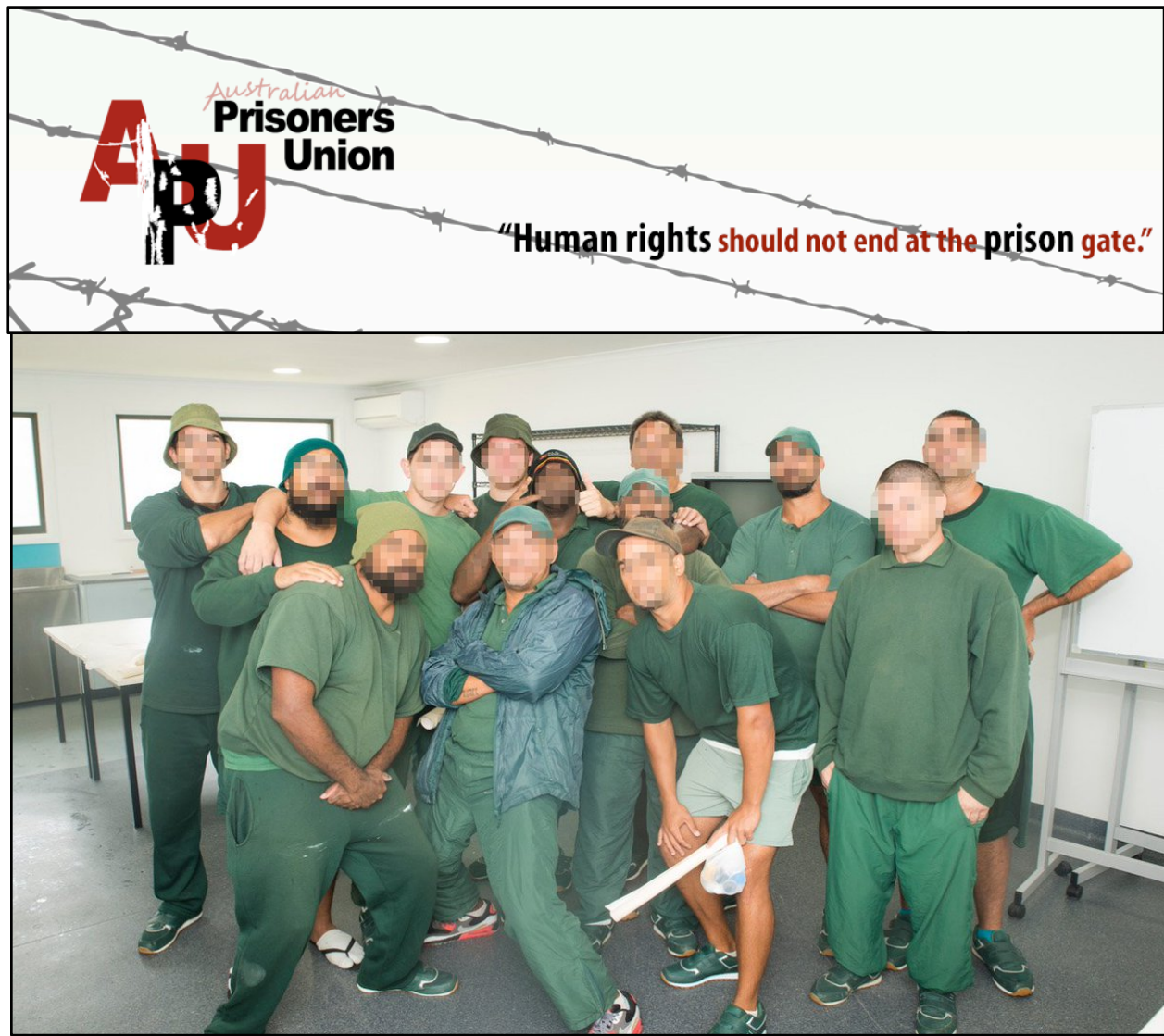


# Australian Prisoners Union:

## Process of Legitimisation

*Draft: 20 July 2021*



## **Australian Prisoner's Union**

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# 1. Executive Summary

Australia's ratification of the *Optional Protocol to the Convention against Torture* (OPCAT) on 21 December 2017 established international obligations towards detainees. The Australian Prisoners Union (APU) could function as a detainee organisation to help monitor human rights in detention. This is in line with Australia's obligations under OPCAT to provide an 'innovative, sustained and proactive approach to the prevention of torture and ill treatment'.<sup>1</sup> Currently the Commonwealth Ombudsman, who controls the implementation of OPCAT, does not recognise the right of detainees to a collective voice in the OPCAT Advisory Group.

Acknowledging the APU would help foster a positive prisoner community expression with the capacity to generate better outcomes for prisoners, correctional staff, and the wider Australian society. Prisoners share an experience unique amongst themselves. Acknowledging prisoners as a community enhances self-esteem, creates shared respect and tolerance, and provides prisoners with greater agency and responsibility in dealing with their common concerns. These benefits can also reduce recidivism and tackle the cyclical nature of crime for prisoners reentering society after their sentence.

Prisoners are entitled to representation as a community and the APU would function as a formal structure to facilitate this. The fundamental purpose of a union is to build solidarity amongst members and work collectively for fairer conditions. As individuals, prisoners are discredited vulnerable people not in a position to defend themselves or have their voices heard. Only through a responsive organisation such as the APU, can prisoners collectively negotiate and be heard. Hence, the formal registration and acknowledgement of the APU is necessary.

The APU was created in 1999 as a union to represent and advance the interests of prisoners and paroled individuals.<sup>2</sup> The founding statement of the APU states that '*fundamental human rights do not end at the prison gate*'. Society must acknowledge that prisoners are members of our communities, many of whom will return to those communities after incarceration.<sup>3</sup> Previous campaigns undertaken by the APU on prison issues relevant to this Report include: Communication with the community including media; Payment of proper employment entitlements for prisoners undertaking

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<sup>1</sup> Office of The High Commissioner for United Nation Human Rights, *Optional Protocol to the Convention Against Torture (OPCAT) Subcommittee on Prevention of Torture* (Web Page) <<https://www.ohchr.org/en/hrbodies/opcat/pages/opcatindex.aspx>>.

<sup>2</sup> Australian Prisoners Union (Web Page) <<http://australianprisonersunion.org.au>>.

<sup>3</sup> Justice Action, *Chronology of the Prisoner Movement in Australia* (Web Page) <<https://justiceaction.org.au/chronology-of-the-prisoner-movement-in-australia/>>.

work whilst incarcerated; Freedom of association for prisoners; Prisoner control of prisoners' service and Improved education and rehabilitation services.<sup>4</sup>

While the APU is not currently a registered union with the Fair Work Commission (FWC), it has the capacity to become one. This Report proposes the registration of the APU and the remodelling of its functions to more actively manage and ensure Australia's fulfilment of its international legal obligations within the framework of OPCAT. A formalised and registered status would allow the APU to more effectively defend the interests of prisoners.

Prisoners' rights as workers to consultation, representation and participation are currently restricted by [s 103](#) of the [Work Health and Safety Act 2011 \(Cth\)](#) ('*WHSA*').<sup>5</sup> Pursuant to s 103, obligations under Part 5 of *WHSA* do not apply to 'a worker who is a prisoner in custody in a prison'.<sup>6</sup> This means that the wide-ranging rights and obligations given to both employers and workers are not afforded to prisoners. Those obligations are for employers to consult workers, resolve health and safety issues and establish health and safety committees upon workers' request or in line with regulatory requirements.<sup>7</sup> Workers also have rights to request elections of health and safety representatives and cease or direct cessation of unsafe work.<sup>8</sup> Additionally, workers elected as health and safety representatives have the right to issue provisional improvement notices where they believe there has been or will be a contravention of the Act.<sup>9</sup>

As a result of incarceration, prisoners are compelled to work by law and other institutional pressures.<sup>10</sup> The basis of a common law contract requires parties to enter into an agreement voluntarily, possess intentions to create legal relations and to be bound.<sup>11</sup> This means that prisoners cannot be considered to be in an employment contract with prison authorities and thus benefit from the 'traditional scope of labour law'.<sup>12</sup>

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<sup>4</sup> Ibid.

<sup>5</sup> *Work Health and Safety Act 2011 (Cth)* s 103 ('*WHSA*').

<sup>6</sup> Ibid.

<sup>7</sup> Ibid pt 5 divs [2](#), [4](#), [5](#).

<sup>8</sup> Ibid pt 5 divs [3](#), [6](#).

<sup>9</sup> Ibid pt div [7](#).

