INTERNATIONAL COURT OF JUSTICE

RIGHT TO STRIKE UNDER ILO CONVENTION NO. 87

WRITTEN STATEMENT OF AUSTRALIA

16 MAY 2024

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I. INTRODUCTION AND PRELIMINARY OBSERVATIONS

A. INTRODUCTION

1. By Resolution adopted on 10 November 2023, the Governing Body of the International Labour Organization ('**ILO**') requested an advisory opinion of the International Court of Justice ('**ICJ**' or '**the Court**') on the interpretation of the *Convention (No. 87) concerning Freedom of Association and Protection of the Right to Organise* ('**Convention 87**'),[1] specifically:

> Is the right to strike of workers and their organizations protected under the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87)?[2]

2. Australia wishes to avail itself of the opportunity afforded by the Court to make a written statement on the question submitted to the Court for an advisory opinion. The following observations are submitted in accordance with the Order of the Court of 16 November 2023.

B. SUMMARY AND STRUCTURE OF AUSTRALIA'S STATEMENT

3. Australia's statement proceeds as follows:

Chapter I sets out Australia's longstanding commitment to the ILO (in particular its critical role in setting international labour standards) and the

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[1] *Convention (No. 87) concerning Freedom of Association and Protection of the Right to Organise*, adopted 9 July 1948, 68 UNTS 17 (entered into force generally 4 July 1950 and for Australia 28 February 1974) (ILO Dossier Document No. 120) ('*Convention 87*').

[2] International Labour Organization, Governing Body, 349th bis (Special) Session, *Decision concerning the action to be taken on the request of the Workers' group and of 36 governments to urgently refer the dispute on the interpretation of Convention No. 87 in relation to the right to strike to the International Court of Justice for decision in accordance with article 37(1) of the Constitution*, (Record of decisions, 10 November 2023), <https://www.ilo.org/gb/GBSessions/GB349bis/WCMS_901625/lang--en/index.htm> ('*ILO GB, 349th bis (Special) Session, Record of decisions*'). The ILO Governing Body adopted the Resolution by 33 votes in favour, 21 votes against and 2 abstentions. See International Labour Organization, Governing Body, 349th bis (Special) Session, *Minutes of the 349th bis (Special) Session of the Governing Body of the International Labour Office* (Minutes, 31 January 2024), para. 146 (draft minutes at ILO Dossier Document No. 31) <https://www.ilo.org/resource/record-proceedings/gb/349bis/minutes-349th-bis-special-session-governing-body-international-labour> ('*ILO GB, 349th bis (Special) Session, Minutes*'). All website references are accurate as at 13 May 2024.

importance of achieving legal certainty through resolution of the ongoing disagreement within the ILO as to whether the right to strike is protected under Convention 87 (**Section C**). It also addresses the Court's jurisdiction to render an advisory opinion (**Section D**) and the scope of the question posed to the Court (**Section E**).

Chapter II sets out Australia's view, taking account of the applicable principles of treaty interpretation (summarised in **Section A**), that Convention 87 protects the right to strike. That is the ordinary meaning of Article 3(1) of Convention 87, interpreted in good faith, in its context and in light of the Convention's object and purpose (**Section B**). That interpretation is confirmed by supplementary means of interpretation (**Section C**), including the practice of State Parties to Convention 87. State practice also confirms that the domestic laws of State Parties may impose restrictions on the right to strike under Convention 87, provided that the right is not substantially impaired. The restrictions that are imposed by State Parties on the right to strike are diverse and cover a wide range of matters.

C. AUSTRALIA'S COMMITMENT TO THE ILO

4. Since its establishment by the *Treaty of Versailles* in 1919,[3] the ILO has played a central role in setting international labour standards. The philosophical basis for its foundation – the belief that universal and lasting peace can be established only if it is based on social justice[4] – remains as relevant today as it was in the aftermath of the First World War.

5. Australia's submission of this written statement reflects its ongoing commitment to the ILO and to the vital work it undertakes. The unique tripartite

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[3] *Treaty of Peace between the Allied and Associated Powers and Germany, and Protocol,* signed 28 June 1919, [1920] ATS 1 (treaty entered into force 10 January 1920, protocol entered into force 28 June 1919) ('*Treaty of Versailles*').

[4] Ibid Preamble. The preamble to the ILO Constitution provides: '*Whereas universal and lasting* peace can be established only if it is based upon social justice…'. See *Instrument for the Amendment of the Constitution, adopted by the International Labour Conference at its twenty-ninth session,* adopted 9 October 1946, 15 UNTS 35 (entered into force 20 April 1948) Preamble para. 1 (ILO Dossier Document No. 118) ('*ILO Constitution*').

structure of the ILO brings together governments, and representatives of employers and workers, to promote decent work conditions and set international labour standards. These standards have made, and continue to make, a tangible difference in member countries and positively impact working conditions and practices around the world.

6. Australia recently affirmed its commitment to strong international labour standards by ratifying the *Convention (No. 190) concerning the Elimination of Violence and Harassment in the World of Work* on 9 June 2023 and the *Convention (No. 138) concerning Minimum Age for Admission to Employment* on 13 June 2023.[5] It has now ratified nine of the ten fundamental ILO conventions[6] and is progressing ratification of the tenth, the *Convention (No. 187) concerning the Promotional Framework for Occupational Safety and Health.*[7]

7. Australia is resolutely committed to ensuring the effectiveness of the ILO as a forum in which governments and representatives of workers and employers can engage on labour issues of international concern. Australia has seen the benefits that tripartism and social dialogue deliver for all stakeholders, both domestically and internationally.

8. Australia is keen to see the ongoing disagreement within the ILO as to the protection of the right to strike by Convention 87 resolved through these proceedings. That disagreement has had ongoing significant impacts on the

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[5] *Convention (No. 190) concerning the Elimination of Violence and Harassment in the World of Work*, adopted 21 June 2019, 2022 ATNIF 21 (entered into force generally 25 June 2021); *Convention (No. 138) concerning Minimum Age for Admission to Employment*, adopted 26 June 1973, 1015 UNTS 297 (entered into force generally 19 June 1976).

[6] The *Declaration concerning the aims and purposes of the International Labour Organization* established fundamental principles on which the ILO is based, including that 'labour is not a commodity' and 'poverty anywhere constitutes a danger to prosperity everywhere' ('*Declaration of Philadelphia*'). See *ILO Constitution* (n 4), Annex, Sections I.(a) and I.(c). The ILO *Declaration on Fundamental Principles and Rights at Work* expanded on these ideas and codified the fundamental principles that members have an obligation to respect, promote and realise, arising from the very fact of their membership in the ILO. The fundamental Conventions reflect these principles. See International Labour Conference, Declaration on Fundamental Principles and Rights at Work (1998), as amended in 2022, para. 2 (ILO Dossier Document No. 128).

[7] *Convention (No. 187) concerning the Promotional Framework for Occupational Safety and Health*, adopted 15 June 2006, 2564 UNTS 291 (entered into force generally 20 February 2009).

operation of the ILO, most notably during the June 2012 session of the ILO's International Labour Conference ('**the Conference**') when, for the first time since its establishment in 1927, the Conference Committee on the Application of Standards ('**CAS**') did not proceed to study any individual cases. The disagreement has continued to have a disruptive impact on the work of the CAS. The effect of these disruptions should not be underestimated. They distract from the important work of the Conference. More broadly, they undermine the integrity of the supervisory system and the ILO's role as a standard setting body.

9. Australia recognises the freedom of association at work, and the rights of workers to join and form trade unions, as critical elements of international human rights law and international labour standards. As one of the ten fundamental ILO conventions, Convention 87 is one of the principal instruments regulating the right to freedom of association. It is essential that State Parties to Convention 87, and those States considering ratification, fully understand the extent of the rights and obligations that exist under Convention 87. An advisory opinion from the Court will assist in providing that clarity.

D. JURISDICTION AND DISCRETION

10. Before turning to the substance of the question referred, the Court must consider two matters.[8] The first is whether it has jurisdiction to give the advisory opinion requested by the Governing Body of the ILO. The second, which arises only if the Court concludes that it has jurisdiction, is whether it should exercise its discretion to render the advisory opinion sought in this proceeding. We address each of these matters in turn below.

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[8] *Statute of the International Court of Justice* Article 65(1); *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019*, p. 111, para. 54 ('*Chagos Advisory Opinion*'); *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 232, para. 10 ('*Legality of Threat or Use of Nuclear Weapons Advisory Opinion*'); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 144, para. 13 ('*Construction of a Wall Advisory Opinion*'); *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010*, p. 412, para. 17 ('*Kosovo Advisory Opinion*').

1. Jurisdiction of the Court

11. The Court has jurisdiction under Article 65(1) of the *Statute of the International Court of Justice* to 'give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request'. Article 96(2) of the *Charter of the United Nations* ('**UN Charter**') relevantly provides that specialised agencies which have been authorised by the United Nations General Assembly ('**UNGA**') may 'request advisory opinions of the Court on legal questions arising within the scope of their activities'.

12. The Court has observed that there are three conditions which must be satisfied in order to found its jurisdiction when a request for an advisory opinion is submitted by a specialised agency:

    (a) the agency requesting the opinion must be duly authorised under the UN Charter to request opinions from the Court;

    (b) the opinion requested must be on a legal question; and

    (c) the question must be one arising within the scope of the activities of the requesting agency.[9]

    All three conditions are met in respect of the present request.

13. *First*, the ILO Governing Body is authorised to request advisory opinions from the Court by Article IX(2) of the *1946 Agreement between the United Nations and the International Labour Organization* ('**UN-ILO Agreement**'), which was approved by the UNGA.[10] Article IX(3) provides that requests may be

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[9] *Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, I.C.J. Reports 1996*, pp. 71-72, para. 10 ('*Legality of Nuclear Weapons in Armed Conflict Advisory Opinion*').

[10] *Protocol concerning the entry into force of the Agreement between the United Nations and the International Labour Organization*, signed 19 December 1946 (entered into force 14 December 1946) Article IX(3) (ILO Dossier Document No. 2). The Resolution adopted by the Governing Body of the ILO at its 349th *bis* (Special) Session (10 November 2023) also referred to Article 37(1) of the *ILO Constitution* (n 4) which provides that: '[a]ny question or dispute relating to the interpretation of this Constitution or of any subsequent Convention concluded by the Members in pursuance of the

addressed to the Court not only by the Conference, but also 'by the Governing Body acting in pursuance of an authorization by the Conference'. In 1949 the Conference authorised the Governing Body to request advisory opinions from the Court on legal questions arising within the scope of the activities of the ILO.[11] The combination of the UN-ILO Agreement and the Conference's 1949 Resolution make clear that the ILO Governing Body is duly authorised to request opinions from the Court.

14. *Second*, the question posed to the Court is a legal one. The Court has indicated that questions 'framed in terms of law and rais[ing] problems of international law' are 'by their very nature susceptible of a reply based on law' and, therefore, are 'legal questions'.[12] In this case, the Court is asked to interpret a treaty – Convention 87 – and identify whether a particular right is protected under that treaty. That is a 'legal question' for the purposes of Article 65(1) of the Court's Statute.

