

Review into Commonwealth Laws for Consistency with Traditional Rights, Freedoms and Privileges

Submission to the Australian Law Reform Commission

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INTRODUCTION

- 1.1 The Australian Council of Trade Unions (ACTU) is the peak body representing almost 2 million working Australians across a range of industries. The ACTU and its 46 affiliated unions have a long and proud history of representing workers' industrial and legal rights and advocating for improvements to legislation to protect these rights. We would like to place on record that the ACTU did not receive a formal invitation to consider the Terms of Reference with respect to the Review into Commonwealth Laws for Consistency with Traditional Rights, Freedoms and Privileges despite the stipulation that relevant stakeholders were to be identified and consulted. We question the need for an inquiry of this nature, but welcome the opportunity to contribute to public discourse.
- 1.2 This submission begins with an important discussion about the Terms of Reference and some of the ambiguities and biases that are evident therein. What follows is a general discussion of particular "rights" which have been identified in the Terms of Reference and a detailed examination of how particular Acts interfere with those rights and whether those interferences are justified. We also provide such examination in relation to Bills that are yet to become law. This analysis is provided in five parts, each dedicated to a particular Act (or class of Acts) or Bill. This is as fulsome an analysis as the timeline for the inquiry and our resources have permitted.
- 1.3 Our specific conclusions and key observations concerning the interferences with rights which we have examined may be summarised as follows:

PART ONE: Anti-Discrimination Laws

- Reverse onus provisions are entirely justifiable in anti-discrimination laws. There are clear, cogent and broadly supported reasons for their continued use. The removal of the reverse onus would be inconsistent with an emerging global trend. The reverse onus in anti-discrimination laws should be retained.

PART TWO: *Fair Work Act*

- Section 361 of the *Fair Work Act* is a rebuttable presumption and not a reverse onus. Because of this, it may strictly lie outside the scope of this inquiry. In any event, the provision has historical roots in industrial relations laws that give effect to international obligations and is based on sound policy reasons recognised and approved of by the courts. It should be retained.
- Various aspects of the *Fair Work Act 2009* unjustifiably interfere with the right to freedom of association and should be reconsidered. It restricts the right to strike, the duration of industrial action and union access to workplaces. The negative rights it provides are inconsistent with the concept of freedom of association and detracts from the scope of the protection. The ILO Committee of Experts on the Application of Standards and Recommendations has repeatedly found that Australian law breaches international labour law.
- Division 2 of Part 3-3 of the *Fair Work Act* authorises the commission of a tort. The exception to the general rule is justified and required by international labour law and human rights law. The scope of protected industrial action permitted under the Act is unnecessarily restrictive and should be reconsidered.

PART THREE: *Building and Construction Industry (Improving Productivity) Bill*

- Clause 57 of the *Building and Construction Industry (Improving Productivity) Bill* is a rebuttable presumption and not a reverse onus. It may therefore lie strictly outside the terms of reference of the inquiry. In any event, use of either a reverse onus or a rebuttable presumption with respect to picketing and coercion is not justified. There are no difficulties of proof concerning the matters it deals with. It is inappropriate and misleading to draw an analogy with anti-discrimination laws. The provision itself is also highly objectionable for more fundamental reasons canvassed elsewhere. Whilst we oppose the Bill in its entirety, within the remit of this inquiry the Commission should recommend that clause 57 be removed.
- The onus of proof with respect to industrial action under the *Building and Construction Industry (Improving Productivity) Bill* over health and safety should be borne by the employer and not the employees. A reverse onus is not justified and would be

inconsistent with the *Fair Work Act* for building and construction workers to bear the onus and not others. Use of the reverse onus under *Work Choices* clearly demonstrates its problematic effect. Whilst we oppose the Bill its entirety, within the remit of this inquiry the Commission should recommend that clause 7(4) should be removed from the *Building and Construction Industry (Improving Productivity) Bill*.

- It is likely that the prohibitions on the industrial action and picketing in the *Building and Construction Industry (Improving Productivity) Bill* breach the right to strike under international labour law and the right to freedom of association and peaceful assembly under the ICCPR. Whilst we oppose the Bill its entirety, within the remit of this inquiry the Commission should recommend that clauses 46 and 47 of *Building and Construction Industry (Improving Productivity) Bill* be removed.
- The legal burden of proof in relation to the duty to provide safe and healthy workplaces should be borne by the employer and not the prosecution. For breaches of the duty of care to provide healthy and safe workplaces, the employer should bear the legal burden of proof in relation to the defence “reasonably practicable” as they possess the resources necessary to defend any charges.

PART FOUR: *Model Work Health and Safety Act*

- Criminal and civil proceedings for discrimination on the basis of health and safety activity in the *Model Work Health and Safety Act* involve at clause 110 and 113 a rebuttable presumption, with cl 113 adding in a defence as well. The provisions likely fall outside the scope of the Terms of Reference, however in any event we are of the view that a rebuttable presumption is justifiable in these circumstances.
- The use of evidentiary burdens with respect to the coercive information-gathering powers of inspectors in the *Model Work Health and Safety Act* is legitimate and justifiable. Use of the evidentiary burden in the health and safety context is proportionate to the aim of protecting life. The abrogation of the privilege against self-incrimination is justifiable and should be retained. There is a clear public interest in ensuring healthy and safe working conditions. Workers are entitled to healthy and safe conditions of work.

PART FIVE: *Fair Work (Registered Organisations) Amendment Bill*

- We oppose the Bill on a number of grounds unrelated to the present inquiry. Within the remit of this inquiry, we consider that the abrogation of the privilege against self-incrimination in the *Fair Work (Registered Organisations) Amendment Bill 2014 (Cth)* is not justified because reasons offered do not justify the abrogation of the privilege, and the safeguards put in place are inadequate.

- We strongly oppose any attempts to exert political control over trade unions. The interferences effected by the *Fair Work (Registered Organisations) Amendment Bill 2014 (Cth)* on the principle of freedom of association are not justified.

1.4 We would welcome the opportunity to participate in further consultation with ALRC as it continues its inquiry.

GLOSSARY

ABCC	Australian Building and Construction Commission
ACTU	Australian Council of Trade Unions
ACT	Australian Capital Territory
AEC	Australian Electoral Commission
ALHR	Australian Lawyers for Human Rights
AHRC	Australian Human Rights Commission
ALRC	Australian Law Reform Commission
CERD	Committee for the Elimination of all Forms of Racial Discrimination
COAG	Council of Australian Governments
Convention No. 87	Freedom of Association and Protection of the Right to Organise Convention
Convention No. 98	Right to Organise and Collective Bargaining Convention
ECHR	European Court of Human Rights
FWA	Fair Work Australia
FWC	Fair Work Commission
GDP	Gross Domestic Product
HRCC	Human Rights Consultation Committee
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of all Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILO	International Labour Organisation
MODEL LAW	Model Work Health and Safety Act
OHS	Occupational Health and Safety
PCBU	Person Conducting Business or Undertaking
UDHR	Universal Declaration on Human Rights

COMMENTARY ON THE TERMS OF REFERENCE AND THE APPROACH TO THE INQUIRY

1.5 The Australian Government has referred this inquiry to the Australian Law Reform Commission (ALRC) under section 20 of the *Australian Law Reform Commission Act 1996* (Cth). The ALRC has been tasked with: (a) identifying Commonwealth laws that encroach upon traditional rights, freedoms and privileges, and (b) critically examining those laws to determine whether the encroachments are appropriately justified.

Context: A Bill of Rights?

1.6 The broader political context of an inquiry into common law rights, privileges and freedoms should be considered, even though the ALRC came to the view arguments about a bill of rights are not the subject of this inquiry.¹ The Human Rights Consultation Committee (HRCC) found there was a high degree of community support for a statutory bill of rights.² Instead of conducting an inquiry into laws that conflict with human rights,³ the Abbott Government is conducting an audit of laws that conflict with common law rights. There does not appear to be any proof of broad-based support for common law bill of rights. It would have been more productive and worthwhile to conduct an inquiry into violations of human rights. The real value of this inquiry lies in the exploration of intersections between human rights and rights under common law. Even though the term “human rights” is not even mentioned in the Terms of Reference, a critical issue is whether they are desirable. The discussion has taken place in the context of a bill of rights, from which the focus on common law rights detracts attention.

1.7 The assumption upon which the Terms of Reference are built is that the “common law bill of rights” is sufficient to protect the rights of Australians. The ALRC is considering how rights are protected from statutory encroachment, through mechanisms such as the Australian Constitution.⁴ We agree with the preliminary conclusion that these mechanisms do not sufficiently protect rights under the common law.⁵ The ALRC touched on the argument that it is

¹ Australian Law Reform Commission, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws: Issues Paper* (2014) [1.15].

² Australian Government, *National Human Rights Consultation Report* (2009) 362.

³ *Ibid.*

⁴ Australian Law Reform Commission, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws: Issues Paper* (2014) [1.18].

⁵ *Ibid* [1.23].

more democratic for elected parliaments to make decisions about rights.⁶ This inquiry demonstrates the practical difficulties involved of not giving the Courts the power to adjudicate disputes. If there was a statutory bill of rights, the Courts could gradually consider these rights over time without apparent or perceived interference from the Government.⁷ Not only is this process more efficient, it would appear to be more legitimate and transparent. Using a political process to demonstrate the primacy of the common law is fundamentally unsound. In our view, a bill of rights would make judicial decision-making more accountable and transparent, and supply a framework for judges to articulate the values on which they make decisions. A bill of rights could legally cement uniquely Australian conceptions of fairness within a wider framework of internationally accepted standards which Australia has ratified.

Difficulties of Interpretation

1.8 Analysis is difficult because the meaning of key words and phrase is not made clear in the Terms of Reference itself.

Conceptual Confusion: “rights, privileges and freedoms...”

1.9 The Terms of Reference provides an open-ended list of laws that “encroach upon traditional rights, freedoms, and privileges”. For the purpose of the inquiry, “laws that encroach upon traditional rights, freedoms, and privileges” are to include laws that:

- reverse or shift the burden of proof
- deny procedural fairness to persons affected by the exercise of public power
- exclude the right to claim the privilege against self-incrimination
- abrogate client legal privilege
- apply strict or absolute liability to all physical elements of a criminal offence
- interfere with freedom of speech
- interfere with freedom on of religion
- interfere with vested property rights
- interfere with freedom of association
- interfere with freedom of movement
- disregard common law protection of personal reputation

⁶ Ibid [1.20].

⁷ Lord Hope commented that it is “now plain that the incorporation of the European Convention on Human Rights into our domestic law will subject the entire legal system to a fundamental process of review and, where necessary, reform by the judiciary”: *R v Director of Public Prosecutions, Ex Parte Kebilene* [2000] 2 A.C. 326.

- authorise the commission of a tort
- inappropriately delegate legislative power to the Executive
- give executive immunities a wide application
- retrospectively change legal rights and obligations
- create offences with retrospective application
- alter criminal law practices based on the principle of a fair trial
- permit an appeal from an acquittal
- restrict access to the courts

In our submission, we will focus on the burden of proof, privilege against self-incrimination, freedom of association and industrial torts.

1.10 The Terms of Reference could have been drafted in a more precise fashion avoiding difficulties with choice of language. Broad descriptive words, including rights, privileges and freedoms have been used although note exclusion of the word “immunities”. For example, the phrase “interfere with vested property rights” has been used instead of “immunity from interference with vested property rights”.⁸ The term “freedoms” is used in preference to “rights” as the term although included as a descriptor is not used anywhere else in the list. But the difference between a freedom and a right is more apparent than real, for example, the right to freedom of speech. The term “privilege” appears to have been included to cover self-incrimination and client legal privilege. Some of the principles listed cannot be characterised as a right, privilege or freedom. For example, the reverse onus is listed but the burden of proof itself is not typically characterised as forming part of the “common law bill of rights”. We agree with the ALRC that the term “principle” is a more accurate description of the matters listed in the Terms of Reference.⁹

1.11 There are also difficulties in relation to the meaning and scope of some of the principles listed in the Terms of Reference. For example, it is not clear whether the privilege against self-incrimination as referred to in the Terms of Reference encompasses the broad concept of privilege,¹⁰ or self-incrimination more specifically.¹¹ The ALRC has assumed that the privilege as listed in the Terms of Reference applies to civil penalties and criminal sanctions.¹² The

⁸ As described in this article: Jennifer Corrin, ‘Australia: Country Report on Human Rights’ (2009) 40 *Victorian University of Wellington Law Review* 37, 42.

⁹ Australian Law Reform Commission, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws: Issues Paper* (2014) [1.15].

¹⁰ *Trade Practices Commission v Abbco Ice Works Pty Ltd* (1994) 52 FCR 96, 111 (Burchett J).

¹¹ See, eg, *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328.

concept encompasses a “trilogy of privileges”; the most relevant one protecting against the imposition of criminal convictions (“self-incrimination”) and civil/administrative penalties (“penalty privilege”).¹³ It is not yet settled whether each of the privileges is a “distinct and separate principle”.¹⁴ There is a considerable degree of “confusion and uncertainty”¹⁵ as to the scope and application of the penalty privilege. The broad-ranging nature of this inquiry and the time provided to conclude it are not conducive to a thorough, careful and considered resolution of these matters.

Selective Approach: “... recognised by the common law”

1.12 The Terms of Reference refer to “rights, privileges and freedoms recognised by the common law”. The phrase encompasses rights recognised by the common law; the body of laws developed by the judiciary.¹⁶ We can refer to this set of rights in the short-hand as common law rights or common law bill of rights.¹⁷ The “common law bill of rights” is a collection of rebuttable presumptions within the field of statutory interpretation.¹⁸ In the absence of evidence to the contrary, the Courts presume that the Parliament did not intend to override common law rights.¹⁹ The judiciary requires a clear statement of intent that “unless the parliament makes unmistakably clear its intention to abrogate or suspend a fundamental freedom, the courts will not construe a statute as having that operation”.²⁰ Although the principles have been developed over the course of centuries,²¹ it is only recently that academics and judges have attempted to catalogue them. Justice Spigelman, writing extra-currially, collated a well-known list. The Terms of Reference is selective as it excludes discussion of rights with no explanation offered. It excludes discussion of common law rights listed by Spigelman J with respect to personal liberty, the course of justice, alienation of property and scope of penal statutes.²² The

¹² Australian Law Reform Commission, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws: Issues Paper* (2014) [10.4].

¹³ *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* [2002] HCA 49 [12]-[13].

¹⁴ Australian Law Reform Commission, *Securing Compliance: Civil and Administrative Penalties in the Federal Jurisdiction* (Discussion Paper, No. 65, 2002) [9.2]

¹⁵ Queensland Law Reform Commission, *The Abrogation of the privilege against self-incrimination* (Report no. 59, 2004) [1.15].

¹⁶ *Concise Australian Legal Dictionary* (1998 2nd edn, Butterworths) 77.

¹⁷ J. Spigelman, ‘The Common Law Bill of Rights’ (Speech, 10 March 2008).

¹⁸ Alexis Henry-Comley, ‘The Principle of legality: An Australian Common Law Bill of Rights’ (2013) 15 *University of Notre Dame Australia Law Review* 83, 91.

¹⁹ J. Spigelman, ‘Principle of legality and the clear statement principle’ (2005) 79 *Australian Law Journal* 769, 774.

²⁰ *Re Bolton; Ex Parte Douglas Beane* (1987) 162 CLR 514, 523 (Brennan J).

²¹ J. Spigelman, ‘The Common Law Bill of Rights’ (Speech, 10 March 2008) 22.

²² *Ibid.*

Terms of Reference also excludes other common law rights such as the right to legal counsel and the right to be brought before the court.²³ We agree with the ALRC that the omitted rights should be re-introduced under the auspices of “other rights, freedoms and privileges”.²⁴

Political Motivation: “workplace relations”

1.13 The ALRC must consider the Commonwealth laws listed including commercial and corporate regulation, environmental regulation and workplace relations. The list of laws is not exclusive. As the clause “including but not limited to” is used the ALRC is not limited to these areas and can consider other legislative schemes. The list is more reflective of political priorities rather than considered policy development. Although we appreciate the need to limit the scope of inquiry, a more principles-based approach would have been preferable. Our primary concern is workplace relations encompassing employment law, industrial relations and workplace health and safety. The **Fair Work Act 2009 (Cth)** in its current form regulates the terms and conditions of employment by providing for minimum standards, enterprise agreements and awards. The **Age Discrimination Act 2004 (Cth)**, **Disability Discrimination Act 1992 (Cth)**, **Racial Discrimination Act 1975 (Cth)**, and **Sex Discrimination Act 1984 (Cth)** provide recourse for victim of discrimination on specified grounds in areas of activity such as employment. We also consider the **Model Work Health and Safety Act** as most jurisdictions have enacted mirror laws consistent with the Model Act²⁵ with the exception of Victoria²⁶ and Western Australia after the Council of Australian Governments (COAG) agreed to harmonisation of workplace health and safety laws. Laws currently under consideration by the Parliament of Australia are also considered. The proposed reforms engage the principles listed in the Terms of Reference. The **Building and Construction Industry (Improving Productivity) Bill 2013 (Cth)** is currently being considered in the Senate. The Bill will re-institute a separate workplace relations framework for the building and construction industry and introduce oppressive measures in relation to industrial action. The **Fair Work (Registered**

²³ Jennifer Corrin, ‘Australia: Country Report on Human Rights’ (2009) 40 *Victorian University of Wellington Law Review* 37, 42.

²⁴ Australian Law Reform Commission, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws: Issues Paper* (2014) [19.3].

²⁵ See generally, Eric Windholz, ‘The Long and Winding Road to OHS Harmonisation’ (2013) 104 *Labour History* 169. See also, Eric Windholz, ‘The harmonisation of Australia’s occupational health and safety laws: Much ado about nothing?’ (2013) 26 *Australian Journal of Labour Law* 185.

²⁶ ‘Proposed Commonwealth OH&S laws to hit Victorian businesses hard’ (12 April 2012) <<http://www.premier.vic.gov.au/media-centre/media-releases/3607-proposed-commonwealth-ohas-laws-to-hit-victorian-businesses-hard.html>> See also, PricewaterhouseCoopers Australia, *Impact of the proposed national Model Work Health and Safety Laws Victorian Government in Victoria: Summary Report of Supplementary Impact Assessment* (2012).

Organisations) Act 2009 (Cth) regulates trade unions and provides for reporting obligations.²⁷ Despite amendments in 2012,²⁸ the Abbott Government has introduced the **Fair Work (Registered Organisations) Amendment Bill 2014 (Cth)**. The ACTU has made its opposition to each of these Bills known in the inquiry processes that have accompanied them and our critique in this submission should be interpreted as deviating from our primary position that these Bills ought not be passed at all.

Confusion of language: “any other similar right, freedom or privilege”

1.14 The ALRC can also consider laws that interfere with “any other similar legal right, freedom or privilege”. As the word “other” has been used the ALRC can consider rights other than the ones listed. We understand that the Terms of Reference was amended to make the list of rights non-exhaustive. We agree with the view of the Australian Lawyers for Human Rights (ALHR) that the catch-all encompasses other rights such as human rights under international law, and that the aim is to protect rights “no matter how they are categorised”.²⁹ To this we would add labour standards developed under the auspices of the International Labour Organisation (ILO) through a legislative-like process.³⁰ These standards play an important albeit “little recognised” role in the protection of human rights in Australia.³¹ The ALRC took a more cautious approach emphasising that the inquiry is not about the “history and source of the common law rights”.³² The qualifier “similar” has also been inserted. The use of the term “similar” is problematic as it is unclear whether the ALRC can consider rights with a similar subject matter or rights producing a similar effect. It is perhaps an example of bad drafting. A more objective approach would be appropriate to guard against the inquiry being tainted by the perception that it has been empowered to consider any right that suits the Abbott Government’s agenda.

²⁷ The *Workplace Relations Act 1996 (Cth)* was mostly repealed with the exception of Schedule 2 renamed *Fair Work (Registered Organisations) Act 2009 (Cth)*.

²⁸ *Fair Work (Registered Organisations) Amendment Act 2012 (Cth)*.

²⁹ Australian Lawyers for Human Rights, *Problems with Terms of Reference of the ‘Freedoms’ Enquiry (2014)* [6]-[7].

³⁰ Breen Creighton, and Andrew Stewart, *Labour Law (2010 5th edn, Federation Press)* ch 3.

³¹ Breen Creighton, ‘The ILO and the protection of fundamental human rights in Australia’ (1998) 22 *Melbourne University Law Review* 239, 241.

³² Australian Law Reform Commission, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws: Issues Paper (2014)* [1.39].

1.15 The ALRC has attempted to limit the scope of the inquiry by excluding discussion of economic, social and cultural rights.³³ We disagree with this course as and note that the Terms of Reference do not compel such a conclusion. The focus on civil and political rights to the exclusion of “second generation” or rights is mistaken. It is difficult to enjoy or realise rights of the kind contemplated by the Terms of Reference without economic, social and cultural rights. This has been recognised by the General Assembly of the United Nations with its resolution that the “full realization of civil and political rights without the enjoyment of economic, social and cultural rights is impossible”.³⁴

Interference with Rights: Proportionality

1.16 The Terms of Reference requires critical examination as whether the “encroachment” on common law rights is “appropriately” justified. We disagree with the use of the term “encroach” as it is unnecessarily pejorative and connotes disapproval of laws under discussion. As such, we will use the terms “conflict” or “interfere” or “impinge” rather than “encroach”. We also take issue with the word “appropriately” given its subjective nature and value-laden connotations. The ALRC has attempted to resolve this issue by asking what general principles or criteria should be applied to determine whether a law that interferes with the rights listed is justified.³⁵ The upside is that the ALRC has tried to put the onus onto persons and organisations making submissions. But the approach is flawed because of the nature of the inquiry itself. Aside from criteria already developed by the Courts, it is difficult to predict the kind of factual scenarios leading to the development of additional principles. The better course of action would be to focus on the test by which conflicts with individuals rights can be resolved. We can borrow from constitutional and human rights jurisprudence by invoking the concept of proportionality which posits any interference should be suitable, proportionate, and necessary.³⁶ Is the measure suitable for achieving the desired objective? Is a less restrictive but equally effective measure available? Is the measure proportionate to its objective?

³³ Ibid [1.17].

³⁴ Proclamation of Teheran, *Final Act of the International Conference on Human Rights*, Teheran, 22 April to 13 May 1968, U.N. Doc. A/CONF. 32/41 at 3 (1968).

³⁵ Australian Law Reform Commission, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws: Issues Paper* (2014) [1.43].

