

ARTICLES

THE RIGHT TO FREEDOM OF ASSOCIATION IN THE WORKPLACE: AUSTRALIA'S COMPLIANCE WITH INTERNATIONAL HUMAN RIGHTS LAW

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ABSTRACT

The right to freedom of association in the workplace is a well-established norm of international human rights law. However, it has traditionally received insubstantial attention within human rights scholarship. This article situates the right to freedom of association at work within human rights discourses. It looks at the status, scope and importance of the right as it has evolved in international human rights law. In so doing, a case is put that there are strong reasons for states to comply with the right to freedom of association not only in terms of international human rights obligations but also from the perspective of human dignity in the context of an interconnected world.

A detailed case study is offered that examines the right to freedom of association in the Australian context. There has been a series of significant changes to Australian labor law in recent years. The Rudd-Gillard Labor government claimed that recent changes were to bring Australia into greater compliance with its obligations under international law. This policy was presented to electors as in sharp contrast to the Work Choices legislation of the Howard Liberal-National party coalition government. This article

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critically assesses the extent to which the new industrial relations regime in Australia complies with international instruments governing the right to freedom of association at work.

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1. INTRODUCTION

The fundamental right to freedom of association has become a well-established principle of international human rights law. Yet, in the context of national or domestic law on industrial rela-

tions matters in Australia, there is still an unresolved divergence of Australian practice and international human rights law. With the substantial changes in Australian industrial relations law over the past decade, it is debatable as to whether Australia has complied with its international obligations in relation to the right to freedom of association in the workplace. This study critically examines such issues, including whether or not the latest round of reforms sufficiently improves Australia's compliance with its international obligations.

The Rudd-Gillard Labor government has presented its new 'Forward with Fairness' regime as strongly distancing itself from the previous government's industrial relations policies and as providing a fair balance between workers and employers. Under the previous government, such matters had caused much controversy. The *Work Choices* legislation that had been introduced by the Howard Liberal-National Coalition¹ government became the subject of major criticism on both a national and international level for supposed infringements of the right to freedom of association. The Rudd-Gillard Labor government, during its term in office, has repeatedly affirmed its intention to bring Australia into compliance with its international obligations.

This study situates the right to freedom of association within human rights discourses and critically examines the extent to which the new industrial relations regime complies with international instruments governing freedom of association. In so doing, it considers whether a case may be put for stronger compliance by Australia and other nation states with their obligations regarding the right to freedom of association. In addition, this study considers the status, scope, and importance of the right to freedom of association as it has evolved in international human rights law.

2. BACKGROUND: SHIFTS IN AUSTRALIAN INDUSTRIAL RELATIONS LAW

2.1. ESTABLISHING A UNIQUE SYSTEM

Historically, Australia's industrial relations system, as it emerged in the late 19th and early 20th century, was based on a conciliation and arbitration model. The system was predicated on a collectivist approach where unions played key roles. Once notification of a dispute occurred, final decisions about disputes would be made by an independent tribunal.² The social upheaval

1. In the Australian political system, the Liberal-National Coalition is the more conservative of the two major parties.

2. BREEN CREIGHTON & ANDREW STEWART, *LABOUR LAW* 47 (4th ed. 2005).

caused by the strikes of the 1890s and their failure left a deep impression on Australian society. In the wake of that history, the system of conciliation and arbitration was instituted. In essence, the system was established as a dispute resolution process aimed at ensuring economic harmony.³

The 1890s strikes were motivated by worker attempts to form trade unions and negotiate collectively with employers.⁴ Workers were campaigning for what would now be seen as important aspects of the right of freedom of association. Employers, by contrast, argued that the terms and conditions of employment should be set on an individual basis. In this context, the system of conciliation and arbitration was a compromise that guaranteed the role of trade unions as workers' representatives and was seen as an alternative to a cycle of lock-outs and strikes.⁵

While unions made some important gains through the conciliation and arbitration system, there were also substantial trade-offs. Under this system, unions could be exposed to the harsh penalties of industrial torts for undertaking any strike action. Indeed, aspects of this system remain; although, in practice, such powers tended to be rarely used.⁶ The system did not, in itself, particularize rights. Rather, it focused on considerations related to the maintenance of economic harmony through an award system.⁷ Individuals received protection through the inclusion of minimum entitlements in awards or orders of the tribunal as an outcome of the dispute resolution process, rather than through any direct or explicit international labor law norms or human rights considerations.⁸

2.2. THE AUSTRALIAN INDUSTRIAL RELATIONS SYSTEM COMPARED TO OTHER INDUSTRIALIZED COUNTRIES

The Australian system, as it developed, may be contrasted to the regimes in many other industrialized countries. With the latter, unions are free to engage in collective bargaining with employers and to threaten or carry out industrial action subject to some limitations.⁹ The international labor system was, to a sig-

3. ROSEMARY OWENS & JOELLEN RILEY, *THE LAW OF WORK* 81 (2007).

4. J.V. STOUT, *A BRIEF HISTORY OF UNIONISM IN ENGLAND AND AUSTRALIA* 13-14 (1947).

5. OWENS & RILEY, *supra* note 3, at 81.

6. Shae McCrystal, *Shifting the Balance of Power in Collective Bargaining: Australian Law, Industrial Action and Work Choices*, 16(2) *ECON. & LAB. REL. REV.* 193, 199 (2006).

7. OWENS & RILEY, *supra* note 3, at 80-81.

8. John Buchanan & Tom McDonald, *Wages: The Lessons of History, in CHANGING AUSTRALIA: THE UNION STORY* 45 (2005).

9. CREIGHTON & STEWART, *supra* note 2, at 19-20.

nificant extent, based on the presumption that this would be the model followed.¹⁰ In this context, the arbitration and conciliation approach did not sit comfortably with other systems that more explicitly recognized the right to freedom of association. However, at the same time, international labor law was not seen as being as relevant in Australia, given the relative successes of the 'compromise' of conciliation and arbitration, outlined above.¹¹

It was not until the early 1990s, under the Keating Labor Government, that legislation was introduced aimed at giving effect to the right to freedom of association more directly. For the first time in Australia, limited protection was introduced for the right to strike in the bargaining period.¹² At the same time, a shift away from the system of conciliation and arbitration also occurred. While this was still an important part of the system, bargaining at the enterprise level was heavily encouraged¹³ as enterprise agreements were presented as a key method of increasing productivity. With the beginnings of a shift away from the system of conciliation and arbitration, the recognition of individual rights is as important, if not more important, in the new bargaining context. This is because, without basic rights, the ability of workers to collectively advocate for better working conditions is likely to be strongly hampered under the new enterprise system. Despite the importance of the recognition of individual rights, with the election of the conservative Howard government in 1996, there was a further de-collectivization of industrial relations at the same time as significant disengagement with the international labor law system.¹⁴

2.3. THE WORK CHOICES LEGISLATION

In 2005, the Howard Government enacted the *Workplace Relations Amendment Act 2005 (Cth) (Work Choices)*. This legislation significantly built on changes introduced in 1996 and, in many respects, went considerably further.¹⁵ According to a number of commentators, *Work Choices*¹⁶ represented a radical reorganization of the Australian industrial relations landscape.¹⁷ This

10. OWENS & RILEY, *supra* note 3, at 474.

11. CREIGHTON & STEWART, *supra* note 2, at 64.

12. OWENS & RILEY, *supra* note 3, at 474.

13. Buchanan & McDonald, *supra* note 8, at 47.

14. CREIGHTON & STEWART, *supra* note 2, at 64-65.

15. *Workplace Relations Act 1996 (Cth)*, amended by *Workplace Relations Amendment (Work Choices) Act 2005 (Cth)* ('*Work Choices*') (Austl.).

16. *Workplace Relations Amendment (Work Choices) Act 2005 (Cth)* ('*Work Choices*').

17. MARIAN BAIRD, RAE COOPER & DAMIAN OLIVER, DOWN AND OUT WITH WORK CHOICES: THE IMPACT OF WORK CHOICES ON THE WORK AND LIVES OF

reorganization gave primacy to individualism over a collective apparatus or mechanism.¹⁸ With the strong move towards individual contracts, the system of awards, established under the conciliation and arbitration system, was arguably left to 'wither on the vine'.¹⁹ The Howard government argued that such reforms were necessary to maintain Australia's competitiveness internationally. Such claims were strongly contested by unions.²⁰

The legal changes were criticized for undermining fundamental rights, including the right to freedom of association at work.²¹ *Work Choices* was also criticized by a number of legal commentators. For instance, Fenwick and Landau strongly maintained that *Work Choices* had widened the already substantial gap between the right to freedom of association in international human rights law and its protection in Australian law.²² In 2006, the Australian Council of Trade Unions (ACTU) took the matter up at the International Labor Organization (ILO). The Committee of Experts of the ILO subsequently made a series of *Observations* expressing significant concern that *Work Choices* did not comply with the right to freedom of association.²³

In November 2007, the Rudd Labor government was elected. The Labor government was elected in part because of its commitment to reform *Work Choices*. The latter legislation had become unpopular after the union's campaign against the legisla-

WOMEN IN LOW PAID EMPLOYMENT 3 (2007), http://www.industrialrelations.nsw.gov.au/pdfs/women_and_work_choices_report_2007.pdf; OWENS & RILEY, *supra* note 3, at 115.

18. DAVID PEETZ, BRAVE NEW WORKPLACE: HOW INDIVIDUAL CONTRACTS ARE CHANGING OUR JOBS 53, 60 (2006).

19. Julia Gillard, *Address to the Australian Labour Law Association* (Nov. 14, 2008) (transcript available at http://www.deewr.gov.au/Ministers/Gillard/Media/Speeches/Pages/Article_081128_090051.aspx, last visited March 12, 2010).

