

5. Freedom of Association

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The common law

5.1 In practice, 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, freedom of association and assembly are less often discussed, and their scope at common law less clear than related freedoms, such as freedom of speech.

5.2 This chapter discusses the source and rationale of the common law right of freedom of association; how this right is protected from statutory encroachment; and when laws that interfere with freedom of association may be considered justified, including by reference to the concept of proportionality.¹

5.3 The approach of the English common law to freedom of assembly has been described as ‘hesitant and negative, permitting that which was not prohibited’.² In *Duncan v Jones*, Lord Hewart CJ said that ‘English law does not recognize any special

1 See Ch 1.

2 *R (Laporte) v Chief Constable of Gloucestershire Constabulary* [2007] 2 AC 105, 126–7.

right of public meeting for political or other purposes'.³ On the other hand, in Australia, there has been some recognition that freedom of association should be considered a common law right.⁴ Regardless, freedom of association is widely regarded as a fundamental right.

5.4 The 19th century author of *Democracy in America*, Alexis de Tocqueville, considered freedom of association as 'almost as inalienable as the freedom of the individual':

The freedom most natural to man, after the freedom to act alone, is the freedom to combine his efforts with those of his fellow man and to act in common ... The legislator cannot wish to destroy it without attacking society itself.⁵

5.5 Professor Thomas Emerson wrote in 1964 that freedom of association has 'always been a vital feature of American society':

In modern times it has assumed even greater importance. More and more the individual, in order to realize his own capacities or to stand up to the institutionalized forces that surround him, has found it imperative to join with others of like mind in pursuit of common objectives. His freedom to do so is essential to the democratic way of life.⁶

5.6 Freedom of association is closely related to other fundamental freedoms recognised by the common law, particularly 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'.⁷

5.7 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.⁸

3 *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.

4 *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*.

5 Alexis de Tocqueville, *Democracy in America* (Library of America, 2004) 220. See also Anthony Gray, 'Freedom of Association in the Australian Constitution and the Crime of Consorting' (2013) 32 *University of Tasmania Law Review* 149, 161.

6 Thomas I Emerson, 'Freedom of Association and Freedom of Expression' [1964] *Yale Law Journal* 1, 1.

7 Eric Barendt, *Freedom of Speech* (Oxford University Press, 2nd ed, 2007) 272. '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 ... Taking part in public protest, particularly if the demonstration itself is covered on television and widely reported, enables people without media access to contribute to public debate': *Ibid* 269.

8 UN 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).

5.8 Freedom of assembly and association serve as vehicles for the exercise of many other civil, cultural, economic, political and social rights. Significantly, 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.

Protections from statutory encroachment

Australian Constitution

5.9 Freedom of association is not expressly protected in the *Australian Constitution*. There is also no free-standing right to association implied in the *Constitution*.⁹ Generally, Australian Parliaments may make laws that encroach on freedom of association.

5.10 This power is subject to general constitutional constraints on the legislative powers of the Commonwealth. For example, in 1951, the High Court ruled that the *Communist Party Dissolution Act 1950* (Cth) was not a valid exercise of express legislative power,¹⁰ and 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.¹¹

5.11 However, just as there is an implied constitutional right to 'political communication', arguably there is also an implied right to 'political association'. As in the case of political communication, any implied right to 'political association' does not protect a personal right, but acts as a restraint on the exercise of legislative power by the Commonwealth.

5.12 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*'.¹²

5.13 Recognition of this corollary acknowledges the importance of freedom of association to a vibrant democracy. People should be free, generally speaking, to join groups like political parties to lobby for and effect change. Gaudron J in *Australian Capital Television Pty Ltd v Commonwealth* said that the

9 *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181, [148] (Gummow and Hayne JJ). ('There is no such 'free-standing' right [as freedom of association] to be implied from the *Constitution*'). 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.

10 Under *Australian Constitution* s 51(xxxix) read with s 61 (incidental and executive powers), s 51(vi) (defence power).

