THE ILO AND THE PROTECTION OF FUNDAMENTAL HUMAN RIGHTS IN AUSTRALIA

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[Australia lacks a constitutionally entrenched bill of rights. In the absence of such provision, it is necessary to rely upon a combination of statute, common law and restraint on the part of legislators for the protection of fundamental human rights. This article focuses upon the role of conventions, recommendations and principles adopted and applied under the auspices of the International Labour Organisation ('ILO') in conditioning the behaviour of legislators, courts and administrators. It concludes that over an extended period, ILO standards relating to the abolition of forced labour, discrimination and freedom of association have played an important, if largely unacknowledged, role in helping to fill a significant gap in Australia's constitutional arrangements. It notes, however, that this country's generally impressive compliance record has increasingly come under question in recent years.]

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I INTRODUCTION

Australia does not have a constitutionally entrenched bill of rights. On present indications, there is no realistic prospect of the electorate being asked to approve

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the adoption of one by way of constitutional amendment.[1] On past experience, there is little likelihood that any such proposal would be able to command the necessary level of electoral support, even if it were put to the people in a referendum.

The *Australian Constitution* contains a number of provisions which can be said expressly to protect fundamental human rights, but they are very limited in scope.[2] In addition, the High Court has evinced a preparedness to read some measure of protection of fundamental human rights into the *Australian Constitution* in certain areas.[3] This technique is inevitably controversial in political terms, and is necessarily limited in scope and effect. It could not realistically be expected to provide adequate protection for a comprehensive range of fundamental human rights such as those enshrined in the *International Covenant on Civil and Political Rights*[4] and the *International Covenant on Economic, Social and Cultural Rights*.[5]

In the absence of comprehensive constitutional protection of human rights, it is necessary to look to the legislature and the courts for such protection. The search is not entirely in vain. Over the last 25 years, both State and Commonwealth Parliaments have adopted an extensive range of provisions which are directed to the protection of fundamental human rights, especially in relation to protection against discriminatory treatment on the basis of criteria such as race, gender, ethnicity or disability.[6]

In many instances, the content of these legislative provisions has been strongly influenced by international standard-setting instruments such as the *ICCPR* and the *ICESCR*. Indeed, in the case of certain Commonwealth provisions in this area, the constitutionality of the legislation turns wholly or partly upon the fact that it is intended to give effect to Australia's international obligations in the field of human rights.[7]

Conventions and recommendations adopted under the auspices of the ILO have been an important source of such obligations: for example, the *Discrimination*

[1] Peter Bailey, *Human Rights: Australia in an International Context* (1990) ch 3; Murray Wilcox, *An Australian Charter of Rights* (1993) pt 3.

[2] Eg, s 51(xxxi) has the effect that the Commonwealth can acquire property only on just terms; s 80 protects the right to trial by jury for indictable offences; and s 116 guarantees freedom of religion. See generally Bailey, above n 1, ch 4; Nick O'Neill and Robin Handley, *Retreat from Injustice: Human Rights in Australian Law* (1994) ch 3.

[3] See, eg, *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1. See also O'Neill and Handley, above n 2, ch 4; Rachel Doyle, 'The Industrial–Political Dichotomy: The Impact of the Freedom of Communication Cases on Industrial Law' (1995) 8 *Australian Journal of Labour Law* 91.

[4] *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('*ICCPR*').

[5] *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) ('*ICESCR*').

[6] Bailey, above n 1, chh 6–7; O'Neill and Handley, above n 2, chh 17–20.

[7] Eg, the *Racial Discrimination Act 1975* (Cth) is intended to give effect to Australia's obligations under the *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 7 March 1966, 660 UNTS 195 (entered into force 4 January 1969). See also *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168; below n 122 and accompanying text.

(Employment and Occupation) Convention 1958 (No 111)[8] provides part of the constitutional underpinning for the *Sex Discrimination Act 1984* (Cth), for the *Human Rights and Equal Opportunity Commission Act 1986* (Cth), and for certain aspects of the *Workplace Relations Act 1996* (Cth).[9]

ILO standards have also played an important, albeit little recognised, role in protecting fundamental human rights in Australia in a number of other contexts. In particular, governments at both State and federal levels appear frequently to use Australia's obligations under ratified conventions concerning discrimination, freedom of association and the abolition of forced labour as a reference point in the development and implementation of legislative policy. The activities of the ILO's supervisory bodies have also played a significant role in protecting and promoting respect for fundamental human rights at both State and Commonwealth level.

The purpose of this paper is to look more closely at the role of ILO standards as a means of promoting and protecting fundamental human rights in Australia. It does this by first looking in general terms at the role of the ILO field of human rights. It then outlines the seven core conventions in relation to the abolition of forced labour, freedom of association, discrimination and the abolition of child labour. It goes on to describe the processes by which all of these instruments, apart from the *Minimum Age Convention 1973 (No 138)*,[10] have been ratified by Australia, and the practical application of the obligations incurred by ratification. It also discusses the jurisprudence of the Governing Body's Committee on Freedom of Association ('CFA') as it has been applied in relation to Australian law and practice over the years. A concluding section considers the overall impact of ILO standards in relation to the protection of fundamental human rights in Australia, and offers some thoughts as to whether and how they might perform this function in the future.

II THE ILO AND HUMAN RIGHTS

The establishment of the ILO in 1919 was impelled to a significant degree by the perceived need to promote social justice as an essential precondition of lasting peace. This was evidenced by the 'methods and principles' which were set out in article 41 of the original *Constitution of the ILO* and which were incorporated in the preamble to the revised *Constitution* of 1946.[11] They included:

[8] *Discrimination (Employment and Occupation) Convention 1958 (No 111)*, opened for signature 25 June 1958, 362 UNTS 31 (entered into force 15 June 1960) ('*Convention No 111*').

[9] *Workplace Relations Act 1996* (Cth) ss 170CB(6), 170CK(1)(a), 170CK(2)(f).

[10] *Minimum Age Convention 1973 (No 138)*, opened for signature 26 June 1973, Cmnd 5829 (entered into force 19 June 1976) ('*Convention No 138*').

[11] *Constitution of the International Labour Organization*, opened for signature 28 June 1919, 2 Bevans 241, art 41 (entered into force 10 January 1920). Article 41 was in turn derived from art 427 of the *Treaty of Peace between the Allied and Associated Powers and Germany*, 28 June 1919, 2 Bevans 43 ('*Treaty of Versailles*'). The revised constitution is reprinted in: International Labour Office, *Constitution of the International Labour Organization and Standing Orders of the International Labour Conference* (1994) 5 ('*ILO Constitution*').

> *First.* — The guiding principle ... that labour should not be regarded merely as a commodity or article of commerce.
> *Second.* — The right of association for all lawful purposes by the employed as well as by the employers.
> *Third.* — The payment to the employed of a wage adequate to maintain a reasonable standard of life as this is understood in their time and country.
> ...
> *Sixth.* — The abolition of child labour. ...
> *Seventh.* — The principle that men and women should receive equal remuneration for work of equal value.[12]

The nature and extent of the ILO's commitment to the protection of fundamental human rights was also evident in the Declaration of Philadelphia of 1944, which was appended to the *ILO Constitution* in 1946:

> The conference reaffirms the fundamental principles on which the Organization is based and, in particular, that —
> (a) labour is not a commodity;
> (b) freedom of expression and of association are essential to sustained progress;
> (c) poverty anywhere constitutes a danger to prosperity everywhere;
> (d) the war against want requires to be carried on with unrelenting vigour within each nation, and by continuous and concerted international effort in which representatives of workers and employers, enjoying equal status with those of governments, join with them in free discussion and democratic decision with a view to the promotion of the common welfare.[13]

Furthermore:

> [A]ll human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity.[14]

The article 41 principles clearly helped guide the standard-setting activities of the International Labour Conference ('ILC') in the inter-War years. There was a particular emphasis throughout this period on improving basic working conditions, for example through the regulation of working hours;[15] the establishment of minimum wage-fixing machinery;[16] the protection of particularly vulnerable

[12] *ILO Constitution* (as at 1919), above n 11, art 41.

[13] 'Declaration Concerning the Aims and Purposes of the International Labour Organisation', annex to the *ILO Constitution*, above n 11, art 1. The annex was adopted at Philadelphia on 10 May 1944 ('Declaration of Philadelphia').

[14] Ibid art 2(a). See also the Declaration on Fundamental Principles and Rights at Work, which was adopted at the 86th Session of the International Labour Conference in June 1998: International Labour Office, *Fundamental Rights Declaration Clears Final Hurdle, ILO Conference Seeks End to Child Labour Abuses*, Press Release, No ILO/98/28 (18 June 1998) 1. Among other things, the Declaration commits all member states to respect the principles inherent in the seven core conventions which constitute the principal focus of this article.