20. KATHIE MUIR, WORTH FIGHTING FOR: INSIDE THE YOUR RIGHTS AT WORK CAMPAIGN 142-43 (2008); Andrew Stewart, Anthony Forsyth, *The Journey from Work Choices to Fair Work*, in FAIR WORK: THE NEW WORKPLACE LAWS AND THE WORK CHOICES LEGACY 2 (Andrew Stewart & Anthony Forsyth eds., 2009).

21. Sharan Burrow, Australian worker delegate's speech to the ILO Committee on the Application of Standards, International Labour Conference of the ILO (June 6, 2006) (transcript available at http://www.actu.org.au/work_rights/news/1149816912_8234.html, last visited March 12, 2010).

22. Colin Fenwick & Ingrid Landau, *Work Choices in International Perspective*, 19 AUSTRALIAN J. LABOUR L. 127, 143 (2006).

23. INT'L LAB. ORG. COMM. OF EXPERTS ON THE APPLICATION OF CONVENTIONS AND RECOMMENDATIONS, INDIVIDUAL OBSERVATION CONCERNING FREEDOM OF ASSOCIATION AND PROTECTION OF THE RIGHT TO ORGANISE CONVENTION, 1948 (No. 87), Australia (ratification: 1973), ILO Doc 062009AUS087 (2009) [hereinafter ILO Doc 062009AUS087]; INT'L LAB. ORG. COMM. OF EXPERTS ON THE APPLICATION OF CONVENTIONS AND RECOMMENDATIONS, INDIVIDUAL OBSERVATION CONCERNING THE RIGHT TO ORGANISE AND COLLECTIVE BARGAINING CONVENTION, 1949, (No. 98), Australia (ratification: 1973), ILO Doc 062008AUS098 (2008) [hereinafter ILO Doc 062008AUS098].

tion, which highlighted the potential to undermine people's rights in the workplace.²⁴ Labor had announced its 'Forward with Fairness' policy during the election campaign. In addition to the specific issues dealt with in this paper, the policy also included such reforms as restoring greater access to unfair dismissal provisions, and introducing ten 'National Employment Standards' (NES) as well as a new institutional arrangement within the system overseen by Fair Work Australia.²⁵

2.4. NEW INDUSTRIAL RELATIONS LEGISLATION

The *Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008* (Cth) was the first piece of legislation to implement this policy. This transitional legislation provided that no new Australia Workplace Agreements (AWAs), a form of statutory individual agreement, could be made after March 28, 2008. However, current AWAs would continue until their expiration date. The transitional legislation also provided for the implementation of an award modernization process which was said to be aimed at the consolidation of existing awards.²⁶

The *Fair Work Act* (2009) (Cth) is the latest piece of industrial legislation that has been passed. The bulk of this legislation took effect from July 1, 2009 and replaced the *Workplace Relations Act 1996* (Cth). Significantly, the legislation incorporates changes to union rights of entry, some changes to strike pay and protected industrial action, as well as new rules for collective bargaining, including the requirement to bargain in 'good faith.' These are all important aspects of the right to freedom of association as it is interpreted in international human rights law. At the same time, there has been no significant change to the individual right to 'freedom of association' which was contained in Part 16 of the *Workplace Relations Act* or to secondary boycott provisions. The government has indicated that the new laws are intended to bring Australia into greater compliance with international human rights law.²⁷

24. MUIR, *supra* note 20, at 207.

25. Joydeep Hor & Danielle Ireland-Piper, *Forward with Fairness: An Introduction to Labor's IR Changes*, in UNDERSTANDING FORWARD WITH FAIRNESS: A PRACTICAL GUIDE TO THE NEW WORKPLACE RELATIONS SYSTEM 2-3 (John Stafford & Carol Louw eds., 2008).

26. *Id.* at 33.

27. INT'L LAB. ORG., COMMITTEE OF EXPERTS ON THE APPLICATION OF CONVENTIONS AND RECOMMENDATIONS, REPORT OF THE COMMITTEE OF EXPERTS ON THE APPLICATION OF CONVENTIONS AND RECOMMENDATIONS, Int'l Labor Conf., 98th Session 53 (2009) [hereinafter ILO REPORT]; Explanatory Memorandum from the Parliament of the Commonwealth of Australia H.R. to the *Fair Work Bill*, 2008, 6, 24, 342; *Fair Work Act 2009* (Cth) § 3 (Austl.); Ben Schneiders, "Labor workplace

The main focus of this study is the protection of the right to freedom of association in light of the *Fair Work Act*, although reference will be made, also, to the *Competition and Consumer Act 2010 (Cth)* (formerly the *Trade Practices Act 1974*) because some aspects of the right to strike, namely secondary boycott provisions, are covered by the *Competition and Consumer Act 2010 (Cth)*.²⁸

3. THE FUNDAMENTAL RIGHT TO FREEDOM OF ASSOCIATION

The previous section looked at important background issues relating to the Australian industrial relations system, including the development of the conciliation and arbitration system, and moves away from that system. This section considers the status, scope and importance of the right to freedom of association as it has evolved in international human rights law. In addition, this study will consider Australia's obligations for compliance with the right to freedom of association, as it is defined in international human rights law.

3.1. FREEDOM OF ASSOCIATION AS AN INDIVIDUAL OR COLLECTIVE RIGHT

The right to freedom of association is the right to associate for social, political, religious or industrial reasons. It has been consistently recognized in international human rights instruments.²⁹ The right to freedom of association at work has come to be seen as an essential means for workers to defend their inter-

laws 'breach ILO,'" <http://www.theage.com.au/national/labor-workplace-laws-breach-ilo-20090522-bicp.html> (last visited May 23, 2009).

28. See generally *Building and Construction Industry Improvement Act (2005) (Cth)* (Austl.); OWENS & RILEY, *supra* note 3, at 131.

29. International Covenant on Civil and Political Rights, *adopted* Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; International Covenant on Economic, Social and Cultural Rights, *adopted* Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR]; INT'L LAB. ORG., ILO DECLARATION ON FUNDAMENTAL PRINCIPLES AND RIGHTS AT WORK, 86TH session, Geneva, 1998 [hereinafter ILO Fundamental Principles]; ILO Doc 062009AUS087, *supra* note 23; INT'L LAB. ORG. COMMITTEE OF EXPERTS ON THE APPLICATION OF CONVENTIONS AND RECOMMENDATIONS, INDIVIDUAL OBSERVATION CONCERNING FREEDOM OF ASSOCIATION AND PROTECTION FOR THE RIGHT TO ORGANISE AN dCOLLECTIVE BARGAINING CONVENTION, 1949 (No. 98) Australia (ratification: 1973), ILO Doc 062009AUS098 (2009) [hereinafter ILO Doc 062009AUS098]. Australia ratified all of these treaties and has a consequential obligation in international law to ensure that the rights contained in these treaties are protected. However, treaties ratified by Australia have no direct effect without domestic legislation being first implemented in Australia to reflect the terms of the treaty.

ests, express their concerns, and protect their entitlements.³⁰ One human rights commentator has argued that the right to freedom of association is essential to ensure other human rights, such as the right to a decent standard of living, are protected.³¹

While freedom of association is a well-established principle of international law, there is significant debate about its exact requirements and scope. Whether freedom of association is an individual right not to associate, or involves interrelated rights of a more collective nature, has been the subject of fierce debate both on a domestic and international level.³²

A general right to freedom of association is part of the *International Covenant on Civil and Political Rights* ('ICCPR')³³ and the *International Covenant on Economic Social and Cultural Rights* ('ICESCR').³⁴ These treaties specifically acknowledge the right to freedom of association at work. Indeed, the ICESCR and the ICCPR make explicit mention of the right to join trade unions and other interrelated rights.³⁵ It is significant that the UN Committee on Economic, Social and Cultural Rights and the UN Human Rights Committee have interpreted both these treaties as supporting collective bargaining as an aspect of the right to freedom of association.³⁶

In addition, the right to freedom of association was recognized in the preamble to the *Constitution of the International Labour Organization* in 1919. The ILO was set up as part of the *Treaty of Versailles* at the end of World War I. The body's mission is based on the principles that labor is not merely a commodity and that social justice is necessary for world peace. A new preamble was adopted after World War II, when the ILO

30. Lee Swepston, *International Labour Law*, in *COMPARATIVE LABOUR LAW AND INDUSTRIAL RELATIONS IN INDUSTRIALIZED MARKET ECONOMICS* 137, 146 (Roger Blanpain ed., 9th ed. 2007); Francis Maupain, *Is the ILO Effective in Upholding Workers' Rights?: Reflections on the Myanmar Experience*, in *LABOUR RIGHTS AS HUMAN RIGHTS* (Philip Alston ed., 2005).

31. See Mark Irving, *Union Membership and Representation*, in *AUSTRALIAN CHARTER OF EMPLOYMENT RIGHTS* 53, 54 (Mordy Bromberg & Mark Irving eds. 2007); INT'L LAB. ORG., *FREEDOM OF ASSOCIATION IN PRACTICE: LESSONS LEARNED* (International Labour Conference, 97th Sess. 2008) 19. Australia has ratified the ICESCR which contains the right to a decent standard of living in art. 7.

32. OWENS & RILEY, *supra* note 3, at 474.

33. ICCPR, *supra* note 29.

34. ICESCR, *supra* note 29.

35. *Id.* at art. 8; ICCPR, *supra* note 29, at art. 22.