15. *Third*, the question transmitted to the Court arises within the scope of the ILO's activities. The Court has noted that '[i]n order to delineate the field of activity or the area of competence of an international organization, one must refer to the relevant rules of the organization and, in the first place, to its constitution'.[13] In 1919 the ILO's Constitution, then contained within the *Treaty of Versailles*, established the ILO for the purpose of improving labour conditions including the 'recognition of the principle of freedom of association'.[14] Australia submits that the question of whether the right to strike is protected under Convention 87,

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provisions of this Constitution shall be referred for decision to the International Court of Justice.' See *ILO GB, 349th bis (Special) Session, Record of decisions* (n 2) Preamble para. 8.

[11] International Labour Conference, 32nd Session, 1949, Resolution concerning the Procedure for Requests to the International Court of Justice for Advisory Opinions, *Official Bulletin*, vol. XXXII, 1949, pp. 338-339 (ILO Dossier Document No. 4).

[12] *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 18, para. 15; *Legality of Nuclear Weapons in Armed Conflict Advisory Opinion* (n 9) p. 73, para. 15; *Legality of Threat or Use of Nuclear Weapons Advisory Opinion* (n 8) p. 233, para. 13.

[13] *Legality of Nuclear Weapons in Armed Conflict Advisory Opinion* (n 9) p. 74, para. 19.

[14] See *Treaty of Versailles* (n 3) Part XIII generally and specifically Article 387 and Preamble to Section 1; *ILO Constitution* (n 4) Preamble para. 2.

a convention adopted under the ILO Constitution and identified by the ILO as one of its fundamental conventions,[15] clearly falls within the ILO's core remit.

2. Exercise of the Court's discretion

16. The Court has discretion under Article 65 of its Statute to decline to give an advisory opinion even if the conditions of jurisdiction are met.[16] However, it is the 'consistent jurisprudence' of the Court that only 'compelling reasons' may lead it to refuse to provide an opinion in response to a request over which it has jurisdiction.[17]

17. Australia submits that there is no reason for the Court to decline to give an opinion in this case. An advisory opinion by the Court will contribute much needed clarity and certainty to the interpretation of Convention 87. As the Resolution requesting the Court's advisory opinion recalled, the referral concerns a 'serious and persistent disagreement within the tripartite constituency of the [ILO]'.[18] Resolving this impasse is integral to the ILO's continued ability to carry out its core mandate of setting and protecting labour standards.

E. Scope of the Question

18. To assist the Court in clarifying and interpreting the question put to it, Australia makes two submissions.

19. *First*, the question transmitted to the Court concerns whether the right to strike is protected, rather than the scope and extent of any such right or any limitations

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[15] See n 6 for discussion of fundamental conventions.

[16] *Statute of the International Court of Justice* Article 65(1); *Chagos Advisory Opinion* (n 8) p. 113, para. 63; *Construction of a Wall Advisory Opinion* (n 8) p. 156, para. 44; *Kosovo Advisory Opinion* (n 8) pp. 415-416, para. 29; *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (First Phase), Advisory Opinion, I.C.J. Reports 1950*, p. 72.

[17] *Chagos Advisory Opinion* (n 8) p. 113, para. 65; *Construction of a Wall Advisory Opinion* (n 8) p. 156, para. 44; *Kosovo Advisory Opinion* (n 8) p. 416, para. 30.

[18] *ILO GB, 349th bis (Special) Session, Record of decisions* (n 2) Preamble para. 2.

upon it. Nevertheless, in answering that question, the Court may wish to record that in State practice the right to strike is not unlimited and has been subjected to restrictions. Those restrictions are diverse and cover a range of distinct matters.

20. *Second*, the competence of ILO committees to interpret ILO Conventions has not been referred to the Court.[19] That issue is beyond the scope of the narrow question posed to the Court and, as the Resolution's negotiating history shows, was deliberately excluded from the Governing Body's request to the Court.[20]

[19] For example, the Committee of Experts on the Application of Conventions and Recommendations, the Committee on Freedom of Association and the CAS. These committees are discussed further at **Chapter II, Section C, Subsection 4** below.

[20] Letter of the Worker Vice-Chairperson of the ILO Governing Body to the ILO Director-General, dated 12 July 2023 (ILO Dossier Document No. 5) p. 2; *ILO GB, 349th bis (Special) Session, Minutes* (n 2); International Labour Organization, Draft minutes of the 349th *ter* (Special) Session, November 2023 (ILO Dossier Document No. 33).

II. PROTECTION OF THE RIGHT TO STRIKE UNDER CONVENTION 87

A. THE APPLICABLE PRINCIPLES OF TREATY INTERPRETATION

21. The Court has frequently noted that the rules of interpretation set out in the *Vienna Convention on the Law of Treaties* ('**Vienna Convention**')[21] reflect customary international law,[22] and that they apply to the interpretation of treaties concluded before the Vienna Convention.[23] The customary rules reflected in the Vienna Convention therefore apply to the interpretation of Convention 87, notwithstanding that it was concluded before the Vienna Convention entered into force.

22. The basic rule of interpretation is set out in Article 31(1) of the Vienna Convention, which provides:

> A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

23. Article 31(2) provides that 'context' for the purposes of interpretation includes 'the text, including its preamble and annexes'. Article 31(3) further provides that, together with the context, account is to be taken of any subsequent agreement between the parties relating to the treaty's interpretation or application (Article 31(3)(a)), and any practice in the application of the treaty

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[21] *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1968, 1155 UNTS 331 (entered into force 27 January 1980).

[22] See, eg, *Kasikili/Sedudu Island (Botswana v. Namibia), Judgment, I.C.J. Reports 1999*, p. 1059, para. 18 ('*Kasikili/Sedudu Island*'); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007*, pp 109-110, para. 160. See also *Territorial Dispute (Libyan Arab Jamahiriya v. Chad), Judgment, I.C.J. Reports 1994*, p. 21-22, para. 41 ('*Territorial Dispute (Libyan Arab Jamahiriya v. Chad)*').

[23] See, eg, *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua), Judgment, I.C.J. Reports 2009*, p. 237, para. 47, applying the rules reflected in Articles 31 and 32 of the *Vienna Convention* (n 21) to a treaty concluded in 1858; *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Judgment, I.C.J. Reports 2002*, p. 645, para. 37 ('*Sovereignty over Pulau Ligitan and Pulau Sipadan*'), confirming that the rules reflected in Articles 31 and 32 of the *Vienna Convention* (n 21) applied to the interpretation of a treaty concluded in 1891.

which establishes their agreement regarding its interpretation (Article 31(3)(b)). The subsequent practice of State Parties necessary to establish an agreement for the purposes of Article 31(3)(b) of the Vienna Convention must consist of conduct in the application of the treaty[24] and must be uniform.[25]

24. In accordance with Article 32, recourse may be had to supplementary means of interpretation either to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31 is ambiguous or obscure, or leads to a result which is manifestly absurd or unreasonable.[26] Supplementary means of interpretation include the preparatory work of the treaty and the circumstances of its conclusion. It also includes the subsequent practice of one or more State Parties,[27] including public statements and decisions of domestic courts.[28] This practice need not be expressly connected to the application of the treaty itself.[29]

B. INTERPRETATION OF THE TEXT OF CONVENTION 87 UNDER THE PRIMARY RULE REFLECTED IN ARTICLE 31 OF THE VIENNA CONVENTION

25. In accordance with the customary international law principles of treaty interpretation outlined above, the terms of Convention 87 are to be given their

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[24] International Law Commission, 'Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, with commentaries' in *Report of the International Law Commission on the work of its seventieth session,* UN GAOR, A/73/10 (2018) p. 32, para. 18 ('*ILC Draft Conclusions on subsequent agreements and practice*').

[25] Ibid p. 5, para. 4.

[26] *Vienna Convention* (n 21) Article 32. See generally *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1995*, p. 21, para. 40; *Territorial Dispute (Libyan Arab Jamahiriya v. Chad)* (n 22) pp. 27-28, paras. 55-56; *Sovereignty over Pulau Ligitan and Pulau Sipadan* (n 23) pp. 476-477, paras. 53-58; *Arbitral Award of 3 October 1899 (Guyana v. Venezuela), Jurisdiction of the Court, Judgment, I.C.J. Reports 2020*, pp. 476-477, paras. 76-78; *Competence of the General Assembly for the Admission of a State to the United Nations, Advisory Opinion, I.C.J. Reports 1950*, p. 8; *Arbitral Award of 31 July 1989, Judgment, I.C.J. Reports 1991*, p. 69, para. 48.

[27] *ILC Draft Conclusions on subsequent agreements and practice* (n 24) p. 20, para. 9.

[28] Ibid pp. 36-37, para. 35.

[29] Ibid pp. 20-21, paras. 9-10. See also Laurence Boisson de Chazournes, 'Subsequent practice, practices, and 'family resemblance': towards embedding subsequent practice in its operative milieu', in Georg Nolte (ed), *Treaties and Subsequent Practice* (Oxford University Press, 2013) pp. 59-62; *Kasikili/Sedudu Island* (n 22) p. 1096, para. 80.

ordinary meaning in their context, and in light of the Convention's object and purpose.[30] Applying these principles, Australia submits that Article 3(1) of Convention 87 protects the right to strike.

1. The ordinary meaning of Article 3(1) of Convention 87

26. Article 3(1) of Convention 87 relevantly provides that workers' and employers' organisations shall have the right 'to organise their administration and activities and to formulate their programmes'.

27. The term 'organisation' is defined in Article 10 of the Convention as 'any organisation of workers or of employers for furthering and defending the interests of workers or of employers'.[31] This definition encompasses trade unions.

28. The term 'activities' is broad. The Oxford English Dictionary defines an activity as 'something which a person…or group chooses to do...'.[32] It defines a 'strike' as a 'concerted cessation of work on the part of a body of workers, for the purpose of obtaining some concession from the employer or employers'.[33] On that meaning, strikes fall within the scope of the term 'activities'.[34] They are a manifestation of the right of individuals to freely associate through organisations in pursuance of shared interests or objectives at work, and an

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[30] *Vienna Convention* (n 21) Article 31(1).

[31] *Vienna Convention* (n 21) Article 31(4).

[32] *Oxford English Dictionary* 'activity' (def 3.a) <https://www.oed.com/dictionary/activity_n?tab=meaning_and_use#19604332>.

[33] *Oxford English Dictionary* 'strike' (def 9.a) <https://www.oed.com/dictionary/strike_n1?tab=meaning_and_use#20188362>.

[34] See also *United States v White* 322 US 694 (1944) pp.701-702; *Winnett v Seamarks Bros Ltd* [1978] ICR 1240, pp. 1245-1246 (Employment Appeal Tribunal); *British Airways Engine Overhaul Ltd v Francis* [1981] ICR 278, p. 282. For completeness, we note that in Australian law the *Fair Work Act 2009* (Cth) relevantly provides that a person 'engages in industrial activit[ies]' if the person 'takes part in industrial action'. See *Fair Work Act 2009* (Cth) Section 347(f) <https://www.legislation.gov.au/C2009A00028/latest/text> ('*Fair Work Act*').

important means of pursuing the objective of the protection of freedom of association.[35]

29. The term 'programmes' is also of broad ambit. It is defined as 'a planned series of activities or events; an itinerary'.[36] In light of the definition of 'organisation' in Article 10, any plan or 'programme' of action for an organisation will include planned activities which further and defend the interests of the organisation's members. Strike activity will, in some circumstances, be considered by workers' organisations to be a necessary programme of activity to advance the interests of workers, especially in the context of collective bargaining on pay and conditions.

