggle to develop multilateral instruments that will reconcile the globalisation process with the need to preserve the core rights of labour.'¹⁴ In relation to these core rights, their recognition was not to be governed by the national context or the level of economic development. Further, as noted above, the source of the obligation to implement these principles and fundamental rights was said to lie in membership of the ILO, not ratification of the conventions.

A follow-up to the Declaration established arrangements to encourage member states to promote the fundamental principles and rights enshrined in the Declaration. These include technical cooperation, simplified annual reporting requirements in relation to unratified fundamental conventions, and global reports. The latter are reports submitted to the ILO's annual conference by the Director General and focus on a different fundamental convention each year.¹⁵

In 2005, the Director General outlined the underlying rationale for the Declaration on Fundamental Principles and Rights at Work, as follows:

The fundamental principles and rights which are the subject of the Declaration seek to enable people 'to claim freely and on the basis of equality of opportunity their fair share of the wealth which they have helped to generate, and to achieve fully their human potential'. Freedom of association and the effective recognition of the right to collective bargaining are the foundation for a process in which workers and employers make claims upon each other and resolve them through a process of negotiation leading to collective agreements that are mutually beneficial. In the process, different interests are reconciled. For workers, joining together allows them to have a more balanced relationship with their employer. It also provides a mechanism for negotiating a fair share of the results of their work, with due respect for the financial position of the enterprise or public service in which they are employed. For employers, free association enables firms to ensure that competition is constructive, fair and based on a collaborative effort to raise productivity and conditions of work.¹⁶

The core standards (and associated fundamental conventions) cover:

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14. C. Nyland and R. Castle, 'The ILO and the Australian contribution to the international labour standards debate', *Journal of Industrial Relations*, 41(3), September 1999, p. 365.
 15. Declaration on fundamental principles and rights at work and its follow-up, op. cit.
 16. International Labour Office, Report of the Director General, Organising for social justice: Global report under the follow-up to the ILO declaration on fundamental principles and rights at work, International Labour Conference, 92nd Session 2004 Report I (B), p. 1.

- the elimination of all forms of forced or compulsory labour (Conventions Nos. 29 and 105)
- the abolition of child labour (Conventions Nos. 138 and 182)
- freedom of association and the effective recognition of the right to collective bargaining (Conventions Nos. 87 and 98)
- the elimination of any discrimination in employment and occupation and the recognition of equal remuneration for work of equal value (Conventions Nos. 100 and 111).

A brief summary of the fundamental conventions is provided at [Appendix B](#).

The ILO's Governing Body has also designated another four conventions as priority instruments, thereby encouraging member states to ratify them because of their importance for the functioning of the international labour standards system. These conventions are:

- Labour Inspection Convention, 1947 (No. 81)
- Labour Inspection (Agriculture) Convention, 1969 (No. 129)
- Tripartite Consultation (International Labour Standards) Convention, 1976 (No. 144)
- Employment Policy Convention, 1964 (No. 122).

It should be noted, that there has been some debate about the extent to which the 1998 Declaration and the ILO's focus on core labour standards has strengthened the international labour rights regime. For example, Alston has criticised the 'lack of definable content for the principles,' and argued that the supervisory and follow-up mechanisms for the Declaration needed to be strengthened. He also noted:

The Declaration's privileging of a limited range of process rights and its neglect of substantive norms such as those relating to safety and health, minimum wages, and reasonable conditions of work has been criticised by a great many commentators.¹⁷

A note on the Economic Benefits of Core Labour Standards

It is beyond the scope of this paper to examine fully the economic costs and benefits of international labour standards. It must be acknowledged, however, that the critics of labour standards often argue that the adoption of such standards distorts market mechanisms by affecting the price of labour and reducing its supply. They also suggest that the adoption of international labour standards can lead to a reduction in foreign investment and may be

17. P. Alston, 'Facing up to the complexities of the ILO's core labour standards agenda', *European Journal of International Law*, 16(3), 2005, pp. 467–480.

regarded as a form of protectionism.¹⁸ Consequently, they argue that standard setting should be left to a freely operating labour market.¹⁹

There is, however, a significant body of literature that argues that international labour standards make good economic sense. Turnell summarises the arguments:

... the adoption of core labour standards confers economic benefits to developing and developed countries alike. It offers the possibility for greater human capital formation, can increase the supply of labour through the elimination of arbitrary discrimination, and is likely to increase foreign investment into developing countries through its promise of greater economic and social stability. The adoption of core labour standards is also likely to bring greater democratic legitimacy to international economic institutions, the pillars that support the emerging liberal trading order.²⁰

This view has received some support from two major studies by the Organisation for Economic Cooperation and Development (OECD). In 1996, the OECD released a study which examined the link between core labour standards and trade, drawing on information from more than 70 countries. It concluded that the adoption of core labour standards did not have any negative consequences for the economies and trade of developing countries and did not undermine their competitive position. It also suggested that:

... it is conceivable that the observance of core standards would strengthen the long-term economic performance of all countries.²¹

In 2000, the OECD undertook a second study which essentially confirmed the results of the 1996 study. In 2000, the OECD tentatively concluded that:

Countries which strengthen their core labour standards can increase economic efficiency by raising skill levels in the workforce and by creating an environment which encourages innovation and higher productivity ... The results suggest that countries that develop democratic institutions – here taken to include core labour rights – before the transition to

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18. That is, insofar as they deprive developing countries of one of their key comparative advantages: the ability to use low-cost labour productively. See N. Haworth and S. Hughes, 'Trade and international labour standards: Issues and debates over a social clause', *Journal of Industrial Relations*, 39(2), June 1997, p. 180.
 19. These arguments are summarised in more detail by Haworth and Hughes, *ibid.*, pp. 179–195. Also see J Bhagwati, 'Policy perspectives and future directions: A view from academia', *International labour standards and global economic integration: Proceedings of a symposium*, United States Department of Labor, Washington DC, July 1994.
 20. S. Turnell, 'Core labour standards and the WTO', Macquarie University, Department of Economics, Research Paper Series, March 2001, p. 3.
 21. OECD, *Trade, employment and labour standards: A study of core workers' rights and international trade*, Paris, 1996, p. 105. Also see R. Torres, 'Labour standards and international trade', Special edition of the OECD Observer for the WTO Ministerial Conference in Singapore, OECD, Paris, December 1996.

trade liberalisation will weather the transition with smaller adverse consequences than countries without such institutions.²²

In 2001, the World Bank observed that:

Keeping labour standards low is not an effective way of gaining a competitive advantage over trading partners. Indeed, low labour standards are likely to erode competitiveness over time because they reduce incentives for workers to improve skills and for firms to introduce labour-saving technology.²³

It has also been claimed that the 'decisive argument' for having international labour standards is that 'only if workers' fundamental rights are taken out of the competitive arena by international agreement, is it possible to ensure that producers who respect those rights are not put at a competitive disadvantage.'²⁴

The ILO has also examined the economic benefits of the core standards, for example, arguing that child labour is detrimental to development since it means that the next generation of workers will be unskilled and less well-educated. Further, collective bargaining and tripartite dialogue are necessary elements for creating an environment that encourages innovation and higher productivity, attracts foreign direct investment and enables the society and economy to adjust to external shocks, such as financial crises and natural disasters. In addition, the discrimination faced by women and minority groups are important obstacles to economic efficiency and social development.²⁵

More recently, a joint study undertaken by the International Labour Office and the Secretariat of the World Trade Organisation examined the connections between trade, labour and social policies. It concluded that trade policies and labour and social policies do interact. It also found that greater policy coherence in the two domains can have significantly positive impacts on the growth effects of trade reforms and thus, ultimately, on their potential to improve the quality of jobs around the world.²⁶

22. OECD, *International trade and core labour standards*, Paris, 2000, p. 15.

23. World Bank, *Global economic prospects and the developing countries 2001*, Washington D.C., 2001.

24. C. Scherrer, 'The economic and political arguments for and against social clauses', *Intereconomics*, January/February 1996, p. 20.

25. For the ILO's summary of the economic benefits of international labour standards see *Rules of the game*, op. cit., pp. 6–10. Also see Turnell, op. cit., pp. 3–4. Turnell cites a 'growing array of studies independent of official bodies' that argue the economic benefits of enforcing core labour standards. For specific citations refer to his paper.

26. International Labour Office and the Secretariat of the World Trade Organisation, *Trade and employment: Challenges for policy research, a joint ILO/WTO Secretariat study*, Geneva, February 2007.

Australia and the ILO

Australia has been a member of the ILO since its foundation in 1919 and has played an active role in its activities for most of that period. However, as at September 2007, Australia had ratified only 55 of the more than 180 current conventions.²⁷ The number of conventions that Australia has ratified is generally lower than the number ratified by the Western European countries, although it is generally higher than the number ratified by Australia's neighbours and trading partners in the Asia-Pacific region, with the exception of Indonesia, and higher than Canada or the USA.²⁸ It should be noted, however, that ratification does not necessarily denote compliance.²⁹

Australia has ratified all but one of the fundamental conventions. Australia has not ratified the Minimum Age Convention³⁰ as Table 1 below shows.

Australia's relatively low ratification rate is generally explained by reference to:

- Australia's general practice of only ratifying conventions when law and practice in all jurisdictions is in conformity with the requirements of those conventions.
- The Constitutional division of legislative power between the Commonwealth and the states, which results in multiple jurisdictions, and differences between jurisdictions in law and practice and makes implementation more complex.
- The difficulties involved in securing agreement with the states and territories that are considered to be necessary to establish and maintain compliance.³¹

27. Of these 55, only 47 are in force—8 have been denounced.

28. Creighton and Stewart, *op. cit.*, pp. 74–76; and B. Creighton, 'The ILO and the protection of fundamental human rights in Australia', *Melbourne University Law Review*, 22(2), August 1998, pp. 254–255. Also see Table 1 for ratifications by selected countries.

29. Creighton and Stewart, *op. cit.*, p. 76.

30. The requirements of this convention are summarised at Appendix B. The minimum age for employment in Australia is determined, for practical purposes, by State and Territory education legislation which requires children aged up to 15 years (16 in Victoria, Queensland and South Australia, and 17 in Tasmania) to attend school. This legislation, together with Commonwealth, state and territory legislation providing for minimum ages for employment in selected occupations, child welfare, and occupational health and safety, can be said to demonstrate Australia's support for the principles of Convention 138. However, Australia's position has been that it is unable to ratify Convention No. 138 as no state or territory government has legislated to set a general minimum age for employment. Department of Employment and Workplace Relations, 'Australia's decent work action plan: Background paper', 22 February 2005.

<http://www.ilo.ch/public/english/region/asro/manila/downloads/dwaus.pdf>, accessed 24/11/2007.

However, as Creighton and Stewart point out, 'there is no legal, as opposed to political or practical reason why the Commonwealth could not ratify conventions without the agreement of the States and Territories,' and without law and practice in Australia being judged to be in compliance with the convention at the time of ratification. This is because:

- The prerogative powers of the Crown in relation to treaty making are far reaching and not limited to the enumerated matters in relation to which the Australian Parliament has the capacity to make laws under the Constitution.
- Section 51(29) of the Constitution (the external affairs power) can be used to give legislative effect to international labour standards.
- Ratified conventions do not become binding until one year after the date of ratification. This provides time in which to bring law and practice into line with the requirements of a convention.³²

In the early 1990s, the Keating (Labor) Government ratified a number of conventions without the agreement of all states and territories, and legislated to give effect to Australia's obligations under those agreements:

- In March 1990, it ratified the Workers with Family Responsibilities Convention (No. 156) without the agreement of New South Wales or the Northern Territory.
- In February 1993, it ratified the Termination of Employment Convention (No. 158) without the formal agreement of any state or territory, and without any Australian jurisdiction being in compliance.
- Ratification of a number of ILO conventions was used as part of the constitutional foundation for the *Industrial Relations Reform Act 1993*. Provisions of that Act relating to termination of employment, minimum wages, equal pay, parental and family leave and the provision of a right to take industrial action were based on Australia's international obligations.³³

The validity of the Keating Government's strategy was 'with only very partial exceptions, upheld by the High Court in *Victoria v Commonwealth*.'³⁴

31. *ibid.* These arguments also apply to other federal systems, such as the USA and Canada.

