



## Trade union membership standards for Not for Profit regulation: standards too high?

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### Executive summary

- Recommendations adopted by the Australian Senate Economics Committee's inquiry into the regulation of the Not For Profit (NFP) sector and developed by the Productivity Commission in its 2010 report on the NFP sector invite questions as to how governance arrangements applying to NFP entities might materialise under any forthcoming regulatory scheme. This research paper pursues the governance aspect of the proposed NFP regulation, putting the case for entities, which comprise the NFP sector, to adopt constitutions, objects and rules for administration upon registration. Entities registered under the proposed scheme would meet standards for their governance.
- Federal industrial law developments in respect of trade union membership can play a heuristic role in these matters. The freedom to associate in trade unions and not to be discriminated against for associating featured in the original federal industrial legislation. The participation of employer associations and trade unions in the arbitration system is founded on these organisations submitting rules as a statutory requirement for registration. Rules effecting the governance of trade unions would be required to be enforceable upon union leadership and later required to be 'democratic' so as the membership could participate in the organisation's affairs.
- The freedom not to associate with unions manifested in registration provisions pertaining to conscientious objection to membership in state and federal industrial jurisdictions on religious grounds in the 1950s then on secular grounds from the 1970s in state jurisdictions and at the federal level in the 1990s.
- Both aspects of union governance in respect of rules and non association could be adopted to provide a standard for member rights across NFPs if the initiative to more broadly regulate the NFP sector takes the form of draft federal legislation.

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## Introduction

The prospect of proposed uniform regulatory arrangements for the Not For Profit (NFP) sector generates an opportunity for discussing governance standards applying to entities which make up the NFP sector.

A recent Productivity Commission report made the case for uniform governance, compliance and registration procedures to apply to Not For Profit entities.<sup>1</sup> In 2010, Prime Minister Gillard endorsed the direction of the Productivity Commission's NFP report by setting up an Office of the Not-For-Profit Sector within the Department of Prime Minister and Cabinet and an NFP reform Council as well as instituting a scope study for the design of an NFP regulator and its functions over 2011.<sup>2</sup> NFP entities are typically those entities which are not government agencies and not business corporations. These entities, grouped under the rubric of the 'third sector', operate in a diverse range of areas and fulfil an array of different functions including:

Culture & Recreation	Media & communications; visual arts, architecture, ceramic art; performing arts; historical, literary & humanistic societies; museums; zoos & aquariums; sports; recreation & social clubs; service clubs.
Education & Research	Elementary, primary & secondary education; higher education; vocational/technical schools; adult/continuing education; medical research; science & technology; social sciences, policy studies
Health	hospitals & rehabilitation; nursing homes; mental health & crisis intervention; other health services (e.g. public health & wellness education).
Social Services	Child welfare, child services & day care; youth services & youth welfare; family services; services for the handicapped; Services for the elderly; self-help & other personal social services; disaster/emergency prevention & control; temporary shelters; refugee assistance; income support & maintenance; material assistance.
Environment	Pollution abatement & control; natural resources conservation & protection; environmental beautification & open spaces; animal protection & welfare; wildlife preservation & protection; veterinary services.
Development & Housing	Community & neighbourhood organisations; economic development; social development; housing associations & assistance; job training programs; vocational counselling & guidance; vocational rehabilitation & sheltered workshops.

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1. The Productivity Commission's report on the NFP sector and the Senate Economics Committee report (2008) recommending regulation of NFPs are canvassed in Appendix A to this paper.
  2. C Bowen (Acting Minister for Human Services and Social Inclusion), *Government seeks expressions of interest for Non-Profit Sector Reform Council*, media release, 15 October 2010, viewed 28 October 2010 at: <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressrel%2F291836%22>

Law, Advocacy & Politics	Advocacy organisations; civil rights associations; ethnic associations; civic associations; legal services; crime prevention & public policy; rehabilitation of offenders; victim support; consumer protection associations; political parties & organisations.
Philanthropic intermediaries & voluntarism promotion	Grant-making foundations; volunteerism promotion & support; Fund-raising organisations.
International	Exchange/friendship/cultural programs; development assistance associations; international disaster and relief organisations; international human rights and peace organisations.
Religion	Congregations (including churches, synagogues, mosques, shrines, monasteries & seminaries); associations of congregations.
Business & Professional Associations & Unions	Business associations (organisations that work to promote, regulate & safeguard the interests of special branches of business); Professional associations (organisations promoting, regulating & protecting professional interests); Labour unions.
Not elsewhere classified	All other non-profit organisations including cooperative schemes, manufacturers, wholesalers, retailers, cemetery operators . <sup>3</sup>

The need to better regulate NFPs has arisen in a number of countries as governments have called upon their resources, volunteers and members to provide community services, often under contract. Employment advisory services and community support services (for example, in aged care) may be provided through NFP entities such as religious organisations (as well as for profit businesses). As the resources commanded by the NFP sector have increased so too have calls for the sector to be accountable for monies raised and spent. Thus, charities commissions have come into operation relatively recently in a number of countries including Great Britain, Ireland and New Zealand . Australia is not immune from these developments, but the direction it appears to be following is the creation of a broader regulatory authority for sections of the NFP sector, to facilitate a smoother compliance regime for NFPs operating across State boundaries.

This paper, however, focuses on one aspect of NFP governance, rights for members in NFP governance arrangements, rather than other aspects of NFP operations such as their role in the economy or competitive neutrality issues. The paper commences by outlining weaknesses in NFP regulatory arrangements where the Commonwealth has some involvement. Political parties are one of the few classes of NFPs subject to Commonwealth regulation through the *Commonwealth Electoral Act 1918*. Calls to increase democratic control of members over political parties are noted. However, one class of NFPs for which a proposed NFP regulatory scheme may in time also cover, referred to as ‘high demand groups’, from evidence of their dissident members appear prone to membership abuse, with members and volunteers complaining of restrictive codes, confidentiality

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3. Productivity Commission, *Contribution of the not for profit sector*, Research Report, Productivity Commission, Canberra, January 2010, p. 65, viewed 4 August 2010, [http://www.pc.gov.au/data/assets/pdf\\_file/0003/94548/not-for-profit-report.pdf](http://www.pc.gov.au/data/assets/pdf_file/0003/94548/not-for-profit-report.pdf)

agreements and intrusive rules.<sup>4</sup> Regulatory arrangements pertaining to NFP membership accountability on the one hand and 'non association' on the other, are minimal by the standards which the Parliament has imposed on federal trade unions, a class of NFPs which has been federally regulated since 1904.

This paper sets out the early registration provisions for trade unions, covering key amendments in the 1920s, 1950s and 1970s, which have provided a significant degree of membership control over unions. Freedom of association is traditionally understood as workers, free of employer or government influences, being able to form and join trade unions for advancement of their conditions of employment. The paper distinguishes the freedom of association from the freedom not to associate, as the key international labour convention on freedom of association to which Australia is a signatory, does not provide for the right not to associate, although other international conventions do.<sup>5</sup>

Provisions facilitating compulsory membership of trade unions as forms of union security are also discussed, as the registration of trade unions was a mechanism to obtain union security. Then, the counter moves to compulsory membership in the development of conscientious objection provisions to membership based on religious grounds are reviewed, followed by the secular challenges to compulsory membership from the 1970s. These challenges instituted rights for non association, often referred to as voluntary unionism. Non association is considered further with some intriguing permutations on conscientious objection to union membership. These incorporate objections by employers to trade union entry based on religious grounds. More recent developments in respect of non association include federal prohibitions on the use of bargaining fee charges to non unionists as a means of preventing coercion of non unionists to join unions.

From the history of membership controls in unions, as well as the focus on anti-coercion or anti-membership measures in recent years, aspects of governance could be drawn on to form a regulatory scheme for the NFP sector. The paper concludes by setting out some fundamental elements of such a scheme.

## Limitations of current NFP regulatory frameworks

Bringing NFP regulation into the spotlight raises the opportunity to canvass NFP membership and governance issues. These include the ability of individuals to associate with NFP entities, to dissociate without coercion and to take part in the management of entities which command the support and, in some cases, obsequious dedication of members. Former senator, Andrew Murray for example, has made a case for greater regulation over one class of NFPs, political parties, arguing:

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4. See for example N O'Malley, 'Refugee volunteers tell of Scientology influence', *Sydney Morning Herald*, 17 January 2011, viewed 17 January 2011 at: <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressclp%2F491658%22>.
  5. Discussed further in Appendix B.

