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**Recognition, Representation and Freedom of Association under the Fair
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Recognition, Representation and Freedom of Association under the Fair Work Act 2009

Rosalind Read¹

ABSTRACT

The Fair Work Act 2009 (Cth) will revise statutory protections for Freedom of Association and introduce new mechanisms for, and obligations in relation to, enterprise level collective bargaining. The Act's enterprise bargaining mechanisms are assessed from the perspective of Freedom of Association: the right to bargain is considered as a constituent element of that freedom as defined in international law. Comparators from previous legislative regimes are identified and discussed to illustrate areas of legislative change. It is argued that the enterprise level collective bargaining mechanisms and general protections contained in the Act fall short of promoting Freedom of Association.

I. INTRODUCTION

On the back of a union campaign for “rights at work”² and an election polarised around Workplace Relations policy, the Rudd labour government were elected promising to restore fairness to the Australian workplace.³ Unions are reported to have spent \$15 million on the election campaign in an effort to secure enhanced legislative protection of Freedom of Association and its necessary subsidiary: the right to bargain.⁴ Now, almost 2 years after the election, the *Fair Work Act 2009* (Cth) (FWA) is about to commence. The machinery and institutions of enterprise level collective bargaining that the FWA creates have the capacity to materially alter the manner in which Freedom of Association is protected and, concomitantly, change the role of unions in Australia. The objects of the Act include: the provision of workplace laws which promote productivity and take into account our international labour obligations, recognition of both a right to Freedom of Association and a right to be represented in the workplace, and the achievement of productivity and fairness through emphasis on enterprise level collective bargains.⁵ Having regard to these objects it is clear that the nature of the system of collective bargaining created by the FWA will affect

¹ LLB(Hons). National Legal Officer, CFMEU – FFPD. The views expressed in this paper are those of the author and should not be taken to represent those of the CFMEU – FFPD.

² Australian Council of Trade Unions, *A Fair Go at Work – Collective Bargaining for Australian Workers*, September 2006.

³ Australian Labor Party, *Forward with Fairness Labor's Plan for Fairer and More Productive Australian Workplaces*, April 2007, 1 and 12, and Australian Labor Party, *Forward with Fairness Policy Implementation Plan*, August 2007.

⁴ Workplace Express, ‘ACTU election Act tops \$15 million’ <http://www.workplaceexpress.com.au/nl06_news_selected.php?act=2&nav=1&selkey=38683> at 6 February 2009. ACTU, above n 2, at 22.

⁵ *Fair Work Act 2009* (Cth) (hereafter FWA) s. 3.

functional Freedom of Association, or lack thereof, of Australian workers, it remains to be seen whether the Act will actively promote that freedom.

While many aspects of the FWA address issues related to Freedom of Association the primary focus of this paper is the relationship between the collective bargaining mechanism created by the Act and the freedom. Apart from a revamped unfair dismissal regime, collective bargaining is arguably the central focus of change in the Act. In the past, Australia's enterprise and collective bargaining machinery has been criticised for failing to properly support Freedom of Association, and failing to meet International Labour Organisation (ILO) standards in relation to Freedom of Association. This paper analyses the system of collective bargaining set out in the FWA in light of Australia's international obligations in relation to Freedom of Association and by comparison with the outcomes for Freedom of Association achieved under the machinery for enterprise agreement making in the *Workplace Relations Act 1996* (Cth) (WRA). The derivation of Freedom of Association from ILO principles and recent redescription of those principles from a purposive, capacity building perspective inform this assessment. The distinction between protecting collective Freedom of Association and an individual right not to associate is considered and the impact of that distinction on the right to bargain is also explored. Comparison with examples taken from the enterprise bargaining mechanisms under previous legislative schemes indicates that the FWA model of collective bargaining will have considerable ramifications for the role and functions of trade unions and functional Freedom of Association.

II. THE RELATIONSHIP BETWEEN FREEDOM OF ASSOCIATION AND THE RIGHT TO BARGAIN

Of the rights and freedoms protected by the ILO, Freedom of Association is a core freedom.⁶ With the Declaration of Philadelphia⁷ the ILO declared that Freedom of Association was essential to sustained progress toward attainment of the ILO's fundamental goal; that all should have the right to pursue their material well-being in conditions of freedom, dignity, economic security and equal opportunity, and affirmed that all national policies and measures, should be judged and accepted only in so far as they promote and do not hinder

⁶ The 1998 Fundamental Declaration on rights at Work protects Freedom of Association, there are also suggestions that Freedom of Association forms part of customary international law, see Rosemary Owens and Joellen Riley, *The Law of Work*, 2007, p 462.

⁷ 'Declaration Concerning the Aims and Purposes of the International Labour Organisation' annex to the *Constitution of the International Labour Organisation and Standing Orders of the International Labour Conference, 1994* (adopted at Philadelphia 10 May 1994).

the achievement that progress⁸. The ILO promotes Freedom of Association through the *Freedom of Association and Protection of the Right to Organise Convention, 1948 (C87)* and the *Right to Organise and Collective Bargaining Convention, 1949 (C98)*. C87 states:

*“Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation”.*⁹

Australia has ratified by C87 and C98¹⁰. The freedom protected by C87 and C98 is a conceptually rich freedom which is more than the simple freedom to join and be a member of a union but one extending to the incidents of membership and those rights and privileges which are necessary to give effect to the freedom. The ILO’s Committee on Freedom of Association (CFA) considers that:

*“The right to bargain freely with employers with respect to conditions of work constitutes an essential element in Freedom of Association, and trade unions should have the right, through collective bargaining or other lawful means, to seek to improve the living and working conditions of those whom the trade unions represent”.*¹¹

and

*“one of the main objects of the guarantee of Freedom of Association is to enable employers and workers to combine to form organisations independent of the public authorities and capable of determining wages and other conditions of employment by means of freely concluded collective agreements”*¹²

Freedom of Association is inextricably linked with the right to bargain and the right to organise. The methods by which those rights are protected in any national system will directly affect the protection of Freedom of Association in that system. If the system of

⁸ Ibid, I(c), II(c).

⁹ Article 2 of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), (hereafter C87).

¹⁰ *ILO Convention (No. 87) concerning Freedom of Association and Protection of the Right to Organise*, opened for signature 9 July 1948, [1974] ATS 3 (entered into force for Australia 28 February 1974). *ILO Convention (No. 98) concerning the Application of the Principles of the Right to Organise and to Bargain Collectively*, opened for signature 1 July 1949, [1974] ATS 5 (entered into force for Australia 28 February 1974).

¹¹ ILO, *Freedom of Association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO Geneva*, International Labour Office, Fifth (revised) edition, 2006, [881] (emphasis added).

¹² Ibid, [882] (emphasis added).

collective bargaining renders union participation in collective bargaining ineffective either, by marginalising the role of unions or, by giving priority to other forms of agreements at the expense of union negotiated collective agreements, then although that system may nominally protect Freedom of Association, it cannot be said to substantively protect the freedom. To be meaningful, Freedom of Association must be more than simply the right to hold a union card but a “bundle of rights and freedoms”¹³, which can be summarised by reference to the rights and freedoms protected in C87 and C98. While the protections created by C87 and C98 will be the focus of this paper, Freedom of Association is also protected by other international human rights instruments which are binding on Australia.¹⁴

Freedom of Association, as described in international law, is a positive right intended to redress the imbalance of power between workers and capital which is “collective, purposive and functional”,¹⁵ rather than an individually focused freedom to dissociate.¹⁶ The idea that Freedom of Association is an individual and not a collective freedom is often cited, particularly by those who espouse neo-liberal analyses, free market theory¹⁷ and Hayekite freedom of contract,¹⁸ as the justification for regulatory regimes which protect a right not to join a union on the basis that without a freedom not to associate Freedom of Association might result in undemocratic, compulsory unionism.

However, this description of Freedom of Association is largely incompatible with the standard ordinarily described in international instruments. As Weeks notes, promotion of voluntary unionism and the freedom to dissociate are often linked with aspirations to limit

¹³ B Creighton, ‘Freedom of Association’ in R Blanpain and C Engels (eds.), *Comparative and International Labour Law and Industrial Relations in Industrialized Market Economics* (7th ed., Kluwer, 2001) 227, p 227.

¹⁴ Article 20 of the Universal Declaration of Human Rights, Article 22(1) of the International Covenant on Civil and Political Rights (ICCPR) and Article 8.1 of the International Covenant on Economic and Social Rights (ICESCR).

The UN’s Committee on Economic, Social and Cultural Rights has held that the right of a trade union to function freely, as guaranteed by the International Covenant on Economic and Social Rights, includes the right to bargain collectively. See P Macklem, ‘The Right to bargain Collectively in International Law: Workers’ Right, Human Right, International Right?’ in P Alston (ed.), *Labour Rights as Human Rights*, (2005), 61-84, p 71 for discussion of these other instruments.

¹⁵ D Quinn, ‘To be or not to be a Member – Is That the Only Question? Freedom of Association under the *Workplace Relations Act 1996*’ (2004) 17 *Australian Journal of Labour Law* 1, at 2.

¹⁶ Creighton notes that C87 and C98 are entirely silent on the right not to associate Ch 11. Creighton, above n 13. M Thorpe and J McDonald, ‘Freedom of Association and Union Membership’ (1998) 9 *Labour and Industry* 23, at 26. Thorpe and McDonald note that the question of incorporating a negative right not to associate was discussed by the drafters of C87 but was rejected in favour of the positive right.

¹⁷ P Weeks, *Trade union security law: a study of preference and compulsory unionism* (1995) p 220.

¹⁸ Lord Wedderburn, ‘Freedom of Association and Philosophies of Labour Law’, (1989) 18 *Industrial Law Journal* 1, at 9 – 11.

the power of collectivised workers¹⁹ while leaving employer's private law rights largely untouched.²⁰ While there is some deference to voluntarism within the ILO jurisprudence²¹ any collective bargaining system which purports to give effect to Australia's international obligations cannot genuinely do so while privileging a right not to associate over the freedom to associate. To argue that because a right to Freedom of Association is a right held by an individual the nature of the right must also be individual, is to mistakenly assume that the nature of a right must necessarily be extrapolated from the bearer of the right.²² As Owens and Riley note, freedom of association is necessary for individual self actualisation through relations with others,²³ the right may be held individually but it is exercised collectively²⁴. The WRA examples discussed below indicate that legislative regimes which privilege a right not to associate will eventually be incompatible with the functional freedom for "individual workers to associate together for the purpose of collective activity" which is protected by the ILO.²⁵

III. FREEDOM OF ASSOCIATION:

THE ROLE AND FUNCTIONS OF UNIONS

If, one of the objects of Freedom of Association is the promotion of organised collective activity, and trade unions are the institutional vehicles which facilitate that activity, then the formation and effective function of trade unions can be considered one of the objects of the exercise of the Freedom of Association. Freedom of Association cannot be exercised effectively without functioning trade unions, although the manner in which it is protected can determine how unions function. Ewing posits five functions of trade unions, these are:

- a service function,

¹⁹ Weeks, above n 17, p 220.

²⁰ Weeks, above n 17, p 263.

²¹ The ILO is concerned that entry into collective negotiations should be voluntary (see Article 4 of C98), not that recognition of unions should be voluntary. The relevant choice is to negotiate or not, rather than to negotiate with the union which represents the workers or not. See also ILO, n 11 above, [880] and [949-959].

