6. Freedom of Association and Assembly

Contents

Summary

6.1 Freedom of association concerns the right of all persons to group together voluntarily for a common goal or to form and join an association, such as a political party, a professional or sporting club, a non-government organisation or a trade union.

6.2 This chapter discusses the source and rationale of the common law rights of freedom of association and freedom of assembly; how these rights are protected from statutory encroachment; and when laws that interfere with them may be considered justified, including by reference to the concept of proportionality.

6.3 Freedom of association is closely related to other fundamental freedoms recognised by the common law, including freedom of speech. It has been said to serve the same values as freedom of speech: 'the self-fulfilment of those participating in the meeting or other form of protest, and the dissemination of ideas and opinions essential to the working of an active democracy'.[1] Freedom of association is different from, but also closely related to, freedom of assembly.

1 Eric Barendt, *Freedom of Speech* (Oxford University Press, 2nd ed, 2007) 272.

6.4 Freedom of association serves as a vehicle for the exercise of many other civil, cultural, economic, political and social rights. For example, freedom of association is vital to modern commerce and economic wellbeing because partnerships and corporations, which are associations of shareholders, account for much business activity. In practice, many business activities cannot be undertaken by individuals alone.

6.5 Freedom of association provides an important foundation for legislative protection of employment rights. The system of collective, or enterprise bargaining, which informs much of Australia's employment landscape, relies on the freedom of trade unions and other employee groups to form, meet and support their members.

6.6 Australians are generally free to associate with whomever they like and to assemble to participate in activities including, for example, a protest or demonstration. However, a wide range of Commonwealth laws may be seen as interfering with freedom of association or freedom of assembly, in the contexts of criminal law and counter-terrorism; public assembly; workplace relations; migration; and anti-discrimination. Many of these provisions relate to limitations of these freedoms that have long been recognised by the common law itself, for example, in relation to consorting with criminals, public assembly and other aspects of preserving public order.

6.7 Some areas of particular concern, as evidenced by parliamentary committee materials, submissions and other commentary, involve:

- various counter-terrorism offences provided under sch 1 of the *Criminal Code Act 1995* (Cth) (*Criminal Code*) and, in particular, the offence of associating with a member of a terrorist organisation and thereby providing support to it;
- workplace relations laws, which are centrally concerned with freedom of association and the right to organise;
- the operation of the so-called 'character test' in the *Migration Act 1958* (Cth), which provides a ministerial discretion to refuse a visa to a person whom the Minister reasonably suspects is a member of or has an association with certain groups or organisations or persons; and
- the operation of Commonwealth anti-discrimination laws.

6.8 Counter-terrorism and national security laws, including those mentioned above, should be subject to further review to ensure that the laws do not interfere unjustifiably with freedom of association and freedom of assembly, or other rights and freedoms. Further review on this basis could be conducted by the Independent National Security Legislation Monitor (INSLM) and the Parliamentary Joint Committee on Intelligence and Security (Intelligence Committee).

6.9 Workplace relations laws in Australia have been subject to extensive local and overseas criticism on the basis of lack of compliance with International Labour Organization (ILO) Conventions concerning freedom of association and the right to organise. However, the extent to which obligations under ILO conventions engage the

scope of common law or traditional understandings of freedom of association may be contested.

6.10 For example, the legal power to take industrial action is not a common law entitlement but a statutory grant. Therefore, the exercise of the power and the benefit of legal protection may be subject to statutory conditions. While conditions on industrial action may offend certain ILO norms, they do not necessarily encroach on freedom of association.

6.11 The character test in s 501 of the *Migration Act* may not be a proportionate limitation on the right to freedom of association. The provision might be amended to provide narrower meanings of 'association' and 'membership'. The issue could be dealt with in any future review of Australia's migration laws aimed at ensuring that these laws do not interfere unjustifiably with freedom of association, or other rights and freedoms.

6.12 Anti-discrimination laws have been criticised for potentially interfering with freedom of association by making unlawful certain forms of discrimination—including the use of rules or criteria excluding people from membership of associations, such as sporting clubs. These concerns overlap with discussion of freedom of religion and are considered in Chapter 5.

The common law

6.13 There has been some recognition by Australian courts that freedom of association should be considered a common law right.[2] In *Tajjour v New South Wales* (*Tajjour*), Keane J cited High Court authority for the proposition that, at common law, freedom of association is a 'fundamental aspect of our legal system'.[3]

6.14 The approach of the common law to freedom of assembly has been described as 'hesitant and negative, permitting that which was not prohibited'.[4] In *Duncan v Jones*, Lord Hewart CJ said that 'English law does not recognize any special right of public meeting for political or other purposes'.[5]

6.15 Common law freedom of assembly is only for peaceful purposes. Freedom of assembly does not always involve freedom of association. People assemble, for example, for entertainment in a cinema, theatre or a sports stadium without necessarily associating with one another.

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2 *Tajjour v New South Wales* (2014) 313 ALR 221; *Minister for Immigration and Citizenship v Haneef* (2007) 163 FCR 414. See Australian Council of Trade Unions, *Submission 44*.

3 *Tajjour v New South Wales* (2014) 313 ALR 221, [224]. Citing *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 200 (Dixon J).

4 *R (Laporte) v Chief Constable of Gloucestershire Constabulary* [2007] 2 AC 105, 126–7. This is generally the way in which the common law protects rights: see Ch 2.

5 *Duncan v Jones* [1936] 1 KB 218 222. This 'reflected the then current orthodoxy': *R (Laporte) v Chief Constable of Gloucestershire Constabulary* [2007] 2 AC 105, 126–7.

Protections from statutory encroachment

Australian Constitution

6.16 Freedom of association is not expressly protected in the *Australian Constitution* and there is also no freestanding right to association implied in the *Constitution*.[6] Generally, Australian Parliaments may make laws that encroach on freedom of association.

6.17 However, there are some constitutional limits on Parliament's power to restrict freedom of association. Section 116 places some limits on the Parliament's power to interfere with freedom of association with respect to religion. Section 92 may prevent the prohibition of interstate trade between corporations. The High Court has also said that the Parliament cannot prohibit trading, financial or foreign corporations under the s 51(xx) corporations power, though it may regulate their activities.[7]

6.18 The power to make laws encroaching on freedom of association is also subject to general constitutional constraints on the legislative powers of the Commonwealth. In 1951, the High Court ruled that the *Communist Party Dissolution Act 1950* (Cth) was not a valid exercise of express legislative power,[8] nor was it valid under an implied power to make laws for the preservation of the Commonwealth and its institutions from internal attack and subversion.[9] The High Court has upheld legislation that deregistered a trade union, validly made under the s 51(xxxv) labour power.[10]

6.19 Most importantly, just as there is an implied constitutional right to 'political communication', there may also be an implied right to 'political association'. As in the case of political communication, any implied right to 'political association' would not protect a personal right, but act as a restraint on the exercise of legislative power by the Commonwealth.

6.20 The High Court has said that 'freedom of association to some degree may be a corollary of the freedom of communication formulated in *Lange v Australian Broadcasting Corporation*'.[11] For example, people should be free, generally speaking, to join groups like political parties to lobby for and effect change. Gaudron J in

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6 *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181, [148] (Gummow and Hayne JJ). See also *Tajjour v New South Wales* (2014) 313 ALR 221; *O'Flaherty v City of Sydney Council* (2014) 221 FCR 382, [28]; *Unions NSW v New South Wales* (2013) 304 ALR 266.

7 *Commonwealth v Bank of New South Wales* (1948) 76 CLR 1, 202–03.

8 Under *Australian Constitution* s 51(xxxix) read with s 61 (incidental and executive powers), s 51(vi) (defence power). However, the majority thought that the law could have been supported by the defence power in times of war: *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, see eg, 255–6 (Fullagar J).

9 *Australian Communist Party v Commonwealth* (1951) 83 CLR 1.

10 *Australian Building Construction Employees' and Builders Labourers' Federation v Commonwealth* (1986) 161 CLR 88.

11 *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181, [148] (Gummow and Hayne JJ). This position has been supported in subsequent judgments: *O'Flaherty v City of Sydney Council* (2014) 221 FCR 382, [28]; *Unions NSW v New South Wales* (2013) 304 ALR 266; *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181, [158] (Gummow and Hayne JJ); *Wainohu v New South Wales* (2011) 243 CLR 181, [112] (Gummow, Hayne, Crennan and Bell JJ).

Australian Capital Television Pty Ltd v Commonwealth said that the 'notion of a free society governed in accordance with the principles of representative democracy may entail freedom of movement [and] freedom of association'.[12]

6.21 Recognition of this corollary acknowledges the importance of freedom of association to a vibrant democracy. In many circumstances, freedom of political communication is unrealisable without freedom of association, as when individuals join together to form political parties or other groups to promote or publicise political viewpoints.

