



Centre for  
Employment &  
Labour  
Relations  
Law



THE UNIVERSITY OF  
MELBOURNE

## **Submission**

**to**

**Senate Employment, Workplace Relations and  
Education Committee**

**Inquiry into Workplace Relations Amendment  
(Workchoices) Bill 2005**

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## EXECUTIVE SUMMARY

1. The authors of this submission oppose the passage of this Bill. The Bill adopts a crude approach to labour regulation in Australia, combining severe state command and control elements with broad employer self-regulation. It is overly complex, punitive, one-sided and bureaucratic. It should not be proceeded with.
2. The Australian workplace relations system would benefit from a comprehensive review. Contemporary regulatory innovation both in Australia and overseas could assist us in designing appropriate processes and institutions that would be responsive to present circumstances.
3. 'Smart regulation' of the labour market, as in other areas of economic and social life, involves a range of legal techniques and policy instruments. Neither extensive 'command and control' state intervention nor unaccountable 'self-regulation' is likely to lead to socially optimal results.
4. A preferable approach to renewing our workplace relations laws would:
  - rest on a diverse range of constitutional powers, and in particular the external affairs power;
  - restructure the AIRC based on the experience of other regulatory institutions such as the ACCC and ASIC, as well as analogous institutions overseas;
  - encourage the development of workplace norms that are responsive to both economic and social objectives;
  - promote the self-organisation of, and private ordering between, employees, employers and other workers, within a framework of broad substantive and procedural standards; and
  - integrate workplace relations reform with complementary labour market measures including changes to tax law, social security law, and education and training policy, with particular emphasis on initiatives targeted at vulnerable socio-economic groups.

## 1. Introduction

- 1.1. This submission is made to the Senate Employment, Workplace Relations and Education Committee by the Centre for Employment and Labour Relations Law at the University of Melbourne. It was prepared by members of the Centre engaged as academic staff in the Melbourne Law School.
- 1.2. In this submission we address several key aspects of the *Workplace Relations (WorkChoices) Bill 2005* (Cth.) ('the Bill'), which is intended to make very significant changes to the *Workplace Relations Act 1996* ('WRA').
- 1.3. We must indicate our strong objection to the truncated nature of this inquiry. The government proposes the most far-reaching reforms to the nation's labour laws since Federation. These reforms, set out in almost 700 pages of un-indexed provisions, go well beyond the measures that have been the subject of previous parliamentary inquiries. Moreover, the Bill would create a range of new offences rendering unlawful conduct which is currently legitimate. In these circumstances, a period of one week is grossly inadequate to digest and analyse the Bill and its Explanatory Memorandum.
- 1.4. As there is insufficient time to provide a detailed analysis of the provisions of the Bill, we focus on the major changes to institutions and entitlements. We intend this submission to be constructive and therefore, apart from explaining in general terms our opposition to the Bill, we propose alternative approaches.
- 1.5. The Centre's members and academic associates are available to meet with the Committee to elaborate on this submission, and would welcome the opportunity to do so.

## 2. A National System: Constitutional Basis

- 2.1. The Bill is designed to override most aspects of the State industrial relations systems, in order to create a uniform national scheme. We believe that a national system is desirable. However, such a system ought to rest on solid constitutional foundations. The Bill is predominantly based on the corporations power for reasons which are not made clear.<sup>1</sup> However, it is evident that this is not the simplest way to establish a national labour law framework.
- 2.2. Primary resort to the corporations power has several negative consequences, in particular:
  - many employers and employees will inevitably be excluded from the coverage of the new system;
  - the State systems are displaced, but to an uncertain extent;
  - many provisions are highly convoluted and difficult to understand; and
  - it is unclear how the corporations power can be invoked to regulate matters such as union governance.

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<sup>1</sup> Australian Government, *WorkChoices. A New Workplace Relations System* (2005) p 11.

It would seem that costly constitutional challenges are inevitable.

2.3. These difficulties would most likely be avoided if a national system were not confined to one head of power alone. Reliance on one head of power alone has led to difficulties in the past. Thus, although the conciliation and arbitration power was originally intended to be the main source of Commonwealth authority in relation to workplace relations, like the corporations power its application has been circumscribed.

2.4. Assuming referral of powers from State governments (other than Victoria) will not be forthcoming, reliance on other Commonwealth legislative powers is appropriate. In particular, extensive use ought to be made of the external affairs power.<sup>2</sup> Australia has ratified many ILO conventions, as well as other relevant international instruments.<sup>3</sup> However, few of these are at present actively used to ground federal law.<sup>4</sup> Broader reliance on conventions (and further ratifications) would enable a relatively comprehensive and coherent national framework to be established regulating core aspects of work, including:

- Child labour and forced labour;
- Anti-discrimination in the workplace context;
- Freedom of association, employee representation and collective bargaining;
- The work/life balance, including leave and reasonable working hours;
- Remuneration;
- Grievances and dispute resolution; and
- Termination of employment.

2.5. There may be instances where the external affairs power is insufficient. In such instances, other heads of power, including the corporations power, should be invoked. However, the corporations power should not be made to constitute the foundational power for workplace legislation, as is the case with the Bill.

### **3. Minimum Standards: Awards and the AFPCS**

3.1. The Bill is aimed at ending the central role still played by awards in the regulation of Australian workplaces. The Bill facilitates the displacement of awards, over time, by the Australian Fair Pay and Conditions Standard (AFPCS).

3.2. The AFPCS consists of five conditions determined unilaterally by the Commonwealth, together with the Australian Fair Pay Commission (AFPC).

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<sup>2</sup> See George Williams, *Labour law and the Constitution* (1998) 86-103; *Victoria v Commonwealth (Industrial Relations Act Case)* (1996) 187 CLR 416.

<sup>3</sup> Such as the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.

<sup>4</sup> Present examples include the ILO's Termination of Employment Convention and its Convention on Workers with Family Responsibilities.

Pay is dealt with in Part 4 of this submission. This Part deals with standards other than remuneration.

- 3.3. It is not clear why just four conditions (other than pay) have been chosen to constitute a floor of employment standards. This floor is much lower than that currently underpinning the conditions of most workers. Nor is it clear how the content of the AFPCS set out in Part VA of the Bill has been derived. In contrast to the manner in which employment standards have been set in the past (for example, through the test case process in the AIRC), there does not appear to have been extensive involvement with employee or community organisations in devising the AFPCS. The AFPCS has the capacity to remove many employee entitlements of long standing; entitlements constructed with extensive input from both employer and employee organisations. This is regrettable, particularly in the absence of a strongly argued case in respect of the conditions to be excluded.
- 3.4. The justification for the sidelining of awards appears to be that ‘we have too much red tape, too much complexity, and too much confusion.’<sup>5</sup> This is said to cost jobs and hold Australia back. Whatever the truth of this assertion, it does not entail the crude measures being introduced here, which result in preventing the establishment of new general workplace standards other than by government fiat. An alternative approach is warranted.

