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**SUBMISSION ON ECONOMIC SOCIAL AND CULTURAL RIGHTS
(INDUSTRIAL RIGHTS)**

TO: NATIONAL HUMAN RIGHTS CONSULTATION

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“Seek to create a crisis and foster a tension so that a community that has constantly refused to negotiate is forced to confront the issue.” Martin Luther King

INTRODUCTION

This submission has a narrow focus upon Industrial Rights which are conceptualized as a part of Economic, Social and Cultural rights. I will argue that the model adopted by the UN Covenant on Economic, Social and Cultural rights should not be followed and that employers and unions should have equal rights with regard to their industrial relations.

The Committee should not recommend rights to unions that are not reciprocated to employers. For if one section of the society possesses rights that others do not it is no longer properly a right but is rather a privilege.

I argue that employers and unions have the right to take industrial action against the other party in pursuit of their legitimate industrial interest but both parties must also have the right to put a stop to industrial action and have the matters in dispute settled by arbitration.

I further argue that Australian Industrial Law is biased against unions and is inimical to the industrial interests of workers.

I will begin by outlining at a theoretical level the economic basis of industrial conflict. I then survey the laws that are presently in breach of what I argue are the Industrial Rights of unions. And finally articulate what I believe are the Industrial Rights that an Australian Charter of Human Rights should include.

INDUSTRIAL CONFLICT

A profit maximizing firm will seek to obtain its factors of production (land, labour and capital) at the lowest cost possible. In the market place the firm faces competition and must compete on price, if a firm's costs of labour are higher than their competitors then they will either suffer lower returns or not be able to compete on price. The cost of labour

represents income to the workers and seeking to support themselves and their families they by in large seek to maximize incomes. Firms seek to maximize profits and workers seek to maximize incomes both objects are legitimate but are in direct conflict. This conflict lies at the heart of industrial relations. The public service also seeks to minimize costs and for the most part carries on its' industrial relations much the same as do the private sector employers. There is a fundamental economic conflict between the industrial parties the worker and the employer.

So long as the individual worker faces the prospect of unemployment if they should loose their job they are at a bargaining disadvantage relative to the employer. This unequal bargaining position led to the formation of trade unions who through collective industrial action seek to increase the workers share of the firms' proceeds. The employer may also use industrial action against the union to lower the workers share of proceeds.

Industrial action usually takes the following forms. The unionists refuse to work and thereby damage the employers business in an attempt to gain improved wages and conditions (strike). The employer may attempts to replace the unionists with temporary non union staff (strike breaking). The union may respond by picketing the employers premises and ask unionists in other firms not to supply their firm (secondary boycott). If the employer is prepared to close down his business he may refuse entry to the unionists in an attempt to force them back to work on his terms (lockout).

Martin Luther King used three weapons to desegregate America, the march, the boycott, and the strike. Few people would now say that the action was not justified. As the quote above points out, King believed that the purpose of conflict is to make the opponent confront the issues in dispute.

Industrial action at one level is an economic contest where each party uses economic pressure to force concessions from the other party. At another level it puts pressure on the parties to confront the issue in dispute and honestly seek to negotiate a solution.

LEGAL PROHIBITIONS AGAINST INDUSTRIAL ACTION

The common law

Australia inherited the common law of England and it allows employers to sue their employee and unions for taking industrial action.

The main tort (civil wrong actionable by a court) used by employers against unions is the tort of 'interference'. Under this tort it is illegal for one party (the union) to interfere with the contractual relations of another party (the employer). That is the union cannot directly prevent or hinder the flow of goods or services from or to the employer.

This tort started with an opera singer, Ms Wagner who was induced to break her contract to sing at Covent Garden by the owner of Her Majesties theatre, the courts awarded damages in favour of Covent Garden¹. Through a string of decisions the courts developed this tort into a near prohibition on union industrial action.

The second tort is 'intimidation'. This tort provides for damages if one person causes a loss to another person through the threat of doing something that is illegal to a third person. This tort began with an English case *Rookes v Barnard* (1964) AC 1129. Essentially a union took industrial action in order to have a non-unionist dismissed in breach of a specific no-strike agreement which made the action illegal and open to the tort of intimidation. The court awarded damages to the dismissed employee².

The third tort that may be used against unionists is the tort of 'conspiracy to injure'. If a group of people agree amongst themselves to cause damage to another party and they do so for predominantly malicious reasons then this tort may apply. Note that the tort does not require that the conspirators act illegally only that their motives be predominantly to injure the other party³.

