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A Comparative Analysis of
Work Choices and the Fair Work Act 2009

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Trade Unions and the Freedom of Association –
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Ben Waugh

INTRODUCTION

For a majority of the twentieth century trade unions have played a central role in Australia’s industrial relations system. They were responsible for setting, monitoring and enforcing awards which regulated working terms and conditions for large sectors of society. Accordingly, industrial statutes provided unions with necessary rights and benefits ensuring their security and ability to function as a labour power in bargaining collective agreements with employers.1 Around the globe the trend away from collective bargaining towards individual contracts has meant that the traditional role of unions has been displaced. Through the Workplace Relations Act 1996 (Cth) (‘WRA’) and as amended by the Workplace Relations Amendment (Work Choices) Act 2005 (Cth) (‘Work Choices’),2 the Howard Coalition Government waged the ‘most serious threat to unions in Australia’3 by substantially altering the industrial environment to reflect a system where unions were stripped of financial security. This was done directly through the prohibition on bargaining service fees, but also indirectly as they had far less to offer members in an increasingly decentralised, individualised bargaining system, diminishing the incentives of membership.

In the lead up to the 2007 election the Rudd Labor Government signalled the priority it gave to ripping up Work Choices and providing ‘cooperative workplace relations’ that balance ‘flexibility’ to employers and ‘fairness’ to employees.4 Part of this vision involved recognising the vital role of unions through the promotion of freedom of association, and shifting back to collective bargaining at the enterprise level. The Fair Work Act 2009 (Cth) (‘FWA’) is the product of extensive consultation with businesses, the union movement and the wider community and deliberated drafting, providing an opportunity for a ‘period of stability’ in Australia’s industrial development.5 While still in its infancy, the FWA has been met with tacit approval by employer and worker groups, indicating that a more suitable equilibrium is in place. This article will focus on the FWA, which came into effect on 1 July 2009, in juxtaposition to Work Choices and examine the extent to which it enhances the freedom of association.

2 The Workplace Relations Act 1996 (Cth) as amended by the Workplace Relations Amendment (Work Choices) Act 2005 shall be the focus of this article.
3 Forsyth and Sutherland, above n 1, 215.
The scope of the freedom of association considered here is confined to industrial relations and specifically to trade unions. The article will first introduce the concept of freedom of association, briefly mentioning its significance, history, content, the international standards and discussing some key cases where this freedom, and hence employees, has been protected. The next two substantive sections will look at two concepts that go to the heart of freedom of association – collective bargaining and union security. This will involve some detailed legislative analysis of the FWA and Work Choices in order to evaluate each in terms of their focus on and enhancement of the freedom of association.

It will be shown that the FWA makes a number of major steps towards promoting the freedom of association. Compared to Work Choices, which attained resounding international criticism for its violations of the freedom, the FWA strives to comply with its international obligations. While the Rudd Government had the potential to further develop the freedom to associate, the FWA makes concessions to deliver a balanced, robust industrial relations system, where, compared to the Work Choices, the freedom is greatly enhanced.

FREEDOM OF ASSOCIATION

A History and Content

While the freedom to associate has a long history, its precise content is still unsettled. At one end, the freedom can be taken literally, extending only to the protection of the right to join or not to join an organisation – the constitutive approach. This ‘legalistic, ungenerous, indeed vapid’ construction would render the freedom meaningless, but is not without judicial support. On the other hand, the purposive approach emphasises the fundamental role of associations as protectors of the needs and interests of workers, overcoming their vulnerability with employers through collective bargaining – an ‘integral and primary function’ of associations. There is a wealth of authority from the judiciary, the International Labour Organisation (‘ILO’), and commentators that advocate that ‘collective bargaining is an essential element of freedom of association’. Further, although with less support, some view the right to strike as concomitant with the right to collectively bargain, hence it would also assume importance in considering freedom of association.

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6 Freedom of association is a far wider term, covering for example religious/political freedom of association.
In Supreme Court of Canada, McIntyre J isolated six possible definitions of the scope of the freedom of association, and was supported by the majority in his opinion that the freedom of association,

stands for the principle that an individual is entitled to do in concert with others that which he may lawfully do alone, and conversely, that individuals and organisations have no right to do in concert what is unlawful when done individually.  

This again accords protection to associational aspects of union membership and permits the ‘collective pursuit of common goals’ – the fundamental purpose of freedom of association.  

Since its inception, the federal industrial law has recognised the rights of individuals, but as an adjunct to the promotion of the collective interests of workers together. Under the WRA, the negative freedom of association, that is the right not to join an industrial association, was made express for the first time, and, in line with the substance of the FWA, featured in the primary objectives. The inclusion of this seemingly reasonable counterbalancing freedom indicates an individualistic treatment of the freedom of association. However, the ‘history and traditions of labour law practice and scholarship’ should form part of the assessment of future industrial relation systems to ensure the ‘latent ideological ramifications’ are manifested. With this in mind, the collective nature of the freedom of association in achieving equity in relation to bargaining between employers and employees suggests that the ideology underlying the recognition of a correlative right not to belong is aimed at destabilising the traditional union role. Nonetheless, Rudd and Gillard indicate that it is the government’s policy to ensure ‘an employee’s choice [is] respected’, and so the negative freedom has been retained.  