6.22 Freedom of assembly may also be a component of the implied freedom of political communication as, for many people, 'participation in public meetings or less formal forms of protest—marches and other demonstrations on the streets, picketing, and sit-ins—is not just the best, but the only effective means of communicating their views'.[13]

6.23 Nevertheless, in the Australian constitutional context, it seems any implied right to freedom of association, or assembly, is *only* a corollary of the right to political communication. The High Court said in *Wainohu v New South Wales*:

> Any freedom of association implied by the *Constitution* would exist only as a corollary to the implied freedom of political communication and the same test of infringement and validity would apply.[14]

6.24 The effect of this decision, Professors George Williams and David Hume wrote, 'will be to give freedom of association a limited constitutional vitality'.[15]

The principle of legality

6.25 The principle of legality provides some protection to freedom of association. When interpreting a statute, courts will presume that Parliament did not intend to interfere with freedom of association, unless this intention was made unambiguously clear.

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12 *Australian Capital Television v Commonwealth* (1992) 177 CLR 106, 212 (Gaudron J).

13 Barendt, above n 1, 269.

14 *Wainohu v New South Wales* (2011) 243 CLR 181, [112]. See also *Tajjour v New South Wales* (2014) 313 ALR 221, [95], [136], [244]–[245]. The case concerned the consorting law contained in s 93X of the *Crimes Act 1900* (NSW), which was found not to be invalid for impermissibly burdening the implied freedom of communication under the *Constitution*.

15 George Williams and David Hume, *Human Rights under the Australian Constitution* (Oxford University Press, 2nd ed, 2013) 217. Williams and Hume go on to write: 'It would be better to reformulate the position in *Wainohu* at least so that any freedoms of political association and political movement were identified as derivative, not of freedom of communication, but of the constitutionally prescribed systems of representative and responsible government and for amending the *Constitution* by referendum. In other words, the *Constitution* protects that freedom of association and movement which is necessary to sustain the free, genuine choices which the constitutionally prescribed systems contemplate': Ibid 217–18.

6.26 For example, in *Melbourne Corporation v Barry*, the High Court found that a by-law, made under a power to regulate traffic and processions, could not prohibit traffic and processions. Higgins J said:

> It must be borne in mind that there is this common law right; and that any interference with a common law right cannot be justified except by statute—by express words or necessary implication. If a statute is capable of being interpreted without supposing that it interferes with the common law right, it should be so interpreted.[16]

6.27 In *Minister for Immigration and Citizenship v Haneef* (*Haneef*) the Full Court of the Federal Court approached the construction of the word 'association' in the light of common law principles. The Court concluded that those principles tended against a construction authorising the Minister to find a person to have failed a migration character test[17] 'merely on the basis of an innocent association with persons whom the Minister reasonably suspects have been or are involved in criminal conduct'.[18] The principle of legality, applied to freedom of association, can be seen as an 'integral part' of the Court's approach to statutory interpretation in *Haneef*.[19]

International law

6.28 International law recognises rights to peaceful assembly and to freedom of association. The *International Covenant on Civil and Political Rights* (ICCPR) provides for 'the right of peaceful assembly'[20] and the 'right to freedom of association including the right to form and join trade unions'.[21]

6.29 The United Nations Special Rapporteur on the rights to freedom of peaceful assembly and of association explained the importance of these rights as empowering people to:

> express their political opinions, engage in literary and artistic pursuits and other cultural, economic and social activities, engage in religious observances or other beliefs, form and join trade unions and cooperatives, and elect leaders to represent their interests and hold them accountable.[22]

6.30 In addition, the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) provides for the 'right of everyone to form trade unions and join the trade union of his choice'.[23]

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16 *Melbourne Corporation v Barry* (1922) 31 CLR 174, 206.

17 Under *Migration Act 1958* (Cth) s 501(6)(b).

18 *Minister for Immigration and Citizenship v Haneef* (2007) 163 FCR 414, [114].

19 Australian Council of Trade Unions, *Submission 44*.

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

21 Ibid, art 22.1.

22 United Nations Human Rights Council, *The Rights to Freedom of Peaceful Assembly and of Association*, 15th Sess, UN Doc A/HRC/RES/15/21 (6 October 2010).

23 *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. Williams and Hume stated: 'the right to freedom of association is recognised in the ICCPR while the right to form trade unions (which can be seen as a subset of the right to freedom of association) is recognised in the ICESCR': Williams and Hume, above n 15, 4.

6.31 Australia is bound to respect freedom of association under international labour standards, and through its membership of the ILO.[24] International labour standards seek to guarantee the right of both workers and employers to form and join organisations of their choice.[25]

6.32 World Trade Organization rules and the provisions of free trade agreements to which Australia is a signatory also create obligations which, by implication, protect freedom of association for the purposes of commerce, industry and investment.[26]

6.33 International instruments cannot be used to 'override clear and valid provisions of Australian national law'.[27] However, where a statute is ambiguous, courts will generally favour a construction that accords with Australia's international obligations.[28]

Bills of rights

6.34 In other countries, bills of rights or human rights statutes provide some protection from statutory encroachment. Freedom of association is protected in the human rights statutes in the United Kingdom,[29] Canada[30] and New Zealand.[31] For example, the *Human Rights Act 1998* (UK) gives effect to the provisions of the *European Convention on Human Rights*, art 11 of which provides:

> Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.[32]

6.35 The First Amendment to the *United States Constitution* refers to the 'right of the people peaceably to assemble, and to petition the Government for a redress of grievances'.[33] Freedom of association in the US is derived primarily from First Amendment freedom of speech.

6.36 Freedom of association is also provided for in the Victorian *Charter of Human Rights and Responsibilities* and the *Human Rights Act 2004* (ACT).[34]

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24 See Breen Creighton and Andrew Stewart, *Labour Law* (Federation Press, 5th ed, 2010) [3.21]–[3.23].

25 See, eg, International Labour Organization, *Freedom of Association and Protection of the Right to Organise Convention*, C87 (entered into force 4 July 1950); International Labour Organization, *Right to Organise and Collective Bargaining Convention*, C98 (entered into force 18 July 1951). See also International Labour Organization, *Declaration on Fundamental Principles and Rights at Work*, 1998.

26 Department of Foreign Affairs and Trade, *The World Trade Organization (WTO) & Free Trade Agreements* <www.dfat.gov.au/international-relations/international-organisations/wto/pages/the-world-trade-organization-wto-free-trade-agreements>.

27 *Minister for Immigration v B* (2004) 219 CLR 365, [171] (Kirby J).

28 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287 (Mason CJ and Deane J). The relevance of international law is discussed more generally in Ch 2.

29 *Human Rights Act 1998* (UK) c 42, sch 1 pt I, art 11(1).

30 *Canada Act 1982* (UK) c 11, Sch B Pt 1 (*Canadian Charter of Rights and Freedoms*) s 2(d).

31 *New Zealand Bill of Rights Act 1990* (NZ) s 17.

32 *Human Rights Act 1998* (UK) c 42, sch 1 pt I, art 11(1).

33 *United States Constitution* amend I.

34 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 16(2); *Human Rights Act 2004* (ACT) s 15(2).

Justifications for limits on freedom of association and assembly

6.37 It has long been recognised that laws may be justified in interfering with freedom of association, including to restrict the association of certain classes, groups or organisations of persons who are involved, or likely to be involved, in crime.

6.38 Bills of rights allow for limits on most rights, but the limits must generally be reasonable, prescribed by law, and 'demonstrably justified in a free and democratic society'.[35] Similarly, the ICCPR recognises permissible limitations on freedom of association.

6.39 The following section discusses some of the principles and criteria that may be applied to help determine whether a law that interferes with freedom of association is justified, including those under international law.

Legitimate objectives

6.40 The threshold question in a proportionality test is whether the objective of a law is legitimate. Some guidance on what should be considered legitimate objectives of a law that interferes with freedom of association or freedom of assembly may be derived from the common law and international human rights law.

6.41 The common law and international human rights law recognise that freedom of association and freedom of assembly can be restricted in order to pursue legitimate objectives such as the protection of public safety and public order. Some existing restrictions on these freedoms are a corollary of pursuing other important public or social needs, such as the need to counter crime and control traffic.

6.42 Preventing people from 'getting together to hatch crimes' has long been considered one justification for restrictions on freedom of association.[36] The High Court has recognised a 'public interest' in restricting the activities, or potential activities, of criminal associations and criminal organisations.[37]

6.43 In *South Australia v Totani*,[38] French CJ explained that legislative encroachments on freedom of association are not uncommon where the legislature aimed to prevent crime. He found that the *Serious and Organised Crime (Control) Act 2008* (SA)

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35 *Canadian Charter of Rights and Freedoms* s 1. See also *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 7; *Human Rights Act 2004* (ACT) s 28; *New Zealand Bill of Rights Act 1990* (NZ) s 5.

