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Global Perspectives on Freedom of Association: Australia

Nicholas Aroney and Mark Fowler

Societās Exploring the Value of Freedom of Association

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Freedom of Association in Australia

Nicholas Aroney[*] and Mark Fowler [*]

I. Introduction

Australia is an international outlier in relation to the legal protection of freedom of association. As one of the only countries in the world without a national bill of rights,[1] freedom of association is legally protected and regulated in Australia principally by the common law and by statute, and only in an elliptical way by the national constitution. Much depends on cultural norms and historical traditions that undergird respect for freedom of association in Australian social and political life. Despite the lack of explicit constitutional protection, Australian citizens exercise and enjoy a comparably very high level of freedom of association.[2] This raises questions about the importance of social, political and legal culture for the maintenance of human rights and the rule of law.[3]

In that context, this article begins by outlining how Australian common law affirms the right to free association as a background liberty, illustrating its application across several domains, including in relation to social and sporting clubs, trade unions and employers' associations, charities and religious organisations, advocacy groups and political parties. The article then discusses the interaction between the national constitution and freedom of association, explaining why the constitution does not contain an express right to freedom of association, while also exploring the limited potential of the express constitutional right to freedom of religion (s 116) and the implied freedom of political communication to provide a degree of protection for religious and political associative rights. Finally, the article summarises the limited statutory protections accorded to freedom of association through human rights charters enacted in three subnational jurisdictions in Australia, juxtaposing these against national and

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[1] Nicholas Aroney and James Stellios, 'Rights in the Australian Federation' (2018) 20(2-3) European Journal of Law Reform 259.
[2] World Justice Project, *Rule of Law Index 2022* (2022) 45.
[3] See, eg, Martin Krygier, 'The Rule of Law: Legality, Teleology, Sociology' in Gianluigi Palombella and Neil Walker (eds), *Relocating the Rule of Law* (2009).

state laws that regulate and constrain associational rights, particularly in the fields of electoral law, not-for-profit associations and charity law, employment relations, anti-terrorism laws and laws directed against organised crime and anti-discrimination law. To illustrate the important role of the common law and constitutional protection for associational freedom within Australia, three case studies are specifically addressed. These focus on the regulatory powers of the Commissioner of the Australian Charities and Not-for-profits Commission at a federal level, the associations regulators at a state and territory level and on the limitations imposed upon advocacy by Australian charities.

It is argued that Australia enjoys a comparably high level of freedom of association largely due to prevailing cultural beliefs and social practices in the country, supported by the common law's traditional respect for freedom of association and a democratic system of open political contestation which enables civil society organisations to mobilise against proposals that would unreasonably curtail their freedoms. More research is needed that rigorously assesses the state of Australian law on the topic in comparison with other national regimes and against international human rights standards.

II. Freedom of Association as a Common Law Liberty

A fundamental principle of Australian common law is that whatever is not prohibited by law is legally permitted. English cases have affirmed this applies to freedom of association and freedom of assembly,[4] and there is little doubt it applies also in Australia.[5] This common law liberty persists so long as it is not curtailed by statute. According to the principle of 'legality', to displace such freedoms Parliament must make its intention unavoidably clear.[6] There has been a long history of laws seeking to prevent or impede crime, such as laws prohibiting 'habitually consorting' with reputed thieves and persons without visible means of support.[7] There have also been common law and statutory offences, such as seditious conspiracy, criminal conspiracy and unlawful assembly, which place restraints on associations between persons directed towards overtly illegal or criminal ends.[8] However, beyond laws prohibiting

[4] *R (Laporte) v Chief Constable of Gloucestershire Constabulary* [2007] 2 AC 105, 126-7, citing *Duncan v Jones* [1936] 1 KB 218, 222.
[5] *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 200 ('*Communist Party'*).
[6] *Tajjour v New South Wales* (2014) 88 ALJR 860, 874 [28] ('*Tajjour*').
[7] *South Australia v Totani* (2010) 242 CLR 1, 30-31 [33] ('*Totani*').
[8] James Fitzjames Stephen and others, *A Digest of the Criminal Law* (1894) 55, 70.

criminal or treasonous association, the common law generally places no *a priori* restraints on freedom of association.