30. Article 3(1) of Convention 87 does not limit the scope of activities and programmes that it protects. In Australia's submission, the ordinary meaning of Article 3(1) as a whole, and in particular the ordinary meaning of the terms 'activities' and 'programmes', interpreted in good faith, capture strike action which furthers or defends the interests of workers and their organisations.[37] It follows that such strike action is protected by Article 3(1) of Convention 87.

31. This does not mean that the rights protected by Article 3(1), including the right to strike, are unqualified or absolute. To the contrary, certain restrictions may be placed on the exercise of the rights contained in Article 3(1), as is expressly contemplated by the Convention and as addressed further in **Subsection 3(b)** below.[38]

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[35] See, eg, *Saskatchewan Federation of Labour v Saskatchewan* [2015] 1 SCR 245 (Supreme Court of Canada, Abella J) p. 289, para. 74 (ILO Dossier Document No. 342) ('*Saskatchewan*'); *Affaire Enerjì Yapi-Yol Sen v Turquie* (European Court of Human Rights, Chamber, Application No 28959/01, 21 April 2009) para. 24 (ILO Dossier Document No. 318) ('*Affaire Enerjì Yapi-Yol Sen v Turquie*').

[36] *Oxford English Dictionary* 'Programme' (def 4) <https://www.oed.com/dictionary/programme_n?tab=meaning_and_use#28123809>.

[37] See, eg, *Right to Freedom of Association Right to Collective Bargaining and Right to Strike, and their Relation to Other Rights, with a Gender Perspective (Advisory Opinion)* (Inter-American Court of Human Rights, OC-27/21, 5 May 2021) para. 96 (ILO Dossier Document No. 323) ('*IACHR Advisory Opinion on Freedom of Association*').

[38] See *Convention 87* (n 1) Articles 3(2), 8(1) and 9.

2. The object and purpose of Convention 87

32. The use of the term 'freedom of association' in the title of Convention 87, in the preamble, and in the title of Part I, signals that the object of the Convention is to protect workers' and employers' freedom of association. That is made express in the Convention's preamble, which refers to provisions of the ILO Constitution declaring the protection of the freedom of association to be one of the fundamental purposes of the ILO.[39]

33. At its core, 'freedom of association' protects the freedom of individuals to form associations with others in pursuance of a shared interest, or for a shared purpose or activity.[40] It is important to note, however, that the purpose of the Convention is not to protect freedom of association generally. Rather, the specific purpose of the Convention is to provide for the protection of freedom of association at work.[41]

34. The ordinary meaning of the terms of Convention 87 must be interpreted in the light of its object and purpose. The object and purpose of Convention 87 – to

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[39] The Preamble to *Convention 87* (n 1) refers to the Preamble to the *ILO Constitution* (n 4) which declares that recognition of the principle of freedom of association is required to ensure 'peace and harmony of the world.' The Preamble of the *ILO Constitution* was derived from the Preamble to Part XIII of the *Treaty of Versailles* (n 3), being the founding document of the ILO. As such, the protection of 'freedom of association' was an objective of the ILO from the time of its inception. Further, this object remains one of the primary purposes of the ILO, by virtue of the *Declaration of Philadelphia* (n 6) and also referred to in the Preamble to *Convention 87*. Article 1 of the *ILO Constitution* establishes the ILO for the 'promotion of the objects' in the Declaration of Philadelphia. The Declaration of Philadelphia 'reaffirms the fundamental principles on which the Organization is based' including that 'freedom of expression and of association are essential to sustained progress.' It is noteworthy that the Declaration of Philadelphia was adopted by the Conference of the ILO in 1944, and incorporated in the *ILO Constitution* by the Instrument of Amendment to the ILO Constitution 1946, approximately one year prior to the negotiation and adoption of *Convention 87*.

[40] See Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (N.P. Engel, 2nd rev ed, 2005) p. 498, para. 7; Sarah Joseph, Jenny Schultz and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (Oxford University Press, 3rd ed, 2013) p. 652, para. 19.13; *R v Skinner* [1990] 1 SCR 1235, p. 1249 (Supreme Court of Canada, Wilson J dissenting); Human Rights Committee, *Views concerning Communication 1274/2004*, 88th sess, UN Doc CCPR/C/88/D/1274/2004 (10 November 2006) p. 8, para. 7.2 <https://digitallibrary.un.org/record/589935?v=pdf> ('*Korneeko v Belarus*'); *IACHR Advisory Opinion on Freedom of Association* (n 37) para. 55.

[41] Australia notes that the Preamble to *Convention 87* (n 1) references the Preamble to the *ILO Constitution* (n 4) which declares 'recognition of the principle of freedom of association' to be a means of improving conditions of labour.

protect freedom of association at work – supports the conclusion that the right to strike is encompassed in the right of workers' and employers' organisations to 'organise … their activities and to formulate their programmes'.[42]

3. Context

35. In accordance with the rule set out in Article 31(1) and (2) of the Vienna Convention, Article 3(1) of Convention 87 is to be interpreted in its context, including the text of the Convention as a whole. In particular, the text of Convention 87 as a whole confirms that it is intended to protect freedom of association in the specific context of work and also that the right to strike is protected as part of the freedom of association. The context to Article 3(1) also makes it clear that the rights contained in Article 3(1), including the right to strike, are subject to some restrictions imposed by domestic legislation.

a. Article 3(1) is intended to protect freedom of association at work, including the right to strike

36. The conclusion that the Convention seeks to protect freedom of association at work is supported by both the text and structure of Convention 87.[43]

37. Articles 3 and 10 are situated in Part I of the Convention, entitled 'Freedom of Association'. Part I is primarily concerned with the rights and freedoms of workers' and employers' organisations.

38. Part II of the Convention is entitled 'Protection of the Right to Organise', which comprises Article 11 only. It requires State Parties to 'take all necessary and appropriate measures to ensure that workers and employers may exercise freely their right to organise'. By explicitly protecting the 'right to organise', Article 11 recognises the special significance that protection of the 'freedom of

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[42] *Convention 87* (n 1) Article 3(1).

[43] This is also confirmed by the French text of the Convention (the English and French texts being equally authoritative, see *Convention 87* (n 1), Article 21), in which the title of Part I is '*La Liberté Syndicale*' rather than '*la liberté d'association*'.

association' has at work.[44] Protecting the right of workers to organise is a necessary component of the effective exercise of the freedom of association, as joint action is the primary means for workers to pursue and defend their interests at work. That is because of the distinct imbalance of bargaining power between employers and individual workers. It follows that, in order to effectively pursue and defend their interests vis-à-vis employers, workers must be able to act collectively. In respect of key concerns, notably pay and conditions, workers should be able to advance their interests by seeking to engage in collective bargaining with employers.[45] As such, pursuit of better pay and conditions through collective bargaining falls squarely within the right to organise set out in Article 11 of Convention 87.[46] Without effective means to have their voices heard in the context of collective bargaining, the freedom of association would be rendered illusory for workers.[47]

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[44] The 'right to organise' contained in Article 11 has also been construed as forming an alternative basis for the protection of the right to strike in *Convention 87* (n 1). See, eg, International Labour Office, Truth, reconciliation and justice in Zimbabwe, Report of the Commission of Inquiry appointed under article 26 of the Constitution of the International Labour Organization to examine the observance by the Government of Zimbabwe of Conventions Nos 87 and 98, *Official Bulletin*, vol. XCIII, 2010, p. 156, para. 575 (ILO Dossier Document No. 280) ('*Report of Commission of Inquiry on Zimbabwe*'). Australia submits that it would be open to the Court to conclude that the 'right to organise' contained in Article 11 also includes the right to strike. However, as the protection of the right to strike falls squarely within the ordinary meaning of Article 3 of *Convention 87* (n 1) (see **Subsection 1** above), Australia submits it is unnecessary for the Court to locate an alternative basis for the right to strike.

[45] *Saskatchewan* (n 35) p. 282, para. 57.

[46] *National Union of Rail, Maritime and Transport Workers v United Kingdom* (2015) 60 EHRR 10, p. 219, para. 55, pp. 228-229, para. 85 (ILO Dossier Document No. 362) ('*NURMTW v UK*'); *Report of Commission of Inquiry on Zimbabwe* (n 44) p. 156, para. 575. Australia also notes that the *Right to Organise and Collective Bargaining Convention*, adopted 1 July 1949, 96 UNTS 257 (entered into force 18 July 1951) (ILO Dossier Document No. 156) ('*Convention 98*') relevantly addresses the relationship between the 'right to organise' and the principle of collective bargaining. There are 168 State Parties to *Convention 98*, including all of the State Parties to *Convention 87* (n 1), save for Myanmar. See International Labour Organization, *Ratifications of C098 - Right to Organise and Collective Bargaining Convention, 1949 (No. 98)* (Web Page) <https://normlex.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO::p11300_instrument_id:312243> and International Labour Organization, *Ratifications of C087 - Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87)* (Web Page) <https://normlex.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO:11300:P11300_INSTRUMENT_ID:312232:NO>.

[47] *Association of Civil Servants and Union for Collective Bargaining* (2023) 76 EHRR 4, p. 70, para. 56 ('*Collective Bargaining v Germany*'); *Demir v Turkey* (2009) 48 EHRR 54, pp. 1307-1308, para. 144 (ILO Dossier Document No. 317); *Association of Academics v Iceland* (2018) 67 EHRR SE4, p. 98, para. 23; *Norwegian Confederation of Trade Unions (LO) v Norway* (2021) 73 EHRR 16, p. 659, para. 94; *Humpert v Germany* (European Court of Human Rights, Grand Chamber, Application Nos

b. Context indicates that the right to strike may be regulated

39. The context of Article 3(1) also indicates that the rights it protects, including the right to strike, are not absolute.

40. Article 8(1) of Convention 87 requires workers, employers and their respective organisations, in exercising the rights provided for in the Convention, to 'respect the law of the land'. It necessarily follows that rights protected by Convention 87 (including the right to strike) are not absolute and may be regulated by domestic law.[48] However, Article 8(2) states that the 'law of the land shall not be such as to impair, nor shall it be so applied as to impair, the guarantees provided for in this Convention'.

41. The meaning of 'impair' in this context is necessarily informed by the purpose of the guarantee in question. Given that the rationale for protecting the right to strike is the promotion of effective collective bargaining, national laws should not be held to 'impair' that right if they are consistent with that rationale. Further, the term 'impair' cannot be interpreted so broadly as to prevent States from regulating the right at all: it cannot be assimilated with any limitation or qualification on the right. A qualitative evaluation is required. As contemplated by Article 8(1), the right to strike arising under Convention 87 is therefore properly understood as a right that must be exercised consistently with national laws, provided those laws do not substantially impair the ability of workers to pursue their interests through collective bargaining. [49] This conclusion is

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59433/18, 59477/18. 59481/18 *and* 59494/18, 14 December 2023) para. 104 ('*Humpert v Germany*'); *Affaire Enerjì Yapi-Yol Sen v Turquie* (n 35) para. 24; *Saskatchewan* (n 35) p. 263, para. 3, p. 282, para. 57; *IACHR Advisory Opinion on Freedom of Association* (n 37) para. 96.

[48] See also Articles 3(2), 8(2) and 9 of *Convention 87* (n 1).