B Freedom of Association and Union Security  

For freedom of association to flourish ideally the workforce should be highly unionised and the industrial system should actively promote collective bargaining. Freedom of association is more than just the mere fact of membership. It requires that unions are able to secure appropriate resources from membership subscriptions and also that they possess certain legal entitlements to ensure that they are able to engage in certain activities. Traditionally unions had an essential role in bargaining agreements and industrial instruments as well as the benefit of the ‘conveniently belong’ rule, closed shop arrangements, preference clauses and compulsory deduction of bargaining service

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13 Ibid 371 (McIntyre J).
14 Ibid 408 (McIntyre J).
15 See Rosemary Owens and Joellen Riley, The Law of Work (2007) 457, 457-461. The ultimate conclusion is that the freedom of association can have a dual-characterisation as an individual, human right, with an essential collective function in relation to work regulation.
16 Work Choices s 3(j).
18 Although not as a primary objective of the FWA. See FWA s 336(b)(ii).
fees from non-members.\textsuperscript{20} Hence in 1953 membership levels were at 63\% of the total workforce.\textsuperscript{21}

*Work Choices* substantially weakened the security of unions\textsuperscript{22} and threatened their ‘continued existence’.\textsuperscript{23} Somewhat counter-intuitively, there was a belief that while the *Work Choices* legislation amounted to a major assault on union security, it provided a platform for unions to re-assert their relevance in a system that prioritised managerial prerogative ahead of workers’ rights.\textsuperscript{24} In the years that followed, however, this optimistic belief did not eventuate.\textsuperscript{25} In 2005 union membership was at 22.4\%\textsuperscript{26} and under *Work Choices* this figure continued to decrease. While there are other potential reasons responsible for such a decline, such as a more diverse workforce including increased casualisation and female presence, these figures and the literature suggest a strong connection between union security and freedom of association.\textsuperscript{27}

\textsuperscript{20} Convention 87 neither endorses nor proscribes these union security arrangements, hence it is largely left to member states to regulate their affairs. The removal of ‘closed shop’ arrangements does tend to support art 2, as workers have the right to join an organisation of their choosing without prior authorisation. For further extensive reading on the topic of union security see P Weeks, *Trade Union Security Law* (1995).

\textsuperscript{21} Forsyth and Sutherland, above n 1, 216.

\textsuperscript{22} As mentioned earlier, this was based on a view by the Howard Government that the industrial relations system was out of touch with the prevailing regulation at the time. There was a belief that allowing unions to operate as closed shops with the benefit of preference clauses and other securities permitted them to operate inefficiently and they became unresponsive to the needs of their members. The changes introduced throughout the Howard term were aimed at increasing competition between unions to force them to offer more to the members or risk the possibility of losing their membership base. Interestingly, one study indicates that there the Howard’s beliefs may have been unfounded, and perhaps the converse is true – closed shop arrangements were more responsive and resulted in higher satisfaction among members. Behind the political rhetoric, the reality of Howard’s campaign was to further destabilise the position of unions in relation to increasingly powerful employers. See Mindy Thorpe and Jim McDonald, ‘Freedom of Association and Union Membership’ (1998) 9(2) *Labour & Industry* 23; Colin Fenwick and John Howe, ‘Union Security after Work Choices’ in Anthony Forsyth and Andrew Stewart (eds) *Fair Work* (2009) 164, 169.

\textsuperscript{23} Graeme Orr, ‘Agency Shops in Australia? Compulsory Bargaining Fees, Union (In)Security and the Rights of Free-Riders’ (2001) 14 *AJLL* 164, 4. Union security can be understood as the various devices that exist to protect unions and ensure their continued existence.

\textsuperscript{24} Forsyth and Sutherland, above n 1, 231. Forsyth and Sutherland noted that it could even be an opportunity for unions to reverse dwindling union membership levels as workers sought to fight for their rights at work.


\textsuperscript{27} Belandra [2003] FCA 910 [151] (North J). See Perry, above n 25, for a discussion of the connection between neoliberal legislation and the drop in union membership. Perry notes that despite low levels of union membership, over the last decade there has been a resurgence in positive attitudes towards unionism. Applying an economics analysis to his discussion, Perry attributes this irony to the fact that weaker unions have a reduced capacity to engage in ‘disruptive union behaviour’, which has allowed the public to feel more positive towards them.
International law provides ‘a fertile source of insight into the nature and scope of the freedom of association of workers’. In 1948 the nations of the world promulgated the first international convention on the protection of the freedom of association – ILO Convention 87 on Freedom of Association and the Protection of Right to Organise. The ‘fundamental human right’ is also a ‘force of social progress’, and its recognition in Convention 87 symbolised a bold step in the ‘struggle for social justice’. The Convention sought to protect the right of workers and employers to form and join organisations of their choice, and ensure their organisational autonomy. Convention 98 on Principles of the Right to Organise and to Bargain Collectively (‘Convention 98’) filled in some of the gaps left by Convention 87, providing protection against anti-union discrimination and further strengthening the functional autonomy of representative organisations. Australia has ratified both Conventions and hence has obligations at international law.

It is possible to contend that the nature of employment and business now is vastly different from that which prevailed in the 1950s such that the role of unions should be on a ‘path to well-deserved irrelevance’. While technological innovation and globalisation have certainly changed business, the ILO believes that unions still have a fundamental role in today’s industrial environment in maintaining peace, social justice and decent work. This latter view has been supported by many nations at a conference in Kuala Lumpur earlier this year providing new impetus to promote the ratification of Conventions 87 and 98 around the world and encourage their implementation into domestic systems.

Both Work Choices and the FWA claim as part of their primary objects to give effect to Australia’s international obligations in relation to labour standards. Therefore, the international standard, as comprehensively elaborated upon in the ILO Freedom of Association.

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32 Creighton, above n 29, 247.
33 Convention 98 arts 1.1, 1.2(b).
34 Convention 98 art 2.
35 Australia has ratified six of the eight core labour standards of the ILO. Convention 138 Minimum Age (1973) and Convention 182 Worst Forms of Child Labour Convention (1999) are yet to be ratified.
37 International Labour Organisation, above n 31, 3.
38 Ibid.
39 Work Choices s 3(n).
40 FWA s 3(a).
41 The role of international law was unpacked in Minister for Immigration and Ethnic Affairs v Teoh 183 CLR 273. For a succinct overview of international law in relation to freedom of association, see Belandra [2003] FCA 910[154]-[160] (North J).
Association Committee's Digest of Decisions,42 will provide a useful lens in comparing the two labour regulation systems.43

D Freedom of Association Protection Under WRA

The irony of Howard's anti-victimisation provisions, designed to provide a launching pad for attacks against unions, was that they were used effectively as ‘defensive weapons’ in resisting employers’ corporate restructuring and outsourcing plans.44