32. Creighton and Stewart, *op. cit.*, pp. 76–78.

33. *ibid.*; and B. Creighton, 'The Workplace Relations Act in international perspective', 10 (1997) *Australian Journal of Labour Law*, p. 35, and 'The ILO and the protection of fundamental human rights in Australia', *Melbourne University Law Review*, 22(2), August 1998, pp. 254–255.

34. Creighton and Stewart, *op. cit.*, p. 77.

Developments under the Keating Government were, however, criticised by the Senate Legal and Constitutional References Committee in 1995. When the Howard Government took office in 1996, it put in place arrangements that gave effect to that Committee's recommendations, which were aimed at enhancing the Commonwealth Parliament's role in treaty-making. The changes included a revised process for ratifying treaties, involving:

- the tabling of treaties in both Houses of Parliament for at least fifteen days before any action is taken that would create legally binding obligations in international law
- the preparation of a National Interest Analysis for each treaty
- the establishment of the Parliamentary Joint Standing Committee on Treaties
- the establishment of a Treaties Council
- the creation on the Internet of the Australian Treaties Library.³⁵

The mechanisms put in place go some way towards addressing the controversial issue of the 'democratic deficit' that may be said to result from executive decisions to become a party to international treaties.³⁶

During the early years of the Howard Government, Australia took a less active role in the ILO—withdrawing its Special Labour Adviser from Geneva, decreasing the size of the Australian delegation to the ILO's annual conference and declining to accept election to the Governing Body. The Howard Government also moved to minimise reliance on the external affairs power of the Constitution as the basis for its workplace relations legislation. However, while reliance on the power was reduced, provisions of the Workplace Relations Act relating to equal pay, parental leave and termination of employment remain primarily underpinned by the external affairs power.³⁷

As Creighton observed in 1998, Australia's 'generally impressive [ILO] compliance record has increasingly come under question in recent years.'³⁸ Following implementation of the Workplace Relations Act, Australia received an increased number of direct requests and observations from the ILO, as Table 2 below shows. Creighton analysed the communications and complaints that occurred prior to 1998, and noted that:

35. Creighton and Stewart, *ibid.*, p. 78. For further detail of these changes and the events that led to them see A. Capling, 'Can the democratic deficit in treaty-making be overcome? Parliament and the Australia-United States Free Trade Agreement', in *The fluid state: International law and national legal systems*, H. Charlesworth, M. Chaim, D. Hovell and G. Williams (eds.), The Federation Press, Sydney, 2005, pp. 64–68.

36. This issue is discussed further by J. Uhr, 'Rethinking legislative powers: Parliamentary responses to international challenges', in *The fluid state*, *ibid.*, pp. 18–33.

37. Creighton and Stewart, *op. cit.*, pp. 74–75, 110.

38. Creighton, *Melbourne University Law Review*, *op. cit.*, p. 239.

... until recently, none of these communications or complaints disclosed significant non-compliance with the relevant standards.³⁹

Since 1996, however, ILO communications have raised a number of unresolved non-compliance, or potential non-compliance, issues. In 1998, for the first time in the history of its membership of the ILO, Australia was asked to appear before the Conference Committee on the Application of Conventions and Recommendations to explain its non-compliance with the obligations under the Right to Organise and Collective Bargaining Convention.⁴⁰ Since that time, Australia has been asked to appear before the Conference Committee in 2000, 2005, 2006 and 2007.⁴¹

In more recent years, Australia has increased its involvement in the ILO. Australia ratified the Occupational Safety and Health Convention (No. 155) in March 2004 and the Worst Forms of Child Labour Convention (No. 182) in December 2006. Further, the size of the Australian delegation to the ILO's annual conference was increased in 2004 and a Special Labour Adviser to Geneva was reinstated in 2006. In 2005, Australia was elected to represent the Asia-Pacific region on the Governing Body of the ILO.⁴² Creighton and Stewart speculated in 2005 that the Howard Government's change of approach likely reflected:

... a perception that Australia has a better chance of influencing the policies and programmes of the ILO if it is an active participant in the decision-making process of the

39. *ibid.*, p. 261. For an overview of 'interesting highlights' concerning such communications and complaints, see pp. 261–278.

40. Creighton and Stewart, *op. cit.*, pp. 74–75.

41. It should be noted that Australia's experience is not without precedent amongst advanced Western democratic countries. In the United Kingdom, the Thatcher Government's labour policies and employment legislation attracted regular ILO criticism, as did the New Zealand government's 1991 Employment Contracts Act (which was repealed in 1999). See Haworth and Hughes, *op. cit.*; K. Miller and M. Steele, 'Employment legislation: Thatcher and after', *Industrial Relations Journal*, 24(3), September 1993, pp. 224–235; N. Haworth and S. Hughes, 'Under scrutiny: The ECA, the ILO and the NZCTU complaint 1993–1995', *New Zealand Journal of Industrial Relations*, 20(2), August 1995, pp. 143–161; R. Wilson, 'The decade of non-compliance; the New Zealand Government record of non-compliance with international labour standards 1990–98', *New Zealand Journal of Industrial Relations*, 25(1), February 2000, pp. 79–94; and B. Creighton, 'Freedom of association' in *Comparative labour law and industrial relations in industrialized market economies*, Kluwer Law International, Netherlands, 2007, p. 320.

42. The Hon Kevin Andrews MP, Minister for Employment and Workplace Relations, Minister Assisting the Prime Minister for the Public Service, Media Release, 'Australia elected to ILO Governing Body', 16505, 9/6/2005. Note that employer and worker members of the Governing Body continued to be elected and to play an important role, notwithstanding that the Australian Government did not choose to be considered for some years.

Organisation rather than a somewhat petulant outsider, as was the case in the period following 1996.⁴³

43. Creighton and Stewart, *op. cit.*, p. 75.

Table 1: Ratification of the ILO's Fundamental Conventions, as at September 2007, selected countries

	Core labour standards							
	Elimination of all forms of forced labour		Freedom of association & recognition of the right to collective bargaining		Elimination of discrimination in employment		Abolition of child labour	
	Fundamental Conventions							
	Forced Labour Convention	Abolition of Forced Labour Convention	Freedom of Association & Protection of the Right to Organise Convention	Right to Organise & Collective Bargaining Convention	Equal Remuneration Convention	Discrimination (Employment & Occupation) Convention	Minimum Age Convention	Worst Forms of Child Labour Convention
Total number of ratifications (all members)	172	170	148	158	164	166	150	165
Australia	1932	1960	1973	1973	1974	1973	-	2006
Canada	1972	-	-	1959	1972	1964	-	2000
China	-	-	-	-	1990	2006	1999	2002
Cuba	1952	1952	1953	1958	1954	1965	1975	-
France	1951	1951	1937	1969	1953	1981	1990	2001
Germany	1957	1956	1956	1959	1956	1961	1976	2002
Greece	1962	1962	1952	1962	1975	1984	1986	2001
Indonesia	1998	1957	1950	1999	1958	1999	1999	2000
Italy	1958	1958	1934	1968	1956	1963	1981	2000
India	-	-	1954	2000	1958	1960	-	-
Japan	1965	1953	1932	-	1967	-	2000	2001
Republic of Korea	-	-	-	-	1997	1998	1999	2001
Netherlands	1950	1993	1933	1959	1971	1973	1976	2002
New Zealand	-	2003	1938	1968	1983	1983	-	2001
South Africa	1996	1996	1997	1997	2000	1997	1977	2001
Sweden	1949	1950	1931	1958	1962	1962	1990	2001
Thailand	-	-	1969	1969	1999	-	2004	2001
UK	1949	1950	1931	1957	1971	1999	2000	2000
USA	-	-	-	1991	-	-	-	1999

Source: International Labour Organisation, ILOLEX Database of International Labour Standards, September 2007.

Table 2: ILO documents (including comments of the Committee of Experts, the Conference Committee and Freedom of Association cases) related to Australia

Documents relating to Australia	Pre-1996#	1996 to September 2007
Individual observations of the Committee of Experts on the Application of Conventions & Recommendations	13	32
Direct requests of the Committee of Experts on the Application of Conventions & Recommendations	33	133
General Observations of the Conference Committee on the Application of Conventions and Recommendations	-	1*
Individual Observations of the Conference Committee on the Application of Conventions and Recommendations	-	7
Direct requests regarding submissions to the Competent Authorities	-	4
Freedom of Association cases (complaints by employee and employer organisations)	18[@]	2
Commission of Inquiry	-	-

Source: International Labour Organisation, ILOLEX Database on ILO documents, September 2007.

Note: # data for the Committee of Experts is available from 1960. For the Committee on Freedom of Association data is available since 1951.

* This case concerned a failure to supply information and related to a number of countries, including Australia.

[@] The majority of these cases related to complaints against State governments.

The ILO and the *Workplace Relations Act 1996*

Background

The scope of this paper is confined to areas of non-compliance, or potential non-compliance, with obligations arising from the fundamental conventions and associated with the *Workplace Relations Act 1996* (the Workplace Relations Act) and the further changes implemented by the *Workplace Relations Amendment (Work Choices) Act 2005* (the Work Choices Act). It should be noted, however, that other Commonwealth legislation has also raised some long-standing issues—including sections of the *Trade Practices Act 1974*, sections of the Commonwealth *Crimes Act 1914* that provide for criminalisation of industrial action, and legislation relating to the building industry and the higher education sector. The ILO has also expressed concerns regarding Australia's failures to overcome discrimination in the labour market against Indigenous people and in relation to the regulation of the work of prisoners in privately run facilities.⁴⁴

The changes introduced by the Workplace Relations Act have been extensively documented and discussed and will not be reviewed here.⁴⁵ The objective of this section is to outline the ILO's areas of concern with international obligations associated with the fundamental conventions, as the issue of Australia's compliance with its international obligations has received little attention during the parliamentary and media debates that surrounded passage of the reforms.⁴⁶ These issues have also received limited attention since that time.

In 1997, following enactment of the Workplace Relations Act, Australia's compliance with Conventions Nos. 87 and 98 was considered by the ILO Committee of Experts on the Application of Conventions and Recommendations. The Committee upheld union criticisms concerning the lack of protection of employees from dismissal due to anti-union discrimination, as well as contraventions of principles relating to the promotion of voluntary collective bargaining.⁴⁷ The ILO Conference Committee on the Application of Standards in June 1998 drew further attention to these criticisms.⁴⁸ The ILO Committee of Experts has

44. For further detail see C. Fenwick and I. Landau, 'Work Choices in international perspective', 19 (2006) *Australian Journal of Labour Law*, p. 131; Creighton, 1997, op. cit., p. 39.

45. For an overview of the reforms, see A. Forsyth and C. Sutherland, 'Collective labour relations under siege: The Work Choices legislation and collective bargaining', 19(2006) *Australian Journal of Labour Law*, pp. 183–197.

46. Fenwick and Landau, op. cit., pp. 128–129. The issue received some coverage in the relevant Bills Digest, see Parliamentary Library, *Workplace Relations Amendment (Work Choices) Bill 2005, Bills Digest*, 2 December 2005.

47. CEACR: Individual Observation concerning Convention No.98, Right to Organise and Collective Bargaining, 1949 Australia (ratification: 1973) Published: 1998, <http://www.ilo.org/iloex>, accessed 20/9/2007.

48. ILCCR: Examination of individual case concerning Convention No. 98, Right to Organise and Collective Bargaining, 1949 Australia (ratification: 1973) Published: 1998, <http://www.ilo.org/iloex>, accessed 20/9/2007.

expressed continuing concerns regarding the Australian legislation every year since then. The ILO Committee on Freedom of Association has also been involved in trying to convince the Australian Government of the need to amend its legislation.⁴⁹

The Howard Government, together with the Australian Chamber of Commerce and Industry, has generally not accepted the views of the ILO's supervisory bodies, resulting in an ongoing dialogue through the processes of direct requests, observations, and appearances before the committees and conference debates. The Government and employers have argued that:

- The views of the Committee of Experts are based on incorrect interpretations of the conventions (for example, Conventions Nos. 87 and 98 do not expressly provide for a right to strike, these conventions do not make collective bargaining mandatory or prescribe that it must be the only form of bargaining and they provide scope for variable implementation at the national level).
- The ILO's supervisory bodies have misunderstood the operation of Australian workplace law and practice in significant respects (for example, a worker negotiating an individual agreement may be represented by a trade union, and participation in the formal system set up by the Workplace Relations Act was voluntary, 'which meant that workers, employers and their representative organisations were free to negotiate and make agreements outside the formal system').
- Australia's legislative arrangements make provision for collective bargaining machinery and collective bargaining continues to be the norm in Australia.
- The ILO's charter of reducing social disadvantage through decent and productive employment is being fulfilled in Australia through an economic and workplace relations system which has achieved record levels of employment, high living standards, investment in skills, low levels of unemployment and low levels of industrial disputation.
- The views of the Committee of Experts are only observations, rather than conclusive findings, and dialogue between the Committee and the government is continuing with a view to resolving areas of disagreement and clarifying understanding of the legislation.⁵⁰

49. For example, see Complaint against the Government of Australia presented by the International Confederation of Free Trade Unions (ICFTU), the International Transport Workers' Federation (ITF), the Australian Council of Trade Unions (ACTU) and the Maritime Union of Australia (MUA) Report No. 320, Case No. 1963, pp. 29–31, <http://www.ilo.org/iloex>, accessed 20/9/2007.