[15] The first instrument adopted by the ILC at its first session was the *Hours of Work (Industry) Convention 1919 (No 1)*, opened for signature 29 October 1919, 38 UNTS 17 (entered into force 13 June 1921). Concern with this issue culminated in the adoption of the *Forty-Hour Week Convention 1935 (No 47)*, opened for signature 4 June 1935, 271 UNTS 199 (entered into force 23 June 1957). Australia is one of only eight countries to have ratified this latter convention. It did not ratify the *Hours of Work (Industry) Convention 1919 (No 1)*.

[16] See especially *Minimum Wage-Fixing Machinery Convention 1928 (No 26)*, opened for signature 30 May 1928, 39 UNTS 3 (entered into force 14 June 1930). This convention was

groups of workers such as children, young persons, and women;[17] and the promotion of workers' compensation and other forms of income security provision.[18] To the extent that these instruments were directed towards attaining and maintaining social justice, they could quite properly be seen to be concerned with the protection of 'human rights' in a general sense.

During this period, the ILC also adopted a number of standards which were concerned with the protection of fundamental human rights in the more conventional sense.[19] The most important of these were the *Right of Association (Agriculture) Convention 1921 (No 11)*[20] and the *Forced Labour Convention 1930 (No 29)*.[21] However, it was not until after the Second World War that the protection of fundamental human rights and freedoms became a major focus of ILO standard-setting activity. This new emphasis was reflected in the adoption of six major instruments between 1948 and 1973:

- the *Freedom of Association and Protection of the Right to Organise Convention 1948 (No 87)*;[22]
- the *Right to Organise and Collective Bargaining Convention 1949 (No 98)*;[23]
- the *Equal Remuneration Convention 1951 (No 100)*;[24]

ratified by Australia in 1931. See also *Minimum Wage-Fixing Convention 1970 (No 131)*, opened for signature 22 June 1970, 825 UNTS 77 (entered into force 29 April 1972). This convention was ratified by Australia in 1973.

17 Eg, two of the six conventions adopted at the 1919 Conference were concerned with the protection of women: *Maternity Protection Convention 1919 (No 3)*, opened for signature 29 October 1919, 38 UNTS 53 (entered into force 13 June 1921); *Night Work (Women) Convention 1919 (No 4)*, opened for signature 29 October 1919, 38 UNTS 67 (entered into force 13 June 1921). Two were concerned with children and young persons: *Minimum Age (Industry) Convention 1919 (No 5)*, opened for signature 29 October 1919, 38 UNTS 93 (entered into force 13 June 1921); *Night Work of Young Persons (Industry) Convention 1919 (No 6)*, opened for signature 29 October 1919, 38 UNTS 93 (entered into force 13 June 1921). Australia has not ratified any of these instruments.

18 Eg, the *Workmen's Compensation (Accidents) Convention 1925 (No 17)*, opened for signature 10 June 1925, 38 UNTS 229 (entered into force 1 April 1927); the *Old-Age Insurance (Industry, etc) Convention 1933 (No 35)*, opened for signature 29 June 1933, reprinted in ILO, *International Labour Conventions and Recommendations* (1996) 183 (entered into force 18 July 1937); and the *Unemployment Provision Convention 1934 (No 44)*, opened for signature 23 June 1934, 40 UNTS 45 (entered into force 10 June 1938). These early conventions have largely been superseded by more recent instruments such as *Social Security (Minimum Standards) Convention 1952 (No 102)*, opened for signature 28 June 1952, 210 UNTS 131 (entered into force 27 April 1955); *Employment Injury Benefits Convention 1964 (No 121)*, opened for signature 8 July 1964, 602 UNTS 259 (entered into force 28 July 1967); *Invalidity, Old-Age and Survivors' Benefits Convention 1967 (No 128)*, opened for signature 29 June 1967, 699 UNTS 185 (entered into force 1 November 1969). Australia has not ratified any social security conventions, and only four pre-War workers' compensation conventions.

19 On the definition of 'human rights' for these purposes, see generally Bailey, above n 1, 1–44; Henry Steiner and Philip Alston, *International Human Rights in Context* (1996) chh 2–5.

20 *Right of Association (Agriculture) Convention 1921 (No 11)*, opened for signature 25 October 1921, 38 UNTS 153 (entered into force 11 May 1923).

21 *Forced Labour Convention 1930 (No 29)*, opened for signature 10 June 1930, 39 UNTS 55 (entered into force 1 May 1932) ('*Convention No 29*').

22 *Freedom of Association and Protection of the Right to Organise Convention 1948 (No 87)*, opened for signature 17 June 1948, 68 UNTS 17 (entered into force 4 July 1950) ('*Convention No 87*').

23 *Right to Organise and Collective Bargaining Convention 1949 (No 98)*, opened for signature 1 July 1949, 96 UNTS 257 (entered into force 18 July 1951) ('*Convention No 98*').

- the *Abolition of Forced Labour Convention 1957 (No 105)*;[25]
- the *Discrimination (Employment and Occupation) Convention 1958 (No 111)*;[26] and
- the *Minimum Age Convention 1973 (No 138)*.[27]

These conventions have been complemented by a number of further instruments over the years,[28] but taken together with *Convention No 29*, they can properly be said to embody the 'core' ILO principles relating to the protection of fundamental human rights.[29]

In addition to these standard-setting instruments, the obligation to respect the 'principles of freedom of association' is taken to be a necessary incident of membership of the ILO.[30] These principles are generally interpreted by reference to *Convention No 87* and *Convention No 98*, which means that even countries which have not ratified these instruments are required to respect the guarantees they enshrine. The importance attached to respect for these principles in the ILO context is reflected in the special procedures adopted by the ILO for dealing with their alleged breach.[31] As will appear presently, all of the core standards, apart from *Convention No 138*, have been ratified by Australia.

The ILO does not categorise either the *Indigenous and Tribal Populations Convention 1957 (No 107)*[32] or the *Indigenous and Tribal Peoples Convention 1989 (No 169)*[33] as human rights instruments. Nevertheless, they clearly deal

[24] *Equal Remuneration Convention 1951 (No 100)*, opened for signature 29 June 1951, 165 UNTS 303 (entered into force 23 May 1953) ('*Convention No 100*').

[25] *Abolition of Forced Labour Convention 1957 (No 105)*, opened for signature 25 June 1957, 320 UNTS 291 (entered into force 17 January 1959) ('*Convention No 105*').

[26] *Convention No 111*, above n 8.

[27] *Convention No 138*, above n 10.

[28] See especially *Workers' Representatives Convention 1971 (No 135)*, opened for signature 23 June 1971, 883 UNTS 111 (entered into force 30 June 1973); *Rural Workers' Organisations Convention 1975 (No 141)*, opened for signature 23 June 1975, Cmnd 7083 (entered into force 24 November 1977); *Labour Relations (Public Service) Convention 1978 (No 151)*, opened for signature 27 June 1978, 1218 UNTS 87 (entered into force 25 February 1981); *Collective Bargaining Convention 1981 (No 154)*, opened for signature 19 June 1981, 1331 UNTS 267 (entered into force 11 August 1983); *Workers with Family Responsibilities Convention 1981 (No 156)*, opened for signature 23 June 1981, 1331 UNTS 295 (entered into force 11 August 1983). For description and analysis see Nicolas Valticos and Geraldo von Potobsky, *International Labour Law* (2nd ed, 1995) 92–129, 216–20.

[29] These priorities are also recognised in the Declaration on Fundamental Principles and Rights at Work, adopted at the ILC in June 1998, above n 14.

[30] Eg, *ILO Constitution*, above n 11, preamble.

[31] These consist of the Fact-Finding and Conciliation Commission on Freedom of Association ('FFCC') and the CFA. See also Valticos and von Potobsky, above n 28, 295–9; Breen Creighton, 'Freedom of Association' in Roger Blanpain and Christian Engels (eds), *Comparative Labour Law and Industrial Relations in Industrialised Market Economies* (5th ed, 1993) 95. For the possible adoption of similar procedures in relation to other human rights issues see ILO, *The ILO, Standard Setting and Globalization* (85th Session, ILC, 1997) 15–19. On ILO supervisory procedures in general, see Lee Swepston, 'Supervision of ILO Standards' (1997) 13 *International Journal of Comparative Labour Law and Industrial Relations* 327, 334–41; Valticos and von Potobsky, above n 28, 284–94, 300–9.

[32] *Indigenous and Tribal Populations Convention 1957 (No 107)*, opened for signature 26 June 1957, 328 UNTS 247 (entered into force 2 June 1959).

[33] *Indigenous and Tribal Peoples Convention 1989 (No 169)*, opened for signature 27 June 1989, 28 ILM 1382 (entered into force 5 September 1991).

with issues which are very much part of contemporary debate on fundamental human rights issues in Australia.