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

12 *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181, [148] (Gummow and Hayne JJ). This position has been supported in subsequent judgements: *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 & Hayne JJ); *Wainohu v New South Wales* (2011) 243 CLR 181, [112] (Gummow, Hayne, Crennan & Bell JJ).

notion of a free society governed in accordance with the principles of representative democracy may entail freedom of movement [and] freedom of association.¹³

5.14 However, in the Australian constitutional context, it seems this right to free association 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

5.15 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

5.16 The principle of legality provides some protection to freedom of association.¹⁶ 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.

5.17 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.¹⁷

5.18 In *Tajjour v New South Wales (Tajjour)* the High Court confirmed that there is no constitutionally implied freedom of association, separate from the implied freedom of political communication.¹⁸ However, Keane J cited High Court authority for the proposition that, at common law, freedom of association is a ‘fundamental aspect of our legal system’.¹⁹

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

14 *Wainohu v New South Wales* (2011) 243 CLR 181, [112].

15 George Williams and David Hume, *Human Rights under the Australian Constitution* (OUP, 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.

16 The principle of statutory interpretation now known as the ‘principle of legality’ is discussed more generally in Ch 1.

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

18 *Tajjour v New South Wales* (2014) 313 ALR 221, [95], [136], [244]–[245]. The case concerning the anti-conspiring 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*.

19 Ibid [224]. Citing *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 200 (Dixon J).

5.19 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 test²⁰ ‘merely on the basis of an innocent association with persons whom the Minister reasonably suspects have been or are involved in criminal conduct’.²¹ 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*.²²

International law

5.20 International law recognises rights to peaceful assembly and to freedom of association. For example, the *International Covenant on Civil and Political Rights* (ICCPR) provides for ‘the right of peaceful assembly’ and the ‘right to freedom of association including the right to form and join trade unions’.²³

5.21 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’.²⁴

5.22 Australia is also bound to respect freedom of association under international labour standards, and through its membership of the International Labour Organization (ILO).²⁵ International labour standards seek to guarantee the right of both workers and employers to form and join organisations of their choice.²⁶

5.23 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

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

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

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

23 *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.

24 *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.

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

26 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.

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 1.

Bills of rights

5.24 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 Canada³⁰ 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

5.25 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

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

Laws that interfere with freedom of association

5.27 A wide range of Commonwealth laws may be seen as interfering with freedom of association, broadly conceived. Some of these laws impose limits on freedom of association 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.

5.28 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;
- migration law; and
- anti-discrimination law.

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

30 *Canada Act 1982 c 11 s 2(d)*.

31 *New Zealand Bill of Rights Act 1990* (NZ) s 17. The protection provided by bills of rights and human rights acts is discussed more generally in Ch 1.

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).

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

Criminal law

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

Counter-terrorism offences

5.31 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. Terrorist organisations are prescribed by regulations made under s 102.1 of the *Criminal Code*.³⁵

5.32 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.

5.33 In addition, the terms of anti-terrorism control orders issued under the *Criminal Code* may contain a prohibition or restriction on a person ‘communicating or associating with specified individuals’.³⁶

5.34 The Independent National Security Legislation Monitor (INSLM) reviewed aspects of the associating with terrorist organisations offence in its 2013 Annual Report. The INSLM recommended that s 102.8 be amended to include an ‘exception for activities that are humanitarian in character and are conducted by or in association with the [International Committee of the Red Cross], the UN or its agencies, or (perhaps) agencies of like character designated by a Minister’.³⁷

5.35 The Law Council of Australia 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’.³⁸ It added that assessing justification for the offences is difficult, ‘given the broad executive discretion to proscribe a particular organisation and the absence of publicly available binding criteria to be applied’.³⁹

35 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.

36 *Criminal Code Act 1995* (Cth) sch 1 (*Criminal Code*) s 104.5(3)(e).

37 Independent National Security Legislation Monitor, Australian Government, *Annual Report* (2013) 89.

38 Law Council of Australia, *Submission 75*.

39 *Ibid*.

5.36 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’. Further, an organisation can be listed as a terrorist organisation simply on the basis that it ‘advocates’ the doing of a terrorist act.