³⁶ See generally, Patrick Quirk, An Australian looks at German ‘proportionality’ (1999) 1(1) *University of Notre Dame Australia Law Review* 39.

Other Matters

1.17 The ALRC can have regard to other matters provided for in the Terms of Reference. The scope of the inquiry is so expansive as to make meaningful discussion of all matters impossible if not unmanageable. Contributing to the enormity of the task before it, the ALRC can also have regard to (a) how these laws are drafted, implemented and operate in practice, (b) any safeguards such as rights of review or other accountability measures, and (c) other inquiries and reviews it considers “relevant” noting that the Australian Human Rights Commission (AHRC) is conducting a national consultation into “rights and responsibilities”.

Underlying Assumptions

1.18 The Terms of Reference are based on underlying assumptions we do not accept with respect to deregulation and individualism.

Common Law v. Regulation

1.19 The Terms of Reference assume that the common law is superior method of regulating rights and entitlements. The “evolving tradition embodied in the history of judicial precedents” is said to result in better decision-making.³⁷ We do not accept the proposition that the common law is inherently more valuable than statute law. Both have a role to play in modern democratic societies. Statute law is important because it is an expression of the public interest. Before the advent of regulation in its modern form, there were no protections with respect to child labour, health and dismissal. The judiciary is concerned with individual disputes not social or economic policy.³⁸ As Roscoe points out, modern statutes “represent long and patient study by experts, careful consideration by conferences or congresses or associations, press discussions in which public opinion is focussed upon all important details, and hearings before legislative committees.”³⁹ That statutes reflect political bias is also undoubtedly true, but this merely confirms that their role as instruments of social engineering on a broad scale.

³⁷ Giacomo Ponzetto and Patricio Fernandez, ‘Case law v statute law: An evolutionary process’ (2008) 37(2) *Journal of Legal Studies* 379, 380.

³⁸ *Ibid* 404.

³⁹ *Ibid* 384.

Deregulation Agenda

1.20 The Terms of Reference makes the assumption that de-regulation - the process of removing or reducing state regulation - is a positive good. The discourse is based on the idea that the market is the most efficient way of allocating resources. We reject the proposition that labour market deregulation would benefit society and the economy. There is evidence to suggest that deregulation results in unsafe working conditions, lower levels of employment, decreased productivity and lower wages.⁴⁰ Labour market deregulation is a guise for consolidating the power of capital at the expense of labour. It is part and parcel of the Abbott Government's extremist neo-liberal conservative agenda and "red tape" rhetoric. The paradoxical output of this agenda in the labour law context was *Work Choices*⁴¹ where the Howard Government used highly prescriptive and legalistic laws⁴² to bring about "de-regulation".

Traditional v. Human Rights

The Terms of Reference makes the assumption that "traditional" rights are preferable to modern rights, possibly meaning common law rights are preferable to human rights. It is inappropriate to separate these rights as Australia is legally and morally obliged to comply with treaties it has ratified.⁴³ Mason CJ and Deane J have said "ratification of a convention is a positive statement by the executive government of this country to the world and to the Australian people that the executive government and its agencies will act in accordance with the convention".⁴⁴ Even though treaties are not automatically incorporated into domestic law,⁴⁵ they are a "legitimate influence" on the common law."⁴⁶ For example, the conceptual basis of

⁴⁰ See generally, Paul Stephen Dempsey, 'Interstate trucking: The collusion of textbook theory and empirical reality' (1992) *Transportation Law Journal* 185, 240. See also, Fred E. Case, 'Deregulation: Invitation to disaster in the S&L industry (1991) 59 *Fordham Law Review* 93. And also, Paul Stephen Dempsey, 'The deregulation of intrastate transportation: The Texas debate' (1987) 39 *Baylor Law Review* 1.

⁴¹ *Workplace Relations Amendment (Work Choices) Act* 2005 (Cth).

⁴² John Howe, *Deregulation of labour relations in Australia: Towards command and control* (Working paper, no. 34, 2005) 2.

⁴³ See, eg, *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/RES/217A (III) (10 December 1948),

⁴⁴ *Minister of State for Immigration and Ethnic Affairs v Ah Hin Teoh* (1995) 128 ALR 353, 365.

⁴⁵ *Walker v Baird* [1892] AC 491.

⁴⁶ *Dietrich v The Queen* (1992) 177 CLR 292, 321 (Justice Brennan).

the privilege against self-incrimination⁴⁷ is now framed in terms of human rights, and specifically the “desire to protect personal freedom and human dignity”.⁴⁸

⁴⁷ Art 14 states “no person should be compelled to “testify against himself or to confess guilt”. International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 14(g).

⁴⁸ (1982) 153 CLR 134, 150.

COMMON LAW RIGHTS: GENERAL PRINCIPLES

1.21 The ALRC has requested that we highlight specific justifications for interferences with common law rights in addition to general criteria and principles.⁴⁹

Burden of Proof: Reverse Onus

1.22 In the Terms of Reference, laws that encroach upon “traditional” rights is defined to include laws that reverse or shift the burden of proof. Note that the burden of proof is not typically regarded as forming part of the common law bill of rights. In adversarial legal systems, the person seeking the benefit of the law must persuade the Court to act in its favour. The maxim “he who asserts must prove” is applicable. In civil cases, the standard of proof is the balance of probabilities of “more likely, than not” while in criminal law the standard is “beyond reasonable doubt”. The evidentiary burden denotes which party is responsible for establishing a *prima facie* case.⁵⁰ Unlike legal burdens, they do not require the respondent to assume the risk of failing to persuade the fact-finder of the matter in question.⁵¹ The legal or “persuasive” burden denotes which party loses in case of doubt.⁵² The presumption of innocence is a related principle curiously omitted from the Terms of Reference. In *Woolmington v Director of Public Prosecutions*,⁵³ Lord Sankey stated, “No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained”.⁵⁴ Its rationale is best expressed by Blackstone who quipped, “It is better that ten guilty persons escape than that one innocent suffer”.⁵⁵ The principle is not absolute and can be subject to exceptions. A reverse onus shifts or moves the burden of proof to the opposing party. They are usually statutory, imposed by express words or by necessary implication.⁵⁶ A typical formulation is found in s 7C of the *Sex Discrimination Act 1984 (Cth)*, which states “the burden of proving that an act does not constitute discrimination because of section 7B lies on the person who did the act”. There are policy considerations as to whether the onus should be reversed and they include ease of

⁴⁹ Australian Law Reform Commission, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws: Issues Paper* (2014) [1.43].

⁵⁰ Ian Dennis, ‘Reverse onuses and the presumption of innocence: In search of principle’ (2005) *Criminal Law Review* 901, 912.

⁵¹ *Ibid* 901.

⁵² *Purkess v Crittenden* (1965) 114 164, 167.

⁵³ [1935] AC 462.

⁵⁴ *Ibid* [7].

⁵⁵ William Blackstone, *Commentaries on the Laws of England* (1769).

⁵⁶ Office of the Queensland Parliamentary Counsel, *Principles of good legislation: Reverse onus of proof* (2013) 8.

proof (“peculiar knowledge”),⁵⁷ “grave danger to public safety”,⁵⁸ position of vulnerability,⁵⁹ and harshness of penalty.⁶⁰ There is little judicial guidance on the relative importance of these factors and the weight that should be attributed to them.

Privilege against Self-Incrimination

- 3.1 In the Terms of Reference, laws that encroach upon “traditional” rights is defined to include laws that that abrogate the privilege against self-incrimination. It is an internationally recognised human right; art 14 of the *International Covenant on Civil and Political Rights* (ICCPR) provides no person should be “compelled to “testify against himself or to confess guilt”.⁶¹ At common law, the privilege entitles a person to refuse to answer any questions or produce documents if the answer or information might incriminate them.⁶² But it cannot be relied upon if the document or answer would incriminate a third party.⁶³ The privilege against self-incrimination is a “substantive” right not merely a rule of evidence.⁶⁴ It exists for a number of reasons; it does not serve “one particular policy or purpose”.⁶⁵ Its historical origins can be traced back to the Star Chamber’s use of inquisitorial methods to elicit confessions.⁶⁶ The privilege is designed to “protect individuals from oppressive methods of obtaining evidence of their guilt for use against them”.⁶⁷ It recognises the disparity in resources between the parties by ensuring a “fair state-individual balance”.⁶⁸ The privilege ensures the integrity of evidence by encouraging witnesses to “truthfully testify without the fear of providing answers against their own interests”.⁶⁹ And it

⁵⁷ Dominique Allen, ‘Reducing the burden of proving discrimination in Australia’ (2009) 31 *Sydney Law Review* 580, 583.

⁵⁸ *Ibid.*

⁵⁹ *Chugg v Pacific Dunlop Ltd* (1990) 170 CLR 249 [3].

⁶⁰ Attorney-General’s Department, *A Guide to framing Commonwealth offences, Infringement notices and Enforcement powers* (2011) 50-51.

⁶¹ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 14(g).

⁶² *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328.

⁶³ *Ibid* [7].

⁶⁴ *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* [2002] HCA 49 [9] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

⁶⁵ *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 [10].

⁶⁶ *Ibid* [31].

⁶⁷ *Rochfort v Trade Practices Commission* (1982) 153 CLR 134 [31].

⁶⁸ *Ibid.*

⁶⁹ *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 [10].

⁶⁹ Stella Gold, ‘Bulwark of liberty or impunity for the wicked? The abrogation of the privilege against self-incrimination in the National Model Work Health and Safety Bill (2014) 27 *Australian Journal of Labour Law* 1, 5.

protects persons from the “cruel trilemma” of punishment for self-accusation, contempt and perjury.⁷⁰

- 3.2 The privilege against self-incrimination is not absolute and can be modified by statute if the “public interest overcomes some of the common law’s traditional consideration for the individual”.⁷¹ This should occur rarely, in circumstances that are clearly defined, compelling and limited in scope.⁷² The privilege might be restricted to avoid risks in relation to serious damage to property or the environment, danger to human life or significant economic detriment.⁷³ The presumption is that the privilege endures if not abrogated by statute.⁷⁴ Sometimes statutes modify the privilege but provide for safeguards instead. The use of immunities lessens the impact of the abrogation on the rights of the individual, the reasoning being that the “essentials of the privilege are not necessarily sacrificed by requiring disclosure of information when the use to which it is put is controlled and limited”.⁷⁵ Direct use immunity prevents the evidence obtained from being used in future proceedings, while derivative use immunity goes further in preventing evidence subsequently obtained as a result of disclosures from being admitted for use in court proceedings.⁷⁶

Freedom of Association

- 3.1 In the Terms of Reference, laws that encroach upon “traditional” rights is defined to include laws that interfere with freedom of association. The right is a “critical means” for individuals and groups to participate in public affairs providing an avenue through which “people can aggregate and voice their concerns and interests”.⁷⁷ As recognised by the ALRC, freedom of association is conceptually pivotal to Australia’s system of industrial relations.⁷⁸ Note that freedom of association was not included in Spigelman J’s list of canons of statutory interpretation. The ALRC seems to suggest that the common law does not recognise the freedom of association. In

⁷⁰ *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 [33].

⁷¹ *Rees and Another v Kratzmann* (1965) 114 CLR 63, 80 (Windeyer J).

⁷² Administrative Review Council, *The Coercive Information-Gathering Powers of Government Agencies*, Report no. 48 (2008).

⁷³ Queensland Law Reform Commission, *The Abrogation of the privilege against self-incrimination* (Report no. 59, 2004) 6.51.

⁷⁴ *Sorby v Commonwealth* (1983) 152 CLR 281, 289.

⁷⁵ Queensland Law Reform Commission, *The Abrogation of the Privilege against Self-Incrimination*, Report No. 59 (2004) 46 (citing J. Mansfield, ‘The Albertson Case: Conflict Between the Privilege against Self-incrimination and the Government’s Need for Information’ (1966) *Supreme Court Review* 103, 160).

⁷⁶ *Ibid.*

⁷⁷ Human Right Council, *Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association (Maina Kiai)* (2012) [5]-[6].

⁷⁸ Australian Law Reform Commission, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws: Issues Paper* (2014) [4.9].

Duncan v Jones,⁷⁹ Hewart CJ stated: “English law does not recognise any special right of public meeting for political or other purposes”.⁸⁰ But here in Australia, there is growing recognition that freedom of association should be considered a common law right. In *Tajjour v New South Wales*,⁸¹ Keane J expressed the view that freedom of association was a “fundamental aspect of our legal system”.⁸² His Honour cited the *Australian Communist Party v The Commonwealth*⁸³ as authority for the proposition that freedom of association constitutes a common law right. And in *Minister for Immigration & Citizenship v Haneef*,⁸⁴ the freedom of association was an integral part of the Federal Court’s approach to statutory construction.⁸⁵ As the common law is under-developed in this area, the right to freedom of association insofar as the concept is understood and applied at the international level is relevant.

3.2 Freedom of association is a basic human right enshrined in the *Universal Declaration of Human Rights*⁸⁶ and codified in the ICCPR and in the *International Covenant on Economic, Social and Cultural Rights* (ICESCR).⁸⁷ Article 22 of the ICCPR provides that everyone has the right to freedom of association, including the right to join trade unions for the protection of their interests.⁸⁸ The right to peaceful assembly under art 21 is related;⁸⁹ the term assembly referring to gatherings for specific purposes such as strikes.⁹⁰ An association refers to a group of individuals or legal entities such as trade unions brought together to collectively act, express, promote, pursue or defend a field of common interests.⁹¹ Freedom of association encompasses the right to form and join an association,⁹² the right to operate freely and be protected from

⁷⁹ [1936] 1 KB 218.

⁸⁰ *Ibid* 222.

⁸¹ [2014] HCA 35.

⁸² *Ibid* [224].

⁸³ (1951) 83 CLR 1.

⁸⁴ [2007] FCAFC 203.

⁸⁵ Black CJ, French and Weinberg JJ did not expressly state that freedom of association was a common law right but this is a logical consequence of their decision: *Minister for Immigration & Citizenship v Haneef* [2007] FCAFC 203 [105]-[113].

⁸⁶ *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/RES/217A (III) (10 December 1948) art 20(1).

⁸⁷ *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) art 8.

⁸⁸ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 22(1).

⁸⁹ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 21.

⁹⁰ Human Right Council, *Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association (Maina Kiai)* (2012) [24].

⁹¹ Human Right Council, *Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association (Maina Kiai)* (2012) [51]-[52]. See also, definition by Purvis DP in *Re Chan and Minister for Immigration and Multicultural Affairs* (2001) 33 AAR 191.

⁹² *Ibid* [53].

undue interference,⁹³ the right to access funding and resources,⁹⁴ the right to take part in the conduct of public affairs,⁹⁵ and protections in relation to dissolution and suspension.⁹⁶ The freedom can be restricted in the interests of national security, public safety or order, public health or morals, provided such restrictions are provided by law and are necessary in a democratic society⁹⁷ insofar as the law is consistent with the aims and objectives of the treaty.⁹⁸ Unlike the ICCPR, the ICESCR does not specifically provide for freedom of association; it focuses on trade union membership a vehicle through which the right can be exercised. Article 8 provides for the right of persons to form and join trade unions subject only to the rules of the organisation for the “promotion and protection of his economic and social interests”.⁹⁹ Any restrictions must be prescribed by law and necessary in a democratic society in the interests of national security or to protect others’ rights.

3.3 The right to freedom of association is also provided for in the specialised field of international labour law, and is a founding principle of the *Declaration of Philadelphia* part of the ILO Constitution.¹⁰⁰ There are obvious linkages as “freedom of industrial association is but one aspect of freedom of association in general, which must itself form part of the whole range of fundamental liberties of man, all interdependent and complementary one to another”.¹⁰¹ The *Freedom of Association and Protection of the Right to Organise Convention*¹⁰² (Convention No. 87) and *Right to Organise and Collective Bargaining Convention*¹⁰³ (Convention No. 98) set out a framework for the protection of freedom of association in the industrial context. Convention No. 87 provides for various trade union rights including the right to establish and join organisations,¹⁰⁴ organise their administration and formulate their programmes,¹⁰⁵ and not be

⁹³ Ibid [63].

⁹⁴ Ibid [67].

⁹⁵ Ibid [73].

⁹⁶ Ibid [75].

⁹⁷ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 22(2).

⁹⁸ Human Right Committee, *General Comment 16: Article 17 – Right to Privacy* [3].

⁹⁹ *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) art 8.

¹⁰⁰ ‘Declaration Concerning the Aims and Purposes of the International Labour Organisation’ annex to the *ILO Constitution*. The annex was adopted at Philadelphia on 10 May 1944 (‘Declaration of Philadelphia’).

¹⁰¹ International Labour Office, *Freedom of Association and Collective Bargaining: Report III* (1994) 14 (citing International Labour Office, *Freedom of Association and Collective Bargaining: Report IV* (1947) 11.

¹⁰² *Freedom of Association and Protection of the Right to Organise Convention* 1948 (No 87), opened for signature 17 June 1948, 68 UNTS 17 (entered into force 4 July 1950). Ratified by Australia on 28 Feb 1973.

¹⁰³ *Right to Organise and Collective Bargaining Convention* 1949 (No 98), opened for signature 1 July 1949, 96 UNTS 257 (entered into force 18 July 1951). Ratified by Australia on 28 Feb 1973.

¹⁰⁴ *Freedom of Association and Protection of the Right to Organise Convention* 1948 (No 87), opened for signature 17 June 1948, 68 UNTS 17 (entered into force 4 July 1950). Ratified by Australia on 28 Feb 1973.

¹⁰⁵ *Right to Organise and Collective Bargaining Convention* 1949 (No 98), opened for signature 1 July 1949, 96 UNTS 257 (entered into force 18 July 1951) art 2.

dissolved or suspended by governmental authorities.¹⁰⁶ Convention No. 87 is complemented by Convention No. 98 which provides additional protection in relation to anti-union discrimination,¹⁰⁷ acts of interference,¹⁰⁸ and collective bargaining.¹⁰⁹

Commission of Tort: “Industrial Torts”

3.4 In the Terms of Reference, laws that encroach upon “traditional” rights is defined to include laws that authorise the commission of a tort. A tort is a civil wrong involving a breach of duty fixed by law for which damages can be awarded.¹¹⁰ It is exceedingly peculiar that the commission of a tort was included considering the ability to sue another is not a common law right. It is plainly an attempt to open up discussion of protected industrial action under the *Fair Work Act 2009* (Cth) via nefarious backdoor means.¹¹¹ The torts of contractual interference, conspiracy and intimidation are relevant in the industrial context. The effect of *Quinn v Leatham*¹¹² was to make all industrial action actionable as a tort under the common law, while *Taff Vale Railway Co v Amalgamated Society of Railway Servants*,¹¹³ made it possible for trade unions to be liable in their own name. The tort of interference with contractual relations takes two forms: (a) direct interference involving the persuasion of a person not to perform a contract with, and (b) indirect interference involving interference or prevention of contractual performance by way of an illegal act.¹¹⁴ The tort of conspiracy also takes two forms: (a) simple conspiracy occurs when two or more persons acting in combination to inflict economic loss on another, while (b) conspiracy by unlawful means occurs when the persons inflict loss on another by the doing of an unlawful act or acting for an unlawful purpose.¹¹⁵ The tort of intimidation occurs a person threatens another

¹⁰⁵ *Freedom of Association and Protection of the Right to Organise Convention 1948* (No 87), opened for signature 17 June 1948, 68 UNTS 17 (entered into force 4 July 1950). Ratified by Australia on 28 Feb 1973.

¹⁰⁵ *Right to Organise and Collective Bargaining Convention 1949* (No 98), opened for signature 1 July 1949, 96 UNTS 257 (entered into force 18 July 1951) art 3.

¹⁰⁶ *Freedom of Association and Protection of the Right to Organise Convention 1948* (No 87), opened for signature 17 June 1948, 68 UNTS 17 (entered into force 4 July 1950). Ratified by Australia on 28 Feb 1973.

¹⁰⁶ *Right to Organise and Collective Bargaining Convention 1949* (No 98), opened for signature 1 July 1949, 96 UNTS 257 (entered into force 18 July 1951) art 4.

¹⁰⁷ *Right to Organise and Collective Bargaining Convention 1949* (No 98), opened for signature 1 July 1949, 96 UNTS 257 (entered into force 18 July 1951) art 1.

¹⁰⁸ *Right to Organise and Collective Bargaining Convention 1949* (No 98), opened for signature 1 July 1949, 96 UNTS 257 (entered into force 18 July 1951) art 2.

¹⁰⁹ *Right to Organise and Collective Bargaining Convention 1949* (No 98), opened for signature 1 July 1949, 96 UNTS 257 (entered into force 18 July 1951) art 4.

¹¹⁰ *Concise Australian Legal Dictionary* (1998 2nd edn, Butterworths) 429.

¹¹¹ *Fair Work Act 2009* (Cth) pt 3-3, div 2.

¹¹² [1901] AC 495.

¹¹³ [1901] AC 426.

¹¹⁴ Andrew J. Stewart, ‘Civil Liability for Industrial Action: Updating the Economic Torts’ [1984] 9(3) *Adelaide Law Review* 359, 360.

¹¹⁵ *Ibid.*

person with an illegal act unless they inflict economic loss on a third party.¹¹⁶ As has been pointed out, the conceptual difference between “acts done in combination and acts done by individuals is somewhat unsatisfactory”.¹¹⁷ The common law seems to hold a deep suspicion of collectivist action (while seemingly blind to the inherent collectivism of corporate capital); this can hardly be reconciled with the right to freedom of association.

3.5 Industrial action is an exception to the rule that persons are responsible for economic loss inflicted upon others. The taking of industrial action is a legitimate and important means of furthering and protecting interests of the workers. The right to strike is expressly and unequivocally guaranteed by art 8 of the ICESCR,¹¹⁸ and probably forms part of customary international law.¹¹⁹ It encompasses stoppages as well as other kinds of protest such as work-to-rule and go-slows.¹²⁰ The ICESCR clearly contemplates that the right to strike is critical means of achieving the aims of “just and favourable conditions of work” including fair wages under art 7. And further, striking is an important way of achieving an “adequate standard of living” for workers and their families and “continuous improvement of living conditions” under art 11. The right to strike is not explicitly stated as such in any ILO Convention, but arises by necessary implication from the broader rights contained in Conventions No. 98 and No. 87.¹²¹ The Committee of Experts has emphasised its importance stating:

*The right to strike is one of the essential means available to workers and their organisations for the promotion and protection of their economic and social interests. These interests not only have to do with obtaining better working conditions and pursuing collective demands of an occupational nature but also with seeking solutions to economic and social policy questions and to labour problems of any kind which are of direct concern to the workers.*¹²²

The difference between the common law of Australia and international labour law and human rights law could not be more stark. Collectively known as the “industrial torts” they are a “means of fixing trade unions and their members and officials with liability for industrial action”.¹²³ The

¹¹⁶ Ibid.