[49] In assessing whether the 'freedom of association' contained in Article 2(d) of the *Canadian Charter of Rights and Freedoms* (which incorporates the right to strike) has been infringed, the Supreme Court of Canada has adopted a test of 'substantial interference' with the freedom: see *Saskatchewan* (n 35) p. 284, para. 61; *Société des casinos du Québec Inc. v Association des cadres de la Société des casinos du Québec* [2024] SCC 13, paras. 33, 36, 42; *Dunmore v Ontario* [2001] 3 SCR 1016, p. 1046 para. 23, p.1048, para. 25; *Health Services and Support – Facilities Subsector Bargaining Assn. v British Columbia* [2007] 2 SCR 391, pp. 443-444, paras. 90, 92. Further, on at least two occasions, the Supreme Court of Canada has equated the test of 'substantial interference' with a test of 'substantial impairment': see *Mounted Police Association of Ontario v Canada (Attorney-General)* [2015] 1 SCR 3, pp. 50-51 para. 76; *Meredith v Canada* [2015] 1 SCR 125, pp.142-143, para. 24. See also *Humpert v Germany* (n 47), para. 128.

consistent with the fact that almost all States place restrictions on the right to strike.

4. Subsequent agreements and practice under Article 31(3)(a) and (b)

42. As noted in **Section A** above, in accordance with the rules set out in Article 31(3)(a) and (b) of the Vienna Convention, subsequent agreements and practice may be taken into account in interpreting Convention 87.

43. There may be a question as to whether resolutions or recommendations of international organisations constitute subsequent agreements for the purposes of the rule set out in Article 31(3)(a) or, alternatively, subsequent practice for the purposes of the rule set out in Article 31(3)(b). However, under either rule, and on whichever basis is considered correct, this material is relevant to the interpretation of the treaty, and is to be taken into account together with the context.[50]

44. In 1951, the Conference adopted a Recommendation concerning Voluntary Conciliation and Arbitration (176 votes for, 0 against and 2 abstentions) recognising the right to strike.[51] On 25 June 1970, the Conference adopted, without opposition, a Resolution Concerning Trade Union Rights and Their Relation to Civil Liberties. That Resolution referred to Conventions 87 and 98

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[50] In *Whaling in the Antarctic (Australia v. Japan: New Zealand Intervening), Judgment, I.C.J. Reports 2014*, p. 257, para. 83 (*'Whaling in the Antarctic'*), the ICJ inferred that resolutions adopted by the International Whaling Commission with the support of all Parties could be either subsequent agreement or subsequent practice for the purposes of *Vienna Convention* (n 21) Articles 31(3)(a) and (b) respectively. The *ILC Draft Conclusions on subsequent agreements and practice* (n 24) at p. 29, para. 7, note that the distinction between subsequent agreement and subsequent practice 'is not always clear and the jurisprudence of international courts and other adjudicative bodies shows a reluctance to assert it.' It refers to *Sovereignty over Pulau Ligitan and Pulau Sipadan* (n 23) p. 656, para. 61, stating that the ICJ 'left open the question whether the use of a particular map could constitute a subsequent agreement or subsequent practice'.

[51] International Labour Conference, 34th Session, 1951, Record of Proceedings, pp. 451, 666 <https://www.ilo.org/public/libdoc/ilo/P/09616/09616%281951-34%29.pdf>. See para. 7 of the Recommendation. ILO Recommendations are recognised in the ILO Constitution as instruments which must be communicated to members 'for their consideration with a view to effect being given to [them] by national legislation or otherwise', with follow up action to be notified to the ILO. See *ILO Constitution* (n 4), Article 19(6).

and the rights that flowed from them, including the right to strike.[52] In 1972, the Conference adopted a Resolution (with 211 votes in favour, 0 against and 84 abstentions) which recognised the 'right to strike' as a trade union right that was recognised under Convention 87.[53]

45. In view of the fact that these resolutions were adopted without opposition, they are relevant to the interpretation of Convention 87 under the rules reflected in Article 31(3)(a) and/or (b) of the Vienna Convention.[54] They explicitly confirm that Convention 87 protects the right to strike.

5. Conclusions on the ordinary meaning of Convention 87

46. Applying the customary international law principles of interpretation reflected in Article 31 of the Vienna Convention, the right to strike falls within the scope of the activities protected by Convention 87. Specifically, such activities are within the rights protected by Article 3(1). That conclusion follows from the ordinary meaning of the terms of Convention 87, read in the context of the whole of the Convention, and in the light of its object and purpose. It is also confirmed by the subsequent resolutions of the Conference, which may be taken into account either as subsequent agreements under the rule reflected in

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[52] International Labour Conference, 54th Session, 1970, Resolution concerning Trade Union Rights and Their Relation to Civil Liberties pp. 6-9 (ILO Dossier Document No. 136).

[53] International Labour Conference, 57th Session, 1972, Resolution concerning the Policy of Colonial Oppression, Racial Discrimination and Violation of Trade Union Rights Pursued by Portugal in Angola, Mozambique and Guinea (Bissau) (ILO Dossier Document No. 137). The Preamble notes 'that in the areas of Angola, Mozambique and Guinea (Bissau) still under its rule the Government of Portugal is applying Portuguese trade union legislation which is in open and flagrant contradiction with the letter and spirit of ILO standards, in particular the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98)' and that the workers there are 'denied basic trade union rights including ... the right to strike'. Some governments abstained as the Resolution in their view canvassed issues of a political nature (New Zealand, Australia, Türkiye and Canada): see International Labour Conference, 57th Session, Record of Proceedings, p. 634, para. 40 (Canada), para. 41 (Australia), para. 42 (Türkiye), para. 43 (New Zealand) <https://www.ilo.org/public/libdoc/ilo/P/09616/09616%281972-57%29.pdf>.

[54] *ILC Draft Conclusions on subsequent agreements and practice* (n 24) pp. 82, para 97-98, paras. 17-18. See also *Competence of the International Labour Organization to regulate, incidentally, the personal work of the employer, Advisory Opinion, 1926 P.C.I.J. (ser B) No. 13,* pp. 19-20; *Whaling in the Antarctic* (n 50) p. 248, para. 46.

Article 31(3)(a) of the Vienna Convention, or subsequent practice under the rule reflected in Article 31(3)(b) of the Vienna Convention.

47. However, the right to strike that is protected by Convention 87 is not unlimited. A State can, through its domestic law, regulate and thereby limit the right to strike provided that the ability of workers to pursue their interests through collective bargaining is not substantially impaired. [55] In practice, States, including State Parties to Convention 87, have subjected the right to strike to wide ranging restrictions that cover a broad range of matters (as is discussed at paragraph 53 below).

C. SUPPLEMENTARY MEANS OF INTERPRETATION

48. As explained in **Section A** above, in accordance with the rule reflected in Article 32 of the Vienna Convention, recourse may be had to supplementary means of interpretation to confirm the meaning resulting from the application of the rule reflected in Article 31 of the Vienna Convention. These include the preparatory work of the treaty and the subsequent practice of one or more State Parties to the treaty.

49. There are five categories of relevant material that Australia considers assists in the interpretation of Convention 87, in accordance with the above rule. These are:

(a) The practice of State Parties to Convention 87 incorporating the right to strike in their domestic law. Commonly that is done in a way that recognises that the right to strike is subject to regulation. The diverse ways in which the right is limited are addressed below (see **Subsection 1**).

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[55] For completeness, Australia notes that Article 9 provides that 'the extent to which the guarantees provided for in this Convention shall apply to the armed forces and the police shall be determined by national laws or regulations.' It is therefore uncontroversial that national laws and regulations may entirely limit the right to strike in respect of members of armed forces and the police. Further, it should be noted that it is clear from the *travaux préparatoires*, that the Convention was not intended to regulate the right to strike of public service workers. See **Section C, Subsection 5(a)** below.

(b) Statements of State Parties to Convention 87, either made by their authorised representatives or by their organs, supporting the conclusion that Convention 87 protects the right to strike (see **Subsection 2**).

(c) Other relevant treaties, namely the *International Covenant on Economic, Social and Cultural Rights* ('**ICESCR**') [56] and the *International Covenant on Civil and Political Rights* ('**ICCPR**'),[57] which protect the right to strike, and also explicitly refer to Convention 87. There is high (although not complete) congruence between the State Parties to those treaties and State Parties to Convention 87 (see **Subsection 3**).

(d) The findings and views expressed by ILO supervisory bodies and Commissions of Inquiry indicating their view that Convention 87 protects the right to strike (see **Subsection 4**).

(e) The negotiating history of Convention 87 and the circumstances of its conclusion, which also confirm the interpretation of Convention 87 that results from the application of the primary rule, i.e. that Convention 87 protects the right to strike (see **Subsection 5**).

1. State practice incorporating the right to strike in domestic law

50. In its 2012 General Survey, the International Labour Office stated that:

> Although the exercise of the right to strike is in most countries fairly commonly subject to certain conditions or restrictions, the principle of this right as a means of action of workers' organisations is almost universally accepted. In a very large number of countries, the right to strike is now explicitly recognized, including at the constitutional level.[58]

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[56] *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) (ILO Dossier Document No. 284).

[57] *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976 for all provisions except those of Article 41; 28 March 1979 for the provisions of Article 41 (Human Rights Committee)) (ILO Dossier Document No. 285).

[58] International Labour Conference, 101st Session, 2012, Report III (Part 1B), *Giving globalization a human face*, General Survey on the fundamental Conventions concerning rights at work in light of

51. The most recent comprehensive analysis[59] of the practice of States in relation to the right to strike, including conditions and restrictions placed on the right to strike, is found in the background document prepared by the International Labour Office for the ILO's 2015 Tripartite Meeting on Convention 87 ('**Background Document for the 2015 ILO Tripartite Meeting**'). [60] Appendix I to that Background Document surveyed the constitutional and legislative provisions of 185 States, including all 158 State Parties to Convention 87.[61] It noted that:

(a) 'At least 97 ILO member States have an explicit protection of strike action in their national Constitutions, leaving it to their legislator to regulate its exercise in practice';[62]

(b) 'In other countries, the guarantee of a constitutional right to strike has been recognised by the courts based on the rights of organization, association and collective bargaining';[63] and

(c) 'More than 150 countries have included regulation of the modalities of strike action in their general legislation. However, the absence of explicit recognition of strike action in the legislation does not mean that strikes cannot be exercised in practice'.[64]

52. More recently, in their 2020 book *The Right to Strike in International Law*, Vogt et al included a list of 97 States (93 of which are State Parties to Convention 87) that incorporate the right to strike in their constitutions, and stated that 'in

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the ILO Declaration on Social Justice for a Fair Globalization, 2008, p. 50, para. 123 (ILO Dossier Document No. 236) ('*ILO 2012 General Survey - Giving globalization a human face*').

[59] There are a number of other sources that set out State practice in regulating the right to strike under their domestic laws. See, eg, Bernd Waas (ed), *The Right to Strike: A Comparative View* (Kluwer Law International, 2014); European Public Service Union, *The right to strike – country fact sheets* (Web Page, 2020-2021) <https://www.epsu.org/article/right-strike-country-factsheets>.

[60] International Labour Office, Governing Body, GB.323/INS/5/Appendix III, The Standards Initiative, Background document for the Tripartite Meeting on the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), in relation to the right to strike and the modalities and practices of strike action at national level (revised) (Geneva, 23–25 February 2015), March 2015 (ILO Dossier Document No. 108) ('*Background Document for the 2015 ILO Tripartite Meeting*').

[61] Ibid Appendix I.

[62] Ibid p. 21, para. 61.

[63] Ibid p. 22, para. 62.

