INTERNATIONAL TRADE UNION CONFEDERATION (ITUC)

INTERNATIONALLY RECOGNISED CORE LABOUR STANDARDS IN AUSTRALIA

REPORT FOR THE WTO GENERAL COUNCIL REVIEW OF THE TRADE POLICIES OF AUSTRALIA

(Geneva, 5 and 7April 2011)

EXECUTIVE SUMMARY

Australia has ratified seven core ILO labour Conventions. However various actions are needed to comply with the commitments Australia accepted at Singapore, Geneva and Doha in the WTO Ministerial Declarations over 1996-2001, and in the ILO's Declaration on Fundamental Principles and Rights at Work and its 2008 Social Justice Declaration.

In general, workers have the right to join and form unions, to bargain collectively and to strike. However there continue to be important areas of non-compliance with ILO Conventions 87 and 98. Special laws applying to the building and construction industry continue to operate, despite being in breach of international standards on freedom of association.

Women's equal rights are protected by the law, but women face a 17 per cent pay gap and are underrepresented in senior positions. Indigenous people face substantial disadvantage and discrimination at the workplace. In general however, the laws on racial, ethnic, disability and sexual orientation discrimination are well applied by the authorities.

Although Australia has not ratified Convention No. 138, the laws protect children and are enforced.

Forced labour is not a widespread phenomenon in Australia. Nonetheless, some prison labour may not comply with Convention No. 29 and there are instances of trafficking for the purpose of forced prostitution and labour, mainly from Asian countries.

INTERNATIONALLY RECOGNISED CORE LABOUR STANDARDS IN AUSTRALIA

Introduction

This report on the respect of internationally recognised core labour standards in Australia is one of the series the ITUC is producing in accordance with the Ministerial Declaration adopted at the first Ministerial Conference of the World Trade Organisation (WTO) (Singapore, 9-13 December 1996) in which Ministers stated: "We renew our commitment to the observance of internationally recognised core labour standards." The fourth Ministerial Conference (Doha, 9-14 November 2001) reaffirmed this commitment. These standards were further upheld in the International Labour Organisation (ILO) Declaration on Fundamental Principles and Rights at Work adopted by the 174 member countries of the ILO at the International Labour Conference in June 1998 and in the Declaration on Social Justice for a Fair Globalisation adopted unanimously by the ILO in 2008.

The sole trade union centre in Australia is the Australian Council of Trade Unions (ACTU) which, through its affiliates, represents around 1,900,000 union members, covering all industries and occupations.

I. Freedom of Association and the Right to Collective Bargaining

Australia ratified both Convention No. 87 on Freedom of Association and Protection of the Right to Organise and Convention No. 98 on the Right to Organise and Collective Bargaining in 1973.

In July 2009, the *Fair Work Act 2009* came into effect, replacing the *Workplace Relations Act 1996*. The Fair Work Act restored many of the rights taken away under the former Coalition Government and has brought Australian law closer to compliance with ILO standards ratified by Australia relating to freedom of association and collective bargaining.

Australian workers have the right to organise and the right to collective bargaining but these rights continue to be limited in important respects.

Forming a union requires a minimum of 50 members, which is excessive by comparison to the ILO core conventions. In the state of New South Wales, registration can be cancelled in case of a strike having a substantially adverse effect on public service. Employers and unions also have the right to challenge changes to union "eligibility rules", which essentially outline the types of employees that unions can represent.

The Fair Work Act restricts the rights of workers to collectively bargain above the enterprise level in a manner that is inconsistent with Conventions 87 and 98. In particular, workers cannot take industrial action when bargaining with multiple employers unless

they form a single interest group (e.g. a joint venture). 'Pattern bargaining' is not permitted.