#### *Modes of regulation*

- 3.5. In recent years, much work has been done by scholars and by regulatory institutions on how best to produce socially and economically desirable outcomes.<sup>6</sup> Certain principles emerge from that scholarship, although their application in specific instances turns on the nature of the activity regulated, the actors involved and so on. The principles include the following:
- Regulation by means of *government rule-making*, coupled with state-imposed sanctions (‘command and control’) is frequently counterproductive, especially in areas of complex and frequently changing social and economic interactions;
  - *Voluntary self-regulation*, in the sense of freedom to set one’s own standards without accountability, frequently fails, although forms of supervised self-regulation may be effective in several contexts; and
  - Effective regulatory arrangements are frequently those that are *responsive*: they seek to integrate a range of modes (government rule-making, industry

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<sup>5</sup> Australian Government, *WorkChoices. A New Workplace Relations System* (2005) p 7.

<sup>6</sup> Some of the leading texts include Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (1992); Robert Baldwin and Martin Cave, *Understanding Regulation: Theory, Strategy and Practice* (1999); Christine Parker et al (eds.), *Regulating Law* (2004); Julia Black, ‘Decentring Regulation: Understanding the Role of Regulation and Self-regulation in a Post-regulating World’ (2001) 54 *Current Legal Problems* 103; Neil Gunningham and Peter Grabosky, *Smart Regulation: Designing Environmental Policy* (1st ed, 1998). A major new work on the implications of regulatory theory for labour law will be published early next year: Chris Arup, Peter Gahan, John Howe, Richard Johnstone, Richard Mitchell, and Anthony O’Donnell, *Labour Law and Labour Market Regulation* (Federation Press). In Australia, much regulatory innovation has been carried out by the Australian Competition and Consumer Commission.

agreements, private ordering, financial incentives and so on); involve a range of stakeholders in the determination and monitoring of standards; adapt to local conditions and to change of circumstances; and provide for transparency, accountability and contestability. Responsive regulation can include arrangements such as *co-regulation* and *enforced self-regulation*.

3.6. These principles are employed widely in various fields of regulation in Australia, one prominent example being consumer protection and competition law. In our submission, they could also be applied productively to work relations. This is evidenced by the increasingly sophisticated arrangements in the field of occupational health and safety.<sup>7</sup>

3.7. The application of new regulatory approaches is also evidenced by the work of the European Union on matters such as hours of work and economic restructuring. The European Union has addressed these matters through generally well-constructed directives that allow each member state to implement social policy as it considers appropriate.<sup>8</sup> Some member states appear to have used implementation methods that have undesirable side-effects (for example, on employment). However, others have largely been able to avoid these. This regulatory experimentation has generated a range of models that help identify which modes of intervention are both most likely to achieve their objective, and least likely to generate negative by-products.

#### *The AIRC as a responsive regulator*

3.8. In recent years, the AIRC has drawn on new regulatory forms to address major workplace issues in a nuanced manner.<sup>9</sup> The Reasonable Hours and Family Provisions test case decisions are sophisticated approaches to the question of work/life balance. This suggests that the institution could be adapted to address further workplace issues through responsive regulatory approaches. Such issues might include, for example, privacy in the workplace, responsibilities in complex contracting chains (outworkers), or training arrangements.

3.9. As a forum for regulating working conditions, the AIRC has the following 'responsive' features:

- It involves a wide range of stakeholders in the determination of standards, which means that it is well-placed to balance competing interests;
- Its processes are public and transparent;
- It tends to avoid the overt politicisation that occurs when contentious matters are directly regulated by the state;

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<sup>7</sup> See, e.g. Neil Gunningham and Richard Johnstone, *Regulating Workplace Safety: Systems and Sanctions* (1999). See also the publications from the National Research Centre for Occupational Health and Safety Regulation: available at <http://ohs.anu.edu.au/publications/index.php>.

<sup>8</sup> See the discussion in Simon Deakin, 'Social Rights in a Globalized Economy' in Philip Alston (ed), *Labour Rights as Human Rights* (2005).

<sup>9</sup> See the forthcoming article on this point by Dr Jill Murray, 'The AIRC Test Case on Work and Family Provisions: the End of Dynamic Regulatory Change at Federal Level?' (2005) 18 *Australian Journal of Labour Law* 325.

- It allows for new forms of regulation to emerge in response to social and technological change; and,
- It has more recently encouraged decentralised implementation of standards through formulating workplace norms so that they can be adapted to local conditions.

*From awards to determinations*

- 3.10. There is nevertheless some substance in certain criticisms of AIRC processes. Its structure and operation are a legacy of the conciliation and arbitration power, with its many technical requirements and artificialities and its dispute-resolution focus. However, AIRC processes can be redesigned while retaining their responsive and democratic elements,<sup>10</sup> especially through use of the external affairs power. The ‘test case’ process would thus be reconceptualised from a legal (although not substantive) point of view. It would be detached from the cumbersome process of varying hundreds of awards. The AIRC would instead establish binding workplace norms of general application based on strong social policy grounds, not on the basis of solving ‘disputes’. In order to distinguish between the current arbitration process and the proposed scheme, we will refer in what follows to AIRC decisions establishing binding norms as ‘determinations’ rather than awards.

*Making determinations*

- 3.11. How would this process of determining workplace norms be triggered? One circumstance would be on reference from the federal government, in particular where Australia ratified an ILO convention. However, non-state organisations should also be able to make application for the determination of new norms, or the revision or revocation of existing ones, as they presently can in relation to test cases. This need not be confined to organisations registered under the Workplace Relations Act.
- 3.12. One concern with this proposal may be that a proliferation of applications for new norms would emerge. However, this outcome could be avoided through legislative guidance to the AIRC and to the public on the appropriate role of general workplace norms. Thus, their establishment would be linked to threshold requirements, including:
- a requirement that any organisation making an application for new norms have presented a strong prima facie case, backed up by empirical evidence and consultation with relevant interest groups, that there is a workplace issue that ought to be addressed through a general standard; and
  - a requirement that new general norms be made only if it is demonstrated that more decentralised arrangements do not deal, and are not likely to deal, with the particular issue appropriately (failure on the part of any applying organisation to attempt to negotiate with other relevant organisations in

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<sup>10</sup> Our proposal can be contrasted with the exclusionary methods through which the AFPC will review minimum standards under the Bill.

relation to the issue might suggest that this requirement had not been complied with).

The AIRC could also have discretion to reject any application and to defer applications, if there are other matters that require more urgent attention.