<sup>10</sup> Collin.F Fenwick, 'Private Use of Prisoners' Labor: Paradoxes of International Human Rights Law.' (2005) 27(1) *Human Rights Quarterly*, 249,293.

<sup>11</sup> Colin Fenwick, 'Regulating Prisoners' Labour in Australia: A Preliminary View' (Research Paper No 77/2004, Faculty of Law, University of Melbourne, June 2004) 5.

<sup>12</sup> Ibid p. 25.

To avoid this restriction, it is proposed that a separate contractual relationship be established that affords prisoners workers' rights. This would avoid having to challenge the present legal status that prisoners are not legally "workers" in their relationship with prison authorities. While contractual employment would not provide prisoners with all employee benefits, it would give them the right to unionise against exploitative conditions. This Report proposes employing prisoners as "**detainee observers**" with contractual worker status that would give them access to a registered APU.

Contractual relations between prisoners and the social enterprise Breakout Media Communications (BOM) would meet the legal threshold of worker status. An [employment contract](#) would engage prisoners as 'detainee observers' whose duty would be to report to BOM the conditions and experiences while incarcerated. The APU would then assist in representing prisoners' interests in their relationship with both BOM and prison authorities about whom they observe and report.

The APU's status and functions would need to be remodelled due to the nature of prison work, the ongoing need for transparency, and the unique status of detainees. Through unionisation, the APU would function as a social and political base for the prisoner community and would centralise the voices of detainees with lived experience. The APU would gain rights to represent its members at the FWC, operate as a legal entity, hold free elections for its officers (facilitated by the Australian Electoral Commission), and sue others or be sued under its registered name. The APU would be better able to address the needs of the prisoner community and voice detainees' interests at policy levels where they are not currently expressed.

The APU would form an integral part of the domestic implementation of Australia's international legal obligations, specifically in the upholding of Australia's obligation to monitor the behaviour of authorities in detention under *OPCAT*. Formally acknowledging the APU would also support the Federal Model for National Preventive Mechanisms, that is to be fully implemented by January 2022.<sup>13</sup>

## 2. Acknowledgment of the Prisoner Community

Criminal justice policy focuses on the actions of people who breach agreed laws and are individually dealt with by the courts and prisons. People's behaviour, problems,

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<sup>13</sup> Australian Human Rights Commission, *Implementing OPCAT in Australia* (June 2021) <<https://humanrights.gov.au/our-work/rights-and-freedoms/publications/implementing-opcat-australia-2020>>

treatment, and responses to that policy are the basis for its success or failure. However, prisoners are currently unable to present their collective views on policies. That is the antithesis of normal policy-making in a functioning democracy, where stakeholders are always required to be engaged. A policy has no legitimacy without consultation with the affected community, and cannot improve without feedback.

Collective engagement must be extended to prisoners, especially when interconnected policy failures of recidivism, racial injustice, and state abuse are obvious and publicly exposed. The current obligation under the UN Optional Protocol to the Convention against Torture (OPCAT) to inspect places of detainment accentuates the problem. In order to address the aforementioned problems, acknowledging prisoners as a community is imperative. [Here is a developed paper](#) on the issue of the prisoner community.

It is important for prisoners to have representation, and in most prison systems, representative committees do exist to facilitate discussions with authorities in a structured manner. The prisoner communities they represent have their own standards, values and social rules, but are restricted in further development by an absence of external communication and support. The notion that building shared values can lead to the creation of norms where respect, tolerance and order are accepted, has long been acknowledged. Prisoner communities help reduce violence, reoffending, and the feeling of injustice amongst the individuals while simultaneously increasing participation, and self-reliance. An increased social responsibility will help prisoners successfully reintegrate into broader society. Consequently, offenders are more likely to engage in rehabilitative programs which provide long-term benefits to detainees, correctional staff, and the broader society alike.<sup>14</sup>

Work health and safety protocols within prisons are hindered by restricted prisoner input. Prisoner Committees with access to services could use links to mainstream resources. These could be education, health, safety and welfare matters, but could also include legal and complaint mechanisms when the internal processes have failed.<sup>15</sup>

Prisoner committees that have functioned effectively over an extended period are the NSW Inmate Development Committees (IDC), QLD Prisoner Advisory Committees (PAC), and NSW Aboriginal Inmate Delegates, with all contributing to voice collective concerns and interests. The IDC, developed by NSW Corrective Services, comprises elected prisoners with a diversity requirement within the committee. These prisoners are

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<sup>14</sup> Andrew, Day et al, 'Assessing the Therapeutic Climate of Prisons' (2012) 39(2) *Criminal Justice and Behavior* 156, 165.

<sup>15</sup> Corrective Services Administrators' Council (CSAC), *Guiding Principles for Corrections in Australia Revised 2018* (Guidelines, February 2018) 20.



recognised as representatives and present shared issues to prison management, resulting in improved health and safety, as well as a shared sense of responsibility. Similarly, the PAC in QLD involves inmates who act as representatives for their units, meeting monthly with staff to raise any issues or requests of their fellows. These committees highlight the potential for their functions to be implemented on a larger scale. The APU could function as a national network to ensure the voices of detainees are heard.

Prison management also benefits from prisoner communities as prisoners cooperate and work together for shared interests, resulting in greater communication and safety. Staff work with prisoner representatives who have a responsibility to the prisoner community, rather than only to individuals, substantially reducing staff management obligations. To create a safer environment for both prisoners and staff, trained and trusted representatives should be used to address the concerns of prisoners at an early stage. Assaults on staff and prisoners are reduced where there is a structure to openly talk and resolve matters.<sup>16</sup> There are also reductions in suicide and self harm due to trained 'listeners' which benefits everyone. Successful peer programs highlight the value of lived experience and the role it should play in policy making and problem solving.

## **3. Prisoners' Status as Workers**

### **3.1 Who is a Worker?**

Prisoners are not protected in the same way workers are under federal legislation, specifically under s 103 of the *WHS*A. This specifically excludes prisoners from rights to consultation, representation and participation which are rights afforded to other workers. A worker in the *WHS*A is defined as a person who performs any act for a party conducting business, including the following<sup>17</sup>:

- An employee
- A contractor or subcontractor
- An employee of a labour hire company who has been assigned to work in the person's business or undertaking
- An outworker
- An apprentice or trainee
- A student gaining work experience

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<sup>17</sup> Fair Work Commission. (n.d.). *Anti-bullying Benchbook*. Retrieved July Wednesday, 2021, from <https://www.fwc.gov.au/anti-bullying-benchbook/who-covered-workplace-bullying-laws/definition-worker>

- A volunteer - except a person volunteering with a wholly 'volunteer association' with no employees (whether incorporated or not)

## 3.2 Prisoners' Status

Prison labour is described in a controversial framework where prisoners are made to work for the purposes of punishment and rehabilitation.<sup>18</sup> The situation of prisoners differs from the traditional employer-employee relationship under Australian employment law.

The relationship between the parties is that of prison authority and prisoner. Prisoners held on remand are not obligated to work, however, they can choose to volunteer but even then there is no legally enforceable duty. However, sentenced prisoners cannot enter into a contract of employment as they are governed by legislation which forcibly [requires them to work](#).<sup>19</sup> The prison does not intend to enter into contractual relations with the prisoner and there is no mutual consideration.<sup>20</sup> There is no voluntary assumption of a legally enforceable duty.<sup>21</sup> Therefore, prisoners are not considered as employees since no contract or relationship exists. Consequently, they are excluded from the bulk of Australia's employment legislation.<sup>22</sup> Prison labour has been described as 'exploitative' and 'an act of state coercion' by scholars attempting to discern its legality.<sup>23</sup>

In the context of Australia, through the purposes of the *WHS Act*, a worker is an individual who performs work in any capacity, as defined above.<sup>24</sup> However, under Section 103, prisoners are not entitled to consultation or representation under Part 6 of the *WHS Act*, unlike other workers.<sup>25</sup> ['Employee'](#) and ['worker'](#) within the *Fair Work Act 2009* (Cth) have their "ordinary meaning"<sup>26</sup>. However, there is no single definition of either term

<sup>18</sup> Dirk van Zyl Smit and Frieder Dünkler, *Prison Labour: Salvation or Slavery?* (Ashgate Dartmouth 1999) VII.

<sup>19</sup> [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=556681](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=556681) p.24

<sup>20</sup> *Ireland v Ian Johnson CEO of the Department of Corrective Services* [2009] WASCA 162, [39]; Andrew Stewart, *Employment Law* (The Federation Press, 6th ed, 2018) 99.

<sup>21</sup> *Ermogenous v Greek Orthodox Community of SA Inc* (2002) 209 CLR 95, [24].