Conflicts of interest and the self-interest of politicians have meant minimal statutory regulation of political parties. It is limited and relatively perfunctory, in marked contrast to the much better and stronger regulation for corporations or unions.<sup>6</sup>

Former minister in the Hawke Government (1983-1991), Gary Johns, has also noted that registered political parties, through their representation in parliaments, are not willing to emulate the democratic standards they impose on unions:

In the Commonwealth sphere for example, the Workplace Relations Act 1996 has specified since 1988 (and decades earlier in some circumstances) that, unless exempted, all elections for office in registered organisations (trade unions and employer bodies), must be conducted by the AEC (Australian Electoral Commission) ... The major political parties have legislated to ensure the scrutiny of the democratic process in the key voluntary associations in industrial relations. They have done so, it appears, to enhance the confidence of the community and members in the conduct of ballots. There can be few more important ballots than those which determine who is to carry the party label of a major Australian party ... Why then would the parties not do the same for themselves?<sup>7</sup>

His last point is particularly relevant. While the electoral laws, *inter alia*, provide for the registration of political parties, there are very few statutory arrangements ensuring party members are able to participate in the management of such organisations.<sup>8</sup> This is not to say that there are no or few rules allowing participation; what is meant is that there are few statutory requirements facilitating members' control and participation over the entity. This feature is separate from the issue of preselecting candidates for parliamentary office to which Mr Johns refers. A submission from the Democratic Audit of Australia to the Joint Standing Committee on Electoral Matters' inquiry into conduct of the 2007 federal election also argued:

... there are minimal requirements placed on how parties are to be structured or organised. Although a party is required to provide a copy of its constitution when applying for registration, there is no requirement for the constitution to be based on democratic principles or for the constitution to be publicly available.<sup>9</sup>

The question of membership participation and control over NFPs might be seen as relative. Many party members would argue that their parties do have more than sufficient practices to ensure

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6. A Murray, 'Can Australia regulate its way to electing better politicians?' *Canberra Times*, 3 November 2009, viewed 17 September 2010, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22library%2Fjrnart%2FUR3V6%22>
  7. G Johns, 'Desirability of regulating political parties' *Agenda*, vol. 8, no. 4, 2001, p. 298, 300.
  8. Compare the registration provisions of the *Commonwealth Electoral Act 1918* sections 123–141 [http://www.comlaw.gov.au/ComLaw/Legislation/ActCompilation1.nsf/0/67A68060AFEEC305CA25736A0004B0D7/\\$file/CwlthElectoral1918\\_WD02.pdf](http://www.comlaw.gov.au/ComLaw/Legislation/ActCompilation1.nsf/0/67A68060AFEEC305CA25736A0004B0D7/$file/CwlthElectoral1918_WD02.pdf) to over 300 sections of the *Fair Work (Registered Organisations) Act 2009* [http://www.comlaw.gov.au/ComLaw/Legislation/ActCompilation1.nsf/0/D713B7FB11B5542ECA2576F10012D296/\\$file/FairWorkRegOrg2009.pdf](http://www.comlaw.gov.au/ComLaw/Legislation/ActCompilation1.nsf/0/D713B7FB11B5542ECA2576F10012D296/$file/FairWorkRegOrg2009.pdf).
  9. Democratic Audit of Australia, Submission to the Joint Standing Committee on Electoral Matters, *Inquiry into the conduct of the 2007 federal election*, 2008, p. 13, viewed 17 September 2010: <http://www.aph.gov.au/house/committee/em/elect07/subs/sub045.pdf>,

membership participation, despite the arguments of Murray and Johns. For other NFPs, those that are more easily recognised, such as clubs and related associations, it is most likely the case that participatory and accountability standards are reasonable, with accounts to be kept and audited and presented to annual general meetings, annual elections for office bearers and provisions for extraordinary meetings, funds to be used for the benefit of members and so-on, with these requirements usually stipulated by State and Territory clubs and associations laws, providing the entity comes under these.

However, evidence presented to a recent Senate Committee investigating a possible public benefit test to justify tax concessions granted to charities, appears to be indicative of very low levels of membership control over certain of these NFPs. It heard evidence of accounts of oppression and coercion to make payments to the entity and accounts of coercion for individuals to remain as members. In some cases payments ran into hundreds of thousands of dollars.<sup>10</sup> Where a member has sought redress in a court, the courts have been found to be of little assistance because in many cases no laws have been broken.<sup>11</sup> Questions were raised over the financial transparency of certain NFPs:

I am just saying that an area of concern is: where is the money going? At the moment the accounts are not always transparent for a not-for-profit organisation...there have been many ... groups where this has happened.<sup>12</sup>

What distinguishes trade union internal affairs regulation from other NFP entities such as political parties or high demand groups, it is suggested, is the rich history of participatory rights for members in their organisations as well as accountability and control over matters such as the organisation's accounts. Further, protections from discrimination due to union membership and non membership make union membership and registration developments worthwhile reviewing in the sections below.

## The importance of registration to industrial organisations and union membership

Under Australia's first federal labour law, the *Conciliation and Arbitration Act 1904*, the positive freedom to associate was adopted as a cornerstone of public policy. The Act as passed provided that employees would not be discriminated against or victimised by employers because of their union membership or an entitlement to an award:

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10. J Anderson, evidence to the Senate Economics Legislation Committee Inquiry into the Tax Laws Amendment (Public Benefit Test) Bill 2010, *Hansard*, 28 June 2010, p. E16, viewed 17 September 2010, <http://www.aph.gov.au/hansard/senate/committee/S13202.pdf>.
  11. Cult Information and Family Support (CIFS) submission to the Senate Economics Committee, *Inquiry into the Tax Laws Amendment (Public Benefit Test) Bill 2010*, 5 June 2010, p. 2, viewed 17 September 2010, : [http://www.aph.gov.au/senate/committee/economics\\_ctte/public\\_benefit\\_test\\_10/submissions.htm](http://www.aph.gov.au/senate/committee/economics_ctte/public_benefit_test_10/submissions.htm).
  12. P Schofield, evidence to the Senate Economics Legislation Committee Inquiry into the Tax Laws Amendment (Public Benefit Test) Bill 2010, *Hansard*, 28 June 2010, p. E14, viewed 17 September 2010, <http://www.aph.gov.au/hansard/senate/committee/S13202.pdf>

No employer shall dismiss any employee from his employment by reason merely of the fact that the employee is an officer or member of an organization or is entitled to the benefit of an industrial agreement or award.<sup>13</sup>

The provisions were enhanced via amendments to the Act in 1914.<sup>14</sup> Paralleling this protection, industrial associations were to be registered under the Act, becoming registered organisations of employees and employers, rather than associations.<sup>15</sup> These measures were incorporated in public policy which as Justice Higgins, President of the Commonwealth Court of Conciliation and Arbitration, expressed it, was to 'treat unionism as desirable'.<sup>16</sup>

For trade unions, the incentive to register federally was the attraction of securing rights to serve logs of claims on relevant employers to create the required 'interstate industrial dispute' thus securing a federal award which set out wages and conditions of employment applicable to its members:

... The representative body must have the right to bind and the power to persuade not only the individuals with whom the dispute has arisen, but the ever changing body of workmen that constitute the trade.<sup>17</sup>

The early registration incentive also can be found in the Act's provisions which gave preference in employment and promotion to members of registered unions over non-members (with other considerations being equal).<sup>18</sup> Also, the cancellation of the registration of a federally registered organisation could be facilitated if its rules were found by the Industrial Registrar not to have included reasonable facilities for the admission of new members or impose unreasonable conditions upon the continuance of their membership or were in any way tyrannical or oppressive.<sup>19</sup> A reciprocal obligation on registered organisations was a form of accountability to members (and the public) in maintaining membership records, keeping accounts and so-on. These obligations were attached to the Act initially as Schedule B.

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13. Section 9, *Conciliation and Arbitration Act 1904*.

14. J Bornstein, 'A law that robs rights', *Herald Sun*, 15 May 2007, viewed 4 August 2010, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressclp%2FQA2N6%22>.

15. Organisations cover both trade unions and employer associations registered under the legislation, although the control measures outlined herein have applied in the main to the relationship of trade unions and their memberships.

16. High Court of Australia, *Federated Engine Drivers and Firemen's Association of Australasia v Broken Hill Proprietary Co Ltd* (1911) 5 CAR 9, at 25, viewed 23 November 2010 at: <http://www.austlii.edu.au/au/cases/cth/HCA/1911/31.html>.

17. High Court of Australia, *Jumbunna Coal Mine, No Liability v Victorian Coal Miners' Association* [1908] CLR 308, per Justice O'Connor at 358–9, viewed 3 November 2010 at: <http://www.austlii.edu.au/au/cases/cth/HCA/1908/95.html>.

18. *Conciliation and Arbitration Act* at section 40. Preference provisions were repealed under the *Workplace Relations and Other Legislation Amendment (WROLA) Act 1996*.

19. *Conciliation and Arbitration Act* at subsection 60(d)). The Australian Industrial Registry ceased to operate from 31 December 2009 when its functions were subsumed into the new industrial regulator Fair Work Australia.



## Union security

Labour lawyer David Quinn has argued that the early anti-union victimisation provisions were designed with the primary aim of providing protection or security to the institutions of the arbitration system, that is, the particular tribunal, registered unions and registered employer associations. The provisions were less focused on providing protections to individual union members. However the role of registered unions and employer associations bolstered the role of the arbitration system as a whole.<sup>20</sup> Two principles of union security became features of state and federal arbitration systems as these developed in the early twentieth century:

- that workers should contribute to the relevant union by way of membership in return for award rates and the employment conditions secured by registered unions and
- employers were to recognise the union for bargaining purposes and organisations were to become integral parts of the arbitration or other bargaining system.<sup>21</sup>

Union security came to take two forms which were often endorsed by legislatures or tribunals. The first was the pre-entry closed shop, in which to gain employment the employee must demonstrate membership of the relevant union. The second was the post-entry closed shop whereby employees were required to join the relevant union after commencing employment if they were to hold on to their jobs. Both requirements can be seen as forms of compulsory unionism and, crucially, they require the employer's co-operation by the threat of, or actual, dismissal of recalcitrant non-member employees. The third option of preference operated to give precedence to union members in appointment and promotion; if employees were retrenched non-unionists would be retrenched first where other considerations may be equal.