In a speech to the United Nations Association in December 1973, Prime Minister Whitlam indicated that his government was giving 'priority attention' to ratification of the *Indigenous and Tribal Populations Convention 1957 (No 107)*.[34] It was not, however, ratified. Apparently, this was because the *Indigenous and Tribal Populations Convention 1957 (No 107)* was thought to adopt a paternalistic and 'assimilationist' approach to the rights of indigenous peoples.[35]

The *Indigenous and Tribal Populations Convention 1957 (No 107)* was extensively revised by the *Indigenous and Tribal Peoples Convention 1989 (No 169)*. The adoption of this new instrument was a controversial exercise. The end result was considered by many observers, including representatives of the Australian Aboriginal communities who attended the ILC in 1989, to provide inadequate recognition of the rights of indigenous and tribal peoples. There were also concerns that the subject matter of many of its provisions fell outside the traditional competences of the ILO and its supervisory procedures.[36] Nevertheless, the *Indigenous and Tribal Peoples Convention 1989 (No 169)* is the only multilateral instrument which deals specifically with the rights of indigenous and tribal peoples,[37] and it can only be a matter for regret that, almost a decade after its adoption, the government of Australia has still not taken any firm decision to ratify this important human rights standard.[38]

III THE CORE STANDARDS IN OUTLINE

A *The Abolition of Forced Labour*

Article 1(1) of *Convention No 29* requires the 'suppression' of 'the use of forced or compulsory labour in all its forms within the shortest possible period.'[39] 'Compulsory labour' for these purposes means 'work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.'[40] However, according to article 2(2), it does not include:

[34] E G Whitlam, 'Speech by the Prime Minister for the United Nations Association Human Rights Day' (Canberra, 10 December 1973) 10.

[35] Department of Industrial Relations, *Status of ILO Conventions in Australia 1994* (1994) 237.

[36] Howard Berman, 'The ILO and Indigenous Peoples: Revision of ILO Convention No 107 at the 75th Session of the ILC 1988' (1988) 41 *International Commission of Jurists Review* 48.

[37] On the UN Draft Declaration on the Rights of Indigenous Peoples, see Steiner and Alston, above n 19, 1006–20.

[38] See, eg, Department of Industrial Relations, *Status of ILO Conventions in Australia*, above n 35, 364–5.

[39] *Convention No 29*, above n 21, art 1(1).

[40] Ibid art 2(1). Note that *Convention No 29* was accompanied by two complementary recommendations: Forced Labour (Indirect Compulsion) Recommendation 1930 (No 35) reprinted in ILO, *International Labour Conventions and Recommendations 1919–1951* (1996) vol 1, 154–5; and Forced Labour (Regulation) Recommendation 1930 (No 36).

(a) any work or service exacted in virtue of compulsory military service laws for work of a purely military character;
(b) any work or service which forms part of the normal civic obligations of the citizens of a fully self-governing country;
(c) ... work [which has been imposed as part of the sentence of a court] provided that the said work or service is carried out under the supervision and control of a public authority and that the said person is not hired to or placed at the disposal of private individuals, companies or associations;[41]
(d) ... work exacted in cases of [genuine] emergency ... ; and
(e) minor communal services [provided] the members of the community or their direct representatives shall have the right to be consulted in regard to the need for such services.[42]

The fact that *Convention No 29* requires the abolition of forced labour within the 'shortest possible period', rather than immediately, explains why it goes on to make specific provision for the manner in which forced labour may be exacted pending its complete suppression.[43]

There are no such concessions in *Convention No 105*. This instrument evolved out of a concern at the use of forced labour as a means of political coercion in the period after the Second World War, and requires the 'immediate and complete'[44] abolition of forced labour:

(a) as a means of political coercion or education or as a punishment for holding or expressing political views or views ideologically opposed to the established political, social or economic system;
(b) as a method of mobilising and using labour for purposes of economic development;
(c) as a means of labour discipline;
(d) as a punishment for having participated in strikes;
(e) as a means of racial, social, national or religious discrimination.[45]

By 30 June 1998, *Convention No 29* had attracted 149 ratifications, whilst *Convention No 105* had attracted 130. This makes them among the most highly ratified of all ILO conventions. *Convention No 105* has the distinction of being the only ILO human rights convention to have been ratified by the United States of America.[46] *Convention No 29* was ratified by Australia in 1932, and *Convention No 105* in 1960.[47]

[41] See also *Convention No 29*, above n 21, art 4(1), which states that 'the competent authority shall not impose or permit the imposition of forced or compulsory labour for the benefit of private individuals, companies or associations.' These provisions, together with arts 5–6, were clearly intended to give effect to the 'guiding principle' that 'labour should not be regarded merely as a commodity or article of commerce.'

[42] Ibid art 2(2).

[43] Ibid arts 4–25.

[44] *Convention No 105*, above n 25, art 2.

[45] Ibid art 1. For the jurisprudence relating to *Convention No 29*, above n 21, and *Convention No 105*, above n 25, see especially Committee of Experts on the Application of Conventions and Recommendations ('Committee of Experts'), *Abolition of Forced Labour* (65th Session, ILC, 1979) Report III (Part 4B). See also Valticos and von Potobsky, above n 28, 109–17.

[46] Having been denounced by Malaysia and Singapore in 1989, it is also the only human rights convention ever to have been denounced by a ratifying state.

[47] For other ILO standards which bear upon the use of forced labour, see *Employment Policy Convention 1964 (No 122)*, opened for signature 9 July 1964, 569 UNTS 65, arts 1(1), 1(2)(c)

B *Freedom of Association*

The adoption of *Convention No 87* was described by the Chairman of the Conference Committee on Freedom of Association and Industrial Relations as 'a turning point in the evolution of international relations, as this was the first time in history that an international treaty gave formal sanction to one of the fundamental rights of man.'[48] This enthusiasm was not shared by the chairman of the Workers' Group:

> It is quite certain that the present Convention does not correspond to the situation as regards the development of the right to organise in the world today. ... There is no doubt that it contains a number of gaps, a number of defects, and a number of points liable to misinterpretation. Nevertheless, as it was found that some countries were not applying freedom of association in their territories (or were applying it subject to restrictions), we considered it essential that the Conference should take positive action on a first Convention, so that freedom of association in its primary stage should be respected in all countries.[49]

Despite these initial reservations on the part of the Workers' Group, *Convention No 87* has played a pivotal role in the international protection of freedom of association: as an instrument which has been ratified by some 122 members of the ILO; as a key component of the jurisprudence of the FFCC and CFA; and as a reference point for other international human rights standards.[50]

In general terms, *Convention No 87* protects two basic rights: (i) the right of workers and employers to form and to join organisations of their choice;[51] and (ii) the organisational autonomy of trade unions and employer organisations once established.[52]

So far as *Convention No 87* is concerned, the right to join a trade union does *not* carry a correlative right not to belong. The ILC expressly recognised at the time *Convention No 87* was adopted that it neither endorses nor proscribes union security arrangements such as 'closed shops', preference clauses or direct deduction of union dues.[53] This means that it would not, for example, be incon-

(entered into force 15 July 1966); Special Youth Schemes Recommendation 1970 (No 136) reprinted in ILO, *International Labour Conventions and Recommendations 1952–1976* (1996) vol 2, 443. The *Employment Policy Convention 1964 (No 122)* was ratified by Australia in 1969.

48 J Thorn (Government member, New Zealand), quoted in ILO, 'The ILO and the Problem of Freedom of Association and Industrial Relations' (1948) 58 *International Labour Review* 575, 575.

49 Mr Jouhaux (Workers' delegate, France, and Reporter of the Committee on the Freedom of Association and Industrial Relations), 'First Report of the Committee on Freedom of Association and Industrial Relations' in ILO, *Record of Proceedings* (31st Session, ILC, 6 July 1948) 229.

50 See, eg, *ICESCR*, above n 5, art 8(3); *ICCPR*, above n 4, art 22(3).

51 *Convention No 87*, above n 22, art 2.

52 Ibid art 3. Articles 4–7 complement the basic guarantees set out in arts 2–3. They deal with the right to form and join federations and confederations; international affiliation; acquisition of legal personality; and dissolution or suspension of organisations.