²² R Owens and J Riley, above n 6, p 458.

²³ Ibid, 460.

²⁴ This notion that Freedom of Association is an individual freedom which can be exercised collectively has been adopted by the Supreme Court of Canada in a number of decisions, including *Health Services and Support – Facilities Subsector Bargaining Association v British Columbia* 2007 SCC 27, [27 – 37] per McLaughlin CJ and LeBel J.

²⁵ R Naughton, 'Sailing into Uncharted Seas: The Role of Unions Under the *Workplace Relations Act 1996* (Cth)', (1997) 10 *Australian Journal of Labour Law* 204, at 211.

- a representation function,
- a regulatory function,
- a government function and
- a public administration function.²⁶

The particular function dominant at a given time is likely to reflect the way in which the state values and protects Freedom of Association. Ewing considers that, in a state which promotes voluntary unionism, and relies on free market principles to justify the protection of an individualist freedom not to associate, unions will be more likely to take up service and limited individual representative functions.²⁷ When collective freedom is protected unions will be free to pursue broader regulatory and participatory goals. For Ewing the regulatory function is the most important function of trade unions,²⁸ although he notes that where regulatory functions dominate over representational functions, an employee is less likely to have to be a member of the union in order to benefit from the activities of the union.²⁹ Conversely, the benefits of the service and representative functions of unions are only available to union members.

The effect of diminishing regulatory functions of unions in the UK, which Ewing describes, applies equally in the Australian context under the WRA and the FWA. Industrial situations which were once the site of co-regulation by unions through Awards have become regulated solely by government through the Australian Fair Pay and Conditions Standard and National Employment Standard and by limitations on the content of awards and agreements and by changes to their nature. The focus of industrial regulation is no longer the prevention of collective disputes but the regulation of individual employment relationships between workers and corporations.³⁰ For Ewing, “*the trade union regulatory function has become political as much as industrial with regulatory ambitions to be secured by political campaigning and by legislation rather than by collective bargaining*”.³¹ Where the ability

²⁶ K Ewing, ‘The Function of Trade Unions’ (2005) 34 *Industrial Law Journal* 1, at 13.

²⁷ *Ibid.*

²⁸ *Ibid.*

²⁹ *Ibid.*, at 4.

³⁰ Note the change from use of the conciliation and arbitration power to the use of the corporations power to constitutionally underpin industrial legislation and the High Court’s approval of this change in the *WorkChoices* decision, *NSW & Ors v the Commonwealth* [2006] HCA 52.

³¹ Ewing, above n 26, at 15.

of unions to exercise regulatory functions is in decline then the need for protection of Freedom of Association will be of increasing importance, as union membership is the prerequisite for access to the benefits of the service and representation functions.

In this respect, Ewing's analysis is consistent with Peetz's description of the effect of the co-regulatory award system on the role of unions in Australia.³² Peetz suggests that the regulatory effect of awards meant that employees did not need to be union members in order to benefit from unions' regulatory efforts, creating a substantial free rider problem. In turn, in order to discourage free riding and encourage membership, unions increasingly adopted a service model, which emphasised the representational benefits available only to members.³³ However, the ascendancy of the service model (encompassing Ewing's service and representational functions) led to a decline in member activism and eventually exacerbated declining density trends in the 1990s. In response, many unions have embraced an organising model which emphasises the collective nature of unionism and encourages grassroots member activism.³⁴ The organising model gives prominence to a characterisation of unions not as a separate institutions distinct from members, but as the institutional manifestation of members collective selves, a "continuous association of workers".³⁵ In the organising model the union IS its members and its strength and legitimacy arises from their involvement. Because the union acts through its members the organising model requires that union members' Freedom of Association be protected in all its incidents, not only the right to be a member, but also the right to participate in union activities and to be collectively recognised for the purpose of enterprise bargaining.

³² D Peetz, *Brave New Workplace*, 2006, Chapter 6.

³³ e.g. representation in disputes and unfair dismissals.

³⁴ See for example Ellem's description of the techniques used by the Pilbara unions to combat BHPIO's deunionising drive in B Ellem, 'Power, place and scale: union recognition in the Pilbara, 1999-2002' (2002) 13 *Labour and Industry*, 67.

³⁵ Peetz, above n 32, 14, here Peetz is drawing on the Beatrice and Sidney Webb's classic definition of a trade union. The absence of distinction between the Union and its members is also consistent with their party principal status in Australian labour law for example the principle that service on a union was sufficient to bind its members as discussed in *Transport Workers' Union of New South Wales v Australian Industrial Relations Commission* [2008] FCAFC 26 where the Federal court noted in obiter that even after WorkChoices there probably remained a class of matter where service on the union could be deemed to be sufficient to bind its members.

IV. UNION DENSITY AND RE-REGULATION

When collective bargaining occurs at the enterprise level, systemic factors which encourage high levels of union density will also be significant for the promotion of functional Freedom of Association. The resource intensive nature of enterprise level collective bargaining³⁶ means that a well resourced union with high levels of shop floor support and organised delegate structures will have greater capacity to achieve the object of the guarantee of Freedom of Association that is to be “*capable of determining wages and other conditions of employment by means of freely concluded collective agreements*”.³⁷

Declining Australian trade union density³⁸ is sometimes used as a justification for the need to revise collectively oriented systems of labour market regulation and to reassess the protections, rights and obligations given to trade unions within those systems.³⁹ Declining union density was used by the Howard government as a justification for the removal of union security measures and the promotion of an individual freedom not to associate as an alleged counterweight to the collective freedom.⁴⁰ However, it is arguable that decline in union density, especially if there are indications of latent unionism in the workforce,⁴¹ could indicate that Freedom of Association is not adequately protected. Peetz discusses empirical studies which indicate that increased use of individual contracts⁴² will put downward pressure on union density even in workplaces where unions are strong and collective bargains are in place.⁴³ Peetz relates these studies to the *BHPIO* case⁴⁴, discussed below, and concludes that there is a strong negative relationship between the use of individual

³⁶ L Rubenstein, ‘Chapter Seven: Confronting the challenges for unions: Freedom of Association and union security’ in G Patmore, P and Gollan, (eds.). *Partnership at Work: The Challenge of Employee Democracy* (2003), 108. G Donovan, ‘Less than they Bargained For: Union Bargaining Fees in Certified Agreements – A matter of Law, Politics or Public Policy’ (2005) 10 *Deakin Law Review* 408, at 410.

³⁷ ILO, above n 11 [882] (emphasis added).

³⁸ Australian Bureau of Statistics, ‘Employee Earnings, Benefits and Trade Union Membership’ 6310.0 August 2007 and August 1999. Union density in 2007 was at 19% whereas in 1999 for example density was 26% although it had been declining for some time.

³⁹ A Forsyth, ‘Worker Representation in Australia: Moving Towards Overseas Models?’ (2007) 33 *Australian Bulletin of Labour* 1, at 3.

⁴⁰ Thorpe and McDonald, above n 16, at 23. Thorpe and McDonald note that the then coalition government had argued that decline in union density ‘raised questions over the legitimacy of trade unions as the voice of the worker’.

⁴¹ B Van Woonroy, et al, ‘Australia at Work: Working Lives Statistics and Stories’ October 2008, p 50.

⁴² The CFA considers that individual contracts which take precedence over collective agreements are inimical to Freedom of Association. ILO, above n 11, [1054-1057.]

⁴³ D Peetz, ‘Individual Contracts, Bargaining and Union Membership’ (2002) 28 *Australian Bulletin of Labour* 39, at 44 and 49.

⁴⁴ *Australian Workers Union v BHP Iron Ore Pty Ltd* (2001) 104 IR 14.

contracts and union membership⁴⁵. In this analysis, individual contracting does not fill a representational void created by low union density but itself creates the void,⁴⁶ diminishing the value of union membership by restricting a union's ability to bargain for its members. Gardner suggests that the incremental nature of regulatory change leading up to WorkChoices⁴⁷ disguised what was actually a regulatory shift as a social change, such that declining union density is the result of, and not the justification for, re-regulation.⁴⁸ As Van Woonroy recognises, "the decision to join a union is not an individual decision reached, in social isolation" but is "influenced by a wide number of contextual factors, including: the economic and social climate; the *institutions of the labour market*; the interests of employers; and the organisational capacity of unions themselves".⁴⁹ The normative effect of labour market institutions, including legislative collective bargaining mechanisms, may influence employees' perception of their Freedom of Association as much as legislation nominally directed at promoting Freedom of Association.

V. FREEDOM OF ASSOCIATION AS A HUMAN RIGHT: A RESPONSE TO THE NEO-LIBERAL AGENDA FOR RE-REGULATION

If Freedom of Association is valued in its own right, as a human right,⁵⁰ then the methods by which it is protected in national law should not be tied to levels of unionisation at a particular time. Freedom of Association is more than a shield preventing an international labour market version of the prisoner's dilemma and race to the bottom, it is a positive tool for the promotion of economic and social progress with inherent value.⁵¹ A government which values decent work and dignity in the workplace may choose to put in place

⁴⁵ Peetz, above n 43, at 47.

⁴⁶ Peetz, above n 43.

⁴⁷ The *Workplace Relations Amendment (WorkChoices) Act 2005* (Cth) which came into operation on 27 March 2006 will be referred to as WorkChoices.

⁴⁸ M Gardner, 'Beyond WorkChoices: Negotiating a Moment' (2008) 18 *Economic and Labour Relations Review* 33, at 33, 37. Gardner refers to the period of change commencing with the *Industrial Relations Reform Act 1993* (Cth).

⁴⁹ Van Woonroy, above n 41, at 43. (emphasis added)

⁵⁰ 1998 ILO Declaration on Fundamental Principles and Rights at Work, and by its inclusion in the ICECSR, the ICCPR and the Universal Declaration of Human Rights. However, characterisation of international labour standards as human rights is not without controversy: see the discussion in C Fenwick, and I Landau, 'WorkChoices in International Perspective' (2006) 19 *Australian Journal of Labour Law* 127, at 133.

⁵¹ International Labour Organisation, 'Report of the Director General: Organising for Social Justice' Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work' (2004), p 50, and B A Langille, 'What is international Labour Law for?' March 2005 Governing Body Public Lecture. (2005) <<http://www.ilo.org/public/english/bureau/inst/download/langille.pdf>> at 25 January 2009.

mechanisms for workplace representation of workers other than by unions when faced with low levels of unionisation. However, those mechanisms should not be at the expense of collective, self determined, mechanisms of employee organisation and representation. Langille's description of Sen's capability approach to human rights issues indicates that if Freedom of Association is "not only the destination but the path"⁵² then collective Freedom of Association must be facilitated as an end in itself and not only when high levels of unionisation democratically legitimate recognition of the benefits of collective regulation of the workplace.