#### *Scope of determination power*

- 3.13. The jurisdictional limit on the AIRC's capacity to establish further general workplace norms could be linked to the Constitution and especially to the external affairs power as it relates to working conditions. We do not see the need to perpetuate arcane legal debates about whether the demands of the conciliation and arbitration power are met. Nor is there a need to construct artificial boundaries around jurisdiction through concepts such as 'non-allowable award matters'. To be sure, linking jurisdiction to constitutionality will invite legal challenge in some instances. In order to avoid the norm-making process becoming involved in protracted constitutional arguments, we would propose that the AIRC could make a recommendation instead of a determination if there was a serious doubt as to the constitutionality of a particular norm. The recommendation would be addressed to the federal government, which would then decide, on the basis of its extensive legal advisory capacity, how best to translate the recommendation into law.
- 3.14. It will also be appropriate to make determinations that are industry-specific. Many ILO conventions are themselves industry-specific. Quite apart from this, as in other areas of public regulation there are sometimes matters peculiar to certain industries which require intervention in the form of norm-setting confined to that industry. Examples might include nursing conditions, outworking in the clothing industry, long-haulage driving, long-range air travel and agricultural workers. The content of industry-specific determinations should not replicate those of general determinations.
- 3.15. The precise form of determinations would be a matter for deliberation during the AIRC's investigative processes. However, regulatory theory and experience presents a wide range of possibilities: mandatory standards, default conditions, mandatory and voluntary industry codes, disclosure obligations, and so forth. Innovation in AIRC processes could be assisted by reference to other Australian regulatory bodies, and in particular the ACCC.

#### *Contracting out*

- 3.16. The Bill will make it much easier for employers to avoid awards. It is true that, under the WRA, particularly if the Bill is passed, it will still not be possible to 'contract out' of awards in a literal sense.<sup>11</sup> However, the same effect will be achieved through the use of statutory workplace agreements such as Australian Workplace Agreements (AWAs). This blanket capacity to avoid all but the barest of standards may be contrasted unfavourably with more sophisticated methods of balancing community norms and individual

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<sup>11</sup> *Workplace Relations Amendment (Work Choices) Bill 2005* s. 7D.

choice now being developed in the European Union and other parts of the world.

- 3.17. Our preferred approach is to move towards a system inspired by the better international practices,<sup>12</sup> whereby general norms (determinations) include mandatory provisions, which cannot be altered by agreement, and default provisions, which can be altered provided certain procedures are followed (such as written agreement). Such procedures would in some cases also allow a person to return to a default standard upon giving reasonable notice. Whether a matter is mandatory or default would be determined by the AIRC following submissions from relevant interest groups.

*Relationship between determinations and awards*

- 3.18. Much of the core content of awards is common across industries, deriving from test cases (themselves often linked to ILO conventions). This common content could readily form the subject of general determinations. Thus, a new system could include transitional arrangements that allow common award provisions to be translated into new determinations. These arrangements would enable obligations to be reformulated and updated based on successful regulatory innovation in other areas and jurisdictions.
- 3.19. There would still however be a significant number of matters that could not be so translated chiefly because (1) they are industry specific conditions; (2) they are not referable to international conventions; and/or (3) they relate to detailed classifications, rates of pay and allowances. The first group of issues can be dealt with through industry-level determinations supplementing the general content.
- 3.20. The second set of matters is not likely to be large, if the list of current allowable award matters (excluding those also directly regulated by legislation) is compared with ILO conventions.
- 3.21. The third area presents the most complex problem (although it would clearly fall within the scope of convention-related jurisdiction). Some simplification of the complex pay scales in awards is probably desirable. This would be undertaken as part of the transition to determinations. However, such simplification should proceed in a transparent way. It should also involve relevant stakeholders, including those who contributed to the construction of the present scales. We are concerned that the simplification process set out in the Bill lacks these elements of transparency and participation.<sup>13</sup>
- 3.22. The matter of pay is considered further in the next section, which reviews the proposed Fair Pay Commission.

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<sup>12</sup> See, for example, the various provisions relating to hours of work in the Working Time Regulations 1998 (as amended) (United Kingdom).

<sup>13</sup> *Workplace Relations Amendment (Work Choices) Bill 2005*, Part VI Division 4 Subdivision B.

## 4. Institutions and Pay: the Australian Fair Pay Commission and the Australian Industrial Relations Commission

- 4.1. The Bill would establish an Australian Fair Pay Commission (AFPC) to set minimum levels of pay,<sup>14</sup> a task presently conducted by the AIRC. It is claimed that this is being done in order to transform ‘the current adversarial and legalistic wage setting process.’<sup>15</sup>
- 4.2. As outlined in Part 3, we agree that the present process should be reformed and have suggested how that could be done in a way which retains the responsive and participative aspects of AIRC processes. It is however completely unnecessary to set up an alternative Commission to regulate pay alone.
- 4.3. The current process for setting minimum wages should be redesigned without establishing and staffing a new statutory agency. As suggested above, the legalistic elements of the process should be reduced by:
- maintaining the jurisdiction of the AIRC;
  - examining how reliance on the external affairs power (and specifically ILO Convention 131 on Fixing Minimum Wages) could eliminate many of the technicalities and duplications experienced at present; and
  - conducting an open and inclusive inquiry on simplification.
- 4.4. The establishment of the AFPC leads to puzzling duplication, because awards will now be dealt with by two government agencies rather than one. Remuneration, hours of work and other terms and conditions of employment should be regulated in an integrated manner, as they are at present.
- 4.5. Furthermore, the AFPC will lack both transparency and responsiveness. This constitutes a regression since the public process of AIRC, together with judicial oversight, upholds these values. There appears to be no obligation on the AFPC to conduct its inquiries in public or to have its preferred sources of evidence subject to scrutiny.<sup>16</sup> The AFPC lacks responsiveness to the community since there is no requirement that it be constituted by representative groups, nor is it obliged to hear from them. This may be contrasted with the tripartite structure and consultation requirements of the Low Pay Commission in the United Kingdom.<sup>17</sup>
- 4.6. Again, the AFPC appears to lack alternative forms of accountability. We are not clear to what extent it is to be subject to judicial review.
- 4.7. Some commentators have speculated that the substantial motive for the creation of the AFPC is the government’s displeasure with the minimum wage decisions of the AIRC. The AIRC is said to take insufficient account of

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<sup>14</sup> *Workplace Relations Amendment (Work Choices) Bill 2005*, Part IA.

<sup>15</sup> Australian Government, *WorkChoices. A New Workplace Relations System* (2005) p 7.

<sup>16</sup> See *Workplaces Relations Amendment (Work Choices) Bill 2005* ss 7K, 7N.