¹¹⁷ R.J. Mitchell, ‘Liability in tort for causing economic loss by the use of unlawful means and its application to Australian industrial disputes’ (1976) 4(5) *Adelaide Law Review* 428, 430.

¹¹⁸ *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) art 8(d).

¹¹⁹ Richard Dalton and Richard Groom, ‘The Right to Strike in Australia: International treaty obligations and the external affairs power the right to strike in Australia’ 2000 (1) *Melbourne Journal of International Law* 162, 165.

¹²⁰ Breen Creighton, and Andrew Stewart, *Labour Law* (2010 5th edn, Federation Press) [22.04].

¹²¹ Committee of Experts on the Application of Conventions and Recommendations, *Conclusions Concerning the Reports Received Under Articles 19 and 22 of the Freedom of Association and Right to Collectively Organise and Collective Agreements* (81st session, ILC, 1994) Report III (Part 4B) [179].

¹²² International Labour Organisation, *General Survey of the Committee of Experts: Freedom of Association and Collective Bargaining* (1983) [200].

¹²³ Breen Creighton, and Andrew Stewart, *Labour Law* (2010 5th edn, Federation Press) [22.87].

genus of economic torts is a prime example of the reticence of the common law to absorb the principles and ideals underpinning international treaties. The torts are used “to curtail the activities of trade unions, or moves by, or combination of workmen, for any militant purpose to secure better or more uniform conditions of employment”.¹²⁴

¹²⁴ J.G. Starke, 'Unlawful interference with contractual arrangements' [1957] 7 *Res Judicatae* 136, 139.

INTERFERENCE LAWS: JUSTIFICATIONS

3.6 The ALRC has requested that we identify laws that unjustifiably interfere with common law rights and explain why those interferences are not justified.¹²⁵ It would remiss of us to not also highlight some interferences which in our view are justified, to counterbalance some of the views that we suspect the inquiry was initiated to give oxygen to.

Part 1: Anti-Discrimination Laws

3.7 The *Sex Discrimination Act 1984* (Cth), *Disability Discrimination Act 1992* (Cth) and *Age Discrimination Act 2004* (Cth) reverse the onus of proof.

Reverse Onus

3.8 The *Sex Discrimination Act 1984* (Cth), *Disability Discrimination Act 1992* (Cth), *Racial Discrimination Act 1975* (Cth) and *Age Discrimination Act 2004* (Cth) prohibit discrimination in employment on the basis of certain circumstances.¹²⁶ It is against the law for employers to discriminate against potential employees in recruitment arrangements, offers or employment, and terms of employment,¹²⁷ employers to discriminate against current employees with respect to terms and conditions of employment,¹²⁸ and for employers to dismiss employees or withhold opportunities (e.g. promotions, transfers, and training) on the basis of disability, or limit access to work benefits or impose other kinds of detriment.¹²⁹ Other kinds of workers including contract workers,¹³⁰ commission agents¹³¹ and partners can also access protections.¹³²

¹²⁵ Australian Law Reform Commission, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws: Issues Paper* (2014) [1.44].

¹²⁶ The Acts encompasses the traditional employment relationship as well as other forms of work arrangements except for the *Racial Discrimination Act 1975* (Cth) which only covers the formal employer/employee relationships: *Racial Discrimination Act 1975* (Cth) s 15(1),(2).

¹²⁷ *Disability Discrimination Act 1992* (Cth) s 15(1)(a)-(c); *Sex Discrimination Act 1984* (Cth) s 14(1)(a)-(c); *Age Discrimination Act 2004* (Cth) s 18(1)(a)-(c).

¹²⁸ *Disability Discrimination Act 1992* (Cth) s 15(2)(a); *Sex Discrimination Act 1984* (Cth) s 14(2)(a); *Age Discrimination Act 2004* (Cth) s 18(2)(a).

¹²⁹ *Disability Discrimination Act 1992* (Cth) s 15(2)(b), (c),(d); *Sex Discrimination Act 1984* (Cth) s 14(2)(b),(c),(d); *Age Discrimination Act 2004* (Cth) s 18(2)(b),(c),(d).

¹³⁰ *Disability Discrimination Act 1992* (Cth) s 1 (a)-(d); *Sex Discrimination Act 1984* (Cth) s 16(a)-(d); *Age Discrimination Act 2004* (Cth) s 20(1).

¹³¹ *Disability Discrimination Act 1992* (Cth) s 16(1),(2); *Sex Discrimination Act 1984* (Cth) s 15(1),(2); *Age Discrimination Act 2004* (Cth) s 19(1),(2).

¹³² *Disability Discrimination Act 1992* (Cth) s 18(1),(2); *Sex Discrimination Act 1984* (Cth) s 17(1),(2),(3); *Age Discrimination Act 2004* (Cth) s 20(1),(2),(3).

The Reverse Onus: Its purpose and effect

3.9 The reverse onus is commonly used in anti-discrimination laws at the Commonwealth level. With the exception of the *Racial Discrimination Act 1975* (Cth), all Commonwealth anti-discrimination laws have a reverse onus. But note that the burden is shifted only with respect to indirect discrimination and not direct discrimination.¹³³ Complainants still bear the onus in proceedings when they have been disadvantaged because of differential treatment.¹³⁴ Even though direct discrimination is just as difficult to prove, there have been no moves to shift the onus to the respondent.¹³⁵ In terms of drafting, there is no real consistency between the enactments. There are two distinct approaches. Under the first approach, the burden is simply shifted to the respondent.¹³⁶ Under the second approach, the respondent is required to prove their decision was reasonable in the circumstances. Section 6(4) of the *Disability Discrimination Act 1992* (Cth) provides that the “burden of proving that the requirement or condition is reasonable...lies on the person who required...the person with a disability to comply with the requirement or condition”.¹³⁷ The States and Territories have shifted the onus of proof in discrimination proceedings in response to these developments. Queensland, Victoria, and the Australian Capital Territory (ACT) all have a reverse onus.

Jurisdiction/Enactment	Reverse onus provisions
Queensland	It is for the complainant to prove, on the balance of probabilities, that the respondent contravened the Act, subject to the requirements in sections 205 and 206. ¹³⁸ In a case involving an allegation of indirect discrimination, the respondent must prove, on the balance of probabilities, that a term complained of is reasonable. ¹³⁹
Victoria	The person who imposes, or proposes to impose, the requirement, condition or practice has the burden of proving that the requirement, condition or practice is reasonable. ¹⁴⁰
Australian Capital Territory	If, apart from an exception, exemption, excuse, qualification or justification under this Act, conduct would be unlawful under part 3, part 5, section 66 or part 7, the onus of establishing the exception,

¹³³ *Sex Discrimination Act 1984* (Cth) s 5(2), *Disability Discrimination Act 1992* (Cth) s 6(2), *Age Discrimination Act 2004* (Cth) s 15(1), *Anti-Discrimination Act 1991* (Qld) s 11(2), *Equal Opportunity Act 2010* (Vic) s 9(1), *Discrimination Act 1991* (ACT) s 8(1),(b).

¹³⁴ *Waters v Public Transport Corporation* (1991) 173 CLR 349, 342 (Dawson and Toohey JJ).

¹³⁵ Neil Rees, Katherine Lindsay, and Simon Rice, *Australian Anti-Discrimination law: Test, Cases and Materials* (Federation Press, 2013) 146.

¹³⁶ *Sex Discrimination Act 1984* (Cth) s 7C.

¹³⁷ *Disability Discrimination Act 1992* (Cth) s 6(4)

¹³⁸ *Anti-Discrimination Act 1991* (Qld) s 204.

¹³⁹ *Anti-Discrimination Act 1991* (Qld) s 206.

¹⁴⁰ *Equal Opportunity Act 2010* (Vic) s 9(2).

	exemption, excuse, qualification or justification lies on the person seeking to rely on it. ¹⁴¹
Sex Discrimination Act 1984 (Cth)	In a proceeding under this Act, the burden of proving that an act does not constitute discrimination because of section 7B lies on the person who did the act. ¹⁴²
Disability Discrimination Act 1992 (Cth)	For the purposes of subsection (3), the burden of proving that the requirement or condition is reasonable, having regard to the circumstances of the case, lies on the person who requires, or proposes to require, the person with the disability to comply with the requirement or condition. ¹⁴³
Age Discrimination Act 2004 (Cth)	For the purposes of paragraph (1)(b), the burden of proving that the condition, requirement or practice is reasonable in the circumstances lies on the discriminator. ¹⁴⁴

Evidentiary Difficulties: The problem of proof

3.10 The problem of proof has been recognised in the literature since anti-discrimination laws were enacted.¹⁴⁵ One barrier is that complainants are typically unable to access evidence controlled by respondents. Respondents are considered to have a “monopoly of knowledge”¹⁴⁶ as only they know the reason for their behaviour.¹⁴⁷ Moreover, respondents are under no obligation to explain actions.¹⁴⁸ If they choose to volunteer an explanation, they can simply deny the allegations.¹⁴⁹ Added to that, there might not be direct evidence of discrimination if the employer does not collect statistical information.¹⁵⁰ It is also possible that the respondent is unaware of their unconscious prejudices or biases.¹⁵¹ And witnesses as employees are usually interested parties unlikely to contradict the respondent’s version of events.¹⁵² This leave it open for respondents to make “no case” submissions. Alternatively, complainants can ask for an

¹⁴¹ *Discrimination Act 1991 (ACT)* s 70.

¹⁴² *Sex Discrimination Act 1984 (Cth)* s 7C.

¹⁴³ *Disability Discrimination Act 1992 (Cth)* s 6(4)

¹⁴⁴ *Age Discrimination Act 2004 (Cth)* s 15(2).

¹⁴⁵ See, eg, W.B. Creighton, ‘The Equal Opportunity Act – Tokenism or prescription for change?’ (1978) 11 *Melbourne University Law Review* 513.

¹⁴⁶ Laurence Lustgarten, ‘Problems of Proof in Employment Discrimination Cases’ (1977) 6 *Industrial Law Journal* 212, 213.

¹⁴⁷ Dominique Allen, ‘Reducing the burden of proving discrimination in Australia’ (2009) 31 *Sydney Law Review* 580, 582.

¹⁴⁸ Laurence Lustgarten, ‘Problems of Proof in Employment Discrimination Cases’ (1977) 6 *Industrial Law Journal* 212, 213.

¹⁴⁹ *Ibid* 215.

¹⁵⁰ Dominique Allen, ‘Reducing the burden of proving discrimination in Australia’ (2009) 31 *Sydney Law Review* 580, 583.

¹⁵¹ *Glasgow City Council v Zafar* [1998] 2 All ER 953: Lord Browne-Wilkinson commented that “those who discriminate on the grounds of race or gender do not in general advertise their prejudices; indeed they may not even be aware of them” (at 958). Cited by the Full Court of the Federal Court in *Sharma v Legal Aid (Qld)*[2002] FCAFC 196 [40].

¹⁵² Dominique Allen, ‘Reducing the burden of proving discrimination in Australia’ (2009) 31 *Sydney Law Review* 580, 583.

inference to be drawn on the available evidence.¹⁵³ But the Courts have been unwilling to infer discrimination without “sound” evidence.¹⁵⁴ To make things even more difficult, the Courts have regarded allegations of racial discrimination as extremely serious,¹⁵⁵ and have required a higher standard of evidence under the *Briginshaw* principle.¹⁵⁶ Unlike other countries, Courts here require cogent evidence before making a finding of discrimination. In response to these concerns, anti-discrimination legislation has been progressively amended. The *Sex Discrimination Act* 1984 (Cth) was amended in 1995 to shift the burden to the respondent.¹⁵⁷ It was recognised in the Explanatory Memorandum that an information asymmetry between the parties exists.¹⁵⁸

Policy Rationale: Recognised again and again

3.11A clear policy rationale justifies the use of the reverse onus in anti-discrimination cases. The arguments can be grouped as follows:

- *Power imbalance* - There is a “significant” imbalance in resources and expertise between complainants and respondents¹⁵⁹
- *Information asymmetry* - The respondent has access to information and evidence that the complainant does not e.g. statistics¹⁶⁰
- *Practicality* - The respondent is in the best position to explain the reason for the requirement. The complainant may not know the reason behind it¹⁶¹
- *Reality* - Use of the reverse onus reflects the realities of the situation because in practice the burden usually falls on the respondent anyway¹⁶²
- *Access to justice* - It is “notoriously” difficult for complainants to prove indirect discrimination has occurred¹⁶³

¹⁵³ Ibid.

¹⁵⁴ Ibid 584.

¹⁵⁵ Jonathan Hunyor, ‘Skin-deep: proof and Inferences of racial discrimination in Employment’ (2003) 25(4) *Sydney Law Review* 535, 536.

¹⁵⁶ *Briginshaw* (1938) 60 CLR 336, 362 (Dixon J).

¹⁵⁷ *Sex Discrimination Amendment Act* 1995 (Cth).

¹⁵⁸ Explanatory Memorandum, *Sex Discrimination Amendment Act* 1995 (Cth) [32].

¹⁵⁹ Equal Opportunity Commission (Western Australia), *Finding a Place: An Inquiry into the existence of discriminatory practices in relation to the provision of public housing and related serviced to Aboriginal people in Western Australia* (2004) 50.

¹⁶⁰ Equal Opportunity Commission (Western Australia), *Finding a Place: An Inquiry into the existence of discriminatory practices in relation to the provision of public housing and related serviced to Aboriginal people in Western Australia* (2004) 51.

¹⁶¹ Government of South Australia, *Review of South Australian Equal Opportunity Legislation* (2004) 37.

¹⁶² New South Wales Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)* (Report 92, 1999) [3.103].

3.12 The cogency of these arguments has been consistently recognised in reviews by bodies at state and federal level. Numerous inquiries over an extensive period of time have found that the reverse onus is justifiable in this context. They are as follows:

- In 1999, the New South Wales Law Reform Commission found that the use of the reverse onus was “appropriate” and “fair”.¹⁶⁴
- In 1994¹⁶⁵ and then again in 2004,¹⁶⁶ the South Australian Government proposed that the respondent bear the burden.
- In a 2004 inquiry into sex discrimination, the ALRC recommended the adoption of the reverse onus.¹⁶⁷
- In its 2004 review of the *Disability Discrimination Act 1992* (Cth), the Productivity Commission found that the onus should rest on the defendant given the “already significant” burden on the complainant.¹⁶⁸
- In 2008, the Victorian Department of Justice recommended the adoption of the reverse onus.¹⁶⁹
- In 2004¹⁷⁰ and 2007,¹⁷¹ the Equal Opportunity Commission of Western Australia recommended that the onus be reversed.
- In 2011, the Attorney-General’s Department found that the imposition of the full burden on the complainant was “difficult and unfair”.¹⁷²

Given the high degree of consensus, it is surprising that the issue has been raised in the current inquiry. Some have suggested that the discomfort be alleviated by converting existing provisions to rebuttable presumptions.¹⁷³

¹⁶³ Equal Opportunity Commission (Western Australia), *Finding a Place: An Inquiry into the existence of discriminatory practices in relation to the provision of public housing and related services to Aboriginal people in Western Australia* (2004) 30.

¹⁶⁴ New South Wales Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)* (Report 92, 1999) [3.103].

¹⁶⁵ Government of South Australia, *Review of the Equal Opportunity Act 1984* (1994).

¹⁶⁶ Government of South Australia, *Review of South Australian Equal Opportunity Legislation* (2004) 37.

¹⁶⁷ Australian Law Reform Commission, *Equality before the law: Justice for women* (1994) [3.26].

¹⁶⁸ Productivity Commission, *Review of the Disability Discrimination Act 1992* (2004) 318.

¹⁶⁹ Department of Justice (Victoria), *An Equality Act for a Fairer Victoria: Equal Opportunity Review Final Report* (2008) [5.43].

¹⁷⁰ Equal Opportunity Commission (Western Australia), *Finding a Place: An Inquiry into the existence of discriminatory practices in relation to the provision of public housing and related services to Aboriginal people in Western Australia* (2004) 51.

¹⁷¹ Equal Opportunity Commission (Western Australia), *Review of the Equal Opportunity Act 1984* (2007) 33.

¹⁷² Attorney-General’s Department, *Consolidation of Commonwealth Anti-Discrimination Laws: Discussion Paper* (2011) 15.

¹⁷³ Discrimination Law Experts’ Group, *Consolidation of Commonwealth Anti-Discrimination Laws* (Submission, 13 December 2011) 11.

3.13 Victims of unlawful discrimination are experiencing difficulty accessing justice. In the 2010-11 period, the Australian Human Rights Commission (AHRC) received 17 401 enquiries of which 3586 were workplace-related.¹⁷⁴ According to the Federal Circuit Court, only 81 applications of a discrimination-nature were lodged in the same time period.¹⁷⁵ Many of these applicants are self-represented because government funding for legal assistance is so limited.¹⁷⁶

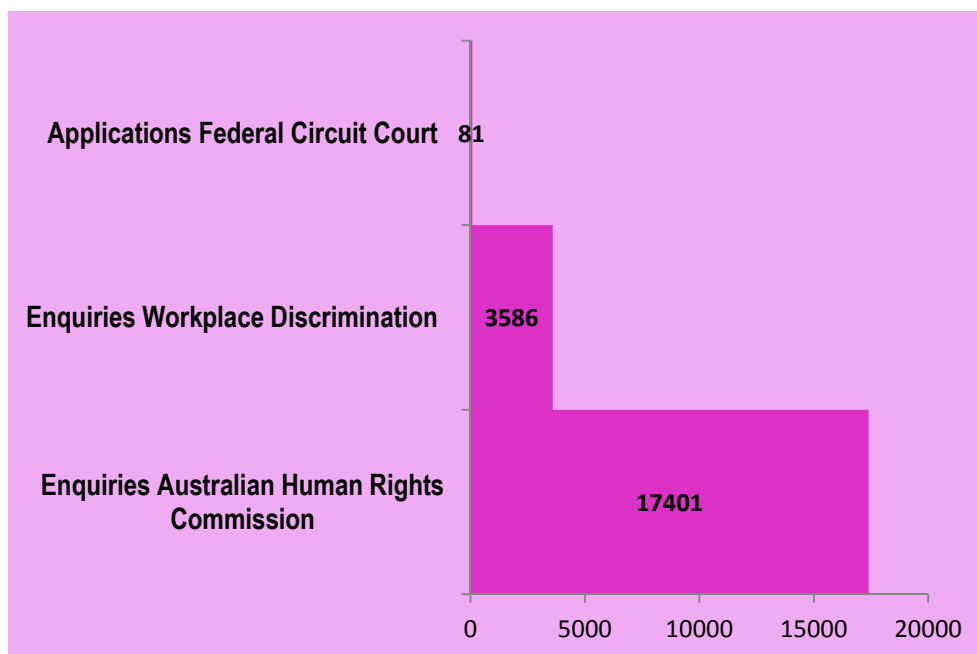


Figure 1 Comparison of applications lodged with Federal Circuit Court with workplace-related enquiries and general enquiries (inclusive of workplace related issues) received by Australian Human Rights Commission.

International Level: An emerging trend

3.14 The problem of proof has been recognised as a human rights issue. The reverse onus is not addressed in international treaties, but has been endorsed in responses to state reports. The *Racial Discrimination Act 1975* (Cth) still places the burden on the complainant. The Committee for the Elimination of all Forms of Racial Discrimination (CERD) has interpreted art 5 as requiring a reverse onus. Article 5 of the *International Convention on the Elimination of all Forms of Racial Discrimination*¹⁷⁷ provides that states are to guarantee the right to equality before the law, particularly the right to equal treatment before tribunals and courts. In its 2010

¹⁷⁴ Ibid 129.

¹⁷⁵ Federal Magistrates Court, *Annual Report* (2011-2012) 4.

¹⁷⁶ See generally, Beth Gaze and Rosemary Hunter, 'Access to Justice for Discrimination Complainants: Courts and Legal Representation,' (2009) 32 *UNSW Law Journal* 699.

¹⁷⁷ *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969).

concluding observation, the Committee of Experts noted its regret that Australia had not shifted the onus of proof to alleviate difficulties faced by complainants.¹⁷⁸ It stated:

The Committee regrets that no steps have been taken by the State party with regard to the Committee's previous recommendation that the State party envisage reversing the burden of proof in civil proceedings involving racial discrimination to alleviate the difficulties faced by complainants in establishing the burden of proof (arts. 4 and 5).¹⁷⁹

Four years later, and the burden of proof has not been shifted to the respondent in racial discrimination proceedings.

3.15 The European Union has passed laws dealing with the burden of proof in discrimination proceedings. Many European countries have shifted the onus of proof in response to these directives. These countries include Finland, France, Germany, Italy, Netherlands, Norway, Sweden, and United Kingdom.¹⁸⁰ Section 8 of the *Racial Equality Directive 2000/43/EC* provides that the respondent must prove there has been no breach of the principle of equal treatment after a complainant has established facts giving rise to a presumption that discrimination has occurred. The *Equal Treatment Directive 2006/54/EU* pertaining to equal treatment between men and women, and the *Employment Equality Framework Directive 2000/78/EC* on disability discrimination provide for the same. There is nothing to suggest that use of the reverse onus in these jurisdictions has resulted in adverse consequences.

3.16 The problem of proof has been recognised by the ILO. The Committee of Experts has welcomed the progress countries have made amending laws to shift the burden of proof,¹⁸¹ noting the “unrealistic demands” associated with normal rules of evidence.¹⁸² This view has influenced the content of emerging labour standards. The *Maternity Protection Convention No. 183* was adopted at the turn of this century. Although mothers are legally protected in Australia,¹⁸³ this particular convention has not been ratified by Australia. Article 8(1) provides that it is unlawful for employers to dismiss women during pregnancy or leave of absence except for reasons unrelated to child birth and care. The burden of proof rests on employers. This

¹⁷⁸ Committee on the Elimination of Racial Discrimination, *Concluding observations of the Committee on the Elimination of Racial Discrimination: Australia* (2010) [25].

¹⁷⁹ *Ibid.*

¹⁸⁰ International Labour Organisation, *Labour Legislation Guidelines* <<http://www.ilo.org/legacy/english/dialogue/ifpdial/llg/noframes/ch7.htm#28>>

¹⁸¹ Committee on the Elimination of Discrimination against Women, *Comments of the International Labour Office for the General Discussion on the Proposed General Recommendation on Access to Justice* (2013) 7.