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.⁴⁰

5.37 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’.⁴¹

5.38 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’.⁴²

5.39 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.⁴³

Anti-consorting offences

5.40 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 *Thomas v Mowbray*, Gleeson CJ referred to counter-terrorism control orders as having similar characteristics to bail and apprehended violence orders.⁴⁴

40 Ibid.

41 UNSW Law Society, *Submission 19*.

42 Law Council of Australia, *Submission 75*. See also Human Rights Law Centre, *Submission 39*. These provisions are discussed in more detail in relation to freedom of movement: See Ch 6.

43 Law Council of Australia, *Submission 75*. See Ch 6.

44 *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) Bk IV, 248.

5.41 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.⁴⁵

5.42 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”’.⁴⁶

5.43 Anti-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.⁴⁷

5.44 In Australia, these laws are creatures of statute that first emerged early last century 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.⁴⁸

5.45 In relation to modern NSW anti-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’.⁴⁹

5.46 Concerns about the impact on freedom of association of state and territory anti-consorting laws⁵⁰ were repeatedly mentioned during the Australian Human Rights Commission’s *Rights and Responsibilities 2014* consultation.⁵¹

5.47 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 any) that it would infringe any constitutional doctrine of implied freedom of political communication’.⁵²

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

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

47 *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.

48 McLeod, above n 47, 104.

49 *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].

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

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

52 *Criminal Code* (Cth) s 390.3(8).

5.48 Some stakeholders in this ALRC inquiry questioned the justification for the Commonwealth anti-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.⁵³

5.49 The UNSW Law Society concluded that, although 'the broad aim of the legislation is legitimate, it is questionable whether targeting unexplained income through criminalising association is effective and suitable'.⁵⁴ The Public Interest Advocacy Centre (PIAC) stated:

Fundamentally, any consorting law, by its very nature, impinges on a person's right to freedom of association and it would be difficult to draft such legislation so as to comply with international human rights law.⁵⁵

5.50 PIAC observed that, while *Tajjour* held s 93X of the *Crimes Act 1900* (NSW) to be constitutionally valid, 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'.⁵⁶ 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'.⁵⁷

5.51 PIAC submitted that Commonwealth anti-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'.⁵⁸

Public assembly

5.52 Most legislative interferences with the right of public assembly are contained in state and territory laws including, for example, unlawful assembly⁵⁹ and public order offences where there is some form of 'public disturbance', such as riot, affray or violent disorder.⁶⁰

5.53 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

53 Law Council of Australia, *Submission 75*.

54 UNSW Law Society, *Submission 19*.

55 Public Interest Advocacy Centre, *Submission 55*.

56 *Tajjour v New South Wales* (2014) 313 ALR 221, [41].

57 *Ibid* [45].

58 Public Interest Advocacy Centre, *Submission 55*.

59 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.

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

respect of Commonwealth premises and certain other places, such as the premises of federal courts and tribunals and diplomatic and special missions.

5.54 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’.⁶¹ 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.⁶²

Workplace relations laws

5.55 The *Fair Work Act 2009* (Cth) purports 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.⁶³

5.56 Part 3-1 of the Act contains protections for freedom of association and involvement in lawful industrial activities, including protection under 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’.⁶⁴

5.57 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’.⁶⁵

5.58 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 fire an employee (partly) because of an ‘offensive and abusive’ protest sign was upheld as lawful. 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’.⁶⁶

61 *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.

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

63 *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].

64 *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 25, [20.06].

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

66 *CFMEU v BHP Coal Pty Ltd* (2014) 314 ALR 1, [92].

5.59 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’. It observed that this principle ‘has been a long-standing and beneficial feature of Australian labour law’ and that without such protections, the ability of employees to bargain with their employer in their collective interest is greatly reduced. 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’.⁶⁷

5.60 The *Fair Work Act* also contains a range of provisions that can be characterised as interfering with freedom of association, which are discussed below.⁶⁸ Arguably, however, some of these provisions may be seen as regulating the activities of associations and their office holders, rather than as directly affecting the scope of freedom of association, as understood by the common law.

5.61 The Australian Council of Trade Unions (ACTU) stated that provisions of the *Fair Work Act* ‘unjustifiably interfere with the right to freedom of association and should be reconsidered’—including restrictions on the right to strike, the duration of industrial action and union access to workplaces.