53 Committee of Experts, *Conclusions Concerning the Reports Received under Articles 19 and 22 of the Constitution of the ILO, on the Effect Given to Conventions and Recommendations Relating to Freedom of Association and Protection of the Right to Organise and Collective Agreements, Cooperation in the Undertaking* (81st Session, ILC, 1994) Report III (Part 4B) [100]–[103], [205] ('*General Survey on Freedom of Association*'). See also ILO, *Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of*

sistent with article 2 for the law to permit, or even to encourage, the making of 'closed shop' agreements (or industrial awards) whereby union membership was a condition of employment for those employees covered by the award or agreement. By the same token, it would also be consistent with article 2 for the law to stipulate that no-one should be compelled to join a trade union against their wishes.[54] It would not, however, be consistent with *Convention No 87* for the law to *compel* union membership, irrespective of the wishes of the employees and unions concerned.[55]

The guarantee of autonomy in article 3 not only protects the right of organisations of employers and workers to draw up their constitutions and rules free of outside interference,[56] but has also been interpreted to include the right of workers to strike and take other forms of industrial action to protect and to promote their legitimate social and economic interests.[57] In exercising their rights under *Convention No 87*, workers, employers, and their organisations must 'respect the law of the land',[58] whilst 'the law of the land shall not be such as to impair, nor shall it be so applied as to impair' the other guarantees provided for in *Convention No 87*.[59] The only groups of workers who may be denied the basic rights set out in *Convention No 87* are members of the police and the armed forces.[60] However, subject to appropriate safeguards in terms of access to binding conciliation and arbitration, it is also permissible to restrict the right to strike of 'public servants acting in their capacity as agents of the public authority' and of workers in 'services whose interruption would endanger the life, personal safety or health of the whole or part of the population.'[61]

the Governing Body of the ILO (4th ed, 1996) [321]–[330] ('*Freedom of Association Digest*'). Employer insistence on a correlative right not to belong had resulted in the abandonment of earlier attempts to adopt a general instrument on freedom of association: C W Jenks, *The International Protection of Trade Union Freedom* (1957) 23. For Australian perspectives, see, eg, Bailey, above n 1, 363–8; Philippa Weeks, *Trade Union Security Law* (1995). For more general perspectives, see, eg, Lammy Betten, *International Labour Law: Selected Issues* (1993) 75–82; Sheldon Leader, *Freedom of Association: A Study in Labor Law and Political Theory* (1992) 123–61; Clyde Summers, 'Review of Sheldon Leader, *Freedom of Association: A Study in Labor Law and Political Theory*' (1995) 16 *Comparative Labor Law Journal* 262.

54 For current Australian provisions in this area, see *Workplace Relations Act 1996* (Cth) pt XA. See especially Richard Naughton, 'Sailing into Uncharted Seas: The Role of Unions under the *Workplace Relations Act 1996* (Cth)' (1997) 10 *Australian Journal of Labour Law* 112, 129–32.

55 Committee of Experts, *General Survey on Freedom of Association*, above n 53, [103]; ILO, *Freedom of Association Digest*, above n 53, [321].

56 Some degree of external regulation of the internal affairs of organisations of employers and workers is permissible, so long as it is not of such a nature and extent as to derogate to an unacceptable degree from the basic guarantees in art 3. See Committee of Experts, *General Survey on Freedom of Association*, above n 53, [108]–[111]; ILO, *Freedom of Association Digest*, above n 53, chh 5–8.

57 Committee of Experts, *General Survey on Freedom of Association*, above n 53, [136]–[179]; ILO, *Freedom of Association Digest*, above n 53, ch 9.

58 *Convention No 87*, above n 22, art 8(1).

59 Ibid art 8(2).

60 Ibid art 9.

61 Committee of Experts, *General Survey on Freedom of Association*, above n 53, [154]–[162]; ILO, *Freedom of Association Digest*, above n 53, [526], [527]–[569]. For comment on ILO standards relating to the right to strike, see J Hodges-Aeberhard and A Odero de Dios, 'Principles of the Committee on Freedom of Association Concerning Strikes' (1987) 126 *International*

Some of the gaps left by *Convention No 87* were filled by *Convention No 98*. Article 1 requires that workers enjoy 'adequate protection' against anti-union discrimination at the point of hiring, during employment, and in relation to termination. Article 2 requires that there be protection against employer domination or interference in the functioning of organisations of workers, whilst article 4 is to the effect that:

> Measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements.[62]

Article 5 provides that members of the police and the armed forces may be excluded from the scope of *Convention No 98* on the same basis as under article 9 of *Convention No 87*, whilst article 6 states that:

> This Convention does not deal with the position of public servants engaged in the administration of the state, nor shall it be construed as prejudicing their rights or status in any way.[63]

This had the curious consequence that public servants could not be denied the guarantees in *Convention No 87* (apart from the right to strike), but that they *could* be denied protection against victimisation in respect of the exercise of those rights, and could also be denied the right to engage in voluntary, autonomous collective bargaining.[64] It was largely in order to address this somewhat anomalous situation that the ILC adopted the *Labour Relations (Public Service) Convention 1978 (No 151)*. As noted earlier, the basic principles set out in *Convention No 87* and *Convention No 98* have also been supplemented by a number of other instruments, most notably the *Workers' Representatives Convention 1971 (No 135)* and the *Rural Workers' Organisations Convention 1975 (No 141)*.[65]

C *Discrimination*

It will be recalled that 'recognition of the principle of equal remuneration for work of equal value' was one of the 'general principles' which were set out in article 41 of the *ILO Constitution*.[66] It also received passing recognition in Part B of the Minimum Wage-Fixing Recommendation 1928 (No 26), and in a number

Labour Review 543; Ruth Ben-Israel, *International Labour Standards: The Case of Freedom to Strike* (1988); Betten, above n 53, 105–23.

62 *Convention No 98*, above n 23, art 4.

63 Ibid art 6.

64 See the rather confused debate on this issue at ILC, *Record of Proceedings* (32nd Session, ILC, 1949) 472–5.

65 As at June 1998, *Convention No 98*, above n 23, had been ratified by 138 of the 174 member states of the ILO.

66 See above n 12 and accompanying text.

of instruments which were adopted in the 1940s.[67] However, it was not until 1951 that the issue became the principal focus of a convention in the form of *Convention No 100*, and accompanying Equal Remuneration Recommendation 1951 (No 90).[68]

Article 2(1) states that:

> Each Member shall, by means appropriate to the methods in operation for determining rates of remuneration, promote and, in so far as is consistent with such methods, ensure the application to all workers of the principle of equal remuneration for men and women workers for work of equal value.[69]

'Remuneration' for these purposes means 'the ordinary, basic or minimum wage or salary and any additional emoluments whatsoever payable directly or indirectly, whether in cash or in kind, by the employer to the worker and arising out of the worker's employment',[70] while the term 'equal remuneration for men and women workers for work of equal value' refers to 'rates of remuneration established without discrimination based on sex'.[71]

Convention No 100 permits considerable latitude as to the means of implementation which may be adopted in order to give effect to the principle thus defined. According to article 2(2), they may include any one or more of: national laws or regulations; legally established or recognised machinery for wage determination; or collective agreements between employers and workers. Where appropriate, 'measures shall be taken to promote objective appraisal of jobs on the basis of the work to be performed',[72] and 'differential rates between workers which correspond, without regard to sex, to differences, as determined by such objective appraisal, in the work to be performed' are not to be considered to be contrary to *Convention No 100*.[73]

The concept of 'equal value' is considerably wider than that of 'equal work' or the 'same' or 'similar' work which is used as a basis for implementation in some national legislation,[74] and in other international instruments such as article 119 of the *Treaty of Rome*.[75] This explains why the ILO approach found favour with the

[67] See, eg, *Social Policy (Non-Metropolitan Territories) Convention 1947 (No 82)*, opened for signature 11 July 1947, 218 UNTS 345, arts 18(1)(i), 18(2) (entered into force 19 June 1955); Social Policy in Dependent Territories (Supplementary Provisions) Recommendation 1945 (No 74) art 2(2), reprinted in ILO, *International Labour Conventions and Recommendations 1919–1951* (1996) vol 1, 415.

[68] Equal Remuneration Recommendation 1951 (No 90) reprinted in ILO, *International Labour Conventions and Recommendations 1919–1951* (1996) vol 1, 653.

[69] *Convention No 100*, above n 24, art 2(1).

[70] Ibid art 1.

[71] Ibid.

[72] Ibid art 3(1).

[73] Ibid.

[74] Eg, *Equal Pay Act 1970* (UK) c 41, s 1 as originally enacted: see now *Equal Pay (Amendment) Regulations 1983* SI 1983/1794; *Industrial Tribunal (Rules of Procedure) Regulations 1985* SI 1985/16.