<sup>17</sup> See National Minimum Wage Act 1998 (UK) ss 7 and Schedule 1.

the employment effects of increases in minimum wages. While there is evidence to suggest that minimum wages set at excessively high levels may impact on employment, the relationship appears to be highly complex. Thus, it is not obvious that the AIRC is 'getting it wrong' from an economic perspective.<sup>18</sup> In any case, if there are concerns about the AIRC's capacity to evaluate economic data, this could be remedied by:

- appointing more persons reflecting a cross-section of economic and social science expertise to the AIRC; and/or
- restructuring the composition of AIRC Benches dealing with minimum wages, or creating a separate division of the Commission to deal with wages.

4.8. We would add that in general terms minimum wages ought to be set at a level which enables a person to participate fully in society, that is, significantly above poverty levels. The appropriate benchmark should be determined by the AIRC based on contemporary social science research methods. The benchmark would preserve work incentives for those on welfare. Complementary policy measures, such as modification to the tax and social security systems, should be used to adjust household incomes according to the differing needs of families.

4.9. Moreover, any changes to minimum wage setting need to be considered alongside active measures to raise employment. If carefully devised, direct job creation programmes, industry policy, and public procurement programmes can be effective in promoting economic growth and productivity, ensuring employment for people especially disadvantaged in the labour market, and also for targeting regional unemployment.<sup>19</sup> Although some of these programs recognize the important role of the public sector in job creation, many such initiatives involve cooperation between government and business whereby the government provides financial subsidies to the private sector to achieve its policy objectives.

4.10. In short, we question the apparent assumption behind the reform of minimum wages that the only or most appropriate way to respond to unemployment and underemployment is to encourage growth in low wage jobs.

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<sup>18</sup> We note that Low Pay Commission in the United Kingdom has found itself able to raise minimum wages, sometimes above the rate of increase in the average wage, without adverse consequences: February 2005: National Minimum Wage. Low Pay Commission Report 2005, available at <http://www.lowpay.gov.uk/lowpay/lowpay2005/>.

<sup>19</sup> For an excellent overview of the various job creation policies available to government, see P Gregg, 'The Evolution of Special Employment Measures' (1990) 132 *National Institute Economic Review* 49. On the value of regional job creation policies, see Senate Employment, Workplace Relations, Small Business and Education References Committee, *Jobs for the Regions: A Report on the Inquiry into Regional Employment and Unemployment*, AGPS, Canberra, 1999. See also J Howe, 'Creating Decent Jobs: the Role of Regulation in Facilitating Transitions Between Employment and Unemployment' (2005) *Australian Bulletin of Labour* (forthcoming).

## 5. Freedom of Association: Unions and Workplace Representation

### *Reconsidering the role of association in Australian workplace relations*

- 5.1. The regulation of Australian workplace associations over the last century has been driven by the role of registered organisations in the conciliation and arbitration system. If conciliation and arbitration is no longer to be a core or even an important aspect of workplace regulation, the law pertaining to the employee association needs to be reconsidered.
- 5.2. Trade unions and worker associations are not equivalent to registered organisations, although they have often been treated as such in the past. The unusually extensive regulatory requirements imposed on many Australian unions are products of the conciliation and arbitration system. It was the integral relationship with that regulatory model that provided the justification for many of the supports for, and detailed monitoring of, registered organisations.
- 5.3. The creation of a new model of workplace regulation, centred on either the corporations power (as the government proposes) or the external affairs power (as we propose) presents Australia with an opportunity to develop and implement a policy approach to the regulation of associative labour relations that proceeds from fundamentally different conceptual bases. Chief of these should be the core liberal democratic principle of freedom of association.

### *What does freedom of association mean?*

- 5.4. Developed liberal democracies purport to uphold freedom of association as an essential civil and political entitlement in their societies. The right to form work-related associations such as trade unions is an emanation of this. Thus, major international instruments specify that:

*Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.*<sup>20</sup> (Emphasis added).

- 5.5. The European Court of Human Rights has recently ruled with respect to that formulation in the European Convention on Human Rights that the right to organise extends beyond the mere right of an organisation to exist:

*‘the words “for the protection of his interests” [...] are not redundant, and the Convention safeguards freedom to protect the occupational interests of trade union members by trade union action, the conduct and development of which the Contracting States must both permit and make possible. A trade union must thus be free to strive for the protection of its members’ interests, and the individual members have*

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<sup>20</sup> International Covenant on Civil and Political Rights art. 22. See also the similar wording in article 11 of the European Convention on Human Rights.

*a right, in order to protect their interests, that the trade union should be heard.*<sup>21</sup>

- 5.6. The Court's decision has been interpreted to mean that states should ensure that trade union members are not prevented or restrained from using their union to represent them in attempts to regulate their relations with their employers.<sup>22</sup>
- 5.7. Europe is not alone in attributing to the right to organise not merely a right to form a trade union or other work-based association, but to give effect to the purposes for which the association is formed. Thus, the United States National Labour Relations Act,<sup>23</sup> the New Zealand Employment Relations Act<sup>24</sup> and Canadian Charter of Rights and Freedoms,<sup>25</sup> and the Constitutions of Japan<sup>26</sup> and democratised Korea,<sup>27</sup> Taiwan<sup>28</sup> and South Africa<sup>29</sup> all protect not only a right to organise, but associated activities, in most cases including a right to bargain collectively.
- 5.8. Regrettably, Australia appears to stand alone in the industrialised world in not establishing a comprehensive legal framework to enable individuals *to protect their interests* through the formation of employee-controlled associations, especially if the narrow interpretation of the freedom of association provisions in the WRA in decisions such as *Australian Workers' Union v BHP Iron-Ore Pty Ltd*<sup>30</sup> is upheld. In that case, Kenny J confined the protection given to union members under s 298L(1) to a mere right to be a member. This decision may be contrasted with that of North J in *Australasian Meat Industry Employees' Union v Belandra Pty Ltd*,<sup>31</sup> a decision remarkable for its extensive consideration of international jurisprudence. North J held that 'where 298L(1)(a) speaks of conduct carried out because a person is a member of a union, it encompasses conduct carried out because of the activities of the union as an incident of that person's membership of the union.'<sup>32</sup>
- 5.9. The latter formulation is more consistent with Australia's international obligations and the legislation should be clarified to reflect this.<sup>33</sup>

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<sup>21</sup> *Wilson v United Kingdom* (2002) 35 EHRR 523, para 42.

<sup>22</sup> Patrick Macklem, 'The Right to Bargain Collectively in International Law: Workers' Right, Human Right, International Right?' in Philip Alston (ed), *Labour Rights as Human Rights* (2005), at 75.

<sup>23</sup> National Labor Relations Act §7, 29 U.S.C. §157.

<sup>24</sup> Employment Relations Act 2000 s.3.