<sup>22</sup> Colin Fenwick, 'Regulating Prisoners' Labour in Australia: A Preliminary View' (Research Paper No 77/2004, Faculty of Law, University of Melbourne, June 2004) 39.

<sup>23</sup> Lindsey Raisa Feldman 'Prison Labour' (*Oxford Bibliographies*, 2018) accessed on 28 June 2018.

<sup>24</sup> *Work Health and Safety Act 2011* ('WHS').

<sup>25</sup> *Ibid.*

<sup>26</sup> *Fair Work Act* (n 10) s 12.

within Australian law. 'Employee' is defined by the Fair Work Ombudsman as a 'person that's hired to provide a service to a company either on a full-time, part-time or casual basis in exchange for payment'. It lists 'staff' and 'worker' as other known terms. However, 'incarcerated people working in jobs in prison (e.g. cleaning units, working in kitchens) are not considered workers'.<sup>27</sup> "They are neither entitled to workers' compensation and are not protected by the [Fair Work Act 2009 \(Cth\)](#)."<sup>28</sup>

In Australia, prisoners are paid varying amounts depending on the type of work they complete; it can be as low as \$0.82<sup>29</sup> or as high as \$16<sup>30</sup> per hour. Prisoners are not paid superannuation for the work they do, and their employers do not pay payroll tax.<sup>31</sup> In NSW, prisoner work is organised by Corrective Service Industries (CSI), which serves as an active arm of the NSW Department of Justice.<sup>32</sup>

In Australia, there are currently nine privately operated prisons which, under the *Forced Labour Convention 1930* (ratified in Australia in 1932), do not allow prisoners to be 'hired to or placed at the disposal of private individuals, companies or associations'.<sup>33</sup> Prisoners are required to provide written consent to work within these facilities and it is voluntary. These facilities are said to remain under the supervision and control of public authorities. The International Labour Organisation expresses concerns for these facilities as '...consent is required in a context of lack of freedom with limited options, there should be indicators which authenticate or satisfy the giving of the free and informed consent'. The Committee recalls that the most reliable indicator of the voluntariness of labour is the work performed under conditions approximating a free labour relationship, which include wage levels (leaving room for deductions and attachments), social security and occupational safety and health.<sup>34</sup>

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<sup>27</sup> "Compensation Claims Whilst In Prison", *Caxton Legal Centre Inc* (Webpage, 2021) <<https://queenslandlawhandbook.org.au/the-queensland-law-handbook/offenders-and-victims/prisons-and-prisoners/compensation-claims-while-in-prison/>>.

<sup>28</sup> Ibid.

<sup>29</sup> Benedict Brook, 'Bed linen and boomerangs - the surprising products made by prisoners', *News.com.au* (online, 28 March 2017) <<https://www.news.com.au/finance/business/other-industries/bed-linen-and-boomerangs-the-surprising-products-made-by-prisoners/news-story/d9cfbb0e9414fd00c0ef764ce8002982>>.

<sup>30</sup> ABC News, 'Union says prisoners working at NSW salt mine 'like slave labour'', *ABC News* (online 12 September 2013) <<https://www.abc.net.au/news/2013-09-12/union-says-prisoners-working-at-nt-salt-mine-27like-slave-labo/4952642>>.

<sup>31</sup> Brook (n 4).

<sup>32</sup> Ibid.

<sup>33</sup> International Labour Organization, *Forced Labour Convention*, C29, 28 June 1930, entered into force 1 May 1932 ('ILO').

<sup>34</sup> ILO, 'Observation (CEACR) - adopted 2014, published 104th ILC session (2015)' (Web Page) <[https://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100\\_COMMENT\\_ID:3184674](https://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:3184674)>.

### 3.3 Prisoners' Access to Workers' Compensation

Workers' Compensation is an insurance payment to cover wages and medical expenses when an employee is injured at work or becomes sick due to their work.<sup>35</sup> Independent contractors meet the requirements under s 2 of the *Workplace Injury Management and Workers Compensation Act 1998* (NSW).<sup>36</sup> In this case, they would be deemed workers and may be entitled to compensation under the act.

#### ***Civil Liability Act 2002 (NSW)***

A prisoner may be able to bring a claim for negligence against the prison if they are injured while working at the prison, under the *Civil Liability Act 2002* (NSW). However, it is a much higher threshold to meet than through Workers' Compensation. For a claim of negligence to be made out, it requires that (a) the risk was foreseeable, (b) the risk was not insignificant and (c) a reasonable person would have taken precautions in the same circumstances.<sup>37</sup> Additionally, pursuant to section 26C, 'no damages may be awarded (whether for economic or non-economic loss) unless the injury results in the death of the offender or in a degree of permanent impairment of the offender that is at least 15%'.<sup>38</sup> Even if a claim is made out, section 26J provides that a protected defendant, such as prison authorities, 'is entitled to deduct from those damages the amount of any victim support payment required to be paid to the offender'.

### 3.4 Prisoners' Rights to be Paid for Outside Work

Prisoners today are entitled to conduct, control or manage their business affairs while they are imprisoned unless it is contrary to the *Corporations Act 2001*.<sup>39</sup> Specifically, if a person is convicted of an act that affects a substantial part of their business, or otherwise commits an act of dishonesty that is punishable by 12 months or more, they are disqualified from managing an operation.<sup>40</sup> Corrective services NSW has a policy that explicitly allows prisoners to run a business on the basis that the continuation of a business can be in the best public interest as employees' livelihood may be dependent on it.<sup>41</sup>

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<sup>35</sup> 'Workers Compensation', *Fair Work Ombudsman* (Web Page) <<https://www.fairwork.gov.au/leave/workers-compensation>>.

<sup>36</sup> *Workplace Injury Management and Workers Compensation Act 1998* (NSW) sch 1 s 2.

<sup>37</sup> *Civil Liability Act 2002* (NSW) s 5B.

<sup>38</sup> *Ibid* s 26C.

<sup>39</sup> *Corporations Act 2001* (Cth)

<sup>40</sup> *Ibid* s 206B.

<sup>41</sup> NSW Government, '8.9 Inmates Conducting a Business', *Custodial Operations Policy and Procedures* (web document) <<https://www.correctiveservices.dcj.nsw.gov.au/documents/copp/inmates-conducting-a-business.pdf>>.

### **3.5 Prisoners as Workers with Employee Rights**

Ensuring that prisoners are still entitled to employee rights is particularly crucial in prison settings, where prisoners are vulnerable to labor exploitation and inhumane treatment. Since prison authorities do not enter into employment contracts with prisoner workers, this Report proposes an alternative method of establishing employment status through a contract between prisoners and BOM which would legitimise prisoner workers' rights in the framework of Australian labour law.

Creating an employment relationship between detainees and BOM would entitle detainees to have representation on issues pertinent in prison through their empowerment to observe and report. The agreement would involve contracted 'detainee observers' (as set out in the drafted contract (see appendix)) who observe and report on their experiences to BOM while incarcerated. As workers, prisoners are entitled to union membership of the APU. Detainee reports would be forwarded to BOM. The APU would have access to them for its work in monitoring its members' conditions and assisting Australia's implementation of OPCAT on the OPCAT Advisory Group.

Ensuring that prisoners are still entitled to employee rights is particularly crucial in prison settings, where prisoners are vulnerable to labour exploitation and inhumane treatment, further highlighting the need for an organisation and mechanism like the APU to support and oversee prisoners' rights. Importantly, the status of prisoners as employees will allow them the legal right to unionisation.

## **4. Option One: Employment Agreement/Independent Contractor Model**

### **4.1 The Current Contractor Business Model**

Under the independent contractor business model, people may provide services to an employer under a contract that classifies them as independent contractors running their own businesses, as opposed to employees. This will provide the contractor limited employee entitlements and circumvent legal limitations imposed by the 'employee' definition. This legal relationship is explored in the *Uber* Business Model.