[75] *Treaty Establishing the European Economic Community*, opened for signature 25 March 1957, 298 UNTS 11 (entered into force 1 January 1958) ('*Treaty of Rome*').

framers of article 4(3) of the *European Social Charter*[76] in 1961 and of article 7(1)(i) of the *ICESCR*.[77] It has also formed the basis of claims for equal pay on the basis of 'comparable worth' in many national legal systems.[78]

In June 1998, *Convention No 100* had attracted a total of 137 ratifications. If implemented, it would clearly afford a significant measure of protection against this particular form of discriminatory behaviour. However, as was clearly recognised in article 2(a) of the Declaration of Philadelphia,[79] it is equally apparent that the promotion of social justice and proper respect for fundamental human rights requires that the broader issues of employment discrimination also be addressed at the international level. The ILC responded to this logic in 1958 by adopting *Convention No 111*, and accompanying Discrimination (Employment and Occupation) Recommendation 1958 No 111.[80]

According to article 2, ratification commits the state concerned

> to declare and pursue a national policy designed to promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof.[81]

More specifically, the state undertakes:

> (a) to seek the co-operation of employers' and workers' organisations ... in promoting the acceptance and observance of this policy;
> (b) to enact such legislation and to promote such educational programmes as may be calculated to secure the acceptance and observance of the policy;
> (c) to repeal any statutory provisions and modify any administrative instructions or practices which are inconsistent with the policy;
> (d) to pursue the policy in respect of employment under the direct control of a national authority;
> (e) to ensure observance of the policy in the activities of vocational guidance [and] training ... ; and
> (f) to indicate in its annual reports [to the ILO] the action taken in pursuance of the policy and the results secured by such action.[82]

The concept of 'discrimination' is defined in article 1(1)(a) as including:

> Any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the

[76] *European Social Charter*, opened for signature 18 October 1965, 529 UNTS 89 (entered into force 1965).

[77] *ICESCR*, above n 5.

[78] For the subsequent interpretation of art 119 of the *Treaty of Rome*, above n 75, by reference to *Convention No 100*, above n 24, see Valticos and von Potobsky, above n 28, 210–11. For a detailed statement of the ILO jurisprudence in this area, see Committee of Experts on the Application of Conventions and Recommendations, *General Survey on Equal Remuneration* (72nd Session, ILC, 1986) Report III (Part 4B).

[79] Declaration of Philadelphia, above n 13.

[80] Discrimination (Employment and Occupation) Recommendation 1958 (No 111) reprinted in ILO, *International Labour Conventions and Recommendations 1952–1976* (1996) vol 2, 180.

[81] *Convention No 111*, above n 8, art 2.

[82] Ibid art 3.

> effect of nullifying or impairing equality of opportunity or treatment in employment or occupation.[83]

This definition has gained general acceptance as the international benchmark in this area. It is not, however, exhaustive, as is recognised in article 1(1)(b) which states that 'discrimination' may also include

> such other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation as may be determined by the Member concerned after consultation with representative employers' and workers' organisations ... and with other appropriate bodies.[84]

There are certain permissible exceptions to the scope of *Convention No 111*:

(i) where a 'distinction, exclusion or preference' is based on the 'inherent requirements' of a particular job;[85]

(ii) 'measures affecting an individual who is justifiably suspected of, or engaged in, activities prejudicial to the security of the State shall not be deemed to be discrimination', so long as the individual concerned has the right to appeal to a competent body;[86]

(iii) 'special measures of protection or assistance' provided for in other international labour standards are not to be deemed to be discrimination for these purposes;[87] and

(iv) after discussion with organisations of employers and workers, 'special measures designed to meet the particular requirements of persons who, for reasons such as sex, age, disablement, family responsibilities or social or cultural status, are generally recognised to require special protection'.[88]

The two latter exceptions would legitimate special measures intended to protect the maternal function, and also other measures which accord special treatment to women or to other groups of workers.[89]

Like *Convention No 100*, this instrument is promotional rather than prescriptive in character. It does not, in other words, require the complete elimination of all forms of discrimination, and then set out the means by which that objective is to be achieved. Rather, it requires the adoption of a policy which is directed to

[83] Ibid art 1(1)(a).

[84] Ibid art 1(1)(b).

[85] Ibid art 1(2).

[86] Ibid art 4.

[87] Ibid art 5(1).

[88] Ibid art 5(2). See also Henrik Nielsen, 'The Concept of Discrimination in ILO Convention No 111' (1994) 43 *International and Comparative Law Quarterly* 827.

[89] See, eg, *Maximum Weight Convention 1967 (No 127)*, opened for signature 28 June 1967, 721 UNTS 39, art 7 (entered into force 10 March 1970); *Night Work (Women) Convention 1919 (No 4)*, above n 17, art 7. For a detailed account of the jurisprudence on *Convention No 111*, above n 8, and the accompanying Discrimination Recommendation (No 111), above n 80, see Committee of Experts, *Equality in Employment and Occupation: Special Survey by the Committee of Experts on the Application of Conventions and Recommendations* (83rd Session, ILC, 1996) Report III (Part 4B).

the attainment of that end, and leaves it to national law and practice to determine how, and over what period, that can best be done:

> The method will largely depend on the nature and extent of the problem in each country, as well as on its legal system and its practice. It will also often happen that the process of elimination of discriminatory practices cannot but be gradual.[90]

This does not mean that compliance can be demonstrated simply by adopting a comprehensive and seemingly progressive national policy, and then sitting back and doing nothing. The policy must also be implemented:

> It is ... necessary, though not sufficient in itself, for the provisions of national law to be in conformity with the requirements of the Convention. It is also important for the law to be fully and strictly applied in practice.[91]

Like the other core human rights standards, *Convention No 111* has attracted a high number of ratifications. By June 1998 it had been ratified by 130 countries, albeit with some conspicuous absentees, including Japan, the United Kingdom and the United States of America.

D *Child Labour*

It was noted above that the protection of especially vulnerable groups of workers, such as children and young people, was a major focus of ILO standard-setting from the earliest days of the organisation. This culminated in 1973 in the adoption of *Convention No 138*, and accompanying Minimum Age Recommendation 1973 (No 146).[92]

Article 1 of *Convention No 138* states that its purpose is 'to ensure the effective abolition of child labour and to raise progressively the minimum age for admission to employment or work to a level consistent with the fullest physical and mental development of young persons.'[93] This clearly locates *Convention No 138* within the field of fundamental human rights, but the instrument is not in fact framed in terms of the protection and promotion of basic rights. Rather, it lays down prescriptive standards which, if implemented, would eliminate most forms of child labour, abusive and otherwise.

Unlike the other human rights standards which have been adopted by the ILO, *Convention No 138* has not attracted a high level of ratifications,[94] and appears to have had only a marginal practical impact — especially in the countries of

[90] Valticos and von Potobsky, above n 28, 123.

[91] Committee of Experts, *Equality in Employment and Occupation*, above n 89, [203].

[92] Minimum Age Recommendation 1973 (No 146) reprinted in ILO, *International Labour Conventions and Recommendations 1952–1976* (1996) vol 2, 533. For an overview of ILO standards on child labour, see H T Dao, 'ILO Standards for the Protection of Children' (1989) 58 *Nordic Journal of International Law* 54.

[93] *Convention No 138*, above n 10, art 1.

[94] As at 30 June 1998 it had been ratified by 63 countries. This is around half the figure for the other human rights conventions.

Africa, Asia and Latin America, where abusive child labour is perceived to be most widespread.[95]

Convention No 138 is the only one of the core human rights conventions which has not been ratified by Australia. This can be attributed to the fact that law and practice in this country do not comply with the requirements of *Convention No 138* in certain crucial respects, and to a perception that the convention adopts an inappropriate approach to the issue to which it is directed.[96]

In 1998, the ILC held its first discussion on a proposed convention and recommendation dealing with the worst forms of child labour. Using the ILO's 'double discussion' procedure,[97] this should lead to the adoption of both the convention and the recommendation at the 1999 Conference. It is anticipated that the new instruments will be framed in a manner which is more suited to the protection of fundamental human rights than the excessively prescriptive *Convention No 138*, and the other instruments dealing with this issue which have been adopted over the years.[98]

IV RATIFICATION OF HUMAN RIGHTS STANDARDS BY AUSTRALIA

A *Ratification of ILO Conventions in General*

Australia's general record of ratification of ILO conventions is less than distinguished: as of 30 June 1998 it had ratified 57 out of the 178 conventions which had been adopted up to that time. This figure does not compare favourably with the unitary countries of Western Europe, several of which have more than 100 ratifications to their credit. On the other hand, it is markedly superior to that of most of Australia's neighbours and trading partners in the Asia-Pacific region.[99] It is also markedly superior to that of other federal states such as Canada (29) and the United States (12); it is on a par with Switzerland (52), but is inferior to that of Germany (75).[100]

One of the conventional explanations for this fairly modest ratification record is that it is difficult for countries with federal systems of government to demonstrate compliance with ILO standards where there is a division of legislative

[95] See, eg, Valticos and von Potobsky, above n 28, 220–1; Breen Creighton, 'Combating Child Labour: The Role of International Labour Standards' (1997) 18 *Comparative Labor Law Journal* 362.