<sup>25</sup> Canadian Charter of Rights and Freedoms sub-s 2(d); see also in relation to union rights *Dunmore v. Ontario (Attorney General)*, [2001] 3 S.C.R. 1016.

<sup>26</sup> Constitution of Japan art. 28

<sup>27</sup>; Constitution of the Republic of Korea art. 33;

<sup>28</sup> Constitution of the Republic of China art.15 as interpreted by the Council of Grand Justices in Interpretation 373.

<sup>29</sup> Constitution of the Republic of South Africa art 23.

<sup>30</sup> (2001) 106 FCR 482. By way of contrast, see *Australasian Meat Industry Employees' Union v Belandra Pty Ltd*. Weinberg J has construed s298L(1)(a) as including 'ordinary union activity': *NUW v Qenos Pty Ltd* (2001) 108 FCR 90.

<sup>31</sup> (2003) 126 IR 165.

<sup>32</sup> *Id* at 226.

<sup>33</sup> *Workplace Relations Amendment (Work Choices) Bill 2005*, s 254 does not do so.

Alternatively, the legislation should simply specify that an individual should be entitled to join an association of employees *for the protection of her or his interests*.

- 5.10. Furthermore, experience from Australian litigation and from the United Kingdom suggests that the Australian provision prohibiting employers from inducing persons not to be union members<sup>34</sup> is too vague. A recent United Kingdom amendment makes clear that employees cannot be induced ‘not to make use, at an appropriate time, of trade union services’.<sup>35</sup> A similar provision should be included in Australian legislation.
- 5.11. We would add that giving effect to international treaty obligations is not only a question of upholding a core civil and political value. Freedom of association in the workplace context has practical consequences for people’s working lives. This is illustrated by a relatively recent World Bank study<sup>36</sup> which surveyed the international experience of employee association. The study analysed both economic and social aspects. On the economic front, the authors of the study concluded that there was ‘little systematic difference in economic performance’ between countries that facilitate unions and collective bargaining and those that do not.<sup>37</sup> The economic impact of collective bargaining, for instance, ‘depends on the economic, legal and political environment in which collective bargaining takes place and can vary over time’.<sup>38</sup>
- 5.12. On the other hand, the study found evidence pointing to social benefits associated with employee organisations, including reduced hours of work and reduced discrimination against women and minority groups.<sup>39</sup> Other evidence points to a strong connection between sound occupational health and safety outcomes and the presence of independent and well-resourced employee associations.<sup>40</sup>

*How should individuals be able to associate through their chosen organisation?*

- 5.13. Employees have only a limited capacity to associate and to seek representation through their association under existing law. That will narrow even further under the proposed legislation. The main aspects of associational activity which the proposed legislation generally protects are:

- actions to secure employer compliance with the law;

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<sup>34</sup> WRA s 298M.

<sup>35</sup> *Employment Relations Act 2004* (United Kingdom) s 29 inserting 145A(1)(c) into *Trade Union Rights and Labour Relations (Consolidation) Act 1992* (United Kingdom).

<sup>36</sup> Toke Aidt and Zafiris Tzannatos, *Unions and Collective Bargaining: Economic Effects in a Global Environment* (2002).

<sup>37</sup> *Id* at 4.

<sup>38</sup> *Id* at 5.

<sup>39</sup> *Id* at 7-9.

<sup>40</sup> See, e.g. Neil Gunningham and Richard Johnstone, *Regulating Workplace Safety: Systems and Sanctions* (1999).0

- lawful industrial action (extremely narrowly defined); and
- a bare right to be accompanied in certain negotiations.

5.14. However, if association in the workplace context is to enable individuals to protect their employment interests, the entitlements of individuals to act through associations must be considerably broader. Those entitlements should include a capacity to negotiate collectively (this is discussed in section 6) but there are other incidents of membership that should be protected and promoted by law. Again, international examples furnish assistance in identifying what those incidents might be. These suggest matters such as:

- Association meetings;<sup>41</sup>
- Communication between and within association members;<sup>42</sup>
- Communication with non-members about the existence of the association;<sup>43</sup>
- Time release and facilities for employees engaged in associational activities;<sup>44</sup> and
- Representational rights in discipline and grievance proceedings.<sup>45</sup>

5.15. These incidents are derived primarily from considering how to give effect to the civil and political right of association in the workplace context. Yet we note that they can also be supported by regulatory theory.<sup>46</sup> Thus, many employees face obstacles to their participation in labour market transactions owing to information asymmetries, co-ordination failures, disadvantages in strategic bargaining, and possible monopsonistic labour market effects. Effective ability to associate provides a means of addressing these shortcomings.

5.16. One option for giving broader effect to employees' capacity to associate would be to set out in legislation the general areas in which employee associations should be able to operate and then authorise the AIRC to develop default codes which would address these matters in more detail. Such codes should be developed through public consultation with representative groups and take into account matters such as the size of the enterprise. Employers and employees should be free to come to alternative arrangements by agreement. This arrangement is similar to the approach taken in the UK to workplace information and consultation, which is discussed in the next section.<sup>47</sup>

### *New Forms of Employee Representation*

5.17. As indicated above, the primary vehicle through which employees associate is currently the organisation of employees registered under the Registration and

<sup>41</sup> See *Employment Relations Act 2000* (New Zealand) s.26

<sup>42</sup> *Id.* .20

<sup>43</sup> *Id.*

<sup>44</sup> See, e.g. OECD Guidelines for Multinational Enterprises Clause IV.2

<sup>45</sup> *Employment Relations Act 2004* (United Kingdom) s.37

<sup>46</sup> Hugh Collins, Paul Davies and Roger Rideout, *Legal Regulation of the Employment Relation* (2000).

<sup>47</sup> Information and Consultation of Employees Regulations 2004 (United Kingdom).

Accountability of Organisations Schedule of the WRA. This registration process, it seems, is to be preserved largely unchanged, apart from a decrease in the minimum size of enterprise unions. While these arrangements in general constitute an appropriate legal framework through which employees can associate free from employer control, they are very complex and in some respects onerous. They should not preclude the development of new forms of worker-controlled association. Nor should they constitute the only modes through which employees can express themselves in a collective manner.

- 5.18. The development of new forms of employee representation at the workplace is desirable. In our December 2004 submission to the Minister for Employment and Workplace Relations, we noted several advantages of employee representation:

*International experience shows that enhanced employee participation would also contribute to employees' personal development, and promote greater efficiency and higher productivity. Research in Australian workplaces has also shown that there is greater satisfaction with management, and greater employee commitment, if a higher level of employee participation and involvement is sought.<sup>48</sup>*

- 5.19. We do not view methods of employee representation as a substitute for the ability to form and participate in free and independent trade unions, and in particular unions free from employer control. Rather, we recognise that trade unions are not the only vehicle of providing 'employee voice'. Additional forms of representation are especially important where trade unions are absent. This is the case in an increasing proportion of workplaces. Empirical studies of workplace relations indicate that sophisticated forms of employee participation in workplace decision-making are rather underdeveloped in this country.<sup>49</sup> This can be contrasted unfavourably with the superior representation and involvement of employees in Europe,<sup>50</sup> and in many advanced Asian societies including Japan (informally) and Korea and Taiwan (by law).