36. U.N. COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS, CONCLUDING OBSERVATIONS OF THE COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS, REPUBLIC OF KOREA, ¶ 39, delivered to the Economic and Social Council, U.N. Doc. E/C.12/1/Add.59 (May 21, 2001); U.N. Human Rights Committee, Concluding observations of the Human Rights Committee, Chile, ¶ 25, delivered to the International Covenant on Civil and Political Rights, U.N. Doc. CCPR/C/79/Add.104 (Mar. 30, 1999).

became a United Nations body, and freedom of association was again endorsed as a key method for attaining social justice and 'universal and lasting peace.' Indeed, the obligation for member states to protect freedom of association is often regarded as a requirement of ILO membership.³⁷

Two major conventions that have emerged out of the ILO system, namely the *Freedom of Association and Protection of the Right to Organise Convention (No 87)*³⁸ and the *Right to Organise and Collectively Bargain Convention (No 98)*,³⁹ are of particular importance in guaranteeing the right to freedom of association. These conventions define the scope of this right in more detail. *Convention 87* provides protection to freedom of association in two key ways. First, it provides protection for the right of workers and employers to form and join organizations. Second, it provides protection for the autonomy of these organizations, once established, to further the interests of its members.⁴⁰ Although *Convention 87* is silent on the right to disassociate from a union or association, Breen Creighton argues that it would be inconsistent with the convention for the law to compel union membership regardless of the wishes of workers and unions.⁴¹

Convention 98, to a significant extent, complements *Convention 87*. *Convention 98* requires that workers enjoy adequate protection against anti-union discrimination.⁴² A substantive function of *Convention 98* is to enable collective bargaining between employers and unions. Indeed, under article 4, state parties must take steps to encourage and promote collective agreement.⁴³ While neither of these conventions make express reference to the right to strike, supervisory bodies have taken the

37. Breen Creighton, *Freedom of Association*, in *COMPARATIVE LABOUR LAW AND INDUSTRIAL RELATIONS IN INDUSTRIALIZED MARKET ECONOMIES* 275, 276 (Roger Blanpain ed., 2007). The International Labour Organization (ILO) is the specialized U.N. body on issues of social justice and labor conditions. It has a distinctive tripartite structure whereby decisions are not only made by states but also by employers and workers representatives. Since its inception in 1919 it has adopted numerous conventions and recommendations dealing with labor rights. The ILO has one of the most highly developed supervisory systems in international human rights law. Under art. 22 of the ILO Constitution member states are required to send reports at regular intervals on their implementation of ILO recommendations in addition to ILO conventions that they have ratified.

38. *Freedom of Association and Protection of the Right to Organise Convention*, adopted July 9, 1948, 1974 Austl. T.S. No. 3 [hereinafter *Convention 87*].

39. *Right to Organise and Collective Bargaining Convention*, adopted July 1, 1949, 1974 Austl. T.S. No. 5 [hereinafter *Convention 98*].

40. *Convention 87*, *supra* note 38, arts. II-V.

41. Breen Creighton, *The ILO and the Protection of Fundamental Human Rights in Australia*, 22 Melb. U. L. Rev. 239, 247-48 (1998).

42. *Convention 98*, *supra* note 39, art. I.

43. *Id.* at art. IV.

view that it is an integral aspect of freedom of association.⁴⁴ These treaties have also been complemented by later instruments dealing with the specific application of freedom of association in particular industries.⁴⁵

The ILO conventions and the jurisprudence of the treaty monitoring bodies have mainly been focused on the collective aspects of the right to freedom of association. However, a dichotomized view about the right as either 'individual' or 'collective' is overly simplistic. The ILO conventions clearly recognize the right as simultaneously individual and collective in key areas. For instance, provisions prohibiting discrimination on the basis of union membership are directly enjoyed by individuals, as well as groups or organizations.

3.2. CONCEPTUALIZING LABOR RIGHTS AS HUMAN RIGHTS AND THE ROLE OF THE ILO

Despite the inclusion of labor rights in human rights treaties, there has been traditionally an insubstantial focus on conceptualizing the rights of workers as human rights. For instance, many human rights non-government organizations (NGOs) have traditionally tended to focus their attention on other civil and political rights, such as the right to life and freedom of religion. While the right to freedom of association is recognized as an economic, a social and cultural right, and a civil and political right, there has been insignificant focus on it by many NGOs where the right pertains to industrial relations.⁴⁶

This may be in part because such issues have been seen as being addressed by other organizations and movements of civil society, such as unions. At the same time, there has been a historical hesitancy from some unionists to adopt the discourse of 'human rights.' Indeed, the legal system has been viewed by some Marxist and critical theorists as acting almost exclusively in

44. ILO Doc 062009AUS087, *supra* note 23; BERNARD GERNIGON, ALBERTO ODERO & HORACIO GUIDO, ILO PRINCIPLES CONCERNING THE RIGHT TO STRIKE 11 (1998); Creighton, *supra* note 37, at 288.

45. LABOUR RELATIONS (PUBLIC SERVICE) CONVENTION, PROTECTION OF THE RIGHT TO ORGANISE AND PROCEDURES FOR DETERMINING CONDITIONS OF EMPLOYMENT IN THE PUBLIC SERVICE, C151, ILO/CONF.64 (June 27, 1978); WORKERS' REPRESENTATIVES CONVENTION, PROTECTION AND FACILITIES TO BE AFFORDED TO WORKERS' REPRESENTATIVES IN THE UNDERTAKING, C135, ILO/CONF.56 (June 23, 1971); RURAL WORKERS' ORGANISATIONS CONVENTION, ORGANISATION OF RURAL WORKERS AND THEIR ROLE IN ECONOMIC AND SOCIAL DEVELOPMENT, C141, ILO/CONF.60 (June 23, 1975).

46. Lance Compa, *Workers' Freedom of Association in the United States: the Gap Between Ideals and Practice*, in WORKERS' RIGHTS AS HUMAN RIGHTS 23 (James A. Gross ed., 2003).

the interests of the powerful.⁴⁷ Human rights have been viewed in this context as not substantially addressing the underlying causes of discrimination, poverty, exploitation and unequal power relations. Rather human rights have been viewed by these theorists as acting largely as a rationalization or camouflage in order to maintain the status quo.⁴⁸

While this interpretation may arguably have some merit, it does not fully take into account the way that the framework of international human rights law can be used to argue against forms of exploitation and abuse, and to possibly compel action. Also, it does not fully explain the ways in which international human rights law and labor law can overlap and have shared goals. James Gross has explained how a failure to acknowledge the potential importance of human rights considerations in relation to industrial relations may actually work strongly against the interests of workers:

. . .while assertions of individual rights and freedoms are commonly made against the exercise of power by the state, rights and freedoms are routinely left outside factory gates and office buildings without a murmur of protest. Consequently, too many workers stand before their employer not as adult persons with rights but as powerless children or servants. . .⁴⁹

Even if there are contradictions and complexities, the discourse of human rights is potentially very powerful in relation to workers rights because it provides a strong rationale for the protection of basic human needs and entitlements. In this context, there are compelling reasons for adopting the language of human rights in the promotion of international obligations relating to employment. Increasingly more human rights NGOs and unions are beginning to take on a greater role in the promotion of human rights related to work.⁵⁰

The debate about whether it is desirable to conceptualize labor rights as human rights has been growing at an international level at the ILO. To a significant extent, these debates have also shaped the way that human rights are discussed and viewed at a national level. Historically, the ILO has often framed the protec-

47. ROBERT VAN KRIEKEN ET AL., *SOCIOLOGY: THEMES AND PERSPECTIVES* 446 (2nd ed. 2000).

48. Klaus Günther, *The Legacies of Injustice and Fear: A European Approach to Human Rights and their Effects on Political Culture*, in *THE EU AND HUMAN RIGHTS* 143 (Philip Alston ed., 1999).

49. James A. Gross, *A Long Overdue Beginning: The Promotion and Protection of Workers' Rights as Human Rights*, in *WORKERS' RIGHTS AS HUMAN RIGHTS* 1, 4 (James A. Gross ed., 2003).

50. HUMAN RIGHTS WATCH, *UNFAIR ADVANTAGE: WORKERS' FREEDOM OF ASSOCIATION IN THE UNITED STATES UNDER INTERNATIONAL HUMAN RIGHTS LAW* (2000).

tion of labor conditions as 'standards' or 'principles' rather than rights. From the mid-1990s, however, the ILO standards have been increasingly perceived as lacking relevancy in the context of increasing globalization.⁵¹

To address such issues, the ILO has embarked on a series of reforms to maintain its relevancy. In 1998, the International Labor Conference of the ILO adopted the *Declaration on Fundamental Principles and Rights at Work*.⁵² The Declaration commits all member states to respect, promote and realize the following: freedom of association and the effective right to collective bargaining, the elimination of all forms of forced or compulsory labor, the effective abolition of child labor and the elimination of discrimination in all its forms. The strength of such an approach is that these core standards are subject to an increased focus and become more visible as human rights. To some extent the Declaration has signified a refocusing of priorities and a re-conceptualization of discourses. With the Declaration, the discourse on labor standards has shifted from an earlier focus on the economics of exploitation versus social protection. Instead of an economic debate, there is some evidence of a greater recognition of workers' rights as 'human rights' and of the need for the international community to respect fundamental human dignity. The right to freedom of association is a key aspect of this recognition.⁵³

3.3. OBLIGATIONS FOR COMPLIANCE

Australia, as member of the ILO, has an obligation to uphold the right to freedom of association. This obligation is further supported by the fact that Australia has ratified the *ICCPR* and the *ICESR* as well as the *Freedom of Association and Protection of the Right to Organise Convention (No 87)*, and the *Right to Organise and Collectively Bargain Convention (No 98)*.⁵⁴ Under the *ILO Constitution*, Australia is required to submit reports on the measures taken to comply with ILO treaties.⁵⁵ Reports in relation to freedom of association are normally requested every two years. The Committee of Experts on the Application of Conventions and Recommendations examines the reports supplied by governments. In the case of an inconsistency with a convention, the Committee of Experts can make a direct

51. Patrick Macklem, *The Right to Bargain Collectively in International Law: Workers' Right, Human Right, International Right?*, in *LABOUR RIGHTS AS HUMAN RIGHTS* 61, 69 (Philip Alston ed., 2005).