[64] Ibid p. 22, para. 63.

practically every country in the world, with or without a constitutional provision, the right to strike is nevertheless recognised in legislation'.[65]

53. These materials demonstrate that the existence of the right to strike is confirmed by the practice of State Parties to Convention 87, which have incorporated and regulated that right in their domestic law. They also reveal that the legislation of most States imposes restrictions on that right. The Background Document for the 2015 ILO Tripartite Meeting reveals a great deal of variation as to those restrictions. They include regulations concerning strikes by workers in the public sector and essential services; restrictions on strikes during the term of a collective agreement; exhaustion of prior procedures such as mediation; advance notice of a strike and cooling off periods; strike ballot requirements; and compulsory arbitration.

54. State practice therefore supports the conclusion that the right to strike under Convention 87 may be regulated and restricted by domestic law. Consistently with that conclusion, the Canadian Supreme Court in *Saskatchewan* cited with approval an earlier statement by Dickson CJ to the effect that the right to strike could be regulated, but it could not be absolutely abrogated.[66]

55. Australia is amongst the State Parties to Convention 87 (and the ICCPR and ICESCR) that protect and regulate the right to strike via legislation. Australian legislation at the federal and state level incorporates and regulates the right to strike.[67]

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[65] Jeffrey Vogt et al, *The right to strike in international law* (Hart Publishing, Oxford, 2020), p. 170 and Annex III.

[66] *Saskatchewan* (n 35) p. 285, para. 65, citing *Re Alberta Reference* [1987] 1 SCR 313, 351 (Dickson CJ).

[67] See, eg, *Fair Work Act* (n 34) Part 3-3.

2. Statements of States and their organs confirming that the right to strike is protected under Convention 87

56. A number of State Parties have individually or collectively made public statements supporting the existence of the right to strike under Convention 87. For example:

(a) At the 101st Conference (2012), Norway noted that their country 'fully accepted' the Committee of Experts on the Application of Conventions and Recommendations' ('**CEACR**') interpretation that the right to strike was protected under Convention 87;[68]

(b) During the negotiations of the ICESCR, Chile expressed the view that Convention 87 protected the right to strike, and that the protections in the ICESCR should not derogate from Convention 87;[69]

(c) At the 349th *bis* (Special) Session of the Governing Body of the ILO, Argentina stated that 'there was no doubt that such an important right as the right to strike was covered in Convention 87';[70] and

(d) Statements to similar effect have been made by Venezuela (on behalf of (GRULAC),[71] Germany,[72] France,[73] Italy[74] and Panama.[75]

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[68] International Labour Conference, 101st Session, 2012, Report of the Committee on the Application of Standards, para. 90 (ILO Dossier Document No. 268).

[69] Economic and Social Council, Commission on Human Rights, *Summary Record of the 299th meeting*, 8th sess, 299th meeting, UN Doc E/CN.4/SR.299 (2 June 1952) pp. 10-11. <https://digitallibrary.un.org/record/1477784?ln=en&v=pdf>.

[70] *ILO GB, 349th bis (Special) Session, Minutes* (n 2) para. 87.

[71] International Labour Office, Governing Body, GB.323/INS/5/Appendix II, The Standards Initiative – Appendix II, Final Report of the Tripartite Meeting on the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), in relation to the right to strike and the modalities and practices of strike action at national level (Geneva, 23–25 February 2015), 13 March 2015, pp. 3-4, para. 11 (ILO Dossier Document No. 107) ('*Final Report of the 2015 ILO Tripartite Meeting*').

[72] Ibid pp. 5-6, para. 17.

[73] Ibid p. 6, para. 18.

[74] Ibid pp. 6-7, para. 23.

[75] Ibid p. 7, para. 25.

57. On the other hand, Belarus and Bangladesh have expressed the view that Convention 87 does not include the right to strike.[76]

58. Australia has long accepted that Convention 87 includes a right to strike. That is evidenced by the fact that, in reliance on 'Australia's international obligation to provide for a right to strike', the Australian Parliament in 1993 made amendments to the *Industrial Relations Act 1988* (Cth) to regulate and protect the right to strike.[77] Parliament identified the source of Australia's international obligations with respect to the right to strike as including Convention 87.[78] Further, in defending a challenge to the validity of the relevant amendments in the High Court of Australia, counsel for the Australian Government (Mr Henry Burmester) expressly relied in part on Convention 87, stating that it 'is not necessary for the right to strike to be set out expressly in the Conventions. Protection of that right is a reasonably apprehended obligation arising from particular protections concerning the rights to freedom of association and to organise and to collectively bargain'.[79] The High Court did not need to decide whether Convention 87 protects the right to strike, as it found that Australia's obligations under Article 8 of the ICESCR were sufficient to enliven a constitutional power to support laws concerning the right to strike. [80] Nevertheless, Parliament's reliance on Convention 87 confirms that Australia has acted on the basis that it protects the right to strike for over 30 years.

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[76] For Bangladesh see *ILO GB, 349th bis (Special) Session, Minutes* (n 2) pp. 13-14, para. 48. For Belarus, see Report of the Commission of Inquiry appointed under article 26 of the Constitution to examine the complaint on the observance by the Government of the Republic of Belarus of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) and the Right to Organise and Collective Bargaining Convention, July 2004, para. 329 <https://webapps.ilo.org/public/english/standards/relm/gb/docs/gb291/pdf/ci-belarus.pdf>.

[77] Section 170PA was inserted into the *Industrial Relations Act 1988* (Cth) by the *Industrial Relations Reform Act 1993* (Cth) <https://www.legislation.gov.au/C2004A04653/asmade/text>.

[78] *Industrial Relations Act 1988* (Cth) section 170PA(b).

[79] *Victoria v Commonwealth* (1996) 187 CLR 416 at 467 ('*Industrial Relations Act Case*').

[80] Ibid p. 545.

59. Reflecting similar reasoning to that of the Australian Government, the Supreme Court of Canada has also accepted that Convention 87 protects the right to strike. Thus, in *Saskatchewan*, the Supreme Court noted:

> Although *Convention No. 87* does not explicitly refer to the right to strike, the ILO supervisory bodies, including the Committee on Freedom of Association and the Committee of Experts on the Application of Conventions and Recommendations, have recognized the right to strike as an indissociable corollary of the right of trade union association that is protected in that convention...[81]

That recognition formed part of the 'historical, international, and jurisprudential landscape' which led the Supreme Court to conclude that 'a meaningful process of collective bargaining requires the ability of employees to participate in the collective withdrawal of services for the purpose of pursuing the terms and conditions of their employment through a collective agreement'.[82]

3. Other relevant treaties

60. As outlined above in paragraph 24 of this statement, recourse can be had to the subsequent practice of one or more State Parties to a Convention as 'supplementary means' in order to confirm an interpretation resulting from the application of Article 31 of the Vienna Convention.[83]

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[81] *Saskatchewan* (n 35) p. 286, para. 67.

[82] Ibid pp. 289-90, para. 75.

[83] 'Supplementary means' include the subsequent practice of one or more State Parties: see *ILC Draft Conclusions on subsequent agreements and practice* (n 24) Conclusion 2, pp. 20-21, para. 4. Australia submits that this includes the subsequent practice of one or more State Parties of *Convention 87* (n 1) negotiating and agreeing to an explicit reference to *Convention 87* in the text of the *ICESCR* (n 56) and the *ICCPR* (n 57). Thus, as between States party to both *Convention 87* and the *ICESCR*, or both *Convention 87* and the *ICCPR* (or all three treaties), the *ICESCR* and/or the *ICCPR* would be a 'relevant rule applicable in the relations between' those States by virtue of Article 31(3)(c) of the *Vienna Convention*. Noting the almost, but not entirely, complete congruence of ratification of *Convention 87*, the *ICESCR* and the *ICCPR*, Australia refers to both human rights covenants as a supplementary means of interpretation in an Article 32 sense. A number of regional instruments also recognise a 'right to strike'. For example, the 'right to strike' is expressly provided for as a component of the 'trade union rights' protected by Article 8(1)(b) of the *Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights 1988*, opened for signature 17 November 1988, OAS Treaty Series No 69 (1988) (entered into force 16 November 1999) (ILO Dossier Document No. 290). Under Article 6(4) of the *European Social Charter (Revised)*, opened for signature 3 May 1996, ETS 163 (entered into force 1 July 1999) (ILO Dossier Document No. 287), and Article 28 the *Charter of Fundamental Rights of the European Union*,

61. The ICESCR and the ICCPR are relevant to the interpretation of Convention 87, including because both explicitly refer to it. Both the ICESCR and the ICCPR were adopted on 16 December 1966, well after the entry into force of Convention 87.[84] There are 147 States that are party to all three treaties. Of the 158 State Parties to Convention 87, 149 are also party to the ICESCR and 151 are also party to the ICCPR.[85] The fact that, subsequent to the conclusion of Convention 87, the vast majority of State Parties to that Convention have entered into two human rights covenants which protect the right to strike, and which expressly refer to Convention 87, reinforces the conclusion that Convention 87 itself protects the right to strike.

(European Union, 'Charter of Fundamental Rights of the European Union' *Official Journal of the European Union C83* (vol 53, p. 389) entered into force 1 December 2009) (ILO Dossier Document No. 288), the right to strike is expressly protected as an aspect of the right to engage in collective bargaining. The right to strike is also expressly protected by Article 45(c) of the *Charter of the Organization of American States*, opened for signature 30 April 1948 119 UNTS 3 (entered into force 13 December 1951). It is also noteworthy that Article 11 of the *European Convention on Human Rights* (ILO Dossier Document No. 286) protects the 'freedom of association', and this protection has been interpreted by the European Court of Human Rights as incorporating a 'right to strike': see, eg, *Affaire Enerjì Yapi-Yol Sen v Turquie* (n 35) para. 24. Similarly, the African Commission on Human and Peoples' Rights has interpreted the right contained in Article 15 of the *African Charter on Human and Peoples' Rights*, opened for signature 27 June 1981, 1520 UNTS 217 (entered into force 21 October 1986) (ILO Dossier Document No. 291), to include the 'right to strike,' being an aspect of the freedom of association, see: African Commission on Human and Peoples' Rights, Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights, 2010, para. 59 (ILO Dossier Document No. 292).

[84] *Convention 87* (n 1) entered into force on 4 July 1950.

[85] See Ratifications of C087 - Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), *International Labour Organization Ratification by conventions* (Web Page) <https://normlex.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312232>; International Covenant on Economic, Social and Cultural Rights, *United Nations Treaty Collection* (Web Page) <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&clang=_en>; International Covenant on Civil and Political Rights, *United Nations Treaty Collection* (Web Page) <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=_en>.

a. The International Covenant on Economic, Social and Cultural Rights (ICESCR)

62. The right to strike was referred to in some detail in the negotiation of the ICESCR which, unlike Convention 87 and the ICCPR, refers expressly to that right. Relevantly, Article 8 of the ICESCR provides:

> (1) The States Parties to the present Covenant undertake to ensure:
>
> (a) The right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests. No restrictions may be placed on the exercise of this right other than those prescribed by law and which 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;
>
> (b) The right of trade unions to establish national federations or confederations and the right of the latter to form or join international trade-union organizations;
>
> (c) The right of trade unions to function freely subject to no limitations other than those prescribed by law and which 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;
>
> (d) The right to strike, provided that it is exercised in conformity with the laws of the particular country.
>
> (2) This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces or of the police or of the administration of the State.
>
> (3) Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or apply the law in such a manner as would prejudice, the guarantees provided for in that Convention.