50. The Government's arguments are summarised in ILCCR: Examination of individual case concerning Convention No.98, Right to Organise and Collective bargaining, 1949 Australia (ratification: 1973) Published: 2000, <http://www.ilo.org/ilolex>, accessed 20/9/2007; ILCCR: Examination of individual case concerning Convention No. 98, Right to Organise and Collective Bargaining, 1949 Australia (ratification: 1973) Published: 2007, <http://www.ilo.org/ilox>, accessed 20/9/2007; ILCCR: Examination of individual case

In 2006 and 2007, the Howard Government also argued that substantial amendments to the Workplace Relations Act as a result of the Work Choices amendments meant that earlier comments and findings by the ILO's supervisory bodies were no longer valid.

The ILO's concerns regarding compliance with binding international legal commitments arising from fundamental ILO Conventions relate to Australia's efforts to protect freedom of association and encourage and promote collective bargaining (Conventions Nos. 87 and 98). The lack of progress towards equal remuneration has also been a concern. More specifically, those aspects of the Workplace Relations Act which have given rise to concerns are provisions which:

- give primacy to individual over collective forms of agreement
- restrict the level at which bargaining may occur
- limit what may be included in a collective agreement
- raise the potential for anti-union discrimination
- limit trade unions' rights to organise
- impose limits on strike action beyond those envisaged by the relevant convention.

The following sections outline the ILO's concerns in more detail, with particular reference to observations and requests made during 2006 and 2007.⁵¹ The ILO's more recent observations have been modified to some degree by the dialogue and debate which has occurred since 1997. However, a number of significant areas of concern have remained outstanding for the last 10 years and, in some cases, have intensified following the Work Choices changes. At the time of publication of this paper, the Australian Government had not provided a report to the

concerning Convention No. 87, Freedom of association and Protection of the Right to Organise, 1948 and Convention No. 98, Right to Organise and Collective Bargaining, 1949 Australia (ratification: 1973) Published: 2006, <http://www.ilo.org/ilox>, accessed 20/9/2007; and ILCCR: Examination of individual case concerning Convention No. 98, Right to Organise and Collective Bargaining, 1949 Australia (ratification: 1973) Published: 2005, <http://www.ilo.org/ilox>, accessed 20/9/2007; also see the Hon. Peter Reith, MP, Minister for Employment, Workplace Relations and Small Business, Press release, 'ILO wrong on Australia's Workplace Relations Act', 12 March 1998; and the Hon. Peter Reith, MP, Minister for Employment, Workplace Relations and Small Business, Press Release, 'Government rejects ILO observations', 10 March 2000; and the Hon. Joe Hockey, MP, Minister for Employment and Workplace Relations, Press release, 'Sharan Burrow takes fear campaign offshore', 5 June 2007.

51. Fenwick and Landau, *op. cit.*, analysed the Work Choices proposals against Australia's international obligations prior to the passage of the Work Choices amendments. The following section provides an update on the basis of the ILO supervisory bodies' response since the legislation was passed.

ILO that explained the effect of the Work Choices amendments and the implications for compliance with Conventions Nos. 87 and 98. Given the outcome of the 2007 election, the task for the Rudd Labour Government will be to outline its proposed changes to the industrial relations framework, and their implications for Australia's compliance with its international obligations.

Freedom of Association and Protection of the Right to Organise⁵²

Exclusion from protection

Convention 98 requires that all workers are protected from anti-union discrimination, at the time of engagement, during employment and in relation to termination of employment. The Workplace Relations Act includes protections from anti-union discrimination; making dismissal on the grounds of union membership unlawful. However, the Committee of Experts has found that section 170CC of the Workplace Relations Act (now section 639 of the Workplace Relations Act, as amended by the Work Choices Act) allows regulations which may provide for additional exclusions. This may effectively exclude some employees from protection under section 170CK of the Workplace Relations Act (now section 659), which relates to protection from unlawful termination. The Committee of Experts has requested the Government to provide information on the particular classes of employees excluded and the manner in which the exclusion has been applied in practice.

Protection at the time of recruitment

The Committee of Experts had identified the need to amend sections 298L and 170WG(1) of the Workplace Relations Act (now sections 793 and 400(5) respectively) to provide adequate protection against anti-union discrimination at the time of recruitment. In 2007, the Committee reiterated its concerns:

These sections did not seem to afford adequate guarantees against anti-union discrimination to the extent that they allowed offers of employment to be conditional on the signing of an AWA ('AWA or nothing') without this being considered as duress by the courts. The Committee observes that section 400(6) of the [Workplace Relations] Act, as amended by the Work Choices Act, now further strengthens the previous provisions by explicitly specifying that offering an 'AWA or nothing' does not amount to duress. The Committee once again emphasises that workers who might refuse to negotiate an AWA at the time of recruitment should be afforded legal protection against acts of anti-union discrimination relative to such refusal and emphasises that the right of workers to join the organisation of

52. The Committee of Expert comments quoted in this section derive (unless otherwise indicated) from CEACR: Individual Observation concerning the Right to Organise and Collective Bargaining Convention, 1949 (No 98) Australia (ratification: 1973) Published: 2007, www.ilo.org/ilolex , accessed 20/9/2007.

their own choosing, combined with the legitimate objective of determining their conditions of employment through collective bargaining, should be fully protected.⁵³

The Committee of Experts has requested the Government to indicate the measures taken or contemplated to repeal section 400(6) of the Workplace Relations Act and to amend sections 793 and 400(5).

Protection in the context of the negotiation of multiple business agreements

Section 423(1)(b)(i) of the Workplace Relations Act, as amended by the Work Choices Act, provided that a bargaining period cannot be initiated with regard to a multiple business agreement unless an *employer* (rather than a union) obtained authorisation from the Employment Advocate⁵⁴ (section 332). The Employment Advocate must not grant the authorisation unless he or she is satisfied that it is in the public interest to do so (section 332(3)). The Committee of Experts noted that, in the absence of a bargaining period, industrial action is not protected (section 437). It concluded that workers are not protected under the Workplace Relations Act against acts of anti-union discrimination, in particular, dismissals, if they organise or participate in industrial action in support of multiple business agreements.

The Committee also noted that the Work Choices reforms introduce further restrictions concerning pattern bargaining.⁵⁵ They did this by prohibiting industrial action in relation to pattern bargaining (section 439 of the Workplace Relations Act, as amended) and requiring the Australian Industrial Relations Commission (AIRC) to suspend or terminate the bargaining period where such bargaining is occurring, thereby preventing the taking of lawful, protected industrial action⁵⁶ (sections 431(1)(b) and 437).

The Committee considered that action related to the negotiation of multiple business agreements and pattern bargaining represent legitimate trade union activity for which adequate protection should be afforded by the law. The Committee also emphasised that the choice of the bargaining level should normally be made by the parties themselves who are in the best position to decide this matter.

The Committee also requested that the government indicate any measures taken or contemplated to amend sections 423 and 431 of the Workplace Relations Act. It regards such measures as necessary to ensure that workers are adequately protected against acts of anti-

53. CEACR: Individual Observation concerning the Right to Organise and Collective Bargaining Convention, 1949 (No 98), op. cit.

54. As explained further below, in 2007, the Workplace Authority replaced the Employment Advocate.

55. Pattern bargaining means negotiations seeking common wages or conditions of employment for two or more proposed collective agreements with different employers or even different subsidiaries of the same parent company.

56. Protected action is explained below in relation to the right to strike.

union discrimination, in particular, dismissal, for negotiating collective agreements at whatever level deemed appropriate by the parties.

Workplace access

In 2007, the Committee of Experts made a direct request to the Australian Government concerning the right of union representatives to visit workplaces. It noted that the Work Choices Act made the right of entry of trade union representatives to the workplace in order to meet with workers subject to a special permit requirement (section 740). Such a permit may be refused (and can also be revoked or suspended) in certain circumstances outlined in the legislation. The Committee noted that section 760 limited the permit holder to entering premises for the purposes of holding discussions with eligible employees; that is, employees who carry out work covered by an award or collective agreement (but not an AWA) that is binding on the organisation and are members of the permit holder's trade union or eligible to become members.

Having examined the provisions, the Committee reminded the government that the right of trade union officers to have access to places of work and to communicate with management is a basic activity of trade unions which should not be subject to the interference of authorities. It observed that the 'restrictive conditions' set for the granting of permits 'could constitute a serious obstacle to the exercise of this right'. It also emphasised that:

... a trade unionist should not be limited in discussions at a workplace only to eligible employees, but should also be able to appraise workers of the potential advantages of unionisation or of coverage of a collective agreement instead of an AWA.⁵⁷

The Committee requested the government to indicate any measures taken or contemplated to amend these sections.⁵⁸

Collective Bargaining⁵⁹

Key ILO requirements relating to collective bargaining (based in Convention No. 98) are that the public authorities should take appropriate measures to encourage and promote—as distinct from merely provide for—voluntary negotiations with a view to concluding collective agreements. However, the ILO has recognised that the parties cannot be compelled to reach agreement and that effective bargaining relationships can only be achieved by the

57. ILO, CEACR: Individual Direct Request concerning Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) Australia (ratification: 1973) Published: 2007, www.ilo.org/ilolex, p. 1, accessed 20/9/2007.

58. *ibid.*, pp. 1–2.

59. The Committee of Expert comments quoted in this section derive (unless otherwise indicated) from CEACR: Individual Observation concerning the Right to Organise and Collective Bargaining Convention, 1949 (No 98), *op. cit.*

voluntary and persistent efforts of both parties.⁶⁰ The ILO's supervisory bodies have emphasised that interference with the autonomy of the bargaining partners (for example, by measures taken unilaterally by the authorities to restrict the level at which bargaining may occur or restrict the content of agreements) are generally contrary to the concept of voluntary bargaining.⁶¹

Protection against acts of interference in the framework of collective bargaining

The Committee of Experts noted that section 170LJ(1)(a) of the Workplace Relations Act (now section 328(a)) gives employers wide discretion in selecting a bargaining partner. It enables an employer to make an agreement with one or more organisations of employees where each organisation has 'at least one member' in the enterprise. The Committee suggested the establishment of a mechanism to undertake the rapid and impartial examination of allegations of acts of interference in the context of the selection of a bargaining partner. It requested the government to provide information on whether such a mechanism exists or, if not, the measures taken or contemplated with a view to establishing one.

Measures to promote free and voluntary collective bargaining

Convention 98 requires member states to take measures to encourage and promote voluntary negotiation with a view to the regulation of the terms and conditions of employment by collective agreements. Since 1997, the Committee of Experts has indicated that Australia has failed to meet this obligation because the Workplace Relations Act has given primacy to individual over collective agreements. The ILO's supervisory bodies have emphasised that member states are required to take steps to ensure that collective bargaining will not only be allowed, but encouraged at the level determined by the bargaining parties.⁶²

Prior to the adoption of the Work Choices amendments, an AWA did not operate to the exclusion of a collective agreement if the latter was already in operation and until its expiry, unless the collective agreement expressly allowed a subsequent AWA to operate to its exclusion. Nevertheless, the Committee criticised the fact that a collective agreement that was subsequent to an AWA did not prevail over the AWA until the expiration of the AWA. In the

60. B. Gernigon, A. Odero and H. Guido, 'ILO Principles concerning collective bargaining', *International Labour Review*, 139(1) (2000), pp. 40–43 and

<http://www.ilo.org/public/english/support/publ/revue/download/pdf/gernigon.pdf>, accessed 14/9/2007.