Australia is also a party to several international human rights treaties that protect the right to freedom of association.[9] While international treaties do not have direct effect in Australian law except to the extent that they are incorporated by domestic legislation,[10] Australia's international human rights obligations can inform the interpretation of statutes analogously to the principle of legality.[11] If a statute is susceptible of an interpretation that is consistent with Australia's obligations, that interpretation should prevail.[12] Furthermore, one of the statutory functions of the Australian Human Rights Commission is to examine whether laws and proposed laws are consistent with internationally protected human rights, including freedom of association.[13] This complements the statutory responsibility of law-makers to issue human rights compatibility statements for all proposed laws and human rights scrutiny of those laws undertaken by a permanent parliamentary committee .[14]

Within this context, Australians enjoy a significant measure of freedom of association, rooted in the general liberties recognised by the common law. Individuals are free to form all manner of associations and organisations, and these associations and organisations are generally free to govern their internal affairs. The law facilitates their formation and operation through several means. Not-for-profit associations may choose to remain unincorporated, foregoing the benefits but avoiding the costs of incorporation. Alternatively, they may choose to incorporate in a variety forms, including as incorporated associations[15] or as companies limited by guarantee.[16] If formed for charitable purposes (eg, to relieve poverty, advance religion, provide

[9] International Covenant on Civil and Political Rights (ICCPR) Article 22; International Covenant on Economic, Social and Cultural Rights (ICESCR) Article 8(1)(a); Convention on the Rights of the Child, Article 15; Convention on the Rights of Persons with Disabilities, Article 21; Convention on the Elimination of All Forms of Racial Discrimination, Article 5.
[10] *Bradley v Commonwealth* (1973) 128 CLR 557; *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 ('*Teoh*').
[11] *Totani* (n 7) 28-29 [31]; *Tajjour* (n 6) 879 [48].
[12] *Teoh* (n 10) 287.
[13] Australian Human Rights Commission Act 1986 (Commonwealth) section 11(e).
[14] Human Rights (Parliamentary Scrutiny) Act 2011 (Commonwealth) sections 7 and 8.
[15] Associations Incorporation Act 1981 (Queensland); Associations Incorporation Act 1991 (Australian Capital Territory); Associations Incorporation Act 2009 (New South Wales); Associations Act 2003 (Northern Territory); Associations Incorporation Act 1985 (South Australia); Associations Incorporation Act 1964 (Tasmania); Associations Incorporation Reform Act 2012 (Victoria); Associations Incorporation Act 1987 (Western Australia).
[16] Corporations Act 2001 (Commonwealth) section 9.

education or pursue other purposes beneficial to the community),[17] they may also secure the benefits of holding property on trust *in perpetuum*.[18] While these legal instruments do not amount to legal guarantees of associational liberty, they provide a framework in which freedom of association has flourished. As Frederic Maitland once observed:

> 'What we know as our English 'liberty of association' was rendered legally possible by the law or the equity about uses and trusts, which enabled a body of men to perpetuate itself and in effect to own property, while a screen of feoffees or trustees protected it from the inquisitive scrutiny of the state.'[19]

Much the same could be said of Australian law today. Many hundreds of thousands of social, cultural, recreational and sporting clubs, trade unions and employers' associations, charities, religious institutions, mutual associations, community service and educational organisations, advocacy groups and political parties have been formed to pursue their particular purposes using various legal vehicles in exercise of their common law liberties.[20] There are numerous statutes that regulate the functioning of these organisations in varying ways, but often within limits that are meant to preserve the principle of freedom of association. An important ongoing policy question concerns the exact boundaries between this associative freedom and appropriate regulation.

III. Freedom of Association as a Constitutional Right

The Australian Constitution does not contain a bill or charter of rights. It does protect certain freedoms, but only in sparing terms. In particular, the Commonwealth Parliament cannot make laws 'prohibiting the free exercise of any religion' (section 116). The provision has been interpreted relatively narrowly so that it applies only to federal laws that have as their *purpose* the prohibition of the free exercise of religion.[21] Although the framers of the Australian Constitution drew upon the First Amendment to the US Constitution for the drafting of section

[17] *Commissioner for Special Purposes of Income Tax v Pemsel* [1891] AC 531, 583; Charities Act 2013 (Commonwealth) section 12.
[18] Gino Dal Pont, *Equity and Trusts in Australia* (2018) chapter 29.
[19] Frederic Maitland, 'Records of the Honourable Society of Lincoln's Inn', in HAL Fisher (ed), *Collected Papers of Frederic William Maitland* (1911) Vol III, 85-86.
[20] It was estimated in 2010 that there were as many as 600,000 such associations in Australia: Productivity Commission, *Contribution of the Not-for-Profit Sector* (2010) 58.
[21] *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth* (1943) 67 CLR 116 ('*Jehovah's Witnesses*').