¹⁸² International Labour Organisation, *Equality at work: The continuing challenge - Global Report under the follow-up to the ILO Declaration on Fundamental Principles and Rights at Work* (2011) [66].

¹⁸³ *Sex Discrimination Act 1984* (Cth) s 7, s 7A, s 7AA.

“innovative” measure furthers equality for women at work.¹⁸⁴ The convention has been ratified by 29 countries, and at least 54 have legal provisions that place the burden of proof on employers.¹⁸⁵ This includes Belgium, South Africa, and Sri Lanka.¹⁸⁶ In some countries, there is a legal presumption that the dismissal was discriminatory.¹⁸⁷

Treaties	
Racial Equality Directive 2000/43/EC	8 (1) Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.
Equal Treatment Directive 2006/54/EU	19 (1) Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.
Employment Equality Framework Directive 2000/78/EC	10 (1) Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.

3.17 Conclusion – We strongly oppose any attempts to remove the reverse onus from anti-discrimination laws. The provisions are entirely justifiable in anti-discrimination laws. There are clear and cogent reasons for their continued use. This has been recognised over and over again in reviews and inquiries. The removal of the reverse onus would be inconsistent with an emerging global trend. The reverse onus in anti-discrimination laws should be retained.

¹⁸⁴ International Labour Organisation, *Maternity and paternity at work: Law and practice across the world* (2014) 78-79.

¹⁸⁵ *Ibid.*

¹⁸⁶ *Ibid* 79.

¹⁸⁷ *Ibid* 80.

Part 2: Fair Work Act 2009 (Cth)

3.18 In this part, we examine provisions of the *Fair Work Act 2009* (Cth) that reverse the burden of proof, authorise the commission of a tort and interfere with freedom of association.

Reverse Onus

3.19 Section 361(1) of the *Fair Work Act 2009* (Cth) is often described as a reverse onus.¹⁸⁸ It applies to proceedings taken under Part 3-1 of the Act as part of the “General Protections.” Assuming s 361 of the *Fair Work Act 2009* (Cth) is a reverse onus, some might argue that its use is not justified. We do not subscribe to either view.

3.20 The *Fair Work Act 2009* (Cth) prohibits adverse action on the basis of various attribute including race, colour, sex, disability, religion, pregnancy and so on.¹⁸⁹ It also prohibits adverse action, coercion, undue influence or pressure, or misrepresentations in relation to workplace rights¹⁹⁰ and industrial activity.¹⁹¹ There are also other protections in relation to temporary absences,¹⁹² sham contracting arrangements,¹⁹³ and application of workplace laws.¹⁹⁴

Legislative History: Expansion of protections

3.21 The scope of industrial protection has expanded dramatically since the turn of the 20th century. The scheme has been amended many times by both Labor and Liberal Governments to extend coverage “in a number of directions”.¹⁹⁵ The underlying context of s 361(1) is relevant to its construction.¹⁹⁶ This includes its linkages to Convention 98 and other ILO Conventions including the Workers Representatives Convention, the Discrimination (Employment and Occupation) Convention.

¹⁸⁸ See, eg, Anna Chapman, Kathleen Love, and Beth Gaze, ‘The reverse onus of proof then and now: The Barclay case and the history of the Fair Work Act’s union victimisation and freedom of association provisions’ (2014) 37(2) *UNSW Law Journal* 471.

¹⁸⁹ *Fair Work Act 2009* (Cth) s 352.

¹⁹⁰ *Fair Work Act 2009* (Cth) ss 341-345.

¹⁹¹ *Fair Work Act 2009* (Cth) ss 346-350.

¹⁹² *Fair Work Act 2009* (Cth) s 352.

¹⁹³ *Fair Work Act 2009* (Cth) s 354.

¹⁹⁴ *Fair Work Act 2009* (Cth) ss 357-359.

~~471.~~

~~1901 (Cth) s 15AA.~~

3.22 The *Commonwealth Conciliation and Arbitration Act 1904* (Cth) contained a union victimisation provision. Employers were prohibited from dismissing employees if they were an officer or a member of a union, or entitled to the benefit of an industrial agreement or award.¹⁹⁷ This was a criminal offence punishable by fines or imprisonment,¹⁹⁸ for which the standard of proof was beyond reasonable doubt.¹⁹⁹ The Act was amended again in 1914 to expand the range of prohibited employer actions.²⁰⁰ Employers were prohibited from injuring employees in their employment, or from altering the position of employees to their detriment.²⁰¹ Workers were also protected if they appeared as a witness or gave evidence in proceedings under the Act.²⁰² The Act was amended again in 1947 to protect workers absent from work for union-related activities for which leave was unreasonably refused.²⁰³ When the *Industrial Relations Act 1988* (Cth) came into force,²⁰⁴ the scope of s 334 was extended to cover a wider range of victimising conduct. Employers were prohibited from discriminating against workers and refusing to employ workers, because of their union activities in the terms and conditions of employment.²⁰⁵ Employers were also prohibited from threatening to dismiss, injure, or alter the position of workers.²⁰⁶ Unionists were protected if they proposed to or participated in a secret ballot for the taking of industrial action,²⁰⁷ by becoming involved with a union.²⁰⁸ Workers were also protected if they associated with an organisation seeking better industrial conditions, and were dissatisfied,²⁰⁹ or if they took lawful action to protect their lawful industrial interests.²¹⁰ Following the 1993 amendments by the Keating Labor Government,²¹¹ (which followed its ratification of the Termination of Employment Convention) the scope of the provisions was again expanded with discrimination-type grounds being added. Per s 170DF, employers were prohibited from terminating the employment of workers on the basis of an attribute such as race, sex and disability.²¹² Further grounds were added with respect to temporary absence due to illness,²¹³ taking of parental leave,²¹⁴ and making of official complaints.²¹⁵

th).

-1993 (Cth).

3.23 When the Howard Liberal Government came to power, the Act was substantially reworked and renamed the *Workplace Relations Act 1996* (Cth). The protections were grouped together under Part XA titled “Freedom of Association”.²¹⁶ The legislation was extended to protect persons other than employees such as independent contractors.²¹⁷ The list of prohibited reasons was extended to cover non-members of industrial associations,²¹⁸ non-payment of dues or bargaining fees,²¹⁹ and non-participants in industrial action.²²⁰ Breach of the provisions ceased to be an offence. Following the introduction of the *Workplace Relations Amendment Act 2005*, popularly known as *Work Choices*, the protections came to be scattered throughout the Act in a “patchwork”²²¹ of regulation.²²² Section 659 listed the grounds on which workers could not be terminated (the “unlawful termination” provisions),²²³ including absences from work for emergency volunteering.²²⁴ Section 448 consolidated protections in relation to protected action (known as the “freedom of association” provisions).²²⁵ Coercion and duress also in relation to individual agreements²²⁶ as well as collective agreements was prohibited.²²⁷ The making of false and misleading statements in relation to workplace agreements was also prohibited.²²⁸ The right to be a member, and the converse, not to be a member of an industrial association was introduced.²²⁹ With the introduction of the *Fair Work Act 2009* (Cth), the various protections were rationalised under Part 3-1 as “General Protections” which draws together and expands on key features found in previous versions of the legislation. While the essential nature of the “reverse onus” has not changed, the range of activities covered has expanded considerably to cover workplace rights as well as industrial activities.

The Reverse Onus: Its purpose and effect

²¹⁶ *Workplace Relations Act 1996* (Cth) div 3 (Conduct by employers etc), div 4 (Conduct by employees etc), div 5 (Conduct by industrial associations etc).

²¹⁷ *Workplace Relations Act 1996* (Cth) s 298K(2)(a)-(e).

²¹⁸ *Workplace Relations Act 1996* (Cth) s 298L(1)(b).

²¹⁹ *Workplace Relations Act 1996* (Cth) 298L(1)(c)(ii),(o).

²²⁰ *Workplace Relations Act 1996* (Cth) 298L(1)(d).

²²¹ Simon Rice and Cameron Roles, “It’s a Discrimination Law Julia, but Not as We Know It’: Part 3-1 of the Fair Work Act” (2010) 21 *Economics and Labour Relations Review* 13, 17.

²²² *Workplace Relations Act 1996* (Cth) s 659 (Employment not to be terminated on certain grounds), s 400 (Coercion and duress), s 401 (False and misleading statements), s 448 (Employer not to dismiss employee etc. for engaging in protected action).

²²³ *Workplace Relations Act 1996* (Cth) s 659(2)(a)-(i).

²²⁴ *Workplace Relations Act 1996* (Cth) s 659(2)(i).

²²⁵ *Workplace Relations Act 1996* (Cth) s 448(1)(a)-(b).

²²⁶ *Workplace Relations Act 1996* (Cth) s 400(3).

²²⁷ *Workplace Relations Act 1996* (Cth) s 400(4).

²²⁸ *Workplace Relations Act 1996* (Cth) s 401(1).

²²⁹ *Workplace Relations Act 1996* (Cth) s 778(a).

3.24 The “reverse onus” is currently found in s 361(1) of the *Fair Work Act 2009* (Cth). It is presumed that a person took action for the alleged reason or with that intent unless they prove otherwise. In effect, the burden lies on the respondent to prove their actions were not motivated by the alleged reason.²³⁰ An allegation stands as sufficient proof unless the respondent proves otherwise,²³¹ but the applicant is still required to prove each ingredient of the contravention.²³² Any allegations must be made clearly and unequivocally early on in the proceedings.²³³ The onus is on the respondent to prove the negative on the balance of probabilities,²³⁴ but the burden of introducing evidence at any particular time may “shift from time to time”.²³⁵ The respondent is not required to prove the reason behind their actions, but “mere denial” may not be sufficient to satisfy the onus.²³⁶ All the facts and circumstances are to be considered including reasons expressed and later denials.²³⁷

3.25 The “reverse onus” is an essential because it is difficult for an applicant to prove the reason for the respondent’s action.²³⁸ A long line of authority suggests the underlying aim is to relieve the applicant of the burden of providing reasons.²³⁹ In *Bowling v General Motors-Holden Pty Ltd*,²⁴⁰ Smithers and Evatt JJ noted that “the real reason for a dismissal may well be locked up in the employer’s breast and impossible, or nearly impossible, of demonstration through forensic purposes”.²⁴¹ Northrop J of the Federal Court came to a similar conclusion in *Heidt Chrysler Australia Ltd*.²⁴² He acknowledged that “the circumstances by reason of which an employer may take action against an employee are, of necessity, peculiarly within the knowledge of the employer”.²⁴³ Justice Branson quoted the passage with approval *Maritime Union of Australia v CSL Australia Pty Ltd*.²⁴⁴

²³⁰ *Heidt v Chrysler Australia Ltd* (1976) 13 ALR 365, 373.

²³¹ *The King v Hush; Ex Parte Devanny* (1932) 48 CLR 487, 507.

²³² *The King v Hush; Ex Parte Devanny* (1932) 48 CLR 487, 507.

²³³ *Australian Building Construction Employees & Builders’ Labourers’ Federation v Employment Advocate* [2001] FCA 1443 [42].

²³⁴ *Bowling v General Motors-Holdens Pty Ltd* (1975) 8 ALR 197, 200.

²³⁵ *Purkess v Crittenden* (1965) 114 164, 167 (Barwick CJ, Kitto and Taylor JJ).

²³⁶ *Ibid.*

²³⁷ *Heidt v Chrysler Australia* (1976) 13 ALR 365, 374.

²³⁸ *Acts Interpretation Act 1901* (Cth) s 15AA.

²³⁹ *Police Federation of Australia v Nixon* [2008] FCA 467.

²⁴⁰ (1975) 8 ALR 197.

²⁴¹ *Ibid* 204.

²⁴² (1976) 13 ALR 365.

²⁴³ *Heidt v Chrysler Australia Ltd* (1976) 26 FLR 257, 267.

²⁴⁴ (2002) 113 IR 326, 336.

3.26 Later jurisprudence suggests the rationale for the reverse onus has not changed. In *Australasian Meat Industry Employees' Union v Belandra Pty Ltd*,²⁴⁵ North J stated, "A reverse onus on the issue of the reason for conduct makes good sense because the reason for the conduct is a matter peculiarly within the knowledge of the respondent".²⁴⁶ This passage was quoted with approval by Ryan J in a 2008 case: *Police Federation of Australia v Nixon*.²⁴⁷ In *Construction, Forestry, Mining and Energy Union v Coal and Allied Operations Pty Ltd*,²⁴⁸ Branson J moved away from the traditional formulation but she makes the same basic point. Its aim is "simply to alleviate the evidentiary difficulty facing the applicant of providing proof of the intent or reason which motivated, or formed part of the motivation for, the respondent's conduct following the absence of the employee from work".²⁴⁹ She stated:

*Rather it is to be construed as an aid to proof of the intent or reason of the respondent which motivated, or formed part of the motivation for, the respondent's conduct. It may fairly be presumed that the section is intended to alleviate the difficulties of proof by one party of the state of mind or motivation of another.*²⁵⁰

There is clear recognition in the case law that the aim of the "reverse onus" is to ensure that the respondent does not escape liability because their reason is unknown. The object of the "General Protections" scheme is to provide protection and effective relief for persons who have been discriminated against.²⁵¹ The "reverse onus" facilitates these aims by ensuring that respondents do not escape liability because the applicant cannot prove their claim. Given the weight of authority, it would be difficult to sustain the argument that s 361(1) does not meet the criterion of being "peculiarly within the knowledge".

Evolution of Reverse Onus: A long history

3.27 The "reverse onus" also has an "unremarkable"²⁵² history in industrial relations laws.²⁵³ It has been a "long-standing"²⁵⁴ feature of industrial relations laws. The concept is not alien to the Australian legal tradition as some suggest. The Explanatory Memorandum makes it clear that

²⁴⁵ (2003) 126 IR 165.

²⁴⁶ Ibid [50].

²⁴⁷ [2008] FCA 467.

²⁴⁸ [1999] FCA 1531.

²⁴⁹ Ibid [162].

²⁵⁰ Ibid [161].

²⁵¹ *Fair Work Act* 2009 (Cth) s 336(a)-(d).

²⁵² Simon Rice and Cameron Roles, "It's a Discrimination Law Julia, but Not as We Know It': Part 3-1 of the Fair Work Act" (2010) 21 *Economics and Labour Relations Review* 13, 20.

²⁵³ See, eg, *Palgo Holdings Pty Ltd* [2005] HCA 28. See also, *Pambula District Hospital v Herriman* (1988) 14 NSWLR 387: Samuels JA commented, "...it has always been open to the court to have regard to the historical setting of a statute and by that means to ascertain what the object of the legislature was" (at 410).

²⁵⁴ Explanatory Memorandum, *Fair Work Act 2009 (Cth)* [1461].

the provision is based on earlier versions of previous legislation.²⁵⁵ Under s 9(3) of the *Commonwealth Conciliation and Arbitration Act 1904* (Cth), the onus was on the employer to show that the employee “was dismissed for some reason other than those mentioned in this section”.²⁵⁶ Following amendments in 1927, the provision re-emerged in a slightly different form seemingly for reasons of style and context. Under s 5(4), the prosecution had to prove that the employee was dismissed and the employee belonged to a union, while the defendant had to prove they were not motivated by their employee’s membership.²⁵⁷

3.28 When the Act became the *Industrial Relations Act 1988* (Cth), the provision was again redrafted and renumbered. Section 334(6) provided that it was not “necessary for the prosecutor to prove the defendant’s reason for the action charged” but it was a defence if the defendant proved otherwise. The language used suggests that s 334(6) was actually a defence rather than a reverse onus, but authority suggests the legal effect of the provision remained the same despite “minor differences in wording”.²⁵⁸ The provision became s 298V when the Act was renamed the *Workplace Relations Act 1996* (Cth). It was presumed that the conduct was “carried out for that reason or with that intent, unless the person or industrial association prove[d] otherwise”.²⁵⁹ Section 298V represents a break from previous versions of the provision. On a textual analysis, the use of the term “presumed” seems pivotal. Note that “presumed” was used again when s 298V became s 809 after *Work Choices* came into force.

3.29 The pattern continued under the *Fair Work Act 2009* (Cth). Section 361(1) in its current incarnation is expressed differently yet again. It states if “taking that action for that reason or with that intent would constitute a contravention of this Part; it is presumed that the action was, or is being, taken for that reason or with that intent, unless the person proves otherwise”. The term “presumed” is picked up on again. It seems Parliament’s real intent was to create a rebuttable presumption and not a reverse onus. This is consistent with the ordinary meaning of words used in s 361(1). The Explanatory Memorandum to the *Fair Work Act 2009* (Cth) frames s 361(1) as a reverse onus,²⁶⁰ but “the words of a Minister must not be substituted for the text of

²⁵⁵ Explanatory Memorandum, *Fair Work Act 2009* (Cth) [1459].

²⁵⁶ *Commonwealth Conciliation and Arbitration Act 1904* (Cth) s 9(3).

²⁵⁷ Chris Jessup, ‘The onus of proof in proceedings under Part XA of the Workplace Relations Act 1996 (2002) 15 *Australian Journal of Labour Law* 198, 6.

²⁵⁸ *Lawrence v Hobart Coaches Pty Ltd* [1994] IRCA 44.

²⁵⁹ *Workplace Relations Act 1996* (Cth) s 298V.

²⁶⁰ Explanatory Memorandum, *Fair Work Bill 2009* (Cth) [1461]. Explanatory memorandums can be used as an aid to construction: *Acts Interpretation Act 1901* (Cth) s 15AA.

the law”.²⁶¹ Although it is referred to colloquially as a reverse onus, it is likely that the true legal nature of s 361(1) is that of a rebuttable presumption.

3.30 We regard the rebuttable presumption in this context as entirely uncontroversial, although we have some concerns that some the statutory “rights” protected by the presumption are, in more recent industrial laws including the *Fair Work Act 2009*, somewhat misconceived particularly in light of the framework of internationally recognised labour rights. We are content to elaborate on those concerns in consultations with the Commission should the Commission consider this appropriate, however we presently presume that such an analysis is outside the remit of the present inquiry.

Industrial Acts	Reverse onus provisions
Fair Work Act 2009 (Cth) s 361(1)	<p>Reason for action to be presumed unless proved otherwise</p> <p>(1) If: (a) in an application in relation to a contravention of this Part, it is alleged that a person took, or is taking, action for a particular reason or with a particular intent; and</p> <p>(b) taking that action for that reason or with that intent would constitute a contravention of this Part; it is presumed that the action was, or is being, taken for that reason or with that intent, unless the person proves otherwise.</p> <p>(2) Subsection (1) does not apply in relation to orders for an interim injunction.</p>
Workplace Relations Act 1996 (Cth) s 809 (Post-Work Choices)	<p>Proof not required of the reason for, or the intention of, conduct in an application under section 807 relating to a person's conduct, it is alleged that the conduct was, or is being, carried out for a particular reason or with a particular intent; and</p> <p>for the person to carry out the conduct for that reason or with that intent would constitute a contravention of this Part;</p> <p>it is presumed, in proceedings under this Division arising from the application, that the conduct was, or is being, carried out for that reason or with that intent, unless the person proves otherwise.</p>
Workplace Relations Act 1996 (Cth) s 298V (Pre-Work Choices)	<p>Proof not required of the reason for, or the intention of, conduct</p> <p>If: (a) in an application under this Division relating to a person's or an industrial association's conduct, it is alleged that the conduct was, or is being, carried out for a particular reason or with a particular intent; and</p> <p>(b) for the person or industrial association to carry out the conduct for that reason or with that intent would constitute a contravention of this Part;</p> <p>it is presumed, in proceedings under this Division arising from the application, that the conduct was, or is being, carried out for that reason or with that intent, unless the person or industrial association proves otherwise.</p>
Industrial Relations Act 1988 (Cth) s 334(6)	<p>In a prosecution for an offence against subsection (1), (2), (3), (4) or (5), it is not necessary for the prosecutor to prove the defendant's reason for the action charged nor the intent with which the defendant took the action charged, but it is a defence to the prosecution if the defendant proves that the action was not</p>

²⁶¹ *Re Bolton; Ex parte Bean* (1987) 162 CLR 514, 517-518 (Mason CJ, Wilson and Dawson JJ).

	motivated (whether in whole or part) by the reason, nor taken with the intent (whether alone or with another intent), specified in the charge.
Conciliation and Arbitration Act 1904 (Cth) s 5(4) (Post-1972 Amendments)	In any proceedings for an offence against this section, if all the relevant facts and circumstances, other than the reason or intent set out in the charge as being the reason or intent of an action alleged in the charge, are proved, it lies upon the person charged to prove that that action was not actuated by that reason or taken with that intent.
Commonwealth Conciliation and Arbitration Act 1904 (Cth) s 9(3)	In any proceeding for any contravention of this section, it shall lie upon the employer to show that any employee, proved to have been dismissed whilst an officer or member of an organization or entitled as aforesaid, was dismissed for some reason other than those mentioned in this section.

A Rebuttable Presumption – Substance over form

3.31 There is considerable uncertainty as to the exact meaning and nature of the reverse onus of proof. The issue is whether s 361 is a reverse onus or a rebuttable presumption. A rebuttable presumption is different to a reverse onus. A presumption can be displaced by evidence contradicting proof of alleged facts.²⁶² In *The King v Hush; Ex Parte Devanny*,²⁶³ Dixon J explained the difference between a reverse onus and rebuttable presumption:

*Sec. 30R of the Crimes Act provides that in a prosecution of the present description the averments of the prosecutor contained in the information shall be prima facie evidence of the matter averred. It is to be noticed that this provision, which occurs in a carefully drawn section., **does not place upon the accused the onus of disproving the facts upon which his guilt depends but**, while leaving the prosecutor the onus, initial and final, of establishing the ingredients of the offence beyond reasonable doubt, provides, in effect, that the allegations of the prosecutor shall be sufficient in law to discharge that onus.²⁶⁴*

In that case, s 30R of the *Crimes Act 1914 (Cth)* is referred to as an example of a rebuttable presumption:

*In any prosecution for an offence under this Part or for an offence to which any provision of this Part is material the averments of the prosecutor contained in the information or indictment shall be **prima facie evidence of the matter** or matters averred (emphasis added).²⁶⁵*

This should be contrasted with then s 5(4) of the *Commonwealth Conciliation and Arbitration Act 1904 (Cth)*. In *Heidt Chrysler Australia Ltd*,²⁶⁶ Northrop J of the Federal Court characterised s 5(4) as a reverse onus. It is formulated as follows:

²⁶² *Concise Australian Legal Dictionary* (1998 2nd edn, Butterworths) 369.