The WRA prevented an employer engaging in certain conduct in relation to an employee for a ‘prohibited reason’,45 or reasons that include a prohibited reason.46 The argument run successfully by unions, for example in the landmark victory in the Patrick waterfront dispute47 and also in Greater Dandenong,48 was that a corporate restructure was prohibited conduct undertaken for the prohibited reason that the workers were ‘entitled to the benefit of an industrial instrument’.49 In the BHP Iron Ore case,50 the Australian Workers’ Union sought to advance a similar argument and, despite the granting of an interlocutory injunction, lost the case at full trial. Justice Kenny’s single judgment, which was criticised and not followed in Belandra,51 represents a narrow reading of membership. Contrary to surveys, case studies and case law,52 Kenny J was not willing to accept that there was a causal chain between an employer's inducement to enter

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42 International Labour Organisation, above n 11.
43 This is despite the fact that in general a low priority has been accorded to the ratification of ILO conventions in Australia, based on it taking 25 years to ratify Convention 87 and Convention 98. See Creighton, above 29, 259.
44 See Fenwick and Howe, above n 22, 174-176; Anthony Forsyth and Carolyn Sutherland, above n 1, 218.
45 WRA s 298K. Given the difficulties of proving intention, there was also a reverse onus of proof (s 298V), that is, it was assumed that an employer engaged in the prohibited conduct for the prohibited reason, unless they could prove otherwise. This onus could be determinative, and hence assisted unions in defending the rights of their members.
48 Work Choices s 793(1)(i).
50 See Belandra [2003] FCA 910 [134]-[137] (North J). North J analyses the historical context of unions and highlights that employer ‘resistance and antagonism’ stems from the activities that flow from union membership, not the mere fact of membership. This judgment illustrates a judicial willingness to recognise the traditional aspects of unionism in constructing the degree of protection accorded to the freedom of association.
51 See D Peetz, 'Individual Contracts, Bargaining and Union Membership' (2002) 28 Australian Bulletin of Labour 39; David Quinn, 'To Be or Not to Be a Member – Is That the Only Question? Freedom of Association under the Workplace Relations Act' (2004) 17 AJLL 1. These indicate that the practical effect of individual contracts is that they will induce employees to leave a union, and that is generally what they are employed to do. The evidence at the Pilbara site itself was fairly conclusive of the connection. In the space of five months, 62% of workers that were previously union members had resigned, believing that a union was of little or no value after signing [an AWA]. See also Australian Workers’ Union v BHP Iron-Ore Pty Ltd (2001) 104 IR [241].
individual contracts and the drop in union membership. She held that the unions could still have a role at the workplace, outside collective bargaining, and hence the magnitude of the decline in union membership was more a reflection of the 'nature of the union's presence and response'. This is despite the evidence of employees that 'a union was of little or no value after signing', which is supported by international guidance as to the fundamental nature of collective bargaining for unions. Arguably, the narrow reading of the right to be a member, virtually extending only to the right to hold a membership ticket, illustrated the inferior protection attached to freedom of association under the WRA in failing to protect the 'collective bargaining aspirations of trade union members'.

After the success of unions under Part XA of the WRA described above, Prime Minister Howard tightened the requirements for protection, requiring the prohibited reason to be the 'sole or dominant reason' for engaging in the conduct.

E Freedom of Association Protections Under FWA

The FWA adopts a similar approach to the WRA, only couched in different terminology. The protection of freedom of association is found under Part 3-1 General Protections. Under this regime, a person cannot take 'adverse action' against another person in relation to a 'workplace right'. The freedom of association is more directly guarded under s 346, which protects a person from adverse action taken because that person is (or is not) an officer or member of an industrial association or in relation to that person's 'industrial activity'. Like the WRA, under the FWA a person takes action for a particular reason if the decision to take the action includes that reason. The reverse onus of proof applies in the same manner as Work Choices. On the whole the


54 Peetz, above n 52, 49.

55 BHPIO [2001] FCA 3 [241] (Kenny J)


57 While the BHPIO decision involved the WRA the commentary is equally as applicable, if not more so, to Work Choices. More so in the sense that under Work Choices, for the same protection to be granted to the employee affected by prohibited conduct engaged in for the prohibited reason of being entitled to the benefit under an award or collective agreement, it must have been the 'sole or dominant reason' for engaging in the prohibited conduct. This is discussed later in this article.

58 Work Choices s 792(4).

59 See FWA s 342.

60 FWA s 340. See FWA s 341 for definition of 'workplace right'. See Explanatory Memorandum, Fair Work Bill 2008 (Cth) for useful practical information in understanding the meaning of workplace right [1359]-[1371].

61 See the broad definition in FWA s 347, which includes involvement and non-involvement in a number of activities. The protection of a person’s right not to engage in industrial activities is another indication of the individual conception of freedom of association, potentially at the expense of the traditional collective rationale behind the freedom.

62 FWA s 360. The analysis is more one of cause and effect between the taking of adverse action and the interference of a workplace right. See Explanatory Memorandum, Fair Work Bill 2008 (Cth) [1379]-[1381].

63 FWA s 361.
protections under this Part strengthen the rights of workers, and also promote the freedom of association by removing the ‘sole or dominant reason’ test and allowing unions a wider reign to prevent corporate restructure aimed at subverting the rights of their members and other employees.

COLLECTIVE BARGAINING

A The Bargaining Focus: Work Choices to FWA

Strong unions and the right to engage in collective bargaining are ‘major tools’ that provide strength and protection to weak voices and allow poverty and social disadvantage to be mitigated. Indeed, collective bargaining is heralded as a vehicle to deliver economic gains as well, particularly where those subject to the agreement share common work tasks, trends and priorities. The move away from individual agreements is in line with Convention 98, which requires measures to encourage and promote the full development and utilisation of machinery for voluntary negotiation... with a view to the regulation of terms and conditions of employment by means of collective agreements.