5.62 The ACTU stated that the ILO Committee of Experts on the Application of Standards and Recommendations (ILO Committee of Experts) has ‘repeatedly found that Australian law breaches international labour law’.⁶⁹

5.63 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’.⁷⁰

5.64 The AIER observed that the Australian Government has been ‘put on notice’⁷¹ that a number of provisions of the *Fair Work Act* infringe on freedom of association⁷² as understood under the ILO *Freedom of Association and Protection of the Right to Organise Convention*.⁷³

67 Kingsford Legal Centre, *Submission 21*.

68 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.

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

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

71 *Ibid.*

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

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

Laws of the Commonwealth, including the *Fair Work Act* and the secondary boycott provisions of the *Competition and Consumer Act*, unjustifiably encroach on freedom of association rights. The right to form and join trade unions for the promotion and protection of collective economic and social interests is a right that goes to the heart of creating a socially just society and allowing the freedom for people to pursue their material well-being.⁷⁴

5.65 Australian Lawyers for Human Rights also submitted that the *Fair Work Act* now unjustifiably limits the right of employees to collectively bargain for terms and conditions of employment under international law.⁷⁵

5.66 A group of legal academics submitted that, on close analysis, while the protections set out in pt 3–3 of 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 in relation to freedom of association in general, and the right to strike in particular’.⁷⁶

Protected industrial action

5.67 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.⁷⁷

5.68 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*.⁷⁸ Each of the criteria for protected action can be interpreted as interfering with freedom of association, including:

- the definitions of an employee claim action, employee response action and employer response action;⁷⁹
- the prohibition on ‘pattern bargaining’;⁸⁰
- the requirement to be genuinely trying to reach an agreement;⁸¹
- the notice requirements in relation to industrial action;⁸² and
- the requirements for protected action ballots.⁸³

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

75 Australian Lawyers for Human Rights, *Submission 43*.

76 Professor Creighton and Others, *Submission 24*.

77 *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 17.

78 *Ibid* ss 408–414.

79 *Ibid* ss 409–411.

80 *Ibid* ss 409–411, 412.

81 *Ibid* ss 409–411, 413.

82 *Ibid* ss 409–411, 413, 414.

83 *Ibid* s 409(2), pt 3–3, div 8.

5.69 The AIER noted criticism of these provisions by the ILO Committee on Freedom of Association, including in relation to: ss 408–411 of the *Fair Work Act*, which effectively prohibit sympathy strikes and general secondary boycotts; s 413(2), which removes protection for industrial action in support of multiple business agreements; and ss 409(4) and 412 in relation to pattern bargaining.⁸⁴

5.70 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 basis that industrial action is only protected during the process of bargaining for an agreement.⁸⁵

5.71 The emphasis within the *Fair Work Act* on enterprise level bargaining can be seen as an unnecessary encroachment on the right to collectively bargain.⁸⁶ For example, while pattern bargaining by employees is restricted, there is no corresponding restriction on pattern or industry-wide coordinated bargaining by employer or other representatives. 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*,⁸⁷ under which ‘the determination of the bargaining level is essentially a matter to left to the discretion of the parties and, consequently, the level of negotiation should not be imposed by law’.⁸⁸

5.72 The ACTU criticised provisions of the *Fair Work Act* concerning the circumstances in which industrial action is authorised by protected action ballot. The Act requires a quorum and a majority vote by secret ballot before industrial action can be taken.

5.73 Section 459(1)(b) provides that at least 50% of the employees on the roll of voters must actually vote. The ACTU noted that the ILO Committee of Experts has commented that, where legislation requires votes before a strike can be held, account should be taken only of the votes cast, and the required quorum and majority fixed at a reasonable level.⁸⁹

5.74 Section 459(1)(c) provides more than 50% of the valid votes must be in favour of taking action. The ILO Committee of Experts has commented that such a requirement is ‘excessive and could excessively hinder the possibility of carrying out a strike, particularly in large enterprises’.⁹⁰ The ACTU submitted that these restrictions on the right to strike unjustifiably interfere with the right to freedom of association.⁹¹

5.75 The ACTU and the AIER also considered that the powers of the Fair Work Commission to suspend or terminate industrial action on various grounds, including

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

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

86 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).

87 International Labour Organization, *Right to Organise and Collective Bargaining Convention*, C98 (entered into force 18 July 1951).