#### 4.1.1 Example: Uber Business Models

The existing framework of the Uber Business Model as summarised in *Gupta v Portier Pacific Pty Ltd; Uber Australia Pty Ltd t/a Uber Eats* [2020] FWCFB 1698 (*Gupta*) is as follows:

- Uber operates a business model via a number of software applications<sup>42</sup>
  - Eats App
  - Restaurant App
  - Partner App.
- There are four participants in the UberEats Business Model arrangement:
  1. the customer who orders the meal,
  2. the restaurant which prepares the meal,
  3. the deliverer (known as a '*Delivery Partner*') who (by car, motorcycle or bicycle) picks up the food from the restaurant and delivers it to the customer, and
  4. Uber Eats itself, which provides the system by which an order for food and delivery by a customer are arranged and paid for.'<sup>43</sup>

The contracts of drivers partnering with Uber themselves have been worded so as to classify them as independent contractors running their own businesses.<sup>44</sup> However, in a recent UK case, *Uber BV v Aslam* [2021] UKSC 5, the UK Supreme Court unanimously held that Uber drivers were considered 'workers'. Despite its lack of precedential value due to being a judgment from another jurisdiction, this may prove to be extremely persuasive in light of similar FWC findings aside from *Gupta*. Notably, the settlement in *Gupta* prevented an Australian federal court finding concerning the Uber model. The ruling in *Aslam* gives a person some of the available employee entitlements, most importantly requiring Uber to pay 'a wage for times drivers were logged into the Uber app and available to work'.<sup>45</sup> The judgement stipulates an overall theme of drivers' limited autonomy and independence, heavy reliance on Uber for ongoing work, and subjection to performance management practices.<sup>46</sup> The five areas of focus in the case were as follows:

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<sup>42</sup> *Gupta v Portier Pacific Pty Ltd* [2020] FWCFB 1698 [4].

<sup>43</sup> *Ibid* [3].

<sup>44</sup> *Uber BV v Aslam* [2021] UKSC 5 ('*Aslam*')

<sup>45</sup> 'New deal for Uber drivers in UK, but Australia's gig workers must wait', *University of Sydney* (Web Page, 30 March 2021) <

<sup>46</sup> *Ibid*.

1. Remuneration paid to drivers is fixed by Uber.<sup>47</sup>
2. Contractual terms were solely dictated by Uber.<sup>48</sup>
3. Despite freedom to choose when and where to work, once logged into the Uber app, 'a driver's choice about whether to accept requests for rides is constrained by Uber'<sup>49</sup> as:
  - Uber controls the information provided to the driver. A passenger's destination is not revealed until the passenger is picked up which offers the driver no opportunity to decline.<sup>50</sup>
  - Uber exercises control by monitoring the 'driver's rate of acceptance (and cancellation) of trip requests'.<sup>51</sup>
4. The significant control Uber has over the way in which drivers deliver their services:
  - Despite drivers' provision and control of physical equipment (their car), Uber 'vets' the cars that may be used.
  - Application/technology, which is a fundamental aspect of the functioning of Uber, is wholly owned and controlled by Uber. This has certain implications for the drivers to follow suggested routes.
5. Restriction by Uber of communication between the driver and passenger.<sup>52</sup>
  - 'Collection of fares, payment of drivers and handling of complaints are all managed by Uber in a way that is designed to avoid any direct interaction between passenger and driver'.<sup>53</sup>

A 2020 Australian FWC ruling corroborated this, recognising a Deliveroo driver as an employee not a contractor, which has significant implications for the rights of workers in the gig economy.<sup>54</sup> Companies like Uber and Deliveroo have previously claimed workers are independent contractors, withdrawing these workers from minimum wage and leave entitlements. This is part of a growing trend towards recognising the legal rights of workers. In March 2020, the UK Supreme Court ruled two Uber drivers were workers, a different classification to the Australian 'employee' category although with

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<sup>47</sup> *Aslam* (n 38) [94] (Lord Leggatt with whom Lord Reed, Lord Hodge, Lady Arden, Lord Sales and Lord Hamblen agree).

<sup>48</sup> *Ibid* [95].

<sup>49</sup> *Ibid* [96].

<sup>50</sup> *Ibid* [97].

<sup>51</sup> *Ibid* [98].

<sup>52</sup> *Ibid* [100].

<sup>53</sup> *Ibid*.

<sup>54</sup> Veen, A, Goods, C, Sullivan, R & Barrett, T. 2020. 'An employee, not a contractor: unfair dismissal ruling against Deliveroo is a big deal for Australia's gig workers', *The Conversation*, <https://theconversation.com/an-employee-not-a-contractor-unfair-dismissal-ruling-against-deliveroo-is-a-big-deal-for-australias-gig-workers-161173>.



more legal rights than an independent contractor.<sup>55</sup> In relation to the APU, this would mean if an employee-employer relationship were to exist with the prisoners, they would be afforded legal rights including the rights to unionise.

There have been three other federal Fair Work Commission decisions that considered Uber drivers as employees: *Kaseris v Rasier Pacific V.O.F* [2017] FWC 6610, *Pallage v Rasier Pacific Pty Ltd* [2018] FWC 2579 and *Suliman v Rasier Pacific Pty Ltd* [2019] FWC 4807. In consideration of the UK court decision and the three favourable FWC rulings, the implication for Australia is that there may be a future court determination of Uber drivers constituting as 'employees' even if *Gupta* has set the current precedent that an Uber driver is not an employee. This means that a similar business model engaged by the APU will, in future, enable prisoners to be considered as employees despite arrangements allowing for high degrees of autonomy and discretion.

- 4.1.2 *Gupta* as an outlier in terms of precedential value

#### *Findings in Gupta*

In applying the multi-factor test, the FWC primarily held that because Uber drivers are able to choose when to log on and off, accept or refuse driving requests and a lack of visible affiliation with Uber Eats, they cannot be classified as employees.<sup>56</sup> The FWC also stated that an inherent part of employment is a work-wage bargain, which requires a correlative obligation between the contracting parties, whereby the employee, on one side, performs the work required by the contract, and the employer, on the other side, pays for the work performed.<sup>57</sup> Uber acted as a conduit for collecting payment, rather than a payer of wages.<sup>58</sup> The FWC therefore concluded that the fundamental elements of an employment relationship were not present. The driver was not required to perform any work for Uber; instead, he was free to 'perform as much or as little work with it as he liked'<sup>4</sup> 'without any further reference to [Uber]'.<sup>5</sup> Additionally, Uber did not pay for any work performed by the driver. In its place, the driver received a percentage of the fees charged to passengers for the trips.<sup>59</sup>

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<sup>55</sup> <https://theconversation.com/a-new-deal-for-uber-drivers-in-uk-but-australias-gig-workers-must-wait-157597>.

<sup>56</sup> Ibid.

<sup>57</sup> Mondaq (2018). *Australia: Absence of work-wages bargain crucial for Fair Work Commission to conclude that an Uber driver was not an employee*. Retrieved June Wednesday, 2021, from <https://www.mondaq.com/australia/employment-and-hr/674414/absence-of-work-wages-bargain-crucial-for-fair-work-commission-to-conclude-that-an-uber-driver-was-not-an-employee>

<sup>58</sup> *Kaseris v Rasier Pacific V.O.F* [2017] FWC 6610 [51].

<sup>59</sup> Mondaq. (2018). *Australia: Absence of work-wages bargain crucial for Fair Work Commission to conclude that an Uber driver was not an employee*. Retrieved June Wednesday, 2021, from <https://www.mondaq.com/australia/employment-and-hr/674414/absence-of-work-wages-bargain-crucial-for-fair-work-commission-to-conclude-that-an-uber-driver-was-not-an-employee>



*Our argument: the reason why Gupta IS applicable in our case*

The issue in contention appears to be whether prisoners could be employed by Breakout Media (BOM) independent contractors. Whether an individual is considered an employee or independent contractor is rooted fundamentally in whether they serve their employer in the employer's business (employee) or carry on a trade or business of their own (independent contractor).<sup>60</sup> To meet such a high autonomy threshold is possible for prisoners considering the nature of their work can be completed with or without reliance on BOM. Engaging with the indicia in both *Vabu* and *Gupta*, the totality of the future relationship between BOM and prisoners will most likely be considered that of an individual contractor.

This is on the basis that:

- The contract can be constructed in such a way that prisoners fall within the definition of an independent contractor. As they are not employees representative of BOM, but carry out their own observations independent and distinct from the employer, they are said to be individual contractors. BOM will not have significant control over how the prisoners wish to complete their services<sup>61</sup>
- Allowing prisoners to choose when they work, in and of itself, will not be enough to establish them as contractors. However the limited control prisoners have over their own activity due to the nature of prison work and life as well as their lack of reliance on BOM for work, should not be relevant to the question whether they are employees or not.
- Part of the role of an employee is being the face of their company, and as its representatives. A contract with BOM could ensure that prisoners are not considered its representatives and are not bound by conduct rules, not required to wear any uniform or logo, or any other indicator of them being a public representative of BOM.

## 4.2 Application of Model to APU Engagement with Prisoners

The model requires prisoners to enter into an employment agreement where they work as independent contractors, 'detainee observers', with their rights and obligations set out in the draft [contract](#) (see appendix). Their role fundamentally involves observing and

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<sup>60</sup> *Hollis v Vabu Pty Ltd* [2001] HCA 44 [40].