36 Professors Campbell and Whitmore wrote, concerning vagrancy laws, that 'New South Wales in 1835 was still a penal colony and one can understand why at that time it should have been thought necessary to prevent people getting together to hatch crimes': Enid Campbell and Harry Whitmore, *Freedom in Australia* (Sydney University Press, 1966) 135. This was quoted in *Tajjour v New South Wales* (2014) 313 ALR 221, [8] (French CJ).

37 *South Australia v Totani* (2010) 242 CLR 1, [92] (Gummow J).

38 In that case, the *Serious and Organised Crime (Control) Act* 2008 (SA) s 4 aimed to disrupt and restrict the activities of organisations involved in serious crime and their members and associates and to protect the public from violence associated with such organisations.

> does not introduce novel or unique concepts into the law in so far as it is directed to the prevention of criminal conduct by providing for restrictions on the freedom of association of persons connected with organisations which are or have been engaged in serious criminal activity.[39]

6.44 Similarly, in *Tajjour,* the High Court upheld the validity of s 93X of the *Crimes Act 1900* (NSW):

> Section 93X is a contemporary version of a consorting law, the policy of which historically has been 'to inhibit a person from habitually associating with persons … because the association might expose that individual to temptation or lead to his involvement in criminal activity'. The object of the section is to prevent or impede criminal conduct.[40]

6.45 Limits on freedom of assembly are sometimes said to be necessary for other people to enjoy freedom of association. For example, a noisy protest outside a church interferes with the churchgoers' freedom of association. Laws that facilitate the freedom of assembly of some may need to inhibit the freedom of assembly of others, for example by giving police certain powers to control or regulate public protests.

6.46 In *Melbourne Corporation v Barry*, Higgins J distinguished between people's right to 'freely and at their will to pass and repass without let or hindrance' from a right to assemble on a public highway. Higgins J said:

> A claim on the part of persons so minded to assemble in any numbers, and for so long a time as they please to remain assembled, upon a highway, to the detriment of others having equal rights, is in its nature irreconcilable with the right of free passage, and there is, so far as we have been able to ascertain, no authority whatever in favour of it.[41]

6.47 Freedom of assembly is sometimes limited by laws that regulate protests aimed, for example, at ensuring protests are peaceful and do not disproportionately affect others. Protest organisers may be required to notify police in advance, so that police may prepare, for example by cordoning off public spaces. Police may also be granted extraordinary powers during some special events, such as sporting events and inter-governmental meetings, such as the 2007 APEC meeting in Sydney and the 2013 G20 summit in Brisbane.[42]

6.48 In considering how restrictions may be appropriately justified, one starting point is international human rights law, and the restrictions permitted by the ICCPR. The ICCPR provides that no restrictions may be placed on the rights to freedom of peaceful assembly and of association other than those which are prescribed by law and 'which

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39 *South Australia v Totani* (2010) 242 CLR 1, 36 [44].

40 *Tajjour v New South Wales* (2014) 313 ALR 221, [160] (Gageler J). References omitted. French CJ (in a dissenting judgment) concluded that the net cast by the provision was 'wide enough to pick up a large range of entirely innocent activity'. The Chief Justice found that the offence was invalid by reason of the imposition of a burden on the implied freedom of political communication, stating that it fails to 'discriminate between cases in which the purpose of impeding criminal networks may be served, and cases in which patently it is not': Ibid [41], [45].

41 *Melbourne Corporation v Barry* (1922) 31 CLR 174, 206 (Higgins J). Quoting *R v Cunningham Graham and Burns; ex parte Lewis* (1888) 16 Cox 420 (the Trafalgar Square case).

42 See, eg, *G20 (Safety and Security) Act 2013* (Qld); *APEC Meeting (Police Powers) Act 2007* (NSW).

are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others'.[43]

6.49 Many of the laws discussed below pursue these objectives. For example, criminal laws, including counter-terrorism and consorting laws, clearly protect the rights of other people, and public order. Criminal laws, such as counter-terrorism laws or those addressing serious organised crime, are also concerned with the protection of national security and public order.

6.50 In the workplace relations context, additional starting points for considering justifications for restrictions on freedom of association are established under international conventions. Essentially, these provide extra protections for freedom of association in the context of trade unions and workplace relations. Arguably, however, these protections operate in areas that are beyond the scope of the common law or traditional understandings of freedom of association.

6.51 Under art 22.3 of the ICCPR, the permissible reasons for restricting freedom of association are not to be taken to authorise 'legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for' in the ILO *Freedom of Association and Protection of the Right to Organise Convention*.[44]

6.52 Further, art 8 of the ICESCR guarantees the right of everyone to form trade unions and to join the trade union of his or her choice. Limitations on this right are only permissible, similar to the ICCPR, where they are 'prescribed by law' and 'are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others'.[45]

6.53 Article 8 also sets out the rights of trade unions, including the right to function freely subject to no limitations other than those prescribed by law and which are necessary for the purposes set out above, and the right to strike. As with art 22 of the ICCPR, art 8 provides that no limitations on the rights are permissible if they are inconsistent with the rights contained in the ILO *Freedom of Association and Protection of the Right to Organise Convention*.

Balancing rights and interests

6.54 Whether all of the laws identified below as potentially interfering with freedom of association or freedom of assembly, in fact pursue legitimate objectives of sufficient importance to warrant restricting the freedom may be contested. However, even if a

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43 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) arts 21, 22.2; United Nations Economic and Social Council, *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, UN Doc E/CN.4/1985/4, Annex (28 September 1984). See Ch 2.

44 International Labour Organization, *Freedom of Association and Protection of the Right to Organise Convention*, C87 (entered into force 4 July 1950).

45 *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.

law does pursue such an objective, it will also be important to consider whether the law strikes an appropriate balance between these freedoms and other rights and interests.

6.55 A recognised starting point for determining whether an interference with freedom of association or freedom of assembly is justified is the international law concept of proportionality. In arts 21 and 22 of the ICCPR, the phrase 'necessary in a democratic society' is seen to incorporate the notion of proportionality.[46]

6.56 In *McCloy v New South Wales*, the High Court expressly adopted a proportionality test to be applied where the purpose of a law and the means adopted to achieve that purpose are legitimate, but the law burdens the implied right of political communication.[47] This test may also be applied to laws that interfere with freedom of association or freedom of assembly, if they are seen as a 'corollary' of the constitutional implied right.

6.57 In relation to one element of proportionality—suitability—the UNSW Law Society stated that a requirement for there to be a 'rational connection' between the objectives of the law and the need to infringe the right 'is particularly relevant to Australian association laws, given that the evidence regarding the effectiveness of such legislation is highly disputed amongst scholars'.[48]

Laws that interfere with freedom of association and assembly

6.58 A wide range of Commonwealth laws may be seen as interfering with freedom of association and freedom of assembly, broadly conceived. Some of these laws impose limits that have long been recognised by the common law, for example, in relation to consorting with criminals and preserving public order. Arguably, such laws do not encroach on the traditional freedom, but help define it. However, these traditional limits are crucial to understanding the scope of the freedom, and possible justifications for new restrictions.

6.59 Commonwealth laws may be characterised as interfering with freedom of association in several different contexts, and including in relation to:

- criminal law;
- public assembly;
- workplace relations;

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46 See, eg, Attorney-General's Department (Cth), *Right to Freedom of Assembly and Association* <http://www.ag.gov.au>; United Nations Economic and Social Council, *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, UN Doc E/CN.4/1985/4, Annex (28 September 1984).

47 *McCloy v New South Wales* [2015] HCA 34 (7 October 2015) [3] (French CJ, Kiefel, Bell, Keane JJ). See Ch 2.

48 UNSW Law Society, *Submission 19*. The Society observed that, for example, while association laws 'have been thought to reduce crime owing to the fact that they prevent communication and planning, there have also been instances where anti-association laws have had the opposite effect as in Canada, where following the introduction of legislation to ban Bikie clubs there was a proliferation in ethnic gangs'.

- migration law; and
- anti-discrimination law.

6.60 These laws are summarised below. Some of the justifications that have been advanced for laws that interfere with freedom of association, and criticisms of laws on that basis, are also discussed.

Criminal law

6.61 A number of offences in the *Criminal Code* directly criminalise certain forms of association. Notably, these include counter-terrorism and foreign incursion offences, and consorting laws which criminalise associating in support of criminal activity or criminal organisations.