In both Deakin's analysis⁵³ and Langille's analysis, the suggested aim of international human rights law, and international labour law, is to promote the capability of humans to lead lives which "we have reason to value"⁵⁴ by the removal of states of unfreedom. To this end, Deakin suggests that the creation of social rights will institutionalise the process of individual capability formation.⁵⁵ In the case of international labour law the unfreedom created by the inequality of bargaining power between workers and capital is addressed by the creation of a constraint on freedom of contract, not as to the substance of the contract but by requiring the employer to recognise and bargain with workers collectively.⁵⁶ As Langille notes, "the most effective way to enforce substantive rights is to put in place the process rights",⁵⁷ and of the process rights created by international labour law Freedom of Association is pre-eminent. Langille draws on the Canadian experience to suggest that elaborate alternative legal mechanisms intended to protect the substantive rights of workers who are not unionised are largely ineffective when compared to the role of collective voice and action in securing the same substantive rights.⁵⁸

VI. THE SCHEME OF ENTERPRISE BARGAINING UNDER WRA

Since the enactment of the WRA, the system of enterprise level bargaining in Australia has been characterised by multiple forms of instrument. Statutory agreements could be made:

⁵² B A Langille, above n 51, at 20.

⁵³ S Deakin, 'Social Rights in a Globalized Economy' in P Alston (ed.), *Labour Rights as Human Rights* (2005) 51-60, p 56.

⁵⁴ Langille, above n 51, at 19, quoting A Sen, *Development as freedom* (1999).

⁵⁵ Ibid.

⁵⁶ B A Langille 'Core Labour Rights – The True Story (Reply to Alston)', (2005) 16 *The European Journal of International Law* 409, at 430.

⁵⁷ Ibid, at 435.

⁵⁸ Ibid.

- Between a union and an employer with respect to current or future employees⁵⁹
- Between an employer and its employees collectively⁶⁰
- Between an employer and its employees individually⁶¹
- Before WorkChoices, in settlement of industrial disputes, which of necessity were agreements between an employer and a union⁶²
- After the enactment of WorkChoices, by an employer unilaterally with respect to future employees of a greenfields site⁶³

Choice of instrument was solely at the discretion of the employer. Neither union nor employee, individually or collectively, had the ability to require an employer to enter into a different form of agreement. Prior to WorkChoices, when a collective agreement was made directly with employees, their union could act as their representative and apply to be bound.⁶⁴

Where an agreement was made with a union, the union had status as a party principal to the agreement, not merely as an agent or representative of its members. This party status reflected unions' traditional role as parties to awards made in settlement of industrial disputes⁶⁵ where unions were an organic part of the award system.⁶⁶ Under the award system party status amounted to a system of union recognition,⁶⁷ contributing greatly to union security.⁶⁸ It did not necessarily follow that party status to agreements conferred the same benefits where there was no obligation to bargain with the union. The level of union recognition afforded by the Award system did not give rise to an obligation to recognise unions for the purpose of collective bargaining at the enterprise level. The absence of an obligation to recognise unions for the purpose of collective bargaining was one of the most

⁵⁹ *Workplace Relations Act 1996* s.170LJ, s.170LL and after 27 March 2006 s.328.

⁶⁰ *Workplace Relations Act 1996* s.170LK and after 27 March 2006 s.327.

⁶¹ *Workplace Relations Act 1996* s.170VF and s.326 after 27 March 2006.

⁶² *Workplace Relations Act 1996* s.170LO.

⁶³ *Workplace Relations Act* s.330.

⁶⁴ *Workplace Relations Act 1996* s.170LK(4) and s.170M(3).

⁶⁵ J Shaw, 'Observations on Trade Union Recognition in Britain and Australia' [2001] *University of NSW Law Journal* 20, at 25 -31.

⁶⁶ Quinn, above n 15, at 6.

⁶⁷ J Whittard; et al, 'Collective bargaining rights under the Workplace Relations Act: the Boeing dispute', (2007) 18 *Labour and Industry*, 1, at 3.

⁶⁸ Rubenstein, above n 36, at 103.

significant flaws of the 1993 and 1996 Acts when analysed from a Freedom of Association perspective⁶⁹. Lack of obligation to recognise a union for the purpose of collective bargaining meant that limited statutory recognition of the concept of bargaining in good faith, for example the obligation to genuinely bargain, were eventually found to be very narrow in scope as the result of the *Asahi*⁷⁰ and *Sensis*⁷¹ decisions.

A. Effect of Multiple Types of Instruments on Freedom of Association

The multiplicity of instrument types under the WRA had the effect of limiting practical Freedom of Association, contributing to a longstanding failure to meet the standards created by Australia's international obligations.⁷² The interaction of the multiple instrument structure with other provisions of the Act combined to give rise to a system which, in many ways, limited the functional capacity of unions, including by limiting their access to the workplace and by allowing employers to bargain to exclude unions to such an extent that some forms of agreement became synonymous with de-unionisation. Employers' ability to use enterprise bargaining to physically, practically and symbolically exclude unions from the workplace is explored below in the context of two aspects of the WRA: Right of Entry and Union Recognition.

a. Agreement Making and Limits on Access to the Workplace

Appropriate rights of access to the workplace are an element of Freedom of Association underpinning the right to organise and bargain.⁷³ In relation to the effect of AWAs, the ILO's Committee of Experts on the Application of Conventions and Recommendations (CEACR) called on the Australian government to remove artificial restrictions on union access to the workplace. The Committee noted, regarding access limits created by non union agreement making, that:

⁶⁹ Whittard, et al, above n 67, at 4.

⁷⁰ *Asahi Diamond Industrial Australia Pty Limited v Automotive, Food Metals and Engineering Union* L9800, 1 March 1995, per O'Connor P, Ross VP, Acton SDP, Merriman C and Harrison C.

⁷¹ *Sensis Pty Ltd v Members of the Full Bench of the Industrial Relations Commission* [2005] FCAFC 74 (12 May 2005) per Wilcox and French JJ, [63-70].

⁷² C Fenwick, *Workers' Human Rights in Australia*, Centre for Employment and Labour Relations Law Working Paper No. 39, The University of Melbourne, 2006, at 31.

⁷³ ILO, above n 11, [1102-1109].

*“a trade unionist should not be limited in discussions at the workplace only to eligible employees, but should be also able to apprise workers of the potential advantages of unionisation or of coverage by a collective agreement instead of an AWA”.*⁷⁴

A substantial impediment to functional Freedom of Association created by the WRA was that the making of a non union agreement prevented unions from having access to members while in the workplace. The Act created a statutory right of entry which reflected unions’ traditional role as co-regulator, and co-enforcer of awards. The right of entry scheme under the Act gave unions access to workplaces, without employer consent, for purposes of discussion with employees and to inspect for breaches of awards and other instruments which they were party to.⁷⁵

The right of entry scheme was a fundamental element of the award system. Prior to the WorkChoices and the establishment of the office of the Workplace Ombudsman (and its precursor the Office of Workplace Service), unions were the principal enforcers of awards. The government inspectorate was small and historically had not engaged in aggressive enforcement or prosecution strategies, preferring a persuasive enforcement approach⁷⁶. The integrity of the Award system, as a system of minimum standards was dependent on union action to enforce the minima, and unions needed a right of entry in order to do that. The role of unions in the Award system was doubly co-regulatory: they participated in the setting of minimum standards and they were the holders of delegated authority from the state to enforce those standards.

Under the WRA and its predecessors the statutory right to enter a workplace was founded on a requirement that the workers be covered by an industrial instrument which was binding on the union. Without the statutory right of entry, a union official can only access the private property of the workplace with employer consent. Where an employer withholds their consent the union risks infringing private property rights when it attempts to organise in the workplace. Statutory right of entry is a significant prioritisation of workers’ collective rights

⁷⁴ International Labour Organisation Committee of Experts on the Application of Conventions and Recommendations, ‘Individual Direct Request concerning Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) Australia’ (2008) <<http://www.ilo.org/ilolex/cgi-lex/pdconv.pl?host=status01&textbase=iloeng&document=20958&chapter=9&query=Australia%40ref&highlight=&querytype=bool&context=0>> at 25 January 2009

⁷⁵ Including breaches of awards, agreements, and the Act. Similarly, state legislation also created rights for unions to enter to for industrial and occupational health and safety purposes.

⁷⁶ L Johns, “Wielding a Bigger Stick in Workplace Relations Compliance”, (2008) 82 *Law Institute Journal* 42, at 42.

over private property rights. However, when the traditional link between right of entry and award coverage played out into the agreement system, it became a tool for union exclusion. The conclusion of a non union agreement prevented the union from accessing the workplace, except with the employer's consent, regardless of whether union members were employed there.⁷⁷ In a workplace where all of the employees were covered by AWAs the union's right of entry would be extinguished regardless of whether the employees covered by the AWAs were union members.⁷⁸

b. Union Recognition and Good Faith Bargaining

Lack of either union recognition rules or obligations to bargain in good faith in the WRA gave employers the opportunity to use the non union and individual forms of agreement making to de-unionise workplaces and to practically limit Freedom of Association. Both before and after WorkChoices non union and individual forms of agreements were commonly made on a 'take it or leave it' basis rather than by genuine negotiations, often for reasons directly related to the employer's desire to de-unionise the workplace.⁷⁹ This tendency was so pronounced that it is more appropriate to refer to these streams as agreement *making* rather than *bargaining* given the legislative focus on employee consent rather than negotiation.⁸⁰

That the WRA's provision that industrial parties genuinely try to reach agreement⁸¹ did not give rise to an obligation to recognise a union or an obligation to bargain in good faith was confirmed in the *Sensis* decisions⁸². In *Sensis* the employer had commenced negotiations to replace an existing non union agreement. The union asked the employer to meet with it as the representative of the employees in the enterprise bargaining negotiations. The employer did not wish to meet with the union, either as party to a proposed agreement or as representative of the employees who would be covered by the proposed agreement. The union sought orders from the AIRC that the employer should meet with it. The Commission

⁷⁷ *CFMEU v Ensham Resources Pty Ltd*, PR943724, 23 February 2004 per Giudice J, Harrison SDP, Cribb C.

⁷⁸ *National Union of Workers v ALDI Foods Pty Limited*, PR943894, 23 February 2004, per Giudice J, Harrison SDP, Cribb C.

⁷⁹ D Peetz, 'Individual Contracts, Bargaining and Union Membership' (2002) 28 *Australian Bulletin of Labour* 39, at 42. K van Barneveld and R Nassif, 'Motivations for the Introduction of Australian Workplace Agreements', (2003) 14 *Labour and Industry* 21, at 22, 27-29. B van Woonroy, et al, 'Australia at Work: the Benchmark Report' (2007), pp 51 – 56.

⁸⁰ C Briggs and R Cooper, 'Between Individualism and Collectivism? Why Employers Choose Non Union Collective Agreements' (2006) 17 *Labour and Industry*, 1, at 4.