Federal labour law traditionally allowed awards and industrial agreements to provide for union preference until 1997 when union preference was specifically made illegal.<sup>22</sup> Federal labour law never authorised compulsory unionism in the form of the closed shop. However, as Academic Phillipa Weeks has observed, at different times, state laws or state tribunals promoted union preference, and recognised forms of compulsory unionism. Moves to enforce union security measures eventually precipitated political campaigns to thwart compulsory unionism and union preference.<sup>23</sup>

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20. D Quinn, 'To be or not to be a member – is this the only question', *Australian Journal of Labour Law*, vol. 17, no. 1, 2004, pp. 1–34.
  21. A Frazer, 'Trade unions under compulsory arbitration and enterprise bargaining: a historical perspective', in P Ronfeldt and R McCallum (eds.), *Enterprise Bargaining, Trade Unions and the Law*, The Federation Press, Sydney, 1995, p. 52.
  22. Workplace Relations and Other Legislation Amendment Act 1996: Item 4 of Schedule 16.
  23. P Weeks, *Trade Union Security Law: A Study of Preference and Compulsory Unionism*, Sydney, The Federation Press, 1995, from p. 16.

## Democratic control

In 1928, amendments were made by the Bruce-Page Government (1923—1929) to give the Arbitration Court power to declare a union rule to be invalid. Secret ballots were to apply to important union matters and union officials could be ordered to obey their union's rules. These measures arose principally as a means of responding to industrial disputation on the Australian waterfront. Upon the defeat of the Bruce-Page Government (due, in part, to its attempts to manage industrial relations by terminating the Court of Conciliation and Arbitration), the Scullin Government (1929—1931) repealed many of the Act's penal powers over trade unions.

With penal powers less available as a source of union control and in an attempt to counter a damaging coal strike, the Chifley Government (1945—49) introduced additional provisions for union rules in 1949. These enabled the Arbitration Court to hold inquiries into election irregularities on the complaint of a union member, including a power to conduct a fresh election, that is, to regulate union behaviour through internal union control measures under threat of deregistering the union, possibly annulling the awards to which it was party (a huge loss for any union's members).

The Industrial Registrar was enabled also to conduct a union election after being requested to do so by the union. In 1951, this provision was amended by the (second) Menzies Government (1949—1966) giving the power to a group of unionists to request the Industrial Registrar to conduct the elections in their union, as well as providing that all union elections be held by secret ballot and including provisions for absentee members to cast their votes. This time, the Government was seeking to 'balance' inter and intra union factional contests between communist and 'grouper' union leaderships.

Union members were later afforded rights to directly participate in the affairs of their union. In 1973, the *Conciliation and Arbitration Act 1904* was amended further to provide for democratic control of registered organisations (again, primarily trade unions). These reforms came about in the main through long standing factional rivalry between Tom Dougherty and Clyde Cameron within the leadership of the Australian Workers Union, with Clyde Cameron going on to be Minister for Labour under the Whitlam Government (1972-75).

The 1973 amendments ensured that persons exercising management functions, or functions relating to the making, alteration or enforcement of rules, or who would occupy positions with duties substantially the same as those of an elected office, became the holder of an 'office' for the purpose of the Act and, subject to certain qualifications, would have to be elected by the rank and file. No officer elected by the rank and file could be dismissed while in office unless found guilty of misappropriation of funds, a grave breach of rules, gross misbehaviour or gross neglect of duty. Financial members were to be given an absolute right to vote in any election for office bearers and in plebiscites touching rules or policy. The right to determine eligibility of candidates would be vested in a returning officer, being a person who was not an employee of the organisation or holding

any other office in the organisation. Commensurate with unions being required to meet these public policy requirements, the Whitlam Government also facilitated the cost of union elections.<sup>24</sup>

In his excellent account of the cumulative effect of these changes to union registration provisions, Professor Ron McCallum opined:

At the close of 1975, Australia had the most thorough controls on the internal affairs of trade unions of any comparable country in the western world. Our controls were tighter and went much further than did the Landrum-Griffin Act of the United States and much further than comparable British and Canadian legislation ... the Conciliation and Arbitration Act gave any interested union member a bulging quiver of remedies so that she or he could ensure that her or his union was administered fairly and democratically.<sup>25</sup>

By the 1980s, the case for the ongoing registration of unions began to change. The Fraser Government passed the *Conciliation and Arbitration (Management of Organisations) Act 1982* which commenced the process of ensuring high standards for union office (absence of previous convictions etc.). The Hancock Committee review of Australia's industrial relations in 1985, established by the Hawke Government to essentially defend the existing award system against the nascent political challenges of the 'New Right', questioned the degree of control over the internal affairs of unions and employer organisations imposed by the federal registration provisions which, in part, had begun to parallel provisions in company law.<sup>26</sup> However, a new case for extensive regulation of trade unions was put at that time. This was that unions could be regarded as major economic entities and for this reason should be regulated under distinct (and increasingly prescriptive) legislation.<sup>27</sup>

In the late 1980s the registration provisions were amended by the Hawke Government to facilitate the role of large unions through union amalgamation. This prompted Australian employers to seek a view from the International Labour Organisation in 1990 that the new minimum membership figure of 10 000 in order to secure union registration, violated freedom of association. This view was upheld by the ILO, necessitating setting the membership requirement back at 100.<sup>28</sup>

While these cumulative developments essentially built up the role of registered trade unions, through changes in the Act's membership and registration provisions, other moves were underway to provide individuals with non association rights.

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24. C Cameron, 'Second reading speech: Conciliation and Arbitration Bill 1973', House of Representatives, *Debates*, p. 1431, viewed 19 August 2010, [http://parlinfo.aph.gov.au/parlInfo/download/hansard80/hansardr80/1973-04-12/toc\\_pdf/083131197304120.pdf;fileType=application/pdf#search=%221970s%201973%22](http://parlinfo.aph.gov.au/parlInfo/download/hansard80/hansardr80/1973-04-12/toc_pdf/083131197304120.pdf;fileType=application/pdf#search=%221970s%201973%22).
  25. R McCallum, 'Secret ballots and the Industrial Relations Bureau: old wine in new bottles', in G Ford, J Hearn and R Lansbury (eds.), *Australian labour relations: readings*, MacMillan, Melbourne, 1980, pp. 377–378.
  26. Committee of Review into Australian Industrial Relations Law and Systems (K Hancock, Chair), *Report of the committee of review, Australian industrial relations law and systems*, Canberra, AGPS, 1985, p. 476.
  27. M Christie, 'Legal duties and liabilities of federal union officials' *Melbourne University Law Review*, vol. 15, 1986.
  28. Industrial Relations Reform Bill 1993 at clauses 72 and 73.

## Individual rights through voluntary unionism

In 1942, then Leader of the Federal Opposition, Robert Menzies, put the case for voluntary unionism in one of a series of radio broadcasts, this one aimed at compulsory membership of trade unions. In his *Forgotten People* lecture 'Compulsory Unionism', Menzies observed that the link between freedom of religion, freedom of thought and the freedom to associate underpinned basic human rights stating:

The movement for compulsory unionism breaks new ground. The trades union has been a splendid servant. It now aspires to be a master...

... It will perhaps be one of the ironies of history that the trades union movement which, in the days of the famous Tolpuddle martyrs, represented a struggle for freedom of industrial association, should now have taken a new turn so that it desires not that there should be freedom to associate in a trades union but that there should be no freedom not to associate in a trades union.

The freedom to associate is of the first order of importance in the world of liberty. It is important that I should be free to associate with other people who think as I do. It is not always realized that it is equally important that I should be free not to associate with people who do not think as I do...

Freedom of worship must involve freedom not to worship; freedom of thought must involve freedom to not think as others do; freedom to associate with Jones and Brown must involve freedom not to associate with Jones and Brown.<sup>29</sup>

In respect of the positive side of association, the public policy consideration supporting the freedom to associate in the workplace has been a key principle underpinning the formation of trade unions and their ability to collectively bargain with employers. Facilitating non association has been a more difficult task for unions, as it has been for NFPs generally.

## Religious and secular challenges to union security

### Religious challenge

The first Australian organisations to take up the Menzies creed and challenge union membership provisions were certain religious groups that did not tolerate their members joining unions or, for that matter, political parties. To such groups, union membership by an adherent would result in oppression because of the individual's special religious beliefs. The formal moves against union security provisions, would take the form of conscientious objection to union membership. The form of objection mirrored the basis of earlier objections to wartime military service. The range of

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29. R Menzies, 'Compulsory Unionism.' *The Forgotten People*, Menzies Virtual Museum website, 1942, viewed 4 August 2010, <http://www.menziesvirtualmuseum.org.au/transcripts/ForgottenPeople/Forgotten24.html>.

religious beliefs which precluded union membership however, was limited to the Exclusive Brethren and Jehovah's Witnesses. The Exclusive Brethren were noted by Weeks:

to adopt a 'principle of separation from society, shunning involvement not only with established churches but all forms of association with people who are impure in faith and morals, including trade unions and professional bodies, the Red Cross and medical benefits organisations'.<sup>30</sup>

These beliefs required that adherents separate themselves as far as possible from 'worldly affairs'. According to Weeks, it was the Exclusive Brethren who persuaded the Queensland ALP Government in 1948 to legislate for conscientious objection to union membership on the basis of religious beliefs.