63. The text of Article 8(1)(d) and Article 8(3) of the ICESCR was negotiated and agreed in January 1957. It was proposed by Bolivia, Peru and Uruguay and discussed during those negotiations. Many States indicated their support for

Convention 87,[86] and the negotiators considered the obligations set out in Convention 87 to be directly relevant to the scope of rights set out in Article 8. In those circumstances, it is not surprising that, in interpreting Article 8(1)(d) of the ICESCR, the United Nations Committee on Economic, Social and Cultural Rights ('**CESCR**') has referred to the right to strike under Convention 87, and to materials published by ILO bodies such as the CEACR and the Committee on Freedom of Association ('**CFA**'),[87] and that it has urged State Parties to the ICESCR to ratify Convention 87.[88]

64. Convention 87 was a frequent topic of discussion in the negotiations concerning Article 8(1)(d) of the ICESCR.[89] That provision protects 'the right to strike,

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[86] See, eg, *Draft International Covenant on Human Rights*, UN GAOR, 3rd Comm, 11th sess, 723rd meeting, Agenda Item 31, UN Doc A/C.3/SR.723 (7 January 1957) p. 212, para. 13 (Pakistan) <https://digitallibrary.un.org/record/862935?ln=en&v=pdf>; Economic and Social Council, Commission on Human Rights, *Summary Record of the 225th meeting*, 7th sess, 225th meeting, UN Doc E/CN.4/SR.225 (21 June 1951), p. 28 (France) <https://documents.un.org/api/symbol/access?j=NL510974&t=pdf>; Economic and Social Council, Commission on Human Rights, *Summary Record of the 300th meeting*, 8th sess, 300th meeting, UN Doc E/CN.4/SR.300 (3 June 1952), p. 7 (Chile) < https://documents.un.org/api/symbol/access?j=N5206145&t=pdf>; *Draft International Covenant on Human Rights*, UN GAOR, 3rd Comm, 11th sess, 721st meeting, Agenda Item 31, UN Doc A/C.3/SR.721 (4 January 1957) p. 199, para. 4 (Greece), p. 200, para. 15 (Canada) <https://documents.un.org/api/symbol/access?j=NL302586&t=pdf>.

[87] See eg, Committee on Economic, Social and Cultural Rights, *Concluding observations of the Committee on Economic, Social and Cultural Rights: Malta*, 33rd sess, UN Doc E/C.12/1/Add.101 (14 December 2004) p. 4, para. 35 <https://www.undocs.org/en/E/C.12/1/Add.101>:

> The Committee encourages the State party to review the legislation on industrial labour disputes with a view to removing the compulsory arbitration procedure, in conformity with the observations made by the ILO Committee of Experts in 2002 concerning the Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87).

See also, Committee on Economic, Social and Cultural Rights, *Concluding observations on the third periodic report of Estonia*; 65th sess, UN Doc E/C.12/EST/CO/3 (27 March 2019), p. 5, paras. 26-27 ((ILO Dossier Document No. 312); Committee on Economic, Social and Cultural Rights, *Concluding observations of the Committee on Economic, Social and Cultural Rights: Mauritius*, 10th sess, UN Doc E/C.12/1994/8 (31 May 1994) pp. 4-5, para. 10; Joint statement by the Committee on Economic, Social, and Cultural Rights and the Human Rights Committee, E/C.12/66/5-CCPR/C/127/4 (2019) p. 1 (ILO Dossier No. 314) ('*CESCR/HRC Joint statement*'). For further discussion of the CEACR and the CFA, see **Subsection 4** below.

[88] See, eg, Committee on Economic, Social and Cultural Rights, *Committee on Economic, Social and Cultural Rights: report on the 36th and 37th sessions, 1-19 May 2006, 6-24 November 2006*, UN ESCOR 2007, UN Docs E/2007/22 and E/C.12/2006/1 (1-19 May 2006, 6-24 November 2006) p. 46, para. 304 <https://digitallibrary.un.org/record/611103?ln=en&v=pdf>: 'The Committee...also invites [Morocco] to expedite ratification of ILO Convention No. 87 (1948) concerning Freedom of Association and Protection of the Right to Organize.'

[89] See, eg, n 86 above.

provided that it is exercised in conformity with the laws of the particular country'. That limitation has a clear parallel with Article 8(1) of Convention 87. It may be contrasted with the limitations that are permitted on the rights that are referred to in Article 8(1)(a) and (c), which are permitted only where the limitation is *both* prescribed by law *and* 'necessary in a democratic society in the interests of national security or public order or for the protection of the rights or freedoms of others'. The contrast is obvious, was recognised by negotiators at the time,[90] and must therefore be taken to have been intentional.[91] The difference appears to reflect recognition that States require a wider margin of appreciation to limit the right to strike than is appropriate for other manifestations of freedom of association, not least because strike action (which by definition is collective action) will inevitably impact upon the rights of third parties, with the consequence that the proper balance between the interests of labour and the wider political, economic and security interests of society involves 'sensitive social and political issues'.[92]

65. Article 8(3) of the ICESCR expressly deals with the relationship between Convention 87 and Article 8 and makes clear that nothing in the ICESCR provides a justification for implementing legislative measures that would prejudice the 'guarantees provided for in [Convention 87]'. Consequently, where a State is party to both Convention 87 and the ICESCR, that State cannot

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[90] See, eg, *Draft International Covenant on Human Rights*, UN GAOR, 3rd Comm, 11th sess, 722nd meeting, UN Doc A/C.3/SR.722 (7 January 1957), p. 290, para. 33; *Draft International Covenant on Human Rights*, UN GAOR, 3rd Comm, 11th sess, 723rd meeting, UN Doc A/C.3/SR.723 (7 January 1957), p. 214, para. 32. See also *Draft International Covenant on Human Rights*, UN GAOR, 3rd Comm, 11th sess, 719th meeting, UN Doc A/C.3/SR.719 (3 January 1957), p. 193, para. 40 (Peru), stating of the right to strike that 'like other freedoms, it was not an absolute right and could be qualified by certain restrictions. It was quite natural that those limitations should be prescribed by national legislation'. Several other delegations referred to the right to strike as a 'last resort', which again implies a wide margin of discretion to regulate that right: see, eg, Economic and Social Council, Commission on Human Rights, *Summary record of the 299th meeting*, 8th sess, 295th meeting, UN Doc E/CN.4/SR.225 (21 June 1951), p. 7 (Uruguay), p. 12 (United States of America); Economic and Social Council, Commission on Human Rights, *Summary record of the 225th meeting*, 7th sess, 299th meeting, UN Doc E/CN.4/SR.299 (2 June 1952), p. 12 (India).

[91] See Matthew Craven, *The International Covenant on Economic, Social, and Cultural Rights: A Perspective on its Development* (OUP, 1995) pp. 258-259, stating that '[t]he limitation finally adopted in article 8(1)(d) was proposed as a compromise, and gave much away to those who opposed the inclusion of the provision'.

[92] See, eg, *NURMTW v UK* (n 46) para 86. See also Craven (n 91) pp. 257-258.

impose a restriction on the right to strike consistent with the ICESCR that would otherwise be in breach of the State's obligations under Convention 87.[93]

b. The International Covenant on Civil and Political Rights (ICCPR)

66. In contrast to the ICESCR, but in common with Convention 87, the ICCPR does not expressly refer to the right to strike. The negotiating history of the ICCPR and the ICESCR provides an explanation for this. The right to strike was discussed in 1951 in negotiations for the International Covenant on Human Rights and Measures of Implementation.[94] After a decision was taken to split the negotiations into two separate covenants, the ICESCR and the ICCPR, the right to strike was discussed in negotiations for the ICESCR. Thus, there is no express reference to the right to strike in the ICCPR, though Article 22 protects freedom of association, and Article 22(3) is identical to Article 8(3) of the ICESCR and to the same effect (i.e. it expressly gives primacy to Convention 87).

67. Some ten years after the entry into force of the ICCPR, the United Nations Human Rights Committee ('**HRC**') expressed the view that the right to strike was not protected by Article 22 of the ICCPR.[95] That view was strongly criticised in an Individual Opinion of four members of the Committee (notably including Rosalyn Higgins, later President of the ICJ), including on the basis that the CFA had held that a general prohibition on strikes was inconsistent with Convention 87.[96] The HRC subsequently reversed its position and recognised

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[93] The same would apply with respect to Article 22(3) of the *ICCPR* (n 57) for States which are party to *Convention 87* (n 1) and the *ICCPR*.

[94] Economic and Social Council, Commission on Human Rights, *Summary Record of the 225th meeting*, 7th sess, 225th meeting, UN Doc E/CN.4/SR.225, pp. 12-14, 17 and 21-28 < https://documents.un.org/api/symbol/access?j=NL510974&t=pdf> .

[95] Human Rights Committee, *Communication No. 118/1982, J.B et al. v. Canada (Decision of 18 July 1986 adopted at the twenty-eight session)*, 28th sess, UN Doc CCPR/C/28/D/118/1982 (18 July 1986) p. 159, para. 6.4 <https://juris.ohchr.org/casedetails/460/en-US>.

[96] Ibid p. 162, para. 7. The Individual Opinion stated in part:

> We are also aware that the ILO Committee on Freedom of Association, a body singularly well placed to pronounce authoritatively on such matters, has held that the general

the right to strike as an aspect of the right to freedom of association contained in Article 22 of the ICCPR in a number of Concluding Observations.[97] That reflects similar reasoning that supports the conclusion that protection of the right to strike is necessary to protect the right to freedom of association under Convention 87.

4. The findings and views expressed by ILO supervisory bodies and Commissions of Inquiry

68. The statements and practice of the ILO and its supervisory bodies over an extended period of time have confirmed that the right to strike is incorporated in Convention 87. These bodies include the CEACR, the CFA, the Fact-Finding and Conciliation Commissions on Freedom of Association and Commissions of Inquiry established under Article 26 of the ILO Constitution. Australia relies on the findings and views of these bodies on the same basis that the Court has referred to interpretations adopted by other independent bodies established to supervise the application of treaties in corroborating its own textual interpretation.[98] That is, the views of these bodies established by the ILO are a

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> prohibition of strikes for public employees contained in the Alberta Public Service Employees Relations Act was not in harmony with article 10 of the ILO Convention No. 87 "...since it constituted a considerable restriction on the opportunities open to trade unions to further and defend the interests of their members"... we cannot fail to notice that the ILO finding is based on the furtherance and defence of interests of trade union members; and article 22 also requires us to consider that the purpose of joining a trade-union is to protect one's interests. Again, we see no reason to interpret article 22 in a manner different from ILO when addressing a comparable consideration.

See also Nowak (n 40) p. 503, who suggests that the '*minority opinion* corresponds more to the wording, object, purpose and historical background of this provision [Article 22] than does the majority opinion.'

[97] Human Rights Committee, *Concluding observations on the sixth periodic report of the Dominican Republic*, 121st sess, UN Doc CCPR/C/DOM/CO/6 (27 November 2017) p. 7, para. 32 (ILO Dossier Document No. 304); Human Rights Committee, *Concluding observations on the 5th periodic report of Belarus*, 124th sess, UN Doc CCPR/C/BLR/CO/5 (22 November 2018) p. 12, para. 55(d) <https://digitallibrary.un.org/record/1653877?ln=en&v=pdf>; Human Rights Committee, *Concluding observations on the 4th periodic report of Estonia*, 125th sess, UN Doc CCPR/C/EST/CO/4 (18 April 2019) p. 7, para. 32 (ILO Dossier Document No. 305). In the latter case the Committee expressed the view: '[t]he State party [Estonia] should refrain from imposing any undue limitations on the right to strike and should ensure that the Collective Labour Dispute Resolution Act is in full conformity with article 22 of the Covenant.'