²⁶³ (1932) 48 CLR 487.

²⁶⁴ *Ibid* 507-508.

²⁶⁵ *Crimes Act 1914 (Cth)* s 30R.

²⁶⁶ (1976) 13 ALR 365.

*In any proceedings for an offence against this section, if all the relevant facts and circumstances, other than the reason or intent set out in the charge as being the reason or intent of an action alleged in the charge, are proved, **it lies upon the person charged to prove** that that action was not actuated by that reason or taken with that intent (emphasis added).²⁶⁷*

This interpretation of s 5(4) is supported by High Court authority. In *General-Motors-Holden's Pty Ltd v Bowling*,²⁶⁸ Mason J, with whom Gibbs, Stephen and Jacobs JJ agreed, expressed the view that s 5(4) reversed the onus. His Honour stated:

Section 5(4) imposed the onus on the appellant of establishing affirmatively that it was not actuated by the reason alleged in the charge. The consequence was that the respondent, in order to succeed, was not bound to adduce evidence that the appellant was actuated by that reason, a matter peculiarly within the knowledge of the appellant. The respondent was entitled to succeed if the evidence was consistent with the hypothesis that the appellant was so actuated and that hypothesis was not displaced by the appellant. To hold that, despite the subsection, there is some requirement that the prosecutor brings evidence of this fact is to make an implication which, in my view, is unwarranted and which is at variance with the plain purpose of the provision in throwing on to the defendant the onus of proving that which lies peculiarly within his own knowledge.²⁶⁹

3.32 When the section was reincarnated as s 298V of the *Workplace Relations Act 1996* (Cth), the Courts began construing it as a rebuttable presumption. In *Police Federation of Australia v Nixon*,²⁷⁰ Ryan J specifically considered whether then s 809 was a “true” reverse onus.²⁷¹ He surmised that it “seems clear enough that s 809 creates a rebuttable presumption of law”.²⁷² In *Davids Distribution Pty Ltd v National Union of Workers*,²⁷³ Wilcox and Cooper JJ of the Federal Court framed s 298V as a statutory presumption. They commented:

In order to make the link between the dismissal and the circumstances which the applicant must establish to bring the dismissal within s 298K, the Act provides in s 298V a statutory presumption that the link exists in certain circumstances. Under s 298V in proceedings under Div 6 of Pt XA of the Act for a contravention of a section in Pt XA, an allegation in those proceedings of conduct for a prohibited reason is sufficient for it to be presumed that the conduct was engaged in for that reason unless the employer proves to the contrary.²⁷⁴

²⁶⁷ *Commonwealth Conciliation and Arbitration Act 1904* (Cth) s 5(4).

²⁶⁸ (1977) 51 ALJR 235.

²⁶⁹ *Ibid* 241.

²⁷⁰ [2008] FCA 467.

²⁷¹ *Ibid* [62].

²⁷² *Ibid*.

²⁷³ [1999] FCA 1108.

²⁷⁴ *Ibid* [109].

In *Greater Dandenong City Council v Australian Municipal, Clerical and Services Union (Greater Dandenong)*,²⁷⁵ a differently constituted Federal Court suggested that s 298V created a rebuttable presumption. In obiter dicta, the following statements were made:

- “Section 298V of the Act creates a rebuttable presumption, in an application under Division 6 of Part XA, that the respondent’s conduct was carried out for the particular reason alleged in the proceeding against that respondent (Wilcox J)²⁷⁶
- “By virtue of s 298V it is presumed that the conduct complained of under s 298K was carried out for a prohibited reason unless the respondent proves otherwise” (Merkel J)²⁷⁷
- “This provision creates a presumption which requires a particular conclusion to be drawn until the contrary is proved” (Finkelstein J)²⁷⁸

3.33 The High Court has not been called upon to consider whether the provision is really a rebuttable presumption. But in *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia*,²⁷⁹ Gaudron J seems to suggest that s 298V is a statutory presumption. She said:

As to the question whether there was a serious question to be tried, it is necessary to note again that it is not in issue that the conduct of which the MUA applicants complain occurred, or, that it had the consequences which they assert. The only issue is whether it was engaged in for a "prohibited reason" or for reasons including a "prohibited reason". Section 298V of the Act operates to create a presumption that it was. And it also operates to place the onus on those who contend otherwise to show that it was not. There is, thus, a very strong prima facie case of contravention, one which, if it proceeds to final hearing, must be determined in favour of the MUA applicants unless the Patrick Employers can prove otherwise.²⁸⁰

There is authority to suggest that s 5(4) of the *Conciliation and Arbitration Act 1904* (Cth) was a reverse onus. The jurisprudence suggests the provision re-emerged as a rebuttable presumption in the early 1990s when it became s 298V of the *Workplace Relations Act 1996* (Cth), now s 361(1) of the *Fair Work Act 2009* (Cth).

²⁷⁵ (2001) 184 ALR 641.

²⁷⁶ Ibid [8].

²⁷⁷ Ibid [123].

²⁷⁸ Ibid [218].

²⁷⁹ [1998] HCA 30.

²⁸⁰ Ibid [123].

3.34 **Conclusion** – Clause 361 is a rebuttable presumption and not a reverse onus. The so-called “reverse onus” is not a new legal fad. It has historical roots in industrial relations laws and sound policy recognised by the courts and should be retained. The text suggests its true nature is that of a rebuttable presumption. The term “reverse onus” is a misdescription of the provision which has been adopted as convenient shorthand. The burden of proof is not reversed therefore it may strictly lie outside the scope of the present inquiry.

Freedom of Association

3.35 The *Fair Work Act 2009* (Cth) breaches the right to freedom of association as provided for under ILO Conventions No. 87 and No. 98. The *Fair Work Act 2009* (Cth) brought Australian law closer to conformity but there are still inconsistencies and areas of non-compliance. It replicated a number of provisions within the *Workplace Relations Act 1996* (Cth) and introduced new provisions which probably breach international obligations.

Negative Right of Association

3.36 Employer groups argue that the concept of freedom of association encompasses the positive right to associate with others as well as the negative right not to participate in collective activities. Section 30B provides for the “freedom to choose whether or not to join and be represented by a union or participate in collective activities” as a fundamental workplace relations principle. To be accurate the construction would be equally applicable to other rights and freedoms, for example, the right to life would also encompass the right to death which would plainly make the scope of protection meaningless. The construct is not consistent with the right to freedom of association.

Restrictions on the Right to Strike

3.37 The *Fair Work Act 2009* (Cth) places significant restrictions on the right to strike; this has been the subject of ongoing criticism by the Committee of Experts. The Committee of Experts has criticised Australian law on the basis it only protects industrial action taken during the process of bargaining for an agreement.²⁸¹ It emphasised that the right to strike should not be limited to industrial disputes that are likely to be resolved through collective bargaining. It stated:

²⁸¹ *Fair Work Act 2009* (Cth) pt 3-3.

The Committee notes that by linking the concept of protected industrial action to the bargaining period in the negotiation of single-business certified agreements, the Act effectively denies the right to strike in the case of the negotiation of multi-employer, industry-wide or national-level agreements, which excessively inhibits the right of workers and their organizations to promote and protect their economic and social interests²⁸²

It is likely that these restrictions on the right to strike unjustifiably interfere with the right to freedom of association.

Restrictions on Right of Entry

3.38 The *Fair Work Act 2009* (Cth) provides for various rules under which right of entry permits can be issued and revoked.²⁸³ The range of issues the FWC can consider in determining whether an applicant is a “fit and proper” person is expansive and non-exhaustive,²⁸⁴ and includes prerequisites like “appropriate” training,²⁸⁵ convictions under industrial law²⁸⁶ and the imposition of penalties²⁸⁷. The Committee of Experts found that the restrictions breach Convention No. 87 on the basis “the right of trade union officers to have access to places of work and to communicate with management is a basic activity of trade unions, which should not be subject to interference by the authorities”.²⁸⁸ It is likely that these requirements unjustifiably interfere with the right to freedom of association.

Ballot Authorisation for Industrial Action

3.39 The *Fair Work Act 2009* (Cth) requires a quorum and a majority vote by secret ballot before industrial action can be taken. Section 459 (1)(b) provides that at least 50% of the employees on the roll of voters must actually vote. The Committee of Experts has commented:

If a member State deems it appropriate to establish in its legislation provisions which require a vote by workers before a strike can be held, it should ensure that account is taken only of the votes cast, and that the required quorum and majority are fixed at a reasonable level.²⁸⁹

Section 459 (1)(c) also provides more than 50% of the valid votes must be in favour of taking action. The Committee of Experts has commented:

²⁸² International Labour Organisation, *Report of the Committee of Experts on the Application of Conventions and Recommendations: Report III* (1999) 205.

²⁸³ *Fair Work Act 2009* (Cth) pt 3-4, div 5-6.

²⁸⁴ *Fair Work Act 2009* (Cth) s 512.

²⁸⁵ *Fair Work Act 2009* (Cth) s 513(1)(a).

²⁸⁶ *Fair Work Act 2009* (Cth) s 513(1)(b).

²⁸⁷ *Fair Work Act 2009* (Cth) s 513(1)(d).

²⁸⁸ Committee of Experts on the Application of Conventions and Recommendations, *Application of International Labour Standards: Report III - Part 1A* (2009) 54.

²⁸⁹ International Labour Organisation, *General Survey of the Committee of Experts: Freedom of Association and Collective Bargaining* (1994) [170].

The requirement of a decision by over half of all the workers involved in order to declare a strike is excessive and could excessively hinder the possibility of carrying out a strike, particularly in large enterprises. The requirement that an absolute majority of workers should be obtained for the calling of a strike may be difficult, especially in the case of unions which group together a large number of members. A provision requiring an absolute majority may, therefore, involve the risk of seriously limiting the right to strike.²⁹⁰

On top of already onerous and burdensome requirements, it can be quite difficult to meet these requirements. The Committee of Experts recently called upon the Australian Government to “ensure respect for these principles in practice”.²⁹¹ It is likely that these restrictions on the right to strike unjustifiably interfere with the right to freedom of association.

Suspension/Termination of Industrial Action

3.40 The FWC has various powers under the *Fair Work Act 2009* (Cth) to suspend or terminate industrial action on various bases including economic harm,²⁹² health and safety,²⁹³ third party damage²⁹⁴ and cooling off.²⁹⁵ The Committee of Experts held that these measures provided for under the then *Workplace Relations Act 1996* (Cth) were inconsistent with international labour law. It commented:

The Committee notes that the bargaining period can be terminated or suspended...where it is threatening to cause significant damage to the Australian economy or an important part of it..The Committee recalls that prohibiting industrial action that is threatening to cause significant damage to the economy goes beyond the definition of essential services accepted by the Committee, namely, those services the interruption of which would endanger the life, personal safety or health of the whole or part of the population ...The Committee hopes that the Government will indicate in its next report measures taken or envisaged to amend the provisions of the Workplace Relations Act referred to above, to bring the legislation into conformity with the requirements of the Convention.²⁹⁶

It is likely that the power to suspend or terminate industrial action unjustifiably interferes with the right to freedom of association.

²⁹⁰ International Labour Organisation, *Freedom of Association – Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO* (2006, 5th end) [556]-[557].

²⁹¹ Committee of Experts, *Report in which the committee requests to be kept informed of development – Australia* (2010) [225].

²⁹² *Fair Work Act 2009* (Cth) s 423.

²⁹³ *Fair Work Act 2009* (Cth) s 424.

²⁹⁴ *Fair Work Act 2009* (Cth) s 426.

²⁹⁵ *Fair Work Act 2009* (Cth) s 425.

²⁹⁶ Committee of Experts, *Direct Observation - Australia* (1999) [6].

3.41 **Conclusion** – Various aspects of the *Fair Work Act 2009* (Cth) unjustifiably interfere with the right to freedom of association and should be reconsidered. It restricts the right to strike, the duration of industrial action and union access to workplaces. The negative right is inconsistent with the concept of freedom of association as it detracts from the scope of the protection. The Committee of Experts has repeatedly found that Australian law breaches international labour law.

Commission of Torts: “Industrial Torts”

3.42 It could be argued protected industrial action under the *Fair Work Act 2009* (Cth) encroaches upon the right to sue in tort. The *Fair Work Act 2009* (Cth) authorises the commission of a tort if protected industrial action is taken. If authorised by the FWC, participants are immune from liability with few exceptions.²⁹⁷ Protected industrial action comprises of employee claim action,²⁹⁸ employee response action,²⁹⁹ and employer response action³⁰⁰ in relation to an enterprise agreement prior to its expiry.³⁰¹ The parties must be “genuinely trying to reach an agreement”³⁰² and comply with various complex requirements such as notice.³⁰³ The ALRC notes “the overall object is that disputes proceed in an orderly, safe and fair way, without duress; that parties are properly and efficiently represented; and that undue risks to those caught up on the dispute are minimised”.³⁰⁴ It is useful to approach the subject of industrial action from the point of view of power relations. It was Kahn-Freund who said the “main object of labour law [is] to be a countervailing force to counteract the inequality of bargaining power which is inherent and must be inherent in the employment relationship”.³⁰⁵ It is important to realise that the point of any industrial action is to inflict economic loss and this will involve some element of compulsion.³⁰⁶ The taking of industrial action may very well impact on third parties, but the implied prohibition on sympathy strikes is inconsistent with international law. In relation to the then *Workplace Relations Act 1996* (Cth), the Committee of Experts stated:

The Committee notes that sympathy action is effectively prohibited under this provision (section 170MW(4) and (6)). Industrial action also remains unprotected if it involves secondary

²⁹⁷ *Fair Work Act 2009* (Cth) s 415.

²⁹⁸ *Fair Work Act 2009* (Cth) s 409.

²⁹⁹ *Fair Work Act 2009* (Cth) s 410.

³⁰⁰ *Fair Work Act 2009* (Cth) s 411.

³⁰¹ *Fair Work Act 2009* (Cth) s 417.

³⁰² *Fair Work Act 2009* (Cth) s 413(3).

³⁰³ *Fair Work Act 2009* (Cth) s 414.

³⁰⁴ Australian Law Reform Commission, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws: Issues Paper* (2014) [16.9].

³⁰⁵ Paul Davies & Mark Freedland, *Kahn-Freund’s Labour and the Law* (Stevens, 3rd edn, 1983) 18.

³⁰⁶ Breen Creighton, and Andrew Stewart, *Labour Law* (2010 5th edn, Federation Press) [22.05].

*boycotts (section 170MM). The Committee recalls in this regard that a general prohibition on sympathy strikes could lead to abuse and that workers should be able to take such action, provided the initial strike they are supporting is lawful.*³⁰⁷

Some of the restrictions could hardly be considered fair, for example, the prohibition on pattern bargaining.³⁰⁸ This prevents unions from using common terms for social purposes, such as leave entitlements in relation to domestic violence, in agreements with different employers. And as the leading expert, Breen Creighton, observes: “It is simply not plausible to suggest that unions will not, or should not, seek common terms and conditions in particular industries or parts of industries...”³⁰⁹ The Committee of Experts criticised Australian law when the *Workplace Relations Act 1996* (Cth) was in force stating:

Thus, the prohibitions noted above with regard to multi-employer agreements, “pattern bargaining”, secondary boycotts and sympathy strikes, negotiations over “prohibited content” that should otherwise fall within possible subjects for collective bargaining, danger to the economy, etc., go beyond the restrictions which are permissible under the Convention.³¹⁰

Although the *Fair Work Act 2009* (Cth) provides some limited immunity, the protection does not go far enough. The discrepancies between international human rights law and labour law are significant and cause for concern.

3.43 **Conclusion** – Division 2 of Part 3-3 of the *Fair Work Act 2009* (Cth) authorises the commission of a tort. The exception to the general rule is justified and required by the international labour law and human rights law. The scope of protected industrial action permitted under the Act is unnecessarily restrictive and should be reconsidered.

Part 3: Building and Construction Industry (Improving Productivity) Bill 2013

3.44 The *Building and Construction Industry (Improving Productivity) Bill 2013* (Cth) reverses the onus of proof and abrogates the privilege against self-incrimination. We oppose the Bill in its entirety and have expressed that view in the relevant forums.

³⁰⁷ Committee of Experts, *Direct Observation - Australia* (1999) [5].

³⁰⁸ *Fair Work Act 2009* (Cth) s 412.

³⁰⁹ Breen Creighton, and Andrew Stewart, *Labour Law* (2010 5th edn, Federation Press) [22.40].

³¹⁰ Committee of Experts, *Observation – Australia* (2007) [13].

Reverse Onus

3.45 The *Building and Construction Industry (Improving Productivity) Bill 2013* (Cth) reverses the onus of proof with respect to picketing and coercion, and industrial action taken for health and safety reasons.

Picketing and Coercion

3.46 Clause 57 of the *Building and Construction Industry (Improving Productivity) Bill 2013* (Cth) is said to be a reverse onus. It applies to proceedings under Part 2 of Chapter 6 and cl 47 dealing with coercion and picketing. Coercion in relation to employment matters,³¹¹ superannuation funds³¹², enterprise agreements,³¹³ and bargaining representatives³¹⁴ is prohibited. Persons are also prohibited from engaging in “unlawful pickets” defined as action preventing a third party from accessing a building for the purpose of advancing industrial objectives.³¹⁵ The term “discrimination” as used in the headings but not in the text is somewhat misleading. It was probably inserted to justify use of the reverse onus. In proceedings arising from the contravention of the above provisions, cl 57 provides for a presumption that “a person took, or is taking action for a particular reason or with a particular intent” unless they prove otherwise.³¹⁶ It is likely that clause 57 is a rebuttable presumption and not a reverse onus. Although the Explanatory Memorandum describes the clause as a reverse onus of proof,³¹⁷ the language of the presumption is used. The verb “presumed” is used in the body of the provision as well in the heading.³¹⁸ There is High Court authority that extrinsic materials are not relevant when a mere view as to the legal nature of something is expressed.³¹⁹ The Explanatory Memorandum draws an analogy between clause 57 and section 361 of the *Fair Work Act 2009* (Cth).³²⁰ As has been established, s 361 is not a reverse onus.

³¹¹ *Building and Construction Industry (Improving Productivity) Bill 2013* (Cth) cl 52.

³¹² *Building and Construction Industry (Improving Productivity) Bill 2013* (Cth) cl 53.

³¹³ *Building and Construction Industry (Improving Productivity) Bill 2013* (Cth) 54.

³¹⁴ *Building and Construction Industry (Improving Productivity) Bill 2013* (Cth) 54.

³¹⁵ *Building and Construction Industry (Improving Productivity) Bill 2013* (Cth) 47.

³¹⁶ *Building and Construction Industry (Improving Productivity) Bill 2013* (Cth) cl 57(1)(a),(b).

³¹⁷ Explanatory Memorandum, *Building and Construction Industry (Improving Productivity) Bill 2013* (Cth) [162].

³¹⁸ *Acts Interpretation Act 1901* (Cth) s 13(1)(a),(b).

³¹⁹ *Hunter Resources Ltd v Melville* (1988) 164 234, 240 (Mason CJ).

³²⁰ Explanatory Memorandum, *Building and Construction Industry (Improving Productivity) Bill 2013* (Cth) [164].

3.47 In explaining the need for a “reverse onus” in the *Building and Construction Industry (Improving Productivity) Bill 2013 (Cth)*, the problem of proof was raised. The rationale for its inclusion was explained in the Explanatory Memorandum. It states:

*...this clause provides that once a complainant has alleged that a person’s actual or threatened action is motivated by a reason or intent that would contravene the relevant provision, that person has to establish on the balance of probabilities that the conduct was not carried out unlawfully. This is because in the absence of such a clause, it would be extremely difficult, if not impossible, for a complainant to establish that a person acted for an unlawful reason.*³²¹

The same argument is used with respect to the reverse onus in anti-discrimination laws. The Bills Digest draws on academic literature when it explains that the “actual motivation for acting in a particular way is something known, by and large, only to that employer”.³²² The quote is taken out of context. The necessity for a reverse onus should be considered in the context of the legislative scheme. Difficulties of proof encountered in discrimination law are not found here, because the conduct with which the provisions engaged by cl 57 are concerned is almost exclusively conduct in the nature of persuasion³²³ - it is almost inconceivable that context that there would be no objective evidence as to what it was that those engaged in the conduct were attempting to persuade the targets of their conduct to do or not do. Irrespective of its characterisation as a reverse onus, the text of cl 57 clearly indicates it is a rebuttable presumption. We reject the analogy with anti-discrimination law. The burden of proof is not shifted or reversed therefore strictly it may lie outside the scope of the present inquiry.

3.48 **Conclusion** - Clause 57 is a rebuttable presumption and not a reverse onus. Even if cl 57 was a reverse onus, there are no difficulties of proof as objective evidence would be available. It is inappropriate and misleading to draw an analogy with anti-discrimination laws. Use of either a reverse onus or a rebuttable presumption with respect to picketing and coercion is not justified. The provision itself is also highly objectionable for more fundamental reasons canvassed elsewhere. Whilst we oppose the Bill its entirety, within the remit of this inquiry the Commission should recommend that clause 57 be removed from the *Building and Construction Industry (Improving Productivity) Bill 2013 (Cth)*.

³²¹ Explanatory Memorandum, *Building and Construction Industry (Improving Productivity) Bill 2013 (Cth)* [164].

³²² Bills Digest, *Building and Construction Industry (Improving Productivity) Bill 2013 (Cth)* 19 (quoting Therese MacDermott, ‘Challenging age discrimination in Australian workplaces: From anti-discrimination legislation to industrial regulation’ (2011) 34(1) *UNSW Law Journal* 204.

³²³ The exception to this cl 47(2)(a)(ii) when relied on in combination with cl 47(2)(b)(iii).

Industrial Action over Health and Safety

3.49 Unlawful industrial action is prohibited under the *Building and Construction Industry (Improving Productivity) Bill 2013* (Cth).³²⁴ Industrial action is defined to exclude action by employees faced with an “imminent risk” to health and safety, in the absence of safe and appropriate work.³²⁵ Clause 7(4) provides that the onus is on the employees to make out their case,³²⁶ if an employer applies for an injunction to stop industrial action³²⁷ or seek a penalty³²⁸. The onus of proof was on the employee under *Work Choices*.³²⁹ The AIRC required the employees to establish the reasonableness of their concern.³³⁰ With only six applications and one upheld by the tribunal, the procedure was rarely used and the likelihood of success was low.³³¹ The equivalent provision under the *Fair Work Act 2009* (Cth) does not reverse the onus of proof; the onus is on the employer.³³² The *Fair Work Act 2009* (Cth) is working as intended; there is no reason to reverse the onus of proof. For example, in *CEPU v LCE Queensland Pty Ltd*,³³³ construction workers stopped work because dust emanating from gypsum wall panels. Richards SDP ruled that the employees were entitled to pay even though the nature of risk posed was uncertain at that time. We strongly oppose the use of a reverse onus with respect to industrial action taken for health and safety reasons.