<sup>61</sup> *R v Foster; Ex parte Commonwealth Life (Amalgamated) Assurances Ltd* (1952) 85 CLR 138 at 150-151; *Adam v Newbigging* (1888) 13 App Cas 308 at 315; *Ex parte Delhasse; In re Megevand* (1878) 7 Ch D 511 at 526, 528, 532

monitoring detainee conditions while still being in a position of incarceration themselves. Observations will then be reported to BOM by means of written or oral correspondence. In summary, prisoners are contracted by BOM while the APU functions as a structure to ensure detainees rights as contractors are respected. This recognises the value of prisoners' lived experience and empowers prisoners to have greater agency and representation in issues that affect them directly.

Being recognised as an employee organisation or an industrial association by the FWC would afford the opportunity for the APU to represent prisoners in the commission, act as a legal entity and give it the ability to take legal action to remedy unfair work conditions.

A key component of having a valid contractual basis for such an agreement is the provision of consideration - payment. Consideration refers to what is received by the contractor in exchange for their services. In this case, the prisoners are offering the service of monitoring the conditions of the prisons. BOM must offer consideration for this in order for the contract between the parties to be binding. In an employer/contractor relationship, the usual consideration offered to the employee will be remuneration for their services.

Providing remuneration to the prisoners for their services can be offered in kind, such as provision of access to membership services such as information or advice. To enter an employment contract individuals undertaking labour must "get something in return"<sup>62</sup>. An exchange is foundational for a valid contractual basis however, remuneration is not necessarily monetary and extends to all methods of financial compensation<sup>63</sup>. Financial compensation is the act of providing a person with economic value in exchange for goods or services. Economic value can be exchanged through goods and services such as education, social services and legal counsel.

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<sup>62</sup>Fair Work Ombudsman 2021, *Unpaid Work*, (Web Page, 5 July 2021). Available at <<https://www.fairwork.gov.au/tools-and-resources/fact-sheets/unpaid-work/unpaid-work-unpaid-work#volunteering>>

<sup>63</sup>Employure Workplace Confidence, *Remuneration*, (Web Page, 5 July 2021). Available at <<https://employsure.com.au/guides/wage-and-pay/remuneration/#:~:text=Our%20Advisers%20Today!-,Short%20Definition%3A%20Remuneration,plan%2C%20accommodation%2C%20or%20meals.https://employsure.com.au/guides/wage-and-pay/remuneration/#:~:text=Our%20Advisers%20Today!-,Short%20Definition%3A%20Remuneration,plan%2C%20accommodation%2C%20or%20meals>>

## 5. Option Two: Volunteer Agreement Model

### 5.1 Who is a Volunteer?

A volunteer performs work for another party without an expectation of, or legal requirement, of payment for their work.<sup>64</sup> While there is no accepted legal definition of a volunteering arrangement, the Fair Work Ombudsman provides useful guidance of the characteristics. A genuine volunteering arrangement requires that 'the parties did not intend to create a legally binding employment relationship, the volunteer is under no obligation to attend the workplace or perform work and that the volunteer does not expect to be paid for their work'.<sup>65</sup> Volunteers are considered workers as they perform work for an employer, business, or organisation, however, they do not need to be paid or compensated through monetary or non-cash benefits<sup>66</sup>

Similar to independent contracting, as discussed above, the prisoners will observe as and report to BOM on the conditions and experiences of incarceration. The prisoners will be acting as volunteers rather than independent contractors.

However, the volunteer agreement model would not be feasible as it guarantees very limited rights to the detainee observers and leaves them legally vulnerable.

#### 5.1.1 The parties did not intend to create a legally binding employment relationship

The parties may enter into a volunteering arrangement by means of a 'Volunteer Agreement'. This should explicitly outline that the volunteer is not an employee and does not have a contractual relationship with the organisation. If a person is described as a volunteer in the agreement, the law will generally interpret it to mean that there was no intention to create legal relations.<sup>67</sup> The agreement should also stipulate that if a party breaches the terms of the agreement, there will be no right to seek recourse as there is no legal relationship between the parties.

#### 5.1.2 The volunteer is under no obligation to attend the workplace or perform work

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<sup>64</sup> Justice Connect, *National Volunteer Guide* (Report No 2, May 2020) 6.

<sup>65</sup> Ibid 60.

<sup>66</sup> <https://www.safework.nsw.gov.au/about-us/glossary/glossary-acordion/worker>

<sup>67</sup> Justice Connect (n 53) 10.

Under the volunteer arrangement, a volunteer cannot be compelled to do work nor is the organisation required to give work.<sup>68</sup> The arrangement can be ended at any time by either party. Additionally, working arrangements are more informal and volunteers generally do not have a regular roster.<sup>69</sup>

### 5.1.3 The volunteer does not expect to be paid for their work

Volunteers generally have no legally enforceable right to receive payments.<sup>70</sup> However, the organisation may give, at its discretion, the volunteer honoraria or non-cash benefits. BOM may offer the prisoners benefits such as free union membership of the APU or free access to information about services such as education as a reward or to show gratitude for the detainee's contribution. It should be stipulated in the Volunteer Agreement that payments are not linked to the number of hours worked or the completion of tasks.

## 5.2 Obligations of BOM

The *Fair Work Act 2009 (Cth)*<sup>71</sup> and the *Independent Contractors Act 2006 (Cth)* do not apply to volunteers.<sup>72</sup> An employer's mandatory obligations to the volunteer only include ordinary occupational workplace health and safety laws.<sup>73</sup> Any other rights and obligations may be outlined in the particular organisation's rules or constitution.<sup>74</sup>

The table below specifies the general rights of volunteers in comparison to those of employees and independent contractors.<sup>75</sup>

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<sup>68</sup> Ibid 11.

<sup>69</sup> 'Unpaid Work' (n 54).

<sup>70</sup> Justice Connect (n 53) 9.

<sup>71</sup> *Fairwork Act 2009 (Cth)* s 4(1)(b).

<sup>72</sup> *Independent Contractors Act 2006* s 3.

<sup>73</sup> Justice Connect (n 53) 6.

<sup>74</sup> Ibid 7.

<sup>75</sup> Ibid 6.

Indicators	Volunteer	Employee	Independent contractor
Is the worker paid?	✗ (note: honorarium discussed below)	✓	✓
National Employment Standards apply?	✗	✗	✗
Superannuation accrues?	✗	✗	✗ (some exceptions)
Workers' Compensation applies?	✗	✗	✗ (some exceptions)
Occupational/Workplace Health and Safety laws applies?	✓	✓	✓
Paid sick and annual leave accrues?	✗	✓	✗ (some exceptions)
Paid long service leave?	✗	✓	✗
Unfair dismissal laws apply?	✗	✓	✗ (but some contractual termination rights may apply)
Redundancy rights apply?	✗	✓	✗ (but some contractual termination rights involving payment may apply)

### 5.2.1 Workplace Health and Safety Laws

The model Work Health and Safety Laws apply if a volunteer organisation, acting as the person conducting a business or undertaking ('PCBU'), employs one or more persons to carry out paid work.<sup>76</sup> However, 'volunteer associations', who are volunteers working for community purpose(s) with no employees, are not covered by model WHS laws. They are furthermore, not covered by WHS laws.

<sup>76</sup> "Volunteers", *Safe Work Australia* (Webpage, 2021)  
<<https://www.safeworkaustralia.gov.au/topic/volunteers>>.

## 6. APU Structure

### 6.1 Registration Process

- Control of the APU should rest with prisoners themselves
- We should consider the legal structure of the APU as a 'cooperative'
- Further research to be conducted on what cooperative structure is best
- Ultimately the APU should benefit those doing the work (ie the prisoners themselves) and empower detainees through a bottom-up approach

#### 6.1.1 Requirements for Registering a Union at the Federal Level

A Registered Organisation is defined as an association; of employers; of employees (a union); or an enterprise association which has been registered by the Fair Work Commission under the *Fair Work (Registered Organisations) Act 2009* (Cth) ('RO Act'). Registered Organisations have the right to represent members in the national workplace relations system, ensuring their rights, providing lawyers and advice on wages and conditions.

For prisoners, creating a formal union would benefit their community, allowing the APU to assist in determining conditions, advocating for working rights and ensuring that the work undertaken by prisoners is properly acknowledged. Having a representative body, especially for those incarcerated, will let their voices be heard. Unfortunately, under current legal definitions and legislation, prisoners are not considered 'employees' and cannot unionise as a Registered Organisation in terms of their relationship with prison authority. However, this does not preclude them from forming an employment relationship with the BOM with the APU acting as their union and effectively facilitating unionisation.

#### 6.1.2. Becoming a registered organisation

The process for becoming a registered organisation is:

1. an association lodges a formal application in the Commission, then
2. the Commission advertises the fact that an application has been made and invites interested parties to object to the association's registration, then
3. the Commission determines the application.