52. ILO Fundamental Principles, *supra* note 29.

53. OWENS & RILEY, *supra* note 3, at 54-55.

54. Swepston, *supra* note 30, at 156.

55. Int'l Lab. Org. [ILO] Const. art. 22.

request, which is usually made in the case of minor failures. Alternatively, the Committee of Experts can make an observation, which is usually reserved for more serious or long-standing offenses.⁵⁶

Under Article 24 of the *Constitution of the International Labour Organisation*, employers' or workers' organizations can make a representation to the Governing Body of the ILO to the effect that a member State has violated a particular ratified convention. The Governing Body will present the representation to the government concerned. If the Governing Body is not satisfied with their response, then the Governing Body publishes the representation along with the government's reply, if any, and its own conclusions concerning further action.⁵⁷ In addition, Article 26 of the *ILO Constitution* allows complaints to be filed by any member state on the application of a Convention that it has also ratified.

In the field of freedom of association, there have also been special mechanisms that have been set up to monitor compliance. In 1950, the ILO Committee on Freedom of Association was set up in agreement with the UN Economic and Social Council to examine complaints about freedom of association from governments, employers' organizations, or workers' organizations.⁵⁸ Under the *ICCPR* and *ICESCR*, Australia is required to submit periodic reports to the UN Human Rights Committee and the UN Committee on Economic, Social, and Cultural Rights.⁵⁹

International supervision through such procedures arguably encourages greater compliance from nation-states. At the same time, the decisions of treaty monitoring bodies provide authoritative interpretations of what constitutes freedom of association.⁶⁰ All of these provisions and related mechanisms provide a strong incentive for Australia to comply with its obligations under international law in relation to the right to freedom of association.

3.4. THE IMPORTANCE OF COMPLIANCE WITH THIS FUNDAMENTAL RIGHT

There are strong reasons for compliance with the right to freedom of association from the perspective of human dignity. When access to other rights—such as the right to a decent standard of living—may rely first on being able to join together with

56. BUREAU FOR WORKERS' ACTIVITIES, INT'L LABOUR OFFICE, BOOKLET NO. 6, TRADE UNIONS AND CHILD LABOUR: USING ILO STANDARDS TO COMBAT CHILD LABOUR 20-21 (2000).

57. Swepston, *supra* note 30, at 157-159.

58. *Id.* at 159.

59. ICESCR, *supra* note 29, at art. 16; ICCPR, *supra* note 29, at art. 40.

60. Swepston, *supra* note 30, at 175-159.

other workers, this is especially true. For instance, an individual worker may theoretically have a right to a minimum level of pay but may not have the legal knowledge or means to enforce this right individually. Without the right to freedom of association, other rights are rendered meaningless.⁶¹

Globalization has posed many further challenges to the protection of workers' human rights. While there have been some winners in both Australia and internationally, there have also been many losers with a widening gap between rich and poor.⁶² With the process of globalization, the implementation of freedom of association in some workplaces has often been hampered.⁶³ Multinational corporations moving their production to locations where the terms of employment can be more easily dictated is one example. In addition, migrant workers who leave their home countries in search of greater economic opportunities are often exploited. The marginalization of these migrant workers often occurs because barriers exist to the exercise of their rights to freedom of association. Among these barriers are the types of work performed, job insecurity, lack of access to information and language skills.⁶⁴ Such cases provide strong examples of how globalization may impact negatively on workers' rights to freedom of association.

At the same time, there are some countervailing trends, with global civil society having an increasingly important role in the promotion and the enforcement of international human rights law. With increased globalization, the project for the protection of labor rights internationally is of increased importance for every individual. Along with economic globalization, there is evidence of movements for global justice and of 'grassroots' globalism. In this context, unions are increasingly using notions of 'global solidarity' or 'freedom of association across borders' as a means of attempting to tackle these pressing issues.⁶⁵

61. See Irving, *supra* note 31, at 54.

62. Piyasiri Wickramasekara, *Protection of Migrant Workers in an Era of Globalization: The Role of International Instruments*, in *COMPARATIVE LABOUR LAW AND INDUSTRIAL RELATIONS IN INDUSTRIALIZED MARKET ECONOMIES* 244 (Roger Blanpain ed., 2007).

63. OWENS & RILEY, *supra* note 3, at 39.

64. TOBY SHELLY, *EXPLOITED: MIGRANT LABOUR IN THE NEW GLOBAL ECONOMY* 155-58 (2007).

65. James Atleson, *An Injury to One. . .: Transnational Labor Solidarity and the Role of Domestic Law*, in *WORKERS' RIGHTS AS HUMAN RIGHTS* 160-61 (James Gross ed., 2003); J.P. Windmuller, S.K. Pursey & J. Baker, *The International Trade Union Movement*, in *COMPARATIVE LABOUR LAW AND INDUSTRIAL RELATIONS IN INDUSTRIALIZED MARKET ECONOMIES* 90 (Roger Blanpain ed., 2006).

Yet, without the full recognition of the right to freedom of association, this becomes particularly difficult.⁶⁶ For instance, if the right to freedom of association is not fully protected in Australia, workers there would be unable to effectively take action in support of workers in other countries. In an increasingly globalised world, the importance of the right to freedom of association is arguably more crucial than ever because it is key to unlocking so many other rights.

4. EXAMINING AUSTRALIA'S COMPLIANCE WITH THE RIGHT TO FREEDOM OF ASSOCIATION IN THE CONTEXT OF RECENT REFORMS

This section examines the extent to which the Rudd-Gillard Labor government's industrial relations regime is compliant with instruments governing freedom of association in international human rights law. Rather than attempting to examine every aspect of the right to freedom of association, some key or salient aspects of the right are assessed: the protection of the individual aspects of the right to freedom of association, protection of the right to strike, the right of workers' representatives to access worksites, and aspects of collective bargaining under the *Fair Work Act*.

4.1. THE INDIVIDUAL RIGHT TO FREEDOM OF ASSOCIATION

The *Workplace Relations Act* 1996 (Cth) provided protection for 'freedom of association' as an individual right under Part 16. Some commentators have argued that, because this provision was originally introduced in the context of other changes designed to limit the power and role of unions, the section was really intended to support a freedom not to associate.⁶⁷ Notwithstanding such criticisms, Part 16 also formally supports the right to join a trade union. It should be noted that support for the right not to associate, as protected in the *Workplace Relations Act*, is not inconsistent with international law. Yet, at the same time, it is not a requirement of Article 2 of *Convention 87* that domestic law should stipulate that no one should be compelled to join a trade union. Indeed, *Convention 87* arguably allows for 'closed shop' arrangements and even for their active promotion by government.⁶⁸

66. Windmuller et al., *supra* note 65, at 90-92.

67. OWENS & RILEY, *supra* note 3, at 475.

68. Creighton, *supra* note 41, at 248.

*Maritime Union of Australia v. Patrick Stevedores No 1 Pty Ltd*⁶⁹ was the first significant case of the ‘freedom of association’ provisions being successfully used by a union against an employer, rather than by the government or employers against ‘union preference provisions’ and ‘closed shops.’⁷⁰ The decisions of the Federal Court and High Court appeared to establish a broad scope for Part XA protection, which was the then equivalent to Part 16.⁷¹ Indeed, the effect of the decision in the High Court in *MUA v Patrick Stevedores* was that employers were prohibited, directly and indirectly, from undermining collective agreements and their employees’ desires for collective representation.⁷²

Since the *Patrick Stevedores* case, there have been a number of attempts by unions to utilize the individual ‘freedom of association’ provisions to stop actions by employers which undermine collective activity.⁷³ However, because the legal right is viewed as an individual one, it has sometimes been interpreted quite narrowly by the courts.⁷⁴ This, in turn, is potentially problematic from the perspective of international human rights law.

A key case in this respect was *Australian Workers’ Union v BHP Iron Ore Pty Ltd*.⁷⁵ This case had commenced after BHP Iron Ore had refused to engage in collective bargaining with unions at its Pilbara mining operations. BHP Iron Ore refused to enter into bargaining for pay increases for workers who wished to continue to remain on a collective agreement negotiated by the union rather than individual workplace contracts.⁷⁶

The Full Court examined the language of s 298K of Part XA and decided ‘the proscription is essentially against an intentional act of the employer directed to an *individual* employee.’⁷⁷ The court held that the offering of individual contracts by BHP was not in of itself conduct which injured or altered the position of its employees. Rather, it was the potential employee accepting the individual contract that had the effect of undermining the posi-

69. *Mar. Union of Australia v. Patrick Stevedores No.1 Pty Ltd.*, F.C.A 378 (1998) (available at http://www.austlii.edu.au/au/cases/cth/federal_ct/1998/378.html).

70. David Quinn, *To Be or Not to Be a Member – Is That the Only Question? Freedom of Association Under the Workplace Relations Act*, 17 AUSTRALIAN J. LABOUR L. 1, 22-23 (2004).