- 5.20. In short, Australia has an employee 'representation gap'. One consequence of such a gap is obviously that employee voices are not heard. Another is that workplace-specific decisions are increasingly left to be dealt with by employers and managers. The gap can be addressed *in part* by providing for employee entitlements to information and consultation.

- 5.21. European experience with methods of consultation in the workplace may provide a useful model for the development of new methods of employee representation in Australia.<sup>51</sup> The European Union's National Directive for

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<sup>48</sup> J Campling and P Gollan, *Bargained Out: Negotiating Without Unions in Australia* (1999).

<sup>49</sup> A Morehead et al, *Changes at Work: The 1995 Australian Workplace Industrial Relations Survey* (1997). See also, R Mitchell, R Naughton and R Sorenson, 'The Law and Employee Participation: Evidence from the Federal Enterprise Agreements' (1997) 39 *Journal of Industrial Relations* 196.

<sup>50</sup> J Campling and P Gollan, above n 49, ch. 7.

<sup>51</sup> P Gollan and G Patmore (eds), *Partnership at Work: the Challenge of Employee Democracy, Labor Essays 2003* (2003).

Information and Consultation 2002 (NDIC) establishes a general framework for informing and consulting employees in medium sized enterprises, meaning those with 50 or more employees. Amongst other things, it provides for elected committees of employees with the right to meet with management to discuss certain key workplace decisions (excluding pay). In the UK, it is estimated that 75 per cent of the entire labour force could be covered after full implementation of the NDIC in 2007.<sup>52</sup> Nothing within the NDIC scheme precludes union members from running for election, although it is not a union-based scheme.

5.22. NDIC-inspired forms of consultation and information diffusion may be appropriate in Australia. They could be established through the determination process we discussed in Part 3. Alternatively, they could be implemented directly by legislation. Unless dealt with by existing processes, topics for negotiations could include:

- Employability and skills training – to help manage the skills shortages in enterprises;
- Finding better ways to integrate casual and full-time employees;
- Introduction of technological change – to enhance productivity;
- Managing acquisitions, mergers and redundancies – to better address the issue of job security;
- Discussing working hours (within the framework of applicable determinations and agreements) as a means of managing the work-life balance; and
- Considering flexible work practices to enhance efficient work outcomes.

## **6. Agreement-making, Negotiation and Industrial Action**

6.1. Irrespective of the extent of consultation and information arrangements, there will obviously continue to be a need for employers and employees to enter into binding obligations in relation to their working conditions. In our scheme, some of these conditions would be set by determinations of the AIRC. However, as we indicated earlier, regulatory theory suggests that decentralised arrangements are generally desirable to implement and to complement general norms, providing that they occur within an overarching framework which prevents opportunistic and/or unconscionable abuse of power.

6.2. The Bill's treatment of decentralised arrangements is highly cumbersome and convoluted.<sup>53</sup> It increases the number of statutory workplace instruments ('workplace agreements' in the terms of the Bill) and attaches many complex conditions and qualifications to them. Disappointingly, two major, and somewhat inconsistent, effects of this scheme are to use statutory instruments to support unilateral determination of employment conditions by employers

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<sup>52</sup> H Gospel and P Willman, 'The Coming of Workplace Information Sharing and Consultation: What it Means for Employee Representation in Britain' (2003) 7(1) *Perspectives on Work* 38.

<sup>53</sup> *Workplace Relations Amendment (Work Choices) Bill 2005* Part VB.

and to enable the state to prohibit agreements about certain terms of employment. In short, it is an odd marriage of blunt bureaucratic command and control measures with exclusionary self-regulation. The unfortunate third party in this is the employee.

- 6.3. In many industrialised countries, decentralised workplace arrangements are mediated through the institution of contract, albeit with significant modifications, especially in the case of collective agreements. In Australia, contracts regulate individual employment relations and, much less commonly, collective and multi-party agreements. However, they sit uncomfortably alongside statutory instruments.<sup>54</sup> This was, at least in practice, relatively unproblematic when the most common interaction was between awards and contracts. However, the potential for inconsistencies and contradictions to emerge between contract and the proliferating statutory instruments is now much greater.<sup>55</sup>
- 6.4. The statutory instruments devised since the late 1980s and perpetuated in the Bill, are in many respects progeny of the award system, although their constitutional basis has shifted from the conciliation and arbitration power to the corporations power. If traditional awards are no longer to be the primary mode of workplace regulation, we may question whether *any* of the existing or proposed forms of statutory agreement are necessary.
- 6.5. Contract is a flexible institution, well adapted to private ordering.<sup>56</sup> True, many of its nineteenth century peculiarities are unsuitable in contemporary conditions. Contract doctrine sometimes impinges on fundamental rights or conflicts with social and economic goals. As the Trade Practices Act demonstrates, legislation is often needed to alter contractual rules. Nonetheless, rather than sidelining the institution of contract, as appears to be the case in the government's framework, we suggest that it is desirable to allow it operate more prominently. This would lead to less complexity and more responsiveness.
- 6.6. Many developed nations have found it possible to regulate workplace conditions through a simple scheme involving:
  - conditions mandated through a state institution (the legislature or an administrative agency); and
  - decentralised arrangements mediated through fairly negotiated private agreements operating at individual, enterprise or sectoral level.

Australia has taken a different path, partly for constitutional reasons. Nonetheless, bearing in mind the external affairs power,<sup>57</sup> there seems no fundamental obstacle to creating a system whereby:

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<sup>54</sup> See *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410.

<sup>55</sup> J Fetter and R Mitchell, 'The Legal Complexity of Workplace Regulation and Its Impact upon Functional Flexibility in Australian Workplaces' (2004) 17 *Australian Journal of Labour Law* 276.

<sup>56</sup> Hugh Collins, *Regulating Contracts* (1999).

<sup>57</sup> And ILO Convention 98.

- general norms are specified by a responsive and transparent regulator (such as our proposal for the reconfiguration of the AIRC outlined above); and
- decentralised norms are specified through various forms of contracts, negotiated through fair processes.