61. See B. Creighton, 'Freedom of Association', op. cit., pp. 312–313.

62. ILO, Report of the Committee of Experts on the Application of Conventions and Recommendations, International Labour Conference, 86th Session, Report III, 1998, p. 223. Also see Complaint against the Government of Australia presented by the International Confederation of Free Trade Unions (ICFTU), the International Transport Workers' Federation (ITF), the Australian Council of Trade Unions (ACTU) and the Maritime Union of Australia (MUA) Report No. 320, Case No. 1963, <http://www.ilo.org/iloex>. pp. 29–31, accessed 20/9/2007.

Committee's view, this prevented workers from profiting from any favourable provisions in a subsequently negotiated collective agreement.

In 2007, the Committee of Experts noted that amendments introduced by the Work Choices Act gave further primacy to AWAs over collective agreements. In particular, it suggested that:

- Section 348(2) of the Workplace Relations Act provides that a collective agreement has no effect while an AWA operates in relation to an employee. This is so irrespective of whether the AWA was made before or after the collective agreement and irrespective of the period of operation of the collective agreement.
- The incentive for employers to use AWAs in order to reduce wages and conditions of employment has been 'substantially increased' by the repeal of the requirement that an AWA should not disadvantage employees in comparison to the terms of an applicable award. The previously applicable no disadvantage test has been replaced with a requirement only that the agreement not exclude the Australian Fair Pay and Conditions Standard setting forth key minimum entitlements relating to pay, hours of work, annual and other types of leave.⁶³
- The award conditions which apply to existing employees can be displaced by specific provision in the AWA (section 354), so that acquired rights are not protected.
- In the case of new employees, an AWA inferior to the collective agreement can be required as a condition of employment. The Committee noted that the primacy given to AWAs under the Work Choices Act removes the ability of unions to bargain collectively on behalf of their members in any practical sense, given that individual AWAs are likely to expire on different dates and their permitted period of operation has been extended from three to five years (section 352). This means that there is never a time when all employees are in a position to bargain collectively.

The Committee indicated that it:

... considers that giving primacy to AWAs, which are individual agreements, over collective agreements, is contrary to Article 4 of the Convention which calls for the encouragement and promotion of voluntary negotiations with a view to the adoption of collective agreements.⁶⁴

The Committee requested the Australian Government to indicate the measures taken or contemplated to amend section 348(2) of the Workplace Relations Act 'so as to ensure that

63. See further below regarding the introduction of the fairness test since these comments were made.

64. ILO, CEACR: Individual Observation concerning Right to Organise and Collective Bargaining Convention, 1949 (No 98), op. cit., p. 3.

AWAs may prevail over collective agreements only to the extent that they are more favourable to the workers.'

Note that the ILO supervisory bodies' concerns in relation to the removal of the no disadvantage test have not yet been reviewed in the light of the fairness test introduced following the enactment of the *Workplace Relations Amendment (A Stronger Safety Net) Act 2007*, which received Royal Assent on 28 June 2007. This Act amended the Workplace Relations Act by introducing a fairness test for workplace agreements lodged on, or after, 7 May 2007. The fairness test is intended to ensure that employees receive fair compensation if their AWA or collective agreement removes or modifies protected conditions, such as penalty rates and overtime loadings.

Negotiations with non-unionised workers

The Committee of Experts identified the need to amend section 170LK(6)(b) of the Workplace Relations Act, which allowed for negotiations to take place directly with non-unionised workers instead of representative trade unions in the enterprise. The Committee noted that the Workplace Relations Act, as amended by the Work Choices Act, places on an equal footing various types of agreements, such as union collective agreements (section 328), AWAs (section 326) and employee collective agreements (section 327). Further, section 4 of the Workplace Relations Act defines a collective agreement as either an employee collective agreement or a union collective agreement.

The Committee observed that Article 4 of the Convention requires the encouragement and promotion of voluntary negotiations between employers or employers' organisations and workers' organisations. It requested the Australian Government to take measures to ensure that employee collective agreements do not undermine workers' organisations and their ability to conclude collective agreements. It also asked the government to indicate the measures taken or contemplated with a view to ensuring that negotiations with non-unionised workers take place only where there is no representative trade union in the enterprise.

Authorisation of multiple business agreements

The Committee identified the need to amend section 170LC(4) of the Workplace Relations Act, which required the AIRC to refuse the certification of multiple business agreements unless certification was in the public interest. Following its amendment by the Work Choices Act, the Workplace Relations Act enabled the Employment Advocate (rather than the AIRC) to authorise the making or varying of multiple business agreements (sections 151(1)(h) and 347(3)). The Committee noted that whereas the AIRC is a quasi-judicial body, the Employment Advocate is part of the administration, appointed by the Governor-General, and subject to the directions of the Minister for Employment and Workplace Relations with which he or she must comply (section 152).

The Employment Advocate must not grant authorisation to make or vary a multiple business agreement unless satisfied that it is in the public interest to do so. In making this decision, the Employment Advocate must have regard to whether the matters could be dealt with more appropriately in a collective agreement other than a multiple business agreement and to any

other matter specified in regulations (section 332(3)). Authorisation can be granted only at the request of the employer (section 332). Trade unions are not able to request authorisation. Any employer who lodges an unauthorised agreement with the Employment Advocate incurs a penalty (sections 343 and 407). Moreover, regulations may set a procedure for applying for authorisation to the Employment Advocate and the Employment Advocate 'need not consider an application if it is not made in accordance with the procedure' (section 332(2)). Finally, multiple business agreements are identified not only as agreements relating to one or more single businesses, but also relating to one or more parts of a single business (section 331(1)(a)(ii)). The Committee said that this effectively obliged the parties 'to carry out fragmented negotiations within single businesses.' Similar authorisation requirements are set in relation to variations of multiple business agreements (section 376).

The Committee noted that the exclusion of pattern bargaining from protected action introduced in the Workplace Relations Act by the Work Choices Act (see above) prevents parallel bargaining on a multi-employer basis, or on the basis of several subsidiaries of the same parent company. This, it found, forced an even greater focus on the single business, even in cases where the business might be part of a larger group of enterprises with common ownership and management.

The Committee observed that the level of collective bargaining should be decided by the parties themselves and not be imposed by law and noted that:

... legislation, which makes the entry into force of collective agreements subject to prior approval by the administrative authority, at the latter's discretion, is incompatible with the Convention and a violation of the principle of autonomy of the parties.⁶⁵

The Committee requested the government to indicate the measures taken or contemplated to repeal or amend sections 151(1)(h), 152, 331(1)(a)(ii) and 332(3) of the Workplace Relations Act. It indicated that such measures should ensure that:

- multiple business agreements are not subject to the requirement of prior authorisation at the discretion of the Employment Advocate
- the determination of the bargaining level is left to the discretion of the parties and is not imposed by law or by decision of the administrative authority.

It should be noted that since the Committee of Experts made its observations in relation to the role of the Employment Advocate, the *Workplace Relations Amendment (A Stronger Safety Net) Bill 2007* was passed. That bill amended the Workplace Relations Act to establish a fairness test for workplace agreements and create two new statutory agencies: the Workplace Authority and the Workplace Ombudsman. The Workplace Authority replaced the Employment Advocate—taking over many of its functions, as well as being given the additional functions of administering the fairness test and providing information and advice

65. ILO, CEACR: Individual Observation concerning Right to Organise and Collective Bargaining Convention, 1949 (No 98), op. cit., p. 5.

to employees and employers about workplace agreement-making and the Commonwealth's workplace relations laws. The Workplace Ombudsman took over the functions previously undertaken by the Office of Workplace Services—including information, education, inspection, inquiry and enforcement roles. These changes have not addressed the concerns raised by the Committee of Experts.

Restrictions on the content of collective bargaining

The Committee of Experts had indicated the need to amend section 187AA of the Workplace Relations Act, which excluded negotiations over strike pay from the scope of collective bargaining. In 2007, the Committee observed that section 507 of the Workplace Relations Act, as amended by the Work Choices Act, prohibited payments for days off work due to industrial action. (For consideration of the right to strike see further below).

The Committee noted that the Work Choices Act extended the list of subjects over which negotiations are excluded, by forbidding negotiations and the reaching of an agreement over prohibited content. The range of matters constituting prohibited content is specified in regulations (sections 436 and 356 of the Workplace Relations Act). The Workplace Relations Regulations 2006, specify prohibited content in a non-exhaustive manner.⁶⁶ In addition to prohibiting these matters from being negotiated, the Workplace Relations Act, as amended by the Work Choices Act, also introduces a substantial financial penalty for a person who seeks to include prohibited content in an agreement, or who is reckless as to whether a term contains prohibited content (sections 365 and 407).

The Committee of Experts observed that the issues listed above as constituting prohibited content represented to a large extent the type of matters that have traditionally been subjects for collective bargaining. It said that, as a general rule, negotiation over such matters should be left to the discretion of the parties and indicated that:

... measures taken unilaterally by the authorities to restrict the scope of negotiable issues are often incompatible with the Convention and the free and voluntary nature of collective bargaining. In the event of doubt as to the matters falling within the purview of collective bargaining, tripartite discussions for the preparation, on a voluntary basis, of guidelines for

66. That is, matters that do not pertain to the employment relationship; objectionable provisions, including provisions which require a person to encourage trade union membership or indicating support for such membership, or requiring or permitting payment of a bargaining services fee; payroll deduction systems for union dues; leave to attend training provided by a trade union; paid leave to attend union meetings; process for renegotiating the agreement on its expiry; right of entry to the premises for union officials; union representation rights in disputes procedures, unless specifically requested by the employee; restrictions on the use of contractors and labour hire; forgoing of annual leave other than in accordance with the Act; encouragement or discouragement of trade union membership; allowing of industrial action; remedies for unfair dismissal; direct or indirect restrictions on AWAs; and discriminatory terms.

collective bargaining could be a particularly appropriate method for resolving such difficulties.⁶⁷

The Committee requested the government to consider tripartite discussions for the preparation of collective bargaining guidelines and to indicate in its next report any measures taken or contemplated to amend the Workplace Relations Regulations, 2006, and to ensure that any prohibited content of collective agreements is in conformity with the principle of the free and voluntary nature of collective bargaining enshrined in Article 4 of the Convention.

Greenfield agreements⁶⁸

Following the introduction of the Workplace Relations Act, the Committee of Experts indicated the need to amend section 170LT(10), which excessively restricted the opportunity for workers in a new business to choose their bargaining agent by enabling the employer to negotiate a greenfield agreement and pre-select a bargaining partner prior to the employment of any persons in the new business.

In 2007, the Committee noted the Workplace Relations Act, as amended by the Work Choices Act, had introduced a new category of greenfield agreement with a nominal life of no more than one year.⁶⁹ For this new category of agreement, the requirement for an agreement to be made with a trade union was removed. This enabled the employer to determine *unilaterally* the terms and conditions of employment through an employer greenfield agreement (that is, an 'agreement' made by the employer with the employer as the only party) (section 330 of the Workplace Relations Act). The changes also extended the scope of greenfield agreements beyond the establishment of a new business, project or undertaking to cover any new activity proposed to be carried out by a government authority, a body in which a government has a controlling interest or which has been established by law for a public purpose (section 323). The Committee also noted that the law had been amended to specify that a new project which is of the same nature as the employer's existing business activities is included in the definition of 'greenfield'.

The Committee concluded that:

... the inclusion of employer greenfields agreements, to the total exclusion of any attempts at good-faith bargaining, within the context of a much enlarged definition of new business to further include the very broad concept of 'new activity', coupled with the greater primacy of

67. ILO, CEACR: *Individual Observation concerning Right to Organise and Collective Bargaining Convention, 1949 (No 98)*, op. cit., p. 6, with reference to ILO, *General Survey on Freedom of Association, 1994*, paragraph 250.

68. That is, agreements for a new project, business or undertaking that an employer is proposing to establish which are made prior to the engagement of employees.

69. Other greenfield agreements have a nominal life of up to five years.

AWAs, would appear to seriously hinder the possibilities of workers in such circumstances from negotiating their terms and conditions of employment.⁷⁰

The Committee has requested the government to indicate any measures taken or contemplated to amend the relevant provisions of the Workplace Relations Act, so as to ensure that the choice of bargaining agent, even in new businesses, may be made by the workers themselves. It has also called on the government to indicate that workers will not be prohibited from negotiating their terms and conditions of employment in the first year of their service for the employer—even if an employer greenfields agreement has been registered.