116, they deliberately chose not to include the First Amendment's protections of freedom of speech, freedom of the press and freedom of assembly.[22] As one High Court judge has observed:

> 'Indeed, those responsible for the drafting of the Constitution saw constitutional guarantees of freedoms as exhibiting a distrust of the democratic process. They preferred to place their trust in Parliament to preserve the nature of our society and regarded as undemocratic guarantees which fettered its powers. Their model ... was ... the British Parliament, the supremacy of which was by then settled constitutional doctrine.'[23]

Despite these intentions and expectations, the High Court has found that the system of representative and responsible government established by the Constitution gives rise to an implied freedom of communication with respect to governmental or political matters.[24] Some judges of the High Court have also suggested that, for the same essential reasons, the Constitution also contains an implied freedom of political association, at least to some extent. Justice McHugh proposed that the Constitution contains 'rights of participation, association and communication' in relation to federal elections but only in so far as these rights are 'identifiable' in the specific provisions of the Constitution that stipulate that members of the Parliament are 'directly chosen by the people'.[25] Justice Toohey considered freedom of association to be 'an essential ingredient' of freedom of political communication.[26] Justice Gaudron similarly said that freedom of association is an aspect of the freedom of political communication that is protected to the extent necessary for 'the maintenance of the system of government for which the Constitution provides'.[27] In later cases, a majority of the Court rejected the proposition that there is a 'free-standing' right to freedom of association implied by the Constitution that is independent of the implied freedom of political communication.[28]

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[22] Nicholas Aroney, 'Freedom of Speech in the Constitution' (1995) 18(2) University of Queensland Law Journal 249, 261-262.
[23] *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 186 ('*ACTV*').
[24] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.
[25] *ACTV* (n 23) 232.
[26] *Kruger v Commonwealth* (1997) 190 CLR 1, 91; see also McHugh J at 142 ('*Kruger*').
[27] ibid 116.
[28] *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 ('*Mulholland*'); *Wainohu v New South Wales* (2011) 243 CLR 181 ('*Wainohu*'); *Tajjour* (n 6).

The constitutional protection of political association thus applies only as a kind of 'corollary' of freedom of political communication.[29]

The High Court has held that a statutory burden on freedom of political communication may be justified if the law is reasonably appropriate and adapted to serve a legitimate end, provided the law is compatible with the constitutionally prescribed system of representative and responsible government.[30] A majority of the Court have further held that three inquiries must be undertaken to determine whether the burden is justified: first, whether the law is *suitable*, in the sense of having a rational connection to the purpose of the law; secondly, whether the law is *necessary*, in the sense that there is no obvious and compelling alternative, reasonably practicable means of achieving the same purpose which has a less restrictive effect on the freedom; and, thirdly, whether the law is *adequate in its balance*, having regard to importance of the purpose served by the restrictive measure and the extent of the restriction it imposes on the freedom.[31]

In *Tajjour v New South Wales*, the High Court had to consider whether a state law which made it a criminal offence to 'consort' habitually with persons convicted of a criminal offence contravened the implied freedom of political communication. The law did not provide an exception in relation to communications about governmental or political matters. While the law imposed a burden on political communication, the burden was considered appropriate and adapted to achieving a legitimate objective.[32]

Despite the implied freedom of political communication and its corollary right to freedom of association, one of the most effective bulwarks in defence of such freedoms has been derived from the federal division of powers. Two cases, one decided during the Second World War, the other during the height of the Cold War, illustrate the effectiveness of the federal system in protecting associative rights.

In the *Jehovah's Witnesses* case, the Court considered the constitutionality of a law empowering the dissolution and forfeiture of the assets of the Adelaide Company of Jehovah's Witnesses, a

[29] *Mulholland* (n 28) 299; *Tajjour* (n 6) 886 [95], 891 [138].
[30] *Coleman v Power* (2004) 220 CLR 1, 51, 78, 82.
[31] *McCloy v New South Wales* (2015) 257 CLR 178, 194-195 ('*McCloy*').
[32] *Tajjour* (n 6) 888-891.

body incorporated under the *Associations Incorporation Act 1929* (SA).[33] The measure was challenged on two key grounds: firstly, that it unconstitutionally interfered with freedom of religion under s 116, and secondly, that it was not within the legislative power of the federal Parliament to make laws with respect to 'defence' under s 51(vi) of the Constitution. The government believed the Jehovah's Witnesses to be promulgating doctrines prejudicial to the defence of the Commonwealth and the efficient prosecution of the war. All the members of the Court held that the most far-reaching aspects of the law were not authorised by the defence power.[34] However, a majority declined to find the law contrary to s 116, on the basis that the free exercise clause does not prevent the Commonwealth from prohibiting the activities of bodies which engage in activities that are prejudicial to the very existence of the Commonwealth. Only Williams J held that the measures which made it illegal to print, publish or promote 'unlawful doctrines' were contrary to s 116.[35] Nonetheless, the Court did hold that, in principle, the Company of Jehovah's Witnesses was a party competent to maintain an action. While some judges considered that a 'company' could not have or 'exercise a religion' as such, others appeared to affirm that freedom of religion can be exercised or enjoyed by 'individuals', 'bodies of individuals' and 'corporations'.[36] This is consistent with definitions of 'religion' and 'religious body' later adopted by the High Court affirming that freedom of religion is exercised by groups of associated people.[37] Freedom of religion in Australia is thus arguably an 'associational right', a point which has wider implications, as we explain in Part 4 below.[38]