6.7. Admittedly, the technical application of agency and formation rules may unravel common law collective agreements.<sup>58</sup> Consequently, legislation is needed to clarify the circumstances in which collective contracts are legally enforceable.<sup>59</sup> An elegant example of such legislation is to be found in New Zealand where ten simple clauses set out the operation of collective agreements.<sup>60</sup> This is by no means uncommon – the Japanese are able to deal with collective agreements in a mere five clauses.<sup>61</sup>

6.8. In contrast, the extraordinary scheme through which the WRA regulates agreement making is uniquely complex, and uniquely prescriptive. The Bill makes matters worse. The scheme should be abandoned in favour of a much simpler scheme. At the very least, the new restrictions on the content of agreements (including an at-large power to prohibit content through regulation)<sup>62</sup> should be abandoned.

*Collective agreements and individual agreements: which prevails?*

6.9. The practice in most if not all other industrialised countries, as well as the ILO jurisprudence,<sup>63</sup> is that collective negotiated agreements prevail over individual agreements to the extent of any inconsistency. This order of priority follows not from contract doctrine but from the associational rights of employees, since one of the most important ways employees can protect their interests through association is by collective bargaining.

6.10. If international practice is a guide, then regardless of whether employment agreements are contractual or statutory, or a combination of both, collective agreements should generally prevail over individual ones. The Bill reverses this order of priority and so threatens to further undermine collective bargaining.

6.11. Now it is arguable that in some circumstances, individuals should be able to opt out of collective arrangements if they can come to mutually satisfactory agreements. However, the proposed amendments to the Workplace Relations Act do not ensure that individual agreements are voluntary from the employee's perspective. Instead, they endorse the capacity of the employer to

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<sup>58</sup> See, for example, *Ryan v Textile Clothing and Footwear Union Australia* (1996) 66 IR 258.

<sup>59</sup> It may be noted, however, that the High Court has suggested that agreements between two parties may have legal effect under the general law, regardless of what effect they may be given by statute: *CFMEU v AIRC* (2001) 203 CLR 645 at 658.

<sup>60</sup> *Employment Relations Act 2000*, ss51-59.

<sup>61</sup> *Trade Union Law* (Japan) arts 14-18.

<sup>62</sup> *Workplace Relations Amendment (Work Choices) Bill 2005*. Part VB Division 7 Subdivision B, especially s101D.

<sup>63</sup> In relation to ILO Convention 98.

require new employees to sign individual agreements,<sup>64</sup> (or, more accurately, employer-determined standard form agreements) and to pressure employees to opt out of collective instruments.<sup>65</sup>

6.12. Once an employee's employment is regulated by an individual statutory instrument, he or she has few feasible options for transferring to a collective arrangement. Indeed, it would appear that an employer may be able to prevent an employee who has entered into an AWA from being covered by a collective agreement indefinitely, by including a clause in an AWA requiring renegotiation of a further AWA when it reaches its nominal expiry date. At the least, if the Bill takes effect, AWAs may preclude employees from engaging in collective bargaining for five years.

6.13. Employees should be able to move to collective arrangements when they choose, providing that reasonable notice is given of an intention to do so. Therefore, the legislation should be amended to provide that where there is a collective agreement applicable to her or his employment, an employee who is a member of the association which negotiated the agreement may give notice to elect to be covered by the collective agreement rather than the individual instrument. As this would be an expression of freedom of association, an employer should not be able to retaliate against an employee who so elects.

*Capacity to engage in negotiations through representatives*

6.14. The amendments to the WRA do not facilitate employees choosing persons who could represent their views to their employer, whether with or without assistance of union officers. Even more significantly, they do not facilitate employees choosing what form negotiations should take – individual or collective.<sup>66</sup>

6.15. To begin with, the choice of preferred form of agreement should not be subject to distortion through employer inducement. As the European Court of Human Rights has determined in the decision cited above,<sup>67</sup> a person should not be denied the capacity to authorise an independent association of employees to act as her or his agent in negotiating on a collective basis with her or his employer. This principle has recently been given effect in the law of the United Kingdom and this provides a basis for similar legislation in Australia. The *Trade Union Rights and Labour Relations (Consolidated) Act 1992* now provides:

*(1) A worker who is a member of an independent trade union which is recognised, or seeking to be recognised, by his employer has the right not to have an offer made to him by his employer if-*

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<sup>64</sup> *Workplace Relations Amendment (Work Choices) Bill 2005* s104(5). See also e.g. *Burnie Port Authority v Maritime Union of Australia* (2000) 103 IR 153.

<sup>65</sup> See, e.g. *Workplace Relations Amendment (Work Choices) Bill 2005* Part VB Division 9 Subdivision D.

<sup>66</sup> Contrast the provisions in Section IV of the OECD Guidelines on Multinational Enterprises.

<sup>67</sup> *Wilson v United Kingdom* (2002) 35 EHRR 523.

- a) acceptance of the offer, together with other workers' acceptance of offers which the employer also makes to them, would have the prohibited result, and*
- (b) the employer's sole or main purpose in making the offers is to achieve that result.*

*2) The prohibited result is that the workers' terms of employment, or any of those terms, will not (or will no longer) be determined by collective agreement negotiated by or on behalf of the union.<sup>68</sup>*

- 6.16. This just-mentioned provision does not address the position where there is no applicable collective instrument because of employer opposition, yet many employees want one. This situation is dealt with in a variety of ways in different jurisdictions. The Australian position is that employees can seek to force the employer to enter into collective negotiations through industrial action. However, as indicated below, the Bill makes this very difficult through the extensive limitations on industrial action, especially when a workplace agreement is in effect.
- 6.17. One alternative approach enables a ballot to be conducted among employees, and if a majority (variously defined) opt for collective negotiation, the employer is obliged to recognise the employee's union for that purpose. This approach is adopted by nations such as the United States and the United Kingdom. The United States mechanism is seriously flawed and conflict-ridden.<sup>69</sup> On the other hand, the much more recent British model<sup>70</sup> appears to have avoided many of the American difficulties. Ballots are commonly used in Australia to determine whether enterprise agreements are acceptable to the employees covered by them and it would seem that they could also be used to assess whether Australian employees want to be covered by collective agreements. Experience suggests that appropriate communication rules need to be in effect in order to ensure that a ballot is fair. Again, the United Kingdom provides a useful model. The role of the Central Arbitration Committee<sup>71</sup> in ensuring fair recognition ballots could be one entrusted to the AIRC.
- 6.18. Another approach is to require an employer to negotiate in good faith with the representatives of union members seeking to conclude a collective agreement. This model, which is typified by New Zealand,<sup>72</sup> does not turn on the 'democratic' notion of obtaining majority support and does not result in all the members of a workforce being covered by the collective agreement. It

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<sup>68</sup> *Trade Union Rights and Labour Relations (Consolidated) Act 1992* (UK), s145B, inserted by *Employment Relations Act 2004* (UK) s 29.