In 1951 New South Wales industrial legislation was amended to provide that workers holding a conscientious objection to union membership on religious grounds could be exempted from union membership. In 1953 legislation was passed to provide for *absolute* preference to NSW unionists in industries covered by an award or industrial agreement. A counter provision was also introduced which provided that a person objecting to being a member of a union on the grounds of conscientious belief and who satisfied the Industrial Registrar that the objection was genuine, could obtain a certificate of exemption from union membership.<sup>31</sup>

Provision was made in the Commonwealth industrial jurisdiction under the Menzies Government in 1956 for exemption certificates to be granted to non-unionists, with payment of the membership fee to a charity. This exemption was modelled on the conscientious objection provisions of the New South Wales Act.<sup>32</sup> Other states also allowed conscientious objection: Western Australia (WA) in 1963; South Australia (SA) in 1972 and Tasmania in 1984. Victoria did not make similar provision for conscientious objection. The Commonwealth provisions were refined in 1978 under the Fraser Government to lessen the evidentiary proof of faith being the prime reason for the objection.

## Secular challenge

The 1970s were a period of challenge to traditional trade union security devices internationally. These challenges were to be transmitted through Australian laws. In the United Kingdom, railway workers, Young, James and Webster (and others), commenced applications in the European Commission of Human Rights in 1976 challenging the closed shop as it operated in British Rail. Their challenge was decided in their favour in the European Court of Human Rights in 1982. The point to note about the Young, James and Webster case is that it was about an actual closed shop policy, where the plaintiffs had been dismissed by the employer in accordance with its membership agreement with rail unions due to the plaintiffs' non membership of the relevant unions—a closed shop policy derived through collective bargaining.

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30. P Weeks, *Trade union security law: a study of preference and compulsory unionism*, Sydney, The Federation Press, 1995, p. 175.

31. NSW Law Reform Commission, 'Conscientious objection in legislation', *Report No. 42*, 1984, viewed 4 September 2010, <http://www.lawlink.nsw.gov.au/lrc.nsf/pages/R42CHP3>.

32. At the time of its repeal and replacement in 1988 by the *Industrial Relations Act*, the *Conciliation and Arbitration Act* provided for conscientious objection at section 144A and resignation from membership at section 145.

Campaigns for voluntary unionism based on the non-religious beliefs of individuals manifested in WA in the mid 1970s giving political expression to the negative right to association. The consequences of compulsory union membership it was argued might manifest in coercion, intimidation and (unwanted) political association. Weeks quotes the then WA Minister for Labour and Industry, William Grayden, who claimed in 1976:

... Society can no longer tolerate a situation where a citizen has no freedom to work except under a licence from a union ...<sup>33</sup>

Compulsory unionism and preference were made illegal in WA in 1979 with the advent of the freedom to associate and non-association provisions.<sup>34</sup> As a consequence, WA conscientious objection provisions and certificates were repealed since the right not to belong to a union became a general right and no longer one based on religious beliefs. Challenges to compulsory unionism and union preference were reflected in other jurisdictions. In 1991 New South Wales outlawed closed shops and prohibited discrimination against non-unionists. The Victorian Employee Relations Commission was prohibited from granting union preference or compulsory unionism and discrimination against non-unionists was outlawed in 1993. SA allowed non-unionists access to award making processes and choice over membership in 1994. Also in 1994, under the Keating Government, national federal dismissal laws were introduced to, inter alia, prevent the dismissal of an employee due to his or her union membership or non membership.<sup>35</sup>

## Voluntary unionism or non association in the *Workplace Relations Act 1996*

The Howard Government (1996-2007) repealed federal union preference provisions, prevented their inclusion in awards and agreements and introduced voluntary unionism provisions (freedom not to associate) under provisions of the Workplace Relations and Other Legislation Amendment Bill 1996. The resulting *Workplace Relations Act 1996* retained the traditional anti-discrimination protections for union members, and the positive and negative protections, together grouped under the rubric of Freedom of Association. These provisions were incorporated as a part of the Act following in

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33. P Weeks, op. cit., p. 220.

34. *Industrial Arbitration Act 1979* (WA) at section 100.

35. The Keating Government accepted an amendment to its national termination provisions contained in the Industrial Relations Reform Bill 1993 proposed by then Opposition Leader John Howard which prevented termination of an employee because of non membership of a union, currently found under Part 3-1 of the *Fair Work Act*. Refer to L Brereton, 'Consideration of Senate Message: Industrial Relations Reform Bill', House of Representatives, *Debates*, 16 December 1993, p. 4249, viewed 7 September 2010, [http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;orderBy=date-eFirst;page=0;query=\(%20Dataset%3Ahansard%20SearchCategory\\_Phrase%3A%22house%20of%20representatives%22%20\)%20Date%3A19810101000000%20%3E%3E%20091231000000%20Decade%3A%221990s%22%20Year%3A%221993%22%20Month%3A%2212%22%20Day%3A%2216%22%20Speaker\\_Phrase%3A%22mr%20brereton%22;rec=0;resCount=Default](http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;orderBy=date-eFirst;page=0;query=(%20Dataset%3Ahansard%20SearchCategory_Phrase%3A%22house%20of%20representatives%22%20)%20Date%3A19810101000000%20%3E%3E%20091231000000%20Decade%3A%221990s%22%20Year%3A%221993%22%20Month%3A%2212%22%20Day%3A%2216%22%20Speaker_Phrase%3A%22mr%20brereton%22;rec=0;resCount=Default).

sequence to the existing membership and registration provisions.<sup>36</sup> The registration provisions were amended to facilitate the disamalgamation of those unions which had amalgamated under the Labor Government's amalgamation amendments and ACTU policy encouraging amalgamations. The aim was to rebuff the challenges to traditional unionism by the New Right. Smaller enterprise associations of employees also could register under the Act, as alternatives to traditional industrial unions.

Introducing the provisions in 1996, then Minister for Industrial Relations, Peter Reith, affirmed that individuals would have a right to be or not to be in a union, that preference for union members would be removed from awards and union entry to workplaces would be restricted:

Among the fundamental principles underpinning the government's industrial relations policy, are the principle of Freedom of Association — including the choice whether or not to be in a union or employer organisation—and the principle that all Australians be treated equally before the law ... Under the government's proposed legislation, employees will be able to make choices about union membership and, if they wish to be in a union, they will be able to join any union whose eligibility rules cover them ... The commission will be denied jurisdiction over preference in employment. Existing award provisions providing for preference will cease to have effect. Under the bill, individuals, including independent contractors, will be protected against coercion to join or not to join an organisation or to cease to be a member of an organisation. Closed shops will be abolished ... the current provisions in the Act relating to the rights of unions to enter workplaces are restricted under our bill to unions with members who have requested them to visit their workplace.<sup>37</sup>

The freedom of association provisions aimed to prevent employees and contractors being victimised, injured, dismissed or discriminated on the basis of membership or non-membership of an association. Contraventions of the provisions gave rise to civil liability and the Federal Court was given powers to make injunctions, to order the payment of compensation, reinstatement of the employee or re-engagement of the contractor and to make any other order deemed appropriate. Maximum penalties for corporations including unions were increased to \$10 000. The Keating Government prohibition on dismissing an employee because of non membership was retained.<sup>38</sup> On the other hand, the retention of the Act's traditional anti discrimination provisions (protection of a member benefitting from an award) were the basis of the Maritime Union of Australia successfully having its members reinstated, having been dismissed by Patricks Stevedores during the 1998 waterfront dispute.<sup>39</sup>

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36. Freedom of association (and non association) was inserted as Part XA of the *Workplace Relations Act*. It followed Part IX and Part X which dealt with registration of organisations, membership, amalgamation, disamalgamation etc.

37. P Reith, 'Second reading speech: Workplace relations and Other Legislation Amendment Bill 1996', House of Representatives, *Debates*, 23 May 1996, pp. 1302–1303, viewed 9 September 2010, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansard%2F1996-05-23%2F0058%22>

38. *Workplace Relations Act 1996* at paragraph 170CK(2)(c).

39. R McCallum, 'A priority of rights: the freedom to associate and the waterfront dispute', *Australian Bulletin of Labour*, vol. 23, no. 3, September 1998.



The administration of the freedom to/not to associate provisions was ascribed to the Office of the Employment Advocate which included making representations on behalf of both employers and employees. It also had the functions of filing and approving Australian Workplace Agreements, the alternatives to awards and collective agreements. By the time its functions were subsumed into the Workplace Ombudsman and the Workplace Authority, the Employment Advocate had become a major industrial regulator. Its budget (2006-07) was \$36 million and it employed 242 staff.<sup>40</sup>

In one of the first non association cases contested under these provisions, the Employment Advocate, in 1997, acted on an employee's behalf to prosecute a union for seeking to recruit a member and for seeking to resolve an industrial dispute. The employee, Mr Holloway, a casual employee supplied under a labour hire arrangement and targeted by co-workers due to his non membership, was not dismissed under the terms of any compulsory union agreement; rather, the relevant union, the National Union of Workers (NUW) sought alternative employment arrangements for the employee so as to resolve the industrial situation. Ultimately Mr Holloway joined the union.