In *Australian Communist Party v Commonwealth*, decided in 1950 at the height of the Cold War, the High Court considered the validity of a Commonwealth law that declared the Communist Party to be unlawful, dissolved it as an organisation and forfeited its property. In the absence of any free-standing constitutional right to freedom of association, the main question was again whether the law could be enacted by the Parliament pursuant to its power to make laws with respect to 'defence'. At the time, although Australian forces were engaged in hostilities in Korea, it was considered that Australia was not 'upon a war footing' and therefore the case had to be addressed on the basis that a state of peace existed.[39] The recitals

[33] *Jehovah's Witnesses* (n 21).
[34] ibid 150, 154, 167.
[35] *Jehovah's Witnesses* (n 21) 165.
[36] ibid 119, 147, 149, 159, 161-163.
[37] *Church of the New Faith v Commissioner of Pay-Roll Tax (Vic)* (1983) 154 CLR 120 ('*New Faith*').
[38] Nicholas Aroney, 'Freedom of Religion as an Associational Right' (2014) 33 *University of Queensland Law Journal* 153.
[39] *Communist Party* (n 5) 196, 207.

to the Act claimed that communists were engaged in activities involving treason, sabotage and espionage intended to overthrow the established system of government in Australia, and that the dissolution of the Communist Party was necessary for Australia's defence. These recitals raised the question whether it was for the Parliament or the Court to determine the factual context in which the constitutionality of the Act would be determined. The Court held that the Parliament cannot recite itself into power merely by asserting certain facts in the preamble to the Act.[40]

Justice Dixon observed that the *Communist Party Dissolution Act* 'names a voluntary association', 'declares it unlawful', 'dissolves it', deprives it of property and thereby imposes a significant restriction on the 'civil rights' of its members.[41] His Honour was not suggesting that there is a constitutional right to freedom of association. Rather, he was alluding to the right of association under the common law, a right that is subject to legislative regulation.[42] Nonetheless, Dixon J considered it important to illustrate what he called 'the substantial effect and nature of the provisions in question'.[43] During a time of war, when the maxim *salus populi suprema lex* may be said to apply, extreme measures may be justified, but such extremities were not apparent in 1950, even in the context of the Cold War.[44]

IV. Freedom of Association as a Statutory Exemption

Within this common law and constitutional context, freedom of association is both recognised and regulated in Australia through a wide range of federal and state laws dealing with a similarly extensive array of associations formed to pursue many and varied objects and purposes. Australian social norms and practices place a high value on associational freedom and Australian lawmakers are generally respectful of this important social fact.

Individuals have a common law liberty to associate for political purposes, such as advocacy of political causes and nomination of candidates for election to political office. Political parties may choose to be registered under the *Commonwealth Electoral Act* to enjoy certain benefits, including public funding.[45] The Act imposes a highly complex set of controls on gifts to parties,

[40] ibid 205–6, 264.
[41] ibid 199-200.
[42] *Tajjour* (n 6) 905 [224].
[43] *Communist Party* (n 5) 200.
[44] ibid 202-203.
[45] Commonwealth Electoral Act 1918 (Commonwealth) Part XX.

members, candidates and related entities and persons, including duties of disclosure concerning gifts to and expenditure by political parties. To be eligible for registration, the only statutory requirements are that a party must hold at least one seat in the Parliament or have at least 1,500 unique members and must have a written constitution that sets out the aims of the party.[46] The provisions of the Act are administered by the Commonwealth Electoral Commission,[47] which is an independent statutory agency.[48] A party may be deregistered if it fails for more than four years to endorse any candidates for election,[49] or if it ceases to have at least 1,500 members, its registration was obtained by fraud or misrepresentation, or an objection to its name or logo is sustained and not rectified.[50] The High Court has held that minimal requirements similar to (but somewhat less demanding than) these are consistent with the Constitution,[51] although some constraints on gifts imposed at a state level have been held unconstitutional.[52]

At the State and Territory level locally incorporated not-for-profit associations are subject to the registration, monitoring and investigation powers of local regulators.[53] Statutory regulators in most of the States and Territories have broad discretion to refuse to incorporate an association.[54] In most of the jurisdictions broad discretion to refuse to permit the subsequent amendment of an association's objects is also provided.[55] As these provisions do not expressly purport to limit common law freedoms, they provide striking examples where the principle of legality may have important work to do in the event regulators apply their powers in a manner that inordinately restricts associational freedom.