88 ‘Reports of the Committee on Freedom of Association’, above n 72, Case No. 2698 (Australia), [220].

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

90 *Ibid.*

91 *Ibid.*

economic harm, health and safety, third party damage and cooling off,⁹² are cast too broadly and unjustifiably interfere with the right to freedom of association.⁹³

Right of entry

5.76 The *Fair Work Act* provides a framework for right of entry to workplaces for union officials to represent their members in the workplace, hold discussions with potential members and investigate suspected contraventions.⁹⁴

5.77 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’.⁹⁵ In introducing amendments to the right of entry provisions in 2013, the Government’s 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.⁹⁶

5.78 Some limitations on rights of entry may be characterised as interfering with union members’ freedom of association.⁹⁷ The legislative limitations include:

- the requirement to hold a valid entry permit, which may only be issued to a ‘fit and proper person’;⁹⁸
- the required period of notice before entry;⁹⁹ and
- limitations on the circumstances in which an official can gain entry.¹⁰⁰

5.79 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’.¹⁰¹

92 *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*.

93 Australian Council of Trade Unions, *Submission 44*; Australian Institute of Employment Rights, *Submission 15*.

94 *Fair Work Act 2009* (Cth) pt 3–4.

95 *Ibid* s 480.

96 Commonwealth, *Parliamentary Debates*, House of Representatives, 21 March 2013, 2907–08 (the Hon Bill Shorten, MP).

97 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.

98 *Fair Work Act 2009* (Cth) ss 512–513.

99 *Ibid* s 487(3).

100 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.

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

5.80 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.¹⁰² 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.¹⁰³

5.81 On the other hand, 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:

These requirements are extraordinary in the sense that they authorise what would otherwise be the tort of trespass. Occupiers (usually employers) bear the lion's share of the risk, including in relation to compliance with workplace health and safety obligations. The provisions infringe the fundamental common law right of a person in possession to exclude others from their premises in a way that is unreasonable. The provisions should be repealed.¹⁰⁴

Registration of organisations

5.82 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*.

5.83 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.¹⁰⁵

5.84 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. For example, the statement of compatibility with human rights for the *Fair Work (Registered Organisations) Amendment Bill 2012* (Cth) stated that

it is arguable that the amendments in the Bill are limiting insofar as they all effectively restrain individuals from forming industrial organisations in any way they wish. In particular the amendments which would enhance the requirements for disclosure of remuneration, expenditure and pecuniary interests of officials under the

102 See *Ibid.*

103 *Ibid.*

104 National Farmers' Federation, *Submission 54*.

105 *Fair Work (Registered Organisations) Act 2009* (Cth) s 5(3).

rules of registered organisations limit the rights set out in Articles 3 and 8 of ILO Convention 87.¹⁰⁶

5.85 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.

5.86 The ILO Committee of Experts on the Application of Conventions and Recommendations has stated, with regard to the ability of governments to intervene in employee or employer organisations:

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. Where such provisions are deemed necessary, they should simply establish an overall framework within which the greatest possible autonomy is left to the organizations for their functioning and administration. The Committee considers that restrictions on this principle should have the sole objective of protecting the interests of members and guaranteeing the democratic functioning of organizations. Furthermore, there should be a procedure for appeal to an impartial and independent judicial body against any act of this nature by the authorities.¹⁰⁷

5.87 The Explanatory Memorandum to the Fair Work (Registered Organisations) Amendment Bill 2012 (Cth), which increased the financial and accountability obligations of registered organisations and their office holders, stated that the limitations which the Bill placed on the right to 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'.¹⁰⁸

Relevantly, parties to decisions made by the General Manager of Fair Work Australia under the Bill's amendments are entitled to review of such decisions by impartial and independent judicial bodies.

Further, the amendments in the Bill are permissible insofar as they are prescribed by law, pursue a legitimate objective (protecting the interests of members and guaranteeing the democratic functioning of organizations), are rationally connected to that objective and are no more restrictive than is required to achieve the purpose of the limitation.¹⁰⁹

106 Explanatory Memorandum, Fair Work (Registered Organisations) Amendment Bill 2012 (Cth). Referring to the right of workers' and employers' organisations to draw up their constitutions and rules (art 3), and the obligation on members of the ILO not to enact laws that impair this right (art 8): International Labour Organization, *Freedom of Association and Protection of the Right to Organise Convention*, C87 (entered into force 4 July 1950).