The nature of the issues in this case may be distinguished from the Young, James and Webster case cited earlier. The NUW conducted the negotiations to arrange the employee's employment at an alternative site. The Federal Court's decision noted that mitigation of this kind was not sufficient to prevent a penalty being applied:

... it is the act of incitement etc and not any response to it that is the proscribed conduct (under the Workplace Relations Act) ... It was common ground that Hearne (the NUW official) made no direct threat to Holloway (union objector) nor did he at any time use intimidatory language to him. The argument ... was that Hearne's intention was not to injure Holloway personally but to avoid an industrial dispute erupting over other members being aggrieved that Holloway had not joined the Union.<sup>41</sup>

The construction of the new laws included the prevention of an employee suffering a detriment in employment due to his or her non membership. The decision, resulting in penalties against the NUW, liable by virtue of the operation of a statutory imputation under Part XA, served to warn the union movement of the significance of the new freedom of non association provisions and acted, to paraphrase Voltaire, as a means 'to encourage the rest'.

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40. Office of the Employment Advocate, *Annual Report 2006-07*, Office of the Employment Advocate, Canberra, 2007, p. 22, 24.

41. Employment Advocate v National Union of Workers [2000] FCA 710, viewed 29 August 2010, <http://www.austlii.edu.au/au/cases/cth/FCA/2000/710.html>.



## Employer conscientious objection to right of entry, political funds, bargaining fees and encouragement clauses

### Conscientious objection to right of entry and political funds

One of the important non association developments from the mid 1990s has been in provisions for the conscientious objection of employees to union membership transforming into provisions which deny trade union entry onto premises where the *employer* has obtained a conscientious objection certificate.

Repealing the WA conscientious objection provisions in 1979 appears to have had some long term consequences as the Exclusive Brethren (also called the Brethren) have sought to retain conscientious objection provisions in a number of jurisdictions when the introduction of freedom not to associate provisions would otherwise act to make the conscientious objection provisions redundant.

Their purpose has been to build on traditional conscientious objection to union membership provisions to provide a denial of union entry with the employer having obtained a conscientious objection certificate based on the employer's religious beliefs. These developments appear to have resulted through a process of 'pattern bargaining', occurring firstly in the New South Wales industrial jurisdiction in 1996<sup>42</sup>, then New Zealand in 2000<sup>43</sup>, the Commonwealth in 2001-02 and in South Australian industrial jurisdiction in 2005.<sup>44</sup> In each case the Exclusive Brethren had made representations for this form of objection to trade unions. The WA jurisdiction was not available for this purpose as it had repealed its conscientious objection provisions in 1979.<sup>45</sup>

In the case of the Commonwealth conscientious objection provisions, the Exclusive Brethren, the then Minister for Workplace Relations, Peter Reith, and the Australian Democrats (who exercised balance of power in the Senate mostly over the period 1996 to 2004) negotiated the retention of conscientious objection to union membership in 1996.<sup>46</sup> The Workplace and Other Legislation

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42. *Industrial Relations Act 1996* (NSW): conscientious objection to organisational membership (section 212) and denial of union right of entry to small business certificate holders (subsection 296 (2)). See also the reference to the Brethren by F Nile, 'Industrial Relations Bill (in Committee)', New South Wales Legislative Council, *Hansard*, 22 May 1996, p. 1296.

43. The former NZ Minister for Labour, Ruth Dyson recalled the original presentations in 1999–2000 by the Exclusive Brethren (for exemption to trade union right of entry), and claimed that the 'basis of their presentation to parliament was that they were outside mainstream political activity. Well, events in New Zealand and Australia as well, have demonstrated that either of those original submissions were totally incorrect, or their situation has changed dramatically. They are active players in the New Zealand political scene and by all accounts in yours as well', ABC 'Religion report', *Radio National*, 27 September 2006.

44. In 2005, the South Australian legislation was amended to include denial of union right of entry based on religious grounds and following representations made to the Stevens Review (*Report of the review of the South Australian industrial relations system 2002*) was Brethren specific: subsection 140(5) of the SA Fair Work Act.

45. P. Weeks, op. cit., p. 221.

46. The lobbying of the Exclusive Brethren to the Hon Peter Reith, then Minister for Industrial Relations to retain federal conscientious objection to union membership in the 1996 workplace legislation has been reported in the Senate by

Amendment Bill 1996 initially proposed repeal of conscientious objection consequent upon introducing the more effective non association provisions, but the Government was persuaded to retain conscientious objection.<sup>47</sup>

The second part of the move in grafting the denial of workplace entry to conscientious objection would occur in 2000-01. Then, the regulation of registered organisations was proposed to be separated from the *Workplace Relations Act* (WR Act).<sup>48</sup> The legislation followed an earlier exposure draft.<sup>49</sup> In a new direction for unions, a ministerial discussion paper accompanying an exposure draft of the Registered Organisations Bill, proposed that registered organisations would be required to have rules to make express provision for political purposes expenditure as was the then case applying to Western Australian unions under that State's industrial system. The organisation's secretary would report on these expenditures in the annual report and a majority of members would approve such a political fund and authorise political expenditures from the fund (and that fund only) and members could direct which part of the organisation's income (subscriptions) could be directed into such a fund.<sup>50</sup>

The draft Registered Organisations Bill showed how prescriptively union rules governing donations, particularly political donations, could be regulated, on the pretext of granting members significant control over the spending of funds. Other changes included new statutory duties for officers and employees of registered organisations, adoption by organisations of Australian Accounting Standards, imposing fiduciary duty on organisations' officers while prohibiting conflicts of interest and secret profits (which were subsequently enacted).

An accompanying consequential amendments Bill to the principal Bill included provisions to deny trade unions' right of entry to small business establishments based on the employer's religious beliefs. It was to be effected by linking the provisions on workplace entry by union officials to a new conscientious objection of small business employers under the existing provisions dealing with

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Senator Murray: Senate, *Debates*, 1 December 2006, viewed 1 September 2010 at p. 89:

[http://parlinfo.aph.gov.au/parlInfo/genpdf/chamber/hansards/2006-12-01/0082/hansard\\_frag.pdf;fileType=application%2Fpdf](http://parlinfo.aph.gov.au/parlInfo/genpdf/chamber/hansards/2006-12-01/0082/hansard_frag.pdf;fileType=application%2Fpdf).

47. Item 16 in Schedule 21 of the Workplace and Other Legislation Amendment (WROLA) Bill 1996. Senator Murray at that time also attempted to move amendments to repeal the denial of trade union entry to small business based on conscientious objection provisions. Senator Bob Brown would move similar amendments to the Fair Work Bill in 2009 with success, although conscientious objection to membership remains, relocated to the *Fair Work (Registered Organisations) Act 2009* at section 180: B Brown, 'Consideration of House of Representatives Message: Fair Work Bill 2009', Senate, *Debates*, 19 March 2009, p. 2317, viewed 5 September 2010, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansards%2F2009-03-19%2F0598%22>
48. T Abbott, 'Second Reading Speech: Workplace Relations (Registered Organisations) Bill 2001', House of Representatives, *Debates*, 4 April 2001, p. 26342, viewed 7 September 2010, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansard%2F2001-04-04%2F0009%22>.
49. Exposure Draft: Registered Organisations Bill 2000: clauses 130–133.
50. The P Reith, 'Accountability and democratic control of registered industrial organisations', *Ministerial discussion paper*, October 1999, p. 16 and proposed clauses 145–151 of the Exposure Draft Registered Organisations Bill 2000.

registered organisations and membership. The employees affected by the loss of union entry would approve the proposed arrangement (although this approval requirement was later repealed in 2006). The new conscientious objection provisions correlated with reciprocal amendments to the right of entry provisions.<sup>51</sup>

Both Bills lapsed at the calling of the 2001 federal election having met Senate resistance, although the role of Brethren employers in seeking a denial of union entry was noted in debates.<sup>52</sup> Both Bills were reintroduced in 2002, following the Howard Government's re-election. The party this time in facilitating the Bills' passage was the then Labor Opposition. Incorporating certain Opposition amendments, the two Registration Bills were passed including denial of union entry to a small business based on the employer holding a conscientious objection certificate but without the requirement for unions to operate political funds.

The effect of the new measures was to deny freedom of association to potential union members; that is, to the employees who may not have been members of the employer's religious faith. This is an issue which is likely to grow as governments come to rely on the provision of services from NFPs, including religious NFPs. They may need to recruit from the general labour market to meet contract obligations, while those recruited employees may have no particular interest in the faith of the employer.