In respect of charities, Australian charitable trusts are subject to the *parens patriae* jurisdiction of the Attorney-General as 'the guardian[s] of the public interest in the enforcement of charities',[56] which empowers intervention to enforce a trust in the public interest.[57] The recently established Commissioner of the Australian Charities and Not-for-profits Commission

[46] ibid sections 123 ('eligible political party') and 124.
[47] ibid sections 132.
[48] ibid sections 6.
[49] ibid sections 136.
[50] ibid sections 137.
[51] *Mulholland* (n 28).
[52] *Unions NSW v New South Wales* (2013) 252 CLR 530; *Unions NSW v New South Wales* (2019) 264 CLR 595.
[53] See note 15.
[54] New South Wales section 7(2); Northern Territory section 9(1), (4); Queensland section 12(2); Victoria section 7(3); Tasmania section 8(1); South Australia section 20(2).
[55] Northern Territory section 23(5); Queensland section 48(8) and (12); Victoria section 50(1) and (2); Tasmania section 18(4); South Australia section 24(4); Western Australia section 33.
[56] *Bradshaw v University College of Wales, Aberystwyth* [1987] 3 All ER 200, 202.
[57] Eg, Associations Incorporation Act 1981 (Queenslandd); Trusts Act 1973 (Queensland) Part 8.

(ACNC) has been given considerable powers over 'federally regulated entities', including the power to give directions, to instigate investigations, and to suspend, remove and replace the leadership of charities.[58] Unlike the *parens patriae* jurisdiction of the Attorney-General, it is not necessary for the ACNC to obtain prior Court approval for the exercise of these powers.

'Basic religious charities' (BRCs) enjoy the benefit of an exemption from the Commissioner's powers to suspend, remove and replace their leadership, but not the power to issue directions.[59] The fact that the BRC exemption does not apply to a religious body that takes corporate form could provide the basis for a constitutional challenge against the Commissioner's powers.[60] However, the exemption has been challenged on the basis of the liberal principle of neutrality: why should we preference religion in this way when other forms of conscientious belief (such as environmentalism or human rights, which are charitable purposes) are not equally protected?[61]

The contestation illustrates the important place of section 116 of the Constitution in providing protection to associational freedom. Noting these concerns, a statutory Review of the ACNC legislation recognised that section 116 'imposes some limits on the power of the Commonwealth to make laws in relation to religious registered entities which do not apply to the making of laws in relation to other registered entities'.[62] The Review recommended that a legislative amendment require the Commissioner of the ACNC to:

> '…respect the independence of the sector in carrying out duties under the ACNC Act. This would include respecting the fundamental rights and freedoms protected by section 116 of the Australian Constitution or set out in the ICCPR, the UDHR and other international treaties and covenants … (including the freedoms of religion, peaceful assembly and association).'[63]

[58] Australian Charities and Not-for-profits Commission Act 2012 (Commonwealth) ('ACNC Act'), Divisions 85 and 100.
[59] ibid section 100-105(3).
[60] ACNC Act, section 205-235(2).
[61] Ann O'Connell, 'Additional Submission', *Australian Charities and Not-for-profits Commission Legislation Review* (2018).
[62] Commonwealth of Australia, *Strengthening for Purpose: Australian Charities and Not-for-profits Commission Legislation Review 2018,* 64.
[63] ibid 67.

The contention that religious charities may be entitled to unique consideration is consistent with the understanding of the original drafters of the United States Constitution First Amendment, on which section 116 is based. Michael Sandel, citing James Madison and Thomas Jefferson, has argued: 'Religious liberty addressed the problem of encumbered selves, claimed by duties they cannot renounce, even in the face of civil obligations that may conflict'.[64] This 'religious burden' explains the historical propensity of religious believers to challenge unjust structures,[65] a sentiment conveyed in the comment of two Australian High Court judges that religious freedom, as 'the paradigm freedom of conscience', is 'of the essence of a free society.'[66] The limited scope of the BRC exemption under the ACNC Act and the resulting power of the Commissioner to replace the leaders of religious institutions illustrates the importance of constitutional protections of freedom of religious association.