107 '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 of the Committee of Experts on the Application of Conventions and Recommendations, International Labour Conference, 2012) [108].

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

109 Ibid. Referring to the right of workers' and employers' organisations to draw up their constitutions and rules (art 3), and the obligation on members of the ILO not to enact laws that impair this right (art 8):

Other issues

5.88 A number of other workplace relations issues were raised by stakeholders. Daniel Black submitted that restrictions on trade union membership and collective bargaining by members of the Australian Defence Forces, constitute an unjustified interference with freedom of association.¹¹⁰

5.89 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.¹¹¹ 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.

Migration law

5.90 Freedom of association is also implicated by provisions of the *Migration Act 1958* (Cth) concerning the circumstances in which a visa may be refused or cancelled on character grounds. Some temporary and permanent visas, depending on their conditions, have rights attached to them, including, the right to live freely, to work, and associate with others.¹¹²

5.91 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.¹¹³

5.92 The Explanatory Memorandum made it clear that membership of, or association with, a group or organisation that has or is involved in criminal conduct is, by itself, grounds for cancellation on character grounds:

The intention of this amendment is to lower the threshold of evidence required to show that a person who is a member of a criminal group or organisation, such as a criminal motorcycle gang, terrorist organisation or other group involved in war crimes, people smuggling or people trafficking, does not pass the character test. 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

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

110 D Black, *Submission 6*.

111 National Farmers' Federation, *Submission 54*.

112 ANU Migration Law Program, *Submission 59*. Citing *Minister for Immigration and Citizenship v Haneef* (2007) 163 FCR 414, [110].

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

requirement that there be a demonstration of special knowledge of, or participation in, the suspected criminal conduct by the visa applicant or visa holder.¹¹⁴

5.93 A number of stakeholders expressed concern about the scope of s 501(6)(b). The UNSW Law Society, for example, submitted that the provision should be considered as failing a test of proportionality because ‘people should be able to choose their acquaintances and connections without government interference’.¹¹⁵

5.94 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,¹¹⁶ the test in effect ‘authorises the detention of a person based on a suspicion in relation to that person’s lawful association with others’.¹¹⁷

The effect of these provisions is the establishment of wide-ranging restrictions on the people with whom a person can associate without being liable to visa refusal or cancellation. As it fails to take into account the nature of the suspected association or the nature of the suspected criminal conduct, this restriction goes far beyond any encroachment on freedom of association that may be justified in order to prevent criminal activity.¹¹⁸

5.95 The Australian National University (ANU) Migration Law Program submitted:

This provision is neither a reasonable or proportionate curtailment of the right to freedom of association. The provision is now so broad that it would cover a range of circumstances where there is no appreciable risk to Australian society. 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. Similarly, it would cover members of an organisation that committed criminal conduct many years ago, but is no longer involved in any criminal activity.¹¹⁹

5.96 The ANU Migration Law Program observed that the broadening of ‘reasonable suspicion’, beyond considering whether the group or person has been involved in criminal activity, ‘heightens the risk of unnecessary curtailment on a person’s freedom of association’. The ANU Migration Law Program suggested that the legislation should be amended to provide definitions of ‘association’ and ‘membership’ consistent with the Full Federal Court’s finding in *Haneef*.¹²⁰

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

115 UNSW Law Society, *Submission 19*.

116 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*.

117 *Ibid*.

118 *Ibid*.

119 ANU Migration Law Program, *Submission 59*.

120 *Ibid*. That is, something beyond mere membership and innocent association is 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’: referring to *Minister for Immigration and Citizenship v Haneef* (2007) 163 FCR 414. The character test was later significantly broadened: see *Migration Amendment (Character and General Visa Cancellation) Act 2014* (Cth) sch 1.