[96] Department of Industrial Relations, *Status of ILO Conventions in Australia*, above n 35, 300–1; Breen Creighton, 'ILO Convention No 138 and Australian Law and Practice Relating to Child Labour' (1996) 2 *Australian Journal of Human Rights* 293.

[97] Standing Orders of the ILC, in *ILO Constitution*, above n 11, arts 39–42. See also Valticos and von Potobsky, above n 28, 52–5.

[98] See the examples listed in *Convention No 138*, above n 10, art 10.

[99] Eg, Indonesia has satisfied only 11 conventions, while Malaysia has 11 ratifications to its credit and Singapore has 21. South Korea has just four. Japan and New Zealand have ratified 42 and 56 conventions respectively.

[100] For an interesting and provocative analysis of ratification patterns, and what many regard as the excessive proliferation of international labour standards, see Efrén Córdova, 'Some Reflections on the Overproduction of International Labor Standards' (1993) 14 *Comparative Labor Law Journal* 138.

responsibility as between the central authority and the constituent parts of the federation. This was perceived to be a particularly significant factor prior to the amendment of article 19 of the *ILO Constitution* in 1946.[101] This seemed to be borne out by the fact that Australia had ratified only 12 of the 67 conventions which had been adopted in the pre-war period, and that all but one of these (*Convention No 29*) was ratified on the basis of 'Commonwealth only' compliance.[102]

However, it is not at all clear that the 'federal factor' ever constituted a real barrier to ratification of ILO standards by Australia. The Commonwealth clearly inherited the common law prerogatives of the British Crown in relation to the creation of international obligations.[103] This suggests that even before the amendment of article 19 of the *ILO Constitution*,[104] the Commonwealth *could* have adopted a more liberal approach to ratification had it been minded to do so.

In 1947, Commonwealth and State Ministers for Labour adopted a procedure for regular consultation between the Commonwealth and the States and Territories on ratification of ILO conventions.[105] This has significantly freed up the ratification process, as evidenced by the fact that Australia has ratified 45 conventions since 1947, most of which do not depend solely upon Commonwealth compliance.

The consultative process is underpinned by an understanding that conventions are ratified only when law and practice in all jurisdictions is adjudged to be in conformity with the requirements of the convention concerned, and that all jurisdictions have formally signified their agreement to ratification. Since 1947, there have been only two departures from this procedure: in 1990 when the *Workers with Family Responsibilities Convention 1981 (No 156)* was ratified without the agreement of New South Wales and the Northern Territory, and in 1993 when the *Termination of Employment Convention 1982 (No 158)*[106] was ratified without the agreement of *any* State or Territory. In the case of the *Workers with Family Responsibilities Convention 1981 (No 156)*, law and practice in all jurisdictions was adjudged to be in conformity with the convention, whereas in the case of the *Termination of Employment Convention 1982 (No 158)*, law and practice in *no* jurisdiction was in conformity![107]

101 *ILO Constitution*, above n 11.

102 Kenneth Bailey, 'The Influence of International Labour Standards on Australian Legislation and Practice', in Department of Labour and National Service, *Seminar on the Role and Influence of International Labour Standards* (1970) 9, 19.

103 See, eg, Gunther Doeker, *The Treaty-Making Power in the Commonwealth of Australia* (1966) 129–60; Leslie Zines, *The High Court and the Constitution* (3rd ed, 1992) ch 13; J G Starke, 'The Commonwealth in International Affairs' in R Else-Mitchell (ed), *Essays on the Australian Constitution* (2nd ed, 1961) 343; Senate Legal and Constitutional References Committee, *Trick or Treaty? Commonwealth Power to Make and Implement Treaties* (1995) ch 4.

104 *ILO Constitution*, above n 11.

105 Department of Industrial Relations, *Status of ILO Conventions in Australia*, above n 35, 22–3.

106 *Termination of Employment Convention 1982 (No 158)*, opened for signature 22 June 1982, [1994] ATS No 4 (entered into force 3 November 1985).

107 Department of Industrial Relations, *Status of ILO Conventions in Australia*, above n 35, 22–5; Senate Legal and Constitutional References Committee, *Trick or Treaty?*, above n 103, 126–9.

While Australia's federal structure probably never did constitute a significant legal (as opposed to political or perceptual) impediment to ratification of conventions, it must be acknowledged that the federal structure may have constituted a significant impediment to implementation of conventions once ratified. Even here, however, it seems clear that the difficulties were more apparent than real.

A number of the legislative powers set out in s 51 of the *Australian Constitution* could clearly provide a basis for federal legislation to give effect to obligations under ratified conventions.[108] These would include the trade and commerce (s 51(i)), corporations (s 51(xx)), immigration (s 51(xxvii)), conciliation and arbitration (s 51(xxxv)), and incidental (s 51(xxxix)) powers. Most importantly, they would also include the external affairs power in s 51(xxix).[109]

Writing some years before the establishment of the ILO, Sir Harrison Moore expressed the view that:

> The power to give effect to international arrangements must, it would seem, be limited to matters which *in se* concern external relations; a matter in itself purely domestic, and therefore within the exclusive power of the States, cannot be drawn within the range of federal power merely because some arrangement has been made for uniform national action. Thus, there is at the present time an international movement for the amelioration of labour conditions, and the International Union has arrived at some agreements for uniformity of legislation. It is submitted that the Commonwealth could not by adhering to an international agreement for the regulation of factories and workshops, proceed to legislate upon that subject in supersession of the laws of the States.[110]

This assessment came under rigorous scrutiny by the High Court in *R v Burgess; Ex parte Henry*.[111] All five members of the court determined that the Commonwealth could use s 51(xxix) of the *Australian Constitution* to legislate to give effect to an international convention on air navigation, although there was some division of opinion as to the exact scope of the power. Nevertheless, a clear majority consisting of Latham CJ and Evatt and McTiernan JJ comprehensively rejected the restrictive approach favoured by Sir Harrison Moore. The joint judgment of Evatt and McTiernan JJ is particularly instructive in relation to the possible use of s 51(xxix) to give effect to ILO conventions:

> In truth, the King's power to enter into international conventions cannot be limited in advance of the international situations which may from time to time arise. And in our view the fact of an international convention having been duly made about a subject brings that subject within the field of international relations so far as such subject is dealt with by the agreement. Accordingly (to pursue the illustration) Australia is not 'a federal State the power of which to enter into international conventions on labour matters is subject to limitations [within the meaning of article 19(9) of the *ILO Constitution*].' A contrary view has apparently governed the practice of the Commonwealth authorities in relation to

[108] See, eg, Francis Maupain, 'Federalism and International Labour Conventions' (1987) 126 *International Labour Review* 625.

[109] See below n 122 and accompanying text.

[110] Sir Harrison Moore, *The Constitution of the Commonwealth of Australia* (1910) 461–2.

[111] (1936) 55 CLR 608 ('*Ex parte Henry*').

> the ratification of the draft conventions of the International Labour Office. In our opinion such view is wrong.[112]

Despite this clear recognition of the Commonwealth's capacity to use the external affairs power to legislate to give effect to obligations incurred by virtue of ratification of ILO conventions, it was not until 1993 that Parliament made any serious attempt to avail itself of the opportunities identified by Evatt and McTiernan JJ in *Ex parte Henry*.

The *Industrial Relations Reform Act 1993* (Cth) introduced a number of radical changes to the federal system of industrial regulation as established by the *Industrial Relations Act 1988* (Cth). These included provisions dealing with equal pay for work of equal value; minimum wage-fixing; termination of employment at the initiative of the employer; workers with family responsibilities; and the right to take industrial action in the context of negotiations for enterprise agreements. The constitutionality of these provisions rested almost entirely upon the need to give effect to Australia's international obligations under a range of international instruments, including several ILO conventions.[113] With only very minor qualifications, the validity of these provisions was upheld by the High Court in *Victoria v Commonwealth*.[114] The *Industrial Relations Act 1988* (Cth) was extensively amended by the *Workplace Relations and Other Legislation Amendment Act 1996* (Cth). There is now less explicit reliance upon the external affairs power than was formerly the case, but s 51(xxix) does still underpin some parts of the re-named *Workplace Relations Act 1996* (Cth), and the Coalition government appears to have gone to some lengths to ensure that the revised legislation is broadly consistent with Australia's international obligations.[115]

B *Ratification of the Human Rights Conventions*

Each of the two forced labour conventions was ratified within three years of adoption.[116] That apart, the only ILO human rights convention to which Australia

[112] Ibid 681–2 (Evatt and McTiernan JJ). At 687, their Honours suggested that the power to legislate under s 51(xxix) also extended to 'the carrying out of "recommendations" as well as the "draft international conventions" resolved upon by the International Labour Organisation.' Note that prior to the 1946 revision of the *ILO Constitution*, unratified conventions were referred to as 'draft conventions'.