71. See generally *id.*; see also *Workplace Relations Act*, *supra* note 15 (available at http://www.austlii.edu.au/au/legis/cth/num_act/wraca2005418/).

72. *Patrick Stevedores Operations No. 2 Pty Ltd. v. Mar. Union of Australia* (1998) 195 C.L.R. 1, 67-70.

73. NICK O’NEILL ET AL., *RETREAT FROM INJUSTICE: HUMAN RIGHTS LAW IN AUSTRALIA* 363 (2d ed. 2004).

74. Quinn, *supra* note 70, at 24-25.

75. *BHP Iron Ore Pty Ltd v. Australian Workers’ Union* (2000) 102 F.C.R. 97.

76. *Id.* ¶¶ 8-12.

77. *Id.* ¶ 35 (emphasis added).

tion of other workers including union members.⁷⁸ The Full Court failed to accept that indirect conduct was conduct within the terms of the 'freedom of association' provisions despite a finding that the employer's aim was to remove any effective role for the union.⁷⁹

Such a narrow interpretation of freedom of association does not fully accord with understandings of the right in international human rights law. Generally, provisions relating to 'freedom of association' in Australia have largely been interpreted in an individualistic manner. As discussed above, freedom of association in international human rights law is normally viewed in more complex terms which take into account 'collective' and 'individual,' as well as the purposive and functional aspects of the right. Some legal commentators have argued that there is substantial scope for the judiciary to interpret freedom of association under Part 16 of the *Workplace Relations Act* more broadly in light of collective concerns.⁸⁰

While this may be true, it does not substantially address the underlying limitations of the approach of Part 16. Indeed, there is little scope for the courts to interpret the right in more complex terms. This is because, in interpreting Part 16, the judiciary is unable to look at key aspects of the protection of the right to freedom of association in Australia. These key aspects include the ability of workers to undertake forms of protected industrial action, the ability of workers' representatives to access the workplace, as well as the issues surrounding collective bargaining which are discussed elsewhere in this paper. Even though the *Workplace Relations Act* purports to protect 'freedom of association' in discrete areas, the interpretation of the individual right has been without a broader consideration of the right in international human rights law. It actually permits practices that undermine the right to freedom of association in reality.⁸¹ This means that the interpretation of the individualized right to 'freedom of association' contained in current Australian legislation is going to remain limited or largely symbolic, as compared to the conception of the right to freedom of association in international human rights law.

Moreover, the *Fair Work Act*, does not significantly alter the protection of this individual right to freedom of association.⁸² Consequently, the 'freedom of association' provisions remain

78. *Id.* ¶ 38.

79. *Id.* ¶¶ 21, 22.

80. Quinn, *supra* note 70, at 84-85.

81. O'NEILL ET AL., *supra* note 73, at 365.

82. *Fair Work Act*, *supra* note 27, at §§ 336, 340, 346.

somewhat problematic from the perspective of international human rights law. However, the *Fair Work Act* does consolidate into one part of the legislation a range of related protections.⁸³ The freedom of association, unlawful termination, and other general protection provisions have been combined into a set of 'general protections.'⁸⁴ This part also contains a range of provisions that may be of importance to freedom of association, as it is interpreted in international law. These include, for instance, the prohibition on taking adverse action against a person based on their workplace rights, or because of the exercise or non-exercise of such a right. There is also, the prohibition on an employer discriminating against an employee or prospective employee because of their race, sex, age, disability, or other proscribed grounds.⁸⁵

The possible strength of such changes is that the individual right to freedom of association in Australian law will potentially be better supported by these other provisions of the *Fair Work Act*. However, at the same time, there remain definite limitations in this approach from the broader perspective of the right to freedom of association in international human rights law.

4.2. THE RIGHT TO STRIKE

The Committee of Experts of the ILO has made a number of observations calling upon Australia to amend laws that restrict the right to strike beyond what is permitted in international law.⁸⁶ As discussed above, the right to strike has been interpreted by the Committee on Freedom of Association and the Committee of Experts as an integral aspect of freedom of association because it is seen as one of the key means available for workers to pursue better working conditions.⁸⁷

The term 'right to strike' encompasses a broad range of activities. These activities include such varied actions as traditional strikes where workers remove their labor temporarily; work bans where workers refuse certain kinds of work; boycotts where there is a refusal to deal with certain goods; go-slows where work is performed at a slower rate; work-to-rule where workers work to the letter of the contract of employment without undertaking

83. *Id.* at §§ 340, 343-44.

84. Andrew Stewart, *A Question of Balance: Labor's New Vision for Workplace Regulation*, 22 AUSTRALIAN J. LABOUR L. 3, 39-40 (2009).

85. *Fair Work Act*, *supra* note 27, at §§ 340, 351.

86. ILO Doc 062009AUS087, *supra* note 23; ILO Doc 062009AUS098, *supra* note 27.

87. Creighton, *supra* note 37, at 315.

additional voluntary activities, and picketing activities.⁸⁸ The right to strike in international law is not limited to the protection of purely industrial interests, but extends to underlying social and policy issues that are of direct concern to workers. It does not, however, extend in its scope to purely 'political strikes.'⁸⁹ A number of the related issues concerning the right to strike are considered below.

4.2.1. *The Right to Strike: Taking Protected Industrial Action*

At present, there is only limited protection of the right to strike in Australia. There is no general right to strike but, rather, under the common law, all industrial action is effectively unlawful, as it may constitute a breach of contract and amount to an industrial tort.⁹⁰ The rules about industrial action in Part 3-3 of the *Fair Work Act* are substantially similar to those that appeared in Part 9 of the *Workplace Relations Act*.⁹¹ Employees under the *Fair Work Act* are able to take protected industrial action to support or advance claims during collective bargaining.⁹² Action will only be protected if it has been authorized by a mandatory secret ballot. Any protected industrial action can only proceed if at least fifty percent of people on the roll of voters participate and more than fifty percent of votes are in favor of the action. In addition, unions are required to provide the employer, within three working days of the vote, written notice of their intention to take the protected industrial action.⁹³ Furthermore, in this context, the regime does not provide protection to all forms of industrial action. For instance, picketing and secondary boycotts as a form of industrial action do not receive protection.⁹⁴

88. *Fair Work Act*, *supra* note 27, at § 19; *Workplace Relations Act*, *supra* note 15, at § 420; EDWARD I. SYKES, *STRIKE LAW IN AUSTRALIA* 88 (2d ed. 1982) (1960); CREIGHTON & STEWART, *supra* note 2, at 534.

89. Creighton, *supra* note 37, at 315; Freedom of association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO, 1996 DIGEST § 9, at ¶ 481.

90. Fenwick & Landau, *supra* note 22, at 140.

91. *Fair Work Act*, *supra* note 27, at § 3-3; *Workplace Relations Act*, *supra* note 15, at § 9; Stewart, *supra* note 84, at 91.

92. 'Protected industrial action' is industrial action where unions and their members are protected from legal actions against them for breach of contract or industrial torts.

93. *Fair Work Act*, *supra* note 27, at §§ 408-412, 414; Explanatory Memorandum from the Parliament of the Commonwealth of Australia H.R. to the *Fair Work Bill*, 2008, 257-259; Shae McCrystal, *A New Consensus: The Coalition, The ALP and The Regulation of Industrial Action*, in *FAIR WORK: THE NEW WORKPLACE LAWS AND THE WORK CHOICES LEGACY* 147, 159-162 (Anthony Forsyth and Andrew Stewart eds., 2009).

94. *Fair Work Act*, *supra* note 27, at § 19; *Competition and Consumer Act* 2010 (Cth) (formerly Trade Practices Act, 1974) § 45(D).

The requirements of this regime create substantial barriers to protected industrial action. Due to the complexity of requirements and the length of time involved in the process, such requirements significantly deter the exercise of these rights. While the Committee of Experts has held that a state can procedurally regulate the right to strike, the regime for protected industrial action extends well beyond what might reasonably be regulated. The Committee of Experts has repeatedly criticized the Australian industrial relations regime, arguing that the right to strike should not be limited to industrial disputes that are likely to be resolved through a collective agreement, but should be extended further to a broad range of issues.⁹⁵

Notwithstanding such points of criticism, there have been a number of changes that potentially improve Australian compliance with the right to freedom of association. Previously, where industrial action involved 'non-protected persons' for the purposes of that industrial action, this would automatically have denied protected status to other participants.⁹⁶ All parties would, therefore, be vulnerable to sanctions under the common law. The involvement of 'non-protected persons' in industrial action under the *Fair Work Act* no longer has the effect of automatically denying protected status to other participants.⁹⁷ This brings Australia into greater compliance with the right to freedom of association, as 'protected industrial action' will now apply to a larger class of actions.