Other laws

5.97 Commonwealth anti-discrimination laws potentially interfere with freedom of association by making unlawful certain forms of discrimination that can be manifested by excluding others from participating in an association (of a kind covered by the laws) on prohibited grounds.¹²¹

5.98 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.¹²² 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'.¹²³

5.99 Professor Patrick Parkinson AM observed that

One of the major tensions, in terms of freedom of association, 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. Having an association inevitably means creating either explicit or implicit rules of membership. Those rules both include and exclude.¹²⁴

5.100 Parkinson submitted that freedom of association needs to be protected from a 'new fundamentalism about "equality"'. For example, faith-based organisations should have a right to

select staff who fit with the values and mission of the organisation, just as political parties, environmental groups and LGBT organisations do. To select on the basis of 'mission fit' is not discrimination. Rather it is essential to the right of freedom of association.¹²⁵

5.101 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'.¹²⁶ FamilyVoice 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'.¹²⁷ It submitted that

121 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).

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

123 *Ibid* s 4.

124 P Parkinson, *Submission 9*.

125 *Ibid*.

126 FamilyVoice Australia, *Submission 73*.

127 *Ibid*.

Antidiscrimination laws should be either abolished or amended so that restrictions are limited to the protection of national security or public safety, order, health or morals, or the freedom of association of others, as provided in Article 22 of the International Covenant on Civil and Political Rights.¹²⁸

5.102 On the other hand, some anti-discrimination legislation contains exemptions that permit certain forms of association that would otherwise be discriminatory. For example, the *Sex Discrimination Act 1984* (Cth) 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.¹²⁹

5.103 In a response to the Parliamentary Joint Committee on Human Rights, in its consideration of the Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013 (Cth), the Attorney-General 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.¹³⁰

5.104 Some concerns were also expressed about the operation of s 100–25 of the *Australian Charities and Not-for-profits Commission Act 2012* (Cth). This 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.¹³¹

Justifications for encroachments

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

128 Ibid.

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

130 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).

131 Law Council of Australia, *Submission 75*.

5.106 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’.¹³²

5.107 Bills of rights include certain general circumstances in which limits on freedom of association may be justified, for example, to:

- protect the rights or freedoms of others;
- protect national security or public safety;
- prevent public disorder or crime.¹³³

5.108 The following discusses some of the principles and criteria that might be applied to help determine whether a law that interferes with freedom of association is justified, including those under international law. However, it is beyond the practical scope of this Inquiry to determine whether appropriate justification has been advanced for particular laws.¹³⁴

5.109 As discussed in Chapter 1, proportionality is the accepted test for justifying most limitations on rights, and is used in relation to freedom of association.

5.110 For example, the Parliamentary Joint Committee on Human Rights in its examination of proposed legislation, asks whether a limitation is aimed at achieving a legitimate objective; whether there is a rational connection between the limitation and that objective; and whether the limitation is proportionate to that objective.¹³⁵ A number of stakeholders expressly endorsed proportionality as a means of assessing justifications for interferences with freedom of association.¹³⁶

Legitimate objectives

5.111 Both the common law and international human rights law recognise that freedom of association can be restricted in order to pursue legitimate objectives such as the protection of public safety and public order.

5.112 The power of Australian law-makers to enact provisions that restrict freedom of association is not necessarily constrained by the scope of permissible restrictions on freedom of association under international human rights law.¹³⁷ However, in considering how restrictions on freedom of association may be appropriately justified,

132 *Canada Act 1982 c 11 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.

133 See, eg, *Human Rights Act 1998* (UK) c 42, sch 1 pt I, art 11(2). See also, *Canada Act 1982 c 11 s 1*; *New Zealand Bill of Rights Act 1990* (NZ) s 5; *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 7; *Human Rights Act 2004* (ACT) s 28.

134 See Ch 1.

135 See Ch 1.

136 Law Council of Australia, *Submission 75*; National Association of Community Legal Centres, *Submission 66*; ANU Migration Law Program, *Submission 59*; Public Interest Advocacy Centre, *Submission 55*; UNSW Law Society, *Submission 19*.

137 See Ch 1.

one starting point is international human rights law, and the restrictions permitted by the ICCPR.

5.113 Article 22(2) of ICCPR provides that no restrictions may be placed on the exercise of the right to freedom of association with others,

other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.¹³⁸

5.114 Many of the laws discussed above pursue these objectives. For example, many criminal laws, including counter-terrorism and anti-consorting law, 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 or public order.