⁸¹ WRA, s170MP and s.170MW (prior to 27 March 2006)

⁸² *CPSU v Sensis Pty Ltd* (2003), 2003, PR930269, per Smith C.

found that it had jurisdiction to order that the employer meet with the union and allow the employees to be represented by the union in the enterprise bargaining negotiations.⁸³ The decision was appealed. A majority of a Full Bench of the Federal Court upheld the Commission's original finding that it had jurisdiction to make the directions:

*"the only proper rationale of the direction sought was to provide representation and assistance for Sensis employees in their bargaining process. There is no rationale which would support an entitlement of the CPSU to participate in those meetings in its own right."*⁸⁴

The court was careful to dispel any suggestion that this right gave rise to an obligation on the employer to bargain in good faith or recognise the union in any way except as one possible representative of the employees. The commission's power to issue the directions was limited to a direction that the employer must meet with the representative of the employees' choosing. Any direction which required that the employer meet with the union in its own right would be beyond power as it could have the effect of limiting the employer's right to choose the form of instrument which covered the workplace.⁸⁵ This was consistent with the earlier *Asahi*⁸⁶ decision in which a Full Bench of the commission noted that it was wholly within an employer's discretion not to make an agreement with a union and that, even in the context of the limited good faith bargaining obligations in the Act (at that time)⁸⁷, a union could not force an employer to make an agreement with it:

*"An agreement cannot be reached with a person who does not want to agree and negotiations for an agreement cannot take place with a person who does not want to negotiate."*⁸⁸

Under the WRA, a union had no ability, beyond its member's willingness and ability to take industrial action, to force an employer to recognise it at the bargaining table. Moreover

⁸³ The commission's finding was based on the then s.170NA and by reference to the objects of the Act at that time which included the promotion of enterprise bargaining.

⁸⁴ *Sensis Pty Ltd v Members of the Full Bench of the Industrial Relations Commission* [2005] FCAFC 74 (12 May 2005) per Wilcox and French JJ, at [63-70].

⁸⁵ *Ibid*, at [70-71, 79].

⁸⁶ *Asahi Diamond Industrial Australia Pty Limited v Automotive, Food Metals and Engineering Union* L9800, 1 March 1995, per O'Connor P, Ross VP, Acton SDP, Merriman C and Harrison C.

⁸⁷ *Industrial Relations Act 1988* (Cth), s.170QK obliged the Commission to ensure that parties seeking to reach an agreement did so in good faith.

⁸⁸ *Ibid*, at part 9.1.

several prolonged recognition disputes⁸⁹ demonstrated that an employer who was prepared to outwait industrial action could continue to ignore a union and its members' desire for a collective agreement indefinitely.

In addition to the employers' discretion to choose whether or not to negotiate with a union at all, the 1996 Act allowed employers to choose which union it would negotiate with by virtue of provisions which stated that an agreement could be made with one or more trade unions, of which "at least one member" was employed in the enterprise.⁹⁰ An employer could choose the union with which it wanted to negotiate and perhaps exert undue interference on employees to choose that union. In 2006 the ILO Committee of Experts pointed out that those provisions gave employers discretion to interfere with trade union internal affairs in breach of Freedom of Association,⁹¹ and arguably limited employees' right to join a union of their own choosing.

The effect of that discretion on Freedom of Association is illustrated by the circumstances of the DHL decision.⁹² DHL acquired a number of courier businesses covered by an agreement with the Transport Workers' Union (TWU). DHL, preferring to deal with the National Union of Workers (NUW), negotiated an agreement with the NUW,⁹³ and took steps to restrict the TWU's access to the workplace. DHL conducted a ballot to approve the NUW agreement. The court found that the ballot process was flawed to the extent that it could not be said that the agreement was validly approved.⁹⁴ The court also found that DHL's conduct had the effect of inducing its employees to resign their membership of the TWU in breach of s.794 of the Act. The finding was not that DHL should not have made an agreement with the NUW but that the way it went about it was inappropriate. There was direct evidence before the court that some members had resigned from the TWU because "*the union is not allowed to support its members at my worksite*".⁹⁵ Although the court considered that it was appropriate to consider "*intangible effects of the affront to the rights of the employees, or*

⁸⁹ For example the *Boeing* dispute, discussed by Whittard, above n 67, and below at n 168.

⁹⁰ *Workplace Relations Act 1996* s.170LJ(1)(a) and s.328 after 27 March 2006.

⁹¹ International Labour Organisation ILCCR: Examination of individual case concerning Convention No. 87, Freedom of Association and Protection of the Right to Organise, 1948 and Convention No. 98, Right to Organise and Collective Bargaining, 1949 Australia (2006) <<http://www.ilo.org/ilolex/cgi-lex/pdconv.pl?host=status01&textbase=iloeng&document=754&chapter=13&query=Australia%40ref&highlight=&querytype=bool&context=0>> at 30 December 2008.

⁹² *Transport Workers Union of Australia v DHL Exel Supply Chain (Australia) Pty Ltd* [2008] FMCA 604

⁹³ The negotiations took place in Melbourne although the workplace was in Sydney.

⁹⁴ *TWU v DHL*, above n 92, at [59].

⁹⁵ *Ibid* at [94].

their loss of a chance to approve a better agreement, or the unions' lost income as result of losing members",⁹⁶ the court found that it was not possible to void the improperly approved agreement. Nor was the court minded to make orders requiring DHL to provide rights of access and representation to the TWU during the life of the new NUW agreement.⁹⁷ The court also declined to make an order that DHL should make a statement to its employees that they could choose to be represented by the TWU. The court was prepared to order only a pecuniary penalty.

Given that DHL, a part of a multinational group of companies which employs more than 286,500 workers worldwide,⁹⁸ was allowed to enjoy the fruits of its conduct and apply its new agreement with the NUW (which will also have the effect of preventing TWU access to the workplace), and that the pecuniary penalties are limited to 300 penalty units, or \$33,000, per contravention,⁹⁹ this outcome seems startlingly inadequate from the perspective of Freedom of Association. That inadequacy is even more apparent given the court's acceptance that those employees who had remained members of the TWU would probably resign in greater numbers during the life of the agreement even to the point that the TWU might lose its entire membership at the site.¹⁰⁰

VII. INDIVIDUAL AND COLLECTIVE FREEDOMS OF ASSOCIATION AND THE WRA

The WRA included provisions for direct protection of Freedom of Association which operated in conjunction with its collective bargaining framework. The Act prohibited conduct by employers which was discriminatory, prejudicial or injurious to employees where that conduct was motivated, in whole or in part, by a prohibited reason.¹⁰¹ The prohibited reasons included membership and non membership of a union. The Act also prohibited conduct motivated by an employee's entitlement to an industrial instrument, including awards and collectively negotiated agreements.¹⁰² In addition, the Act prohibited

⁹⁶ Ibid at [100].

⁹⁷ under s.807(1)(c) of the Act.

⁹⁸ DHL corporate website <<http://www.dhl.com.au/publish/au/en/about/network.low.html>> at 10 January 2009.

⁹⁹ under s.407(1)(b) and 807(1)(a)

¹⁰⁰ *TWU v DHL*, above n 92, at [94].

¹⁰¹ In Part XA prior to 27 March 2006 and Part 16 thereafter.

¹⁰² After WorkChoices the employee's entitlement to the benefit of the industrial instrument had to be the sole or dominant reason for the employer's conduct to enliven this protection.

coercion of employees in relation to their union membership, or inducement of employees to resign union membership. The interaction of those provisions with employer's discretion as to the form of industrial instrument which would apply in a workplace, and their combined failure to provide adequate functional protection of freedom of association, is exemplified by the *BHPIO* decisions.

A. *The BHPIO decisions*

In the *BHPIO* decisions¹⁰³ the Federal Court considered whether bargaining conduct by BHPIO amounted to a breach of the legislative principles that an employer must not injure or alter the position of an employee to their prejudice by reason of their membership of a registered organisation or induce an employee to resign their union membership.¹⁰⁴ BHPIO, desiring to reduce or eliminate the role of unions in the workplace,¹⁰⁵ had withdrawn from collective bargaining and made future wage increases conditional upon signing a statutory individual contract. There was an immediate and substantial drop in union membership which correlated with acceptance of individual contracts.¹⁰⁶ The union claimed that BHPIO's conduct amounted to an injury to its members because it weakened their bargaining position and also that it was prejudicial to those employees whose access to wage increases was limited by their refusal to take up individual contracts. The union also claimed this conduct was to intended induce employees to resign from the union.¹⁰⁷

In an interlocutory appeal, the Full Court of the Federal Court found that, taking into account the permissive nature of the system of enterprise bargaining with regard to individual contracts, there was no discriminatory conduct because BHPIO had not singled out members of the union for adverse treatment. Kenny J, following the Full Court's reasoning, held that no prejudice attributable to BHPIO arose as a result of the employer's offer, any prejudice

¹⁰³ Initially before Grey J who issued an interlocutory injunction in *AWU v BHPIO* (2000) 96 IR 422. This interlocutory decision was appealed to the Full Court of the Federal Court in *BHPIO v AWU* (2000) 102 FCR 97, the Full Court upheld Grey J's order and remitted the matter to Kenny J for determination in *Australian Workers Union v BHP Iron Ore Pty Ltd* [2001] FCA 3. While the proceedings before the Full Court were interlocutory in nature Kenny J followed their reasoning that s.298K required intentional conduct singling out employees for adverse treatment. For a discussion of the interaction of these decisions see: D Noakes and A Cardell- Ree, 'Individual Contracts and the Freedom to Associate' (2001) 14 *Australian Journal of Labour Law* 89.

¹⁰⁴ Workplace Relations Act s.298K.

¹⁰⁵ B Ellem, 'Power, place and scale: union recognition in the Pilbara, 1999-2002' (2002) 13 *Labour and Industry*, 67, at 75. Kenny J found that BHPIO wanted to create a structure where unions would have no operation role and would not be able to hinder productivity or workplace change by eliminating the need to negotiate with the unions. *Australian Workers Union v BHP Iron Ore Pty Ltd* [2001] FCA 3, at [208], [214].

¹⁰⁶ Quinn, above n 15, at 32.

¹⁰⁷ *Workplace Relations Act 1996* s.298M

suffered by an employee was the result of their own choice to accept or reject the offer of an individual contract.¹⁰⁸ The union were unable to show that the reason for the members' resignations was the offer of individual contracts. Kenny J rejected a submission, based on earlier jurisprudence,¹⁰⁹ that the notion of union membership protected by the Act was more than simple possession of a membership ticket. In particular, Kenny J considered that because some of the incidents of union membership were expressly protected elsewhere in the legislation this indicated that parliament had not intended to protect those incidents of union membership which were not specifically named.¹¹⁰

B. International and Domestic Criticism of the Narrow Approach to the Meaning of Union Membership

If we accept that one of the fundamental purposes of international labour law, and of trade unions under that law, is to act as a '*countervailing force to counteract the inequality of bargaining power*',¹¹¹ which is inherent in the relationship between employees and employers then it is reasonable suppose that respect for Freedom of Association will also entail a right for employees to insist that their employer recognise their union in enterprise bargaining negotiations.¹¹² However, as Creighton notes, ILO jurisprudence stops short of directly recognising this principle, notwithstanding the desirability of union recognition, because of a preference for voluntary entry into negotiation for collective bargains.¹¹³ This reluctance may arise because, for the ILO, collective bargaining is synonymous with bargaining with a union. The ILO does not condone direct bargaining with employees, preferring that: "*negotiations with non-unionized workers take place only where there is no representative trade union in the enterprise.*"¹¹⁴ Thus the Australian legislation which allowed an employer to collectively bargain directly with its employees while refusing to recognise their union, is so far beyond the scope of the ILO's principles as to result in a

¹⁰⁸ Noakes and Cardell-Ree, above n 103 include a detailed discussion of this aspect of the decision.

¹⁰⁹ *Davids Distribution Pty Ltd v National Union of Workers* [1999] FCA 1108, at [107]. In that decision Wilcox and Cooper JJ held that the right to join a union protected by the Act was "more than the right to be a member. It is the right to participate in protected union activities, including the taking of collective industrial action against an employer to seek to obtain better industrial conditions".