The Fair Work Act also contains restrictions on the rights of workers to take industrial action that go beyond those permitted under international law. Industrial action is only 'protected' if it is taken during the process of bargaining for an agreement. As noted above, there are also effective prohibitions on taking industrial action in pursuit of multiple business agreements and pattern bargaining. Industrial action can be terminated by the Minister at her/his own initiative, and Fair Work Australia (the federal industrial relations tribunal) can suspend or terminate a strike in a range of circumstances, including where it is deemed to cause significant economic damage or where the action is causing significant harm to a third party. Secondary action is unlawful. In its 2009 comments on Australia's compliance with Convention 87, the ILO's Committee of Experts on the Application of Conventions and Recommendations (CEACR) requested that the Government review those provisions in the Act which place undue restrictions on workers' freedom of association, with a view to bringing the Act into full conformity with Convention 87.

The Fair Work Act enables parties to bargain over a significantly broader range of matters than were permitted under the former Workplace Relations Act 1996. However it does not permit free bargaining, and a number of the restrictions on the content of agreements are inconsistent with Convention 98 and ILO jurisprudence.

Separate and punitive laws apply to workers and trade unions in the building and construction industry. The Building and Construction Industry Improvement (BCII) Act 2005 renders virtually all forms of industrial action in the building and construction sector illegal. The Act imposes severe financial penalties for damages in case of "unlawful" industrial action and gives an enforcement agency, the Australian Building and Construction Commission (ABCC), coercive powers akin to an agency charged with investigating criminal matters. Amongst its various statutory powers, the ABCC has the power to compel people to attend interviews, answer questions and/or provide documents or information related to any investigation. These interrogations are conducted in private and interviewees are generally not allowed to disclose to anyone else what happens during the interrogation. The penalty for failing to comply with these requirements is six months' imprisonment.

The BCCII Act has been the subject of repeated and strong criticism from the ILO's CEACR and the ILO's Committee on Freedom of Association. In 2007 a commitment was given by the present Government (then the Opposition) that the ABCC would be abolished and replaced by a specialist division of the general labour inspectorate by 1 February 2010. In June 2009 the Government introduced legislation into Parliament that sought not to abolish the ABCC but to create a separate building industry inspectorate with coercive powers though with additional safeguards. This bill would have represented some improvement on the current situation. However it failed to pass through the Parliament.

Summary

In general, workers have the right to join and form unions, to bargain collectively and to strike. However there are restrictions on the rights of workers to take industrial action and to collectively bargain that go beyond those permitted under Conventions 87 and 98. In particular, there continue to be separate and punitive laws applying to workers and trade unions in the building and construction industry that are inconsistent with Conventions 87 and 98.

II. Discrimination and Equal Remuneration

Australia ratified Convention No. 100 on Equal Remuneration in 1974, and Convention No. 111 on Discrimination (Employment and Occupation) in 1973.

Australia has a number of statutes to implement its obligations under these Conventions.

With respect to gender equality, the *Fair Work Act 2009* has introduced a stronger safety net of minimum wages and terms and conditions of work, as well as a number of other mechanisms which may go some way in achieving gender wage parity. The new equal remuneration provisions in the FW Act are currently being tested for the first time.

In practice, however, women continue to face discrimination in employment in relation to equal remuneration for work of equal value. According to the Australian Bureau of Statistics, women earn an average of 17 per cent less than men.[1] In addition, on average, women retire with less than half the amount of savings in their superannuation accounts compared to men. Women are underrepresented in senior and high-skills positions: fewer than 2 per cent of the top 200 companies listed on the Australian Securities Exchange have a female CEO and only 1 in 12 board directors are women.[2]

The Indigenous population, approximately 2.5 per cent of the total, faces substantial disadvantage and discrimination. The 2008 National Aboriginal and Torres Strait Islander Social survey found an indigenous unemployment rate of 16.5 per cent. The Indigenous unemployment rate is more than three times that of the general labour force. The Federal Government committed in 2008 to closing the gap between Indigenous communities and the wider population in areas of life expectancy, early childhood mortality, educational attainment, and employment outcomes. Despite total spending across all levels of government in Australia in 2008-09 estimated at $21.9 billion or 5.3 per cent of total general government expenditure on Indigenous affairs, these indicators have improved only slightly.