Terrorism offences

6.62 Section 102.8 of the *Criminal Code* provides for the offence of associating with a member of a terrorist organisation and thereby providing support to the organisation, if the person intends the support to assist it. A terrorist organisation is defined as an organisation that is 'directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act'[49] or is specified by regulations made under s 102.1 of the *Criminal Code*.[50] The Attorney-General's Department has issued a protocol that provides guidance on the process for listing organisations for this purpose.[51]

6.63 Section 119.5 of the *Criminal Code* provides for offences of allowing the use of buildings, vessels and aircraft to commit offences, by permitting a meeting or assembly of persons to be held with the intention of supporting preparations for incursions into foreign countries for the purpose of engaging in hostile activities.

6.64 In addition, the terms of counter-terrorism control orders issued under the *Criminal Code* may contain a prohibition or restriction on a person 'communicating or associating with specified individuals'.[52]

6.65 The Law Council of Australia (Law Council) observed that the associating with terrorist organisations offence 'may disproportionately shift the focus of criminal liability from a person's conduct to their membership of an organisation'.[53] It added that assessing justification for the offence is difficult, 'given the broad executive

49 *Criminal Code* s 102.1(1).

50 See eg, *Criminal Code (Terrorist Organisation—Al-Qa'ida) Regulation 2013* (Cth). Other specified terrorist organisations include: Al-Qa'ida in the Lands of the Islamic Maghreb; Al-Qa'ida in the Arabian Peninsula; Islamic State; Jabhat al-Nusra; Jamiat ul-Ansar; Jemaah Islamiyah; Abu Sayyaf Group; Al-Murabitun; Ansar al-Islam; Boko Haram; Jaish-e-Mohammad; Lashkar-e Jhangvi.

51 Attorney-General's Department (Cth) *Protocol—Listing Terrorist Organisations under the Criminal Code*.

52 *Criminal Code* s 104.5(3)(e).

53 Law Council of Australia, *Submission 75*.

discretion to proscribe a particular organisation and the absence of publicly available binding criteria to be applied'.[54]

6.66 Problems with the process of specifying terrorist organisations were said to include that it 'involves the attribution of defining characteristics and commonly shared motives or purposes to a group of people based on the statements or activities of certain individuals within the group'.[55] Further, an organisation can be listed as a terrorist organisation simply on the basis that it 'advocates' the doing of a terrorist act. The Law Council stated:

> The offences may also disproportionately impinge on freedom of association as the current process of proscribing terrorist organisations set out in Division 102 does not afford affected parties the opportunity to be heard prior to an organisation being listed or to effectively challenge the listing of an organisation after the fact, without exposing themselves to prosecution; and the avenues for review after an organisation has been listed may also be inadequate.[56]

6.67 The UNSW Law Society also criticised the associating with terrorist organisations offence. It observed that it is important to understand that 'mere association with a terrorist organisation may not be intentional and is not directly linked to the planning and execution of an attack'. It stated that despite the 'legitimacy of the broad aims of counter-terrorism laws in Australia, it is debatable whether targeting individuals by criminalising association with terrorist organisations is effective and appropriate'.[57]

6.68 The Law Council criticised the control orders and preventative detention orders regimes under divs 104 and 105 of the *Criminal Code* because a 'person's right to associate may be removed or restricted before the person is told of the allegations against him or her or afforded the opportunity to challenge the restriction of liberty'.[58]

6.69 The Law Council also submitted that the offence of entering or remaining in a 'declared area' contained in s 119.2 of the *Criminal Code* may have the

> unintended effect of preventing and deterring innocent Australians from travelling abroad and associating with persons for legitimate purposes out of fear that they may be prosecuted for an offence, subjected to a trial and not be able to adequately displace the evidential burden.[59]

Consorting offences

6.70 Courts have long held the power to restrict freedom of association in circumstances where criminal associations may pose a threat to peace and order. In

54 Ibid.
55 Ibid.
56 Ibid.
57 UNSW Law Society, *Submission 19*.
58 Law Council of Australia, *Submission 75*. See also Human Rights Law Centre, *Submission 39*.
59 Law Council of Australia, *Submission 75*.

Thomas v Mowbray, Gleeson CJ referred to counter-terrorism control orders as having similar characteristics to bail and apprehended violence orders.[60]

6.71 The High Court has also recognised that there may be circumstances where the legislature is justified in infringing freedom of association in order to disrupt and restrict the activities of criminal organisations and their members.[61]

6.72 This is an object, the High Court observed, that has been 'pursued in the long history of laws restricting the freedom of association of certain classes, groups or organisations of persons involved or likely to be involved in the planning and execution of criminal activities'. The object is 'legitimised by the incidence and sophistication of what is generally called "organised crime"'.[62]

6.73 Consorting laws are not a new phenomenon. In *Tajjour*, French CJ observed that:

> Laws directed at inchoate criminality have a long history, dating back to England in the Middle Ages, which is traceable in large part through vagrancy laws. An early example was a statute enacted in 1562 which deemed a person found in the company of gypsies, over the course of a month, to be a felon.[63]

6.74 In Australia, these laws are creatures of statute that first emerged early last century, also in vagrancy legislation:

> Their primary object was (and remains) to punish and thereby discourage inchoate criminality, and the means by which they sought to achieve this was the imposition of criminal liability for keeping company with disreputable individuals.[64]

6.75 In relation to modern NSW consorting laws, the High Court has stated that 'preventing or impeding criminal conduct is compatible with the system of representative and responsible government established by the *Constitution*'.[65]

6.76 Concerns about the impact on freedom of association of state and territory consorting laws[66] were repeatedly mentioned during the Australian Human Rights Commission's 2014 rights and responsibilities consultation.[67]

6.77 At the Commonwealth level, ss 390.3 and 390.4 of the *Criminal Code* provide for offences of associating in support of serious organised criminal activity and supporting a criminal organisation. Section 390.3 is stated not to apply 'to the extent (if

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60 *Thomas v Mowbray* (2007) 233 CLR 307, [16]. Quoting Blackstone, who wrote of what he called 'preventive justice': William Blackstone, *Commentaries on the Laws of England*, (1769) vol IV, Bk IV, Ch 18, 248.

61 See, eg, *Wainohu v New South Wales* (2011) 243 CLR 181.

62 Ibid [8] (French CJ and Kiefel J).

63 *Tajjour v New South Wales* (2014) 313 ALR 221, [7]. See Andrew McLeod, 'On the Origins of Consorting Laws' (2013) 37 *Melbourne University Law Review* 103, 113.

64 McLeod, above n 63, 104.

65 *Tajjour v New South Wales* (2014) 313 ALR 221, [160] (Gageler J). Referring to *Crimes Act 1900* (NSW) s 93X. Gageler J held that an 'association' must involve the 'temptation of involvement in criminal activity': Ibid [160].

66 For example, *Crimes Act 1900* (NSW) s 93X; *Vicious Lawless Association Disestablishment Act 2013* (Qld); *Criminal Organisations Control Act 2012* (WA).

67 Australian Human Rights Commission, *Rights and Responsibilities Consultation Report* (2015) 32.

any) that it would infringe any constitutional doctrine of implied freedom of political communication'.[68]

6.78 Some stakeholders in this ALRC Inquiry questioned the justification for the Commonwealth consorting laws. The Law Council, for example, stated that the offences in div 390

> shift the focus of criminal liability from a person's conduct to their associations. Offences of this type have the potential to unduly burden freedom of association for individuals with a familial or community connection to a member of a criminal association.[69]

6.79 The Public Interest Advocacy Centre (PIAC) submitted that Commonwealth consorting legislation should be 'proportionate to the legitimate aim of public safety by inserting sufficient safeguards, such as ensuring the laws can be limited to a targeted group of persons involved in serious criminal activity'.[70] Because any consorting law, 'by its very nature, impinges on a person's right to freedom of association', PIAC stated that it would be 'difficult to draft such legislation so as to comply with international human rights law'.[71]

6.80 However, the Commonwealth offences may constitute a proportionate interference with freedom of association. Legislating for specific criminal offences that target the conduct of members of criminal groups is a common approach internationally to combating serious and organised crime.[72] The Explanatory Memorandum for these offences provided the following example of the type of offence targeted by the provisions:

> Person A meets with person B on two or more occasions. Person B is proposing to engage in an illegal operation with four other people involving the import into Australia of commercial quantities of border controlled drugs … Person A works at the airport through which person B proposes to import the drugs, and knows that Person B proposes to engage in the illegal importation. The purpose of person A's meetings with person B is to provide advice on how person B may circumvent the airport security system as part of the operation. In doing so, person A is reckless as to whether his advice will help person B to engage in the illegal importation.[73]

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68 *Criminal Code* s 390.3(8). Arguably, following the decision of the High Court in *Tajjour*, upholding the constitutional validity of s 93X of the *Crimes Act 1900* (NSW), this qualification is no longer necessary: *Tajjour v New South Wales* (2014) 313 ALR 221.