[113] These included *Convention No 87*, above n 22; *Convention No 98*, above n 23; *Convention No 100*, above n 24; and *Convention No 111*, above n 8. They also included the *Minimum Wage-Fixing Convention 1970 (No 131)*, above n 16; the *Workers with Family Responsibilities Convention 1981 (No 156)*, above n 28; and the *Termination of Employment Convention 1982 (No 158)*, above n 106. See generally Ronald McCallum, 'The Internationalisation of Australian Industrial Law: The *Industrial Relations Reform Act 1993*' (1994) 16 *Sydney Law Review* 122; William Ford, 'The *Constitution* and the Reform of Australian Industrial Relations' (1994) 7 *Australian Journal of Labour Law* 105, 117–30; Marilyn Pittard, 'International Labour Standards in Australia: Wages, Equal Pay, Leave and Termination of Employment' (1994) 7 *Australian Journal of Labour Law* 170; Breen Creighton, 'The ILO and the Internationalisation of Australian Labour Law' (1995) 11 *International Journal of Comparative Labour Law and Industrial Relations* 199.

[114] (1996) 187 CLR 416.

[115] Breen Creighton, 'The *Workplace Relations Act* in International Perspective' (1997) 10 *Australian Journal of Labour Law* 31.

[116] *Convention No 29*, above n 21, was ratified on 2 January 1932, whilst *Convention No 105*, above n 25, was ratified on 7 June 1960.

had acceded by the end of 1972 was the *Right of Association (Agriculture) Convention 1921 (No 11)*, which was ratified in 1960. Article 1 of this instrument requires ratifying states to 'secure to all those engaged in agriculture the same rights of association and combination as to industrial workers.'[117] Unfortunately, it gives no indication of the rights which are to be accorded to those with whom agricultural workers are entitled to parity of treatment! The *Right of Association (Agriculture) Convention 1921 (No 11)* was undoubtedly of some significance in the 1920s, when agricultural workers in many countries were denied the same rights to organise as industrial workers.[118] This has never been the case in Australia. It can, therefore, be only a matter for conjecture as to why this country took forty years to ratify this undemanding and (in practical terms) fairly marginal instrument — or indeed, why it elected to do so when it did.

Within days of taking office in December 1972, the Whitlam government announced that it had taken the necessary steps to sign the *ICCPR* and the *ICESCR*,[119] and that it intended to ratify ILO *Convention Nos 87*, *98*, *100* and *111* 'fairly soon'.[120] It also announced that it would introduce legislation to enable Australia to ratify the *International Convention on the Elimination of All Forms of Racial Discrimination*.[121] This latter commitment eventually led to the passing of the *Racial Discrimination Act 1975* (Cth), which in turn generated the High Court challenge in *Koowarta v Bjelke-Petersen*.[122] This decision clearly affirmed that the Commonwealth had the capacity to legislate to give effect to obligations incurred by virtue of ratification of international human rights instruments.

Ratification of the four ILO conventions, which was foreshadowed in December 1972, took rather longer than anticipated. Nevertheless, all four instruments were ratified by the end of 1974.[123] This was no mean achievement in light of the general lack of progress over the previous quarter century. It also meant that,

[117] *Right of Association (Agriculture) Convention 1921 (No 11)*, above n 20, art 1.

[118] For an example of denial of equal organisational rights for agricultural workers, see FFCC, *Report of the Fact-Finding and Conciliation Commission on Freedom of Association Concerning the Republic of South Africa* (79th Session, ILC, 1992) in 75 *ILO Official Bulletin* (ser B) special supplement, [473]–[495] and [723]–[724].

[119] Dominique De Stoop, 'Australia's Approach to International Treaties on Human Rights', in Robert Miller (ed), *The Australian Year Book of International Law 1970–73* (1975) 27, 32. Although the *ICESCR* and the *ICCPR* were signed in December 1972, they were not formally ratified until 1975 and 1980 respectively.

[120] De Stoop, above n 119, 32.

[121] *International Convention on the Elimination of All Forms of Racial Discrimination*, above n 7; De Stoop, above n 119, 32.

[122] (1982) 153 CLR 168. See also *Commonwealth v Tasmania* (1983) 158 CLR 1; *Richardson v Forestry Commission* (1988) 164 CLR 261; *Polyukhovich v Commonwealth* (1991) 172 CLR 501; *Victoria v Commonwealth* (1996) 187 CLR 416. See also Andrew Byrnes, 'The Implementation of Treaties in Australia after the *Tasmanian Dams Case*: The External Affairs Power and the Influence of Federalism' (1985) 8 *Boston College International and Comparative Law Review* 275; Donald Rothwell, 'The High Court and the External Affairs Powers: A Consideration of its Outer and Inner Limits' (1993) 15 *Adelaide Law Review* 209, and the sources cited therein.

[123] *Convention No 87*, above n 22, and *Convention No 98*, above n 23, were ratified on 28 February 1973. *Convention No 111*, above n 8, was ratified on 15 June of the same year, whilst *Convention No 100*, above n 24, was ratified on 10 December 1974.

despite its modest overall ratification record, Australia had in fact ratified all the 'core' ILO human rights standards, apart from the somewhat problematic *Convention No 138*.

Since 1973, Australia has ratified only two further ILO human rights conventions: the *Workers with Family Responsibilities Convention 1981 (No 156)* and the *Workers' Representatives Convention 1971 (No 135)*. The first of these is a promotional standard, and constitutes an important adjunct to *Convention No 111*. As noted earlier, it was ratified in March 1990 without the agreement of New South Wales and the Northern Territory.

The *Workers' Representatives Convention 1971 (No 135)* is essentially an adjunct to *Convention No 87* and *Convention No 98*, and deals with the facilities and protections which ought to be accorded to workers' representatives in the undertaking. It was ratified in February 1993 with the agreement of all States and Territories, and is the only one of the post-1949 freedom of association conventions to have been ratified by Australia. There is, however, substantial compliance with the others in all jurisdictions, and all four conventions were identified as suitable targets for ratification by an Interdepartmental Task Force on the Ratification of ILO Conventions, which was established by the Minister for Industrial Relations in May 1991.[124] There has not, however, been any significant progress since that time, and the Coalition government which was elected in March 1996 has evinced little interest in ratification of ILO conventions, or indeed in ILO matters in general.[125]

C *The Freedom of Association Conventions*

As already indicated, *Convention No 87* and *Convention No 98* were ratified in February 1973. At one level, the fact that these fundamental standards were not ratified until a quarter of a century after their adoption is indicative of the low priority generally accorded to the ratification of ILO conventions in Australia. At another level, it is also indicative of a genuine concern that certain aspects of Australia's highly distinctive industrial relations system might not be in compliance with some of the key provisions of the conventions. The manner in which they were eventually ratified affords a number of significant insights into the ratification process in general, and into the supervisory procedures of the ILO.

In its 1959 *General Survey on Freedom of Association and Protection of the Right to Organise, Collective Bargaining, and Collective Agreements*, the Committee of Experts on the Application of Conventions and Recommendations ('Committee of Experts'[126]) observed:

[124] Department of Industrial Relations, *Status of ILO Conventions in Australia*, above n 35, 24–5.

[125] See also Creighton, '*The Workplace Relations Act* in International Perspective', above n 115, 32–4, and below n 229 and accompanying text.

[126] Although it lacks formal constitutional recognition, the Committee of Experts is in practical terms one of the principal supervisory bodies of the ILO. It was set up in 1927 and consists of 20 eminent jurists from around the world, who meet in Geneva each year. Member states are required to report to the International Labour Office periodically as to the effect given to ratified conventions in law and practice. These reports are subject to scrutiny by the Committee of Experts: Valticos and von Potobsky, above n 28, 284–7.

> *Previous authorisation in certain cases.* This situation arises in a number of countries in which the authorities responsible for registration have more extensive powers of exercising judgment and in which registration, whether compulsory or nominally optional, is in practice necessary to the organisation which is being founded to enable it to achieve its objects. This is the case, for example, when registration may be refused on the ground of the existence of another organisation in the occupation or area. [*Member States*: Australia (*Conciliation and Arbitration Act,* section 142)[127]] ... As the Committee has already had occasion to emphasise, such provisions ... involve a risk of interference on the part of the authorities responsible for effecting registration which does not appear to be compatible with Article 3, paragraph 2, or with Article 8, paragraph 2, of the *Freedom of Association and Protection of the Right to Organise Convention (No 98).*[128]

This assessment was inaccurate both as a statement of the legal and factual position in Australia at that time. In particular, it failed to take account of the optional character of registration under both federal and State industrial legislation, and of the fact that the 'conveniently belong' provision in s 142 was not mandatory — it was a factor to be taken into account in deciding whether a given organisation should be registered, but was not determinative of the matter. Erroneous or not, this assessment by the Committee of Experts seems significantly to have inhibited progress towards ratification of *Convention No 87* and *Convention No 98* throughout the 1960s.

