

ACTU

ACTU SUBMISSION TO THE NATIONAL HUMAN RIGHTS CONSULTATION

15 June 2009

1. The Australian Council of Trade Unions (ACTU) is pleased to have this opportunity to make a submission to the National Human Rights Consultation. We welcome the Government's commitment to consultation and debate on the legal recognition and protection of human rights in Australia.
2. In this submission, the ACTU identifies a number of workers' rights which are recognised internationally as human rights. We emphasise the need for these rights to be strongly protected in Australian law.
3. The ACTU believes that, in considering the enactment of a human rights instrument or charter in Australia, equal consideration must be given to Australia's international obligations to protect civil and political *and* economic, social and cultural rights.

WORKERS' HUMAN RIGHTS

4. The Australian Government has ratified a number of international treaties, committing to respect, protect and promote human rights. Principal among these are the *International Covenant on Civil and Political Rights* 1966 (ICCPR) and the *International Covenant on Economic, Social and Cultural Rights* 1966 (ICESCR). Australia has also ratified a number of other core international human rights treaties, including the *International Convention on the Elimination of all Forms of Racial Discrimination*; the *Convention on the Elimination of all Forms of Discrimination against Women*; the *Convention on the Rights of the Child*; and the *Convention on the Rights of Persons with Disabilities*. Australia's compliance with these treaties is monitored by the relevant UN treaty monitoring bodies. Implementation of the ICCPR by state parties, for example, is monitored by the Human Rights Committee (HRC) and implementation of the ICESCR is monitored by the Committee on Economic, Social and Cultural Rights (CESCR).

5. The human rights instruments above enunciate a number of individual and collective workers' rights. In addition, the International Labour Organisation (ILO), the United Nations specialist agency devoted to the world of work, has identified four rights as fundamental to the rights of human beings at work. These rights, identified in the *ILO Declaration on Fundamental Principles and Rights at Work 1998*, are: freedom of association and the rights to organise and to bargain collectively; freedom from forced or compulsory labour; freedom from discrimination in employment (including equal remuneration for work of equal value); and freedom from harmful child labour.¹ These rights are expressed and developed in eight ILO Conventions: the *Freedom of Association and Protection of the Right to Organise Convention, 1948 (No 87)* (Convention 87) and the *Right to Organise and Collective Bargaining Convention, 1949 (No 98)* (Convention 98); the *Forced Labour Convention, 1930 (No 29)* and the *Abolition of Forced Labour Convention, 1957 (No 105)*; the *Minimum Age Convention, 1973 (No 138)* and the *Worst Forms of Child Labour Convention, 1999 (No 182)*; the *Equal Remuneration Convention, 1951 (No 100)* and the *Discrimination (Employment and Occupation) Convention, 1958 (No 111)*. Australia has ratified all of these conventions except the *Minimum Age Convention, 1973*. Australia's compliance with its obligations under ILO instruments is supervised by two key ILO bodies – the Committee on Freedom of Association and the Committee of Experts on the Application of Conventions and Recommendations.
6. In Australia, the rights embodied in the instruments above are afforded protection largely through legislation at the federal and state/ territory level: most notably, through industrial relations and anti-discrimination laws.
7. Australia has a history of incomplete compliance with internationally recognised workers' rights. Under the former Coalition Government in particular, there was a fundamental and sustained attack on the individual and collective human rights of Australian workers. Yet, at the time that these reforms were passed by Parliament, the

¹ The Declaration is available at <http://www.ilo.org/declaration/lang--en/index.htm>

implications of these laws for Australia's conformity with its international human rights obligations received relatively little attention from Government or the media.

8. International supervisory bodies of the UN and the ILO have repeatedly found Australia's respect for the internationally recognised human rights of workers to be inadequate and called upon the Government to bring its laws into conformity with international human rights conventions.
9. In the following section, we briefly examine the fundamental labour rights identified in the human rights conventions that Australia has ratified. We also present some recent examples that demonstrate how the protection of workers' human rights in Australia has been, and in some cases continues to be, inadequate in key areas. It is important to note that we do not comprehensively or exhaustively evaluate the extent to which Australian law protects workers' human rights.