69 Law Council of Australia, *Submission 75*.

70 Public Interest Advocacy Centre, *Submission 55*.

71 Ibid.

72 Definitions used in the criminal organisation offences draw on the *United Nations Convention Against Transnational Organized Crime*: See *United Nations Convention Against Transnational Organized Crime*, opened for signature 12 December 2000, resolution adopted by the General Assembly, 8 January 2001, A/RES/55/25 (entered into force 29 September 2003) art 2(a).

73 Explanatory Memorandum, Crimes Legislation Amendment (Serious and Organised Crime) Bill (No 2) 2009 (Cth).

Public assembly

6.81 Most legislative interferences with the right of public assembly are contained in state and territory laws including, for example, unlawful assembly[74] and public order offences where there is some form of 'public disturbance', such as riot, affray or violent disorder.[75] Sometimes, state laws limiting freedom of assembly are enacted for the purposes of specific events, such as those related to APEC and the G20.[76]

6.82 At Commonwealth level, the *Public Order (Protection of Persons and Property) Act 1971* (Cth) regulates the 'preservation of public order' in the territories and in respect of Commonwealth premises and certain other places, such as the premises of federal courts and tribunals and diplomatic and special missions.

6.83 Under the Act it is an offence to take part in an assembly in a way that 'gives rise to a reasonable apprehension that the assembly will be carried on in a manner involving unlawful physical violence to persons or unlawful damage to property'.[77] An assembly consisting of no fewer than twelve persons may be dispersed if it causes police reasonably to apprehend a likelihood of unlawful physical violence or damage to property.[78]

6.84 It may be hard to conceive of an alternative method of prevention in circumstances of imminent danger to public order. In this regard, the Act seems to adopt the standard model in democratic states with respect to when assembly will be unlawful.[79]

Workplace relations laws

6.85 The *Fair Work Act 2009* (Cth) is intended, in part, to protect freedom of association. An object of the Act is to recognise the right to freedom of association and the right to be represented.[80] Part 3-1 of the Act contains protections for freedom of association and involvement in lawful industrial activities, including protection under

74 For example, in NSW, *Crimes Act 1900* (NSW) s 545C. The requirements for a 'lawful assembly' are set out in *Summary Offences Act 1988* (NSW) ss 22–27.

75 For example, in NSW, *Crimes Act 1900* (NSW) s 93B (riot), s 93C (affray); *Summary Offences Act 1988* (NSW) s 11A (violent disorder).

76 *APEC Meeting (Police Powers) Act 2007* (NSW); *G20 (Safety and Security) Act 2013* (Qld).

77 *Public Order (Protection of Persons and Property) Act 1971* (Cth) ss 6(1), 15(1). See also *Parliamentary Precincts Act 1988* (Cth) s 11. This applies the *Public Order (Protection of Persons and Property) Act 1971* (Cth) to the parliamentary precincts in Canberra.

78 *Public Order (Protection of Persons and Property) Act 1971* (Cth) s 8(1).

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

80 *Fair Work Act 2009* (Cth) s 3(e). In *Barclay v The Board of Bendigo*, Gray and Bromberg JJ stated that the objects of the *Fair Work Act* emphasise that 'recognition of the right to freedom of association and the right to be represented is designed to enable fairness and representation at work': *Barclay v The Board of Bendigo Regional Institute of Technical and Further Education* (2011) 191 FCR 212, [14].

s 346 against adverse action being taken because a person is (or is not) a member of an industrial association or has (or has not) engaged in 'industrial activity'.[81]

6.86 In *Barclay v The Board of Bendigo Regional Institute of Technical and Further Education*, the Federal Court stated that freedom to associate in this context is 'not simply a freedom to join an association without adverse consequences, but is a freedom to be represented by the association and to participate in its activities'.[82] The freedom to participate in an association's lawful industrial activities—such as an industrial protest—does not give participants unfettered protection from being dismissed for their conduct during such activities. For example, in *CFMEU v BHP Coal Pty Ltd*, the decision of an employer to dismiss an employee (partly) because of an 'offensive and abusive' protest sign was upheld as lawful.[83]

6.87 BHP Billiton observed that regulation of workplace relations involves balancing rights, where 'exercise of one person's right will commonly encroach upon the rights of another'. For example, union rights of entry 'encroach upon the co-existent rights of an occupier to have the quiet enjoyment of property free from trespass and the co-existent rights of an employer to have the benefit of an employment contract without interference'. Similarly, the rights of employees include a 'right not to be pressed into membership of a union where that is the employee's preference'.[84]

6.88 The Kingsford Legal Centre stated that, in the workplace, freedom of association protects the right to form and join associations 'to pursue common goals in the workplace, helping to correct the significant power imbalance between employees and employers'. This principle, it said, 'has been a long-standing and beneficial feature of Australian labour law' and, without such protections, the ability of employees to bargain with their employer in their collective interest is greatly reduced.[85]

6.89 The Australian Institute of Employment Rights (AIER) observed that, in the workplace relations context, freedom of association is the 'base from which other rights flow, in particular the right to collectively bargain and the right to strike'. It argued that the practical application of the right to freedom of association in the workplace is subject to 'considerable and unjustified encroachment by the laws of the Commonwealth'—in particular, by provisions of the *Fair Work Act*.[86]

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81 *Fair Work Act 2009* (Cth) s 346. Part 3-1 of the *Fair Work Act* is also concerned with protecting a freedom not to associate, a concept that is not mandated by ILO labour standards: Creighton and Stewart, above n 24, [20.06].

82 *Barclay v The Board of Bendigo Regional Institute of Technical and Further Education* (2011) 191 FCR 212, [14].

83 Gageler J stated that the protection afforded by s 346(b) is 'not protection against adverse action being taken by reason of engaging in an act or omission that has the character of a protected industrial activity'. Rather, Gageler J found that it is 'protection against adverse action being taken by reason of that act or omission having the character of a protected industrial activity': *CFMEU v BHP Coal Pty Ltd* (2014) 314 ALR 1, [92].

84 BHP Billiton, *Submission 129*.

85 The Centre submitted that 'the current protections for freedom of association in the workplace are integral and that any repeal of these legislative protections or the introduction of laws that interfere with these protections would not be justified': Kingsford Legal Centre, *Submission 21*.

86 Australian Institute of Employment Rights, *Submission 15*.

6.90 The Australian Council of Trade Unions (ACTU) stated that existing provisions of the *Fair Work Act* 'unjustifiably interfere with the right to freedom of association and should be reconsidered'. These included restrictions on the right to strike, the duration of industrial action and union access to workplaces.[87]

6.91 Arguably, however, while some of these provisions may be seen as inconsistent with international labour law norms[88]—as reflected in ILO conventions—they do not necessarily infringe on the scope of freedom of association, as understood by the common law.

Protected industrial action

6.92 Protected industrial action is acceptable to support or advance claims during collective bargaining. When an action is 'protected', those involved are granted immunity from legal actions that might otherwise be taken against them under any law, including, for example, in tort or contract.[89]

6.93 Industrial action will generally be unlawful if it does not meet the criteria for 'protected industrial action', which are set out in the *Fair Work Act*.[90] Each of the criteria for protected action[91] can be interpreted as interfering with freedom to associate for the purposes of taking industrial action.

6.94 The AIER noted criticism of these provisions by the ILO Committee on Freedom of Association,[92] including in relation to: prohibitions on sympathy strikes and general secondary boycotts;[93] removal of protection for industrial action in support of multiple business agreements;[94] and prohibitions in relation to pattern bargaining.[95]

6.95 In particular, restrictions on the right to strike contained in the *Fair Work Act* have been criticised by the ILO Committee of Experts on the Application of Conventions and Recommendations on the basis that industrial action is only protected during the process of bargaining for an agreement.[96] The emphasis within the *Fair Work Act* on enterprise level bargaining can also be seen as an unnecessary

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87 Australian Council of Trade Unions, *Submission 44*.

88 For more analysis on how the *Fair Work Act* may be seen as failing to accord with international labour standards on freedom of association, see, eg, Shae McCrystal, *The Right to Strike in Australia* (Federation Press, 2010) ch 10; Breen Creighton, 'International Labour Standards and Collective Bargaining under the Fair Work Act 2009' in Anthony Forsyth and Breen Creighton (eds), *Rediscovering Collective Bargaining: Australia's Fair Work Act in International Perspective* (Routledge, 2014) ch 3.