In 1992/1993 the Keating Government began the paradigm change towards decentralising industrial regulation by moving away from industry-based awards and promoting enterprise level bargaining. The subsequent WRA, and more so Work Choices, continued this trend, facilitating party autonomy on an individual level in employment bargaining based on the false premise that bargaining agents would yield equal bargaining power. The individualistic approach of Work Choices had as a corollary the substantial weakening of the role and security of unions, and hence was detrimental to the freedom of association. The Office of Employment Advocate actively promoted the use of Australian Workplace Agreements (AWAs), which were accorded primacy over all other agreements. In furthering the agenda of decentralising industrial relations, AWAs were made increasingly attractive from an employer’s point of view. While supposedly advancing flexibility in the individual employment relationship, the terms of AWAs were more likely to be unilaterally set and offered on a ‘take it or leave it’ basis, much like the new employer greenfield agreement option. These developments diluted the unions’ capacity to engage in collective bargaining.

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65 International Labour Organisation, above n 31.
66 Rudd and Gillard, above n 4, 13.
67 Owens and Riley, above n 15, 514. One must query whether this is still the case today.
68 Convention 98 art 4.
70 The other five types of agreements are listed in Work Choices Part 8 Division 2.
71 They were no longer subject to collective agreements, the ‘no disadvantage’ test was removed, they only had to include five minimum conditions, rather than being juxtaposed with industrial awards, and once made, an AWA would exclude the relevant award, even after their expiration. See International Trade Union Confederation, above n 56, 3.
72 Work Choices s 330.
The FWA recalibrates the focus of industrial regulation in Australia back on to the collective. The FWA shows a preference for single enterprise agreements, as the evidence suggests these are ‘drivers of productivity growth’. This preference is manifested through its approach to pattern bargaining and less-favourable treatment of multi-enterprise agreements. However, McCallum has noted that the internal structures and resources of unions are rooted in their industry-based past, and hence they are ill-equipped to engage in collective bargaining at the enterprise level.

Each modern award and enterprise agreement is required to have an individual flexibility term. This term is designed to enable employment arrangements to meet the ‘genuine needs of the employee and employer’. While some authors have been critical of the mandatory flexibility terms, likening them to AWAs, individual flexibility agreements must result in the employee being ‘better off overall’. Also, the fundamental point of departure is that the level of bargaining is still the collective, where the role of unions, and hence the right of freedom of association, is meaningful. Individual flexibility arrangements can be seen as a method to achieve the flexibility-based productivity gains attached to AWAs, without the exploitation of the worker nor marginalisation of the role and presence of unions in the workplace.

B Bargaining under FWA

1 Legislative Regime

During bargaining under the FWA, bargaining representatives (‘BRs’) will be under the new obligations of good faith bargaining (‘GFB’). To begin with, an employer is required to take all reasonable steps to give all employees employed at the ‘notification time’ and who will be covered by the agreement notice of the right to be represented

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74 Rudd and Gillard, above n 4, 13.
75 FWA ss 409(4), 412. These are mirrored in Work Choices ss 421, 439. The issue rarely arises practice due to the declaration that ‘common terms’ meant ‘identical terms’, see Australian Nursing Federation v Trinity Garden Aged Care (2006) 155 IR 124.
76 During the 1990s the Committee of Experts analysed Australia’s industrial relations system (WRA) in terms of its congruence with international standards. A number of findings were made, including the fact that according primacy to single-enterprise agreements over multi-enterprise agreements breaches international standards (Convention 98 art 4) that require that the level of bargaining be a matter for the bargaining parties. The fact that this is carried through to the FWA signals a continuance of this shortcoming. See Creighton, above n 29, 272 for more detail. Under the FWA, a multi-enterprise agreement requires Fair Work Australia’s approval (s 186(2)(b)). They cannot support industrial action (s 413(2)) and are also not subject to the good faith bargaining requirements, unless there is a low-paid authorisation (s 229(2)).
77 McCallum, above n 66, 235. McCallum compares the union organisational structure to the United State and Canada, where unions are designed to engage in bargaining on a smaller scale.
78 FWA s 202(1) (enterprise agreements). Where an enterprise agreement does not include a flexibility term, the model flexibility term is taken to be a term in the agreement (s 202(4)).
79 FWA s 202(1)(a).
80 FWA s 203(4).
82 Four different events trigger the notification time. One is voluntary, that is, where the employer agrees to bargain, or initiates bargaining for the agreement, while the remaining three, the majority support
The notice must explain the consequence of the default BR provisions, which makes an employee organisation the BR of its members, unless they appoint another person. A bargaining order can be made to remove one or more of the BRs where the process is not proceeding efficiently due to a cluttered bargaining table, while a scope order can more appropriately set the coverage of an agreement. Fair Work Australia (‘the Tribunal’), the new independent industrial umpire, will play a key role in looking at the regulation of labour, not only in terms of issuing bargaining orders, but also ensuring compliance with good faith requirements and ultimately in approving enterprise agreements prior to their operation. Repeated or ‘serious and sustained’ breaches of a bargaining order can result in a ‘serious breach declaration’ and the Tribunal arbitrating an outcome.

Under Work Choices employers could, and did, refuse outright to bargain a new collective agreement, forcing workers onto individual contracts. The FWA introduces majority support determinations for single-enterprise agreements. Upon application by a BR, if the Tribunal is satisfied that a majority of employees to be covered by the agreement wish to bargain with their employer, it must make a determination, which forces employers to the bargaining table with GFB obligations, and triggers the obligation to notify employees of their representation rights. Despite bargaining ideally being about the free exercise of bargaining power, this element of compulsion appropriately moderates the potential abuse of power by employers and enhances the ability of a union to engage in collective bargaining. It is of course possible to have a non-union agreement with no union input at all, but only where both bargaining sides (not just the employer) desire this.