The regime governing advocacy by registered charities provides an important illustration of the protections afforded to associational freedom by the implied freedom of political communication. In *Aid/Watch Incorporated v Commissioner of Taxation*, decided in 2011, a majority of the High Court considered that the general law relating to charities must be informed by the implied freedom.[67] This meant rejection of the old rule, developed in prior English case-law, that a trust formed to secure 'political objects' in the form of advocacy for change in the content of the law, is invalid.[68] The majority concluded that 'the generation by lawful means of public debate … concerning the … relief of poverty, itself is a purpose beneficial to the community'.[69] The Charities Act 2013 extends this principle to all charitable purposes, but further imposes three additional requirements (each of which involve certain continuing residues of the English case-law): a registered charity must not have 'a purpose of promoting or opposing a political party or candidate',[70] and must satisfy the separate 'public benefit'[71] test and the not 'contrary to public policy'[72] test. Concerns that the two latter common law tests could lead to the loss of charity status for an entity that holds a traditional

[64] Michael Sandel, 'Religious Liberty' [1989] Utah Law Review 597.
[65] See, eg, Beverley McLachlin CJ and Jean Bethke Elshtain, 'Freedom of Religion and the Rule of Law' in Douglas Farrow (ed), *Recognizing Religion in a Secular Society* (2004); Michael McConnell, 'Why Is Religious Freedom the "First Freedom"?' (2000) 21 Cardozo Law Review 1243.
[66] *New Faith* (n 38) 130.
[67] *Aid/Watch Incorporated v Commission of Taxation* (2010) 241 CLR 539, 556 [44].
[68] ibid 550 [27], 557 [48], citing *Bowman v Secular Society* [1917] AC 406.
[69] ibid 557 [47].
[70] Charities Act 2013 (Commonwealth) section 11.
[71] ibid sections 5 and 6.
[72] ibid sections 11.

view of marriage led to the passage of amendments to the Charities Act through the House of Representatives with bipartisan support in 2022.[73] However, the Parliamentary term lapsed before those amendments were put to the Senate. Subsequent developments in at least one other common law country (relevant due to the cross-pollination amongst Anglophone courts in charity law) have accentuated this particular concern.[74]

A similar set of problems arises in relation to freedom of association in the workplace. The Fair Work Act 2009 (Cth) protects freedom of association in the workplace by ensuring that persons are free to become, or not become, members of industrial associations, are free to be represented, or not represented, by industrial associations, and are free to participate, or not participate, in lawful industrial activities.[75] These rules protect both 'freedom of association' and 'freedom of disassociation' in the particular context of employment law. International human rights standards expressly protect the former but are less clear about the latter.[76]

Since federation in 1901, the Commonwealth Parliament has had power to make laws in respect of the 'conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State' (section 51(xxxv)). This has enabled the Commonwealth to enact a system of registration of associations of employers and associations of employees, as well as for their incorporation, as part of a system of compulsory arbitration of industrial disputes involving such associations.[77] In more recent times, the Commonwealth has relied principally on the power to legislate with respect to 'trading corporations' and 'financial corporations' (section 51(xx)) to regulate relations between corporate employers and their employees, including the regulation of their structure and internal affairs.[78] The long association of the trade union movement with the Australian Labor Party (ALP) has occasionally given rise to tensions comparable to those encountered by charitable trusts that engage in political advocacy. For example, the High Court has upheld the right of a trade union

[73] Commonwealth, *Parliamentary Debates*, House of Representatives, 9 February 2022, 286. See Mark Fowler, 'Attaining to Certainty: Does the Expert Panel's Proposal for Reform of the Charities Act Sufficiently Protect Religious Charities?' (2020) 26(2) Third Sector Review 87.
[74] *Attorney-General v Family First New Zealand* [2022] NZSC 80, [137].
[75] Fair Work Act 2009 (Commonwealth) sections 336, 346.
[76] ICCPR, Article 22(1); ICESCR, Article 8(1)(a); Freedom of Association and Protection of the Right to Organise Convention (1949); Right to Organise and Collective Bargaining Convention (1949); ILO Declaration on Fundamental Principles and Rights at Work (1998), Article 2(a). See Stephen Lynch, *Freedom of Disassociation: The Forgotten Corollary Right* (LLM Thesis, University College Cork, 2021).
[77] *Jumbunna Coal Mine, No Liability v Victorian Coal Miners' Association* (1908) 6 CLR 309.
[78] *Workplace Relations Amendment (Work Choices) Act 2005* (Cth), upheld in *New South Wales v Commonwealth* (2006) 229 CLR 1.

to impose levies upon their members to support the political operations of the ALP, but also found the trade union to be liable in the tort of conspiracy for physically obstructing dissenting trade union members from attending their place of work in a manner that interfered with their 'personal liberty and freedom of movement'.[79]