89 *Fair Work Act 2009* (Cth) s 415. The immunity does not apply to actions likely to involve personal injury, damage to property or the taking of property. Defamation is also excluded. See also Ch 16.

90 Ibid ss 408–414.

91 These include the following provisions of the *Fair Work Act*: the definitions of an employee claim action, employee response action and employer response action (ss 409–411); the prohibition on 'pattern bargaining' (ss 409–412); the requirement to be genuinely trying to reach an agreement (ss 409–411, 413); the notice requirements in relation to industrial action (ss 409–411, 413, 414); and the requirements for protected action ballots (s 409(2), pt 3–3, div 8).

92 Australian Institute of Employment Rights, *Submission 15*.

93 *Fair Work Act 2009* (Cth) ss 408–411.

94 Ibid s 413(2).

95 Ibid ss 409(4), 412.

96 Australian Council of Trade Unions, *Submission 44*. The ILO Committee of Experts on the Application of Conventions and Recommendations examines government reports on ratified ILO conventions.

encroachment on the right to collectively bargain.[97] For example, industrial action in support of pattern bargaining by employees is restricted.[98]

6.96 The ACTU also criticised provisions of the *Fair Work Act* concerning the circumstances in which industrial action is authorised by protected action ballots. The Act provides that at least 50% of the employees on the roll of voters must actually vote; and more that than 50% of the valid votes must be in favour of taking action.[99] The ILO Committee of Experts has commented that such requirements are 'excessive and could excessively hinder the possibility of carrying out a strike, particularly in large enterprises'.[100] The ACTU submitted that these 'restrictions on the right to strike unjustifiably interfere with the right to freedom of association'.[101]

6.97 Finally, the ACTU and the AIER considered that the powers of the Fair Work Commission to suspend or terminate industrial action on various grounds, including economic harm, health and safety, third party damage and cooling off,[102] are cast too broadly and unjustifiably interfere with the right to freedom of association.[103]

6.98 In contrast, BHP Billiton submitted that there is no legitimate criticism of the current legislation regulating industrial action on the basis of freedom of association concerns. It observed that industrial action involves a 'substantial encroachment on the legal, economic and societal rights of others' and should not be facilitated by legislation except as reasonable and proportionate. In Australia, the legislative framework is based on a system of regulated enterprise bargaining, and it would not be 'in any way proportionate or reasonable, to expand industrial action rights beyond what is reasonable and appropriate within an accepted enterprise bargaining framework'.[104]

Right of entry

6.99 The *Fair Work Act* provides a framework for rights of entry to workplaces for union officials to represent their members in the workplace, hold discussions with potential members and investigate suspected contraventions of workplace laws.[105]

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97 Australian Institute of Employment Rights, *Submission 15*. See, eg, *Fair Work Act 2009* (Cth) pt 2–4, ss 3(f), 186(2)(ii), 229(2).

98 This is said to conflict with the principle of free and voluntary collective bargaining embodied in art 4 of the ILO *Right to Organise and Collective Bargaining Convention*: International Labour Organization, *Right to Organise and Collective Bargaining Convention*, C98 (entered into force 18 July 1951).

99 *Fair Work Act 2009* (Cth) s 459(1)(b)–(c). However, the roll of voters may not represent the entire workforce or even every employee that will be covered by the enterprise agreement the subject of bargaining: Australian Industry Group, *Submission 131*.

100 Australian Council of Trade Unions, *Submission 44*.

101 Ibid.

102 *Fair Work Act 2009* (Cth) ss 423–426. See also s 431, which allows for the Minister to terminate industrial action without reference to the parties or to any process: Australian Institute of Employment Rights, *Submission 15*.

103 Australian Council of Trade Unions, *Submission 44*; Australian Institute of Employment Rights, *Submission 15*. The AIG stated that these provisions have been exercised infrequently under the *Fair Work Act*, and predecessor legislation: Australian Industry Group, *Submission 131*.

104 BHP Billiton, *Submission 129*.

105 *Fair Work Act 2009* (Cth) pt 3–4.

6.100 The object of these provisions is to balance the right of unions to represent people and to provide information to employees and the 'right of occupiers of premises and employers to go about their business without undue inconvenience'.[106] The expressed intention was to

> balance the right of employers to go about their business without undue interference; to balance it, though, with the democratic right, the right of employees in a functioning democracy, to be represented in their workplace and to participate in discussions with unions at appropriate times.[107]

6.101 Some limitations on rights of entry may be characterised as interfering with union members' freedom of association.[108] The relevant legislative limitations include the requirement to hold a valid entry permit, which may only be issued to a 'fit and proper person';[109] the required period of notice before entry;[110] and limitations on the circumstances in which an official can gain entry.[111]

6.102 The ILO Committee of Experts found that these provisions breach the *Freedom of Association and Protection of the Right to Organise Convention* because the right of trade union officials 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.[112] The ACTU submitted that it is likely that the requirements placed on the right of entry unjustifiably interfere with the right to freedom of association.[113]

6.103 The National Farmers' Federation criticised div 7 of pt 3–4 of the *Fair Work Act*, concerning arrangements in remote areas. These provisions may compel occupiers of remote premises to enter into arrangements to provide accommodation and transport to persons exercising the right of entry. The Federation submitted that these requirements 'are extraordinary in the sense that they authorise what would otherwise be the tort of trespass' and should be repealed.[114]

6.104 The Australian Industry Group (AIG) rejected the idea that limitations on rights of entry interfere with an employee's right to freely associate with a union. It submitted

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106 Ibid s 480.

107 Commonwealth, *Parliamentary Debates*, House of Representatives, 21 March 2013, 2907–08 (Bill Shorten).

108 At the same time, rights of entry may also be characterised as 'authorising the commission of a tort' (ie, the tort of trespass to land), another encroachment on traditional rights, freedoms and privileges referred to in the Terms of Reference.

109 *Fair Work Act 2009* (Cth) ss 512–513. The ACTU stated that the range of issues the Fair Work Commission can consider in determining whether an applicant is 'fit and proper' to hold an entry permit is 'expansive and non-exhaustive' and includes considerations such as 'appropriate training': Australian Council of Trade Unions, *Submission 44*.

110 *Fair Work Act 2009* (Cth) s 487(3).

111 For example, to investigate a suspected contravention of the Act or a fair work instrument, to hold discussions with employees, to investigate an occupational health and safety matter: see Ibid ss 481, 484, 494.

112 See Australian Council of Trade Unions, *Submission 44*.

113 Ibid.

114 National Farmers' Federation, *Submission 54*.

that 'reasonable restrictions on the right of an employee representative to enter a workplace are necessary to prevent misuse of entry rights by unions'.[115]

6.105 BHP Billiton stated that it is important to understand rights of entry as substantive rights of the employees, rather than of the union or the union officer. It submitted that 'there is no legal or other proper principle under which statutory rights of entry for union officials should be expanded or restrictions protecting the encroached rights of others should be lessened'.[116]

6.106 The Productivity Commission, in its 2015 draft report on the workplace relations framework, stated that the provisions of the *Fair Work Act* providing rights of entry by union officials to worksites 'are broadly sound, though at times both sides play games with each other'.[117]

Registration of organisations

6.107 The *Fair Work (Registered Organisations) Act 2009* (Cth) includes requirements for the registration and operation of trade unions and other similar organisations. Registered organisations are required to meet the standards set out in the Act in order to gain the rights and privileges accorded to them under the Act and under the *Fair Work Act*.[118]

6.108 By requiring registration and prescribing rules for employer and employee organisations, the *Fair Work (Registered Organisations) Act* can be interpreted as interfering with freedom of association.[119]

6.109 However, from another perspective, provisions of the *Fair Work (Registered Organisations) Act*, which enhance the financial and accountability obligations of employee and employer organisations, to ensure that the fees paid by members of such organisations are used for the purposes intended, and that the officers of such organisations use their positions for proper purposes, are not inconsistent with freedom of association—because the obligations promote association.

6.110 The ILO Committee of Experts has stated, with regard to the ability of governments to intervene in employee or employer organisations, that legislative provisions which 'regulate in detail the internal functioning of workers' and employers' organizations pose a serious risk of interference which is incompatible with the Convention'.[120]

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115 Australian Industry Group, *Submission 131*.

116 BHP Billiton, *Submission 129*.

117 Productivity Commission, *Workplace Relations Framework—Productivity Commission Draft Report* (2015) 42.

118 These standards are intended, among other things, to ensure that employer and employee organisations are representative of and accountable to their members, and are able to operate effectively; and provide for the democratic functioning and control of organisations: *Fair Work (Registered Organisations) Act 2009* (Cth) s 5(3).