The right to freedom of association, including the right to form and join trade unions for the protection of their economic and social interests

10. Freedom of association is a fundamental human right. It is protected by article 8 of the ICESCR, article 22 of the ICCPR and by ILO Convention 87. Article 8 of the ICESCR enunciates the right of everyone to form trade unions and to join the trade union of their choice for the protection of their economic and social interests, as well as the right of trade unions to function freely. Article 8(3) of the ICESCR provides that nothing in article 8 shall authorise the state parties to ILO Convention 87 to take legislative measures that would prejudice, or apply the law in such a manner as would prejudice, the guarantees provided for in that Convention.
11. Article 22 of the ICCPR protects the right to freedom of association with others, including the right to form and join trade unions. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are

necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others. Article 22(3) of the ICCPR provides that nothing in article 22 authorises state parties to ILO Convention 87 to take legislative measures or apply the law in such a way as to prejudice the guarantees provided in article 22.

12. The most comprehensive articulation of the right to freedom of association is found in ILO Conventions 87 and 98. In addition, the ILO's supervisory bodies - the Committee on Freedom of Association and the Committee of Experts on the Application of Conventions and Recommendations - have developed a comprehensive and sophisticated jurisprudence on the nature and extent of this fundamental right.²

13. In Australia, the *Australian Building and Construction Industry Improvement Act 2005 (Cth)* has been found by key international bodies to severely limit the right to freedom of association – a right that Australia is bound to respect by virtue of its ratification of the ICCPR, the ICESCR and ILO Conventions 87 and 98. In 2005, the ILO's Committee on Freedom of Association found that the law breached Australia's international obligations to respect the right to freedom of association of workers in the building and construction industry and requested that the Government amend the Act.³ The ILO Committee of Experts on the Application of Conventions and Recommendations has also repeatedly called upon the Government to bring the Act into line with international standards.⁴

14. In May 2009, the CESCR voiced its concern that:

“provisions of the *Building and Construction Industry Improvement Act 2005* seriously affect freedom of association of building and constructions workers, by

² See, eg, CFA, *Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO*, 5th ed, 2006.

³ Complaint against the Government of Australia presented by the Australian Council of Trade Unions (ACTU) and supported by the Trade Unions International of Workers of the Building, Wood and Building Materials Industries (UITBB), Report No. 338, Case No. 2326 (2005).

⁴ See the Individual Observations of the CEACR with respect to Australia's compliance with Conventions 87 and 98, <http://www.ilo.org/ilolex/english/newcountryframeE.htm>

imposing significant penalties for industrial actions, including six months of incarceration.”

The Committee proceeded to recommend that Australia:

“remove, in law and in practice, obstacles and restrictions to the right to strike, which are inconsistent with the provisions of article 8 of the Covenant and ILO Convention No. 87. In particular, the Committee recommends that the State party abrogate the provisions of the Building and Construction Industry Improvement Act 2005 that imposes penalties, including six months of incarceration, for industrial action and consider amending the Fair Work Act 2009. The State party should lift the restrictions on ‘pattern bargaining’, the pursuit of multi-employer agreements and matters that are not ‘permitted’, and to remove the secret ballot requirements for workers who wish to take industrial action.”⁵

The right to bargain collectively in pursuit of their economic and social interests

15. The right to bargain collectively is afforded comprehensive protection in ILO Convention 98. According to the ILO, the right to bargain freely with employers with respect to conditions of work is ‘an essential element in freedom of association’.⁶ A similar approach has been adopted by the UN’s CESCR and HRC: while neither the ICCPR nor the ICESCR explicitly provide a right to collective bargaining, both supervisory bodies have found the right to collective bargaining to be an integral element of the broader right to freedom of association.⁷

The right to work, including the right of everyone to the opportunity to gain their living by work which they freely choose or accept

16. The right of everyone to gain their living by freely chosen or accepted work is enshrined in article 6 of the ICESCR. Parties are obliged to take steps to achieve the full realisation of this right, including through technical and vocational guidance and

⁵ E/C.12/AUS/CO/4 (22 May 2009) [19]

⁶ Ibid, para 881.

⁷ 2001 Concluding Comment on Korea, E/C.12/1/Add.59 (9.5.2001), para 39; 2001 Concluding Comment on France, E/C.12/1/Add.72, para. 29. For the HRC, see 1999 Concluding Comment on Canada, CCPR/C/79/Add.104 (30-3-1999), para 25; 1999 Concluding Comment on Chile, CCPR/C/79/Add.104 (30-3-1999), para. 25; and 1999 Concluding Comment on Coasta Rica, CCPR/C/79/Add.107, para 17. For discussion, see Patrick Macklem, ‘The Right to Bargain Collectively in International Law: Workers’ Right, Human Right, International Right?’ in Richard Alston (ed) *Labor Rights as Human Rights* (2005) 60, 72-73.

training programmes, and policies and techniques to achieve steady economic, social and cultural development and full and productive employment.