Building industry

The Committee of Experts has also requested the Government to indicate the measures taken or contemplated to bring the *Building and Construction Industry Improvement Act 2005* into conformity with the Collective Bargaining Convention, in particular with regard to:

- The revision of section 64 of the Act so as to ensure that the determination of the bargaining level is left to the discretion of the parties and is not imposed by law, by decision of the administrative authority.
- The promotion of collective bargaining, especially by ensuring that there are no financial penalties or incentives linked to undue restrictions of collective bargaining. Sections 27 and 28 of the Act authorise the Minister to deny Commonwealth funding to contractors bound by a collective agreement that, although lawful, does not meet the requirements of the Building Code.⁷¹ The latter excludes a wide range of matters from the scope of collective bargaining, and contains financial incentives to ensure that AWAs may override collective agreements.

This legislation has also been brought to the attention of the Committee on Freedom of Association which has made similar recommendations.⁷²

70. ILO, CEACR: Individual Observation concerning Right to Organise and Collective Bargaining Convention, 1949 (No 98), op. cit., p. 7.

71. The Building Code is defined in the *Building and Construction Industry Improvement Act 2005* as a code of practice consisting of one or more documents issued by the Minister in respect of building work, which may relate to occupational health and safety matters in the building industry, but is not necessarily limited to such matters.

72. See Complaint against the Government of Australia presented by the Australian Council of Trade Unions (ACTU) and supported by the Trade Unions International of Workers of the Building, Wood and Building Materials Industries (UITBB) Report No. 338, Case No. 2326, www.ilo.org/ilex pp. 17–18, accessed 20/9/2007.

Higher education sector

The Committee of Experts has identified the need to amend sections 33-35 of the *Higher Education Support Act 2003*, and the Higher Education Workplace Relations Requirements. It regards these Acts as raising:

... obstacles to collective bargaining similar to those raised by the *Workplace Relations Act 1996* ... by: (1) providing economic incentives to ensure that collective agreements contain exceptions in favour of AWAs; and (2) allowing for negotiations with non-unionised workers even where representative trade unions exist in the unit.⁷³

Committee's concluding comments on collective bargaining

In 2007, the Committee of Experts concluded by addressing key arguments of the government and employers, and stating:

The Committee observes, as it has already done on numerous occasions in the past, that a large number of provisions of the [Workplace Relations] Act have the effect of preventing the negotiating parties from exercising a free choice between different forms of bargaining. The Committee is particularly concerned by the primacy accorded to individual contracts (AWAs) over collective agreements in the [Workplace Relations] Act, the obstacles contained in this Act with regard to bargaining at any level above that of the workplace, and the express prohibition of bargaining over a very wide range of matters which normally constitute common topics in free and voluntary negotiations, as well as the heavy penalties incurred in case the parties try to negotiate such subjects. The Committee observes that the above measures *can in no way be seen as measures to encourage and promote collective bargaining as they deny the parties any choice and restrict their bargaining autonomy and free will*. In the Committee's view, although the expressions 'where necessary' and subject to 'national conditions' found in Article 4 of the Convention allow for a wide range of different national practices in the implementation of measures for the encouragement and promotion of collective bargaining, *they do not authorise in any way the introduction of disincentives, obstacles to, and downright prohibitions of negotiations which amount to a negation of the free and voluntary nature of collective bargaining enshrined in Article 4 of the Convention.*⁷⁴ (Emphasis added.)

The Committee reiterated the request of the Conference Committee for the government to engage in consultations with the representative employers' and workers' organisations with respect to these matters. It also requested the government to provide detailed statistical data on the impact of the Workplace Relations Act and its most recent amendments on the number and coverage of collective agreements in the country.

73. ILO, CEACR: Individual Observation concerning Right to Organise and Collective Bargaining Convention, 1949 (No. 98), op. cit., pp. 7–8.

74. ILO, CEACR: Individual Observation concerning Right to Organise and Collective Bargaining Convention, 1949 (No. 98), op. cit., pp. 8–9.

The right to strike

Creighton and Stewart explain that:

Neither the Freedom of Association and Protection of the Right to Organise Convention 1948 (No. 87) nor the Right to Organise and Collective Bargaining Convention 1949 (No. 98) makes any *express* reference to the right to strike. However, the right to strike is taken to be an integral part of the Principles of Freedom of Association developed by the Governing Body's Committee on Freedom of Association, and is taken as read into Articles 3, 8 and 10 of Convention No 87.⁷⁵ By contrast, a right to strike in support of economic and social interests is *expressly protected* by the UN International Covenant on Economic, Social and Cultural Rights.⁷⁶ (Emphasis added.)

In Australia, under the common law, all industrial action is unlawful as it constitutes a breach of contract and/or a tort. Concerns had been expressed by the Committee of Experts about limitations on industrial action in Australia as far back as 1989 and 1991.⁷⁷ In 1993, the Keating Government's industrial relations reforms, under the *Industrial Relations Reform Act 1993*, partially addressed these concerns by giving workers seeking to negotiate an enterprise agreement under federal law a right to take protected action in support of their claims. Such action was protected in that employers were prevented from taking common law action against the involved employees. However, as Fenwick and Landau note:

... the ILO's supervisory bodies have criticised this regime, repeatedly emphasising that the right to strike should not be limited to industrial disputes that are likely to be resolved through the signing of a collective agreement. The right to strike extends to enabling workers to express their dissatisfaction through industrial action with economic and social policy matters that affect their interests.⁷⁸

In addition to these general concerns, the Committee of Experts has raised specific concerns about the conformity of several legislative provisions with the legitimate scope for industrial action. In particular, it has requested the government to amend the following provisions:⁷⁹

75. Creighton and Stewart, *op. cit.*, p. 533.

76. *ibid.*, Creighton, *op. cit.*, 1997, p. 315; and Fenwick and Landau, *op. cit.*, p. 140.

77. Creighton, *op. cit.*, 1997, p. 43 and 1998, pp. 273–275.

78. Fenwick and Landau, *op. cit.*, pp. 140–141. Also see Creighton and Stewart, *op. cit.*, p. 537 and Creighton, 'Freedom of Association', *op. cit.*, pp. 315–319 for consideration of the extent of, and limitations on, the right to strike.

79. ILO, CEACR: Individual Observation concerning Right to Organise and Collective Bargaining Convention, 1949 (No 98), *op. cit.*; CEACR: Individual Observation concerning Convention No 87, Freedom of Association and Protection of the Right to Organise, 1948, Australia (ratification:1973), Published: 2004, www.ilo.org/ilolex; and CEACR: Individual Observation concerning Convention No 87, Freedom of Association and Protection of the Right to Organise, 1948, Australia (ratification:1973), Published: 1999, www.ilo.org/ilolex. Accessed 20/9/2007.

- Section 170MN of the Workplace Relations Act, which prohibited industrial action in support of multiple business agreements. Section 423(1)(b)(i) of the Workplace Relations Act as amended by the Work Choices Act, excludes such agreements from the procedure for initiating a bargaining period, thereby preventing protected industrial action in relation to such agreements.
- Section 187AA of the Workplace Relations Act—prohibiting industrial action in support of a claim for strike pay (section 508 of the amended Act).
- Section 45D of the *Trade Practices Act 1974*, which prohibits secondary boycotts, and section 438 of Workplace Relations Act.⁸⁰
- Section 170MW of the Workplace Relations Act—which provided for the power of the Australian Industrial Relations Commission (AIRC) to terminate a bargaining period, and thus the ability to take protected industrial action, when the action was threatening to cause significant damage to the Australian economy or an important part of it (section 430(3)(c)(ii) of the amended Act).
- Section 30J of the *Crimes Act, 1914*—which prohibits industrial action threatening trade or commerce with other countries or among states.
- Section 30K of the *Crimes Act, 1914*—prohibiting boycotts resulting in the obstruction or hindrance of the performance of services by the Australian Government or the transport of goods or persons in international trade.

In 2007, the Committee noted that, according to the ACTU, not only had the Committee's previous comments not been addressed, but the Work Choices Act introduced additional prohibitions on industrial action,⁸¹ more specifically:

- preventing the taking of lawful industrial action relative to pattern bargaining (see above)(section 421)
- further narrowing the range of matters which can be the subject of industrial action by providing that such action is not protected if it is taken in support of claims which include prohibited content(section 436)

80. Creighton and Stewart, *op. cit.*, pp. 577–582 note that section 45D was repeatedly criticised by the ILO's Committee of Experts for the extent to which it prohibited activity which ought to be lawful in terms of Convention 87, and outline reforms to the provision in 1993 and 1996.

81. ILO, CEACR: Individual Observation concerning Freedom of Association and Protection of the Right to Organise Convention, 1948 (No 87) Australia (ratification: 1973) Published: 2007, www.ilo.org/ilolex. For an outline of the changes made by the Work Choices Act with respect to industrial action, see S. McCrystal, 'Smothering the right to strike: Work Choices and industrial action', 19 (2006) Australian Journal of Labour Law, p. 201.

- tightening the prohibition of industrial action taken in concert with other parties who are not protected (that is, sympathy strikes)(section 438). It is now mandatory for the AIRC to order that such action stop or if it has not yet occurred, that it not occur
- removing the discretion formerly held by the AIRC in respect of suspending or terminating a bargaining period in case of danger to the economy, and making it mandatory to do so (section 430)
- making provision for a third party who is affected by the industrial action to apply for the suspension or termination of the bargaining period, which must be granted if the AIRC is satisfied that the employer is adversely affected and economic loss is also caused to the applicant (that is, without consideration of the interests of the employees involved)(section 433)
- enabling the Minister unilaterally to issue a declaration terminating a bargaining period in circumstances including threatened economic damage, thereby preventing the taking of protected industrial action (section 498). Section 500(a) provides for compulsory arbitration in this case with the decision being binding for up to five years under section 504(3).

The Committee observed that to the extent that industrial action which is unprotected under the above provisions may also fall under the definition of coercion and duress in section 400(1) of the Workplace Relations Act (which prohibits industrial action with intent to coerce another person to agree to a collective agreement), it may lead to heavy pecuniary penalties under section 407 of the Workplace Relations Act.

The Committee emphasised that strikes can be prohibited under the Convention only in essential services in the strict sense of the term. That is, the interruption of which would endanger the life, personal safety or health of the whole or part of the population, and for public servants exercising authority in the name of the State, in addition to the armed forces and police. The Committee concluded that:

... the prohibitions noted above with regard to multi-employer agreements, pattern bargaining, secondary boycotts and sympathy strikes, negotiations over 'prohibited content' that should otherwise fall within possible subjects for collective bargaining, danger to the economy, etc., go beyond the restrictions which are permissible under the Convention.

The Committee requested the government to indicate in its next report the measures taken or contemplated so as bring the Workplace Relations Act into conformity with the Convention.

Building industry and industrial action

The Committee of Experts also requested the government to report on any measures taken or contemplated with a view to:

- amending sections 36, 37 and 38 of the *Building and Construction Industry Improvement Act, 2005*, which prohibit all unlawful industrial action (which is defined as industrial

action undertaken with respect to building work which is industrially motivated, constitutionally connected and which is not protected under the Workplace Relations Act)⁸²

- amending sections 39, 40 and 48–50 of the Act so as to eliminate any excessive impediments, penalties and sanctions against industrial action in the building and construction industry⁸³
- introducing sufficient safeguards into the Act so as to ensure that the functioning of the Australian Building and Construction Commissioner and inspectors does not lead to interference in the internal affairs of trade unions. This could include provisions on the possibility of lodging an appeal before the courts against the Commissioner's notices prior to the handing over of documents (sections 52, 53, 55, 56 and 59 of the Act)
- amending section 52(6) of the Act which enables the Commissioner to impose a penalty of six months' imprisonment for failure to comply with a notice to produce documents or give information so as to ensure that penalties are proportional to the gravity of any offence⁸⁴

Equal remuneration

The Committee has expressed concerns that the move away from award regulation to workplace-based regulation in the setting of wages, and more specifically the advent of individual workplace agreements (AWAs), is associated with the 'lack of recent progress in narrowing the pay gap between men and women.' Given the 'considerable growth in the use of AWAs including in female-dominated sectors', the Committee asked the government to provide detailed information on the wages and benefits negotiated under these agreements, including with regard to family-friendly provisions, disaggregated by sex and sector. The government was also requested to include detailed information on the AWAs' practical impact on the existing remuneration gap between men and women workers.⁸⁵

82. For a discussion of these terms, see McCrystal, *ibid.*, p. 200.

83. For more information on the penalties applicable, see McCrystal, *ibid.*

84. ILO, CEACR: *Individual Observation concerning Freedom of Association and Protection of the Right to Organise Convention, 1948 (No 87)*, *op. cit.*

85. ILO, CEACR: *Individual Observation concerning Equal Remuneration Convention, 1951 (No. 100) Australia (ratification: 1974)* Published: 2007, www.ilo.org/ilolex, accessed 20/9/2007.