119 See, eg, Explanatory Memorandum, Fair Work (Registered Organisations) Amendment Bill 2012 (Cth).

120 Committee of Experts on the Application of Conventions and Recommendations, 'General Survey on the Fundamental Conventions Concerning Rights at Work in Light of the ILO Declaration on Social Justice for a Fair Globalization, 2008' (Report, International Labour Conference, 2012) [108].

6.111 The Explanatory Memorandum to the Fair Work (Registered Organisations) Amendment Bill 2012 (Cth) stated that the limitations which the Bill placed on the freedom of association fell within the express permissible limitations in the ICCPR and the ICESCR 'insofar as they are necessary in the interests of public order and the protection of the rights and freedoms of others'.[121]

Other issues

6.112 A number of other workplace relations issues were raised by stakeholders. One stakeholder submitted that restrictions on trade union membership and collective bargaining by members of the Australian Defence Force constitute an unjustified interference with freedom of association.[122]

6.113 The National Farmers' Federation submitted that s 237 of the *Fair Work Act* overrides the voluntary nature of collective bargaining and, therefore, infringes the right to freedom of association.[123] Similarly, AIG expressed concern that the introduction of compulsory enterprise bargaining and the removal of the right to bargain at the individual level 'interferes with freedom of association to the extent that an employer and employee may not wish to negotiate collectively when negotiating the terms and conditions of employment'.[124]

Conclusion

6.114 A number of stakeholders expressed the view that the *Fair Work Act* may not comply with international obligations in relation to freedom of association in the workplace, and the right to strike.[125]

6.115 The ACTU observed that the ILO Committee of Experts has 'repeatedly found that Australian law breaches international labour law'.[126] Similarly, the United Services Union stated that it is 'apparent that there is some divergence between Australia's obligations at international law and the system in place domestically when it comes to the right to strike'. It submitted that while there is scope for the Australian domestic legislative regime to diverge from the international law position where it is 'necessary', the restrictions currently placed upon employees are 'excessive and unnecessarily restrictive'.[127]

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121 Explanatory Memorandum, Fair Work (Registered Organisations) Amendment Bill 2012 (Cth).

122 D Black, *Submission 6*. The *Defence Act 1903* (Cth) regulates ADF remuneration.

123 National Farmers' Federation, *Submission 54*. Section 237 permits the Fair Work Commission to make a majority support determination if a majority of employees want to bargain with their employer, and the employer has not yet agreed to do so, effectively compelling the employer to bargain.

124 Australian Industry Group, *Submission 131*.

125 United Services Union, *Submission 117*; Kingsford Legal Centre, *Submission 110*; Australian Council of Trade Unions, *Submission 44*; Australian Lawyers for Human Rights, *Submission 43*; Australian Institute of Employment Rights, *Submission 15*. A group of legal academics submitted that, while the protections set out in the Fair Work Act 'fall some considerable way short' of ILO and ICESCR standards, the protections nevertheless 'at least go some way towards meeting Australia's international obligations': See B Creighton and Others, *Submission 24*.

126 Australian Council of Trade Unions, *Submission 44*.

127 United Services Union, *Submission 117*.

6.116 The AIER observed that the Australian Government has been 'put on notice'[128] that a number of provisions of the *Fair Work Act* infringe on freedom of association[129] as understood under the ILO *Freedom of Association and Protection of the Right to Organise Convention*.[130]

6.117 The Australian Government has provided a number of detailed reports to the ILO setting out the reasons why it considers that the *Fair Work Act* does comply with relevant ILO conventions.[131]

6.118 For example, in 2011, the ILO Expert Committee recorded that the Australian Government had not amended various provisions of the *Fair Work Act*,[132] despite the Committee's expressed concerns. The Australian Government explained that, overall, 'the industrial action provisions of the *Fair Work Act* strike the right balance between an employee's right to strike and the need to protect life and economic stability in a manner that is appropriate to Australia's national conditions and that [Fair Work Australia] has set a high threshold for allowing for suspension or termination of protected industrial action in specific circumstances'.[133]

6.119 While workplace relations laws in Australia have been subject to extensive local and overseas criticism on the basis of lack of compliance with ILO Conventions, the extent to which obligations under ILO conventions engage the scope of common law or traditional understandings of freedom of association may be contested.

6.120 At common law, employers and employees, whether individually or collectively, may bargain for the purpose of concluding employment contracts. However, the common law does not compel either party to engage in bargaining. Under the *Fair Work Act*, the Fair Work Commission may compel an employer to bargain with a group of employees if a majority of those employees wish to negotiate an enterprise agreement.[134] The Act creates many rights and duties in relation to enterprise bargaining agreements, the right to strike, the duration of industrial action and union access to workplaces. While some of these provisions may offend ILO norms, they do not necessarily infringe common law freedom of association.

6.121 Limits concerning the entry of union officials to workplaces, for example, do not seem to infringe common law freedom of association. Entry is a power granted by statute, not common law, and to unions but not to other persons.

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128 Australian Institute of Employment Rights, *Submission 15*.

129 See 'Reports of the Committee on Freedom of Association' (357th Report, International Labour Office, 2010) Case No. 2698 (Australia), [213]–[229].

130 International Labour Organization, *Freedom of Association and Protection of the Right to Organise Convention*, C87 (entered into force 4 July 1950).

131 Australian Industry Group, *Submission 131*.

132 Including *Fair Work Act 2009* (Cth) ss 413(2); 409(4), 412, 422, 437(2); 408–411; 172, 194, 353, 409(1),(3), 470–475; 423, 424, 426, 431.

133 International Labour Organization, Committee of Experts on the Application of Conventions and Recommendations, *Observation (CEACR)—Freedom of Association and Protection of the Right to Organize Convention–Australia* Adopted 2011, 101st ILC Session (2012).

134 *Fair Work Act 2009* (Cth) ss 236–7.

6.122 Laws that interfere with the constitution and internal arrangements of an association are more likely to interfere with common law freedom of association. In this context, a distinction needs to be drawn between laws that control the internal arrangements of an association and laws that deal with the activities of an association as they affect others. What is unlawful does not generally become lawful when done by an association of individuals.

6.123 Trade unions have special legal status, which carries rights and powers under the law that other associations do not enjoy. These are concerned with legal power and associated rights to take industrial action in pursuit of collective demands. The legal power to take industrial action is not a common law entitlement but a statutory grant. Therefore, the exercise of the power and the benefit of legal protection may be subject to statutory conditions.

6.124 However, some statutory provisions may infringe common law freedom of association if they unreasonably regulate the internal governance of an association. It is possible that some aspects of the *Fair Work (Registered Organisations) Act 2009* (Cth) may fall into this category.

Migration law character test

6.125 Freedom of association may be engaged by provisions of the *Migration Act* concerning the circumstances in which a visa may be refused or cancelled on character grounds.

6.126 Section 501(1) of the Act provides that the Minister may refuse to grant a visa to a person if the person does not satisfy the Minister that the person passes the character test. Section 501(6) provides that a person does not pass the character test if, among other things, the Minister reasonably suspects that the person has been or is a member of a group or organisation, or has had or has an association with a group, organisation or person; and that the group, organisation or person has been or is involved in criminal conduct.[135]

6.127 Section 501(6)(b) was broadened in 2014.[136] The Explanatory Memorandum to the amending legislation made it clear that membership of, or association with, a group or organisation that has or is involved in criminal conduct would be, by itself, grounds for cancellation on character grounds:

> The intention is that membership of the group or organisation alone is sufficient to cause a person to not pass the character test. Further, a reasonable suspicion of such membership or association is sufficient to not pass the character test. There is no requirement that there be a demonstration of special knowledge of, or participation in, the suspected criminal conduct by the visa applicant or visa holder.[137]

135 *Migration Act 1958* (Cth) s 501(6)(b).

136 *Migration Amendment (Character and General Visa Cancellation) Act 2014* (Cth) sch 1.