17. The CESCR has adopted a General Comment on the right to work which emphasises that the right to work is the right to decent work. The ICESCR has noted that the right to work has both individual dimensions (developed in article 7) and collective dimensions (developed further in article 8).⁸ The right to work includes the right the right not to be deprived of work unfairly.⁹

18. The ICESCR has observed that the right to work is also contained in article 8, paragraph 3 (a), of the ICCPR; in article 5, paragraph (e) (i) of the *International Convention on the Elimination of All Forms of Racial Discrimination*; in article 11, paragraph 1 (a), of the *Convention on the Elimination of All Forms of Discrimination against Women*; and in article 32 of the *Convention on the Rights of the Child*.¹⁰

19. The right to work is not expressly protected in Australian law. Many groups in Australia continue to confront significant barriers to workforce participation, including Indigenous people, asylum seekers, migrants and persons with disabilities. In its May 2009 comments on Australia's compliance with the ICESCR, the CESCR noted with concern the high unemployment rates among these groups and recommended the adoption of special programmes and measures designed to address the significant barriers to the enjoyment of the right to work faced by many indigenous people, asylum seekers, migrants and people with disabilities, including measures to protect them from exploitation.¹¹

⁸ General Comment No. 18 (The Right to Work, art. 6 ICESCR), adopted on 24 November 2005, E/C.12/GC/18, 6 February 2006, paras 1, 2, 7 and 8.

⁹ Ibid, para 6.

¹⁰ Ibid, para 3.

¹¹ E/C.12/AUS/CO/4 (22 May 2009) [18].

The right to decent work including the right to the enjoyment of just and favourable conditions of work

20. Article 7 of the ICESCR recognizes the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular:

- Remuneration which provides all workers, as a minimum, with fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work; and a decent living for themselves and their families;
- Safe and healthy working conditions;
- Equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence; and
- Rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays.

21. In Australia, the former Coalition Government's industrial relations reforms radically undermined the right of Australian workers, under article 7 of the ICESCR, to just and favourable conditions of work. In particular, the *Workplace Relations Amendment (Work Choices) Act 2005 (Cth)* (Work Choices) dramatically reduced the safety net for Australian workers. The comprehensive wages and conditions of work found in awards were replaced with just five minimum legislated standards. Responsibility for setting minimum wages was shifted from the Australian Industrial Relations Commission, which was obliged to balance the considerations of a strong economy and fairness and to reach its decisions through a public, participative process, to the Australian Fair Pay Commission, a non-transparent administrative body with no obligation to consider the fairness of its decisions. Job security was undermined, with over 4 million workers losing any protection against being dismissed arbitrarily or unfairly. The impact of Work Choices was felt most acutely by the most vulnerable

workers in the Australian labour market, including women, young workers and the low paid.

The right to strike

22. The right to strike is recognised as a human right in international law. While ILO Conventions 87 and 98 do not contain an explicit right to strike, the ILO's Committee on Freedom of Association has emphasised that this right is an essential aspect of freedom of association, guaranteed not only by Conventions 87 and 98 but also by the ILO Constitution.¹² This view has since been adopted by the ILO's Committee of Experts on the Application of Conventions and Recommendations.¹³
23. Article 8(1)(d) of the ICESCR explicitly protects the right to strike. In applying this article, the CESCR has drawn upon, and deferred to, ILO standards.¹⁴
24. The ICCPR does not explicitly contain a right to strike. In *JB et al. v Canada*, the Human Rights Committee appeared to depart from the ILO jurisprudence in finding that 'freedom of association' did not necessarily imply a right to strike.¹⁵ A dissenting minority, however, noted:

“It is, of course, manifest that there is no mention of the right to strike in article 22, just as there is no mention of the various other activities, such as holding meetings, or collective bargaining, that a trade-unionist may engage in to protect his interests. We do not find that surprising, because it is the broad right of freedom of association which is guaranteed by article 22. However, the exercise of this right requires that some measure of concerted activities be allowed; otherwise it could not serve its purposes.”¹⁶

¹² *Freedom of Association: Digest of Decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO*, 5th ed, 2006.