Future directions

Use of the external affairs power

Creighton and Stewart have argued that ratification of appropriate ILO conventions, combined with use of the external affairs power of the Constitution, could provide the basis for a national workplace relations system. While noting that ILO standards do not deal with many issues that may merit legislative intervention, they suggest that such an approach could provide a system that protected minimum employment rights and conditions, including through legislated national minimum standards.⁸⁶ One of the advantages of use of the external affairs power would be that it could achieve a uniform, national basis for protecting minimum labour standards.⁸⁷ The current constitutional basis for the Workplace Relations Act (which is based largely on the corporations power, and a mix of other powers) is not able to achieve 100 per cent coverage in the absence of a referral of power by the States.⁸⁸

Williams has also examined the potential for use of the external affairs power as the basis for a single national scheme for the regulation of workplace relations in Australia. While noting the considerable potential of the power to enable Commonwealth legislation, Williams identifies a number of limitations, including:

... the power can only be used to the extent that a government is willing to implement policies that are consistent with International Labour Organisation and other international conventions.⁸⁹

Further, in order to be held valid by the High Court under the external affairs power:

... a law must be 'reasonably capable of being considered appropriate and adapted to implementing the treaty'. Problems arise, for example, if the legislation exceeds what is reasonably required to satisfy Australia's obligations under the Convention; perhaps if the legislation does not comply with *all* the obligations of the treaty or if the treaty expresses some vague goal or ideal rather than prescribing a more specific course of action to be taken by signatory states.⁹⁰

86. Creighton and Stewart, *op. cit.*, pp. 78–83.

87. *ibid.*

88. Federal Minister for Employment, Workplace Relations and Small Business, the Hon. Peter Reith MP, *Breaking the Gridlock: Towards a Simpler National Workplace Relations System, Discussion Paper 1: The Case for Change*, Appendix D: Potential changes in coverage of workplace employees under a new federal system, Canberra, 2000.

89. G. Williams, 'The Constitution and a national industrial relations regime', *Deakin Law Review*, 10(2), p. 502.

90. *ibid.*, p. 503.

An example of the difficulties created where provisions of ILO conventions are not explicit, is provided by reference to the right to strike. In *Victoria v Commonwealth*⁹¹, the High Court found the International Covenant on Economic, Social and Cultural Rights to be an appropriate source of legislative authority to enact provisions supporting lawful industrial action during bargaining periods, because it specifically refers to a right of strike, whereas the relevant ILO convention does not.

This means that before any rights-based national system could be developed based on the external affairs power, its designers would need to ensure that:

- treaties were available to underpin the desired features of the system
- the relevant treaties had been ratified by the government
- the terms of the relevant treaties being relied upon were sufficiently definitive to provide a firm foundation for legislation.

The Australian Labor Party's workplace relations policy, *Forward with Fairness*, commits a Rudd Labor Government to achieve a 'uniform national industrial relations system', and states that it would 'rely on all of the Constitutional powers available to it' to enact national industrial relations laws. However, the ALP policy also indicates that Labor will work cooperatively with the states to achieve such a system, and that a national system could be achieved by state governments referring powers or by 'other forms of cooperation and harmonisation.'⁹² The policy leaves open a range of options for implementation, but does not preclude reliance on the external affairs power. As a minimum, it is likely that equal pay, parental leave and termination of employment will remain primarily underpinned by the external affairs power.

Other parties have proposed models influenced by international labour standards or have raised the prospect of possible use of the external affairs power as the basis for a national approach. For example, during 2006, the ACTU undertook a major study with a view to developing a new system of collective bargaining in Australia that would balance the need for social justice, democratic and cooperative industrial relations and economic prosperity. The working group recommended a rights-based approach which was informed by the ILO's fundamental conventions, but also by arrangements in a number of other countries, including the United Kingdom, the USA, Canada and New Zealand.⁹³ In launching its report, the

91. (1996) 187 CLR 416, pp. 545–546.

92. Australian Labor Party, *Forward with fairness: Labor's plan for fairer and more productive Australian workplaces*, April 2007, http://www.alp.org.au/download/now/fwf_finala.pdf, accessed 25 November 2007.

93. ACTU, *A Fair go at work: Collective bargaining for Australian workers*, September 2006, <http://www.actu.asn.au/AboutACTU/ACTUPublications/AFairGoAtWorkCollectiveBargainingforAustralianWorkers.aspx>, accessed 9/8/2007; and Cath Bowtell, Industrial Officer, ACTU,

ACTU did not comment on the possible use of particular constitutional powers to underpin the proposed model.⁹⁴

In September 2007, the New South Wales Government released an issues paper, as part of the consultation process for an inquiry into options for a new national industrial relations system. The issues paper identifies six options, one of which is a national minimum standards model using the external affairs power.⁹⁵

Future relations with the ILO

The potential use of the external affairs power as the constitutional basis for a national workplace relations system is a separate, although related, issue to the continued relevance of the ILO and its international labour standards. In relation to the latter, none of the major, or minor, Australian political parties has suggested that Australia's membership of the ILO should be withdrawn, or that Australia should cease to participate in the ILO, or cease to ratify and implement appropriate conventions. Indeed, as noted above, for almost all of the history of the ILO, Australia has played, and continues to play, an active role in the ILO's activities, including standard setting. What then are the prospects for Australia's future relations with the ILO?

Should the Workplace Relations Act not be significantly amended following the 2007 election, there is a real prospect of escalating criticism from the ILO's supervisory bodies. Such criticism has implications for Australia's standing and role within the ILO. It also has implications for Australia's ability to influence its regional neighbours to improve the conditions of their workers and, in the longer term, move towards a more level playing field for international trade.

The table at Appendix C extracts policy statements that relate to the areas of compliance concern noted above, and provides a *preliminary* view of the prospect that the Rudd Labor Government would *reduce* the ILO's areas of concern. The workplace relations policies of the Australian Greens are also considered. It should be noted that it is not possible to

'The ACTU's industrial relations policy: Why the union movement has moved to a rights based approach', address to the Industrial Relations Society of the ACT, Canberra, 8 August 2007.

94. When the ACTU report was released in September 2006, the ACTU indicated that it was awaiting the outcome of the High Court's consideration of the constitutional validity of the Work Choices Act before making a decision about an appropriate basis for its proposed system. In November 2006, the High Court handed down its decision in *New South Wales v Commonwealth*, [2006] HCA 52; 81 ALJR 34; 231 ALR 1. It upheld the Australian Parliament's capacity to rely, in large part, on the corporations power of the Constitution to sustain its workplace relations legislation.
95. G. Williams, *Inquiry into options for a new national industrial relations system: Issues paper*, NSW Government, Office of Industrial Relations, September 2007.

comment on all areas of concern with any degree of certainty until further policy detail is provided.

Analysis of the ALP's workplace relations policy, *Forward with Fairness*, suggests that the ILO's compliance concerns would be significantly reduced, but not eliminated, by implementation of ALP policy. The policy does not commit the Rudd Labor Government to implementing fundamental ILO conventions *per se*. However, Labor has committed to give effect to 'important workplace rights that are essential to a functioning democracy'—and those listed in the policy broadly reflect the ILO's fundamental principles and core standards. Further, the stated intention of the ALP policy is to better balance the need for workplace flexibility with the need for fairness in the workplace—an objective which is broadly in line with the ILO's concern to ensure that economic progress is not achieved at the expense of fundamental workplace rights. As outlined at Appendix C, preliminary analysis suggests that implementation of the ALP's policy commitments would address a number of the ILO's concerns, particularly in relation to collective bargaining and equal remuneration for work of equal value. However, some concerns regarding limitations on trade unions' rights to organise and to strike would appear to remain outstanding on the basis of the information available at the time of publication.

The Australian Greens' policy is underpinned by a more general commitment to implement international human rights obligations, including in relation to collective bargaining, freedom of association, collective action and equal remuneration. The Greens' policy statements suggest that they will be attempting to exert pressure on the Rudd Government to address residual areas of ILO concern in relation to union rights to organise and to strike.

Conclusion

Core labour standards have been recognised as embodying fundamental human rights. This being the case, it is surprising that the concerns raised by the ILO's supervisory bodies regarding compliance issues related to the Workplace Relations Act have received relatively limited attention in parliamentary and media debates in Australia over the last 10 years. To some extent this may reflect the cautious nature of the ILO's approach, involving as it has, a process of dialogue, exchange of information and reports, and gradually escalating demands. Continuing rounds of direct requests, observations and responses over more than a decade, and the absence of conclusive findings, have not proved sufficient to exert powerful compliance pressure. No doubt other factors have also contributed to restrict the debate, including the length and complexity of the Workplace Relations Act, the length and complexity of the ILO's observations and reports and limited understanding of its processes. These factors have tended to focus media coverage on the assertions of the major players, rather than to an analysis of the issues.

The underlying rationale for the ILO's cooperative approach is that membership of the organisation and ratification of conventions should signal a nation's willingness to comply with the associated obligations. Therefore, where compliance issues arise, all that should be necessary is a cooperative dialogue between the ILO and the country concerned. However, the Australian experience suggests that where fundamental differences of opinion in the

interpretation and application of international labour standards occur between a nation and the ILO, the processes of dialogue may become extended. In this context, any ambiguities, lack of definition and exception provisions in the terms of the conventions, as well as complexities in legislative arrangements at the national level will enable ongoing argument. This, together with the ILO's reluctance to escalate its supervisory processes until all avenues for dialogue have been exhausted, has allowed compliance issues to remain unresolved for long periods, limiting the protection which fundamental international standards might otherwise provide for workers.

Appendix A: Key steps in the development of core labour standards in the context of globalisation⁹⁶

During the late 1980s and early 1990s, acceleration of the process of economic globalisation generated concerns within the trade union and civil rights movements for an international 'race to the bottom' which would undermine the basic rights of labour. This led organised labour to urge the World Trade Organisation (WTO) to adopt a social clause⁹⁷ that would link respect for workers' rights to the right to engage in cross-border trade. However, this move was opposed by a coalition asserting that such a clause was a form of protectionism designed to deny under-developed nations the ability to compete on the basis of their low wages. The WTO's refusal to adopt such a clause heightened the focus on the ILO and raised questions about its credibility as an organisation established to uphold the basic rights of labour. The adoption, in 1998, of the *ILO Declaration on Fundamental Principles and Rights at Work* marked a new step in the ILO's approach and the basis for further action.⁹⁸

The ILO response to globalisation developed in a number of key steps and was influenced by a number of key developments:

- 1993. The North American Free Trade Agreement (NAFTA) included a labour clause. The NAFTA Side Accord on Labour Cooperation made no reference to the ILO and international labour standards, but obliged signatories to the agreement to promote certain core labour principles—freedom of association, the right to bargain collectively and the

96. Economic globalization has been described as 'the increasing integration of economies around the world, particularly through trade and financial flows.' International Monetary Fund, *Globalization: Threat or Opportunity?*

<http://www.imf.org/external/np/exr/ib/2000/041200.htm#I>

accessed 15/9/2007. While globalisation is not a new phenomenon, it has been given impetus by the removal of trade barriers, deregulation of capital controls, and the development of new communication technologies.

97. The term 'social clause' refers to a clause attached to a multilateral trade agreement that obliges the signatory governments to respect the fundamental rights of workers, as set out in the ILO's fundamental conventions. Should a nation not observe these rights, they could lose the benefits of the agreement or be subject to trade sanctions, such as the levying of special tariffs on goods produced in conditions violating the standards.