¹¹⁰ An apparent, although unstated, application of the *expressio unius est exclusio alterius* principle.

¹¹¹ Kahn-Freund as quoted in B Creighton and A Stewart, *Labour Law* (fourth edition) 2005, p 5.

¹¹² Creighton, above n 13, at 253.

¹¹³ Creighton, above n 13, at 253.

¹¹⁴ International Labour Organisation Committee of Experts on the Application of Conventions and Recommendations, 'Individual Observation concerning Right to Organise and Collective Bargaining Convention, 1949 (No. 98)' (2006) <<http://www.ilo.org/ilolex/cgi-lex/pdconv.pl?host=status01&textbase=iloeng&document=8516&chapter=6&query=Australia%40ref&highlight=&querytype=bool>> at 25 January 2009. R91, The Collective Bargaining Recommendation of 1951

perversion of their intention when applied to justify voluntary recognition, as occurred at BHPIO, in a multi instrument system.

For Quinn, the Kenny J's approach in BHPIO misses the point that the reason why employers discriminate against union members is not because of their membership, per se, but because of the perceived effects of union membership.¹¹⁵ The evidence in BHPIO, which in the end was fatal to the union's case, was that BHPIO did not mind if employees were union members as long as BHPIO did not have to deal with the union in any way which affected their business operations. The court did not recognise that this goes directly to the heart of union membership, a functioning union must be able to affect the business operations of the employers of its members: apart from a few ideologues very few employees are likely to join a union which does not have that capacity. The protection offered by Freedom of Association must correspondingly protect the features of union membership,¹¹⁶ including the right to join a functioning union, the normal incidents of union membership and the fruits of collective action.¹¹⁷ The courts' failure to recognise the centrality of collective bargaining to freedom of association led to criticism of the *BHPIO* decisions, including by the CEACR, as rendering the protection of Freedom of Association in the Workplace Relations Act as almost meaningless.¹¹⁸

One prominent criticism of the *BHPIO* approach is that made by North J in the *Belandra* decision.¹¹⁹ North J rejected the approach taken by Kenny J in *BHPIO* and held that the Act protected conduct carried out because of the activities of the union as an incident of membership of the union.¹²⁰ While North J's decision did not turn on the right to bargain, it is illustrative of the relevant international law principles and their uncertain application under the WRA. North J concluded that the Act's protection of the freedom to join a union also extended to protection of activities carried out as an incident of that membership.¹²¹

¹¹⁵ Quinn, above n 15, at 13.

¹¹⁶ Quinn, above n 15, at 29.

¹¹⁷ Quinn, above n 15, at 30.

¹¹⁸ B Ellem, et al. 'WorkChoices: Myth-making at Work', (2005) *Journal of Australian Political Economy* 13, at 18. CEACR, *Individual Observation concerning Convention No. 98, Right to Organise and Collective Bargaining, 1949 Australia* (2005). See also R Owens and J Riley, *The Law of Work* (2007), p 473 for discussion of the ILO's response to the BHPIO decision.

¹¹⁹ *Australian Meat Industry Employees Union v Belandra Pty Ltd* (2003) 126 IR 165 (Belandra).

¹²⁰ Belandra, above n 119 [226].

¹²¹ Belandra, above n 119, [216].

North J considered the application of international law principles in relation to Freedom of Association and the content of the freedom to be protected. In particular, he drew on English jurisprudence that a union member's reliance on their union to negotiate terms and conditions of employment was the "outward and visible manifestation of trade union membership" such that there was no valid distinction between being a member of a union and making use of the essential services of the union.¹²²

The *Wilson and Palmer*¹²³ decision of the European Court of Human Rights also underpinned North J's reasons. North J held that *Wilson and Palmer* conditioned Australia's international obligations in relation to Freedom of Association.¹²⁴ In *Wilson and Palmer*, the employer had offered individual contracts and refused pay increases to employees who did not accept individual contracts. The European Convention protects "the right to Freedom of Association with others, including the right to form and join a trade union for the protection of his interests".¹²⁵ *Wilson and Palmer* is authority for the proposition that, under the European Convention, protection of Freedom of Association extends at least as far as protecting an employees' right to instruct a union to make representations and attempt to regulate relations with their employer by collective means. The European Court held that by permitting employers to use financial incentives to induce surrender of important union rights, the UK had failed in its obligation to protect the right to Freedom of Association and the right to join a union,¹²⁶ the contrast with the *BHPIO* outcome is immediately apparent.

North J also considered decisions of the Supreme Court of Canada in relation to the level of protection of Freedom of Association guaranteed by the *Canadian Charter of Rights and Freedoms*. That jurisprudence has rejected a narrow approach to construing the protections associated with the right to be a member of a union. North J noted Canadian authority that constitutional protection of Freedom of Association extends beyond simple "*associational status to give effective protection to the associational interests to which the constitutional guarantee is directed*".¹²⁷ Since *Belandra* this view of Freedom of Association has been

¹²² *Belandra*, above n 119, [211].

¹²³ *Wilson, National Union of Journalists and Others v. the United Kingdom*, [2002] IRLR 568.

¹²⁴ In this case North J was referring to the ICESCR and ICCPR which are in similar terms to the European Convention in this respect.

¹²⁵ European Convention on Human Rights, Article 11.

¹²⁶ *Belandra*, above n 119, at 221.

¹²⁷ *Re Public Service Employees Relation Act (Alberta)* [1987] 1 SCR 313 as referred to in *Belandra* above n 119, at 224.

confirmed by the Canadian Supreme Court in *Health Services Support*¹²⁸ where McLachlin CJ, in the majority, held that collective bargaining was the most significant activity through which freedom of association was expressed¹²⁹, and that recognition that “workers have a right to bargain collectively as a part of their freedom to associate reaffirms the values of dignity, personal autonomy, equality and democracy”¹³⁰.

The issue of whether the WRA protected only the right to join a union or the broader incidents of that right was not determinatively settled. The decision of the Full Bench of the Federal Court in BHPIO was made at an interlocutory stage, without benefit of evidence, the decisions of Kenny J and North J are decisions of single members of the court. As Noakes and Cardell-Ree note, while the issue remained unresolved, it appeared that the balance of decisions inclined to the narrower membership only protection, notwithstanding the divergence from international consideration of the issue.¹³¹ In any event, the need to address this question of the scope of Freedom of Association appears to form a part of the justification for the approach taken to specific protection of Freedom of Association in the FWA, which is discussed further below.

VIII. THE MACHINERY OF ENTERPRISE BARGAINING CREATED BY THE FWA

In addition to mechanisms for direct protection of Freedom of Association, a number of aspects of the collective bargaining mechanism created by the FWA will affect Freedom of Association. The FWA’s enterprise bargaining mechanism is briefly outlined below. Two aspects of the scheme of the FWA which address issues created by the WRA are examined: the creation of union recognition and bargaining process rights and the effect of the scheme on right of entry. The FWA reframes the permissible content of agreements, in a manner which will affect the role of unions, setting out what is permissible, lawful and mandatory in a collective agreement. The likely effects on Freedom of Association, of the rules created by the Act about the content of collective agreements are assessed in the context of effective recognition of the right to bargain.

¹²⁸ *Health Services and Support – Facilities Subsector Bargaining Association v British Columbia* 2007 SCC 27.

¹²⁹ *Ibid*, at 66.

¹³⁰ *Ibid*, at 86.

¹³¹ Noakes and Cardell-Ree, above n 103, at 93.

The influence of statutory mechanisms relating to collective agreements, made with respect to current and future employees, in single enterprise bargaining on Freedom of Association are the focus of discussion in this paper. The FWA promotes bargaining at the enterprise level, although there is also scope for some multi employer bargaining in limited circumstances. The Act continues to outlaw industry wide pattern bargaining.¹³² The ILO views bargaining at levels above the enterprise, as consistent with Freedom of Association, and the maintenance of restrictions on those kinds of bargaining as an inappropriate limit on the exercise of the right to bargain with attendant effects on Freedom of Association.¹³³ While those limits on Freedom of Association are maintained by the FWA they are not the focus of this paper.

In relation to greenfields sites, the FWA removes the WorkChoices option of an employer making an agreement with itself. Greenfields agreements can now only be made with a Union. In addition to addressing the oxymoronic dissonance associated with the concept of a unilateral employer greenfields ‘agreement’ the removal of this option will eliminate the detriments to Freedom of Association associated with unilateral greenfields ‘agreements’ under the WRA.

With respect to enterprise level bargaining, the FWA replaces WorkChoices’ three instrument system with a single type of instrument under which an employer may make an agreement with its employees. The employer may initiate bargaining or may respond to a bargaining request from its employees or their representative. While no formal notice initiating bargaining is required, an employer who wishes to commence bargaining, or who otherwise agrees to bargain, must give its employees a notice of representational rights. The notice must advise the employees of their right to appoint a bargaining representative. An employee must be advised that if they are a union member the union is their default bargaining representative. A union member also has a right to appoint someone other than the union as their bargaining representative and must be notified of that right. The notice of representational rights must be given by the employer within 14 days of the commencement of negotiations or agreement to bargain.¹³⁴ The notice requirements are not dissimilar to those created by s.170LK(4) of the 1996 Act which required an employer who wished to make an agreement with its employees (rather than with a union) to advise its employees

¹³² Fair Work Act 2008 (FWA), s.409, 412.

¹³³ ILO, above n 11, at [988-991].

¹³⁴ FWA s.173 – 4.

that they were entitled to be represented by their union in the negotiations. However, under the 1996 Act those obligations could be satisfied by a single desultory¹³⁵ meeting with the employees' union. The application of the FWA's mutual good faith bargaining obligations, which are likely to require more of employers, will be of significance in this respect.

A. Statutory Union Recognition

The FWA creates a new class of participants in enterprise bargaining negotiations called bargaining representatives. Procedural rights are conferred on bargaining representatives although not all bargaining representatives are 'parties' to the agreement in the contractual sense. The agreement is made between the employer and its employees rather than between the employer and the union, even where the employees are union members. Bargaining representatives in the FWA process are:

- the employer,
- the employees (if they appoint themselves as their own bargaining representatives pursuant to s.176(4)),
- any union either as the default representative appointed by its members who will be covered by the agreement,
- any other person appointed in writing by the employees, and
- any person appointed in writing by the employer.

An employer, or an employer's bargaining representative, must not refuse to recognise or bargain with another bargaining representative.¹³⁶ Where a union has members in the workplace the employer must recognise the union as the default bargaining representative of those members, unless the members appoint some other person as their bargaining representative. The Act also allows an employee to revoke a union's status as their bargaining representative, without appointing another representative¹³⁷, although beyond the possibility of creating distinctions between a union and its members the purpose of this provision is not clear.

¹³⁵ A Forsyth and C Sutherland, 'Collective Labour Relations Under Siege: The Work Choices Legislation and Collective Bargaining' (2006) 19 *Australian Journal of Labour Law* 183.

¹³⁶ FWA s.179.