In application, the FWA’s collective bargaining and union recognition mechanisms would have adequately dealt with the Boeing case and TWU v DHL. Both cases involved an

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83 FWA s 173(1). See Part 2-4 Division 3 for more procedural detail.
84 FWA s 174(3).
85 FWA s 230(3)(ii).
86 FWA s 238(1), note the obligation under sub-ss (4A) and (5).
87 See, eg, FWA ss 230(3), s 231(1)(a), 187(2).
88 FWA s 54(1). The general requirements for approval of an enterprise agreement are contained in s 186, and include, for example, the absence of unlawful terms, and the setting of a nominal expiry date. For a thorough overview of enterprise agreements under FWA see Art 51, Ch 8.
89 FWA s 235.
90 For more detail see Forsyth and Sutherland, above n 1.
92 FWA s 236.
93 Where the agreement will not cover all employees, there is a requirement that this group be fairly chosen, taking into account whether the group is ‘geographically, operationally or organisationally distinct’; FWA s 237(3A).
94 This can be determined through a voting process, but the Tribunal can be satisfied in other ways. See Andrew Stewart, Stewart’s Guide to Employment Law (2009) 132.
95 This coercion would appear to breach of Convention 98 art 4, in that it requires ‘voluntary negotiations’.
96 Rudd and Gillard, above n 4, 13.
97 Boeing Australia Ltd v Australian Workers’ Union (2006) 148 IR 466.
98 Transport Workers Union of Australia (TWU) v DHL Exel Supply Chain (Australia) Pty Ltd [2008] FMCA 604.
employer that was unwilling to recognise a union as a bargaining representative, which trumped the wishes of the workers. While GFB does not force an employer to agree, it does mandate that they negotiate and give genuine consideration to proposals.

2 GFB

The GFB requirements, under s 228, apply to bargaining representatives and seek to ensure that enterprise bargaining is a process of ‘real and not illusory negotiation and general agreement’.\(^99\) Under Work Choices, the concept of ‘genuinely trying to reach an agreement’ was relevant in defining pattern bargaining\(^100\) and as an obligation on an employer engaged in industrial action.\(^101\) While there is some suggestion that this requirement was tantamount to good faith,\(^102\) Work Choices did not have the same practical requirements\(^103\) and mechanisms surrounding this obligation (such as bargaining orders and the prospect of arbitration) to be of the same force in promoting quality collective bargaining. Further, the concept had no application in general enterprise bargaining, hence there was no real equivalent under Work Choices.

The Keating Government introduced the concept of GFB obligations, and one identified shortcoming was that they could not be used to affect the substance of a bargain.\(^104\) The FWA is liable to the same criticism, in that it does not require concessions, and respects the autonomy and free bargaining of parties.\(^105\) Another identified failing of the previous GFB regime was that it could not compel a party to bargain.\(^106\) The FWA addresses this through majority support determinations, scope orders and low-paid authorisations, all of which compel an employer to bargain in accordance with GFB requirements. The Rudd formulation is also more prescriptive, containing, for example, the requirement to refrain from capricious or unfair conduct that undermines the freedom of association or collective bargaining,\(^107\) and the requirement to recognise and bargain with other bargaining representatives.\(^108\) It therefore has more content than the Keating package and is not liable to the same criticisms.

Wood is pessimistic about the prospects of this refined obligation to bargain in good faith.\(^109\) He refers to the unsuccessful US experience with good faith bargaining\(^110\) and the general undesirability of having a blanket prohibition on refusing to bargain. Rathmell considers the US and NZ experiences, and makes a number of useful

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100 Work Choices s 421(3).
101 Work Choices s 444.
102 See, eg, AMIEU v G & K O'Connor (1999) 97 IR 261.
103 In relation to classifying pattern bargaining, Work Choices contained a list of considerations to determine whether the bargaining agent was genuinely trying to reach agreement (s 421(4), however this list was expressly stated not to apply to the interpretation of the term elsewhere in the Act (s 421(6)). Hence under s 444 there is no guidance as to how to determine whether an employer is genuinely trying to reach an agreement.
104 See Community and Public Sector Union v Australian Broadcasting Corp (1995) 36 AILR 419
105 FWA s 228(2). This voluntary agreement procedure is consistent with international conventions.
107 FWA s 228(1)(e).
108 FWA s 228(1)(f).
109 See Wood, above n 36.
110 The FWA good faith obligations are similar to the elements under the Wagner Act in the United States. See Rathmell, above n 81, 190.
suggestions to ensure that the Australian experience does not fall into the same pitfalls.\textsuperscript{111} Contrary to Wood, Rathmell foresees great utility in GFB recommending the NZ approach which moves away from the traditional ‘core meaning’ towards a ‘result-oriented approach’ – requiring parties to reach agreement \textit{unless} there is a genuine reason not to.\textsuperscript{112}

3 Content of agreement

Under \textit{Work Choices}, a workplace agreement that contained ‘prohibited content’\textsuperscript{113} was void.\textsuperscript{114} By defining the term ‘prohibited content’ with reference to \textit{regulation}, the Coalition was able to yield unacceptable power to introduce its political agenda into the scope of bargaining. Among other terms, the regulations included the following as prohibited content: matters not pertaining to the employment relationship; leave to attend trade union meetings or training; right of entry for union officials; encouragement of trade union membership; and restrictions on AWAs.\textsuperscript{115} Protected industrial action could not be taken in support of prohibited content, and given that many of the inclusion in the basket of prohibited content were routine union-negotiated provisions, \textit{Work Choices} curtailed the freedom to \textit{act} through trade unions. Further, lodging an agreement containing prohibited content,\textsuperscript{116} or being involved in other ways,\textsuperscript{117} could result in harsh penalties.\textsuperscript{118}

The \textit{FWA} takes a much broader approach, adopting the notion of ‘permitted matters’, which include matters pertaining to the employer/employee relationship and employer/employee organisation relationship.\textsuperscript{119} In place of ‘prohibited content’, the \textit{FWA} has a shorter \textit{legislative} list of ‘unlawful terms’\textsuperscript{120} which are not as patently anti-union. This feature of the \textit{FWA} will allow unions to take protected industrial action in support of a wider variety of terms that serve their members interests.\textsuperscript{121} Unlike \textit{Work Choices}, the \textit{FWA} does not classify non-permitted matters - matters not pertaining to the employment relationship - as ‘unlawful terms’, meaning that an agreement containing non-permitted matters can be valid and approved by the Tribunal.\textsuperscript{122} Also, for industrial action to be protected it requires that claims are ‘reasonably believed’ to be about

