

# ASIA/PACIFIC

## AUSTRALIA <sup>112</sup>

### El affiliates

- AEU** Australian Education Union, 190.000 members
- NTEU** National Tertiary Education Union, 25.000 members
- IEU** Independent Education Union of Australia, 68.000 members

### Ratification

- C. 87 Freedom of Association and the Protection of the Right to Organise (1948) ratified 1973
- C. 98 Right to Organise and Collective Bargaining (1949) ratified 1973
- C. 100 Equal Remuneration (1951) ratified 1974
- C. 111 Discrimination (Employment and Occupation) (1958) ratified 1973
- C. 144 Tripartite Consultations (1976) ratified 1979

### Introduction

Australia has a federal system of government with a federal, Commonwealth government together with a further 8 provincial, state or territory governments.

Under the Commonwealth Constitution, provision of public education at the school and vocational education and training level remains a state government responsibility. However under complex federal-state financial arrangements, funding is increasingly being provided to state governments through national initiatives to promote national goals.

There are both federal and state government statutes to regulate trade unions. Registration systems apply to provide registered trade unions with separate legal and corporate identity, to provide them with 'standing' in industrial relations matters and to enable government to oversee registered union internal financial, administrative and democratic accountabilities. The federal system for the registration of trade unions applies where trade unions operate in industries where the Employer is a trading corporation or where state governments have referred their 'industrial relations powers' to the Commonwealth. There are also, for the most part, state systems of trade union registration. Such state-based trade unions may be a state branch of a nationally registered trade union.

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There are also both federal and state laws that govern industrial relations, including collective bargaining and freedom of association, generally. The federal laws operate predominantly in the Commonwealth public sector and for the private sector generally, with state laws operating predominantly for state public sector enterprises. However, State governments are increasingly divesting from direct service provision and instead establishing or encouraging corporations to take over the role of service provision. Due to the constitutional underpinnings of the federal industrial relations statute being based on what is called the 'corporations power' rather than the more traditional 'conciliation and arbitration power', whenever or wherever employment occurs through a corporation, the resultant terms and conditions of employment are subject to federal and not state industrial relations laws.

### Status of teachers

Teachers in public education are typically engaged as State level public employees. Even where an individual government school council or board employs some categories of teaching staff, such staff are 'public' employees in the sense that the councils/boards are established by or under a statute of the parliament for state or public purposes, are accountable to and regulated by the minister of state and primarily funded from government sources.

Around 30% of early childhood education, primary and secondary education services are private sector, although receiving public funding, mainly from the Federal government.

### Freedom of Association

Freedom of association is guaranteed for both private and public sector workers; however, employers can seek 'representation orders' in the workplace tribunal, which can dictate which classes of employee the union can (or cannot) represent. The Armed Forces and a small number of senior civil servants, such as those appointed to statutory posts, are prohibited from forming or joining a union.<sup>113</sup>

At the national level, following the election of a new 'Labor' government in 2007, the Fair Work Act 2009 ('the FW Act') came into operation with marked changes to freedom of association and collective bargaining. The previous conservative government's principal industrial relations legislation, the Workplace Relations Act 1996 (the 'WR Act'), introduced and gave primacy to statutory individual employment contracts which ousted the operation of awards and collective enterprise agreements. In its regulation of trade unions, the previous legislation also adopted a conception of freedom of association as a sort of 'competitive unionism' which encouraged the development of smaller unions which competed for members with already established unions. It also put considerable restraints upon union 'right of entry' to the workplace provisions.

The FW Act prohibited statutory individual contracts, gives primacy to collective employment agreements and loosens but retains constraints on union right of entry to a workplace. It has not removed the provisions concerning the registration of trade unions and so the current dominant paradigm for freedom of association remains one of an individual 'personal' right to choose to join or refuse to join a union.

### Right to strike

Strikes are only permitted in respect of enterprise bargaining and only when undertaken in the process of bargaining for an agreement, i.e. only when an existing agreement has expired. Strikes are also only permitted if the union is genuinely trying to reach agreement (the employer's conduct is not assessed) and only after a ballot has taken place and due notice has been given of the action to be taken. In this way, the FW Act effectively prohibits protected industrial action in the case of multiple business agreements, pattern bargaining, and sympathy strikes and secondary action in general.