#### 6.1.3. Factors the Commission will consider in determining the application

The Commission will consider various factors, including whether:

1. the association is an association of employers or employees, or an enterprise association

2. the association is a genuine association
3. the association would conduct itself consistent with the obligations contained in the *RO Act* and the *Fair Work Act 2009*
4. the association's rules make provision as required by the *RO Act*
5. the association's name is not so similar to that of an existing organisation that it would cause confusion, and
6. a resolution in favour of registration as an organisation has been passed

#### 6.1.4. For employer or employee associations whether either

1. there is no organisation to which members of the association might belong, or
2. if there is, it would not more effectively represent those members and the members would not more conveniently belong to it although the Commission can accept an undertaking in order to avoid demarcation disputes

#### 6.1.5. For enterprise associations whether

1. the association is free from control or improper influence from any employer, person or body, and
2. a majority of the persons eligible to be members of the association support its registration as an organisation.

Source: [Registration | FWC Main Site](#)

#### 6.1.6 Documents that need to be lodged

An application to register an organisation must be lodged with the following documents:

1. A declaration, made by an officer of the association authorised to make the declaration, verifying the facts stated in the application and in any document lodged with the application;<sup>77</sup>
2. a list of the members of the association, showing the name and postal address of each member;<sup>78</sup>
3. a list of the offices in the association and in each branch of the association;
4. a list of the names, postal addresses and occupations of the persons holding the offices;
5. a list of the branches of the association, showing for each branch its name and the location of its office;
6. the rules of the association and the rules of each of its branches;<sup>79</sup>

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<sup>77</sup> RO Regulations r 21(1)(b).

<sup>78</sup> Ibid r 21(1)(d)(i).

7. a copy of a resolution in favour of the registration of the association as an organisation passed in accordance with the rules of the association by a majority of the members of the association present at a general meeting of the association or by an absolute majority of the committee of management of the association.<sup>80</sup>

An association applying for registration may lodge with the FWC an additional statement supporting the application.<sup>81</sup>

Source: Fair Work (Registered Organisations) Regulations 2009

[https://www.legislation.gov.au/Details/F2021C00278/Html/Text#\\_Toc68693834](https://www.legislation.gov.au/Details/F2021C00278/Html/Text#_Toc68693834)

## 6.2 General requirements to form a union

In particular, a trade union is an organisation formed to represent the interests of one or more groups of workers.<sup>82</sup> To register an organisation (union) we need to apply to the Fair Work Commission (FWC). The application needs 50 members in the union. Additionally, the application also needs applicants to list the people holding the offices of President, Secretary, Committee Member) including, if applicable, each office of each branch of the association (e.g. Branch President, Branch Secretary, Branch Committee Member)

### 6.2.1 Members

All employees and independent contractors have the right to join a union but must be registered under Australian Unions to receive protection, support and advice.<sup>83</sup> All workers have a right to choose whether to join a union and cannot be pressured by their employer to join.<sup>84</sup> It is illegal for the employer to threaten or take adverse action against the worker for not being part of a union.<sup>85</sup> Therefore, there cannot be a de facto membership by default of status. On average, union membership costs around \$10 per week but varies depending on the union joined, the number of hours worked and income earned.<sup>86</sup>

Under the *Fair Work Act 2009*, some general protections are provided for independent contractors. They have limited workplace rights, the right to engage in certain industrial

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<sup>79</sup> Ibid r 21((1)(d)(v).

<sup>80</sup> Ibid r 21(1)(d)(vi).

<sup>81</sup> Ibid r 21(2).

<sup>82</sup> *Ireland v Ian Johnson CEO of the Department of Corrective Services* [2009] WASCA 162, [39]; Andrew Stewart, *Employment Law* (The Federation Press, 6th ed, 2018) 450.

<sup>83</sup> 'Australian Unions', *Australian Union* (Web Page) <<https://join.australianunions.org.au/>>.

<sup>84</sup> 'Union Membership', *Fair Work Ombudsman* (Web Page) <<https://www.fairwork.gov.au/employee-entitlements/industrial-action-and-union-membership/union-membership>>.

<sup>85</sup> Ibid.

<sup>86</sup> 'Why Join a Union', *Australian Union* (Web Page) <<https://www.australianunions.org.au/about-unions/why-join-a-union/>>.



activities and are protected from adverse action, coercion and abuses of freedom of association.<sup>87</sup>

- Can a volunteer be working on contract?
- Since independent contractors aren't employees, they don't have a minimum wage or pay rate. Usually negotiate payment as part of their contract for services they provide.<sup>88</sup>

#### USEFUL WEBSITES:

- <https://www.fairwork.gov.au/find-help-for/independent-contractors#:~:text=Since%20independent%20contractors%20aren't,minim%20wage%20or%20pay%20rate.&text=If%20an%20independent%20contractor%20doesn,enforce%20payment%20of%20unpaid%20invoices>.
- <https://business.gov.au/people/contractors/contractor-rights-and-protections>

VERY USEFUL WEBSITE HAVE A LOOK!

[https://howardleague.org/wp-content/uploads/2016/05/Business\\_behind\\_bars.pdf](https://howardleague.org/wp-content/uploads/2016/05/Business_behind_bars.pdf)

## 6.3 Rights and Responsibilities of Registered Organisations

Once registered, an organisation:

1. will receive a certificate of registration. The organisation must retain the original of this certificate as it is proof of its corporate identity
2. can represent its members at the Commission
3. can have its elections conducted by the Australian Electoral Commission at the Commonwealth's expense
4. becomes a body corporate
5. has perpetual succession
6. has the power to purchase, take on lease, hold, sell, lease, mortgage, exchange and otherwise own, possess and deal with, any real or personal property
7. can sue or be sued in its registered name
8. must have a common seal

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<sup>87</sup> 'Independent Contractors', *Fair Work Ombudsman* (Web Page)  
<<https://www.fairwork.gov.au/ArticleDocuments/723/Contractors-and-employees-whats-the-difference.pdf.aspx>>.

<sup>88</sup> <https://www.fairwork.gov.au/find-help-for/independent-contractors>

9. must have rules that comply with the RO Act
10. must hold elections for its offices
11. must submit annual returns and financial reports to the Commission, and
12. must conduct itself such that it:
  - a. is representative and accountable to members
  - b. operates effectively
  - c. encourages members to participate in its affairs
  - d. has efficient management and high standards of accountability to its members, and
  - e. functions and is controlled in a democratic manner.

Source: [Registration | FWC Main Site](#)

## 6.4 Websites to lodge an application for a union (and become a registered organisation)

All forms: <https://www.fwc.gov.au/resources/forms>

Application by an association of employees (other than an enterprise association) for registration as an organisation: [Application by an association of employees \(other than an enterprise association\) for registration as an organisation](#)

Application by an enterprise association of employees for registration as an organisation: [Application by an enterprise association of employees for registration as an organisation](#)

Completed forms can be lodged with one of the Fair Work Commission's offices via email, fax or post. The contact details for the Sydney office are found below:

- Address: Level 10, Terrace Tower, 80 William Street, East Sydney NSW 2011
- Telephone Number: 1300 799 765
- Fax: (02) 9380 6990
- Email: [sydney@fwc.gov.au](mailto:sydney@fwc.gov.au)

## 7. Precedents and International Examples

### 7.1 Recognising Prisoners as Employees

United Kingdom

One3One Solutions

One3One Solutions (formerly known as the Prison Industries Unit) was launched in May 2012 by the UK Justice Secretary Kenneth Clarke. The initiative has the aim of increasing the commercial work done by UK prisoners. The aim of One3One Solutions is to win and manage contracts of work for prisoners, and to secure their employment within both the public and private sectors. This initiative expands the scope for prisoners to rehabilitate and provides a significant opportunity to garner funds for rehabilitation.<sup>89</sup> Once leaving prison, inmates would be equipped with work experience.

### **Barbed (Howard League for Penal Reform)**

This initiative was designed to be a 'rehabilitative revolution' in which prisoners are allowed to participate in a normal working day.<sup>90</sup> Prisoners engage in real work and are recognised as paid employees, paying taxes and national insurance on their earnings. This motivates the prisoners, provides them with a sense of purpose, and equips them with skills, ultimately increasing the success of the prisons and chances of reintegration for detainees. Barbed, a graphic design business, was the first social enterprise to be established within a UK prison in 2005.<sup>91</sup> Prisoners were paid fair and real wages for the work undertaken.