98. C. Nyland and R. Castle, 'The ILO and the Australian contribution to the international labour standards debate', *Journal of Industrial Relations*, 41(3), September 1999, p. 355 provide a more detailed analysis of the events and debates leading up to the *Declaration on Fundamental Principles and Rights at Work* in 1998. Also see A. Frazer and C. Nyland, 'In search of the middle way: the ILO, standard setting and globalisation', *Australian Journal of Labour Law*, 10(3), pp. 280–86; and ILO, K. Tapiola, Executive Director, International Labour Office, 'Core labour standards and globalisation', paper prepared for the meeting of the Asian Development bank, Manila, 1 July 2002.

prevention of occupational injuries and illness—subject to each party's domestic legislation.⁹⁹

- June 1994. The Director General of the ILO made the labour rights-trade issue the focus for his report to the ILO's annual conference. The developing countries ended any discussion of a social clause in the trading system to link market access to the observance of key labour standards. The conference established a Committee on Legal Issues and International Standards.
- The Committee on Legal Issues and International Standards began the development of a portfolio of proposals for new conventions and recommendations which it believed could generate law, rather than merely expressing good intentions and were appropriate areas for legal regulation. This prioritisation process aimed to overcome the issues associated with a plethora of instruments of limited impact.
- 1994. The Governing Body of the ILO established a Working Party on the Social Dimensions of the Liberalisation of International Trade (which was later renamed the Working Party on the Social Dimension of Globalisation). This body identified two essential conditions necessary to ensure that the economic benefits of globalisation were commensurate with the social benefits, that is
 - the universal recognition of basic rights to be honoured by nations engaging in international trade, and
 - the setting up of an institutional framework to encourage states to use the benefits from globalisation to promote social progress.
- March 1995. The World Summit for Social Development, held in Copenhagen, determined the ILO Conventions that would form the content of its core labour standards and that these standards were also fundamental human rights. These conventions covered the prohibition of forced or compulsory labour, the abolition of child labour, freedom of association, the right to collective bargaining, equal remuneration for work of equal value, and the elimination of any discrimination in employment and occupation.
- 1996. The Organisation for Economic Cooperation and Development (OECD) released a study which concluded that the respect of core labour standards did not have any negative consequences for the economies and trade of developing countries and does not undermine their competitive position.¹⁰⁰

99. N. Haworth and S. Hughes, 'Trade and international labour standards: Issues and debates over a social clause', *Journal of Industrial Relations*, 39(2), June 1997, p. 188.

100. OECD, *Trade, employment and labour standards: A study of core workers' rights and international trade*, Paris, 1996.

- December 1996. The Ministerial Meeting of the WTO in Singapore issued a Ministers' communiqué which reaffirmed the commitment to international labour standards, declared the ILO the competent body to deal with those standards. It also stated that such standards should not be used for protectionist purposes and particularly not for denying the comparative advantage of developing countries from lower wages.
- March 1997. A discussion paper presented to the Committee on Legal Issues and International Standards identified options for promoting the core labour standards by either amending the ILO Constitution to enshrine the core principles, or developing a statement of fundamental rights in the form of a declaration adopted by the Conference. Such a declaration would become binding on member states through its embodiment of principles considered to be inherent in membership of the ILO.
- June 1998. The ILO Conference adopted the *Declaration on Fundamental Principles and Rights at Work*.
- June 1999. The Director General of the ILO proposed that the primary goal of the ILO in the period of global transition would be 'to promote opportunities for women and men to obtain decent and productive work, in conditions of freedom, equity, security and human dignity.' Decent work was seen to be reliant on four strategic objectives (different from the four core labour standards)—that is, the promotion of rights at work, employment, social protection, and social dialogue,¹⁰¹ as well as respect for international labour standards. The concept of decent work recognises that work is not just about an employment contract, but a vital source of personal dignity and self-worth, as well as individual, family and community stability.¹⁰²
- 1999. The Global Compact, which was proposed to the international business community by the Secretary-General of the UN in Davos, adopted the four categories of the 1998 ILO declaration as its labour principles.
- 2000. The Charter of Fundamental Rights of the European Union, proclaimed at the European Council at Nice on 7 December 2000, included seven chapters covering fundamental rights relating to dignity, liberty, equality, solidarity, citizenship and justice. Of particular interest to employment and industrial relations, are provisions on protection of personal data (Article 8), freedom of association (Article 12), freedom to choose an occupation and right to engage in work (Article 15), non-discrimination (Article 21), equality between women and men (Article 23), workers' right to information and consultation within the undertaking (Article 27), right of collective bargaining and collective action (Article 28), protection in the event of unjustified dismissal (Article 30), fair and just working conditions (Article 31), prohibition of child labour and protection of

101. That is, dialogue between the social partners—government, employers and workers.

102. ILO, *Report of the Director General: Decent Work*, International Labour Conference, 87th Session, Geneva, June 1999, <http://www.ilo.org/public/english/standards/relm/ilc/ilc87/rep-i.htm>, accessed 14/9/2007.

young people at work (Article 32) and reconciliation of family and professional life (Article 33).¹⁰³

- 2000. The OECD published a new study, *International Trade and Core Labour Standards*, which reaffirmed the main findings of the OECD's 1996 study. Amongst the study's tentative conclusions was that 'countries which strengthen their core labour standards can increase economic growth and efficiency by raising skill levels in the work force and by creating an environment which encourages innovation and higher productivity.'¹⁰⁴
- November 2001. The Governing Body of the ILO established the World Commission on the Social Dimension of Globalisation.
- 2002. A 2002 study on core labour standards and foreign direct investment (FDI) found that the negative effect of freedom of association and collective bargaining rights on FDI through labour costs is offset by other positive effects, such as greater political and social stability.¹⁰⁵
- 2003. A study by the ILO Institute found that freedom of association and collective bargaining rights and democracy enhance export competitiveness.¹⁰⁶
- February 2004. The World Commission released its report, *A fair globalisation: Creating opportunities for all*, setting out recommendations for making 'decent work a global goal.' Amongst other things, the Commission recommended that countries develop stronger policies to cope with the social strains of globalisation and proposed that a certain minimum level of social protection needs to be accepted as part of a socio-economic floor for the global economy. The main components of that floor were:
 - Fundamental rights at work and other civil and political liberties
 - Employment policies that combat exclusion from the labour market, and

103. European Foundation for the Improvement of Living and Working Conditions, 'Fundamental rights',

<http://www.eurofound.europa.eu/areas/industrialrelations/dictionary/definitions/fundamentalrights.htm> accessed 15/9/2007.

104. OECD, 'Policy brief: International trade and core labour standards', www.oecd.org accessed 7/9/2007; and Organisation for Economic Cooperation and Development, *International trade and core labour standards*, Paris, 2000, p. 15.

105. D. Kucera: 'Effects of labor standards on labor costs and FDI flows', Chapter 6, in H. Corbet and J. Bhagwati (eds.): *Labor standards in an integrating world economy*, Washington, DC, Cordell Hull Institute, 2002.

106. D. Kucera and R. Sarna: *International trade and freedom of association and collective bargaining rights: A bilateral gravity model*, International Labour Office, 2003.

- Social protection policies to ensure that all members of society enjoy a basic level of security in terms of income, health and other aspects of well-being.¹⁰⁷
- February 2007. A joint study undertaken by the International Labour Office and the Secretariat of the World Trade Organisation examined the connections between trade, labour and social policies.¹⁰⁸
- June 2007. The Group of Eight (G8)¹⁰⁹ summit meeting in Germany supported the ILO's Decent Work Agenda as central to globalisation with social progress. The G8 committed to include decent work and respect the ILO's core labour standards in their bilateral trade agreements, recalling that labour and social standards should not be used for protectionist purposes.¹¹⁰
- July 2007. The UN Economic and Social Council stated its strong support for fair globalization and the need to translate growth into reduction of poverty through full and productive employment and decent work.¹¹¹

107. International Labour Office, *A fair globalisation: the role of the ILO*, report of the Director General on the World Commission on the Social Dimension of Globalisation, Geneva, International Labour Conference, 92nd Session, 2004.

108. International Labour Office and the Secretariat of the World Trade Organisation, *Trade and employment: Challenges for policy research, a joint ILO/WTO Secretariat study*, Geneva, February 2007.

109. The Group of Eight is an international forum for the governments of Canada, France, Germany, Italy, Japan, Russia, the United Kingdom and the United States.

110. See ILO Press Releases, 'ILO welcomes G8 support for decent work as central to globalization with social progress',

http://www.ilo.org/global/About_the_ILO/Media_and_public_information/Press_releases/lang-en/WCMS_082902. accessed 15/9/2007.

111. Ministerial declaration of the 2007 high-level segment of ECOSOC as adopted on 10 July 2007, http://www.un.org/ecosoc/docs/pdfs/Revised_Ministerial_declaration.pdf. accessed 20/10/2007.

Appendix B: A Brief Summary of the Fundamental Conventions¹¹²

The elimination of all forms of forced or compulsory labour (Conventions Nos. 29 and 105)

Forced Labour Convention, 1930 (No. 29)

This fundamental convention prohibits all forms of forced or compulsory labour, which is defined as 'all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.' Exceptions are provided for work required by compulsory military service, normal civic obligations, as a consequence of a conviction in a court of law (provided that the work or service in question is carried out under the supervision and control of a public authority and that the person carrying it out is not hired to or placed at the disposal of private individuals, companies or associations), in cases of emergency and for minor communal services performed by the members of a community in the direct interest of the community.

The convention also requires that the illegal extraction of forced or compulsory labour is punishable as a penal offence and that ratifying states ensure that the relevant penalties imposed by law are adequate and strictly enforced.

Abolition of Forced Labour Convention, 1957 (No. 105)

This fundamental convention prohibits forced or compulsory labour as a means of political coercion or education or as a punishment for holding or expressing political views or views ideologically opposed to the established political, social or economic system; as a method of mobilising and using labour for purposes of economic development; as a means of labour discipline; as a punishment for having participated in strikes; and as a means of racial, social, national or religious discrimination.

The abolition of child labour (Conventions Nos. 138 and 182)

Minimum Age Convention, 1973 (No. 138)

This fundamental convention sets the general minimum age for admission to employment or work at not less than the age of completion of compulsory schooling and, in any case, not less than 15 years (13 for light work). The minimum age for hazardous work is set at 18 (16 under

112. ILO, 'Selected ILS by Subject',

<http://www.ilo.org/public/english/standards/norm/subject/index.htm>. Accessed 14/9/2007. The full text of these and other ILO conventions is available from the ILOLEX database on the ILO's website, <http://www.ilo.org/ilolex/english/index.htm>. Accessed 14/9/2007. For a more detailed outline of the core standards, see B. Creighton, 'The ILO and the protection of fundamental human rights in Australia', *Melbourne University Law Review*, 22(2), August 1998, pp. 245–254.

certain strict conditions). It provides for the possibility of initially setting the general minimum age at 14 (12 for light work) where the economy and educational facilities are insufficiently developed. Examples of such light work may include work in a family business, on a family farm, after school, or in legitimate apprenticeship opportunities that are not hazardous and that do not affect a child's attendance at school.

Worst Forms of Child Labour Convention, 1999 (No. 182)

This fundamental convention defines as a child a person under 18 years of age. It requires ratifying states to eliminate the worst forms of child labour, including all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labour, including forced or compulsory recruitment of children for use in armed conflict; child prostitution and pornography; using children for illicit activities, in particular for the production and trafficking of drugs; and work which is likely to harm the health, safety or morals of children.

The convention requires ratifying states to provide the necessary and appropriate direct assistance for the removal of children from the worst forms of child labour and for their rehabilitation and social integration. It also requires states to ensure access to free basic education and, wherever possible and appropriate, vocational training for children removed from the worst forms of child labour.

Freedom of association and the effective recognition of the right to collective bargaining (Conventions Nos. 87 and 98)

Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87)

This fundamental convention sets forth the right for workers and employers to establish and join organisations of their own choosing without previous authorisation. Workers' and employers' organisations shall organise freely and not be liable to be dissolved or suspended by administrative authority and they shall have the right to establish and join federations and confederations, which may in turn affiliate with international organisations of workers and employers. Organisations should have full freedom to develop their own constitution and rules and their own programs of activities, provided that they respect the law of the land. The convention does not *expressly* include a right not to join an organisation or a right to strike.