¹³⁷ FWA s.178A

There is no majority requirement for union recognition in the Act. An employer is obliged to recognise any union with even a single member in the workplace, as that employee's bargaining representative, as long as the member is within the eligibility rule of the union.¹³⁸ Failure to recognise a bargaining representative will attract a civil remedy.¹³⁹ This protection is not directed solely at recognition of registered organisations, or even at unions and employee associations, but is equally available should an employee choose to appoint a lawyer, consultant or some other person as their representative. Perhaps, even more than obligations to bargain in good faith, this mandatory recognition provision, in conjunction with the single instrument structure, enhances functional Freedom of Association by enhancing the "social legitimacy of unions"¹⁴⁰ in the bargaining process. Although, at the same time, the FWA legitimates the participation of other employee bargaining representatives on an equal basis with unions without requiring that they have any kind of qualification or collective authority, and seems to go to some length to make it clear that a unions status as bargaining representative is revocable, and severable from membership.

The Act does not specify qualifications for bargaining representatives who are not registered organisations, although this could have been the subject of regulation¹⁴¹. Regulation 2.06 does specify that an employee's bargaining representative must be free from control by the employer or another bargaining representative and free from improper influence from the employer or another bargaining representative. This requirement that employee bargaining representatives be independent of the employer protects employees from sham representation arrangements and will go some way to ensuring the integrity of the representation process. However, it will not ensure quality or integrity of representation, and other employee bargaining representatives will not have to comply with registration and accountability or organisations legislation.

In relation to multi-union agreements, the FWA allows any bargaining representative to seek the exclusion of another bargaining representative from the negotiations if their participation is making the process inefficient.¹⁴² While the Act makes it clear that an excluded

¹³⁸ FWA s.176(3).

¹³⁹ FWA s.179.

¹⁴⁰ C Briggs, 'Statutory union recognition in North America and the UK: lessons for Australia?' (2007) 17 *Economic and Labour Relations Review* 77, at 91.

¹⁴¹ FWA s.178(3).

¹⁴² FWA s.231(2)(a).

representative may still apply to be covered by the agreement it seems to come dangerously close to the situation described by the CFA as having the undesirable effect:

*“of depriving trade union organisations that are not recognised as being among the most representative of the essential means for defending the occupational interests of their members... as provided for in Convention No.87”.*¹⁴³

Unions’ loss of status as parties to agreements also creates opportunity for an employer to request its employees to approve the agreement without the consent or approval of the union, allowing an employer to attack internal solidarity between the union negotiating team and the shop floor.¹⁴⁴ Where a union has acted as a bargaining representative, an employer who seeks approval without union agreement is susceptible to a good faith bargaining order.¹⁴⁵ Despite the risk of good faith bargaining orders this ability to seek approval of an agreement without the consent of the other bargaining representatives is indicative of the loss of authority unions will experience corresponding to the loss of party status. Lack of obligation to acquire union consent prior to seeking employee approval emphasises FWA’s positioning of unions in representational rather than regulatory roles, highlighting the distinction that the Act draws between a union and its members.

Although they are not a party to the agreement, a union which has acted as a bargaining representative may seek to be *covered* by the agreement.¹⁴⁶ Coverage will give the union right to enforce the agreement. Application to be covered by an agreement must be made in the period between when the agreement is made¹⁴⁷ and when the agreement is approved by Fair Work Australia. There is no obligation on a bargaining representative who lodges an application to notify the other bargaining representatives who have participated in the negotiations that the application has been made. There does not appear to be any capacity for FWA to retrospectively decide that an agreement should cover an employee organisation if the organisation does not give notice prior to approval. Unlike the other procedural rights granted to bargaining representatives during the negotiation process, this right to notify a

¹⁴³ ILO, above n 11, [346].

¹⁴⁴ FWA s.181. Briggs and Cooper discuss employer use of s.170LK agreements under the *Workplace Relations Act 1996*, where it was not uncommon for an employer to offer s.170LK agreements to weaken the internal solidarity of union bargaining positions. C Briggs and R Cooper, ‘Between Individualism and Collectivism? Why Employers Choose Non Union Collective Agreements’ (2006) 17 *Labour and Industry*, 1, at 18.

¹⁴⁵ FWA s.229(3)(a)(ii).

¹⁴⁶ FWA s.183, compare the effect of the former s.170M(3).

¹⁴⁷ An agreement is made when it is approved by a valid majority of employees FWA s.182(1).

desire to be covered by an agreement does not extend to bargaining representatives other than employee organisations.

In relation to the issue of who an agreement is negotiated with, and the status of unions the ILO, in the *Collective Agreements Recommendation of 1951*,¹⁴⁸ have defined a collective agreement as one made between an employer or employers or their organisations on the one hand and one or more representative workers' organisations on the other: enterprise bargaining should only take place directly with employees where there is no union presence at all.¹⁴⁹ The Recommendation contemplates that unions will be parties to agreements, not merely the representatives or agents of parties to the agreements. The CFA has raised the application of this Recommendation in criticism of the non union stream of bargaining under the earlier legislation.¹⁵⁰ Given the similarities between the FWA provisions and the former legislation it is likely that the FWA's restructuring of the bargaining relationship would also attract that criticism, even having regard to the Act's inclusion of statutory union recognition and mutual good faith bargaining. Coulthard described the former s.170LK(4) provisions as evidence of a individualistic rather than collective policy approach intended to "move away from the group representational model" to "an agency based model in which the union is seen as the provider of services to its members according to their interests"¹⁵¹ and that description seems equally valid in the context of the FWA. Peetz suggests that non union agreements suffer all of the disadvantages of individual contracts, undermining genuine collective bargaining and generating poor outcomes for workers, the Act does not appear to address those criticisms of non union bargaining.¹⁵²

Loss of party status is indicative of a departure from the role traditionally given to unions. As Coulthard notes, since the *Burwood Cinemas*¹⁵³ and *Metal Trades*¹⁵⁴ decisions the

¹⁴⁸ International Labour Organisation, Recommendation 91, the Collective Agreements Recommendation of 1951 (R91).

¹⁴⁹ R91 Art 2(1).

¹⁵⁰ *Workplace Relations Act 1996*, s.170M(3).

¹⁵¹ A Coulthard, 'The Individualisation of Australian Labour Law' (1997) 13 *The International Journal of Comparative Labour Law and Industrial Relations* 95, at 104.

¹⁵² Peetz, above n 32, p 200.

¹⁵³ *Burwood Cinema Limited and ors v The Australian Theatrical and Amusement Employees' Association* (1925) 35 CLR 528. This case was authority for the proposition that because "the existence of an industrial dispute does not depend upon the actual relation of employer and employee or of master and servant between the participators in the dispute" (per Starke J) where a demand was made by a union on behalf of its members, a dispute could exist between a union and an employer even though the employer did not employ any union members (per Isaacs, Powers, Starke, Rich JJ).

¹⁵⁴ *Metal Trades Employers Association v Amalgamated Engineering Union* (1935) 54 CLR 387. This case was authority for the proposition that that 'the Arbitration Court has jurisdiction to make an award as to the

Australian regulatory system has rejected “the proposition that unions can only act as agents for the interests of their members and do not have interests beyond those of their members” to create a “model of union representation that focuses on the collective nature of industrial disputes rather than on the individual or contractual”.¹⁵⁵ Even under WorkChoices unions retained vestigial party status, that is no longer case under the FWA and unions will need to adjust their approach.

B. Mutual Good Faith Bargaining

The FWA creates mutual “good faith bargaining requirements” which a bargaining representative must meet.¹⁵⁶ These requirements are procedural in nature and very similar to previous obligations to genuinely try to reach agreement which applied in relation to pattern bargaining,¹⁵⁷ termination of bargaining periods¹⁵⁸ and the issue of ballot orders.¹⁵⁹ While most of these types of obligation are not new their mutual application to both parties to the negotiation is. Prior to the FWA, in practical terms, only unions have borne the burden and the risk of having to show that they are genuinely trying to reach agreement.

The good faith bargaining requirements do not require substantive evidence of bargaining. A party is not required to make concessions or actually reach agreement in order to show that they are bargaining in good faith. In this respect, the good faith bargaining requirements appear likely to be interpreted in a manner which is consistent with previous AIRC and Federal Court jurisprudence in this area¹⁶⁰ although the introduction of statutory union recognition provisions will influence the scope of the good faith obligation.¹⁶¹ In this respect, the most significant of the new good faith bargaining obligations are the obligation in s.228(1)(f) to recognise other bargaining representatives and the obligation in s.228(1)(e) to refrain from capricious or unfair conduct which undermines freedom of association or

terms of employment of non-unionists by employers between whom and a union a dispute relating to that subject in fact exists, whether or not those employers employ any unionists’ (per Latham CJ).

¹⁵⁵ A Coulthard, ‘Non-Union Bargaining: Enterprise Flexibility Agreements’ (1996) 38 *Journal of Industrial Relations* 339, at 350.

¹⁵⁶ FWA, s.228.

¹⁵⁷ *Workplace Relations Act 1996* s.421(4).

¹⁵⁸ *Workplace Relations Act 1996* s.430(2).

¹⁵⁹ *Workplace Relations Act 1996* s.461(1)(a). Broadly described the requirements are: attending meetings, disclosing relevant information, genuinely considering and responding to the other party’s proposals, and refraining from capricious or unfair conduct.

¹⁶⁰ Including decisions like *AMIEU v G & K O'Connor* (1999) FCA 310, made in relation to s.170QK of the *Industrial Relations Act 1998* (Cth) which included an obligation to bargain in good faith.

¹⁶¹ Although these provisions will not strictly address the *Asahi* situation as the union had no members in the workplace in that case and was seeking to create an industry wide pattern bargain.

collective bargaining. The impact of the obligation to refrain from conduct which undermines freedom of association will be conditioned by the approach taken by the courts when defining the content of the freedom. Given the interaction between union recognition and good faith bargaining, demonstrated in *Sensis* and *Asahi*, the impact of the introduction of union recognition provisions may be more significant than the rest of the good faith bargaining obligations could ever be in isolation.

A bargaining representative who believes that another bargaining representative is not negotiating in good faith can seek a bargaining order. Application for bargaining orders will only be available in the last 90 days prior to the nominal expiry date of any current agreement, or if the employer has sought the approval of a new agreement by the employees but prior to its approval, remedying situations where the act of seeking approval from employees itself may be considered to be an act of bad faith.

The scope of orders available to FWA is broad. The Act sets out a non-exhaustive list which includes orders for action to remedy the effects of previous capricious or unfair conduct, orders to ensure that the good faith requirements are met in future, orders excluding particular bargaining representatives from the negotiations, orders reinstating employees' employment if they have been terminated in bad faith for reasons related to the bargaining. In addition, FWA can refuse to approve an agreement negotiated in bad faith, and this power will presumably remedy situations like those in the DHL case, above, more effectively than post fact reference to the courts.

C. Majority Support Determination

A good faith bargaining order is available where either the employer has initiated bargaining or has otherwise agreed to bargain with the employees. If the employer has not agreed to bargain, a majority support declaration¹⁶² or scope order¹⁶³ must be in place before a bargaining representative can seek a bargaining order.

A majority support determination does not determine whether the majority of employees support the position that they should be represented by a particular union but the issue of whether there is majority support for the proposition that the employer should bargain with

¹⁶² FWA, s.236.