\textsuperscript{111} Ibid 199.
\textsuperscript{112} Ibid 187.
\textsuperscript{113} Definition prescribed through regulations (Workplace Relations Regulations 2006). See s 356.
\textsuperscript{114} \textit{Work Choices} s 358.
\textsuperscript{115} Workplace Relations Regulations 2006, regs 2.8. 5-2.8.7.
\textsuperscript{116} \textit{Work Choices} s 357.
\textsuperscript{117} See \textit{Work Choices} ss 366, 377.
\textsuperscript{118} Up to $6,600. Each charge is liable to 60 ‘penalty units’ (see ss 407(2)(k), (n), (o)), which are defined with reference to the \textit{Crimes Act 1914} s 4AA, which provides that a ‘penalty unit’ means $110.
\textsuperscript{119} \textit{FWA} s 172(1). This is a reversion back to the \textit{Conciliation and Arbitration Act 1904} (Cth).
\textsuperscript{120} \textit{FWA} s 194. For the interplay between ‘non-permitted matters’ and ‘unlawful terms’, see Sutherland, above n 5, 110. Also see Stewart, above n 94, 136-137. Stewart believes the Rudd Government reneged on its promise to remove the ‘onerous, complex and legalistic restrictions’ under the prohibited content provisions.
\textsuperscript{121} Gostencnik, above n 64, 161.
\textsuperscript{122} See definition of ‘unlawful terms’ \textit{FWA} s 194. In approving an enterprise agreement, the Tribunal must be satisfied it does not include any unlawful terms (s 186(4)), however if a term is found to exist in an approved agreement it is unenforceable, and does not affect the validity of the remaining agreement. See \textit{FWA} s 253.
permitted matters, which should remove the technical arguments previously available to employers to delay and undermine industrial action.\textsuperscript{123}

\section*{C. Industrial Action}

While rates of industrial action remain at historic lows, the ability of a union to take \textit{protected} industrial action\textsuperscript{124} is important in recognising that employers and employees do not enter negotiations on an equal footing. \textit{Work Choices} introduced a number of measures that restricted the right to strike, including, the ‘cumbersome and legalistic’ secret ballot procedure,\textsuperscript{125} weakening the security of a ‘bargaining period’,\textsuperscript{126} increasing the penalties for engaging in unlawful action\textsuperscript{127} and expanding the definition of ‘prohibited content’,\textsuperscript{128} which significantly limited the matters which could base protected action.\textsuperscript{129} The concerns that the secret ballot is designed to circumvent, namely, over-zealous union leaders and unreliable internal decision-making processes within unions,\textsuperscript{130} both lacked credible foundations, and regardless have not been shown to be remedied through an externally administered ballot.\textsuperscript{131} In practice, case studies show that the ballot process effectively delays industrial action\textsuperscript{132} and removes the ‘sting’ from the union’s front.\textsuperscript{133}

Rudd opted to follow the ‘tough’ approach on industrial action under \textit{Work Choices}.\textsuperscript{134} The \textit{FWA} did remove the concept of a bargaining period, which merely operated as another pressure point for employers to frustrate industrial action.\textsuperscript{135} By retaining the mandatory secret ballot provisions, albeit with minor amendments,\textsuperscript{136} and the inability of multi-enterprise agreements to support industrial action, the \textit{FWA} maintains the limitations on unions to address the inequality between the owners of labour and the

\begin{thebibliography}{99}
\footnotesize
\bibitem{123} Gostencnik, above n 64, 105-106.
\bibitem{124} \textit{FWA} s 415.
\bibitem{125} See \textit{Work Choices} Part 9, Division 4. For a brief summary of the operation of the secret ballot, see Shae McCrystal, ‘A New Consensus: The Coalition, the ALP and the Regulation of Industrial Action’ in Anthony Forsyth and Andrew Stewart (eds) \textit{Fair Work} (2009) 141, 147-148. This inclusion attracted international disapproval from the International Trade Union Confederation, see International Trade Union Confederation, above n 56, 4.
\bibitem{126} See McCrystal, above n 125, 153-154. The theme of \textit{Work Choices} was to make it easier for the bargaining period to be disrupted, which would then render any industrial action unprotected (s 437) and liable to immediate cessation through an order of the AIRC under s 496(1).
\bibitem{127} Individuals faced $6,600 and body corporates up to $33,000.
\bibitem{128} \textit{Work Choices} s 436.
\bibitem{129} See McCrystal, above n 125, 147.
\bibitem{130} See Explanatory Memorandum, \textit{Workplace Relations Amendment (Work Choices) Bill 2005} (Cth) [2578].
\bibitem{132} See generally McCallum, above n 131.
\bibitem{133} McCrystal, above n 125, 152.
\bibitem{134} Rudd and Gillard, above n 4, 21; Australian Labor Party, \textit{Forward with Fairness Labor’s Plan for Fairer and More Productive Australian Workplaces} (2007), 16. For a concise summary of the \textit{FWA} industrial action provisions see McCrystal, above n 125, 159-163.
\bibitem{135} Fenwick and Howe, above n 22, 160.
\bibitem{136} See discussion at McCrystal, above n 125, 161. According to McCrystal the changes should reduce the pressure points in the protected action ballot process, and hence facilitate better access to protected industrial action.
\end{thebibliography}
owners of capital through taking legitimate and timely industrial action, and carries with it the criticisms expressed by the International Trade Unions Confederation.137

**UNION SECURITY**

**A Expanding the Role of Unions**

As detailed above, the *FWA* introduces a number of changes to the bargaining procedure that enhance a union’s ability to carry out central functions, such as collectively bargaining with employers and organising protected industrial action. In comparison to *Work Choices*, the new legislation therefore provides unions better prospects of recruiting new members and hence offers them more financial and practical strength and security. In combination with other key areas of legislative reform, such as the unfair dismissal laws, which will provide protection to millions of Australians through the conciliation and arbitration processes of the Tribunal, it is likely that unions can reestablish their role as providers of essential services to workers, and hence provide enrichment to the freedom of association.