¹³ *Committee of Experts on the Application of Conventions and Recommendations: General Survey on Freedom of Association and Collective Bargaining* (1994) paras 175 and 179.

¹⁴ *Concluding Observations: Trinidad and Tobago 17/05/2002 E/C.12/1/Add.80*, paras. 35 and 43; and *Concluding Observations: Bulgaria 9/12/99 E/C.12/1/Add.37*, para 16.

¹⁵ Human Rights Committee, 28th Session, Communication No. R.26/118/1982.

¹⁶ *Ibid*, para 3.

25. The minority proceeded to emphasise that they “... cannot see that a manner of exercising a right which has, under certain leading and widely ratified international instruments, been declared to be in principle lawful, should be declared to be incompatible with the Covenant on Civil and Political Rights.”¹⁷
26. Since *JB v Canada*, the HRC appears to have repeatedly adopted the contrary view that article 22 of the ICCPR protects the right to strike.¹⁸ In its 1996 Concluding Comment on Germany’s periodic report on compliance with the ICCPR, for example, the HRC expressed its concern “that there is an absolute ban on strikes by public servants who are not exercising authority in the name of the State and are not engaged in essential services, which may violate article 22 of the Covenant.”¹⁹ Similarly, in its 2004 Concluding Observations on Lithuania’s periodic report on compliance, the HRC expressed its concern that “that the new Labour Code is too restrictive in providing, inter alia, for the prohibition of strikes in services that cannot be considered as essential and requiring a two-thirds majority to call a strike, which may amount to a violation of article 22.” It proceeded to recommend that “The State party should make the necessary amendments to the Labour Code to ensure the protection of the rights guaranteed under article 22 of the Covenant.”²⁰
27. Recognition of the status of Convention 87 in article 22(3) of the ICCPR further suggests that *JB v Canada* is not a valid interpretation of article 22, at least as it relates to state party to Convention 87. Article 22(3) of the ICCPR forbids states from relying on the guarantee of freedom of association in article 22 to prejudice rights enshrined in ILO Convention 87.

¹⁷ Ibid, para 8.

¹⁸ See Patrick Macklem ‘The Right to Bargain Collectively in International Law: Workers’ Rights, Human Right, International Right?’ in P Alston (ed) *Labor Rights as Human Rights* (2005) 60.

¹⁹ CCPR/C/79/Add.72 (7 November 1996)(Germany).

²⁰ CCPR/CO/80/LTU (1 April 2004)(Lithuania), para. 18.

The right to freedom from discrimination in employment on the grounds of sex, race, colour, ethnic or social origin, genetic characteristics, language, religion or belief, political or other opinion, property, birth, disability, age, sexual orientation or gender identity

28. Article 3 of the ICESCR and article 2 of the ICCPR require Australia to extend the rights in those Conventions without distinction of any kind on the ground of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. In addition, the right to freedom from discrimination in employment is dealt with specifically in the *Discrimination (Employment and Occupation) Convention, 1958 (No 111)* and the *Equal Remuneration Convention, 1951 (No 100)*. The right is also protected with respect to specific vulnerable groups through article 5 of the *International Convention on the Elimination of all Forms of Racial Discrimination*; article 11 of the *Convention on the Elimination of all Forms of Discrimination against Women*; and article 27 of the *Convention on the Rights of Persons with Disabilities*.

The right to freedom from forced or compulsory labour

29. The right to be free from forced or compulsory labour is enshrined in article 8(3)(a) of the ICCPR and given comprehensive effect in two core ILO Conventions: the *Forced Labour Convention, 1930 (No 29)* and the *Abolition of Forced Labour Convention, 1957 (No 105)*.

The rights of children, including the right to be protected from exploitative labour practices

30. The right of children to be protected from exploitative labour practices is protected by the ILO's *Worst Forms of Child Labour Convention, 1999 (No. 182)*, which requires state parties to take immediate and effective measures to secure the prohibition and elimination of the worst forms of child labour. In addition, article 32 of the *UN*

Convention on the Rights of the Child enunciates the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's development.

Conclusion

31. Australia has a range of obligations to respect workers' human rights, arising from both multilateral human rights instruments of the United Nations and ILO conventions. These rights encompass civil and political and economic, social and cultural rights. Any consideration of the extent to which Australian law currently protects human rights and of the extent to which such rights could be better protected must take into account these obligations. Everyone within Australia's jurisdiction is entitled to strong protection of these fundamental rights.