Another important interface between freedom of association and Australian law concerns the proscription, under the federal Criminal Code, of an array of activities related to treason, genocide, sabotage, espionage and terrorism,[80] including prohibitions on conspiring or associating for such purposes,[81] and a specific offence of intentionally associating with a terrorist organisation or a member of a terrorist organisation so as to provide support to the organisation.[82] The Criminal Code also authorises the making of interim control orders on the movement and location of persons reasonably suspected of being likely to perpetrate or support the perpetration of a terrorist act,[83] and preventative detention orders enabling persons to be held in custody for a short period of time to prevent a terrorist act being perpetrated or to secure evidence relating to a recent terrorist act.[84] The extreme restrictions on association imposed by interim control orders have been considered constitutionally justified provided they are made where reasonably necessary and reasonably appropriate and adapted for the purpose of protecting the public from a terrorist act.[85]

Comparable State and Territory laws authorise the preventative detention on reasonable grounds of persons likely to perpetuate serious acts of violence or sexual assault.[86] Similar laws have authorised declaration of associations of individuals as 'criminal' or 'declared' organisations based on criminal intelligence presented to the court in special closed hearings in the absence of representatives of the organisation.[87] Under these laws, control orders may be issued against members of such organisations prohibiting them from associating with other

[79] *Williams v Hursey* (1959) 103 CLR 30, 78.
[80] Criminal Code Act 1995 (Commonwealth) Part 5.1, Part. 5.2, Part. 5.3.
[81] ibid sections 11.2, 11.2A, 11.5.
[82] ibid section 102.8.
[83] ibid Division 104.
[84] ibid Division 105.
[85] *Thomas v Mowbray* (2007) 233 CLR 307. See Kirby J's dissenting judgment referencing Australia's human rights obligation to protect freedom of association: 440-441 [379]-[382].
[86] Eg, Dangerous Prisoners (Sexual Offenders) Act 2003 (Queensland) ('DPSO Act').
[87] ibid sections 10 and 78; see, similarly, Corruption and Crime Commission Act 2003 (Western Australia) section 76.

members.[88] Often challenges to these laws have been unsuccessful.[89] On the occasions that they have been successful, the cases turned on constitutional requirements relating to the independence and integrity of the courts, not the principle of freedom of association.[90]

One further important set of statutory constraints applicable to a wide array of associations are anti-discrimination laws. While many of these laws apply to the relations between businesses and members of the public, they also apply to the relations between organisations and their employees and members. For example, it is generally unlawful for a club or association to discriminate on the grounds of sex, relationship status, sexuality, gender identity, race, age, or disability in determining conditions of membership.[91] However, a club may exclude applicants who are not members of the group of people for whom the club was established if the club operates wholly or mainly to preserve a minority culture or to prevent or reduce disadvantage suffered by people of that group.[92] These and similar statutory exceptions and exemptions are designed to protect freedom of association in specifically defined contexts.

One important and controversial topic concerns the rights of religious bodies to maintain their particular religious ethos and character and the rights of individuals to be members of, or be provided services by, such organisations, without discrimination.[93] Under Australian federal and state anti-discrimination laws, there are prohibitions on discrimination in employment that apply generally to all employers, but with special exemptions for religious organisations in certain limited contexts.[94] These exceptions concern the training and ordination of religious leaders such as priests or ministers,[95] and more general exceptions for bodies established for religious purposes acting in accordance with the doctrines of the religion or consistently with religious sensitivities.[96]

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[88] DPSO Act (n 89) section 19.
[89] *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575; *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police (WA)* (2008) 234 CLR 532; *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501; *Assistant Commissioner Michael James Condon v Pompano Pty Ltd* (2013) 252 CLR 38.
[90] *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51; *Totani* (n 7); *Wainohu* (n 28).
[91] Eg, Anti-Discrimination Act 1991 (Queensland) section 94.
[92] ibid section 97.
[93] Philip Ruddock and others, *Religious Freedom Review: Report of the Expert Panel* (Commonwealth of Australia, 2018).
[94] Eg, Sex Discrimination Act 1984 (Commonwealth); Anti-Discrimination Act 1977 (New South Wales); Equal Opportunity Act 2010 (Victoria); Anti-Discrimination Act 1991 (Queensland); Anti-Discrimination Act 1992 (Northern Territory).
[95] Eg, Queensland section 109(1)(a)-(c); New South Wales section 56(a)-(c); Commonwealth section 37(1)(a)-(c).
[96] Eg, Queensland section 109(1)(d); Commonwealth section 37(1)(d).