¹⁶³ While not discussed here in any detail a scope order is one which determines the scope of the group of employees to be covered by an agreement. The scope of the group must be fairly chosen. Selection of appropriate scope may have significant bearing on obtaining majority support for bargaining.

the employees. While majority support determinations sound like the mechanisms for statutory union recognition used in the UK, Canada and the US, majority support determinations under the FWA are conceptually different. Although, as with the UK union recognition provisions, majority support determinations are a fallback position and there is a legislative preference that employers and employees voluntarily agree to bargain¹⁶⁴. Given the single instrument structure of the FWA bargaining system the utility of majority support determinations is ambivalent: they do not directly address the circumstances which developed at *BHPIO*¹⁶⁵, *Esselte*¹⁶⁶, *Telstra*¹⁶⁷ and *Boeing*¹⁶⁸ where the employer, because of a preference for individual or non union agreements, refused to bargain with or recognise the union. The FWA has created a union recognition rule and a single form of instrument which limit an employer's ability to choose to conclude an agreement without union involvement where the union represents its employees. The majority support determination provisions address the entirely more limited set of circumstances of the employer who does not wish to bargain at all, rather than the more common, and deleterious to Freedom of Association, situation of the employer who uses enterprise bargaining to de-unionise their workforce by refusing to recognise a union. Practically, the effect of majority support determination may be the same as majority union recognition determination as employee initiated bargaining where unions are not present is uncommon¹⁶⁹ and it is probable that most majority support declarations applications will be made by unions. The ambiguous utility of majority support determinations highlights one of the internal tensions of the FWA in creating a system of union recognition in which unions are not party to agreements. The utility of a majority support declaration lies not as a union recognition tool but as a pre-requisite to legitimise the jurisdiction to make a good faith bargaining order and possible arbitral determination. It is

¹⁶⁴ Forsyth, above n 39, at 13. This is facilitative, when compared with the North American position where a union recognition ballot is required prior to commencement of bargaining and bargaining directly with employees without a union is not allowed. A Rathmell, 'Collective Bargaining after WorkChoices: Will 'Good Faith' Take us Forward with Fairness?' (2008) 21 *Australian Journal of Labour Law* 164, at 168.

¹⁶⁵ *Australian Workers Union v BHP Iron Ore Pty Ltd* [2001] FCA 3.

¹⁶⁶ In relation to Esselte: see for example "Annualised hours could abolish overtime in Esselte AWAs: NUW" 26 May 2006 and "Big fine for company that sacked union delegate after AWA strike" in *Workplace Express* 4 November 2008 <http://www.workplaceexpress.com.au/nl06_news_selected.php?selkey=31683> at 26 January 2009.

¹⁶⁷ *CEPU v Telstra Limited* [2008] AIRC 734 per Lacy SDP.

¹⁶⁸ J Whittard, et al, 'Collective bargaining rights under the Workplace Relations Act: the Boeing dispute', (2007) 18 *Labour and Industry*, 1. This dispute, which involved an 8 month strike by Boeing employees as a result of Boeing's decision not to negotiate a collective agreement with their union but to offer only individual contracts, is noted in the explanatory memorandum to the Fair Work Act 2008 at page xxxii as the kind of protracted dispute the majority support provisions are intended to address. See also Forsyth, above n 39, at 21 and Peetz, above n 32, p 137.

¹⁶⁹ Briggs and Cooper, above n 144, discuss the use of s.170LK agreements and do not suggest evidence of employee initiated bargaining in the former non union stream.

the obligation to bargain in good faith which is dependent on majority support for bargaining rather than the obligation to recognise a union.

D. Affect of Agreements on Right of Entry

Part 3-4 of the FWA sets out right of entry provisions allowing union officials access to the workplace. The provisions largely replicate the WRA provisions. The main point of difference is that the FWA provisions do not require that the workplace be covered by an industrial instrument which is binding on the union seeking to exercise the right of entry. Access to the workplace for purposes of recruitment and representation have been held by the CFA to be a concomitant of the principle derived from C87 that workers' representatives should enjoy such facilities are necessary for the proper exercise of their functions, including a right to access the workplace in order to "communicate with workers in order to apprise them of the potential advantages of unionisation".¹⁷⁰ The decision to de-link collective agreement coverage and right of entry is indicative that the FWA's concern with promotion of Freedom of Association is not merely token. Under the FWA, the making of a collective agreement which does not apply to a union (perhaps because the union was not active in the workplace at the time of finalisation of the agreement) is not intended to exclude the organisation from the workplace or to limit access to the union for the employees covered by that agreement. This provision is also indicative of a legislative awareness of the ILO criticism of the effect of non union agreement making on Freedom of Association, particularly given the Labor Party's commitment to make no change to right of entry law.¹⁷¹ Although, given the Act's restructuring of role of unions and removal of their party status, anything less would render any pretension protecting the right to organise illusory.

E. Content of Agreements under the FWA

If, we accept that the right to bargain is an essential element of Freedom of Association, then the question of what can be the subject of bargaining also becomes a legitimate concern when examining the protection offered to Freedom of Association in a particular regulatory system. If the content of agreements is constrained then even genuine bargaining in good faith will not give effect to a functional freedom of association. When unions cannot bargain

¹⁷⁰ ILO, above n 11, at [1102 – 1109].

¹⁷¹ Australian Labor Party, August 2007, above n 3, at 23.

for their own security or for members' job security¹⁷² limits on the content of bargains will have the effect of discouraging union membership. On an instrumental analysis of the benefits of union membership, limits on the content of bargains diminish the value of joining a union. The CFA of the ILO has held that legislation which restricts the scope of negotiable issues in collective bargaining is often incompatible with C98, and that where it is necessary to restrict the scope of collective bargaining such restrictions should be agreed on a voluntary basis¹⁷³.

a. Permitted Content

The FWA permits agreements to contain terms about:

- matters pertaining to the relationship of employer and employee,
- matters pertaining to the relationship between employer and union,
- deductions from wages, and
- machinery matters about the operation of the agreement.¹⁷⁴

The explanatory memorandum to the Act goes into some detail about the content of these permitted matters and it is apparent that the terms allowed by the Act will, *where they are able to be negotiated into agreements*, add significantly to union security and unions' ability to perform representative functions. While the subjects which may be agreed are now significantly broader than under the WRA the field is still relatively narrow. The 'matters pertaining' limitations prescribed by the WRA¹⁷⁵ have been retained although the FWA has different constitutional underpinnings which do not require that limitation.¹⁷⁶ Specific legislative permission of clauses dealing with the role of the union in the workplace may to some extent offset the symbolic diminution of power experienced by unions as a result of loss of party status, but the extent to which one can be said to offset the other is not clear. In any event, the maintenance of content limits, even in expanded, union friendly, form, fails to

¹⁷² For example by including provisions relating to termination of employment and unfair dismissal in enterprise agreements.

¹⁷³ Above, n 11, at [912].

¹⁷⁴ FWA, s.172(1)(b).

¹⁷⁵ *Workplace Relations Act 1996*, s.170LI.

¹⁷⁶ The corporations power of the Constitution (s.51(xx)) does not limit parliament to legislating about 'matters pertaining to the relationship of employee and employer' as was the case with the conciliation and arbitration power (s.51(xxxv)) as interpreted by the High Court in *Electrolux Home Products Pty Ltd v Australian Workers' Union* ((2004) 221 CLR 309) and its predecessors.

address the criticism consistently levelled by the CFA that restrictions on the content of agreements of this kind create unacceptable limits on the rights of parties to bargain freely.¹⁷⁷

b. Unlawful Content

i. Bargaining Fees

In the UK, Canada and some US states, a union is able to charge non members a fee in exchange for their bargaining services. Sometimes these fees are called fair share fees, indicating one of their purposes: to fairly spread the cost of bargaining among those who enjoy the benefits of the bargain. Where agreements are regulatory, in that they cover the entire workforce, Bargaining Fees are used to address the free-rider problem which arises when workers who are not members of the union obtain the same benefits from the bargain as union members.

Although the ILO views bargaining fees as an appropriate subject for collective bargaining, the FWA makes terms in agreements in relation to bargaining fees unlawful. While the CFA has noted that bargaining fees can be counter to individual Freedom of Association if imposed by government such that they result in de-facto compulsory unionism, it takes a permissive view when they are collectively negotiated.¹⁷⁸ Collective approval provides a mandate for the limitation of individual choice to pay the fee or join the union and C87 does not either require or prohibit union security arrangements like bargaining fees.¹⁷⁹ It is problematic to justify the continued prohibition on collectively agreed bargaining fees on Freedom of Association grounds. Nonetheless, the FWA maintains the contradiction that in order to represent their members unions must also represent those in the workplace who are not members, and who do not contribute to the collective voice, as the agreement will cover them all.¹⁸⁰

In spite of the problems associated with creating a fair bargaining fee system, the value of addressing the free rider problem through bargaining fees would have a positive effect on Freedom of Association by enhancing the functional capacity of unions and allowing unions

¹⁷⁷ C Fenwick and I Landau, above n 50, at 139.

¹⁷⁸ ILO, above n 11, at [363 – 368]

¹⁷⁹ Ibid.

¹⁸⁰ Rubenstein, above n 36, at 108.

to offset the costs of regulatory, enterprise level bargaining.¹⁸¹ In the context of an enterprise bargaining system where agreements cover members and non members alike, the blanket prohibition, extending even to fair share fees,¹⁸² is paradoxical given the re-positioning of unions as ‘bargaining representatives’ rather than parties to agreements. The policy emphasis on the service and representative roles of unions rather than their broader collective regulatory functions would appear to be a good fit for negotiated bargaining fees. If unions are limited to representative status then the idea that non members should also pay a fair share fee to be represented (rather than an obligation to join the union as in a closed shop arrangement) is consistent with that notion of representation. After all, the FWA clearly draws a distinction between membership and representation for the purposes of collective bargaining. The FWA appears to say that representation is a separate category of right from membership by allowing a union member to nominate a bargaining representative other than the union, by separating the protection of the right to be represented by the union from the right to be a member and by separating the right to have your union represent you in collective bargaining from the union’s right to enforce the bargain. This tension between the right to representation in effective collective bargaining and who should bear its costs is highlighted by Forward with Fairness election policy document which promises bargaining assistance to unrepresented employees and financial assistance to employer associations to assist them in the bargaining process¹⁸³ but does not promise unions similar assistance. The policy recognises that bargaining can be an expensive process where participants require assistance but the Act deprives union members of the means to assist themselves by legitimately recouping the costs of bargaining from those directly benefit.

ii. Right of Entry

The FWA also maintains a prohibition on negotiation of terms in collective agreements in relation to those aspects of right of entry which are covered by part 3-4 of the FWA, that is entry for the purpose of discussions or inspection of breaches. The explanatory memorandum states that it will be possible to negotiate terms in collective agreements about

¹⁸¹ For a detailed discussion of the difficulties in creating a fair agency shop system see: G Orr, Agency Shops in Australia? Compulsory Bargaining Fees, Union (In)Security and The Rights of Free Riders’ (2001) 14 *Australian Journal of Labour Law* 1.

¹⁸² A fair share fee is a fee set at less than the cost of union membership equating to the cost of representation in enterprise bargaining negotiations which is common in North America, see for example Donovan, above n 36, at 434, and Orr, above n 181.