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[1] ABS cat no. 6302.0 Average Weekly Earnings (Full-time employment) February 2009.
[2] Equal Employment Opportunity for Women in the Workplace Agency (EOWA), Pay Power and Position: beyond the 2008 EOWA Australian Census of Women in leadership, 2009.

The Disability Discrimination Act prohibits discrimination against persons with disabilities in employment; education and other services access and building access.

The Racial Discrimination Act prohibits discrimination on the grounds of race, origins and ethnicity. The Act's complaints mechanism was used 396 times from July 2008 to June 2009, citing 617 cases of racial discrimination. Of these, 54 per cent involved employment.

The Sex Discrimination Act prohibits discrimination on the grounds of sexual orientation. Discrimination against lesbian, gay, transgendered and bisexual (LGTB) people occurs, however it is not a significant problem by comparison to other countries. The Australian Human Rights Commission received 17 complaints on cases of anti-LGTB discrimination in employment from July 2008 to June 2009.

Laws at both national and state level prohibit discrimination on the grounds of HIV-positive status. There is limited information on the extent of discrimination against people who live with HIV/AIDS because the Australian Human Rights Commission includes such cases under the prohibition on discrimination on the grounds of disability.

In April 2010 the Australian Government announced a review of federal anti-discrimination legislation, through which it intends to harmonise and consolidate current laws into a single Commonwealth Act. In addition, the Government is reviewing the Equal Opportunity for Women in the Workplace Act and Agency.

Summary

Although gender equality is enshrined in the law, there continues to be a significant gender pay gap and women are underrepresented in senior positions. Indigenous people face substantial disadvantage and discrimination at the workplace. In general however, the laws on racial, ethnic, disability and sexual orientation discrimination are well applied by the authorities.

III. Child Labour

Australia has not ratified Convention No. 138, the Minimum Age Convention. Australia ratified Convention No. 182, the Worst Forms of Child Labour Convention in 2006.

There is no federal legislation in Australia that sets a minimum age for employment, as child employment issues lie primarily within the jurisdiction of the states. State and Territory laws require children to remain in school until they turn 15 years (in some states and territories, 16 or 17 years); and provide for minimum ages for employment in selected occupations, child welfare, and occupational health and safety. These laws are implemented through State and Territory Government agencies including departments of education, community services, workplace relations, and health and

safety. In addition, federal and state industrial instruments regulate aspects of the employment of children and young people.

The latest Australian Bureau for Statistics (ABS) survey of child employment in 2006 found that 7 per cent of children aged 5 to 14 had worked in the previous year.[3] Of these, a third worked for their parents and just over half for employers; 2.4 per cent of children aged 10 to 14 worked more than five hours a week during school terms, although most worked fewer than 13 weeks in the year. Fewer than 2 per cent of children aged 5 to 9 were employed, mostly in family farms and businesses. Common jobs other than assisting in family businesses were delivering newspapers and leaflets, gardening, babysitting and retail.

There is no federal legislation that prohibits forced or bonded child labour, although such crimes are prosecuted under the Criminal Code which establishes high penalties in case of conditions amounting to slavery and for forcing children under 18 to provide sexual services. The Migration Act punishes trafficking of people and the Proceeds of Crime Act punishes sexual servitude offences.

Summary

Although Australia has not ratified Convention no. 138, the laws protect children and they are enforced effectively.

IV. Forced Labour

Australia ratified Convention No. 29, the Forced Labour Convention in 1932 and Convention No. 105, the Abolition of Forced Labour Convention, in 1960.

The law does not explicitly prohibit forced labour but trafficking in persons is prohibited.

There is evidence to suggest that forced labour occurs in Australia but the extent of the practice is unknown. Over the past few years, trade unions, NGOs and academics have raised concerns over the exploitation of migrant workers in Australia, including the use of forced or indentured labour. There have been a number of cases in which migrant workers on temporary visas have been denied wages or had their wages illegally reduced to pay for recruitment or migration agent fees and airfares, have been forced to work long hours without adequate meals or rest breaks, have been forced to work in unsafe workplaces or have been threatened with deportation if they seek to enforce their rights.