However, the exceptions for religious bodies and schools have often been further limited, so that they do not (or no longer) apply in relation to employment or education or the provision of government-funded services,[97] or apply only in respect of 'genuine occupational qualifications'.[98] In some jurisdictions there is explicit recognition that a religious school may employ persons of a particular religion to teach in a school established for students of the particular religion.[99] Other jurisdictions narrow the exception by requiring that conformity with the doctrines of the religion must be a requirement of the specific position held by the employee.[100] These highly fact-specific, complex and sometimes repetitive requirements impose a high regulatory load on such institutions. It can be asked whether such laws admit of sufficient certainty in operation so as to satisfy the international law requirement that it is 'possible to discover, if necessary with the aid of professional advice, what its provisions are'[101] such that a person may 'foresee the consequences of the law for them'.[102]

A more generous set of exceptions are provided at a federal statutory level.[103] Despite the restrictive scope of these exceptions, especially at a state level, there are current proposals by law reform and human rights commissions to curtail these exceptions even further.[104] These proposals purport to rely on comparative evaluation of laws in other countries and jurisdictions, such as the European Union and Ireland in particular, but only in a selective way,[105] and without regard to the specific circumstances of the countries considered.[106]

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[97] Eg, Commonwealth section 37(2); Victoria section 82B.
[98] Northern Territory section 35(1)(b)(i).
[99] Eg, Queensland section 25(1).
[100] Victorian Act section 82A, 83A; Queensland Act section 25(2)-(5).
[101] *In Re Gallagher* [2019] 2 WLR 509 [17].
[102] *Higgs v Farmor's School* [2023] EAT 89 [52], citing *Huvig v France* (1990) 12 EHRR 528; *Kruslin v France* (1990) 12 EHRR 547; *Purdy v DPP* [2010] 1 AC 345.
[103] Fair Work Act 2009 (Commonwealth) sections 351(2), 153(2)(b), 195(2)(b) and 772(2)(b); *Sex* Discrimination Act 1984 (Commonwealth) sections 37 and 38.
[104] Queensland Human Rights Commission, *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (2022) 467, 575–83; Western Australia Law Reform Commission, *Review of the Equal Opportunity Act 1984* (WA) (2022) 16–7, 178–84; Australian Law Reform Commission, *Religious Educational Institutions and Anti-Discrimination Laws* (2023).
[105] Nicholas Aroney, 'Cherry Picking Human Rights' (2023) 2 Australian Journal of Law and Religion 95; Mark Fowler, 'The Position of Religious Schools Under International Human Rights Law' (2023) 2 Australian Journal of Law and Religion 36.
[106] ALRC (n 104) 43-4 citing Human Rights Committee, *Concluding observations on the fourth periodic report of Ireland*, UN Doc CCPR/C/IRL/CO/4 (19 August 2014) [21]. The Commission cites the Committee's observations on Ireland, where genuine alternative employment opportunities for teachers that do not uphold the ethos of religious schools are not available, as authority for limiting exceptions for religious schools within all State Parties to the ICCPR.

In this context, statutory human rights charters enacted in two Australian States and one Territory, all of which protect 'freedom of association',[107] have not been especially effective, including in relation to 'freedom of religion', which is also protected.[108] Part of the reason is that what is expressly protected is the right of 'every person' to 'freedom of association with others', which emphasises the individual's right to associate, and not the right of the association to govern its own internal affairs. Another factor is that the human rights charters contain express limitation clauses that allow human rights to be limited on very broad 'balancing' grounds, such that human rights are 'subject to reasonable limits that can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom'.[109] This contrasts with the more rigorous standard required by Article 22(2) of the ICCPR, which emphatically prohibits the placing of any restrictions on the exercise of the right to freedom of association unless the restriction is 'prescribed by law' and is 'necessary' in the interests of certain particular identified ends.[110] Paradoxically, a case brought in New South Wales in the absence of a human rights charter offered a more generous interpretation to the associational rights of a religious organisation than a corresponding case brought in Victoria where a human rights charter existed but was deemed not to be applicable.[111]

[107] Charter of Human Rights and Responsibilities Act *2006* (Victoria) section 16(2); Human Rights Act 2019 (Queensland) section 22(2); Human Rights Act 2004 (Australian Capital Territory) section 15(2).
[108] Victoria section 14; Queensland section 20; ACT section 14.
[109] Eg, Queensland section 13. See also Victoria section 7(2); Australian Capital Territory section 28.
[110] ICCPR, Article 22(2). See Paul M Taylor, *A Commentary on the International Covenant on Civil and Political Rights* (Cambridge: Cambridge University Press, 2020) 619-627.
[111] Aroney Nicholas, 'Can Australian Law Better Protect Freedom of Religion?' (2019) 93(9) Australian Law Journal 708, 716-717.