137 Explanatory Memorandum, Migration Amendment (Character and General Visa Cancellation) Bill 2014 (Cth).

6.128 In *Haneef*, Spender J, in the Federal Court, read down the previous version of s 501(6)(b) as meaning that there had to be an 'alliance or link or combination' between the person subject to the character test and the group, organisation or person engaged in criminal activity.[138]

6.129 On appeal, the Full Federal Court also considered the scope of the word 'association'. In a unanimous judgment, the Full Court agreed with Justice Spender that a narrower interpretation of 'association' than that applied by the Minister should be taken to reflect the intention of the Parliament:

> Having regard to its ordinary meaning, the context in which it appears and the legislative purpose, we conclude that the association to which s 501(6)(b) refers is an association involving some sympathy with, or support for, or involvement in, the criminal conduct of the person, group or organisation. The association must be such as to have *some* bearing upon the person's character.[139]

6.130 A number of stakeholders expressed concern about the present scope of s 501(6)(b).[140] The Refugee Advice and Casework Service (RACS) stated that s 501 'plainly encroaches on freedom of association'. RACS submitted that, because the consequence of failing the character test is generally the detention of the individual,[141] the test in effect 'authorises the detention of a person based on a suspicion in relation to that person's lawful association with others'.[142]

6.131 The Australian National University (ANU) Migration Law Program submitted that the provision 'is neither a reasonable or proportionate curtailment of the right to freedom of association' as it is 'now so broad that it would cover a range of circumstances where there is no appreciable risk to Australian society'.[143] The Law Council and the ANU Migration Law Program suggested that the legislation should be amended.[144]

6.132 In the ALRC's view, the character test in s 501 of the *Migration Act* may not be a proportionate limitation on the right to freedom of association. The provision might be amended to provide meanings of 'association' and 'membership' consistent with the Federal Court judgments in *Haneef*.[145] This issue could be dealt with in any future

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138 *Haneef v Minister for Immigration and Citizenship* (2007) 161 FCR 40, [230].

139 *Minister for Immigration and Citizenship v Haneef* (2007) 163 FCR 414, [130] (emphasis in original).

140 Law Council of Australia, *Submission 140*; ANU Migration Law Program, *Submission 59*; Refugee Advice and Casework Service, *Submission 30*; UNSW Law Society, *Submission 19*.

141 That is, the result of being suspected of having or having had such an association is the refusal or cancellation of a visa, rendering the person an unlawful non-citizen and subject to mandatory detention: Refugee Advice and Casework Service, *Submission 30*.

142 Ibid.

143 For example, the provision would cover 'instances where a person was, but is no longer, a member of a group or organisation that is involved in criminal activities' and 'members of an organisation that committed criminal conduct many years ago, but is no longer involved in any criminal activity': ANU Migration Law Program, *Submission 59*.

144 Law Council of Australia, *Submission 140*; ANU Migration Law Program, *Submission 59*.

145 That is, something beyond mere membership and innocent association should be required to judge a person's character. For example, legislation could make it clear that association or membership requires that 'the person was sympathetic with or supportive of the criminal conduct': ANU Migration Law Program, *Submission 59*.

review of Australia's migration laws aimed at ensuring that these laws do not interfere unjustifiably with freedom of association, or other rights and freedoms.

Other laws

6.133 Commonwealth anti-discrimination laws potentially interfere with freedom of association by making unlawful certain forms of discrimination that can be manifested by excluding people, on prohibited grounds, from participating in an association (of a kind covered by the laws).[146]

6.134 For example, the *Disability Discrimination Act 1992* (Cth) makes it unlawful for a club or incorporated association to discriminate against a person by refusing membership on the ground of the person's disability.[147] A club for these purposes is defined as 'an association (whether incorporated or unincorporated) of persons associated together for social, literary, cultural, political, sporting, athletic or other lawful purposes that provides and maintains its facilities, in whole or in part, from the funds of the association'.[148]

6.135 Professor Patrick Parkinson observed that having an association 'inevitably means creating either explicit or implicit rules of membership', which 'both include and exclude'.[149] He stated that one area of major tension is 'between the right of people to form associations of various kinds and the claims of advocates for an expansion in the reach of anti-discrimination law'. In particular, he submitted that faith-based organisations should have a right to select staff on the basis of 'mission fit', which is seen as essential to the right of freedom of association.[150]

6.136 Similarly, FamilyVoice submitted that the 'development of voluntary associations in Australia today is hindered by the unnecessary, intrusive and counterproductive constraints imposed on voluntary associations by anti-discrimination laws'.[151] It stated that there are numerous examples of 'interference by antidiscrimination bodies to prevent Australians from being free to associate with others in accordance with their wishes, for social, cultural, sporting or other purposes'.[152]

6.137 Other stakeholders contested these views.[153] The Kingsford Legal Centre, for example, considered that freedom of association should protect 'the right of individuals to associate in political and religious organisations, and trade unions', but does not

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146 Commonwealth anti-discrimination laws prohibit breaches of human rights and discrimination on the basis of race, colour, sex, religion, political opinion, national extraction, social origin, age, medical record, criminal record, marital status, impairment, disability, nationality, sexual preference and trade union activity: see *Racial Discrimination Act 1975* (Cth); *Sex Discrimination Act 1984 (Cth)*; *Age Discrimination Act 2004* (Cth); *Disability Discrimination Act 1992* (Cth); *Australian Human Rights Commission Act 1986* (Cth).

147 *Disability Discrimination Act 1992* (Cth) s 27(1).

148 Ibid s 4.

149 P Parkinson, *Submission 9*.

150 Ibid.

151 FamilyVoice Australia, *Submission 73*.

152 Ibid.

153 A Lawrie, *Submission 112*; Kingsford Legal Centre, *Submission 110*.

'apply to organisations in their recruitment practices in order to permit them to discriminate unfairly'.[154] Another stakeholder observed:

> Any argument that might be raised that these schools, hospitals or aged care facilities should have the freedom to include or exclude 'whoever they want, on whatever basis they want' is outweighed by the public interest in having education, health and community services provided on a non-discriminatory basis, and specifically by the harm caused to LGBT people by allowing such discrimination to occur.[155]

6.138 Anti-discrimination legislation already contains exemptions that permit certain forms of association that would otherwise be discriminatory. For example, the *Sex Discrimination Act 1984* (Cth) (*SDA*) permits a voluntary body to discriminate against a person on certain grounds and in connection with membership and the provision of members' benefits, facilities or services.[156]

6.139 The Attorney-General, Senator the Hon George Brandis QC, has observed that the 'voluntary bodies' exemption

> recognises that rights may be limited to pursue a legitimate objective, such as limiting the right to equality and non-discrimination in order to protect the right to freedom of association. While the right to freedom of association allows people to form their own associations, it does not automatically entitle a person to join an association formed by other people. However, nothing prevents other people from forming their own associations.[157]

6.140 There are some inconsistencies in the scope of exemptions that can be seen as protecting freedom of association. FamilyVoice questioned, for example, why the *Racial Discrimination Act 1975* (Cth) allows an exception only for charities—and not for clubs, educational institutions, religious organisations, sporting bodies or voluntary associations, as does the *SDA*.[158]

6.141 Some concerns were also expressed about the operation of the *Australian Charities and Not-for-profits Commission Act 2012* (Cth) (*ACNC Act*). The *ACNC Act* was established to 'provide a national regulatory system that promotes good governance, accountability and transparency for not-for-profit entities be introduced to maintain, protect and enhance public trust and confidence in the not-for-profit sector'.[159] The not-for-profit sector receives a range of funding, including donations from members of the public and tax concessions, grants and other support from Australian governments.

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154 Kingsford Legal Centre, *Submission 110*.

155 A Lawrie, *Submission 112*.

156 *Sex Discrimination Act 1984* (Cth) s 39.

157 Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011, Tenth Report of 2013* (June 2013). The comments were made in connection with the Committee's consideration of the Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013 (Cth).

158 FamilyVoice Australia, *Submission 122*. FamilyVoice submitted that anti-discrimination laws should be 'amended to affirm the priority of freedom of association over constraints on discrimination'.

159 *Australian Charities and Not-for-Profits Commission Act 2012* (Cth) preamble.

6.142 Elizabeth Shalders submitted that while religious organisations and other charitable voluntary associations 'are required to be accountable to the broader public for their tax concessions' through the *ACNC Act* and the ACNC Commissioner, the 'considerable enforcement powers associated with that accountability can be said to impinge on freedom of association and freedom of religion'.[160]

6.143 The Law Council expressed some concern about a specific provision of the *ACNC Act*. Section 100–25 of the Act makes it an offence, in some circumstances, for a person who has been removed from the governing body of a charity, to communicate instructions to remaining members on the governing body. The Law Council submitted:

> While addressing legitimate concern over continuing influence of former directors and decision-makers, these powers may extend beyond those conferred upon the Australian Securities and Investments Commission over companies. The [Queensland Law Society] has noted that it does not seem appropriate to regulate charities and other forms of voluntary association more rigorously than commercial enterprises and inquiry into this limitation on freedoms is a proper subject for investigation.[161]

Conclusion

6.144 The ALRC concludes that the following Commonwealth laws should be further reviewed to determine whether they unjustifiably limit freedom of association:

- *Criminal Code* ss 102.8, divs 104–105 (control orders and preventative detention orders), s 119 (declared area offences). These provisions are subject to review by INSLM and the Intelligence Committee as part of their ongoing roles.
- The character test in s 501 of the *Migration Act*.

160 Elizabeth Shalders, *Submission 139*.
161 Law Council of Australia, *Submission 75*.