Another key change is in relation to strike pay. Under *Work Choices*, there was a requirement to withhold a mandatory four hours of pay irrespective of the type of industrial action taken or the actual duration of the action. This meant that workers would be penalized four hours pay for a half an hour stop-work meeting, which deterred workers from taking any industrial action that fell short of four hours. In the new system, the four-hour rule will not apply to protected industrial action. A deduction will still have to occur, but this will be only for the period of action. However, employers will still be required to withhold four hours pay for any incident of unprotected industrial action of up to four hours duration. For incidents of unprotected action of more than four hours, employers will be required under the

95. ILO Doc 062009AUS087, *supra* note 23; GERNIGON ET AL., *supra* note 44, at 13.

96. Non-protected persons, include non-union members.

97. ANDREW STEWART, FAIR WORK LEGISLATION 2009 (2009); Stewart, *supra* note 84, at 93-94.

Fair Work Act to withhold payment for the duration of the action.⁹⁸

A further reform is in relation to any form of partial work ban such as work-to rule, go-slows or work bans. Under the *Work Choices* legislation, employers were required to pay nothing to employees who were undertaking protected industrial action in the form of a partial work ban, despite the fact that the employees may have been performing productive work.⁹⁹ Under the *Fair Work Act*, the employer may choose to make a proportionate deduction or no deduction at all, which may be reviewed by Fair Work Australia.¹⁰⁰ The Committee of Experts had previously strongly criticized Australia for imposing a blanket prohibition on workers receiving pay for the period during which they are engaged in industrial action rather than leaving the issue open to bargaining.¹⁰¹

Ultimately, changes to strike pay and the widening of protected industrial action bring Australia into closer compliance with the right to freedom of association. However, a fundamental gap clearly remains between Australian law and the right to freedom of association in international human rights law. This includes such matters as limiting protected industrial action to those which advance claims during collective bargaining, as well as the heavy procedural restrictions on the exercise of protected industrial action.

In addition, there are further restrictions, such as the general rule that industrial action is prohibited if it is in support of 'pattern bargaining' or multi-employer bargaining across an industry. This remains substantially unchanged under the *Fair Work Act*. Under this act, the government will be required to order the parties to stop taking industrial action that is threatening to cause

98. Explanatory Memorandum from the Parliament of the Commonwealth of Australia H.R on the *Fair Work Bill* 2008, 287-289; DEP'T OF EDUC., EMPLOYMENT AND WORKPLACE RELATIONS, AUSTRALIA'S FAIR WORK SYSTEM: 10. CLEAR, TOUGH RULES FOR INDUSTRIAL ACTION (2009).

99. *Fair Work Act*, *supra* note 27, at § 471(4); Explanatory Memorandum, *supra* note 98, at 287-289; DEP'T OF EDUC., EMPLOYMENT AND WORKPLACE RELATIONS, *supra* note 98.

100. *Fair Work Act*, *supra* note 27, at § 471.

101. INT'L. LAB. ORG. COMMITTEE OF EXPERTS ON THE APPLICATION OF CONVENTIONS AND RECOMMENDATIONS, INDIVIDUAL OBSERVATION CONCERNING FREEDOM OF ASSOCIATION AND PROTECTION OF THE RIGHT TO ORGANISE CONVENTION, 1948 (No. 87) Australia (ratification: 1973), ILO Doc 062007AUS087 (2007) [hereinafter ISO Doc 062007AUS087]; ILO Doc 062008AUS098, *supra* note 23; INT'L. LAB. ORG. COMMITTEE OF EXPERTS ON THE APPLICATION OF CONVENTIONS AND RECOMMENDATIONS, INDIVIDUAL OBSERVATION CONCERNING FREEDOM OF ASSOCIATION AND PROTECTION OF THE RIGHT TO ORGANISE CONVENTION, 1948 (No. 87) Australia (ratification: 1973), ILO Doc 062008AUS087 (2008) [hereinafter ILO doc 062008AUS087].

significant damage to the Australian economy or to an important part of it.¹⁰² While the Committee of Experts has stated that the right to strike may be restricted in some circumstances, such circumstances are limited to when workers are engaged in essential services.¹⁰³ The provisions of the *Fair Work Act* do not appear to define such circumstances in such an extremely limited way. All these issues point to the need for a greater focus on the right to strike as a fundamental aspect of the right to freedom of association.

4.2.2. *The Right to Strike: 'Primary' and 'Secondary' Action*

Australian law draws a distinction between 'primary' and 'secondary' action. 'Primary' action is directed against the employer with whom the workers are in dispute. 'Secondary' action is often directed against a third party that an employer has dealings with so as to bring pressure to bear on the employer.¹⁰⁴ The ILO has indicated that 'sympathy action' and 'secondary' action should be lawful so long as the initial strike that it is taken in support of is lawful.¹⁰⁵ The ability of workers to take industrial action in solidarity with others is of increasing importance in the context of globalization, the fragmentation of corporate structures and the current global economic crisis.¹⁰⁶ Decisions made offshore, directly impacting the employees of another legal entity, can have a significant indirect impact on workers at a local level. Similarly, decisions made by the parent company of a corporate group can have significant impacts on employees of its subsidiary company. For many workers, their ultimate working conditions are not merely a function of the employer-employee relationship.¹⁰⁷

As currently interpreted, the protection afforded to cross-country 'sympathy action' as an aspect of the right to freedom of association ultimately depends on the legal system of the workers' host country.¹⁰⁸ Therefore, if workers were to take industrial action outside 'protected industrial action' in Australia, it is likely

102. *Fair Work Act*, *supra* note 27, at § 424. Fair Work Australia is the new national industrial relations tribunal set up under the *Fair Work Act*.

103. GERNIGON ET AL., *supra* note 44, at 18-19.

104. CREIGHTON & STEWART, *supra* note 2, at 535.

105. Creighton, *supra* note 37, at 318.

106. Jackie Smith & Dawn Wiest, *National and Global Foundations of Global Civil Society*, in *GLOBAL SOCIAL CHANGE: HISTORICAL AND COMPARATIVE PERSPECTIVES* 289 (Christopher Chase-Dunn & Salvatore J Babones eds. 2006).

107. See generally Jackie Simpkins, *The Global Workplace: Challenging the Race to the Bottom*, in *14 DEVELOPMENT IN PRACTICE* 110 (2004); DUNCAN GREEN, *FROM POVERTY TO POWER: HOW ACTIVE CITIZENS AND EFFECTIVE STATES CAN CHANGE THE WORLD* 158-66 (2008).

108. GERNIGON ET AL., *supra* note 44, at 15-16.

that industrial action taken in support of Australian workers overseas would not be protected in international law. By contrast, if Australian workers were to take industrial action in support of workers in another country where that initial action was not prohibited, then this would be protected by international law. There would seem to be some inconsistency in these outcomes. A human rights-based approach to freedom of association would require that protected action would apply universally across jurisdictions. The current reasoning may be a reflection of the evolving nature of international human rights law and a product of more traditional approaches by the ILO to freedom of association. Indeed, some commentators have suggested that it would be preferable for the treaty monitoring bodies to apply a test of 'common interest.' That is, sympathy action should be permissible where there is a common interest between workers involved in primary or secondary action.¹⁰⁹

4.2.3. 'Sympathy Action': Secondary Boycotts and Boycott-like Conduct

Notwithstanding this situation and the unresolved issues of the scope of 'sympathy action,' the right to freedom of association has an important role to play in the promotion of transnational human rights. For example, on February 27, 1997, Renault, a multinational car manufacturer, closed its plant at Vilvoorde, Belgium. This closure occurred without any prior consultation with union representatives, and it led to coordinated sympathy or solidarity strikes by Renault workers from production sites across Europe, as well as strikes by workers from other car manufactures within Belgium. While the union was not able to prevent the plant from closing, it was able to negotiate a redundancy plan which avoided a mass lay-off of workers.¹¹⁰ Without such international solidarity action, the outcome may have been substantially worse for the workers involved. There are many other examples of international solidarity.¹¹¹ However, if such solidarity actions occurred in the Australian context, they would probably be prohibited under the 'secondary boycott' provisions in the *Competition and Consumer Act 2010 (Cth)*.¹¹²

There are no consequential changes to 'secondary boycott' provisions under the *Fair Work Act*. This means that unions still

109. Creighton, *supra* note 37, at 319.

110. Simpkins, *supra* note 107; Eurofund, *Transnational Industrial Action* (available at <http://www.eurofound.europa.eu/areas/industrialrelations/dictionary/definitions/transnationalindustrialaction.htm> (last visited May 5, 2009)).

111. See, e.g., Atleson, *supra* note 65, at 168.

112. *Competition and Consumer Act* (2010) (Cth) (formerly *Trade Practices Act 1974* (Cth)) §§45D-45E (Austl.).

face large fines for taking part in most forms of ‘sympathy action.’ Employees are also potentially prevented from taking industrial action against other members of a corporate group, even though their actions may strongly influence conditions of employment for themselves.¹¹³ The secondary-boycott provisions in the *Competition and Consumer Act* mean that the provisions are viewed largely as a function of commercial and competition policy, rather than pertaining to the entitlements of workers. The prohibitions on ‘secondary’ strike action are especially problematic because they may prevent alternative methods for workers to press for improved working conditions.

*Australian Competition and Consumer Commission v IPM Operation and Maintenance Loy Yang Pty Ltd (No 2)*¹¹⁴ is illustrative of potential issues. This case concerned an agreement between the owner of a power station and the Electrical Trades Union (ETU). The union was fined for making an agreement with the power station that contracts would only be awarded to service providers who employed their workers under a union collective agreement.¹¹⁵ By making such an agreement, the union sought to discourage non-union agreements and individual contracts that, in practice, often act to undermine pay, working conditions and union access to sites.¹¹⁶ These are issues that go to the heart of freedom of association and the ability to collectively bargain as an aspect of that right. Yet, in Australia, they are approached from the perspective of competition policy.

Similarly, Section 804 of the *Workplace Relations Act*, which prohibits boycott-like conduct, is potentially problematic from the perspective of the right to freedom of association. The Section prohibits a person from discriminating against an employer on the basis that its employees are or are not covered by a particular type of industrial instrument. At its broadest, the section may catch trade union campaigns that insist suppliers meet key labor standards by employing workers on certain kinds of industrial instruments. For instance, if an individual chose not to employ a particular contractor because they employed their staff on AWAs, when this was an option, then this would be contrary to the section.¹¹⁷

The Explanatory Memorandum to the *Work Choices* legislation stated that the section was not intended to apply to the sub-

113. *Competition and Consumer Act*, *supra* note 112.

