

APPENDIX 1

ILO COMMITTEE OF EXPERTS OBSERVATIONS

Convention 87: Freedom of Association and the Right to Organise

Article 3 of Convention 87 provides:

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 formulate their programmes.

The public authorities shall refrain from any interference which would restrict this right or impede the lawful exercise thereof.

Article 11 of Convention 87 provides:

Each Member of the International Labour Organisation for which this Convention is in force undertakes to take all necessary and appropriate measures to ensure that workers and employers may exercise freely the right to organise.

The finding of the Committee of Experts regarding the *Workplace Relations Act 1996* and Convention 87 was as follows:

The Committee is of the view that given that where a strike is "unprotected" under the Act, it can give rise to an injunction, civil liabilities and dismissal of the striking workers (sections 127, 170ML, 170MT, 170MU), even if these consequences are not automatic, for all practical purposes, the legitimate exercise of strike action can be made the subject of sanctions. *The Committee will now turn to consider whether such limitations on strike action conform with the requirements of the Convention.*

(i) Restrictions on the subject-matter of strikes

The Committee notes that by linking the concept of protected industrial action to the bargaining period in the negotiation of single-business certified agreements, the Act effectively denies the right to strike in the case of the negotiation of multi-employer, industry-wide or national-level agreements, *which excessively inhibits the right of workers and their organizations to promote and protect their economic and social interests.*

(ii) Prohibition of sympathy action

The Committee notes that the bargaining period, during which protected industrial action can take place, can be terminated or suspended for a number of reasons (section 170MW) ...The Committee notes that sympathy action is effectively prohibited under this provision (section 170MW(4) and (6)). Industrial action also remains unprotected if it involves secondary

boycotts (section 170MM). *The Committee recalls in this regard that a general prohibition on sympathy strikes could lead to abuse and that workers should be able to take such action, provided the initial strike they are supporting is lawful (see General Survey on freedom of association and collective bargaining, 1994, paragraph 168).*

(iii) Restrictions beyond essential services

The Committee notes that the bargaining period can be terminated or suspended ...where it is threatening to cause significant damage to the Australian economy or an important part of it (section 170MW(3)). ...*The Committee recalls that prohibiting industrial action that is threatening to cause significant damage to the economy goes beyond the definition of essential services accepted by the Committee, namely, those services the interruption of which would endanger the life, personal safety or health of the whole or part of the population ...The Committee hopes that the Government will indicate in its next report measures taken or envisaged to amend the provisions of the Workplace Relations Act referred to above, to bring the legislation into conformity with the requirements of the Convention.*

(emphasis added)

Convention 98: The Right to Organise and Collective Bargaining

Article 4 of Convention 98 provides:

Measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers' organisations and workers organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements.

The Committee of Experts had this to say about the Workplace Relations Act and its relationship to this Convention:

This emphasis on direct employee-employer relations is particularly evident in Part VID of the Act regarding Australian workplace agreements (AWAs), which are defined in section 170VF: "an employer and employee may make a written agreement, called an Australian workplace agreement, that deals with matters pertaining to the relationship between an employer and employee". This Part promotes AWAs ...*The Committee considers that the provisions of the Act noted above do not promote collective bargaining as required under Article 4 of the Convention. It, therefore, requests the Government to indicate in its next report any steps taken to review these provisions of the Act and to amend it to ensure that it will encourage collective bargaining as required by Article 4 of the Convention.*

The Committee notes that with respect to the levels of bargaining, a clear preference is given in the Act to workplace/enterprise-level bargaining ...*In short, the determination of what level of bargaining is considered*

appropriate is placed in the hands of the Commission, which is mandated to give primary consideration to single-business agreements and to use the criterion of “the public interest”. The Committee is of the view that conferring such broad powers on the authorities in the context of collective agreements is contrary to the principle of voluntary bargaining.

The Committee recalls that, since the Convention contemplates voluntary collective bargaining, *the choice of the bargaining level should normally be made by the partners themselves ...* The Committee requests the Government to review this issue and amend the legislation in the light of the requirements of the Convention.

Regarding the subjects of negotiation, the combined effect of sections 166A, 187AA and 187AB prohibit the issue of strike pay being raised as a matter for negotiation. *Considering that in general the parties should be free to determine the scope of negotiable issues (see General Survey, op. cit., paragraph 250), the Committee requests the Government to review and amend these provisions to ensure conformity with the Convention.*

With reference to the provisions of the Act in Part VIB requiring majority approval of a certified agreement, the Committee recalls that where no trade union represents a majority of the workers, the unions should be able to negotiate an agreement at least on behalf of their own members.

(emphasis added)