## **France**

### **'Semi-private' arrangement**

This arrangement is closely related to the labour-leasing system and enables inmate labour to be managed by a private company which organises a full range of services: food service, upkeep, maintenance, inmate occupational training and inmate labour. There are variations of this system, ranging from prisons with a single company in charge of all state-delegated operations to other prisons having one primary company who subcontracts to other companies. Large industrial companies tend to outsource their production to prisons, providing employment for prisoners. As part of a subcontracting chain, prison labour is then given flexibility permitted by the laws governing inmate labour.<sup>92</sup>

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<sup>89</sup>

<https://discovery.nationalarchives.gov.uk/details/r/C14465616#:~:text=One3One%20Solutions%20was%20launched%20in,commercial%20work%20done%20by%20prisoners.&text=It%20was%20intended%20that%20One3One,the%20public%20and%20private%20sectors.>

<sup>90</sup> Crook (2011). Business Behind Bars. [https://howardleague.org/wp-content/uploads/2016/05/Business\\_behind\\_bars.pdf](https://howardleague.org/wp-content/uploads/2016/05/Business_behind_bars.pdf)

<sup>91</sup> Ibid [8].

<sup>92</sup> Fabrice Guilbaud, 'Working in Prison: Time as Experienced by Inmate-Workers', (2010) 51(5) *Revue française de sociologie* <https://www.cairn.info/revue-francaise-de-sociologie-1-2010-5-page-41.htm>

## 7.2 Historical forms of Prisoners Union

### Missouri Prison Labor Union (MPLU)

Based in the US, the Missouri Prison Labour Union (MPLU) is a non-profit organisation that acts as a guardian for prisoner's civil and human rights. This organisation views ~~prison conditions as an extension of a corrupt system, being~~ worsened by lewd behaviour, drug abuse, and economical and political abandonment.<sup>93</sup>

The MPLU recognises and believes in:

- The inherent dignity and rights of every human being, and the recognition and adherence to these rights, as the basis of freedom for all humans
- All prisoners as human beings as well as political prisoners, whom have a right to be freed from abuse, oppression, repression, racism, sexism, and slave labour exploitation
- People having the right to govern their own lives and be freed from wage slavery
- MPLU's founding principles of liberty, equality, and solidarity, which are fortified by mutual aid, free association, and free cooperation
- The abolition of all prisoners and the death penalty.

### Preservation of the Rights of Prisoners UK (PROP)

A prisoners' rights movement emerged in the UK during the early 1970s, when the group Preservation of the Rights of Prisoners (PROP) was formed by prisoners and ex-prisoners to preserve, protect and extend prisoners' rights and to improve prison conditions.<sup>94</sup> It came as a retaliation to a report released that recommended a shift in prison regime which stripped many entitlements previously held by prisoners. PROP drafted a Prisoners' Charter of Rights which contained 26 rights outlining issues such as participating in the Union, communication, access to legal support and education. PROP used Strikes and action declarations to gain media attention to help focus their efforts. PROP continued to operate until the late 1970s but with the repression of their striking efforts and a lack of support and recognition the movement folded.<sup>95</sup>

### United Prisoners Union California (US)

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<sup>93</sup> Jerome White-Bey, Missouri Prison Labour Union, *South Central Correctional Centre*.

<sup>94</sup> R Totale, *PROP '72: the history of a UK prisoners' union*, 2019, <https://libcom.org/history/prop-72-history-uk-prisoners-union>.

<sup>95</sup> Ibid.

The United Prisoners Union (UPU), formerly referred to as the California Prisoners Union, was established in 1970 to advance the rights of Californian prisoners while overturning the presumption that convicted offenders belonged at the bottom of social order. Since its inception, the UPU has identified goals to achieve universal sentencing laws, restore civil and human rights to prisoners and negotiate fairer pay standards.<sup>96</sup> Specifically, the UPU organised prisoners and ex-prisoners into collective labour unions in advocacy of safer working conditions, better medical care and improved visitation regulations. Such representation of inmate democracy and self-determination has been successful in achieving inmate bargaining with prison administrators. Unionisation can help in the rehabilitation of an inmate while also benefiting the prison community.<sup>97</sup>

### **Bulgarian Prisoners' Association**

The Bulgarian Prisoners Rehabilitation Association (BPRA) was created in July 2012 by Jock Palfreeman, an Australian man imprisoned in Bulgaria from 2007-2019. BPRA is a non-government organisation that directly defends the human rights of prisoners in Bulgaria with the aim to coincide the operation of Bulgarian prisons with international human rights. Further, it exposes and hinders the systemic corruption and violations of human rights committed by prison officials and authorities. Comprising of prisoners and ex-prisoners only, through consequential work to reform the criminal justice system the association seeks to combat the corruption in penitentiary institutions in Bulgaria.

### **'FFCO' Sweden (United Prisoners Central Organisation)**

In the face of mounting dissatisfaction with the 'factory prisons' of Sweden, Swedish prisoners embarked in a collective hunger strike.<sup>98</sup> Fifty percent of the national prison population participated and at the height of the strike prison authorities convened with detainee representatives at Österåker Prison outside Stockholm.<sup>99</sup> Prisoners demanded improved living conditions on a nationwide scale where negotiations between detainees and prison staff resulted in authorities' accession. Hence, the FFCO was formed.

The FFCO entered negotiations regarding expanded furlough, improved visiting arrangements and the abolition of mail censorship.<sup>100</sup> Negotiations however, proved

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<sup>96</sup> The Freedom Archives, *United Prisoners Union*, <[https://search.freedomarchives.org/search.php?view\\_collection=196](https://search.freedomarchives.org/search.php?view_collection=196)>.

<sup>97</sup> Paul R. Comeau (1972) 'Labor Unions for Prison Inmates: An Analysis of a Recent Proposal for the Organization of Inmate Labor,' 21 *Buff. L. Rev.* 963.

<sup>98</sup> Mathiesen, T 1974, 'The Prison Movement in Scandinavia' *Crime and Social Justice*, no. 1, pp. 45–50.

<sup>99</sup> *Ibid.* [47]

<sup>100</sup> *Ibid.*

difficult. Prison staff used this dialogue to legitimise their actions and make the authorities appear democratic whilst implementing no action.

### **'FFF' Prisoners Trade Union Norway**

The FFF was established in July 1972 within Ullersmo National Prison, just outside Oslo<sup>101</sup>. Prisoners put forward both general and specific demands to prison administration including; higher wages; relaxed visitation regulations; three weeks internal vacation; free access to earnings accumulated in prison; and a conference with the governor (Mathieson, 1975, p.48). The prison administration refused to negotiate and the prisoners consequently went on strike<sup>102</sup>.

Though the efforts of the FFF were systematically oppressed, the union had an impact on an ideological level<sup>103</sup>. It provided insight regarding the operation of strikes. It revealed that strikes, as a mechanism of unionisation, should be; brief; symbolic gestures to enlist public support; directed towards government regulatory mechanisms; focus on issues with public support; and used with judicious selection<sup>104</sup>.

### **'FLO' Denmark (The Prisoners Labour Union)**

In November of 1973, outside Copenhagen, a group of prisoners on Furlough established the FLO. The Organisation was an 'outgrowth' of nationwide prison strikes the summer beforehand<sup>105</sup>. The strike was centered upon inmate wages. The FLO has since demanded negotiations with correctional authorities<sup>106</sup>.

Useful Links:

[Union membership – Industrial action and union membership](#)

[Preventing workplace problems - Workplace problems](#)

[Unions and employer associations - Related sites](#)

[Registered Organisations Commission](#)

[About us-About registered organisations-Registered](#)

[Running a registered organisation | FWC Main Site](#)

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<sup>101</sup> Source: Huff, C R 1945. 'Unionisation Behind the Walls: An Analytic Study of the Ohio Prisoners' Labour Union Movement' PhD Thesis, The Ohio State University, <[https://etd.ohiolink.edu/apexprod/rws\\_etd/send\\_file/send?accession=osu1285003605&disposition=inline](https://etd.ohiolink.edu/apexprod/rws_etd/send_file/send?accession=osu1285003605&disposition=inline)>, 84,85.

<sup>102</sup> Ibid.

<sup>103</sup> Ibid.

<sup>104</sup> Ibid.

<sup>105</sup> Ibid.

<sup>106</sup> Ibid.

<https://www.fairwork.gov.au/awards-and-agreements/employment-contracts>  
<https://www.fairwork.gov.au/employee-entitlements>

## Appendix

### 1. Employment Contract

**THIS EMPLOYMENT AGREEMENT** (the 'Agreement') is dated this \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_.

BREAKOUT MEDIA COMMUNICATIONS (Social Enterprise) - (the 'Employer')  
Name of DETAINEE of (Institution) ('Detainee Observer') - (the 'Employee')

#### **BACKGROUND**

- A. The Employer is of the opinion that the Employee has the necessary abilities to assist and benefit the Employer in its business.
- B. The Employer desires to employ the Employee and the Employee has agreed to accept and enter such employment upon the terms and conditions set out in this Agreement.