114. *Australian Competition & Consumer Comm'n. v. IPM Operation & Maint. Loy Yang PTY Ltd.*, F.C.A 11 (2007).

115. *Id.* at 2, 55, 79; *Competition and Consumer Act*, *supra* note 112.

116. BRIGID VAN WANROOY ET AL., AUSTRALIA AT WORK: THE BENCHMARK REPORT 52-53 (2007).

117. OWENS & RILEY, *supra* note 3, at 486-487.

stance of the industrial instrument.¹¹⁸ However, it forecloses on actions because certain kinds of industrial instruments are much more likely to work against freedom of association and the fight for better working conditions than are others.¹¹⁹ The Explanatory Memorandum to the *Fair Work Act* states that Section 354 of the new legislation is intended to be broadly equivalent to Section 804 of the *Workplace Relations Act*.¹²⁰ Despite reforms under the *Fair Work Act*, there may still be forms of industrial instruments, such as non-union agreements, that are less likely to protect workers' rights. Section 354, therefore, still potentially provides significant limitations on union campaigns.

Thus, the current provisions against secondary boycotts and boycott-like conduct substantially limit the ability of workers to take forms of action in support of both their own rights and the rights of other workers. In the context of increasing globalization, sympathy action is likely to become a progressively more important aspect of the right to freedom of association. This is because in a local and global context, it may have profound implications for the protection of interrelated rights, such as the right to a decent standard of living. This is especially so when alternative opportunities for action to achieve better working conditions are limited by other legislative provisions, such as those contained in Section 354 of the *Fair Work Act*. The Committee on Freedom of Association has specifically highlighted the potential abuses that may occur unchecked if sympathy action is prohibited.¹²¹ In fact, in 2009, the Committee of Experts criticized Australia for continuing to maintain secondary boycott provisions that infringe the right to freedom of association.¹²² In other words, there are significant amendments that will be required to bring Australia's laws into compliance with the right to freedom of association in this respect.

4.3. RIGHT OF ENTRY PROVISIONS

If union organizers do not have access to the worksite, it can become very difficult for workers to exercise their freedom of association in a practical sense. Without the possibility of communicating with workers, the role of trade unions representing the collective interests can be significantly limited. Indeed, without a union organizer being able to visit a site, workers may even

118. Explanatory Memorandum from the Parliament of the Commonwealth of Australia H.R. to the *Workplace Relations Amendment (Work Choices)*, 2005, 383.

119. OWENS & RILEY, *supra* note 3, at 486-487.

120. Explanatory Memorandum from the Parliament of the Commonwealth of Australia H.R. to the *Fair Work Bill*, 2008, 231.

121. GERNIGON ET AL., *supra* note 44, at 16.

122. ILO Doc 062009AUS087, *supra* note 23.

be unaware of the possibility of participating in a union. The Freedom of Association Committee has stated that ‘workers’ representatives should enjoy such facilities as may be necessary for the proper exercise of their functions, including access to workplaces.’¹²³

Currently, there are a number of limitations placed on the right of a workers’ representative to access worksites. Under the *Fair Work Act*, a union official must hold a valid right-of-entry permit, issued by Fair Work Australia. Permits can only be issued to a ‘fit and proper person.’¹²⁴ In addition, the permit holder must give at least twenty-four hour notice before entering a worksite and entry can only occur during working hours.¹²⁵ A permit holder must comply with any “reasonable” request from an employer that discussions or interviews take place in a particular part of the premises, and even that they take a particular route to reach that location.¹²⁶ This significantly curtails the potential for union organizers to have discussions with workers on site. Anecdotal evidence confirms that union organizers are often required to stay in a particular place in the building, making it difficult for workers to talk to them unobserved by management.¹²⁷ These right-of-entry provisions remain significantly the same as they were under *Work Choices*.¹²⁸

The key change between *Work Choices* and the *Fair Work Act* pertains to which worksites union organizers will be able to visit. The *Fair Work Act* links visitation to whether the union has coverage to represent the industrial interests of the relevant employees. In contrast, *Work Choices* imposed significant limitations and provided that union organizers could only have access to sites covered by an award or enterprise agreement. Moreover, if all employees on site were employed under Australian Workplace Agreements (AWAs), then there was no right of entry at all

123. Freedom of Association Convention, *Access to the Workplace: Digest of Decisions of the Committee on Freedom of Association*, ILO Doc 2320061804 (2006).

124. *Fair Work Act*, *supra* note 27, at §§ 510, 513. Under section 513, in determining whether an official is a ‘fit and proper person’ Fair Work Australia must take into account: whether the person has received training about the rights and responsibilities of a permit holder; whether the person has ever been convicted of a offence involving entry on to premises, fraud, dishonesty, violence or property damage in any jurisdiction; whether the person has ever been ordered to pay a penalty under industrial law; whether a right of entry has ever been refused or revoked; and other matters Fair Work Australia considers relevant, *id.*

125. *Id.* at § 487

126. *Id.* at §§ 491-492; Hor & Ireland-Piper, *supra* note 25, at 56.

127. *E.g.*, Anonymous consultation with union officials conducted by author at Liquor, Hospitality and Miscellaneous Union, Sydney on April 10, 2009.

128. Colin Fenwick & John Howe, *Union Security After Work Choices*, in *FAIR WORK: THE NEW WORKPLACE LAWS AND THE WORK CHOICES LEGACY* 164, 182 (Anthony Forsyth & Andrew Stewart eds. 2009).

for the purposes of discussion. Indeed, unions could only enter such a site to investigate breaches of AWA conditions with the written request of the employee concerned.¹²⁹

In 2007, the Committee of Experts made a direct request to the state party of Australia concerning right of entry provisions under *Work Choices*. The Committee of Experts expressed concern about the limitations that were placed on union access to worksites where people are employed under AWAs.¹³⁰ The *Fair Work Act* is likely to bring Australia into greater compliance with the right to freedom of association. It allows access to worksites based on the broader concept of whether a union has coverage to represent a particular industry of workers. Nevertheless, there are unresolved issues. The Committee has expressed a number of concerns about right of entry provisions under *Work Choices*¹³¹ that have not been substantially addressed by the *Fair Work Act*.

The fact that entry to a workplace is still subject to a special entry permit, which may be refused or revoked, also infringes on freedom of association. The Committee of Experts stated such restrictive conditions for the granting of permits under the *Work Choices* legislation could constitute a serious obstacle to the exercise of these rights.¹³²

In practice both the *Work Choices* legislation and the *Fair Work Act* may force unions to rely on alternative methods to assist workers to exercise the right to freedom of association. Methods for reaching potential and current members include, for instance, the use of union call centers, offsite meetings, home visits and even media advertisements.¹³³ While there have been some improvements in compliance with the right to freedom of association under the *Fair Work Act*, there remain issues of potential non-compliance. Without further amendment to the current regime, significant impediments remain to workers participating in unions and having their interests represented.

4.4. COLLECTIVE BARGAINING

A key aspect of the right to freedom of association is to allow for collective bargaining. In many ways, the fundamental purpose of the right to freedom of association is to enable workers to deal with employers on more equal terms through collec-

129. *Fair Work Act*, *supra* note 27, at § 484.

130. ILO Doc 062007AUS087, *supra* note 101.

131. *Id.*

132. *Id.*

133. See, e.g., Mark Boyd, *Call for union advice* (LHMU New South Wales Union News, winter 2008); MUIR, *supra* note 20, at 66-75, 104.

tive organization and action. Collective bargaining is a key method of improving working conditions and ensuring a decent standard of living.¹³⁴ As discussed above, Article 4 of *Convention 98* provides that state parties shall take appropriate measures to encourage and promote voluntary negotiations, with a view to the creation of collective agreements.¹³⁵

The Committee of Experts has, on a number of occasions, indicated that Australia has failed to meet its obligations in relation to this aspect of freedom of association. Australia was explicitly criticized for giving primacy to individual over collective agreements through the incentives for employers to utilize statutory individual agreements or AWAs.¹³⁶ With the phasing out of AWAs, some of these concerns will be addressed. The *Fair Work Act* instead places emphasis on collective bargaining at the enterprise level. However, there are still crucial questions concerning whether the new system promotes collective bargaining. There are two key aspects relevant to collective bargaining as a feature of freedom of association: the introduction of good faith bargaining and the ability of collective agreements to be undermined through interference with the outcomes of the bargaining process.

4.4.1. 'Good Faith' Bargaining

One of the significant changes in the *Fair Work Act* is the introduction of 'good faith' bargaining.¹³⁷ Correspondingly, there are new provisions that have been introduced that require an employer to recognize an employee's bargaining representative. Bargaining representatives for workers may include a union, the employee themselves or someone else nominated by the employee in writing. Where a worker is a union member, the union is presumed to be the bargaining representative unless someone else is appointed.¹³⁸ While the monitoring bodies of the ILO have stressed the desirability of good faith bargaining with a workers' representative, it has not been viewed as mandatory for compliance with the right to freedom of association. Introducing a scheme of good faith bargaining is a means of

134. JEAN-MICHEL SERVAIS, *INTERNATIONAL LABOUR LAW* 115 (2005); Irving, *supra* note 31, at 54.

135. *Right to Organise and Collectively Bargain Convention*, *supra* note 29.

136. ILO Doc 062008AUS098, *supra* note 23.

137. *Fair Work Act*, *supra* note 27, at § 228.