3.50 **Conclusion** – Use of the reverse onus is not justified. The onus of proof with respect to industrial action over health and safety should be borne by the employer and not the employees. It would be inconsistent with the *Fair Work Act 2009* (Cth) for building and construction workers to bear the onus and not others. Use of the reverse onus under *Work Choices* clearly demonstrates its deterrent effect. Clause 7(4) should be removed from the *Building and Construction Industry (Improving Productivity) Bill 2013* (Cth).

³²⁴ *Building and Construction Industry (Improving Productivity) Bill 2013* (Cth) cl 46.

³²⁵ *Building and Construction Industry (Improving Productivity) Bill 2013* (Cth) cl 7(2)(c)(i),(ii).

³²⁶ *Building and Construction Industry (Improving Productivity) Bill 2013* (Cth) cl 7(4).

³²⁷ *Building and Construction Industry (Improving Productivity) Bill 2013* (Cth) cl 48.

³²⁸ *Building and Construction Industry (Improving Productivity) Bill 2013* (Cth) cl 81.

³²⁹ *Workplace Relations Amendment Act 2005* (Cth) 106A(4).

³³⁰ Explanatory Memorandum, *Fair Work Bill 2008* (Cth) lix.

³³¹ Explanatory Memorandum, *Fair Work Bill 2008* (Cth) lxiii.

³³² *Fair Work Act 2009* (Cth) s 19(2)(c)(i),(ii).

³³³ *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v LCE Queensland Pty Ltd* [2013] FWC 2014.

Privilege against Self Incrimination

3.51 The *Building and Construction Industry (Improving Productivity) Bill 2013* (Cth) abrogates the privilege against self-incrimination with respect to the Australian Building and Construction Commission's duty to investigate "suspected" breaches of building laws.³³⁴ Like its predecessor,³³⁵ the bill prohibits unlawful industrial action and pickets.³³⁶ The penalties under the *Fair Work Act 2009* (Cth) are significantly less: \$6,600 for persons³³⁷ and \$33,000 for unions.³³⁸ Clause 102 provides that persons are not excused from (a) giving information, (b) producing documents, or (c) answering questions on the basis it might incriminate them or expose them to a penalty.³³⁹ The privilege is restricted in the following circumstances:

- When the ABC Commission issues written notices requiring persons to give information, produce documents, or attend before it to answer questions "relevant" to an investigation.³⁴⁰
- When ABC Inspectors and Federal Safety Officers exercise their power to enter premises³⁴¹ and require persons with custody or access to records or documents to produce them.³⁴²
- When ABC Inspectors and Federal Safety Officers issue written notices for persons to produce records or documents.³⁴³

3.52 No satisfactory explanation has been offered as to the abrogation of the privilege in the industrial arena. The enforcement of industrial law (whether in the building and construction industries, or generally) simply does not go to these issues of vital public importance. It does not raise questions of public safety, national security, the functioning of government, or the smooth operation of the economic system. Industrial law is merely concerned with the relationship between employers, employees and unions. It is wholly inappropriate for the ABCC to have coercive powers to enforce industrial law. In *Thorson v Pine*³⁴⁴ Marshall J commented:

³³⁴ *Building and Construction Industry (Improving Productivity) Bill 2013* (Cth) cl 16(b).

³³⁵ *Building and Construction Industry Improvement Act 2005* (Cth).

³³⁶ *Building and Construction Industry (Improving Productivity) Bill 2013* (Cth) cl 46, cl 47.

³³⁷ *Fair Work Act 2009* (Cth) s 539(2), item 14.

³³⁸ *Fair Work Act 2009* (Cth) s 546(2)(b).

³³⁹ *Building and Construction Industry (Improving Productivity) Bill 2013* (Cth) cl 102(1).

³⁴⁰ *Building and Construction Industry (Improving Productivity) Bill 2013* (Cth) cl 61(2).

³⁴¹ *Building and Construction Industry (Improving Productivity) Bill 2013* (Cth) cl 72.

³⁴² *Building and Construction Industry (Improving Productivity) Bill 2013*(Cth) cl 74(1)(d).

³⁴³ *Building and Construction Industry (Improving Productivity) Bill 2013* (Cth) cl 77(1).

³⁴⁴ [2004] FCA 1316.

*Roving inquiries may be an apposite expression for broadranging inquiries into alleged tax fraud and the like under income tax legislation but such notices are foreign to the workplace relations of civilised societies, as distinct from undemocratic and authoritarian states.*³⁴⁵

The Abbott Government argues separate treatment is needed because of the lawlessness of building and construction sites.³⁴⁶ This goes back to the Cole Inquiry which asserted that there was widespread disregard for the rule of law.³⁴⁷ But the bill does not address criminal activity; the ABCC has no powers in relation to matters of that nature.³⁴⁸ The argument is self-fulfilling in a way as the more laws become oppressive and unfair the more likely breaches will take place. Despite \$60 million spent on the inquiry, the investigation did not lead to the prosecution of any worker or union official. The ALRC's list of "other" rights includes laws that legislate contrary to the rule of law. In *Moran Hospitals Pty Ltd v King*,³⁴⁹ Beaumont J cited Lord Steyn stating:

*Unless there is the clearest provision to the contrary, Parliament must be presumed not to legislate contrary to the rule of law. And the rule of law enforces minimum standards of fairness, both substantive and procedural.*³⁵⁰

In our view, it is not fair or just that the privilege against self-incrimination has been abrogated in the building and construction industry.

3.53 Under current laws,³⁵¹ workers can be penalised for exercising their right to strike with respect to systemic issues surrounding non-payment of entitlements, unsafe working conditions and sham contacting.³⁵² The investigatory powers conferred on the ABCC undermine the rule of law because their use is so broadly discretionary.³⁵³ It has been argued that the ABCC needs to be reintroduced because of improvements in productivity.³⁵⁴ If the premise of that argument is correct, the evidence shows that rates of industrial disputation are at historic lows³⁵⁵, and the "expert material" upon which productivity claims has been proven to be floored. In any event,

³⁴⁵ Ibid [40].

³⁴⁶ Explanatory Memorandum, *Building and Construction Industry (Improving Productivity) Bill 2013* (Cth) 2.

³⁴⁷ Commonwealth, *Royal Commission into the Building and Construction Industry*, Final Report (2003) [15].

³⁴⁸ Senate, Education and Employment Committee, *Building and Construction Industry (Improving Productivity) Bill 2013 [Provisions]* (2013) [1.15].

³⁴⁹ (1997) 49 ALD 444, 461.

³⁵⁰ *R v Home Secretary; Ex parte Pierson* [1997] UKHL 37, 521.

³⁵¹ Industrial action is prohibited until the enterprise agreement expires: *Fair Work Act 2009* (Cth) s 417(1).

³⁵² See generally, Senate, Employment, Workplace Relations and Education References Committee, *Beyond Cole: The future of the construction industry: confrontation or co-operation?* (2004).

³⁵³ George Williams and Nicola McGarrity, 'The Investigatory Powers of the Australian Building and Construction Commission' (2008) 21 *Australian Journal of Labour Law* 244, 276.

³⁵⁴ Australian Government, *Transition to Fair Work Australia for the Building and Construction Industry* (2009) [5.94], [5.77].

³⁵⁵ Senate, Education and Employment Committee, *Building and Construction Industry (Improving Productivity) Bill 2013 [Provisions]* (2013) 17-18.

commercial considerations do not justify breaches of international obligations with respect to labour law and human rights. It is also likely that that the coercive information gathering powers violate the broader concept of the common law right to silence under which ‘there is no obligation to answer questions asked by an executive agency or to produce documents requested...’³⁵⁶ The argument that the right is not infringed because of protections surrounding admissibility is wrong and unconvincing.³⁵⁷ The Hon. Wilcox failed to understand and appreciate the practical application of theoretical concepts when he downplayed “arguments of principle”.³⁵⁸ Building and construction workers should be governed by the same industrial protections that apply to all others. This is consistent with the fundamental principle of equality of all persons before the law. The broad policy reasons offered in support of the reform do not justify the abrogation of such an important civil liberty. It is not impossible to prove some types of contravention have taken place.³⁵⁹ And one would imagine that there would be witnesses to pickets or other kinds of industrial action.

3.54 The investigatory powers of the reincarnated ABCC are extensive and potentially subject to abuse. The threshold for the exercise of the ABCC’s investigatory powers is extraordinarily low. ABC Inspectors and Federal Safety Officers when entering premises need only hold a reasonable belief that contraventions are occurring,³⁶⁰ or relevant information is otherwise accessible.³⁶¹ When issuing notices, they must hold a reasonable belief that a person has information relevant to an investigation or is capable of giving evidence.³⁶² There is no requirement that inspectors obtain permission from the executive or the judiciary, and no mechanism for the review of decisions to exercise these powers. There is no requirement that inspectors consider the trivial nature of the conduct or the possibility of obtaining information another way.³⁶³ The *Building and Construction Industry Improvement Act 2005* (Cth) was the subject of significant criticism while it was in force. In a thorough and sophisticated analysis of the ABCC’s investigatory powers, Williams and McGarrity state:

³⁵⁶ *Pyneboard Proprietary Limited v Trade Practices Commission* [1983] HCA 9 [6] (Brennan J).

³⁵⁷ Australian Government, *Transition to Fair Work Australia for the Building and Construction Industry* (2009) [5.94], [5.28].

³⁵⁸ Australian Government, *Transition to Fair Work Australia for the Building and Construction Industry* (2009) [5.84].

³⁵⁹ Australian Government, *Transition to Fair Work Australia for the Building and Construction Industry* (2009) [1.23]

³⁶⁰ *Building and Construction Industry (Improving Productivity) Bill 2013*(Cth) cl 72(1)(a).

³⁶¹ *Building and Construction Industry (Improving Productivity) Bill 2013*(Cth) cl 72(1)(b).

³⁶² *Building and Construction Industry (Improving Productivity) Bill 2013* (Cth) cl 61(1).

³⁶³ George Williams and Nicola McGarrity, ‘The Investigatory Powers of the Australian Building and Construction Commission’ (2008) 21 *Australian Journal of Labour Law* 244, 272.

...the powers are conferred in overbroad terms, with limitations on their scope too often left to the discretion of the ABC Commissioner rather than being set out in the BCII Act. The only limitation on the type of evidence, information and documents that the ABC Commissioner may request is that it be 'relevant to an investigation'. The ABC Commissioner is, for example, empowered to approach an employee in the building and construction industry and require him or her to answer questions about past or present membership of a trade union or even of a political party. Such information might be 'relevant' to determining whether a person was present at a union or political meeting at which a contravention of the BCII Act allegedly occurred, and the level of a person's involvement in that contravention. This investigatory power might also be used to require a person to: reveal their phone, email and bank account records, whether of a business or personal nature; report on both their own activities and those of their fellow workers; and report on discussions in private union meetings or other meetings of workers³⁶⁴

They conclude that the ABCC's investigatory powers "simply have no place in a modern, fair system of industrial relations, let alone one of a nation that prides itself on political and industrial freedoms".³⁶⁵ There is little to stop ABC Inspectors (apart from the protests of lawyers, if present) in their zeal to obtain information, from calling persons in for "fishing expedition" interviews; from harassing witnesses (through, for example, holding long interrogations, or badgering the interviewee with oppressive questions); from asking interviewees to reveal privileged information (which the witness might not know they have the right to withhold) and so forth. The "wide and far-reaching" powers of the ABCC³⁶⁶ are unjustifiable and unsuited to the industrial context. The abrogation of the privilege against self-incrimination is not justified.

3.55 The ABCC also breached model litigant guidelines regulating government agencies. It persistently breached the standards of propriety, honesty, fairness and professionalism expected of government agencies and fails to observe the standards required of a government model litigant. The ABCC pursued politically motivated investigations and prosecutions against unions and workers and failed to prosecute a single employer for underpayment or non-payment of workers entitlements. In the unreported case *Lovewell v O'Carroll & Others*,³⁶⁷ the ABCC commenced proceedings against Bradley O'Carroll and the Queensland branch of the CEPU. It alleged O'Carroll had attempted to coerce a head contractor not to engage a subcontractor on the Southport Central project on the Gold Coast. The ABCC chose not to investigate the employer for setting up its workers as independent contractors. Spender ACJ stated:

³⁶⁴ Ibid 256.

³⁶⁵ Ibid 279.

³⁶⁶ John Howe, *Deregulation of labour relations in Australia: Towards command and control* (Working paper, no. 34, 2005) 29.

³⁶⁷ (unreported, QUD 427/2007, transcript, 8 October 2008).

The case, as brought and as evidenced by the evidence yesterday, was misconceived, was completely without merit and should not have been brought... There is room for the view that if the Commission was even-handed in discharging its task of ensuring industrial harmony and lawfulness in the building or construction industry, proceedings, not necessarily in this court and not necessarily confined to civil industrial law, should have been brought against a company, Underground, and its managing director and possibly another director... The promotion of industrial harmony and the ensuring of lawfulness of conduct of those engaged in the industry of building and construction is extremely important, but as one which requires an even-handed investigation and an even-handed view as to resort to civil or criminal proceedings, and that seems very much to be missing in this case...

The present arrangement in the present proceedings, on the material presently available to me, strongly suggests that the arrangement of the workers as 'independent subcontractors' was a sham, a bogus arrangement. It was an example of dishonest fraudulent financial engineering by Underground, whose intended purpose was to avoid payments made under the certified agreement which bound Underground at the time... The commercial arrangements that Underground entered into with its workers is a species of black economy, which, unfortunately, seems to exist in the building industry, and equally, that it is to be stamped out if at all possible in the payment to workers in such an ad hoc way as to avoid the obligations of the income tax legislation and the superannuation legislation. It is not to be ignored or a blind eye cast when it is engaged in by the employers.

3.56 The *Building and Construction Industry (Improving Productivity) Bill 2013* (Cth) provides for some limited protections. A use and derivative use indemnity applies as information, documents or things directly or indirectly obtained is not admissible as evidence.³⁶⁸ Information obtained in this manner is not admissible in criminal proceedings except for offences relating to compliance with examination notices, false or misleading statements and obstruction of Commonwealth officials.³⁶⁹ There is, however, significant scope for the information to be disclosed after it has been obtained³⁷⁰. The penalties for participating in industrial activity are significant. The prohibitions are civil remedy provisions. Workers can be fined \$34,000 while unions can be fined \$170,000.³⁷¹

The Construction Forestry Mining Energy Union (CFMEU) was recently fined \$1 million for unprotected industrial action against Grocon, while Grocon was fined a mere \$250,000 for the Carlton wall collapse that killed three innocent bystanders. Workers and unions can also be penalised for not providing information to the ABCC. Workers can be fined \$3,400 and unions

³⁶⁸ *Building and Construction Industry (Improving Productivity) Bill 2013* (Cth) cl 102(2)(a),(b).

³⁶⁹ *Building and Construction Industry (Improving Productivity) Bill 2013* (Cth) cl 102(2)(c)-(e).

³⁷⁰ See for example clause 105(2)(b)

³⁷¹ *Building and Construction Industry (Improving Productivity) Bill 2013* (Cth) cl 81(2)(a). Section 4AA of the Crimes Act 1900 (Cth) provides that the value of a penalty unit is \$170.

fined \$17,000 for failure to comply with a notice to produce records or documents.³⁷² Persons can also be prosecuted for failure to comply with an examination notice and can be imprisoned for 6 months.³⁷³ They can also be imprisoned for the provision of false or misleading information for 12 months,³⁷⁴ and obstruction for 2 years.³⁷⁵ These extreme and heavy-handed penalties could potentially bankrupt workers and take them away from their families. Considering the severity of these penalties, the safeguards contained in the Act are manifestly inadequate. These limited protections do not appear to be an adequate safeguard against the misuse of this power, particularly when the threshold for exercising the powers is low and circumstances in which these powers can be exercised are extensive.

3.57 Conclusion – The abrogation of the privilege against self-incrimination in the building and construction industry is not justified. Commercial considerations such as productivity do not justify the abrogation of the principle. The threshold for the exercise of the ABCC investigatory powers is low and subject to abuse. There are limited protections with respect to use and derivative use immunity but they are clearly inadequate because of the excessive penalties. We oppose the *Building and Construction Industry (Improving Productivity) Bill* 2013 (Cth) in its entirety.

Freedom of Association

3.58 Certain aspects of the *Building and Construction Industry (Improving Productivity) Bill* 2013 (Cth) likely infringe upon the right to freedom of association. Clause 46 prohibits persons from organising or engaging in unlawful industrial action, while cl 47 prohibits persons from organising or engaging in unlawful pickets. An unlawful picket is defined broadly to include action that:

- (a) has the purpose of or prevents entry or egress from building sites, or would intimidate any person from doing so; and
- (b) has the purpose of advancing industrial objective or claims against employers, or is otherwise unlawful.³⁷⁶

The scope of industrial action is similarly broad and is defined as “the performance of building work by an employee in a manner different from that in which it is customarily performed, or the adoption of a practice in relation to building work by an employee, the result of which is a

~~2013 (Cth) cl 81(2)(b).~~
~~2013 (Cth) cl 62.~~
~~1995 (Cth) r 137.1.~~

³⁷⁶ *Building and Construction Industry (Improving Productivity) Bill* 2013 (Cth) cl 47(2).

restriction or limitation on, or a delay in, the performance of the work”.³⁷⁷ It also includes bans, limitations, or restrictions on the performance of building work,³⁷⁸ and any failures or refusals to attend or perform building work.³⁷⁹ Under the *Building and Construction Industry Improvement Act 2005* (Cth), the previous ABCC had issued a declaration that a 20 minute meeting organised to collect money for the widow of a worker crushed to death constituted a contravention.³⁸⁰

3.59 It is likely that the provisions violate the right to strike, an aspect of freedom of association. The Committee on Freedom of Association had concluded sections 37 and 38 of the then *Building and Construction Industry Improvement Act 2005* (Cth) had breached the right to strike.³⁸¹ It stated:

*In sum, the Committee notes that the 2005 Act carries over to the building industry the restrictions to strike action already criticized by the Committee in respect of the WRA and the Trade Practices Act and would appear to even broaden their effect within that industry. It further notes that the 2005 Act stiffens these restrictions by imposing penalties and sanctions which may be as high as 11 times the generally applicable penalties and sanctions. These may become applicable to workers having a remote connection to the building and construction industry and may be enforced by third parties. The Committee considers that the broad prohibition of unlawful industrial action and the heavy and widely applicable penalties and sanctions provided for in the 2005 Bill are likely to discourage any involvement in industrial activity due to fear of the consequences. The Committee emphasizes that the right to strike is one of the essential means through which workers and their organizations may promote and defend their economic and social interests. To determine situations in which a strike could be prohibited, the criteria which has to be established is the existence of a clear and imminent threat to the life, personal safety or health of the whole or part of the population. Construction is not an essential service in the strict sense of the term and therefore workers in this industry should enjoy the right to strike without undue impediments.*³⁸²

3.60 It is also likely that the prohibitions on industrial action and picketing breach the right to freedom of association and peaceful assembly under the ICCPR. The Explanatory Memorandum claims that the limitation on the right to freedom of association is reasonable, necessary and proportionate to the aim of prohibiting activity “designed to cause economic loss to building industry participants for industrial purposes”.³⁸³ The analysis is incorrect as

³⁷⁷ *Building and Construction Industry (Improving Productivity) Bill 2013* (Cth) cl 7(1)(a).

³⁷⁸ *Building and Construction Industry (Improving Productivity) Bill 2013* (Cth) cl 7(1)(b).

³⁷⁹ *Building and Construction Industry (Improving Productivity) Bill 2013* (Cth) cl 7(1)(c).

³⁸⁰ George Williams and Nicola McGarrity, ‘The Investigatory Powers of the Australian Building and Construction Commission’ (2008) 21 *Australian Journal of Labour Law* 244, 273.

³⁸¹ ILO Committee on Freedom of Association, *Case No 2326 (Australia)*, *Report in which the committee requests to be kept informed of developments - Report No 338*, November 200 [457].

³⁸² *Ibid* [446].

³⁸³ Explanatory Memorandum, *Building and Construction Industry (Improving Productivity) Bill 58*.

economic loss is not listed as an exception to art 21 and 22 of the ICCPR. And clearly, the kind of damage contemplated is financial or monetary on the part of individual employers.

3.61 **Conclusion** – It is likely that the prohibitions on the industrial action and picketing breach the right to strike under international labour law and the right to freedom of association and peaceful assembly under the ICCPR. The *Building and Construction Industry (Improving Productivity) Bill 2013* (Cth) should be amended to remove cl 46 and 47.

Part 4: Model Work Health and Safety Act

3.62 The *Model Work Health and Safety Act* (Model Law) reverses the burden of proof and abrogates the privilege against self-incrimination.

Reverse Onus

3.63 The Model Law reverses the onus of proof with respect to discriminatory conduct and coercive information-gathering powers. The burden of proof with respect to employer duties remains with the prosecution but arguably should lie with employers.

Employer Duties

3.64 Under the Model Law, employers are responsible for protecting the health and safety of workers. Clause 19(1) provides imposes a primary duty of care on person conducting a business or undertaking (PCBU). PCBUs can be a natural person or a company.³⁸⁴ PCBUs are required to ensure the health and safety of workers they engage or direct “so far as reasonably practicable” while at work. Officers also have a duty to exercise “due diligence” to ensure that the PCBU complies with duties and obligations under the Act.³⁸⁵ The burden of proving these elements rests on the prosecution.³⁸⁶ The National Review of Model OHS laws recommended that the prosecution should bear the onus of proof in relation to all the elements.³⁸⁷ There was

³⁸⁴ Safe Work Australia, *Interpretive guideline: Model Work Health and Safety Act - The meaning of ‘person conducting a business or undertaking’* [1]-[2].

³⁸⁵ *Model Health and Safety Act* cl 27(1).

³⁸⁶ Explanatory Memorandum, *Model Work Health and Safety Bill* [148].