¹⁸³ Australian Labor Party, August 2007, above n 3, p 14.

entry for other purposes, including, as an example, entry for dispute resolution.¹⁸⁴ This continuing prohibition on negotiation of terms in relation to access to the workplace is contrary to CFA consideration of the issue which suggests that decisions and agreements about access to the workplace should be the subject of agreement between employers and organisations of employees.¹⁸⁵ While the statutory right of entry grants access, it is in limited circumstances and these provisions will prevent unions and employers from documenting their agreements to arrangements which reflect custom and practice in the workplace.

c. Mandatory Individual Flexibility Arrangement Terms

The FWA makes it mandatory for an enterprise agreement to include an individual flexibility arrangement term. An individual flexibility arrangement term must enable an employee and their employer to agree in writing to an arrangement varying the effect of the agreement in order to meet genuine needs of the employer and employee. A model flexibility term is included in the regulations¹⁸⁶. Where an agreement does not include a flexibility term it will be deemed to include the model term. A flexibility term must indicate which parts of the agreement can be subject to an individual arrangement and require that an employee covered by the arrangement be better off overall than they would have been without the flexibility arrangement, although the better off overall test is not subject to external scrutiny. A flexibility term cannot require that a flexibility arrangement be subject to the approval of any person other than the employee and employer it covers.¹⁸⁷ An employer cannot make an offer of employment conditional upon agreeing to an individual flexibility arrangement.¹⁸⁸

The Act does not require flexibility terms to create an obligation for an employee to be represented in the negotiations for an individual flexibility arrangement, although the inclusion of a term granting representation rights to employees would not contravene the requirements of the Act.¹⁸⁹ Given the sometimes complicated nature of workplace

¹⁸⁴ Explanatory Memorandum, FWA, [676].

¹⁸⁵ ILO, above n 11, at [1109].

¹⁸⁶ *Fair Work Regulations 2009* (Cth), r2.08 and Schedule 2.2

¹⁸⁷ This, presumably, is to avoid the inclusion of flexibility terms in agreements which require the approval of any union which is covered by the agreement.

¹⁸⁸ FWA s.341(3).

¹⁸⁹ As a matter pertaining or incidental to the relationship of employer and employee, and also the relationship of the union and employer. However, the model clause developed by the AIRC for awards does not contain a right to representation.

arrangements, the failure of the FWA to require that flexibility clauses provide representation rights for employees is unfortunate from a functional Freedom of Association perspective. The explanatory memorandum makes it clear that an individual flexibility arrangement may be initiated by either an employee or an employer. The explanatory memorandum describes the application of a subjective test to the question of whether an employee is better or worse off under an arrangement indicating that:

*“because the value that a particular employee may place on a non-monetary benefit is important, it is less likely that an employee would be better off overall where the employer has initiated a request to agree to an individual flexibility arrangement”.*¹⁹⁰

Taking into account the highly subjective nature of the assessment, the fact that individual flexibility arrangements do not have to be externally approved, and the many subtle ways an employer may encourage an employee to agree to a flexibility arrangement (even though there is a prohibition on undue pressure¹⁹¹), an obligation to include a term requiring an employer to recognise an employee’s independent representative in negotiating an individual flexibility arrangement would have indicated a genuine concern about maintaining the integrity of collectively approved terms and conditions of employment.

While individual flexibility terms appear to be sufficiently limited in scope and application to avoid the suggestion that they are a modern form of individual statutory contract by another name, there remain a number of facets to the proposed arrangements which raise questions in relation to respect for the outcomes of protective bargaining which is a necessary element of the right to bargain. The mandatory nature of the obligation to include flexibility terms highlights the instability of the FWA’s attempts to reconcile both collective and individual rights: every collective agreement becomes a vehicle for employer initiated individual arrangements. Although purporting to promote collective bargaining, the FWA requires collective bargains to include a concept fundamentally at odds with one of the central purposes of collective bargains which is to take conditions of employment out of competition between employees during the life of the bargain.

¹⁹⁰ Explanatory Memorandum, above n 184, at [868].

¹⁹¹ FWA, s.344(c).

IX. WORKPLACE RIGHTS: DIRECT PROTECTION OF FREEDOM OF ASSOCIATION IN THE FWA

The FWA applies a new model to the direct protection of Freedom of Association. Chapter Three of the Act creates a category of rights called workplace rights. The workplace rights interact with the bargaining rights described above to protect Freedom of Association. The workplace rights model sidesteps the controversy of whether the right to be a member of a union is more than merely the right to hold a membership ticket, highlighted by the *BHPIO* and *Belandra* decisions, by separately protecting:

- the freedom to become or not become **member**,
- a freedom to be **represented** by a union and
- a freedom to **participate** in lawful **industrial activities**.¹⁹²

While this trifurcation of protections differs from the protections in the WRA, the workplace rights maintain a focus on the negative right not to associate in conjunction with the freedom to associate.

The protected concept of *Industrial Activity* is defined by the Act¹⁹³ and includes joining, organising, encouraging, promoting and participating in lawful or unlawful activity on behalf of a union, taking part in industrial action, and seeking to be represented by a union. This protection for participation in industrial activities is notionally broader than the letter of the protections previously available to employees as an incident of membership of a union and is likely enhance the protection of Freedom of Association in the enterprise bargaining context. However, it should be noted that this FWA concept of industrial activities correlates strongly with the incidents of union membership recognised and protected by the right to membership alone prior to the *BHPIO* decision.¹⁹⁴ Legislative recognition of a broader concept of membership as a source of protection would have had a similar effect. It could be argued that the Act has adopted the narrow approach to membership described by Kenny J in *BHPIO*, rather than the broad concept consistent with international law described

¹⁹² FWA, s.336 (emphasis added).

¹⁹³ FWA, s.347.

¹⁹⁴ For example in *Davids Distribution Pty Ltd v NUW* [1999] FCA 1108, at [107] a full bench of the Federal Court held legislative protection of the right to be a union member included protection of the right to participate in protected union activities including the taking of industrial action.

by North J in *Belandra*. In order to avoid the narrowness of the *BHPIO* model of protection, the FWA is obliged to specify two new categories of protection rather than recognising that they could and should, according to the ILO,¹⁹⁵ have been protected under a broadly stated protection of union membership and all its incidents.

DISCUSSION AND CONCLUSIONS

In its direct protection of Freedom of Association, the FWA takes a positive approach to promotion of functional Freedom of Association by creating a new category of workplace right to protect a right to participate in industrial activity separately from the right to be a union member. But, in creating this separate category of protection for participation in industrial activities it could be said that the Act disembodies the concept of union membership reducing it to the right to hold a ticket rather than the more meaningful concept recognised internationally. In doing so the Act betrays a degree of legal formalism, specifying protections for industrial activities rather than by recognising that those protections should inhere in the right to be a union member. There is apparently a legislative reluctance to allow the exact scope of the protection of the right to join a union to grow and develop in a manner consistent with international law.

Under the Act the principal role for unions will be as representatives during bargaining yet, as Quinn notes, “the institution and process of collective bargaining is no more limited to bargaining rounds than democracy is limited to casting a ballot once every three years”.¹⁹⁶ In recasting the role of unions, the Act tells us that Australian legislation will no longer recognise that a union has an interest in collective bargaining and dispute resolution processes independent of its representation of any individual member. This loss of status is more than just symbolic but reflects a common thread in the FWA that the Freedom of Association is an individual freedom and the role of a union is as the representative of individuals rather than as the institutional manifestation of the collective voice of workers.

The creation of a single form of statutory agreement tied to the obligation to recognise an employee’s union as their bargaining representative may be shown to be an elegant solution which sidesteps the Freedom of Association problems associated with multiple instrument

¹⁹⁵ According to the ILO. See the CEACR’s criticism of the outcome in *BHPIO* as noted above at n 118.

¹⁹⁶ Quinn, above n 15, at 13.

types while facilitating collective bargaining in non-unionised workplaces. This solution allows the FWA to avoid the problems associated with recognition ballots illustrated by the UK and North American experiences.¹⁹⁷ By introducing union recognition obligations and mutual good faith bargaining obligations the FWA addresses issues which have been the subject of criticism since the time of the Keating government.¹⁹⁸

The FWA's prohibition of statutory individual contracts¹⁹⁹ can only be said to promote Freedom of Association and collective bargaining. At the same time, by mandating the inclusion of individual flexibility arrangements in all statutory agreements, the Act reinserts into the collective relationship the imbalance of bargaining power between individual and employer which collective agreements are intended to overcome. The individual flexibility arrangement provisions draw attention to the Act's ambivalent approach to protection of true collective Freedom of Association, and the respect for collectively negotiated conditions of employment which Freedom of Association entails. These provisions have the capacity to render collective agreements little more than a sophisticated safety net over which individual bargaining can take place at any time an employer chooses to initiate it. In addition, the Act reduces all bargaining to the level of the non union bargaining stream under the 1996 legislation and promotes non union bargaining as the equivalent of collective bargaining, despite the shortcomings associated with that form of agreement making.²⁰⁰

Although the enactment of the FWA will result in many advantages for the protection of Freedom of Association when compared to the WRA it is by no means clear that the Act protects the freedom in a manner consistent with Australia's international obligations. The Act does not take into account the approach to Freedom of Association as a human right which emphasises that, in the workplace, individual capacity is best built through the exercise of collective voice. The Act continues to promote the fiction that it is necessary to protect an individual's right not to associate instead of recognising that Freedom of

¹⁹⁷ See R McCallum, 'Australian Labour Law after the WorkChoices Avalanche: Developing an Employment Law for our Children', *JIR* 447 for a discussion of these problems. Note also that Fells suggests that recognition disputes are more profound and intense than typical industrial disputes, so the legislative decision to avoid the issue of the threshold at which recognition is granted could be considered a sensible way of dealing with recognition. R Fells, 'Competitive negotiation and the question of union negotiating rights' (1999) 9 *Labour and Industry*, 99-122, at 117.

¹⁹⁸ Whittard, above n 168, at 4.

¹⁹⁹ Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008 (s.1 of the Act repeals s.326 of the *Workplace Relations Act 1996* and replaces AWA's with the transitional and temporally limited ITEA.)

²⁰⁰ Peetz, above n 32, p 200.

Association is an individual right which is exercised collectively. The Act appears to fall into the trap of providing alternate mechanisms for employee voice at the expense of promoting the mechanism which is internationally recognised as being the most effective. In their desire to extend the benefits of collective bargaining to the whole workforce, including the non unionised workforce, the government have created a hybrid which posits a limited representational role for unions, instead of recognising that the benefits of collective bargaining are only likely to flow to those who are collectively associated and actively encouraging that association. Freedom of Association cannot be exercised without functioning trade unions, yet the FWA does little to promote unionism and often diminishes their status.

While the Act appears to encourage the participation of unions and gives more recognition to broad notions of Freedom of Association than its predecessors, in truth its encouragement of unions is limited to participation in workplace relationships as the appointed representative of each individual employee. There is no longer any recognition that the union has a legitimate interest of its own in the resolution of disputes or the making of collective bargains: individual consent is as important as collective agreement. For these reasons, unions will need to work hard to overcome the impetus toward individualisation in the Act if they continue to rely on organising strategies based on collective mobilisation and solidarity. While the Act is certainly more tolerant of collective activity and freedom of association than its predecessor it is clear that although recognition of a right to freedom of association is included in the objects of the Act the FWA falls short of obtaining the object of *promotion* of Freedom of Association.