[98] *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Merits, Judgment, I.C.J. Reports 2010*, pp. 663-664, para. 66. Cf *Application of the International Convention on the*

relevant and persuasive source in confirming the existence of the right to strike under Convention 87. They might also be categorised as supplementary means of interpretation for the purposes of Article 32 of the Vienna Convention.[99] They are addressed here without prejudice to their specific categorisation.

69. State Parties to Convention 87 have recognised the role and expertise of the ILO committees in the interpretation of ILO Conventions. For example, in 2015, Norway (speaking on behalf of Denmark, Finland, Iceland, Norway and Sweden) stated that '[t]he right to strike could be derived from Convention No. 87', and '[t]he CEACR's interpretation of Convention No. 87 was in accordance with Article 31 of the Vienna Convention'.[100]

70. The views of these bodies have commonly been given weight by domestic and international courts. For example, in *Saskatchewan* (cited in paragraph 59 above), the Supreme Court of Canada noted:

> Though not strictly binding, the decisions of the Committee on Freedom of Association have considerable persuasive weight and have been favourably cited and widely adopted by courts, tribunals and other adjudicative boards around the world, including our Court ... The relevant and persuasive nature of the Committee on Freedom of Association jurisprudence has developed over time through custom and practice and, within the ILO, it has been the leading interpreter of the contours of the right to strike...[101]

71. To similar effect, the Inter-American Court of Human Rights noted that, in its interpretation of the *American Convention on Human Rights*,[102] it would take into account, among other things:

Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates), Preliminary Objections, Judgment, I.C.J. Reports 2021, p. 104, para. 101.

[99] *ILC Draft Conclusions on subsequent agreements and practice* (n 24) p. 115, para. 24, citing Osaka High Court, Judgment of 28 October 1994. As noted in footnote 653 of the ILC Draft Conclusions, 'The High Court of Osaka has explicitly stated: "One may consider that the 'general comments' and 'views'...should be relied upon as a supplementary means of interpretation of the ICCPR'.

[100] *Final Report of the 2015 ILO Tripartite Meeting* (n 71) pp. 4-5, para. 15.

[101] *Saskatchewan* (n 35) p. 287, para. 69.

[102] *American Convention on Human Rights,* opened for signature 22 November 1969 1144 UNTS 123 (entered into force 18 July 1978) (ILO Dossier Document No. 329).

> ...opinions and recommendations from the ILO Committee on Freedom of Association and Committee of Experts on the Application of Conventions and Recommendations, to develop a harmonious interpretation of international obligations established under these [international instruments of labour law].[103]

72. The mandate of each ILO supervisory body, together with an outline of its views concerning Convention 87 and the right to strike, are set out below. As noted by the International Labour Office, these supervisory bodies 'have invariably affirmed that the right to strike is intrinsically linked to the principle of freedom of association and is thus protected under Convention No. 87'.[104]

a. Committee of Experts on the Application of Conventions and Recommendations (CEACR)

73. The CEACR was established in 1926 by a resolution of the Conference.[105] It is comprised of 20 members who are independent experts. As the CEACR itself has noted:

> Although the Committee's mandate does not require it to give definitive interpretations of Conventions, it has to consider and express its views on the legal scope and meaning of certain provisions of these Conventions, where appropriate, in order to fulfil the mandate with which it has been entrusted of supervising the application of ratified Conventions.[106]

74. The CEACR first expressed a view concerning Convention 87 and the right to strike in 1959. It noted that a prohibition of strikes by workers 'may run counter

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[103] *IACHR Advisory Opinion on Freedom of Association* (n 37) para. 52. See also para. 98.

[104] International Labour Organization, Governing Body, GB.349bis/INS/1/1, Action to be taken on the request of the Workers' group and of 36 governments to urgently refer the dispute on the interpretation of Convention No. 87 in relation to the right to strike to the International Court of Justice for decision in accordance with article 37(1) of the Constitution – Office background report, September 2023, p. 24, para. 45 (ILO Dossier Document No. 29).

[105] International Labour Conference, 8th Session, 1926, Record of Proceedings, Appendix VII: Resolution concerning the methods by which the Conference can make use of the reports submitted under Article 408 of the Treaty of Versailles submitted by the committee on Article 408, p. 429 (ILO Dossier Document No. 73).

[106] International Labour Conference, 100th Session, 2011, Report III (Part 1A), Report of the Committee of Experts on the Application of Conventions and Recommendations, p. 9, para. 11 (ILO Dossier Document No. 101).

to Article 8, paragraph 2 of [Convention 87]'.[107] In 2012, the CEACR 'reaffirm[ed] that the right to strike derives from [Convention 87]'.[108]

75. Vogt et al summarise the position of the CEACR as follows:

> The Committee of Experts' position is thus that the terms of Convention 87 are broadly stated and encompass the right to strike, as well as other means of promoting and protecting the economic and social interests of workers. The right to strike is also derived from the very concept of freedom of association. The Committee also recognises that the right to bargain collectively is dependent on the right to strike.[109]

b. Committee on Freedom of Association (CFA)

76. The CFA was established in 1951 for the purpose of examining complaints about violations of the freedom of association. It is composed of an independent chairperson and six representatives each from the Government group, the Employers' group and the Workers' group. The CFA's mandate includes 'determining whether any given legislation or practice complies with the principles of freedom of association and collective bargaining laid down in the relevant Conventions'.[110]

77. The CFA was the first ILO supervisory body that recognised the right to strike as a union right, finding in 1952 that '[t]he right to strike and that of organising union meetings are essential elements of trade union rights'.[111] Since then, it has

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[107] International Labour Conference, 43rd Session, 1959, Report III (Part IV), *Information and Reports on the Application of Conventions and Recommendations*, Report of the Committee Experts on the Application of Conventions and Recommendations (Articles 19, 22 and 35), pp. 114-115, para. 68 <http://www.ilo.org/public/libdoc/ilo/P/09661/09661(1959-43).pdf>.

[108] *ILO 2012 General Survey - Giving globalization a human face* (n 58) p. 49, para. 119.

[109] Vogt (n 65) p. 59.

[110] International Labour Office, Compendium of rules applicable to the Governing Body of the International Labour Office, Annex II, Special procedures for the examination in the International Labour Organization of complaints alleging violations of freedom of association, para. 14 (ILO Dossier Document No. 90).

[111] International Labour Office, Sixth Report of the International Labour Organisation to the United Nations, Appendix V: Reports of the Governing Body Committee on Freedom of Association, Case No. 28, Complaint presented by the World Federation of Trade Unions against the Government of the United Kingdom (Jamaica), p. 210, para. 68 <https://www.ilo.org/public/libdoc/ilo/P/09618/09618(1952-6).pdf#page=216>.

stated on numerous occasions that '[t]he right to strike is an intrinsic corollary to the right to organize protected by Convention No. 87'.[112]

78. The CFA has also addressed the restrictions that may be placed on the right to strike. It has recognised that many limitations are acceptable. For example, and without being exhaustive, the CFA has expressed the view that:

(a) Strikes of a purely political nature do not fall within the protection of Convention 87;[113]

(b) An obligation to give reasonable prior notice to an employer before calling a strike is permissible;[114]

(c) Legal procedures for declaring a strike are permissible, but should not be so complicated as to make it practically impossible to declare a legal strike;[115]

(d) If strikes are prohibited while a collective agreement is in force, there must be impartial and rapid mechanisms for the examination of individual or collective complaints about the interpretation or application of collective agreements;[116]

(e) The solution to a legal conflict as a result of a difference in interpretation of a legal text should be left to the competent courts. The prohibition of strikes in such a situation does not constitute a breach of the right;[117]

(f) In cases of mandatory conciliation of collective disputes before a strike may be called, it is desirable to entrust the decision of opening the

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[112] International Labour Office, *Compilation of decisions of the Committee on Freedom of Association*, sixth edition, 2018, p. 143, para. 754 (ILO Dossier Document No. 282).

[113] Ibid p. 145, para. 761.

[114] Ibid p. 150, para. 799.

[115] Ibid p. 149, para. 790.

[116] Ibid p. 146, para. 768.

[117] Ibid p. 146, para. 767.

conciliation procedure to a body which is independent of the parties to the dispute;[118]

(g) Restrictions on the right to strike in certain sectors, to the extent necessary to comply with statutory safety requirements, are permissible;[119] and

(h) The principles of freedom of association do not protect abuses consisting of criminal acts while exercising the right to strike.[120]

79. The CFA has also addressed the restrictions that may *not* be placed on the right to strike (which may properly be analysed as restrictions that substantially impair the right to strike: see paragraph 41 above). They include:

(a) A requirement for a two-thirds majority vote of the total number of members of the union or branch concerned for the calling of a legal strike, non-compliance with which might entail a penalty by the administrative authorities, including the dissolution of the union;[121]

(b) Laws which treat virtually all industrial action as a breach of contract on the part of those participating in the action; make any trade union or trade union official who instigates such breaches of contract liable in damages for any losses incurred by the employer in consequence of their actions; or enable an employer faced with such action to obtain an injunction to prevent the commencement or continuation of the unlawful conduct;[122] and

(c) The dismissal or refused re-employment of workers on account of their having participated in a strike or other industrial action.[123]

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[118] Ibid p. 150, para. 796.

[119] Ibid p. 164, para. 864.

[120] Ibid p. 180, para. 965.

[121] Ibid p. 151, para. 805.

[122] Ibid p. 179, para. 960.

[123] Ibid p. 179, para. 959.

c. Article 26 Complaints and Commissions of Inquiry

80. Under Articles 26 to 34 of the ILO Constitution, a member State may file a complaint against another member State for not complying with a ratified Convention. Such complaints can be dealt with by a Commission of Inquiry composed of three independent members, who conduct a full investigation and may make recommendations on measures to be taken. The views of two Commissions of Inquiry that have addressed Convention 87 and the right to strike are set out below, both of which support the conclusion that the right to strike is protected by Convention 87.

81. In 1984, in a complaint concerning restrictive industrial legislation in Poland, the Commission of Inquiry stated:

> Convention No. 87 provides no specific guarantee concerning strikes. The supervisory bodies of the ILO, however, have always taken the view – which is shared by the Commission – that the right to strike constitutes one of the essential means that should be available to trade union organisations for, in accordance with Article 10 of the Convention, furthering and defending the interests of their members. An absolute prohibition of strikes thus constitutes, in the view of the Commission, a serious restriction on the right of trade unions to organise their activities (Article 3 of the Convention) and, moreover, is in conflict with Article 8, paragraph 2 under which 'the law of the land shall not be such as to impair, nor shall it be so applied as to impair, the guarantees provided for [by the Convention]'.[124]

82. In 1989, in a complaint concerning restrictive industrial legislation in Zimbabwe, a Commission of Inquiry chaired by Raymond Ranjeva (later Vice-President of the ICJ) stated: '[t]he Commission wishes to confirm that the right to strike is an intrinsic corollary of the right to organize protected by Convention No. 87'.[125]

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[124] Report of the Commission instituted under article 26 of the Constitution of the International Labour Organisation to examine the complaint on the observance by Poland of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98) presented by delegates at the 68th Session of the International Labour Conference, *Official Bulletin*, vol. LXVII, 1984, p. 127, para. 517 (ILO Dossier Document No. 277).