The new registration scheme took the form of an extensive schedule to the WR Act (the Registration and Accountability Schedule), incorporating the membership control provisions outlined earlier.<sup>53</sup>

## **Bargaining fees and encouragement clauses**

In 2003, non membership was given further effect by banning union bargaining fees. These had been introduced as a term of a certified agreement applicable to the enterprise subject to the proposed industrial agreement. Unions had responded to the removal of traditional union security provisions (preference clauses) by pursuing bargaining agents' fees and union encouragement clauses in enterprise agreements. Including a bargaining fee as a charge in an enterprise agreement was seen to be a method of preventing 'free-riding' by non unionists on the efforts of union members to secure superior pay and employment conditions (to the applicable award) and have been common

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51. Workplace Relations (Registered Organisations) (Consequential Amendments) Bill 2001. The amendments manifested in the right of entry provisions of the Workplace Relations Act as subsections 285C(3)-285C(7) and under the conscientious objection provisions in Schedule 1 of the WR Act at subsection 180(1).
  52. Arch Bevis observed in the debate on the 2001 Bill that 'many members of this Parliament have met with representatives of the Brethren', however, he expressed his reservation at the proposal to deny union entry on the basis of employer beliefs: A Bevis, 'Consideration in detail: Workplace Relations (Registered Organisations) (Consequential Provisions) Bill 2001', House of Representatives, *Debates*, 27 August 2001, p. 30321, viewed 7 September 2010, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansard%2F2001-08-27%2F0158%22>.
  53. In this form, provisions governing the registration and accountability of organisations were relocated to Schedule 1B of the *Workplace Relations Act 1996*.

industrial arrangements in other jurisdictions. Canadian academic Frank Reid, for example, reported on the practice as it applied in Canada:

... although no employee is obligated to join the union, all employees are required to pay dues to support the union. The (Labour Relations) Act provides for the agency shop (or Rand formula as it is also known in Canada) as the minimum level of union security, i.e. compulsory dues check-off (at the request of the union) for both union and non-union members.<sup>54</sup>

Even if such fees had been allowed, it is doubtful that they would have ever been able to deliver compulsory membership to Australian unions approaching the scale that the Edict of Thessalonica, for example, delivered 'compulsory' membership to the Christian Church in the fourth century. A bargaining fee could not have resulted in compulsory membership, in the terms of compulsory membership discussed earlier. The possibility of paying a fee could have resulted in the relevant employee choosing membership to avoid the fee, although the relevant employee's ongoing employment did not hinge on the fee being paid, therefore it could not have resulted in compulsory membership. Nevertheless, in introducing the Bill, the then Workplace Relations Minister, Tony Abbott, stated that reported instances where the bargaining fee was set at a level of \$500 per annum was indicative of coercion on an employee to join the union:

This fundamental freedom (to join or not) is violated by recent union attempts to impose so-called 'bargaining agent's fees'. These require non-union members to pay for union negotiations at their workplace, even though these negotiations may take no account of their concerns. In many cases the fee demanded has been set at \$500 per year, well above the level of annual union dues. This suggests that many compulsory fee demands are being made with premeditated coercive intent.<sup>55</sup>

The bargaining fee provisions prohibited employers and others from engaging in discriminatory conduct against people who refuse to pay the fee; prohibited an industrial association from encouraging or inciting others to take discriminatory action against people who refuse to pay a bargaining fee; prohibited an industrial association from taking, or threatening to take, action with intent to coerce people to pay a bargaining fee; prohibited an industrial association from demanding a bargaining fee other than those fees for services usually entered into by employer associations and their clients/members and prohibited the making of false or misleading representations about a person's liability to pay a compulsory union fee.<sup>56</sup> The *Fair Work Act 2009* preserves bargaining

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54. F Reid, 'An assessment of enterprise bargaining in Canada and implications for industrial relations reform in Australia', in *Enterprise bargaining systems international case studies*, EPAC Background Paper No 33, Canberra, AGPS, 1993, p. 17.

55. T Abbott, 'Second reading speech: Workplace Relations Amendment (Prohibition of Compulsory Union Fees) Bill 2002 [No. 2]', 4 December 2002, p. 9537, viewed 3 September 2010, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansard%2F2002-12-04%2F0009%22>.

56. *Workplace Relations Amendment (Prohibition of Compulsory Union Fees) Act 2003*.

services fee as an objectionable term in an enterprise agreement, but allows the payment of such fees where an employee consents to it.<sup>57</sup>

Union encouragement clauses, the other half of union security arrangements to bargaining fees, were designed to create an environment in which workers would not feel afraid to join a union. Workers would realise that with an enterprise agreement specifying a union encouragement clause, the employer would have no objection to them joining the union. In other words, individual workers would be free to make up their own mind on the question of union membership. Union encouragement clauses were banned following the Work Choices amendments to the WR Act.<sup>58</sup>

## Registration: declining benefits?

For unions, registration remains the prerequisite for participating in the current Fair Work system, although it appears that the rights conferred by registration diminished from the early 1990s. For example, unions and employer associations are no longer parties expressly bound by federal awards, instead the *Fair Work Act 2009*'s modern award coverage provisions are directed towards employees. Unions are no longer party principals to awards. They are no longer capable of being party principals to enterprise agreements, although they may join employees as parties to the agreement. Industrial action other than protected industrial action is rendered illegal, where an enterprise agreement applies. At the same time the privileges of registration for unions have been diminished through the removal of preference to union members and a broad choice on representation for employees, including through choice of bargaining agents and therefore a weakening union 'monopoly' on bargaining, although the *Fair Work Act 2009*'s facilitation of an employee's union being the default bargaining agent unless another choice is made is an important bulwark against declining union security. Then there is the strengthening of penalties for industrial breaches, including the secondary boycott provisions of the trade practices legislation. Right of entry to workplaces by union officials holding a permit remains an important benefit of registration, as is recognition of unions in proceedings before Fair Work Australia, for example representations concerning award content.

Despite these declining benefits of registration, the cumulative requirements of registration have endured. The use of internal control over union affairs to regulate union behaviour remains but has given way to direct prohibition on unprotected industrial action as well as extenuated procedures applying for securing protected industrial action in bargaining, which in any case is open to non union employees as well as union members. Rules of organisations are required to stipulate elections for office, assure the fitness of office bearers to hold office, ensure democratic control over the organisation, ensure accounts are maintained and audited, govern the making of grants and donations and ensure the rights to membership amongst many other control and administrative duties as was the case when trade unions were party principals to awards, representing employees in the arbitration and award system.

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57. *Fair Work Act 2009*: section 353.

58. *Workplace Relations Act 1996* (amended by the *Workplace Relations Amendment (Work Choices) Act 2005*): at section 356.

## Rights for members through NFP regulation

The measures reported above have constituted a revolution in public policy toward union membership. On the one hand the current Fair Work rules pertaining to membership, accounts, management and so-on are probably on a level not applicable elsewhere in the NFP sector, while non association has been both supported and enforced; ‘freedom of association’ in the 21st century could quite easily be understood as the right not to associate, that is, **not** be in a union.

The internal regulatory standards applying to unions also raise questions as to whether similar standards for membership control and accountability, as well as application of non association provisions should apply to the NFP sector more generally. It appears the case that instances of ‘oppressive’ conduct, for example by high demand groups toward ex-members relying on ‘doctrines of separation’, offend the rights to non association set out by Robert Menzies in 1942 as much as compulsory union membership was found to be offensive.<sup>59</sup>

If a \$500 annual bargaining fee is understood to be coercive and to warrant legislation prohibiting the arrangement, why are the coercive practices of certain NFPs costing individuals hundreds of thousands of dollars left unaddressed? The accounts of membership abuse cited earlier, indicating the absence of membership control over organisations, might be compared to the NUW case in 1997. Upon joining the NUW, Mr Holloway would have been required to pay membership dues of \$7-\$8 per week. Through these subscriptions he would have made a contribution towards the costs involved in securing a union certified agreement for his benefit as well as for future members and employees. He would have contributed toward on-going award servicing costs by the union. He would have had access to registered union rules and been granted rights to participate in the affairs of the union which, inter alia, provided for resignation from membership with appropriate notice had he left the industry or quit the occupation.<sup>60</sup> It is not evident that similar standards of membership accountability and protections are statutorily required across the NFP sector.

## Membership rights in a proposed NFP regulatory scheme

Accounts of member maltreatment as provided to the Senate Economics Committee, as well as the examples of state support for non-association in relation to trade union membership make it reasonable to ask whether the principles of association providing membership control should have a wider, equal and more uniform application across NFPs? One option in the forthcoming NFP regulatory scheme might be to locate freedom to/not to associate provisions within the broader regulatory scheme for NFP entities.

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59. Refer to ‘Separate Lives’, *Four Corners*, Australian Broadcasting Corporation (ABC), 25 September 2006, viewed 10 September 2010, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22emms%2Femms%2F54627%22> See also: ‘Church hush up abuse claim’, *Herald Sun*, 25 September 2006; and G Green, ‘Secret sect exposed’, *Courier Mail*, 7 October 2006.

60. Fair Work (Registered Organisations) Act, section 174.

A regulatory regime might also provide balance by according membership rights in the administration of these entities. NFPs may set up subordinate entities which trade; they may make donations (and receive them); they may employ persons or volunteers and by and large their administrative and fund raising/management functions and operations may be basically similar. The basis for the approach is that NFP entities such as political parties, religious organisations, charities, unions and others NFPs such as clubs generally have a need to make contact with individuals and engage in forms of 'contract' with individuals where they choose to join (subject to the entity refusing membership to an individual). Obligations under legal or even psychological contract should generate corresponding rights.

Should support for a national NFP regulatory scheme broaden into a more definite legislative scheme, consideration might be given to including some equivalents of a 'membership' charter, setting out the role and rights of members and volunteers. The scheme could be structured to provide for non-association principles applicable to those seeking to leave or not be compelled to remain in unions, associations, political parties, high demand groups and similar NFP entities without discrimination. This would be in keeping also with the principles set out in international instruments.