138. *Id.* at § 176.

encouraging a culture of genuine bargaining and addressing perceptions of unfairness in bargaining processes.¹³⁹

However, the Committee on Freedom of Association seems to consider that compelling an employer to negotiate with unions would deprive the bargaining of its 'voluntary' character. Thus, it is not required for compliance with the right to freedom of association. Creighton has strongly criticized this interpretation, arguing that compelling parties to negotiate should be viewed as a method of encouraging and promoting collective bargaining as required by *Convention 98*. This is especially so, as, in practice, the absence of such mechanisms may severely undermine the ability to engage in collective bargaining as an aspect of freedom of association.¹⁴⁰

The 'good faith' bargaining requirements are set out in Section 228 of the *Fair Work Act*. Under this section bargaining representatives are required to attend and participate meetings at reasonable times, disclose relevant information, respond to proposals in a timely manner, give genuine consideration to the proposals of the other, give reasons for responses to those proposals, refrain from capricious or unfair conduct that undermines freedom of association or collective bargaining, and recognize and bargain with the other bargaining representatives.¹⁴¹

Under the *Fair Work Act*, a failure to bargain in good faith does not carry any automatic sanctions. However, on the application of a bargaining representative, Fair Work Australia may issue a bargaining order to address failures to bargain in good faith in relation to single enterprise agreements or in the new 'low paid stream.'¹⁴² In addition, Fair Work Australia can make a 'serious breach declaration' in limited circumstances, which can result in an arbitrated outcome. The circumstances for issuing a 'serious breach declaration' include instances when all other reasonable alternatives to reach an agreement have been exhausted.¹⁴³

Generally, the provisions impose obligations on the process of bargaining, but not on the outcome. This is similar to the good faith bargaining provisions that exist under the United States *National Labor Relations Act 1935* (US). The provisions in United States have been strongly criticized by some commentators for

139. Aaron Rathmell, *Collective Bargaining After Work Choices: Will 'good faith' take us forward with fairness?*, 21 AUSTRALIAN JOURNAL OF LABOUR LAW 168 (2008).

140. Creighton, *supra* note 37, at 312.

141. *Fair Work Act*, *supra* note 27, at § 228.

142. *Id.* at §§ 229-223.

143. *Id.* at §§ 234-235.

being meaningless in practice.¹⁴⁴ Notwithstanding such criticisms, the Australian provisions arguably provide for the stronger protection of the integrity of collective bargaining than under *Work Choices*.¹⁴⁵ From the perspective of freedom of association in international law, such provisions can be read as going beyond the strict legal requirements. The supervisory bodies have not suggested that obligating employers to negotiate with unions would be contrary to international law but merely that it is not required by it.¹⁴⁶ Whether the good faith bargaining provisions represent best practice in terms of freedom of association will largely be a function of how they are interpreted in practice by Fair Work Australia. It will also depend on important contingencies such as the extent Australian law can be said to comply with the right to freedom of association in other interconnected areas such as the scope of collective bargaining.

4.4.2. *Interference with Bargaining Outcomes: The Scope of Bargaining*

ILO supervisory bodies have been highly critical of limitations in the bargaining process which do not leave parties free to reach their own settlement. For instance, the limitations on the level of collective bargaining and exclusions of certain matters from the scope of collective bargaining have been held by supervisory bodies to be problematic from the perspective of international human rights law.¹⁴⁷

The *Work Choices* legislation provided numerous limitations on what could be bargained for through ‘prohibited content’ provisions. While the new *Fair Work Act* has removed the concept of ‘prohibited content,’ substantial limitations still remain. Section 172(1) of the *Fair Work Act* states that an enterprise agreement can only validly deal with ‘permitted matters,’ including: matters pertaining to the employment relationship, matters pertaining to the relationship between the employer or employers and the employee organization, deductions from wages for any purpose authorized by an employee, and how the agreement will operate.¹⁴⁸ This means that there are a range of issues that were previously treated as ‘prohibited content’ that will now be allowable. Among the latter are deductions for union dues and time

144. Anthony Forsyth, *Exit Stage Left, now Centre Stage: Collective Bargaining under Work Choices and Fair Work*, in *FAIR WORK: THE NEW WORKPLACE LAWS AND THE WORK CHOICES LEGACY* 135 (Andrew Stewart & Anthony Forsyth eds., 2009).

145. *Id.* at 134, 136.

146. Creighton, *supra* note 37, at 313.

147. *Id.* at 314; ILO Doc 062009AUS098, *supra* note 29.

148. *Fair Work Act*, *supra* note 27, at § 172.

off for trade union training.¹⁴⁹ Such matters directly relate to the ability of unions to represent their members effectively and to the right of freedom of association.

However, in addition to requiring that the agreement relates to permitted matters, there is the further requirement that the enterprise agreement does not contain 'unlawful terms.' Unlawful terms include provisions that seek to contract out of the *Fair Work Act*. Under these provisions, workers are expressly prohibited from bargaining for rights that are greater than the legislation in areas directly linked to the right to freedom of association, such as industrial action and right of entry.¹⁵⁰

An enterprise agreement is also required to contain certain 'mandatory' terms. Significantly, each agreement must have a 'flexibility term' that allows for individual flexibility arrangements.¹⁵¹ This clause is also required in modern awards. If an agreement fails to include such a clause, a 'model' term will apply. The flexibility clause means that an employer and an individual employee can vary the terms of an enterprise agreement to meet the needs of the employer or employee.¹⁵² In the 'model' clause, the terms the employer and the individual employee may agree to vary include such wide ranging matters as when work is performed, overtime rates, penalty rates, allowances and leave loading.¹⁵³

At the worst, this clause could be used to undermine collective bargaining, while allowing for what is arguably a new and more covert form of individual agreement. Although there are some safeguards,¹⁵⁴ workers may still be placed in a position of vulnerability due to unequal power relations between individual workers and their employers.¹⁵⁵ Based on what treaty monitoring bodies have previously indicated, the mandatory inclusion of such a provision in enterprise agreements is in itself inconsistent with Australia's obligations under international human rights law.¹⁵⁶ This is especially so as a 'flexibility clause' allows the terms of an enterprise agreement to be circumvented. The provision is far from the promotion of collective bargaining and non-

149. Stewart, *supra* note 84, at 74.

150. *Fair Work Act*, *supra* note 27, at § 194.

151. *Fair Work Act*, *supra* note 27, at § 202.

152. Stewart, *supra* note 84, at 77-78.

153. Australian Industrial Relations Commission, *Award Modernisation*, 187 (Mar. 28, 2008).

154. *Fair Work Act*, *supra* note 27, at §§ 202-203.

155. Jill Murray & Rosemary Owens, *The Safety Net: Labour Standards in the New Era*, in *FAIR WORK: THE NEW WORKPLACE LAWS AND THE WORK CHOICES LEGACY* 60 (Anthony Forsyth & Andrew Stewart eds. 2009).

156. INT'L LAB. ORG. COMMITTEE ON FREEDOM OF ASSOCIATION, GENERAL SURVEY, ILO Doc 251994G10 ¶¶ 248-250 (1994).

interference with bargaining outcomes as is required by international human rights law.

Accordingly, while there have been some changes, serious limitations remain on bargaining outcomes. Consequently, the purpose of the right of freedom of association is seriously curtailed. The potential to bargain for wider right of entry and industrial action provisions outside of the legislative framework is also curtailed. When 'good faith' bargaining is seen as part of this broader system of collective bargaining, its impact in practice on the right to freedom of association could be even more circumscribed than it may appear at first sight.

5. CONCLUDING REMARKS

With this study, a systematic attempt has been made to both situate and critically analyze a number of key issues concerning the fundamental right to freedom of association. Particular attention has been given to the question of compliance in the Australian industrial relations system as it relates to the right to freedom of association as expressed in the evolving body of international human rights law. This study also examined whether the *Fair Work Act* represents a substantial departure from the previous *Work Choices* industrial relations regime. The latter regime had received considerable criticism for violating the right to freedom of association.

An important part of this study has been a critical examination of issues surrounding the status, scope and importance of the right to freedom of association. This has included consideration of the historical underpinnings of this right, as expressed in contemporary international human rights law. Among the important matters discussed in this context has been the debate about whether it is desirable to conceptualize labor rights as human rights. This has been the subject of growing attention at the international level. Historically, there is documentation to suggest that the ILO often framed the protection of labor conditions as 'standards' and 'principles' rather than rights. However, especially in the context of globalization, there is now increasing evidence of greater recognition of the importance of conceptualizing fundamental labor rights as human rights.

There are compelling reasons for compliance with the right to freedom of association. This is from the perspective not only of Australia's international obligations, but from the perspective of human dignity as a rationale for human rights in an interconnected world. In Australia, detailed examination of relevant evidence and issues has shown that, notwithstanding some significant improvements from *Work Choices*, a number of spe-

cific provisions in the *Fair Work Act* remain highly problematic from an international human rights law perspective. Among these specific provisions are the still highly restrictive conditions applied to union officials seeking to enter a worksite, the limitations on strike action, and the limitations placed on the outcomes of collective bargaining. Such provisions are very difficult to reconcile with any claims to full compliance with the right to freedom of association, as it has developed in international human rights law. Clearly, a substantial gap remains between the right to freedom of association in international human rights law and the protection and of this right in Australian law.

There is a need for a serious rethinking of these issues and for moves that will take Australia beyond the *Fair Work Act*, in order to bring Australia into full compliance with international law in relation to the fundamental right to freedom of association. Moreover, in terms of human dignity, important issues have been raised as to the potential significance of the right to freedom of association in enabling workers to act collectively not only to improve their own working conditions but to act in solidarity with others for a fairer and more socially just future in a globalizing world order.