[125] *Report of Commission of Inquiry on Zimbabwe* (n 44) p. 156, para. 575.

d. Conclusion concerning the views of ILO Supervisory Bodies

83. The views expressed by ILO supervisory bodies confirm the interpretation of Convention 87 that results from the application of the rules reflected in Article 31 of the Vienna Convention. Specifically, they confirm that Convention 87 protects the right to strike, and that the right to strike may be subject to a wide variety of restrictions under domestic law.

5. The negotiating history of Convention 87 and the circumstances of its conclusion

84. That Convention 87 incorporates the right to strike is confirmed by recourse to both the Convention's *travaux préparatoires* and the circumstances of its conclusion,[126] which may also be taken into account under the rule reflected in Article 32 of the Vienna Convention.[127]

a. Travaux préparatoires to Convention 87

85. In 1948, the International Labour Office circulated a questionnaire to States to facilitate discussion on the adoption of an instrument on freedom of association at the 31st Session of the Conference.[128] It included the following question:

> (c) Do you consider that it would be desirable to provide that the recognition of the right of association of public officials by international regulation should in no way prejudge the question of the right of such officials to strike?[129]

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[126] *Vienna Convention* (n 21) Article 32.

[127] See, most recently, *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation), Judgment, I.C.J. Reports 2024,* p. 35, paras. 51-52; *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia), Judgment, I.C.J. Reports 2022*, p. 337, para. 184. This was also the approach taken by the Permanent Court of International Justice in interpreting the 1919 ILO Convention No. 4 in *Interpretation of the Convention of 1919 concerning Employment of Women during the Night P.C.I.J (1932) (ser A/B) No. 50*, p. 380.

[128] International Labour Conference, 31st Session, 1948, Questionnaire, Freedom of Association and Protection of the Right to Organise (ILO Dossier Document No. 157).

[129] Ibid p. 15.

86. The International Labour Office's analysis of States' responses to that questionnaire observed that:

> [m]ost countries ... implicitly recognise the right of association of public officials without prejudice to the question of the right to strike, which latter question, many countries point out, is not relevant to the present proposed Convention.[130]

87. The International Labour Office then concluded that several governments, whilst giving approval to the formula proposed in the questionnaire, 'have nevertheless emphasised...that the proposed Convention relates only to the freedom of association and not to the right to strike'.[131] However, that broad conclusion must be read in the context of the narrow question posed by the Labour Office, which concerned only the right of *public officials* to strike.

88. There is very little evidence that States considered the right to strike for any other category of worker to be beyond the scope of the Convention. Of the 31 States that responded to the questionnaire, 23 were in favour of the inclusion of a provision making clear that the right of association of public officials should in no way prejudge the right of such officials to strike.[132] A number of those responses emphasise the 'particular responsibility'[133] of public officials which places them in a 'unique position',[134] rendering it 'undesirable to extend' the

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[130] Ibid p. 67.

[131] Ibid p. 87.

[132] See responses: International Labour Conference, 31st Session, 1948, Report VII, Freedom of Association and Protection of the Right to Organise, p. 16 (Australia), p. 17 (Austria, Belgium, Bulgaria), p. 18 (Canada, Denmark, Ecuador, Finland), p. 19 (France, Hungary, India), p. 20 (Switzerland), pp. 22-23 (Union of South Africa), p. 23 (United Kingdom), p. 24 (United States of America) (ILO Dossier No. 158) ('*ILC 1948 Report VII*'); and International Labour Conference, 31st Session, 1948, Report VII (Supplement), Freedom of Association and Protection of the Right to Organise, p. 8 (Bolivia), p. 9 (Chile, Cuba), p. 10 (Greece, Iceland), p. 11 (Luxembourg), p. 12 (Pakistan, Poland) (ILO Dossier No. 159) ('*ILC 1948 Supplement to Report VII*').

Two States responded to the question in the negative – Mexico (see *ILC 1948 Report VII*, p. 19) and Egypt (see *ILC 1948 Supplement to Report VII*, p. 9).

Two States did not respond to the question at all – China (see *ILC 1948 Report VII*, p. 18) and New Zealand (see *ILC 1948 Supplement to Report VII*, p. 11).

[133] Austria: *ILC 1948 Report VII* (n 132) p. 17.

[134] Cuba: *ILC 1948 Supplement to Report VII* (n 132) p. 9.

right to strike to them.[135] At least one State's response also specifically recognised a general right to strike.[136] During the course of the 31st Conference, the only two States that referred to the right to strike did so in the course of emphasising that the Convention should either exclude, or at least not prejudge, a right to strike for public officials.[137]

89. The fact that the vast majority of States considered it was important to carve out public officials' right to strike from the proposed freedom of association protections, indicates that States likely considered those protections did protect the right to strike for other workers. The existence of the right to strike is inherent both in the question posed by the International Labour Office and in the majority of States' responses.[138] Had States considered that the right to strike for *all workers* was not within the scope of the Convention, nor an intrinsic part of freedom of association, then States could have been expected to reserve that issue in the same way they specifically sought to for public officials.

90. Australia recognises that three States' responses to the questionnaire call into question whether the right to strike is protected under Convention 87 in general.[139] However, these States were in a small minority, and there is no basis on which those views of a small minority can displace the interpretation of Convention 87 that results from its ordinary meaning, in accordance with the rule reflected in Article 31 of the Vienna Convention.[140]

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[135] Chile: Ibid, p. 9.

[136] France: *ILC 1948 Report VII* (n 132) p. 19.

[137] International Labour Conference, 1948, Record of Proceedings, Appendix X, Freedom of Association and Protection of the Right to Organise, p. 478 (India) (ILO Dossier Document No. 164); International Labour Conference, 31st Session, 1948, Record of Proceedings, First report of the Committee on Freedom of Association and Industrial Relations, p. 232 (Portugal) (ILO Dossier Document No. 161).

[138] Jeffrey Vogt, 'The Right to Strike and the International Labour Organisation (ILO)' (2016) 27(1) *King's Law Journal* p. 115.

[139] See *ILC 1948 Report VII* (n 132) pp. 19-20 (Netherlands), p. 20 (Sweden) and *ILC 1948 Supplement to Report VII* (n 132) pp. 11-12 (Norway).

[140] See **Chapter II Section B**.

b. Circumstances of conclusion – 'freedom of association' in ILO constitutional law and practice prior to 1948

91. Additionally, the broader circumstances of the conclusion of Convention 87 and, in particular, the development of the protection of freedom of association between the ILO's inception in 1919 and the negotiation of the Convention in 1948, further confirm that Convention 87 protects the right to strike.

92. Freedom of association has been a central objective of the ILO since its inception. As such, it was a principle that had been intensively studied by the Organization in the years preceding the adoption of Convention 87. A report commissioned by the Governing Body of the ILO in October 1923 entitled 'Freedom of Association and Trade Unionism: An Introductory Survey' made frequent references to 'strikes' and surveyed the circumstances in which restrictions on strikes were generally enforced. [141] Four years later, a comprehensive study on the question of 'freedom of association' undertaken by the International Labour Office described the 'intimate relationship' between the 'right to combine for trade purposes' and the 'right to strike', with any 'attack' on the latter described as an 'attack' on the former. [142] Further, it emphasised that the 'right to strike' was a necessary component of the 'right to combine' as strikes were one of the 'weapons *par excellence* of labour disputes'.[143]

93. These reports and studies provided numerous examples of national laws protecting the right to strike,[144] and demonstrated that State practice on strike action was varied at the time. They also confirm that strikes formed part of the

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[141] Jean Nicod, 'Freedom of Association and Trade Unionism: An Introductory Survey' (1924) 9(4) *International Labour Review* pp. 471, 474-8.

[142] International Labour Office, Studies and Reports, Series A (Industrial Relations) No. 28, *Freedom of Association: Volume I: A Comparative Analysis* (1927) p. 75 <https://www.ilo.org/public/libdoc/ilo/ILO-SR/ILO-SR_A28_engl_vol.1.pdf>.

[143] Ibid p. 96.

[144] Ibid pp. 76-79. Further to the national laws cited in this report, Australia also notes the subsequent recognition of the right to strike by Lord Wright of the House of Lords in *Crofter Hand Woven Harris Tweed Company v Veitch* [1942] AC 435, p. 463: '[t]he right of workmen to strike is an essential element in the principle of collective bargaining.'

ordinary activities of trade unions, and were directly relevant to protecting 'freedom of association' at work.[145] The circumstances outlined in the reports and studies provide further confirmation that the ordinary meaning of 'activities' and 'programmes' of workers' organisations in Article 3(1) of Convention 87 included strike activities, and support the conclusion that the right to strike is protected by Convention 87.

94. The manner in which Convention 87 was negotiated also provides an explanation for the absence of an express reference to the 'right to strike' in the text of the Convention. In drafting the Convention, the Conference opted to set down general principles relating to the freedom of association, rather than to regulate the minutiae of trade union activities.[146] The materials referred to above indicate that, at the time of the drafting of the Convention, it would have been obvious to its drafters that the 'right to strike' was directly related to, and a component of, the freedom of association, such that it did not require explicit mention in Convention 87.

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[145] For the relevance of the protection of 'freedom of association' as the primary object and purpose of Convention 87, see **Chapter II Section B**.

[146] See Janice R Bellace 'The ILO and the Right to Strike' (2014) 153(1) *International Labour Review* pp. 41-42.

III. CONCLUSION

95. Protection of the right to strike is an essential element of labour standards both nationally and internationally, with the promotion of those standards being a key objective of the ILO, and of Australia as a founding member of the ILO.

96. The right to strike of workers and their organisations is protected under Convention 87. Although the Convention does not expressly mention the right to strike, when interpreted in accordance with the applicable principles of treaty interpretation, Convention 87, and in particular Article 3(1), protects that right. That conclusion follows from the ordinary meaning of Article 3(1), interpreted in good faith, in its context and in the light of the Convention's object and purpose. Specifically, strike action falls within the 'activities' and 'programmes' of organisations furthering and defending the interests of workers, which are protected under Article 3(1). Further, the broader text of Convention 87, along with its object and purpose, make clear that the Convention aims to protect freedom of association at work. Without effective means for workers to have their voices heard through collective bargaining – including through the exercise of the right to strike – freedom of association would be rendered illusory.

97. Interpretation of Convention 87 in accordance with its ordinary meaning also indicates that the right to strike may be subject to regulation and restriction under domestic law. In practice, State Parties to Convention 87, including Australia, protect and regulate the right to strike in accordance with their domestic laws in diverse and varied ways.

98. This interpretation of Convention 87 is confirmed by resolutions and recommendations of the International Labour Conference, which explicitly confirm that State Parties consider Convention 87 protects the right to strike.

99. This interpretation of Convention 87 is further confirmed by supplementary means of interpretation, including:

(a) statements of State Parties supporting the interpretation of Convention 87 as protecting the right to strike;

(b) other treaties, notably the ICESCR and the ICCPR, both of which make express reference to Convention 87, and which are ratified by 172 and 174 States respectively;

(c) the findings of, and views expressed by, the ILO supervisory bodies and Commissions of Inquiry;

(d) the practice of State Parties to Convention 87 incorporating and regulating the right to strike in their domestic law; and

(e) the negotiating history and circumstances of conclusion of Convention 87.

100. Australia submits that the Court should answer the question before it in the affirmative – that is, the right to strike of workers and their organisations is protected under Convention 87.

Respectfully submitted on behalf of Australia,

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