<sup>69</sup> Cynthia Estlund, 'The Ossification of American Labor Law', (2002) 102 *Columbia Law Review*. 1527.

<sup>70</sup> *Trade Union and Labour Relations (Consolidation) Act 1992* (United Kingdom), as amended by *Employment Relations Act 1999* (UK), s.1 and Sch.1 and *Employment Relations Act 2004* (UK) Part 1.

<sup>71</sup> <http://www.cac.gov.uk/>

<sup>72</sup> *Employment Relations Act 2000* (New Zealand) s32, and see generally Part 5 of the Act.

proceeds instead from the contractual concepts of agency and good faith.<sup>73</sup> Only union members are covered by the negotiations, an approach which would, if the Bill becomes law, continue to be prohibited in Australia.<sup>74</sup> The incentive for parties to engage in good faith negotiations is increased by the ability of the New Zealand Employment Relations Authority to prescribe terms and conditions of employment in the event of serious breach of good faith negotiations.<sup>75</sup>

6.19. These approaches are not exhaustive of the possible ways in which employees (rather than employers) may be given the option of bargaining collectively. Given the time constraints on this submission, we do not propose here to evaluate different international models or to elaborate on a suitable scheme for Australia. We would simply observe that international experience suggests that an effective framework for collective bargaining in Australia is both feasible and desirable. Such a framework would need to address matters including:

- the position where there is more than one employee organisation at a workplace;
- bargaining across multiple worksites; and
- the position of non-members.

#### *Unilateral termination of agreements*

6.20. We note that the Bill contains a mechanism allowing for unilateral termination of agreements notwithstanding provisions within the agreement to the contrary.<sup>76</sup> This is inconsistent with contractual principles that enable parties to determine *mutually* the effect of an agreement between them. The Explanatory Memorandum does not seem to explain why the departure from agreement-making principles is justified in this context. This provision significantly favours employers in workplace bargaining. No longer will they be bound to continue to observe conditions under an existing agreement that has passed its nominal expiry date. Employees will face the choice of agreeing to the employer's terms or reverting to the bare minimum conditions of the AFPCS.

#### *Industrial action*

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<sup>73</sup> Noting that good faith in contracting is accepted to a much greater extent in civil law jurisdictions and in the United States than it is in Australia and (at least until recently) the United Kingdom.

<sup>74</sup> See, e.g. *Workplace Relations Act 1996* ss 298K(1)(e) and 298L(1)(a) and (b). This provision sits uncomfortably with the prohibition on bargaining fees (s298SA) in that it means that a union bargains for non-members. These provisions are retained in the Bill: see also *Workplace Relations Amendment (Work Choices) Bill 2005* s 104B.

<sup>75</sup> *Employment Relations Act 2000* (New Zealand) s 50J. Note that this is not a general power of compulsory arbitration but a power to intervene to remedy a breach in a specific instance. As such it has more in common with the current 's170MX' awards under the WRA or the proposed determinations in Part VC Division 8 of the Bill.

<sup>76</sup> *Workplace Relations Amendment (Work Choices) Bill 2005* s 103L.

- 6.21. The Bill greatly circumscribes the capacity of employees to take industrial action.<sup>77</sup> The highly prescriptive and constricting provisions in this part of the proposed legislation appear to have no counterpart in corresponding laws of other developed liberal democracies. They are undesirable on regulatory grounds alone; for example, the principles governing the ability of employees to withdraw their labour lawfully are not readily comprehensible by those employees. It would seem that the legal advice is likely to be a prerequisite to industrial action in many instances. The approach in the Bill should be abandoned in favour of a much simpler scheme. We confine our remarks here to ‘primary boycott’ strikes. However, a more extensive consideration of this topic would consider the legitimacy of strikes in other circumstances.
- 6.22. Strikes usually occur in Australia in a bargaining context, although they may also be used as a means of securing employer compliance with a contractual or industrial commitment. Their unlawfulness stems at common law from the breach of contract usually involved with failure to perform duties as directed. This may entitle an employer to dismiss participants in a strike. Liability also flows (as a result of the breach) to organisations which have encouraged it (through the torts of interference with contractual relations, unlawful means conspiracy, and so on). It would, however, be lawful for employees in an industry to resign *en masse*, a tactic which might become more prominent if no other legal options are feasible, especially in those industries where there is a skill shortage.
- 6.23. Most if not all industrialised countries have adopted the view that, at the very least, the peaceful withdrawal of labour in a negotiation context should be lawful. They have usually succeeded in achieving this modification of the common law (or civil law) with a few simple provisions.<sup>78</sup> A typical approach is to render industrial action lawful where it occurs within a genuine bargaining context. This can be understood, to some extent, as suspending contractual obligations, since those very obligations are at issue in the renegotiation.
- 6.24. Procedural and notice requirements are common, but these are not generally onerous or technical, except in authoritarian societies. Furthermore, some provision is usually made to limit strike action where the impact is highly disruptive, as in the case of essential services. In such cases, compulsory arbitration may be used as a last resort.
- 6.25. A far more straightforward approach to that adopted in the Bill would be to confer immunity from contractual and tort liability on employees and their representatives organisations in a genuine primary bargaining context. This would sit alongside a power for the AIRC to intervene<sup>79</sup> where bargaining was not genuine or where severe economic effects were probable. In the first case, the AIRC should have power to direct parties to cease industrial action

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<sup>77</sup> *Workplace Relations Amendment (Work Choices) Bill 2005* s 103L Part VC.

<sup>78</sup> One of the better known formulations is to be found in the Trade Union and Labour Relations (Consolidation) Act 1992 (United Kingdom) s 219(1).

<sup>79</sup> Analogous to the power in s 127 of the current Workplace Relations Act.

and to resume negotiations in good faith. In the second, compulsory arbitration would continue to be appropriate.

6.26. In contrast to international practice, the Bill seeks to introduce a complicated regime which ‘micromanages’ industrial action. This fetters the capacity of implementing and enforcement agencies to respond to different fact situations, and is redolent of some of the worst features of ‘regulatory unreasonableness.’<sup>80</sup> The prohibition on ‘pattern bargaining’ is unnecessary since its undesirable aspects are covered by the concept – well established internationally - of good faith bargaining. Furthermore, the capacity for third parties to prevent industrial action is covered by the ability of the Commission to respond to serious economic effects (which, internationally, requires more than the inevitable inconvenience to individuals flowing from most strikes).

## **7. Termination of employment and parental leave**

7.1. This submission does not address termination of employment or parental leave. However, we adopt the views of our colleague Ms Anna Chapman, in her submission to the inquiry.

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<sup>80</sup> Eugene Bardach and Robert Kagan, *Going by the Book: The Problem of Regulatory Unreasonableness* (1982).