In 2009, the Australian Government reformed the principal visa through which overseas skilled workers may be sponsored by employers to work in Australia temporarily – the *Temporary Business Long Stay – Standard Business Sponsorship (Subclass 457) Visa.* The reforms were directed at restoring integrity to the visa

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[3] Australian Bureau of Statistics, *Child Employment, Australia,* Cat. No. 6211, June 2006.

programme and go some way in preventing further exploitation of vulnerable migrant workers.

According to a report by Australia's Institute of Criminology, many cases of forced labour and trafficking go unreported. The same report stated that certain immigrant groups, depending on their visa status, were potentially vulnerable and in some instances, had actually been subjected to unlawful conduct of varying degrees of extremity. Cases included "confiscation of passports by 'employers' or agents, use of sexual or physical violence and what might broadly be described as abuse of vulnerability that flows from having limited work options and a debt or family obligation." Reports find that migrant women are at risk of being forced into prostitution or domestic servitude, while exploited men are more usually found in construction and agriculture.

Although there is lack of information, research shows that the estimated number of trafficking victims is modest. The government actively investigates, prosecutes and convicts trafficking offenders and in 2009 it improved its legislation on victim protection. Furthermore the government provided training and consultation to foreign government officials on trafficking matters.

Prison labour occurs in Australia. Private prisons exist in several states, although these prisons remain under the control of a public authority and are subject to government established guidelines. Work or service from a prisoner is only compatible with core ILO Conventions if the work or service is carried out under the supervision and control of a public authority and if the person is not hired to or placed at the disposal of private individuals, companies or associations. Work by prisoners for private companies can be compatible with the Convention only when such work is performed in conditions approximating a free employment relationship. The ILO Committee of Experts on the Application of Conventions and Recommendations has for a number of years, including most recently in 2009, reiterated its concerns over the adequacy of Australian state regulatory arrangements for the work of prisoners in privately operated prisons.

Summary

Although forced labour is not a widespread phenomenon in Australia, some prison labour may not comply with Convention No. 29 and there are instances of trafficking for the purpose of forced prostitution and labour, mainly from Asian countries.

Recommendations

1. The government should amend the *Fair Work Act 2009* so as to ensure workers have the right to bargain at all levels, including the capacity to take industrial action in pursuit of multiple business agreements.
2. The government should amend the *Fair Work Act 2009* so as to ensure employees have the right to strike in conformity with Conventions 87 and 98. This includes removing ministerial and tribunal powers for suspending or terminating industrial action that go beyond those permitted under international law.
3. The government should amend the *Fair Work Act 2009* to remove restrictions on the content of collective agreements that go beyond those permitted under international law.
4. The federal and state governments should remove excessive requirements for forming unions and "eligibility rules" for union representativeness.
5. The government should take measures to close the gender pay gap and to increase women's representation in higher and senior posts.
6. The Australian Government should intensify its efforts to empower indigenous peoples and work collaboratively with indigenous communities to close the gaps in life expectancy, educational and employment outcomes and other priority areas.
7. The Australian Human Rights Commission should start collecting data on discrimination against people who live with HIV/AIDS.
8. The Australian government should ratify Convention No. 138.
9. The government should closely monitor the operation of its migration laws and regulations to ensure they are adequately protecting the rights of migrant workers.
10. The federal and state governments should follow the CEACR's recommendations with respect to prison labour so as to ensure that the use of prison labour is in line with Convention No. 29.
11. In line with the commitments accepted by Australia at the Singapore and Doha WTO Ministerial Conferences and their obligations as members of the ILO, the government of Australia should provide regular reports to the WTO on its legislative changes and implementation of all the core labour standards.
12. The WTO should draw the attention of the authorities of Australia to the commitments they undertook to observe core labour standards at the Singapore and Doha Ministerial Conferences. The WTO should request the ILO to intensify its work with the government of Australia in these areas and provide a report to the WTO General Council on the occasion of its next trade policy review.

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