³⁸⁷ Australian Government, *National Review into Model Occupational Health and Safety Laws: First Report* (2008) 118-119.

no change in the law in most states and territories.³⁸⁸ In these jurisdictions, the employer's obligation to take measures for the health and safety of employees was limited to taking measures as was practicable. The High Court had held that provisions of this nature placed the onus on the prosecution to show that the means employed to remove or mitigate a risk were practicable.³⁸⁹

3.65 The High Court considered the Victorian counterpart in *Chugg v Pacific Dunlop Ltd*³⁹⁰ prior to the introduction of the Model Law. Section 21(1) required employers to "provide and maintain so far as reasonably practicable for employees a working environment that is safe and without risks to health". The issue was whether the element "reasonably practicable" constituted a rule or an exception. The burden of proving exceptions (also exemptions, excuses, qualifications, exculpations) usually lies on the defendant.³⁹¹ The categorisation of a statement as a general rule or exception depends on a process of statutory construction,³⁹² including express words and implications.³⁹³ It does not depend on rules of formal logic;³⁹⁴ it is a matter of substance over form.³⁹⁵ One factor is whether the matter sets up a new or different matter from the subject matter of the rule.³⁹⁶ But note that a description will ordinarily be construed as an element unless suggested otherwise by language or subject matter.³⁹⁷

3.66 The majority construed then s 21 as imposing the onus on the prosecution. A critical factor was that a reversed onus would entail the additional burden of "anticipating and negating the practicability of every possible means of avoiding or mitigating a risk or accident that might be raised in the course of cross-examination".³⁹⁸ This is not an onerous task and is usually done in the course of any legal proceeding. The ability to run a successful case should not of itself be a reason to shift the burden to the opposing party. The majority rejected the argument that the employer had superior knowledge of matters peculiar to the workplace because inspectors possess wider knowledge of risks or hazards.³⁹⁹ The problem with this approach is that

³⁸⁸ *Occupational Health and Safety Act 1985* (Vic) s 21; *Occupational Health, Safety and Welfare Act 1986* (SA) s 19; *Occupational Safety and Health Act 1984* (WA) 19; *Workplace Health and Safety Act 1995* (Tas) s 9; *Work Health Act* (NT) s 29; *Occupational Health and Safety Act 1989* (ACT) s 27.

³⁸⁹ *Chugg v Pacific Dunlop Ltd* (1990) 170 CLR 249.

³⁹⁰ [1990] HCA 41.

³⁹¹ *Vines v Djordjevitch* (1955) 91 CLR 512, 519.

³⁹² *Director of Public Prosecutions v United Telecasters Sydney Ltd* (1990) 64 ALJR 181, 183.

³⁹³ *Reg. v Edwards* (1975) QB 27.

³⁹⁴ *Dowling v Bowie* (1952) 86 CLR 136, 147.

³⁹⁵ *Ibid* 140.

³⁹⁶ *Darling Island Stevedoring and Lighterage Co. Ltd. v. Jacobsen* [1945] HCA 22.

³⁹⁷ *Chugg v Pacific Dunlop Ltd* [1990] HCA 41.

³⁹⁸ *Chugg v Pacific Dunlop Ltd* [1990] HCA 41 [24].

³⁹⁹ *Ibid* [16]-[17].

employers are legally required to provide safe workplaces.⁴⁰⁰ By implication, employers should be aware of advances of knowledge and developments in their industry. Justice Brennan's reasoning was different concluding the words were a measure of the precaution thus related to the obligation.⁴⁰¹ Accordingly, it is likely cl 19(1) imposes the burden of proof on the prosecution, and that the criterion of "reasonably practicable" forms part of the statement as a general rule. But note the employer may give evidence once the prosecution has made its case.

3.67 The position in New South Wales and Queensland was different. Section 15 of the *Occupational Health and Safety Act* 1983 (NSW) provided that every employer was responsible for ensuring "the health, safety and welfare at work of all the employer's employees". The element of "reasonably practicable" was not included in the offence. Section 53 instead provided a defence that "it was not reasonably practicable for the person to comply with the provision of this Act...the breach of which constituted the offence". The Queensland Act was drafted in similar terms.⁴⁰² In *Kirk v Industrial Relations Commission of NSW*,⁴⁰³ the Full Court of the High Court considered the relationship between then s 15 and s 53. It stated:

*A feature of the legislation here in question is that where an employer is charged with an act or omission which is a contravention of s 15 or s 16, it will be necessary for the employer to establish one of the defences available under s 53 in order to avoid conviction. Where reliance is placed by the employer on s 53(a), it would be necessary for the employer to satisfy the Industrial Court, to the civil standard of proof, that it was not reasonably practicable to take the measure in question. Such a defence can only address particular measures identified as necessary to have been taken in the statement of offence. Section 53(a), in the context of proceedings for offences against ss 15 and 16, referred to the situation where it is not reasonably practicable for an employer to comply "with the provision of this Act". It is not to be understood as requiring an employer to negate the general provisions of ss 15 and 16 and to establish that every possible risk was obviated. It requires that regard be had to the breach of the provision which it is alleged constituted the offences. A breach or contravention of s 15 or s 16 is the measure not taken, the act or omission of the employer. **The duties referred to in ss 15(1) and 16(1) cannot remain absolute when a defence under s 53 is invoked.** The defence allows that not all measures which may have guaranteed against the risk in question eventuating have to be taken. The measures which must be taken are those which are reasonably practicable...The OH&S Act delimits the obligations of employers by the terms of the defences provided in s 53 (emphasis added).⁴⁰⁴*

⁴⁰⁰ *Model Health and Safety Act* cl 27(1).

⁴⁰¹ *Ibid* [1]-[2].

⁴⁰² *Workplace Health and Safety Act* 1995 (Qld) s 26.

⁴⁰³ (2010) 239 CLR 531.

⁴⁰⁴ *Ibid* [16] – [18].

It is clear that the onus was on the employer rather than the prosecution to prove the element of “reasonably practicable”.⁴⁰⁵ Section 53 is typically described as a reverse onus but its text read literally imposes a defence.

3.68 It has been argued reverse onuses infringe upon the presumption of innocence. The Maxwell Review concluded that the phrase “reasonable practicality” imported notions of blameworthiness.⁴⁰⁶ But it is highly unlikely the presumption would be available to corporations as non-natural persons. The presumption of innocence is justified on the basis of the considerable power imbalance between individuals and governments.⁴⁰⁷ But the Gross National Product (GDP) of some multi-national corporations exceeds that of some small countries.⁴⁰⁸ Shiner opines:

The picture of the innocent citizen accused of a crime so hold us captive that we cannot see the essential moral role in the quest for and administration of criminal justice of reverse onus offences for corporate defendants.

In *Salabiaku v France*,⁴⁰⁹ the European Court of Human Rights (ECHR) examined the relationship between the presumption and procedural requirements. Strictly speaking, the ECHR considered a rebuttable presumption but its approach has been applied to reverse onuses.⁴¹⁰ The applicant was convicted of a customs offence and appealed on the basis that the presumption was “almost irrebuttable”.⁴¹¹ The ECHR held the rule was not absolute pointing out presumptions of fact or law “operate in every legal system. Clearly, the Convention does not prohibit such presumptions in principle. It does, however, require the Contracting States to remain within certain limits in this respect as regards criminal law”.⁴¹² The test is whether presumptions are confined to reasonable limits taking into account “the importance of what is at stake and maintain the rights of the defence”.⁴¹³ Describing the burden of proof as “shared” the ECHR found there had been no breach.⁴¹⁴

3.69 In the United Kingdom, there is a considerable body of case law on the use of reverse onuses. The relationship between the presumption of innocence and reverse onus has been considered

⁴⁰⁵ *Kirk v Industrial Relations Commission of NSW* (2010) 239 CLR 531 [16].

⁴⁰⁶ Chris Maxwell, *Occupational health and safety Act review* (2004) [1706].

⁴⁰⁷ Andrew Ashworth, ‘Four threats to the presumption of innocence’ (2006) 10(4) *International Journal of Evidence and Proof* 241, 250.

⁴⁰⁸ See generally, Institute for Policy Studies (Sarah Anderson and John Cavanaugh), *The rise of corporate global power* (2000).

⁴⁰⁹ (1988) 13 EHRR 379.

⁴¹⁰ See, eg, *Attorney-General v Malta* (App. No.16641/90).

⁴¹¹ *Ibid* [26].

⁴¹² *Ibid* [28].

⁴¹³ *Ibid*.

⁴¹⁴ *Ibid* [26].

by the House of Lords in a number of cases.⁴¹⁵ Whether a reverse onus is justifiable depends on the circumstances of each case. The question is whether the reverse onus serves a legitimate aim and is proportionate.⁴¹⁶ The Court of Appeal has considered the validity of the reverse onus in relation to employer duties. In *Davis v Health and Safety Executive*,⁴¹⁷ the legal burden was considered to be necessary and proportionate. It drew a distinction between the attribution of blame and regulation in the public interest. Influenced by Canadian jurisprudence, the following statement was cited:

*If the false advertiser, the corporate polluter and manufacturer of noxious goods are to be effectively controlled, it is necessary to require them to show on a balance of probabilities that they took reasonable precautions to avoid the harm which actually resulted. In the regulatory context there is nothing unfair about imposing that onus; indeed it is essential for the protection of our vulnerable society.*⁴¹⁸

The collective rights and interests of society justify the imposition of the burden on well-resourced and capable defendants.

3.70 In the National Review of Model OHS laws, the lack of objective evidence was pivotal in its decision to recommend that the burden of proof stay with the prosecution.⁴¹⁹ It commented:

*We have not been helped in analysing this matter by the apparent lack of substantive evidence about the effect of a reverse onus on OHS outcomes. We were unable to identify objectively whether the legislative approach taken in Queensland and NSW to the reverse onus results in a materially different culture of compliance or OHS performance generally than in the jurisdictions where it does not exist.*⁴²⁰

Objective evidence as to the impact of the burden of proof on proceedings is available. New South Wales is a useful case study. Under the pre-reform laws, the onus was on the defendant to run the defence that compliance was not “reasonably practicable”.⁴²¹ In June 2011 the *Occupational Health and Safety Amendment Act 2011* (NSW) came into effect.⁴²² The burden of proof was shifted to the prosecution.⁴²³ After the new laws came in, the number of successful prosecutions by WorkCover declined. The number of prosecutions declined from

⁴¹⁵ *R v Director of Public Prosecutions, Ex Parte Kebilene* [2000] 2 A.C. 326; *Lambert* [2002] 2 A.C. 545; *Johnstone* [2003] 2 Cr. App R. 493; *Sheldrake v Director of Public Prosecutions* [2004] UKHL 43. See also for a more recent example: *Webster v R* [2010] EWCA Crim 2819.

⁴¹⁶ Ian Dennis, ‘Reverse onuses and the presumption of innocence: In search of principle’ (2005) *Criminal Law Review* 901, 912.

⁴¹⁷ (18 December 2002).

⁴¹⁸ *R v Wholesale Travel Group* (1991) 3 SCR 154.

⁴¹⁹ Australian Government, *National Review into Model Occupational Health and Safety Laws: First Report* (2008) [13.5] – [13.6].

⁴²⁰ Australian Government, *National Review into Model Occupational Health and Safety Laws: First Report* (2008) [13.13].

⁴²¹ *Occupational Health and Safety Act 2000* (NSW) s 28.

⁴²² The Act commenced on 7 June 2011: *Occupational Health and Safety Amendment Act 2011* (NSW) s 2.

⁴²³ *Work Health and Safety Act 2011* (NSW) s 19.

109 in 2010-2011 to a new low of 52 in the last reporting period.⁴²⁴ The number of prosecutions has declined from a high of 300 in 2006-2007.⁴²⁵ The removal of the reverse onus has clearly been a contributing factor.

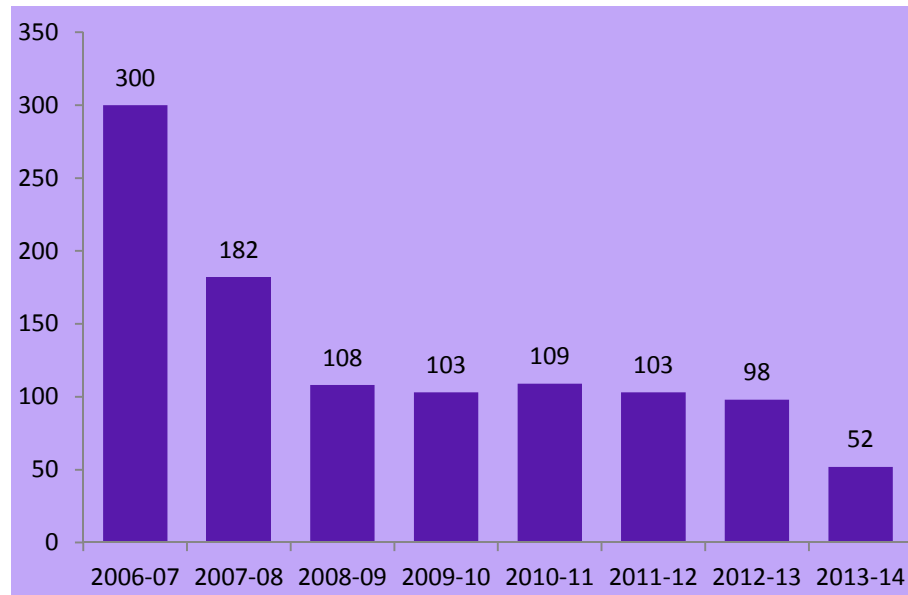


Figure 2 Successful prosecutions by WorkCover over 8-year period

3.71 Conclusion – The legal burden of proof in relation to the duty to provide safe and healthy workplaces should be borne by the employer and not the prosecution. For breaches of the duty of care to provide healthy and safe workplaces, the employer should bear the legal burden of proof in relation to the defence “reasonably practicable” as they possess the resources necessary to defend any charges.

Discriminatory Conduct

3.72 It is against the law to discriminate against workers and contractors on health and safety grounds. Whether the burden of proof stays or moves depends on whether proceedings are criminal or civil in nature. This reflects High Court authority which suggested that the legislative intent be made clear.⁴²⁶ Persons are prohibited from engaging (or inducing, encouraging, authorising, or assisting etc)⁴²⁷ in discriminatory conduct (i.e. dismissal etc)⁴²⁸ for a prohibited

⁴²⁴ Work Cover Authority of New South Wales, *Annual Report (2013-2014)* 4; WorkCover NSW, *Annual Report (2010-2011)* 29.

⁴²⁵ WorkCover NSW, *Annual Report: Safe, Secure and Productive workplaces (2006-2007)* 8.

⁴²⁶ *Chugg v Pacific Dunlop Ltd* (1990) 170 CLR 249.

⁴²⁷ *Model Health and Safety Act* cl 104, 107.

⁴²⁸ *Model Health and Safety Act* cl 105(1)(a),(b).

reason (e.g. exercise of statutory power).⁴²⁹ With respect to civil proceedings,⁴³⁰ cl 113 seems to incorporate elements of a rebuttable presumption and a defence. The text “that reason is presumed...unless the defendant proves” indicates cl 113 is a rebuttable presumption. The reason for the conduct is presumed unless the defendant proves that it was not a substantial reason. In addition to a rebuttable presumption, also cl 113 seems to incorporate a defence. It is a defence if the defendant proves (a) the conduct was reasonable in the circumstances, and (b) a substantial reason was to comply with the Act. There is no reverse onus; there is a defence and a rebuttable presumption. Even if it were a reverse onus, it would be justifiable on the basis of peculiar knowledge.

3.73 Clause 110 splits the burden of proof between the prosecution and defendant in criminal proceedings. The onus is on the prosecution to prove and adduce evidence the defendant engaged in discriminatory conduct for a prohibited reason.⁴³¹ It is a legal burden.⁴³² The presumption is rebutted if the applicant can prove that it was not the “dominant” reason on the balance of probabilities.⁴³³ It is a rebuttable presumption. This approach is consistent with the recommendations of the Second Review into Model OHS Laws that the criminal burden of proof should be carried by the prosecution to the criminal standard of beyond a reasonable doubt,⁴³⁴ and the burden of proving a reason be carried by the defendant on the balance of probabilities.⁴³⁵ It applied learnings from anti-discrimination law concluding it would be “excessively difficult” for the prosecution to prove the reason for the conduct, as the intent of a person who engaged in discriminatory conduct would only be known to that person.⁴³⁶ This consideration is equally applicable to the criminal law - Justice would not be served if respondents were to avoid taking responsibility. In relation to criminal and civil proceedings, Clause 110 and 113 both incorporate a presumption, with cl 113 adding a defence to the mix as well. The burden of proof should be borne by the respondent/defendant irrespective of whether the provision is framed as a rebuttable presumption or reverse onus. But they fall outside the scope of the Terms of Reference and strictly should not be considered in this inquiry.

⁴²⁹ *Model Health and Safety Act* cl 106(1)(a)-(j).

⁴³⁰ *Model Health and Safety Act* cl 112.

⁴³¹ *Model Health and Safety Act* cl 110(1)(a)-(c).

⁴³² *Model Health and Safety Act* cl 110(3).

⁴³³ *Model Health and Safety Act* cl 110(2).

⁴³⁴ Australian Government, *National Review into Model Occupational Health and Safety Laws: Second Report* (2009) [29.62].

⁴³⁵ *Ibid* [29.66].

⁴³⁶ *Ibid* [29.63]-[29.65].

3.74 **Conclusion** – In relation to criminal and civil proceedings for discrimination on the basis of health and safety, Clause 110 and 113 both incorporate a rebuttable presumption, with cl 113 adding in a defence as well. Whilst we are of the view that a rebuttable presumption is justifiable in these circumstances, the issue strictly falls outside the scope of the Terms of Reference and should not be considered in this inquiry...

Workplace Health and Safety Laws	Reverse onus provisions
Model Health and Safety Act cl 110	<p>Proof of discriminatory conduct</p> <p>(1) This section applies if in proceedings for an offence of contravening section 104 or 107, the prosecution:</p> <ul style="list-style-type: none"> (a) proves that the discriminatory conduct was engaged in; and (b) proves that a circumstance referred to in section 106(a) to (j) existed at the time the discriminatory conduct was engaged in; and (c) adduces evidence that the discriminatory conduct was engaged in for a prohibited reason. <p>(2) The reason alleged for the discriminatory conduct is presumed to be the dominant reason for that conduct unless the accused proves, on the balance of probabilities, that the reason was not the dominant reason for the conduct.</p> <p>(3) To avoid doubt, the burden of proof on the accused under subsection (2) is a legal burden of proof.</p>
Model Health and Safety Act cl 113	<p>Procedure for civil actions for discriminatory conduct</p> <p>(2) In a proceeding under section 112 in relation to conduct referred to in section 112(2)(a) or (b), if a prohibited reason is alleged for discriminatory conduct, that reason is presumed to be a substantial reason for that conduct unless the defendant proves, on the balance of probabilities, that the reason was not a substantial reason for the conduct.</p> <p>(3) It is a defence to a proceeding under section 112 in relation to conduct referred to in section 112(2)(a) or (b) if the defendant proves that:</p> <ul style="list-style-type: none"> (a) the conduct was reasonable in the circumstances; and (b) a substantial reason for the conduct was to comply with the requirements of this Act or a corresponding WHS law. <p>(4) To avoid doubt, the burden of proof on the defendant under subsections (2) and (3) is a legal burden of proof.</p>
Model Health and Safety Act cl 19	<p>Primary duty of care</p> <p>(1) A person conducting a business or undertaking must ensure, so far as is reasonably practicable, the health and safety of:</p> <ul style="list-style-type: none"> (a) workers engaged, or caused to be engaged by the person; and (b) workers whose activities in carrying out work are influenced or directed by the person, while the workers are at work in the business or undertaking. <p>(2) A person conducting a business or undertaking must ensure,</p>

	so far as is reasonably practicable, that the health and safety of other persons is not put at risk from work carried out as part of the conduct of the business or undertaking.
Occupational Health and Safety Act 1983 (NSW)	<p>Section 15 Every employer shall ensure the health, safety and welfare at work of all the employer's employees.</p> <p>Section 53 It shall be a defence to any proceedings against a person for an offence against this Act or the regulations for the person to prove that:</p> <p>(a) it was not reasonably practicable for the person to comply with the provision of this Act or the regulations the breach of which constituted the offence, or</p> <p>(b) the commission of the offence was due to causes over which the person had no control and against the happening of which it was impracticable for the person to make provision</p>

Coercive information-gathering powers

3.75 The evidentiary burden is placed on the accused at various points in the Model Law with respect to the coercive information-gathering powers of inspectors. The typical formulation is "...places an evidential burden on the accused to show a reasonable excuse". The defendant bears the burden of proof when they fail or refuse to provide information or produce documents,⁴³⁷ provide reasonable assistance to inspectors,⁴³⁸ provide their name and address,⁴³⁹ comply with non-disturbance notices,⁴⁴⁰ or comply with direction to provide OHS training.⁴⁴¹ The defendant also bears the burden of proof when they tamper with seized objects,⁴⁴² obstruct entry of permit holders,⁴⁴³ or provide false or misleading information.⁴⁴⁴ These procedural safeguards ensure that regulators can carry out their functions according to law thwarting attempts of employers to avoid liability. There have been numerous cases where employers have tried to avoid liability. In a recent case, Christopher Dwyer was prosecuted for providing false and misleading information to an inspector. The tags on the electrical equipment had not been inspected and tested by a suitably qualified person prior to being used at the construction site.⁴⁴⁵ In a similar case, Ivan Deak was prosecuted for obstructing entry when he refused to allow inspectors to conduct a workplace inspection at a retail premises.⁴⁴⁶

⁴³⁷ *Model Health and Safety Act* cl 155, cl 171.

⁴³⁸ *Model Health and Safety Act* cl 155, cl 165.

⁴³⁹ *Model Health and Safety Act* cl 185.

⁴⁴⁰ *Model Health and Safety Act* cl 200.

⁴⁴¹ *Model Health and Safety Act* cl 241-242.

⁴⁴² *Model Health and Safety Act* cl 177.

⁴⁴³ *Model Health and Safety Act* cl 144.

⁴⁴⁴ *Model Health and Safety Act* cl 268.