In addition, the FW Act permits the suspension or termination of protected industrial action and the imposition of compulsory arbitration, where it is regarded as liable to cause significant economic damage, or harm to life, safety or welfare of the population or part of it. Industrial action is also prohibited if it threatens trade or commerce with other countries, or results in the obstruction or hindrance of the performance of services by the Australian Government or the transport of goods or persons in international trade. The ILO CEACR considers these limitations on the right to strike are not in full conformity with the ILO Convention 87.<sup>114</sup>

At the federal level and in some states, limited industrial action is permitted in the context of bargaining for a new enterprise agreement. All jurisdictions have a mechanism for dispute resolution before a workplace tribunal. This includes where a dispute involves industrial action. Somewhat separately all jurisdictions have 'essential services' legislation which enables the government to proclaim specific services or industries as 'essential' and thereby to issue regulations prohibiting specified behaviour, eg, industrial action and prescribing other behaviour, eg, extended working hours. Proclamations under essential services legislation are rare. However, in some States public sector workers are prohibited from taking industrial action. For example, in New South Wales (NSW), public employees, including teachers, police and nurses, are prohibited from striking. Instead, there is an independent workplace tribunal to arbitrate wage claims.

### Collective bargaining

The FW Act has a number of provisions which contribute to undermining the principles of collective bargaining. Enterprise Bargaining Agreements (EBAs) are seen as industrial

<sup>114</sup> ILO CEACR report adopted 2011 published ILC 2012 Australia Convention 87



instruments made between an employer and its employees rather than between a union and an employer (or industry body). Under this scheme, unions are simply agents bargaining on behalf of their members. However, any employee may choose their own representative in the bargaining process. The relevant union is the 'default bargaining representative' in the absence of any choice by the employee of another bargaining representative. The WR Act and now the FW Act thus remove the status unions had had since 1904 of being 'parties principal' in their own right in industrial matters although the FW Act does enable a union to have a collective agreement cover and apply to itself and not only to employees per se. The bargaining process can be undermined by any subsequent 'proliferation' of bargaining representatives.

In the education sector, most collective bargaining is conducted at State level. There are common terms and conditions of employment for the public sector, including superannuation (pensions) and Long Service Leave, and a series of EBAs, signed normally between the AEU State level Branch and with the State level Education and Training Directorate (ETD).

Typically in each State/territory, there is:

- (a) One EBA for government schools teachers and principals;
- (b) One EBA for the teaching staff in all Technical and Further Education (TAFE) institutes. Non teaching staff have separate EBAs. Where these are located at institute level, they still must be approved by the State government.
- (c) One EBA for administrative and support staff in government schools; or alternatively, this EBA will apply across the 'public service sector' of which the administrative and support staff are part.

At tertiary level, the EBAs are signed between the university management and NTEU although the union draws up a national set of claims, which is then adapted to local conditions and extended to include other specific issues. The NTEU produces a monthly "Bargaining State of Play" during the negotiations period.

The main issues covered in the public schools agreements include types of employment; selection and advancement, hours of work; pay and classifications; professional development; teaching loads and classroom hours; workload management; workforce planning; workplace behaviour, dispute and appeals mechanisms; facilities for unions, redundancy procedures; leave entitlements and allowances. The FW Act removed earlier prohibitions under the WR Act, concerning trade union subscriptions, trade union training leave and union involvement in dispute settlement procedures and consultations with unions about workplace changes.

The standard EBAs now include provision for setting up school or training institute consultation committees. Composition of these committees can vary from equal management and union representation to including specifically elected staff representatives. These Committees meet as required and are charged with reviewing the long-term planning and operations of the school, including class size and working hours arrangements. However, the FW Act

still prohibits the inclusion of bargaining service fees for non-members in an EBA and some other issues can be considered unlawful, creating a confusing and inconsistent situation.<sup>115</sup> In addition, the AEU negotiates with the ETD on guidelines and procedures concerning appointments and other issues.

In the private sector, there is a State level award which provides a set of minimum conditions and the IEU negotiates with individual employers to sign an enterprise or certified agreement.

### Social dialogue

There are a number of advisory or consultative mechanisms, which are usually tripartite where consultation with stakeholders occurs over proposed legislative change to industrial laws. The education unions are not represented on an 'ex officio' basis as such but may be involved as a nominee of Australian Council of Trade Unions.

The AEU is also represented on a variety of federal or national 'professional' bodies such as the Australian Institute for Teachers and School Leaders which develop and oversee matters such as professional standards.

### Trends since the Financial Crisis in 2008

The enactment of the FW Act in 2009 provided that enterprise agreements could cover a greater range of subject matters. The previous WR Act had restricted that content to only those matters which directly pertained to the employer-employee relationship. The FW Act, while maintaining that requirement, extended it to also include matters pertaining to the relationship between a union and an employer.

The result has been that collective enterprise agreements from late 2009 onwards have various provisions that enable unions to access workers in their workplaces and to provide various entitlements to union workplace delegates. This has led to a significant extension in the scope or coverage of collective enterprise agreements in the period 2008-2012.