#### **Agreement to Observe Detainee Conditions**

The role stipulated in this contract is for the Employee to 'Observe Detainee Conditions', while incarcerated, by means of written and oral correspondence to Breakout Media Communications. These reports are then to be forwarded to the Australian Prisoners Union (APU) who will proceed to present these findings to the Optional Protocol for the Convention Against Torture (OPCAT).

**IN CONSIDERATION OF** the matters described above and of the mutual benefits and obligations set forth in this Agreement, the receipt and sufficiency of which consideration is hereby acknowledged, the parties to this Agreement agree as follows:

#### **Commencement Date and Term**

1. The Employee will commence the role of Detainee Observer with Breakout Media Communications on the date agreed to by the parties till the ceasement of their prison sentence (subject to exceptions under 'Termination of Employment').
2. The parties to this contract hereby agree that the commencement of the Employee's work under the Employer is on the following date and time:  
\_\_\_\_\_.

#### **Job Title and Description**

3. The initial job title of the Employee will be the following: Detainee Observer
4. The Employee agrees to be employed on the terms and conditions set out in this Agreement. The Employee agrees to be subject to the general supervision of and act pursuant to the orders, advice and direction of the Employer.
5. The Employee will perform any and all duties as requested by the Employer that are reasonable and that are customarily performed by a person holding a similar position in the industry or business of the Employer.



6. The Employee may make changes to the job title or duties of the Employee where the changes would be considered reasonable for a similar position in the industry or business of the Employer. The Employee's job title or duties may be changed by agreement and with the approval of both the Employee and the Employer or after a notice period required under law.
7. The Employee agrees to abide by the Employer's rules, regulations, policies and practices, including those concerning work schedules, as they may from time to time be adopted or modified.

#### **Employee Compensation**

8. Compensation paid to the Employee for the services rendered by the Employer as required by this agreement will be afforded by the formation of a Australian Prisoners' Union.

#### **Place of Work**

9. The Employee's primary place of work will be at the following location:

#### **Time of Work**

10. The Employee's normal hours of work, including breaks, ('Normal Hours of Work') are as follows:
- 

#### **Employee Benefits**

11. The Employee will be entitled to only those additional benefits that are currently available as described in the lawful provisions of the Employer's employment booklets, manuals, and policy documents or as required by law.
12. Employer discretionary benefits are subject to change, without compensation, upon the Employer providing the Employee with 60 days written notice of that change and providing that any change to those benefits is taken generally with respect to other employees and does not single out the Employee.

#### **Duty to Devote**

13. The employee agrees to devote effort, as an employee of the Employer, to the employment duties and obligations as described in this Agreement.

#### **Conflict of Interest**

14. During the term of the Employee's active employment with the Employer, the Employee will not, directly or indirectly, engage or participate in any other business activities that the Employer, in its reasonable discretion, determines to be in conflict with the best interests of the Employer without the written consent of the Employer.

#### **Contract Binding Authority**

15. Notwithstanding any other term or condition expressed or implied in this Agreement to the contrary, the Employee will not have the authority to enter into any contracts or commitments for or on the behalf of the Employer without first obtaining the express written consent of the Employer.

#### **Termination Due to the Discontinuance of Business**

16. Notwithstanding any other term or condition expressed or implied in this Agreement, in the event that the Employer will discontinue operating its business at the location where the Employee is employed, then, at the Employer's sole option, and as permitted by law, this Agreement will terminate as of the last day of the month in which the Employer ceases operation at such location with the same force and effect as if such last day of the month were originally set as the Termination Date of this Agreement.

#### **Termination of Employment**

17. Where there is just cause for termination, the Employer may terminate the Employee's employment without notice, as permitted by law.
18. The Employee and the Employer agree that reasonable and sufficient notice of termination of employment by the Employer is the greater of one (1) week or any minimum notice required by law.
19. If the Employee wishes to terminate this employment with the Employer, the Employee will provide the Employer with the greater of one (1) week and the minimum required by law.
20. Once notice has been given by either party for any reason, the Employee and the Employer agree to execute their duties and obligations under this Agreement diligently and in good faith through to the end of the notice period. The Employer may not make any changes to compensation or any other term or condition of this Agreement between the time termination notice is given through to the end of the notice period.

#### **Severability**

21. The Employer and the Employee acknowledge that this Agreement is reasonable, valid and enforceable. However, if any term, covenant, condition or provision of this Agreement is held by a court of competent jurisdiction to be invalid, void or unenforceable, it is the parties' intent that such provision be changed in scope by the court only to the extent deemed necessary by that court to render the provision reasonable and enforceable and the remainder of the provisions of this Agreement will in no way be affected, impaired or invalidated as a result.

#### **Notices**

22. Any notices, deliveries, requests, demands or other communications required here will be deemed to be completed when hand-delivered, delivered by agent,

or seven (7) days after being placed in the post, postage prepaid, to the parties at the following addresses or as the parties may later designate in writing:

- **Employer:**

Name: \_\_\_\_\_

Address: \_\_\_\_\_

Fax: \_\_\_\_\_

Email: \_\_\_\_\_

- **Employee:**

Name: \_\_\_\_\_

Address: \_\_\_\_\_

Fax: \_\_\_\_\_

Email: \_\_\_\_\_

### **Modification of Agreement**

23. Any amendment or modification of this Agreement or additional obligation assumed by either party in connection with this Agreement will only be binding if evidenced in writing signed by each party or an authorised representative of each party.

### **Governing Law**

24. This Agreement will be construed in accordance with and governed by the laws of the state of New South Wales.

### **Definitions**

For the purpose of this Agreement the following definitions will apply:

25. '*Employee*' means, for the purposes of the *Fair Work Act 2009* (Cth) s 6, has its ordinary meaning, and includes a person who is usually such an employee, but does not include a person in a vocational placement.

26. '*Employer*' means, for the purposes of the *Fair Work Act 2009* (Cth) s 6, has its ordinary meaning and includes:

- (a) a person who is usually such an employer (Breakout Media Communications); and
- (b) an unincorporated club.

27. '*Enterprise*' means for the purposes of the *Fair Work Act 2009* (Cth s6):

- (a) A business that is carried on by a single employer; or
- (b) A business that is carried on by related bodies corporate, at least one of which is an employer; or
- (c) An operationally distinct part of a business mentioned in paragraph (a) or (b); or
- (d) A grouping of 2 or more operationally distinct parts of a business mentioned in paragraph (a) or (b).

28. '*Termination Date*' means the date specified in this Agreement or in a subsequent notice by either the Employee or the Employer to be the last day of employment under this Agreement. The parties acknowledge that various provisions of this Agreement will survive the Termination Date.

29. '*Work*' - refer to specific provisions section.

30. '*Worker*' means, for the purposes of the *Fair Work Act 2009* (Cth) s 789FC, an individual who performs work in any capacity, including as an employee, a contractor, a subcontractor, an outworker, an apprentice, a trainee, a student gaining work experience or a volunteer.

### **General Provisions**

31. Time is of the essence in this Agreement.

32. Headings are inserted for the convenience of the parties only and are not to be considered when interpreting this Agreement. Words in the singular mean and include the plural and vice versa. Words in the masculine mean and include the feminine and vice versa.

33. This Agreement constitutes the entire agreement between the parties and there are no further items or provisions, either oral or written. The parties to this Agreement stipulate that neither of them has made any representations with respect to the subject matter of this Agreement except such representations as are specifically set forth in this Agreement.

### **Specific Provisions**

34. The scope of the work to be undertaken by the Employee is as follows:

- (a) The Employee will be contacted to monitor living and working conditions on a regular basis within their prison and then report to representatives at BreakOut Media Communications.
- (b) The Employee is expected to report ORALLY (via telephone call) or IN WRITING about the conditions of their specific environment of detention and treatment.

35. The report made by the Employee is to be submitted to the Australian Prisoners Union (APU). The APU will proceed to present these findings to the Optional Protocol for the Convention Against Torture (OPCAT).

36. The Employee acknowledges that he/she will not receive monetary remuneration, wage or salary of any kind for the work which falls under the scope of their employment with the Employer.

IN WITNESS WHEREOF, the parties have duly affixed their signatures under hand and seal on this \_\_\_\_ day of \_\_\_\_, \_\_\_\_.

**EMPLOYER:**

\_\_\_\_\_  
\_\_\_\_\_

**EMPLOYEE:**

\_\_\_\_\_  
\_\_\_\_\_