The English case law in certain circumstances allows for a number of defenses against the torts. {*Torquay Hotel Co Ltd v Cousins* (1969) 2 Ch 106, *Morgan v Fry* (1968)⁴} Notwithstanding this, the torts in Australia have proved themselves to be a powerful weapon against union industrial action.

All the torts were used against the Confectioners Union in the Dollar Sweets case. The union placed a picket on Dollar Sweets P/L. The employers sort and were granted an injunction to end the picket on the grounds that the union had committed the torts of interference with contractual relations, intimidation, nuisance and conspiracy to injure.⁵

The Trade Practices Act

The Trade Practices Act 1974 prohibits union secondary boycotts. Strike action is a primary boycott against the employer. A secondary boycott would be in place if workers placed a ban on the customer or a supplier of their employer. Strictly speaking if strikers picket a site and stop the movement of goods in or out this is also a secondary boycott. The secondary boycott is against the third party receiving or delivering the goods to the site. The Trade Practices Act 1974 was originally aimed at anti-competitive behaviour by companies and therefore unions were exempt from its' provisions. In 1977 the Fraser government removed the union exemption.⁶

If the purpose of the picket is the furtherance of an industrial dispute with the unionists employer the action is exempt from prosecution under the Act.

Fair Work Australia Bill

The Fair Work Australia Bill prohibits industrial action while an enterprise agreement is in place. Any industrial action by a union covered by a certified agreement outside of enterprise bargaining is illegal.

The Bill allow for protection from the industrial torts in certain circumstances. If an enterprise agreement is either not in place or is past it's nominal expiry date and ballot

and notice requirements are met then industrial action is lawful against a specific employer. The protection does not apply to secondary boycotts.

So called 'pattern bargaining', seeking common standards of employment in an industry is illegal under the bill.

The bill only provides for compulsory arbitration when a union is strong enough to gain the employers agreement to it in an enterprise agreement. National awards will not provide for compulsory arbitration.

INDUSTRIAL RIGHTS

The reason for the existence of industrial rights is the unfairness of the bargaining position between employers and employees. In response to this unfair economic relationship employees have formed and joined unions. In Australia the Common Law and Federal legislation significantly restricts the capacity of unions to perform their legitimate functions within the society. This has been recognized by the Courts themselves.

In a case involving the Transport Workers Union the union was charged with the tort of interference. (*Davies v Nyland and O'Neil* (1975) 10 SASR 76). The Supreme Court of South Australia summed up the situation as follows,

"It would be regrettable if the trade unions should see the recent development of the tort of inducement to breach of contract as one more demonstration that the courts are ranged against them. They are not so arranged, but they have to take the laws as they find it. The truth is that here two important values come into collision. The first is the principle that the terms and conditions of employment should be fair and just and properly safeguarded and the organisation of the workers into trade unions is an essential weapon for this purpose. The other is that contracts should be honoured and promises kept and that third parties should not be permitted to induce by threats or otherwise one of the parties to the contract to break his bargain. All the courts can do is to resolve that conflict in particular cases by the application of principles laid down by statute or authoritative precedent. If those principles are to be altered then Parliament must do it." ⁷

I submit that part of the resolution to the conflict of rights to which the Supreme Court refers is the adoption of a Bill of Rights for Australia along the lines of the Victorian or ACT models and in this Bill two industrial rights which belong equally to employers and unions should be recognised.

Right 1 - Both employers and unions may seek to further their legitimate industrial interests by taking industrial action.

Because of the destructive nature of industrial action this right should be limited but it must be limited in a way that preserves equality between the parties. In line with Australia's long and proud history of compulsory arbitration there needs to be a second right to which the right to take industrial action is subject.

Right 2 - Both employers and unions may settle any industrial dispute by compulsory arbitration.

¹ Australian Labour Law, Pittard and Naughton 4th Edition, Butterworths 2003, p. 934

² Australian Labour Law, Pittard and Naughton 4th Edition, Butterworths 2003, p. 969

³ Australian Labour Law, Pittard and Naughton 4th Edition, Butterworths 2003, p. 997

⁴ Australian Labour Law, Pittard and Naughton 4th Edition, Butterworths 2003, p. 948, 978

⁵ Industrial law Butterworths' Student Companion. By Peter Rozen, p. 30.

⁶ Australian Labour Law, Pittard and Naughton 4th Edition, Butterworths 2003, p. 1076.

⁷ Australian Labour Law, Pittard and Naughton 4th Edition, Butterworths 2003, p. 959.