However, on the other hand, since 2010, the election of conservative state governments with substantial majorities has emboldened such governments, at least in the one state which has a unicameral parliamentary system, to enact statutes removing from collective agreements matters which have been agreed between employers and employees and approved by the relevant industrial relations regulatory authority.

There have been considerable constraints placed upon the content of EBAs in the state of Queensland, such as the removal of consultation rights, including in relation to introduction of change and redundancy, and of security of employment provisions. In the state of New South Wales there has been an attempt to promote registration of trade unions with overlapping membership rules (subsequently confined to one specific industrial sector – medical and

<sup>115</sup> ILO CEACR Report adopted 2011, published ILC 2012 Australia Direct Request ILO convention 98



allied health professionals). In New South Wales also, increased financial penalties imposed for the taking or organising industrial action, including strike action, are pending. The AEU NSW branch has previously had such penalties imposed on it. Conservative state governments have also imposed stringent conditions on the bargaining process which effectively place a limit or maximum cap on wage increases in state public sector employment unless there is a demonstrable 'productivity trade-off' in working conditions.

Some states have even amended the relevant industrial law to require the industrial regulator to give effect to, as distinct from taking account of, state government wages or economic policy. For example in New South Wales, the conservative government passed a law dictating that the tribunal could not award a pay increase greater than 2.5% per annum, in line with the government's wages policy. This allows the government to dictate the wages of over 300,000 workers, without the obligation to bargain and without the right to strike.

### Good practice

The AEU has long campaigned and bargained for the inclusion in industrial regulatory arrangements or agreements of provisions relating to class sizes, actual teaching hours and related professional duties. It also negotiates on arrangements to ensure that education and training workplaces, be they early childhood centres, schools or TAFE institutes, have the required qualified professional and other staff irrespective of the geographic location or socio-economic status.

This work of the AEU is based on its fundamental tenet that teaching and learning conditions are dynamically and inextricably linked.

This work is especially crucial in the light of current government policy prescriptions which are aimed at devolving to the local workplace the authority to make decisions concerning such matters including the right or power to employ or dismiss staff.

The Victorian Government Schools Agreement, a legally enforceable industrial instrument formally approved under the federal FW Act, contains express objectives or commitments recognising the fundamental tenet referred to above as well as provisions regulating class sizes and teaching hours.<sup>116</sup> This agreement also contains a set of industrial relations principles and provision for the consultation committees referred to above.

### AEU Industrial Relations Principles: (which receive widespread Management support at a policy level)

The parties commit to the following industrial relations principles:

- (1) Cooperative and consultative relationships between management, employees and the union;

<sup>116</sup> see clauses 9,,10, 22 and 23- This agreement can be found at: <http://www.fwc.gov.au/documents/agreements/wpa/CAUN085122741.pdf>

- (2) Management, employee and union relationships based on mutual respect, trust and preparedness to consider alternative viewpoints;
- (3) Negotiations involving a mutual problem solving approach focusing on long-term gains for all parties;
- (4) To work within a progressive industrial relations culture to create a system of highly effective schools with effective workplace practices;
- (5) Recognition of an appropriate role for workplace representatives.

In tertiary education, in the 2012 bargaining round, claims presented by NTEU included provisions for a review and improvement of the indigenous employment strategy, including setting new binding targets, and incorporation of these in the Agreement.

The union also presented clauses concerning domestic violence, stating that the agreement should:

- a) Include an agreed statement of principle about domestic violence, and provide for the joint development of policies and protocols to address circumstances where an employee is dealing with matters arising from or as a result of domestic violence; which shall include appropriate referral arrangements to relevant agencies, and the promulgation of the policies to staff and especially supervisors.
- b) Provide that no employee will be disadvantaged in her/his employment because of the consequences of his/her dealing with matters arising from or as a result of domestic violence; and
- c) Provide for the granting of sufficient special leave for an employee to deal with matters arising from or as a result of domestic violence, including but not limited to:
  - Seeking safe housing;
  - Attending medical/counselling appointments;
  - Attending court hearings and access legal advice;
  - Organising alternate care or education arrangements for children; and
  - Rebuilding support networks with children, family or others.<sup>117</sup>

### Education expenditure and GDP growth

% of government expenditure on education	% GDP spent on education	GDP % Growth
2008: 13.5%	4.6%	2.3%
2009:	5.1%	1.2%
2010		2.7%
2011		2.0%

Source World Bank/IndexMundi

<sup>117</sup> see NTEU website [http://www.universitybargaining.org.au/key\\_claims/key\\_claims/domestic\\_violence](http://www.universitybargaining.org.au/key_claims/key_claims/domestic_violence) accessed 21.03.2013