**B Bargaining Fees**

The union fees that members pay, inter alia, provide the financial resources that unions require to effectively bargain with employers. Of necessity, the victories of trade unions in securing decent terms and conditions of employment must be applied indiscriminately across the workforce, that is, without distinguishing between union status. This sets the platform for where for what has been coined the ‘free rider problem’, where non-union members get the benefit of hard fought conditions without having contributed to the effort. Only since 2003 have compulsory bargaining service fees been prohibited, as it was seen as imposing a form of compulsory unionism.138 *FWA* carries this prohibition through.139 The explanatory memorandum has nothing to offer in justifying the government’s decision to replicate *Work Choices* in this regard.140 This seems to be another example of the *FWA* compromising ‘fairness’ and the enhancement of the freedom of association in order to placate those employers concerned with powerful ‘third party’ unions interfering too heavily with their business.141

The Australian Council of Trade Unions advocated strongly for the ‘agency shop’ or ‘fair share fee’ arrangements ‘most advanced’ in the United States.142 Despite some reservations, Orr does believe that ‘financial coercion’143 in the form of agency fees is justified, indeed required, in a system that restricts collective bargaining to the

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137 International Trade Union Confederation, above n 56, 4.
138 Forsyth and Sutherland, above n 1, 218.
139 *FWA* s 353.
140 Explanatory Memorandum, *Fair Work Bill 2008* (Cth) [1433].
141 Oddly enough, Rudd and Gillard committed to provide funding to employer organisations to enable them to assist their members (employers) with collective bargaining. Unions are not accorded equal treatment to access funding to facilitate collective bargaining. See Rudd and Gillard, above n 4, 14.
142 Orr, above n 23, 3.
143 Ibid 5. Orr contrasts the libertarian arguments (liberty to direct one’s own resources) with the communitarian arguments (bargaining fees recoverable on the basis of user pays) in the lead up to his thorough analysis of the United States model.
enterprise level,\textsuperscript{144} provided the fee is limited to a ‘fair fee’, and not tantamount to the union’s ordinary dues.\textsuperscript{145} This allows the avoidance of ‘the evils of compulsory unionism while allowing financial support for the bargaining agent’,\textsuperscript{146} or in other words solves the free-rider problem, while respecting individual associational rights.

Without adequate financial resources, there is the undesirable consequence that unions will not be able to effectively collectively bargain with employers on a ‘level playing field’. In light of GFB obligations that encourage parties to ‘get on with it’\textsuperscript{147} the default bargaining representative provisions, majority support determinations, easier access to protected industrial action and a modified ballot requirement, it could be argued that the FWA seeks to drive the associated costs of collective bargaining for unions down, and hence removes the necessity to provide fair share fees. Time will tell whether the omission to include a fee to unions for bargaining services operates to the detriment of collective bargaining and hence freedom of association under the FWA.

\textbf{C Union Right of Entry}

The statutory right of a union official to enter a workplace has only existed since 1973.\textsuperscript{148} Since this time it has become an elaborate legislative code. The scheme under \textit{Work Choices} provided employers a far greater ability to prevent unwanted union involvement in their workplace. Despite the Australian Labor Party’s commitment to retain this regime, the FWA makes some key departures that provide unions with far greater access to work sites.

\textbf{1 Objects}

The effective operation of unions is reliant on a legally enforceable right to enter the private property of an employer for certain purposes.\textsuperscript{149} Under \textit{Work Choices}, it was made express for the first time, that union right of entry involved a balance between the right of unions to represent their members and the right of employers to run their business without excessive interference.\textsuperscript{150} While perhaps tokenistic, when juxtaposing the objects of each of the regimes, the FWA expressly recognises the rights that employees have in facilitating union entry and obtaining information and representation while at work.\textsuperscript{151} It is arguable that this introduces the concept of individual rights into the matrix of freedom of association protection, and hence treats the role of unions as service providers to their members, rather than a representative body for the collective voice of the workforce.

\textbf{2 Provisions}

Under the FWA an organisation may apply to obtain a permit\textsuperscript{152} for the purposes of investigating suspected breaches of the law,\textsuperscript{153} or for the purposes of holding

\textsuperscript{144} This point ties in with the remarks by McCallum in relation to the union structure in Australia still being predicated in its historical roots. See above section II B.

\textsuperscript{145} Orr, above n 23, 3.

\textsuperscript{146} Ibid 10, quoting \textit{NLRB v General Motors Corp} 373 US 734 (1963) at 744.

\textsuperscript{147} Sensis Pty Ltd \textit{v} Community and Public Sector Union (2003) 128 IR 92, 141.

\textsuperscript{148} Forsyth and Sutherland, above n 1, 223.

\textsuperscript{149} See Fenwick and Howe, above n 22, 169.

\textsuperscript{150} \textit{Work Choices} s 736, counterpart in FWA s 480.

\textsuperscript{151} FWA s 480.

\textsuperscript{152} FWA s 512, mirrored in \textit{Work Choices} s 740(1).
discussions. Unless an exemption certificate is granted, 24 hours notice (but less than 14 days) must be given to the employer, and if relevant, written particulars of suspected breaches must be provided. The permit will not be granted unless the Tribunal is satisfied that the applicant is a ‘fit and proper’ person to hold the permit. While at the workplace the permit holder can conduct interviews and obtain access to documents. The permit holder also has obligations to act appropriately and obey the reasonable requests of the occupier, including holding discussion in a particular room or area, and taking a particular route.