The NZ Charities Commission requires registration under its scheme, making registration a pre-requisite for the organisation being granted tax-exempt status in conjunction with the entity submitting its rules for registration. The relevant provisions pertaining to registration require that the application:

- (a) be in the prescribed form; and
- (b) be accompanied by a document in the prescribed form, signed by, or on behalf of, every person who is an officer of the entity, that contains a certification that the person is not disqualified from being an officer of a charitable entity in relation to the entity under section 16 and
- (c) be accompanied by a copy of the rules of the entity; and
- (d) be accompanied by the prescribed fee for the application (if any); and
- (e) contain, or be accompanied by, any other prescribed information or documentation.<sup>61</sup>

The register of the NZ Charities Commission enables rules of the entities to be read and compared.<sup>62</sup> Also, the *Charities Act 2005* (NZ) addresses management of the organisation's resources in the definition of rules and serious wrongdoing:

*rules* means,—

- (a) in relation to the trustees of a trust, the rules, trust deeds, and instruments constituting, or defining the constitution of, that trust; and

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61. *Charities Act 2005* (NZ), section 17, viewed 12 November 2010 at:

<http://www.legislation.govt.nz/act/public/2005/0039/latest/whole.html#DLM345083>.

62. At: <http://www.charities.govt.nz/TheRegister/PurposeoftheRegister/tabid/94/Default.aspx>, viewed 10 October 2010.



(b) in relation to any other entity, the rules, constitution, and instruments constituting, or defining the constitution of, that entity.

*serious wrongdoing*, in relation to an entity, includes any serious wrongdoing of any of the following types:

- (a) an unlawful or a corrupt use of the funds or resources of the entity; or
- (b) an act, omission, or course of conduct that constitutes a serious risk to the public interest in the orderly and appropriate conduct of the affairs of the entity; or
- (c) an act, omission, or course of conduct that constitutes an offence; or
- (d) an act, omission, or course of conduct by a person that is oppressive, improperly discriminatory, or grossly negligent, or that constitutes gross mismanagement.<sup>63</sup>

One improvement to facilitate membership control and accountability would be to require NFP rules to meet certain standards, as evident in the regulatory framework for trade union membership, rather than leaving the standard of rules to be determined primarily by the NFP.

A model for administration of NFP entities based on that provided for registered organisations under the national workplace laws could provide the framework and principles for a regulatory NFP model. Such a model could provide that:

- an organisation must have constitution, objects and rules
- rules cannot be contrary to law, nor oppressive or unjust; they must accurately and fully reflect the structures under which the organisation operates
- rules must be observed
- any rule not specified in the public register of the entity's rules will be taken to be invalid
- rules might address:
  - the conditions for spending funds
  - the audit of those accounts and reports to members
  - the organisation's administrative structure of branches and other matters
  - candidacy for office
  - where rules provide for direct elections, they must be conducted by secret ballot
  - terms of office

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63. Charities Act 2005 (NZ), subsection 4(1).



- the making of grants, donations and loans, and
- disputes within organisations being resolved through the organisation’s rules with rules ultimately being enforceable through a court.

As the Productivity Commission’s report has recommended that NFP regulation take the form of a new chapter in corporations law, it might be assumed that certain existing legislative standards or obligations may transfer to the NFP scheme.

## Conclusion

Trade unions are required to meet prescriptive regulation for the conduct of their internal affairs primarily on the basis of them being economic entities, yet the statutory scheme provides a basis for democratic involvement in the organisation’s affairs. A similar regulatory system could have application to NFP economic entities; whether the regulatory scheme would develop to approach the ‘democratic’ standards currently applying to Australian trade unions is another matter. Non association rights could also be considered in an NFP regulatory scheme.

As the reform program for the NFP sector takes shape consideration should be given to NFP membership issues and what rights they may derive under a new scheme. A requirement to have and observe rules is a pre-requisite for NFP accountability. It may be feasible to derive basic principles in a more general reform program affecting the NFP sector which would include rights for members to cease membership and enjoy freedom not to associate protections. Dissident members or members with complaints may gain rights under a statutory regulatory regime to ensure administration of their group in accordance with its values and principles.

NFP regulation should require the submission of constitutions objects and rules on public register. Further, membership participation in the making of rules would facilitate a form of legal redress against oppressive treatment of members and related discriminatory treatment. Provisions preventing coercive membership would be in keeping with the non association principles set out by Robert Menzies in 1942. NFP governance standards—at least approaching those for the governance of trade unions— applicable to the NFP sector could contribute toward saving many individuals considerable grief and financial cost. If it be deemed in the interests of the membership of the Transport Workers Union of Australia for its accounts to include a political fund as a statutory requirement, then it would appear difficult to argue that it is not in the interests of the memberships of the Australian Conservation Foundation, the Liberal Party of Australia or the Exclusive Brethren for their accounts to feature such provisions. In other words movement toward a more homogenised governance framework for NFP memberships in the federal jurisdiction may help to remove the perceptions that certain entities are subject to discriminatory treatment while others are privileged. A reference to a body such as the Australian Law Reform Commission on the appropriate governance and membership framework for a diverse and growing federal NFP jurisdiction may be thus warranted.

## Appendix A: Characteristics of the NFP sector

Individuals may become members of clubs, political parties, religious groups, benevolent societies, trade unions and even motorcycle clubs. These diverse entities have been recently grouped under the rubric of the Not for Profit sector, chosen due to the economic connotation of these otherwise diverse entities not making profit distributions to members as a result of any business or trading activity; that is, to distinguish them from business corporations.<sup>64</sup> In its preliminary case for uniform accountability and disclosure requirements applying to the NFP sector, the National Roundtable of Non Profit Organisations in 2004 set out the important areas of social service delivery performed by NFP entities:

Non profit organisations are the major providers of community services, sport and the representation of collective interests. They are significant providers of education and health services, arts and culture and hospitality services. They are the exclusive providers of religious services. The non profit sector encompasses a much wider set of organisations than those traditionally called 'charities'.<sup>65</sup>

The NFP sector was investigated by the Industry Commission in 1995 and by the Charities Definition Inquiry in 2000-01 which developed a methodology for classifying the various NFP entities resulting in amendments to the taxation law prescribing certain conduct in order to enjoy tax exempt status.<sup>66</sup> The Senate inquiry of 2008 recommended that there be a single independent national regulator for NFP organisations and that a register for NFP entities be developed.<sup>67</sup> As well, the NFP sector has been the subject of an Australian Government reference to the Productivity Commission in 2009 which has supported similar directions for NFP regulation.<sup>68</sup>

The Productivity Commission has estimated that 600 000 entities comprise the NFP sector; 440 000 are small unincorporated entities, of the remaining 160 000 entities, about 60 000 are identified as economically significant employing 889 900 staff and contributing \$47 billion to Australia's GDP in

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64. While NFP organisations are varied in their aims and activities, they are all constituted to preclude profits or surplus assets on cessation being returned to members. Profits must be put to the organisation's objectives, and, on winding up, surplus assets are generally distributed to another NFP organisation with similar objectives. See Treasury, Submission to the Senate Standing Committee on Economics, *Inquiry into the disclosure regimes for charities and not-for-profit organisations*, September 2008, viewed 3 September 2010: [http://www.apf.gov.au/senate/committee/economics\\_ctte/charities\\_08/submissions/sublist.htm](http://www.apf.gov.au/senate/committee/economics_ctte/charities_08/submissions/sublist.htm)
  65. National Roundtable of Non Profit Organisations, 'Non profit reform and regulation: an initial statement by the national roundtable of non profit organisations', National Roundtable of Non Profit Organisations website, May 2004, viewed 3 September 2010, <http://www.nonprofitroundtable.org.au/>
  66. Industry Commission, *Charitable organisations in Australia*, Report no. 45, AGPS, 1995, Canberra. Committee of Inquiry into the Definition of Charities and Related Organisations, Australia, *Report of the Inquiry into the Definition of Charities and Related Organisations*, June 2001.
  67. Australian Senate, Standing Committee on Economics, *Disclosure regimes for charities and not-for-profit organisations*, December, 2008, Recommendation 5, viewed 12 September 2010 at: [http://www.apf.gov.au/senate/committee/economics\\_ctte/charities\\_08/report/report.pdf](http://www.apf.gov.au/senate/committee/economics_ctte/charities_08/report/report.pdf).
  68. Productivity Commission, *Contribution of the not for profit sector*, Research Report, January 2010, recommendations 6.2 to 6, viewed 4 August 2010 at [http://www.pc.gov.au/data/assets/pdf\\_file/0003/94548/not-for-profit-report.pdf](http://www.pc.gov.au/data/assets/pdf_file/0003/94548/not-for-profit-report.pdf).

2006-07. It is a sector which has increasingly become of concern to certain NFP entities themselves due to the complexity of requirements for their administration under state and federal laws, particularly those that operate in practical effect as national corporations; indeed, there is a certain resonance in NFP arguments for uniform administrative NFP regulations to the arguments for effecting national regulations of companies, away from state regulation commencing in the 1960s with uniform state and federal Companies Acts.