⁴⁴⁵ WorkSafe published a summary of the 2014 prosecution

3.76 Although the High Court has not considered whether evidentiary burdens are consistent with the right to innocence, it has condoned their use. In *Chugg v Pacific Dunlop Ltd*,⁴⁴⁷ it characterised then s 21 of the *Occupational Health and Safety Act 1985* (Vic) as an evidentiary burden. Their Honours stated:

*In some cases the mere identification of the cause of a perceptible risk may, as a matter of common sense, also constitute identification of a means of removing that risk, thereby giving rise to a strong inference that an employer failed to provide "so far as is practicable" a safe workplace. In other cases the same inference will arise from the identification of some method which would remove or mitigate a perceptible risk or hazard. And, in such cases, that inference might well be further strengthened by the failure of an employer to call evidence as to matters, such as cost and suitability, peculiarly within his knowledge.*⁴⁴⁸

This is broadly consistent with the approach taken in the United Kingdom. In *R v Director of Public Prosecutions, Ex Parte Kebilene*,⁴⁴⁹ Lord Hope in obiter distinguished between evidential and legal burdens. The House of Lords has reinterpreted statutory provisions as being evidentiary,⁴⁵⁰ and Parliament has converted many legal burdens.

3.77 The ECHR has considered whether evidential burdens are consistent with the presumption of innocence under art 6(2) of the *Convention for the Protection of Human Rights and Fundamental Freedoms*. In *John Murray v United Kingdom*,⁴⁵¹ the ECHR held that it was not an absolute rule and can be qualified. The court drew adverse inferences because the applicant did not answer the questions, or give evidence. The ECHR found that it was "equally obvious that these immunities cannot or should not prevent the accused's silence, in situations which clearly call for an explanation from him, be taken into account in assessing the persuasiveness of the evidence adduced by the prosecution".⁴⁵² The use of evidentiary burdens with respect to procedural safeguards in assisting regulators to discharge their duties under the Act is legitimate and appropriate.

3.78 **Conclusion** – We strongly oppose any attempts to remove procedural safeguards from the Model Law. The use of evidentiary burdens with respect to the coercive information-gathering

<<http://www.worksafe.vic.gov.au/laws-and-regulations/enforcement/prosecution-result-summaries-and-enforceable-undertakings>>

⁴⁴⁶ WorkSafe published a summary of the 2014 prosecution

<<http://www.worksafe.vic.gov.au/laws-and-regulations/enforcement/prosecution-result-summaries-and-enforceable-undertakings>>

⁴⁴⁷ [1990] HCA 41.

⁴⁴⁸ *Ibid* [18].

⁴⁴⁹ [2000] 2 A.C. 326.

⁴⁵⁰ Andrew Ashworth, 'Four threats to the presumption of innocence' (2006) 10(4) *International Journal of Evidence and Proof* 241, 241.

⁴⁵¹ (1996) 22 EHRR [47].

⁴⁵² *Ibid*.

powers of inspectors is legitimate and justifiable. Use of the evidentiary burden in the health and safety context is proportionate to the aim of protecting life.

Privilege against Self Incrimination

3.79 In the Model Law, the privilege against self-incrimination is abrogated with respect to investigations by inspectors into contraventions of workplace health and safety laws.⁴⁵³ For example, the powers of inspectors to require documents and answers to questions,⁴⁵⁴ copy and retain documents,⁴⁵⁵ and seize evidence or dangerous things.⁴⁵⁶ Persons are not excused from:

- (a) giving information,
- (b) producing documents, or
- (c) answering questions

on the basis it might incriminate them or expose them to a penalty.⁴⁵⁷ The privilege extends to the provision of documents, the scope of which is broader than a mere “questioning privilege”.⁴⁵⁸ The Model Law provides for a “use immunity” as evidence is not admissible in civil or criminal proceedings except for prosecutions for false or misleading statements.⁴⁵⁹ So even though the privilege has been abrogated, information obtained as a result of forced disclosure cannot be used. It is however not clear whether a “derivative use immunity” applies insofar as evidence indirectly obtained can be used against the individual.

3.80 Employers have expressed concerns about the availability of the privilege to employers in prosecutions under the criminal law. As corporations are not entitled to the privilege,⁴⁶⁰ its abrogation is relevant to prosecutions of directors as individuals. Directors are required to exercise due diligence to ensure compliance with duties under the Model Law.⁴⁶¹ There are three offences including Category 1 which requires proof of reckless conduct without reasonable excuse.⁴⁶² Both Category 2 and Category 3 offence require proof of breach, with Category 2 resulting in death or injury.⁴⁶³ Directors can be fined or jailed for breaches of the Model Law. For a Category 1 offence, they can be fined up to \$300,000 or sent to prison for 5 years. Although

⁴⁵³ *Model Health and Safety Act* cl 160.

⁴⁵⁴ *Model Health and Safety Act* cl 171.

⁴⁵⁵ *Model Health and Safety Act* cl 174.

⁴⁵⁶ *Model Health and Safety Act* cl 176, 175.

⁴⁵⁷ *Model Health and Safety Act* cl 172(1).

⁴⁵⁸ Ben Saul and Michelle McCabe, ‘The privilege against self-incrimination in federal regulation’ (2001) 78 *Australian Law Reform Commission Reform Journal* 54.

⁴⁵⁹ *Model Health and Safety Act* cl 172(2).

⁴⁶⁰ *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477.

⁴⁶¹ *Model Health and Safety Act* cl 27(1).

⁴⁶² *Model Health and Safety Act* cl 31.

⁴⁶³ *Model Health and Safety Act* cl 32, cl 33.

the penalties are significant, prosecutions are fairly infrequent and the fines imposed are extremely low. In 2014, WorkCover NSW prosecuted only six employers for breaches resulting in death or disability with any success. There was not one case of a judge imposing a sentence of imprisonment. The lowest fine imposed was \$500 while the highest was \$30,000 with the average being a mere \$8,610 which could be viewed as no more than doing the cost of business.⁴⁶⁴ The argument could certainly be made that the discretion of the Court should be curbed by the introduction of minimum penalties.

3.81 It is more common for employers to be fined, but employers are also avoiding the Model Law by taking out statutory liability insurance. Even though directors can be prosecuted and fined as individuals, the resources of the corporation are still available to them. In *Hillman v Ferro Con (SA) Pty Ltd v Anor*,⁴⁶⁵ the director was fined \$200,000 but only paid \$10,000 the excess required by his insurance company. Lieschke SM commented:

In my opinion Mr Maione and Ferro Con have taken positive steps to avoid having to accept most of the legal consequences of their criminal conduct as determined by the course of justice. This has occurred through Mr Maione successfully calling on an insurer to pay his fine...In my opinion Mr Maione's actions have also undermined the Court's sentencing powers by negating the principles of both specific and general deterrence. The message his actions send to employers and Responsible Officers is that with insurance cover for criminal penalties for OHS offences there is little need to fear the consequences of very serious offending, even if an offence has fatal consequences⁴⁶⁶

Although accountability is crucial to effective regulation of health and safety,⁴⁶⁷ employers are actively taking steps to avoid personal responsibility.

3.82 There is a clear public interest in ensuring workers are healthy and safe at work and employers comply with workplace laws. Inspectors need to have strong unambiguous powers to obtain information. The National Review found that the "social utility" with respect to the prevention of death and injury justified its removal.⁴⁶⁸ In 2013 almost 200 Australian workers were fatally injured at work and many more were injured.⁴⁶⁹ In *Brown v Stott*,⁴⁷⁰ the House of Lords held that restrictions were legitimate and proportional. The case concerns road traffic management but

⁴⁶⁴ Data based on information provided by WorkCover
<<http://www.workcover.nsw.gov.au/lawpolicy/prosecutions/Pages/allprosecutions.aspx>>

⁴⁶⁵ [2013] SAIRC 22.

⁴⁶⁶ *Ibid* [78]-[80].

⁴⁶⁷ Karen Wheelwright, 'Some care, little responsibility? Promoting Directors' and Managers' liability for occupational health and safety in the workplace' (2005) 10(2) *Deakin Law Review* 471.

⁴⁶⁸ Australian Government, *National Review into Model Occupational Health and Safety Laws: Second Report* (2009) 350-351.

⁴⁶⁹ Safe Work Australia, *Work-related traumatic injury fatalities* (2013) 1.

⁴⁷⁰ [2003] 1 AC 681.

the goal of harm minimisation is the same. The police were called when a woman was accused of theft. In response to questioning she said she had travelled to the store by car. The police required her to say she had been driving under the influence of alcohol to which she later tested positive. Lord Bingham concluded that the respondent had a fair trial noting:

All who own or drive motor cars know that by doing so they subject themselves to a regulatory regime...This regime is imposed not because owning or driving cars is a privilege or indulgence granted by the state but because the possession and use of cars (like, for example, shotguns, the possession of which is very closely regulated) are recognised to have the potential to cause grave injury.⁴⁷¹

The interest of society to healthy and safe working conditions outweighs the right of individuals to claim the privilege of self-incrimination.

3.83 **Conclusion** – The abrogation of the privilege against self-incrimination is justifiable and should be retained. There is a clear public interest in ensuring healthy and safe working conditions. Workers are entitled to healthy and safe conditions of work.

Part 5: Fair Work (Registered Organisations) Amendment Bill 2014 (Cth)

3.84 In the *Fair Work (Registered Organisations) Amendment Bill 2014 (Cth)*, the privilege against self-incrimination is restricted. Some of the proposed amendments might also interfere with the right to freedom of association. Whilst we oppose the Bill in its entirety, our comments here are restricted to the matters of interest to this Inquiry.

Privilege against Self Incrimination

3.85 In the *Fair Work (Registered Organisations) Act 2009 (Cth)*, the privilege against self-incrimination is restricted with respect to the duty of the Australian Electoral Commission (AEC) to investigate electoral matters. Electoral officers are entitled to information “reasonably necessary” for the purposes of a ballot with respect to proposed amalgamation of unions⁴⁷² or withdrawal from an amalgamation.⁴⁷³ The AEC can apply to the Federal Court to for permission to launch an inquiry into an “irregularity”.⁴⁷⁴ The FWC can conduct investigations taking various

⁴⁷¹ Ibid [74].

⁴⁷² *Fair Work (Registered Organisations) Act 2009 (Cth)* s 51 (5).

⁴⁷³ *Fair Work (Registered Organisations) Act 2009 (Cth)* s 103(5).

⁴⁷⁴ *Fair Work (Registered Organisations) Act 2009 (Cth)* s 200.

actions such as requiring the production of an electoral document.⁴⁷⁵ The FWC can issue written notices requiring disclosure where it “reasonably believes” that the person or body has “relevant” evidence.⁴⁷⁶ The privilege cannot be claimed if a person fails to produce or knowingly or recklessly gives “false or misleading” information.⁴⁷⁷

3.86 Throughout the Act, the privilege is restricted in the same or similar terms.⁴⁷⁸ A person does not commit an offence if they have a “reasonable excuse”,⁴⁷⁹ but they cannot rely on the privilege against self-incrimination. For example, s 51(5) states:

A person is not excused from giving information or producing or making available a document under this section on the ground that the information or the production or making available of the document might tend to incriminate the person or expose the person to a penalty.

The Act provides for use and derivative use immunities as evidence obtained directly or indirectly is not admissible in civil or criminal proceedings with the exception of false and misleading statements. For example, s 51(6) states:

However: (a) giving the information or producing or making available the document; or (b) any information, document or thing obtained as a direct or indirect consequence of giving the information or producing or making available the document; is not admissible in evidence against the person in criminal proceedings or proceedings that may expose the person to a penalty, other than proceedings under, or arising out of, subsection 52(3).

If passed the *Fair Work (Registered Organisations) Amendment Bill 2014* (Cth) will repeal s 337AA and insert cl 337AD. With respect to information or documents requested by the General Manager,⁴⁸⁰ the privilege against self-incrimination is abrogated albeit with some protections in relation to admissibility.⁴⁸¹ Clause 337AD although similar requires the person subjected to an examination to know, at the time of their examination, that they have such a right. A failure to object to providing information during that examination constitutes an irrevocable waiver of the privilege.⁴⁸² The accompanying effect of cl 329G, which provides that the Commissioner or General Manager have the discretion to disclose information if there are reasonable grounds to believe that it is “necessary or appropriate” to do so in the performance of their duties, is concerning

⁴⁷⁵ *Fair Work (Registered Organisations) Act 2009* (Cth) s 202 (8).

⁴⁷⁶ *Fair Work (Registered Organisations) Act 2009* (Cth) s 337AA (6).

⁴⁷⁷ *Fair Work (Registered Organisations) Act 2009* (Cth) s 337 (4).

⁴⁷⁸ But see, *Fair Work (Registered Organisations) Act 2009* (Cth) s 202 (8).

⁴⁷⁹ See, eg, *Fair Work (Registered Organisations) Act 2009* (Cth) s 51(4).

⁴⁸⁰ *Fair Work (Registered Organisations) Act 2009* (Cth) s 335A (2).

⁴⁸¹ *Fair Work (Registered Organisations) Act 2009* (Cth) s 337.

⁴⁸² *Fair Work (Registered Organisations) Amendment Bill 2014* (Cth) cl 230, repealing *Fair Work (Registered Organisations) Act 2009* (Cth) cl 337AA and inserting cl 337AD(2).

3.87 It is difficult to identify any rationale for the abrogation of the privilege against self-incrimination.

The Explanatory Memorandum does not identify any particular reason other than broad policy reasons of “financial transparency and accountability”.⁴⁸³ The reforms proposed in the bill are based on (but do not mirror) laws regulating corporations.⁴⁸⁴ For example, cl 337AD is based on s 68 of the *Australian Securities and Investments Commission Act 2001* (Cth). But note that the privilege is still available in relation to proceedings under the *Corporations Act 2001* (Cth).⁴⁸⁵

The interests of unions are inherently different as they represent their members in the industrial framework. On the other hand, corporations are designed to generate profit and protect the financial interests of shareholders.

3.88 In our view, it is inappropriate for union regulations to adopt the investigative framework that appears under the ASIC Act. The impetus for that framework was the Rae Report⁴⁸⁶ of 1974, a report prompted by (and detailing) substantial manipulation of and misconduct in securities markets, particularly in the mining industry. The report recommended the creation of a national statutory authority, with strong investigative powers, in response to the identified problems. Early versions of the scheme were evident in the National Companies and Securities Commission Act 1979 and were built upon through amendments to uniform schemes and the transition to the Australian Securities Commission and ultimately the Australian Securities and Investment Commission in the late 1980s, such reforms also responsive to the corporate conduct and regulatory failures evident in that period.

3.89 The investigative framework in the ASIC Act is focussed on the regulator’s power to prosecute contraventions of the law, including offences⁴⁸⁷. The investigative framework under the RO Act is not intended for the investigation of offences. Whilst it does apply to the investigation of contravention of civil penalties, it also serves other purposes, such as:

- Internal management according to the Rules of organisations⁴⁸⁸;
- Irregularities evident from Auditors reports⁴⁸⁹; and
- General finances and financial administration⁴⁹⁰.

⁴⁸³ Explanatory Memorandum, *Fair Work (Registered Organisations) Amendment Bill 2014* (Cth).

⁴⁸⁴ Commonwealth Parliament, *Parliamentary Debates*, House of Representatives, 14 November 2014 (Christopher Pyne) 19-20.

⁴⁸⁵ *Corporations Act 2001* (Cth) s 1316A.

⁴⁸⁶ Senate Select Committee on Securities and Exchange, “Australian Securities Markets and their Regulation”.

⁴⁸⁷ See generally Division 1 and Division 5 of Part 3 of the *ASIC Act*.

⁴⁸⁸ Section 331(1)(d) of the *RO Act*.

⁴⁸⁹ *Fair Work (Registered Organisations) Act 2009* (Cth) s 332.

Many of those investigations may not reveal any contravention of the law, however they may reveal a need for an organisation or a reporting unit thereof to improve its practices in some way. The outcome of an investigation therefore may be a requirement to improve those practices⁴⁹¹, or a re-definition of reporting units⁴⁹², rather than a prosecution. An investigative framework that is focussed solely on prosecution and enforcement is ill suited to these aims.

3.90 In any event, it certainly could not be argued that a person questioned in relation to financial irregularities would have “peculiar knowledge”⁴⁹³ as documentary evidence such as transactional data would typically be available.

3.91 The abrogation of the privilege is retained and expanded in important aspects. The proposed amendments remove or lessen important protections of a procedural or substantive nature. There are key differences between the current Act and proposed amendments, one being that the defence of reasonable excuse would not be available. This means persons being questioned would have limited scope to resist answering questions put to them. And unlike the *Australian Securities and Investments Commission Act 2001* (Cth), there is no requirement that questions put be relevant to the matter under investigation.⁴⁹⁴ Although the information or documents obtained are not directly admissible in civil or criminal proceedings, it would appear that evidence indirectly obtained as a result of disclosures pursuant to further investigations can still be used.⁴⁹⁵ There is no requirement for a person to be informed of their right to legal representation. And although persons questioned can have a lawyer, an investigator can stop them participating if they think the lawyer is being obstructive.⁴⁹⁶ This impacts on the ability of lawyers to represent their clients and protect their interests. The amendments would also, as noted above require that persons claim the privilege prior to giving the information.⁴⁹⁷ This means the evidence might be admissible if the person is unaware of and fails to claim their right. For this reason, the Scrutiny of Legislation Committee is opposed to the imposition of such

⁴⁹⁰ *Fair Work (Registered Organisations) Act 2009* (Cth) s 333

⁴⁹¹ *Fair Work (Registered Organisations) Act 2009* (Cth) s 336(2)

⁴⁹² *Fair Work (Registered Organisations) Act 2009* (Cth) s 247

⁴⁹³ *Pyneboard Proprietary Limited v Trade Practices Commission* [1983] HCA 9 [27] (Mason ACJ, Wilson and Dawson JJ).

⁴⁹⁴ *Fair Work (Registered Organisations) Amendment Bill 2014* (Cth) cl 335D(3). Cf *Australian Securities and Investments Commission Act 2001* (Cth) s 21(3).

⁴⁹⁵ *Fair Work (Registered Organisations) Amendment Bill 2014* (Cth) cl 337AD(3).

⁴⁹⁶ *Fair Work (Registered Organisations) Amendment Bill 2014* (Cth) cl 335F(2).

⁴⁹⁷ *Fair Work (Registered Organisations) Amendment Bill 2014* (Cth) cl 230, repealing *Fair Work (Registered Organisations) Act 2009* (Cth) cl 337AD and inserting cl 337AD(2)(a).

conditions.⁴⁹⁸ The reasons offered do not justify the abrogation of the privilege, and the safeguards put in place are not sufficient.

3.92 **Conclusion** – The abrogation of the privilege against self-incrimination in the *Fair Work (Registered Organisations) Amendment Bill 2014* (Cth) is not justified because reasons offered do not justify the abrogation of the privilege, and the safeguards put in place are inadequate.

Freedom of Association

3.93 The *Fair Work (Registered Organisations) Amendment Bill 2014* (Cth) could potentially interfere with freedom of association. The right to freedom of association under art 22 of the ICCPR encompasses the right to operate freely and be protected from undue interference.⁴⁹⁹ This means members of associations should be free to determine their structure and activities without State interference.⁵⁰⁰ There are very limited exceptions; control over the internal affairs of trade unions is not one. ILO Conventions similarly provides for various protections in relation to freedom of association. Under art 3 of Convention No. 87, representative organisations have the right to organise their administration and activities and to formulate their programmes without interference from public authorities. Article 2(1) of Convention No. 98 provides that trade unions and employers' associations are to be protected from "acts of interference" with respect to establishment, functioning and administration. Certain aspects of the bill are inconsistent with the protections provided for in the ILO Conventions. For example, the bill provides that the Minister for Employment can give directions to the Registered Organisations Commissioner⁵⁰¹ and require reports on specified issues in relation to the Commissioner's functions.⁵⁰²

3.94 The stated aim of the *Fair Work (Registered Organisations) Amendment Bill 2014* (Cth) is to "improve the governance and financial transparency of registered organisations".⁵⁰³ The reform seemingly for reasons of enhanced accountability is designed to interfere with the independent operation of trade unions. For example, trade unions would be required to report on employment-related costs, advertising, legal and operating costs, and donations to political parties.⁵⁰⁴ Note that one of the functions of the Registered Organisations Commissioner would

⁴⁹⁸ Office of the Queensland Parliamentary Counsel, *Principles of good legislation: Self-incrimination* (2013) [36].

⁴⁹⁹ Human Right Council, *Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association: Report I (Maina Kiai)* (2012) [63].

⁵⁰⁰ *Ibid.*

⁵⁰¹ *Fair Work (Registered Organisations) Amendment Bill 2014* (Cth) cl 329FA.

⁵⁰² *Fair Work (Registered Organisations) Amendment Bill 2014* (Cth) cl 329FB.

⁵⁰³ Explanatory Memorandum, *Fair Work (Registered Organisations) Amendment Bill 2014* (Cth) [3].

⁵⁰⁴ *Fair Work (Registered Organisations) Amendment Bill 2014* (Cth) cl 89 (inserting cl 255(2A)).

be to monitor acts and practices to ensure the “democratic functioning and control of organisations”.⁵⁰⁵ The Special Rapporteur on Freedom of Association has commented:

*The transparency and accountability argument has, in some other cases, been used to exert extensive scrutiny over the internal affairs of associations, as a way of intimidation and harassment. The Special Rapporteur warns against frequent, onerous and bureaucratic reporting requirements, which can eventually unduly obstruct the legitimate work carried out by associations. Controls need therefore to be fair, objective and non-discriminatory, and not be used as a pretext to silence critics. Composition of the supervisory body also needs to be independent from the executive power to ensure its decisions are not arbitrary.*⁵⁰⁶

The Special Rapporteur also emphasised the importance of responsibility on the part of trade unions. He stated:

*This does not mean that associations do not have any obligations. Associations have to ensure that funds are used for the purposes intended and that they are transparent and accountable to their donors, according to the terms of their funding agreements. It is crucial that associations – like other sectors in society – work with integrity and ethically as a way of generating trust within the sector. In this regard, the Special Rapporteur refers to a number of civil society-led initiatives, such as the International Non-Governmental Organisations (INGO) Accountability Charter, which are valuable examples of the sense of responsibility shown by civil society actors.*⁵⁰⁷

There are alternative solutions whereby trade unions can maintain their independence and improve accountability. The scheme that is already in place is such a model.

3.95 Conclusion – We strongly oppose any attempts to exert political control over trade unions.

The interferences effected by the *Fair Work (Registered Organisations) Amendment Bill 2014* (Cth) on the principle of freedom of association are not justified.

⁵⁰⁵ *Fair Work (Registered Organisations) Amendment Bill 2014* (Cth) cl 329AB(b).

⁵⁰⁶ Human Right Council, *Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association: Report II (Maina Kiai)* (2012) [38].

⁵⁰⁷ *Ibid* [13].

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