3 Changes Under FWA
The isolated position of AWAs as a tool for individualisation and union exclusion was further illustrated under Work Choices by making union right of entry for suspected breaches of an AWA contingent on a written request by the employee to the organisation of the permit holder. In light of common notions of workplace apathy and the connection between ‘individualised bargaining’ and ‘deunionisation’, this provision substantively operated to keep unions at bay at the expense of workplace rights and safety. By virtue of abolishing individual contracts, the FWA addresses a core source of union denial, and should restore elements of their traditional central functions.

Another major change that the FWA delivers is removing the requirement that a permit holder’s organisation be bound by an award or collective agreement when exercising its right of entry to investigate suspected breaches, or holding discussions with ‘eligible employees’. The option of non-union collective agreements, which inhibit a union being bound, should signal the potential impact of the Work Choices position in ‘freezing out’ unions. Under the FWA, it is sufficient if the suspected breach relates to a member of the permit holder’s organisation, while for the purposes of discussion, unions have...

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153 FWA s 481, compared to Work Choices Div 4 s 747(1)(a)-(d). There is a fundamental difference between the two regimes here, as Work Choices required that the union be bound by the award or collective agreement that is suspected to have been breached.

154 FWA s 490(2), mirrored in Work Choices s 761.

155 See FWA s 519(1), mirrored in Work Choices s 750(2).

156 FWA s 487(3), mirrored in Work Choices s 738.

157 FWA s 481(1) Note 1, and in Work Choices s 749(2)(c).

158 FWA s 512, mirrored in Work Choices s 742(1). Matters to be considered in making this determination are at FWA s 513, mirrored in Work Choices s 742(2).

159 FWA s 482(1) mirrored in Work Choices s 748(1).

160 FWA s 502, mirrored in Work Choices s 767. The permit holder is entitled to the same treatment by persons at the workplace. See FWA ss 501, 502, mirrored in Work Choices s 767(3), (7).

161 FWA s 492. Note the factors that indicate when a request may be unreasonable s 492(2). Compared Work Choices s 751 which includes reasonable requests by the occupier and affected employers. Also under Work Choices there is no guidance as to when a request will be unreasonable.

162 Work Choices s 747(2). This was affirmed in National Union of Workers v ALDI Foods Pty Limited [2003] AIRC PR937747 (2 October 2003) (‘ALDI’), where the union had no right of entry in a workplace that was covered entirely by AWAs. See particularly [17]-[19] and [24]-[28] (Ives DP).

163 Forsyth and Sutherland, above n 1, 225.

164 Work Choices s 747(1)(c).

165 Work Choices s 760(a).

166 Fenwick and Howe, above n 22, 182.

167 FWA s 481(1). The organisation must be entitled to represent that members industrial interests, and the member must also perform work on the premises.
free reign to meet with employees whose industrial interests the permit holder's organisation is entitled to represent.\textsuperscript{168}

The removal of the requirement to be bound addresses a very real concern expressed by Forsyth and Sutherland, which combined a number of the \textit{Work Choices} elements to illustrate a hypothetical scenario that would severely cripple a union's presence at a workplace.\textsuperscript{169} Unions should be far better placed to enter workplaces and assist in regulating employer conduct, subject to satisfying the burden of showing reasonable suspicion,\textsuperscript{170} and also facilitate in the recruitment of new members by opening the doors to more workplaces.

\textbf{CONCLUSION}

Given the union resources and passion injected into the ALP campaign and the ultimate success at the 2007 election, there have been fleeting remarks as to the possibility for tension should the FWA fail to take 'major steps to provide for unions'.\textsuperscript{171} The above analysis has shown a general flavour in the FWA to promote the underlying rationale of freedom of association, which requires functional unions with the practical, financial and legal capacity to carry out their central functions. The recentralising of industrial relations with a focus on enterprise collective bargaining brings the unions core function in representing the collective voice of workers back to centre stage. The right to be recognised as a default or appointed bargaining representative, as well as the ability to apply to the Tribunal for a majority support determination and force the employer to bargain collectively with obligations of good faith, give the union substantially more power in the labour market. Members will also have the benefit of stronger anti-victimisation provisions to secure their position against outsourcing initiatives. This elevated position coupled with greater access to workplaces to promote the benefits of unionism and membership in a struggling economy where abuse of workers' rights and redundancies are commonplace,\textsuperscript{172} could mark a new chapter in the history of trade unions in Australia.

It could be contended that the FWA could have been more 'radical' in its recalibration of the industrial system and promotion of freedom of association, particularly taking international standards as a benchmark. However, when one considers this in the context of Convention 87 being the least ratified of all eight fundamental labour standards of the ILO, with Brazil, China, India and the United States notable non-signatories,\textsuperscript{173} would it be wise to aspire to protect freedom of association with the zeal

\begin{footnotes}
\item\textsuperscript{168} FWA s 484. The employee must also work on the premises and consent to participate in the discussions.
\item\textsuperscript{169} The combination of AWAs, unilateral termination by an employer and the requirement to be bound by an agreement to exercise right of entry could produce dire consequences. See Forsyth and Sutherland, above n 1, 225. Of relevance, see also ALDI [2003] AIRC PR937747 (2 October 2003).
\item\textsuperscript{170} FWA s 481(3), mirrored in Work Choices s 754. This is to prevent 'fishing expeditions'. A reasonable suspicion is satisfied by responding to a complaint of a member of the permit holder's organisation suggesting a contravention of the Act or relevant fair work instrument. See Explanatory Memorandum, \textit{Fair Work Bill 2008} (Cth) [1923].
\item\textsuperscript{171} Fenwick and Howe, above n 22, 181.
\item\textsuperscript{172} International Labour Organisation, above n 31. The ILO mentions the importance of protecting freedom of association during the current economic downturn.
\item\textsuperscript{173} International Labour Organisation, above n 31, 1.
\end{footnotes}
recommended by the ILO? Could it come at the expense of maintaining a healthy economy? The Labor Government has unquestionably made some major adjustments to the industrial playing field in favour of unions and workers’ rights, and in doing so, perhaps we should sit back and prepare for smooth sailing ahead.
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