5.115 As discussed above, preventing people from ‘getting together to hatch crimes’ has long been considered one justification for restrictions on freedom of association.¹³⁹ The High Court has recognised a ‘public interest’ in restricting the activities, or potential activities, of criminal associations and criminal organisations.¹⁴⁰

5.116 In *South Australia v Totani*,¹⁴¹ 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)

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.¹⁴²

5.117 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

138 *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).

139 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).

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

141 In that case, South Australia’s *Serious and Organised Crime (Control) Act 2008* 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.

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

involvement in criminal activity'. The object of the section is to prevent or impede criminal conduct.¹⁴³

5.118 Limits on free association are also sometimes said to be necessary for other people to enjoy freedom of association and assembly. 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 therefore need to inhibit the freedom of assembly of others, for example by giving police certain powers to control or regulate public protests.

5.119 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. Quoting *Ex parte Lewis* (the Trafalgar Square Case), 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.¹⁴⁴

5.120 Freedom of association is sometimes limited by laws that regulate protests, laws perhaps aimed at ensuring the protests are peaceful and do not disproportionately affect others. Protest organisers might 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 like the G20 or APEC.

5.121 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.

5.122 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*.¹⁴⁵

143 *Tajjour v New South Wales* (2014) 313 ALR 221, [160] (Gageler J). References omitted.

144 *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.

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

5.123 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 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’.¹⁴⁶

5.124 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*.

Proportionality and freedom of association

5.125 Whether all of the laws identified above as potentially interfering with freedom of association, in fact pursue legitimate objectives of sufficient importance to warrant restricting the freedom may be contested. However, even if a law does pursue such an objective, it will also be important to consider whether the law is suitable, necessary and proportionate.

5.126 The recognised starting point for determining whether an interference with freedom of association is justified is the international law concept of proportionality. In art 22 of the ICCPR, the phrase ‘necessary in a democratic society’ is seen to incorporate the notion of proportionality.¹⁴⁷

5.127 In relation to one element of proportionality, 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’.¹⁴⁸

Conclusions

5.128 A wide range of Commonwealth laws may be seen as interfering with freedom of association, in the contexts of criminal law; public assembly; workplace relations; migration law; and anti-discrimination law. However, many provisions relate to limitations 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.

146 *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.

147 See, eg, Australian Government Attorney-General’s Department, *Right to Freedom of Assembly and Association* <<http://www.ag.gov.au/RightsAndProtections/HumanRights/PublicSectorGuidanceSheets>>.

148 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’.

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

- various counter-terrorism offences provided under the *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*, which provides a ministerial discretion to refuse a visa to a person who 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.

5.130 Some counter-terrorism offences raise freedom of association issues. Review of these laws falls within the role of the INSLM, who reviews the operation, effectiveness and implications of Australia’s counter-terrorism and national security legislation on an ongoing basis.

5.131 Workplace relations laws in Australia have been subject to extensive local and overseas criticism on the basis of lack of compliance with 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.

5.132 A Productivity Commission inquiry, due to report in November 2015, is examining the performance of the Australian workplace relations framework. In undertaking this inquiry, the Productivity Commission has been asked to review the impact of the workplace relations framework on matters including: unemployment, underemployment and job creation; fair and equitable pay and conditions for employees; small businesses; and productivity, competitiveness and business investment.

5.133 As it is not expected that the Productivity Commission inquiry will focus on concerns that the existing workplace relations framework may unjustifiably interfere with the right to freedom of association, further review of this aspect of the framework may be desirable.

5.134 The character test in s 501 of the *Migration Act* has been criticised by stakeholders. The decision of the Full Federal Court in *Haneef*¹⁴⁹ provides a possible rationale for reform to narrow the scope of the concept of ‘association’.

149 *Minister for Immigration and Citizenship v Haneef* (2007) 163 FCR 414.

5.135 Anti-discrimination laws have been criticised for potentially interfering with freedom of association by making unlawful certain forms of discrimination. This issue overlaps with the discussion of freedom of religion, which is also centrally concerned with the operation of anti-discrimination law.¹⁵⁰

150 See Ch 4.