The National Roundtable on NFPs also noted that there were more than twenty different ways to incorporate or form a non profit organisation. This variety has been a product of both specialist forms of incorporation (for example, for trade unions under specialist law), and the existence of a dual state/federal regime. In tax law there are a great variety of concessions given by different levels of government, each to a variety of non profit organisations. The High Court's 1983 *Church of New Faith* judgement summarised the tax and related benefits available to religious organisations, and historically the advancement of religion is recognised as a charitable purpose, thus religious organisations are viewed by the authorities as charities. Benefits include exemptions on stamp duty, pay-roll tax, sales tax, local government rates, and the taxes on motor vehicle registration, hire purchase, insurance premiums, purchase and sale of marketable securities and financial transactions and many other state and federal laws which directly or indirectly subsidize or support religion. These could, for example, extend to the exemption from unfair dismissal laws where the religious organisation is the employer and exemption from discrimination claims, depending on the state or territory.<sup>69</sup>

The Productivity Commission finds that the current regulatory framework for the NFP sector is complex, lacks coherence and sufficient transparency and is costly to NFPs. It recommends a national registrar for NFPs be established, the Registrar for Community and Charitable Purpose Organisations which might be a statutory body in the Australian Securities and Investment Commission. The registrar would consolidate Commonwealth regulation; register and endorse NFPs for concessional tax status; register cross-jurisdictional fundraising organisations and provide a single portal for corporate and financial reporting so as to institute a consolidated regulatory framework that provides a one-stop-shop for Commonwealth registration and tax endorsement for NFPs. However the Productivity Commission's report is more cautious on the form of governance arrangements that NFP entities might be required to adopt. Its primary focus is on those 10,000 corporations limited by guarantee which might be recognised as charities. Such entities will have an incentive to register under the Productivity Commission's proposed scheme, as the tax exempt status of the entity is to be determined through the offices of the registrar, as well as access to the other concessions noted above. However, these arrangements are yet to be worked through under the Government's NFP reform process.

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69. High Court of Australia, *Church of New Faith v Commissioner of Pay-Roll Tax* (1983) 154 CLR 149, viewed 20 October 2010 at: <http://www.austlii.edu.au/au/cases/cth/HCA/1983/40.html>.

## Appendix B: International conventions on the freedom of association

### The freedom to associate in the positive

The freedom for individuals to associate in order to engage in various forms of peaceful political and social activities, including to form and join unions, is enshrined in international conventions which have been adopted and supported by the international community including Australia. Freedom to associate policies in the positive sense have led to the encouragement of trade unions as the recognised bargaining agents of employees from the very early part of the 20th century.

Conventions establishing rights to the freedom to associate include the *Universal Declaration on Human Rights* (1948), the *International Covenant on Civil and Political Rights* (1966, Article 22)<sup>70</sup> and the *International Covenant on Economic, Social and Cultural Rights* (1966).<sup>71</sup> Importantly, the International Labour Organisation's (ILO) *Convention on the Freedom of Association and Protection of the Right to Organise* (No. 87, 1948)<sup>72</sup> and its *Convention on the Right to Organise and to Bargain Collectively* (No. 98, 1949)<sup>73</sup> provide association rights to individuals in the workplace for the purposes of bargaining collectively.

More recently, ILO members (including Australia) adopted the *Declaration on Fundamental Principles and Rights at Work* which aims to ensure that social progress keeps pace with economic progress and development.<sup>74</sup> The Declaration encapsulates the principles of decent work which include: the freedom to associate (again without the negative right), the right to collective bargaining, the elimination of forced labour, the abolition of child labour, and the elimination of discrimination in employment and occupation.

Association rights give effect to a consequence of association, expressed in the form of collective negotiation with employers over employment conditions. As is accepted, ratification of ILO conventions by ILO members requires the adoption of the convention's principles into national

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70. *International Covenant on Civil and Political Rights*, opened for signature on 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976 except article 41, 28 March 1979), viewed 8 August 2010, <http://www2.ohchr.org/english/law/ccpr.htm>.

71. *International Covenant on Economic, Social and Cultural Rights*, opened for signature on 19 December 1966, 999 UNTS 3 (entered into force 3 January 1967), viewed 9 August 2010, <http://www2.ohchr.org/english/law/cescr.htm>.

72. *International Labour Organisation Convention (no. 87) on the Freedom to Associate and Protection of the Right to Organise*, opened for signature 9 July 1948, ATS [1974] no. 4 (entered into force generally 4 July 1950 and for Australia 28 February 1974), viewed 9 August 2010, at: <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C087>.

73. *International Labour Organisation Convention (no. 98) on the Right to Organise and to Bargain Collectively*, opened for signature 1 July 1949, ATS [1974] no. 5 (entered into force generally 18 July 1951 and for Australia 28 February 1974), viewed 9 August 2010, <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C098>.

74. International Labour Organisation, *Declaration on Fundamental Principles and Rights at Work*, ILO, 18 June 1998, Geneva, viewed 7 August 2010, <http://www.ilo.org/declaration/thedeclaration/textdeclaration/lang--en/index.htm>.

labour law or codes.<sup>75</sup> ILO Convention No. 87 provides that workers and employers shall have the right to establish, and subject to the rules of the organisation, join organisations of their own choosing without authorisation (from an employer or the state). The Convention's first four articles read:

Article 1: Each Member of the International Labour Organisation for which this Convention is in force undertakes to give effect to the following provisions.

Article 2: Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation.

Article 3:

1. Workers' and employers' organisations shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities and to formulate their programmes.
2. The public authorities shall refrain from any interference which would restrict this right or impede the lawful exercise thereof.

Article 4: Workers' and employers' organisations shall not be liable to be dissolved or suspended by administrative authority.<sup>76</sup>

## **The freedom to associate in the negative**

The freedom not to associate in unions is often expressed as voluntary unionism, meaning allowing individuals to be free from a compulsion to join. Creighton has noted that the negative right to associate was debated within the ILO in the 1920s on a draft general convention of the freedom to associate; as he puts it, unions objected to government and employer demands to include the right of non association in the proposed convention:

In the 1920s there were a number of attempts to give effect to (tripartitism) through the adoption of a general convention on the freedom to associate. However, these endeavours foundered in 1927 in the face of employer (and government) insistence that the right to form and join trade unions must carry with it a correlative right not to join. This proposition was not acceptable to the workers' group, 'and in these circumstances it was thought preferable not to proceed with the matter.'<sup>77</sup>

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75. J Romeyn, *The International Labour Organisation's core labour standards and the Workplace Relations Act 1996*, Research paper no. 13, 2007-08, Parliamentary Library, Canberra, 2007, pp. 2-9, viewed 7 August 2010, <http://www.aph.gov.au/library/pubs/rp/2007-08/08rp13.pdf>

76. *International Labour Organisation Convention (no. 87) on the Freedom to Associate and Protection of the Right to Organise*, op. cit.

77. B Creighton, 'The freedom to associate' in R Blanpain (ed), *Comparative labour law and industrial relations in industrialized market economies*, Kluwer Law International, 2007, p. 281.

Thorpe and McDonald observed that at the time of formulation of ILO Convention No. 87 in the 1940s, the question of the negative right of association was agreed to be left to individual member countries to determine.<sup>78</sup> This suggests that the negative right was to have a lesser weight compared to the positive right enshrined in international labour law. It is the Universal Declaration on Human Rights which provides a right to non association. Relevant provisions of the Declaration read:

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance. (Article 18) ...

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers. (Article 19) ...

Everyone has the right to freedom of peaceful assembly and association. No one may be compelled to belong to an association. (Article 20) ...

Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment. Everyone, without any discrimination, has the right to equal pay for equal work. Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection. Everyone has the right to form and to join trade unions for the protection of his interests. (Article 23) ...<sup>79</sup>

Presumably, those who seek to make the case to establish trade unions free of employer intervention, or a political organisation (distinct and separate from a party or regime in power) or, those who seek to establish religious groups free of state repression face similar tasks in that representatives of the entity making the case for the right to associate (or worship) rarely make the case for non association (as important as this might be).

The case for the positive and negative association rights lying side by side has also been made. The former Employment Advocate, for example, observed that the right of non association in an industrial context is incorporated within the (positive) right where the negative right is not specified and further, that such an approach had been upheld in international law.<sup>80</sup> This argument relied on the approach of the European Court of Human Rights in *Surgisson v Iceland* in respect of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*. However, it is doubtful whether the ILO's Freedom of Association Committee would reach a similar interpretation

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78. M Thorpe and J McDonald, 'The freedom to associate and union membership' *Labour & Industry*, vol. 9, no. 2, 1998.

79. United Nations, *Universal Declaration on Human Rights*, GA Res 217A (III), UN Doc A/810 (1948), viewed 9 August 2010, <http://www.un.org/en/documents/udhr/index.shtml>.

80. Office of the Employment Advocate, *The freedom to associate, a survey report*, Office of the Employment Advocate, Canberra, 2004. The case being relied on was *Surgisson v Iceland*, 16 European Human Rights Reports, p. 462, 1993.

on ILO Convention No.87, that is that this core convention supports negative association.<sup>81</sup> That said, the ILO has not found against national laws which require voluntary association of workers with trade unions, often expressed as voluntary unionism per se; in other words, the ILO accepts labour law provisions which protect an individual employee because of his/her membership or non-membership of a trade union.<sup>82</sup>

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81. Note the debate between Senator Andrew Murray and representatives of the International Centre for Trade Union Rights (ICTUR) as to whether ILO Convention 87 implied a negative right of association: Senate Employment Workplace Relations and Education Committee Inquiry into the Building and Construction Industry Improvement Bill, *Hansard*, 19 May 2003, pp. 49–50, viewed 9 September 2010, <http://www.aph.gov.au/hansard/senate/commttee/S7499.pdf>.
82. International Labour Office, *The freedom to associate: Digest of decisions and principles of the freedom to associate committee of the governing body of the ILO*, 5<sup>th</sup> edition, ILO, Geneva, 2006, par. 367, viewed 29 August 2010, <http://www.ilo.org/ilolex/english/23e2006.pdf>.