Right to Organise and Collective Bargaining Convention, 1949 (No. 98)

This fundamental convention provides that workers shall enjoy adequate protection against acts of anti-union discrimination, including requirements that a worker not join a union or relinquish trade union membership for employment, or dismissal of a worker because of union membership or participation in union activities. Workers' and employers' organisations shall enjoy adequate protection against any acts of interference by each other, in particular the establishment of workers' organisations under the domination of employers or employers' organisations, or the support of workers' organisations by financial or other means, with the object of placing such organisations under the control of employers or employers'

organisations. The convention requires ratifying states to promote the regulation of terms and conditions of employment by voluntary collective bargaining, where necessary, by measures that are appropriate to national conditions. The convention does not *expressly* include a right to strike.

The elimination of any discrimination in employment and occupation and the recognition of equal remuneration for work of equal value (Conventions Nos. 100 and 111)

Equal Remuneration Convention, 1951 (No. 100)

This fundamental convention requires ratifying countries to ensure the application to all workers of the principle of equal remuneration for men and women workers for work of equal value. The term 'remuneration' is broadly defined to include the ordinary, basic or minimum wage or salary and any additional emoluments payable directly or indirectly, whether in cash or in kind, by the employer to the worker and arising out of the worker's employment.

Discrimination (Employment and Occupation) Convention, 1958 (No. 111)

This fundamental convention defines discrimination as any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation. It requires ratifying states to declare and pursue a national policy designed to promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in these fields. This includes discrimination in relation to access to vocational training, access to employment and to particular occupations, and terms and conditions of employment.

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Appendix C: Summary and preliminary assessment of ALP and Australian Greens Policy Statements relevant to areas of stated ILO concerns for the impact of the Workplace Relations Act on core labour standards

Areas of ILO concern for core labour standards	ALP Policy Statements: <i>Forward with Fairness</i>	Is the ALP policy likely to <u>reduce</u> ILO concerns?	Australian Greens Policy Statements	Is the Greens' policy likely to <u>reduce</u> ILO concerns?
<p>Failure to encourage and promote voluntary collective bargaining</p> <p>Primacy given to individual relations over collective relations</p>	<p>Labor has committed to give effect to 'important workplace rights that are essential to a functioning democracy', including:</p> <ul style="list-style-type: none"> • collective bargaining • freedom of association • the right to representation, information and consultation in the workplace • protection against unfair treatment, and • freedom from discrimination. <p>Labor policy states that the law will protect the right to bargain collectively, take protected industrial action or rely on the benefits of a collective bargain.</p> <p>At the commencement of bargaining, employers will be obliged to inform employees to be covered by the agreement of their right to choose to be represented in bargaining.</p> <p>All bargaining participants will be</p>	<p>Yes. The major emphasis is on collective bargaining, rather than individual agreement making. Good faith bargaining obligations will be legislated. No disadvantage test to be reintroduced.</p> <p>Some concerns may remain in the transition period and in relation to non-union bargaining. The extent of remaining concerns will depend on the implementation detail. However, it is likely that the Work Choices amendment which specified that offering an 'AWA or nothing' does not amount to duress will be removed and not applied to transitional individual agreements (ITEAs).</p>	<p>In-principle commitment given to implementing international human rights obligations, including collective bargaining.</p> <p>Stated goal is the promotion of collective agreements as the primary means of regulating employment</p> <p>Key underlying principle is the right to be a member of a union, to bargain collectively, collectively to withhold labour and collectively organise in the workplace is essential to achieving a sustainable and democratic future.</p> <p>Committed to ensure that workplace and union-led bargaining is the primary tool for obtaining industrial outcomes by putting in place a sufficient threshold before any party can refer a dispute to conciliation and arbitration.</p> <p>Repeal the Coalition Government's Work Choices legislation.</p>	<p>Yes</p>

Areas of ILO concern for core labour standards	ALP Policy Statements: <i>Forward with Fairness</i>	Is the ALP policy likely to <u>reduce</u> ILO concerns?	Australian Greens Policy Statements	Is the Greens' policy likely to <u>reduce</u> ILO concerns?
	<p>obliged to bargain in good faith.</p> <p>The legislation will support collective enterprise bargaining regardless of whether employees choose to negotiate through a union or without a union.</p> <p>A non-union collective agreement will be possible that has no union input, including at the approval stage.</p> <p>Fair Work Australia will consider whether the collective agreement meets the safety net.</p> <p>All collective agreements will be required to contain a flexibility clause to enable individual arrangements. However, when approving a collective agreement, Fair Work Australia must consider the scope of such a clause to ensure: it provides for 'genuinely agreed individual flexibilities'; the collective agreement 'as a whole' is 'better off than the relevant award'; and the individual employee cannot be disadvantaged with respect to the collective agreement by entering into an individual flexibility arrangement.</p>		<p>Abolish Australian Workplace Agreements.</p> <p>Require employers to enter into collective agreements with their workforce.</p>	

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Areas of ILO concern for core labour standards	ALP Policy Statements: <i>Forward with Fairness</i>	Is the ALP policy likely to <u>reduce</u> ILO concerns?	Australian Greens Policy Statements	Is the Greens' policy likely to <u>reduce</u> ILO concerns?
	<p>Transitional arrangements:</p> <p>Existing AWAs will continue to operate for their full term.</p> <p>New individual agreements (ITEAs) are possible during a finite transition period in defined circumstances, but must not disadvantage the employee against a collective agreement applying to the work.</p> <p>During the transitional period, awards and collective agreements will not be able to override an AWA or ITEA while those agreements remain in operation.</p> <p>Following the transition period, AWAs and statutory individual contracts will not be provided.</p> <p>Employers and employees will be assisted to bargain collectively.</p>			
Greenfield agreements	Where an employer commences a 'genuinely new business or undertaking' and they have not engaged employees, the employer and a relevant union may bargain for a collective greenfield	Yes. Employer greenfield agreements will be abolished. However, it is unclear whether the words 'genuinely new business or undertaking' suggest	No specific mention, but Work Choices legislation to be repealed and in-principle commitment given to implementing international human rights obligations, including collective	Yes.

Areas of ILO concern for core labour standards	ALP Policy Statements: <i>Forward with Fairness</i>	Is the ALP policy likely to <u>reduce</u> ILO concerns?	Australian Greens Policy Statements	Is the Greens' policy likely to <u>reduce</u> ILO concerns?
	agreement for the new business.	that provisions which extend the scope of greenfield agreements (for example, to new activities carried out by government authorities and new projects within an existing business) will be removed.	bargaining.	
The potential for anti-union discrimination	<p>Labor has committed to give effect to 'important workplace rights', including:</p> <ul style="list-style-type: none"> • freedom of association • protection against unfair treatment • freedom from discrimination. <p>Employees will have the right to seek advice, assistance and representation from their union in the workplace, and workplace delegates will be able to represent their colleagues in the workplace.</p> <p>Working people will have the right to choose whether or not to be a member of a union. An employee's choice will be respected. It will be prohibited for anyone, employer or union or anyone else to subject an employee to any pressure in making that choice.</p>	Some reduction of concerns is likely, but the extent of the difference between current arrangements and proposed system will depend on how the policy is implemented.	<p>Free, independent and democratic unions are an essential pillar of a civil society</p> <p>The right to be a member of a union, to bargain collectively, collectively to withhold labour and collectively organise in the workplace is essential to achieving a sustainable and democratic future.</p>	Yes

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Areas of ILO concern for core labour standards	ALP Policy Statements: <i>Forward with Fairness</i>	Is the ALP policy likely to <u>reduce</u> ILO concerns?	Australian Greens Policy Statements	Is the Greens' policy likely to <u>reduce</u> ILO concerns?
	Unfair dismissal protection will be extended.			
Limits on trade unions' rights to organise	<p>Labor policy states that 'Existing right of entry laws will be retained.' It specifies:</p> <ul style="list-style-type: none"> • Right of entry laws will allow union officials with a right of entry permit and proper notice to: <ul style="list-style-type: none"> – investigate breaches of industrial law, awards or agreements – hold discussions with employees who are members or who are eligible to be members of the union, or – investigate breaches of OHS law. 	Yes. While the existing right of entry provisions will be retained, the abolition of AWAs, and encouragement of collective bargaining, means that restrictions on entering workplaces are likely to be of lesser effect.	<p>Require employers to inform new and existing employees that they are entitled to join a union, and enable the provision of information about the unions responsible for the sector and industry.</p> <p>Restore unions' right of entry to recruit members, inspect for and remedy breaches of occupational health and safety provisions, breaches of the Workplace Relations Act and relevant awards or agreements, and other activities relating to strengthening workers' organisations.</p> <p>Remove the restrictions on the right of trade unionists to have their dues deducted from their wages directly.</p>	Yes
Limits on the negotiation of multiple-business agreements and pattern bargaining	Collective bargaining will be based on bargaining at the level of an 'enterprise' (that is, a single business or employer, group of related businesses operating as a single business or a discrete undertaking, site or project).	Yes. Multiple-employer collective bargaining will be possible for some low paid industries. Broad definition of 'enterprise' suggests some contraction of the concept of multiple-business agreements	An industrial relations system that protects and enhances the rights of employees and workers by ... facilitating industry wide collective agreements that are union negotiated and exceed the Award standards.	Yes

Areas of ILO concern for core labour standards	ALP Policy Statements: <i>Forward with Fairness</i>	Is the ALP policy likely to <u>reduce</u> ILO concerns?	Australian Greens Policy Statements	Is the Greens' policy likely to <u>reduce</u> ILO concerns?
	Pattern bargaining will continue to be unlawful, but multi-employer collective bargaining may be facilitated by Fair Work Australia for low paid employees or employees who have not historically had access to collective bargaining, 'such as in community services, cleaning and childcare industries.'	which applied under Work Choices.		
Limits on what may be included in a collective agreement	Prohibited content provisions will be removed.	Yes.	No mention of limits. Work Choices legislation to be repealed and in principle commitment given to implementing international human rights obligations, including collective bargaining.	Yes
The extent of limitations on the right to strike.	Existing secondary boycott provisions in the <i>Trade Practices Act</i> will be retained. Tough restrictions on industrial action will be kept, including mandatory secret ballots to be conducted in workplaces before protected industrial action can occur. Industrial action in pursuit of pattern bargaining is not allowed.	Wording of the policy does not suggest change.	Repeal provisions against legitimate union activity (such as sections 45D and 45E in the Trade Practices Act 1974), and protect unions and workers against common law actions. Legislatively protect the right to strike, as recognised in International Labour Organization (ILO) Conventions No. 87 and No. 98, as a fundamental right of workers to promote and defend their economic and social interests.	Yes

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Areas of ILO concern for core labour standards	ALP Policy Statements: <i>Forward with Fairness</i>	Is the ALP policy likely to <u>reduce</u> ILO concerns?	Australian Greens Policy Statements	Is the Greens' policy likely to <u>reduce</u> ILO concerns?
			Abolish the requirement for secret ballots before industrial action.	
Equal remuneration for work of equal value	<p>Labor has committed to give effect to 'important workplace rights', including equal remuneration for work of equal value.</p> <p>Fair Work Australia will be able to commission and publish research on the effect of minimum wage variations on equity. It will also be able to 'conduct enquiries and may recommend adjustment to ... national employment standards'. Fair Work Australia will also be able to adjust minimum wages and award conditions.</p>	<p>Yes. In-principle commitment.</p> <p>The role given to Fair Work Australia suggests scope for major inquiries into pay equity and recommendations for adjustment to the minimum employment standards.</p> <p>Other aspects of the policy also have the potential to impact on this issue, for example:</p> <ul style="list-style-type: none"> • strengthened safety net • 30% casual loading • multiple-employer bargaining for low paid industries such as community services, cleaning and childcare (which are all female dominated) • decreased emphasis on individual bargaining. 	<p>Key goals are: equal access to paid work based on ability and irrespective of gender, age, sexual orientation, ethnicity, marital or civil status, family responsibilities, political affiliation, union membership, disability or religion; and elimination of the gender pay gap.</p> <p>Establish a National Pay Equity Standard to help correct the gender pay gap.</p> <p>Provide industrial tribunals with full powers to make orders to give effect to gender pay equity, on a workforce, industry or workplace basis.</p>	Yes

Sources: Australian Labor Party, *Forward with Fairness: Labor's plan for fairer and more productive Australian workplaces*, April 2007; and *Forward with Fairness: Policy Implementation Plan*, August 2007.

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Australian Greens, Policy, Employment and Industrial Relations, and Human Rights and Democracy, <http://greens.org.au/election/policy>, accessed 28/10/2007.

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