A further misleading assessment by the Committee of Experts in 1969[129] prompted the National Labour Advisory Council[130] to agree that a tripartite delegation of council members should seek to resolve these issues of interpretation with senior officials of the ILO. This delegation, consisting of the Secretary of the Department of Labour and National Service, the President of the Australian Council of Trade Unions ('ACTU'), and the Executive Director of the Australian Council of Employers' Federations,[131] duly met with the Director-General and Deputy Director-General of the ILO during the 1969 ILC.

In the course of this meeting, the Director-General agreed to a highly unusual arrangement whereby a law and practice report on *Convention No 87* would be prepared by the government and submitted to the International Labour Office, which would then examine it as if it were a report on a ratified convention. This was done later in 1969, and following further discussions with government representatives, the International Labour Office provided an informal advice to

[127] *Conciliation and Arbitration Act 1904* (Cth) s 142 provided that trade unions or employer organisations which applied for registration under the (then) *Conciliation and Arbitration Act 1904* (Cth) could be denied registration if there was already registered an organisation to which the members of the applicant body could 'conveniently belong'. See now *Workplace Relations Act 1996* (Cth) ss 189(1)(j), 189(2).

[128] *Report of the Committee of Experts on the Application of Conventions and Recommendations* (43rd Session, ILC, 1959) Report III (Part 4) [31], fn 67 (original footnotes omitted).

[129] *Report of the Committee of Experts on the Application of Conventions and Recommendations* (53rd Session, ILC, 1969) Report III (Part 4) 189, [19].

[130] This was the forerunner of the present National Labour Consultative Council: *National Labour Consultative Council Act 1977* (Cth).

[131] Later the Confederation of Australian Industry ('CAI'), now the Australian Chamber of Commerce and Industry ('ACCI').

the effect that it considered that law and practice were in compliance with the convention.

The unofficial 'law and practice report' had this to say about the 1959 observation:

> Two points should be noted. First, in Australia registration under the Trade Union or Industrial Arbitration Acts is irrelevant to the right to establish workers' or employers' organisations. If by choice or for some other reason an association is not registered, or if it is deregistered, it can continue to exist and to further and defend the interests of its members. Registration is not a prerequisite for furthering and defending the interests of members. There are unregistered associations in all Australian jurisdictions whose continued existence is a testimony to the fact that they are able to further and defend the interests of their members ...
>
> Second, even were the question of registration relevant, there is a strong case, particularly in countries such as Australia, where trade unions have long been recognised, where trade union membership covers a substantial proportion of the work force and where an orderly industrial relations system is in operation, for measures to be taken to prevent multiplicity of organisations for bargaining purposes.[132]

This, apparently, was sufficient to persuade the International Labour Office to reconsider the earlier assessments by the Committee of Experts, and it was on the basis of this understanding of the nature of the registration provisions in federal and State legislation that Australia ratified *Convention No 87* and *Convention No 98*. It has also been on this basis that compliance with the requirements of the conventions has subsequently been assessed by both the Committee of Experts and the CFA.[133]

V Implementation of ILO Human Rights Standards

In light of the Commonwealth's generally conservative approach to ratification of conventions, it is hardly surprising that Australia should have attracted relatively little adverse comment from the supervisory bodies over the years in relation to those conventions which *have* been ratified. Nevertheless, it is interesting that between January 1960 and March 1998 the Committee of Experts submitted a total of 48 direct requests and 15 observations in relation to the effect given to the six 'core' human rights conventions in Australia.[134] There have also been 13 complaints to the CFA since 1951. Until recently, none of these communications or complaints disclosed significant non-compliance with the relevant standards. They do, however, provide some interesting insights into the impact of ILO human rights standards and the associated supervisory procedures upon law

[132] Department of Industrial Relations, departmental file.

[133] See below nn 213–219 and accompanying text.

[134] Reliable information on *Convention No 29*, above n 21, is not available prior to 1960.

and practice in Australia.[135] More recently, significant areas of non-compliance have been identified by both the Committee of Experts and the CFA.

A *Forced Labour*

In a series of direct requests since the early 1970s, the Committee of Experts has raised a number of issues concerning *Convention No 29* and *Convention No 105* — for example, in relation to the possible imposition of forced labour on striking seafarers, and the capacity of certain members of the armed forces to resign if they so choose. The 'dialogue' in relation to the first of these issues lasted for almost 20 years, with the Committee of Experts eventually indicating that the matter had been resolved to its satisfaction in 1988.[136] The armed forces issue was first raised in 1979, and had still not been resolved in 1998.

Perhaps the most interesting issue which has arisen in relation to *Convention No 29* and *Convention No 105* concerned the *Electricity Industry (Continuity of Supply) Act 1985* (Qld) ('*Electricity Supply Act 1985* (Qld)'). The Commonwealth drew attention to this legislation in its report for 1983–85, together with an assessment by the federal Human Rights Commission to the effect that the *Electricity Supply Act 1985* (Qld) effectively placed electricity workers and other persons at risk of being subjected to forced or compulsory labour in breach of article 8 of the *ICCPR*.[137] In a 1986 direct request the Committee of Experts 'noted' this information, and in particular the fact that the effect of s 7(3)(b) of the *Electricity Supply Act 1985* (Qld), when read with s 204 of the *Queensland Criminal Code 1899* (Qld), was to make it an offence punishable by up to one year's imprisonment for an employee of the South East Queensland Electricity Board to take part in a strike or other industrial action. It also made a cross-reference to its direct request of the same year under *Convention No 29*.

In this latter communication, the Committee of Experts asked the government to keep it informed as to any measures taken or contemplated in response to the recommendation by the Human Rights Commission 'that the Act be repealed or at least amended to limit its operation to emergency situations.'[138] In its report under *Convention No 29* for 1985–87, the government expressed its 'concern' about the *Electricity Supply Act 1985* (Qld). It described various (unsuccessful) attempts to transfer electricity workers in Queensland to the federal industrial relations jurisdiction, and noted that a Bill had been introduced in the Queen-

[135] Since 1960 there has also been a number of direct requests in relation to Australia's non-metropolitan territories. Most of these relate to the effect given to *Convention No 98*, above n 23, in Norfolk Island. Their content falls outside the scope of the present study.

[136] *Report of the Committee of Experts on the Application of Conventions and Recommendations* (75th Session, ILC, 1988) Report III (Part 4A) 240 ('*Committee of Experts 1988 Report*').

[137] Human Rights Commission, *Queensland Electricity Supply and Related Industrial Legislation*, Report No 14 (1985). In arriving at this conclusion, the Human Rights Commission relied upon the definition of 'forced or compulsory labour' in art 2(2) of *Convention No 29*, above n 21. However, it did not express any view on whether there had been any breach of either of the forced labour conventions: Human Rights Commission, *The Queensland Electricity (Continuity of Supply) Act 1985*, Report No 12 (1985).

[138] Direct request relating to *Convention No 29* from the Committee of Experts to the Australian government (1986).

sland Parliament in 1987 which, if passed, would remove the more offensive aspects of the legislation. The government also forwarded to the Committee of Experts a 'comment' by the government of Queensland which purported to show, by reference to articles 2(2)(d) and 9 of *Convention No 29*, that there 'was no conflict with ILO Conventions 29 and 105 inherent in this legislation.'[139]

In a further direct request in 1988, the Committee of Experts asked for more information as to the proposed amendments to the *Electricity Supply Act 1985* (Qld). This was provided in the report for 1987–89, which indicated that the amending legislation had been passed early in 1988. This was 'noted' in a 1990 direct request. In its report for 1989–90, the government advised that the *Electricity Supply Act 1985* (Qld) had been repealed in its entirety by the *Industrial Relations Act 1990* (Qld).

It is interesting that the Committee of Experts did not express any decided view as to whether the Queensland legislation was inconsistent with either or both of *Convention No 29* and *Convention No 105*. Possibly this was due to a perception that it was unnecessary to do so in light of the fact that the Human Rights Commission had already determined that the legislation breached the *ICCPR*. It seems unlikely that it reflected a determination that the legislation could be legitimated on the basis of articles 2(2)(d) and 9 of *Convention No 29*.

B *Discrimination*

It was pointed out earlier that both *Convention No 100* and *Convention No 111* are promotional in character: that is, they set out certain policy objectives and then require ratifying states to pursue policies intended to achieve those objectives over a period of time. This contrasts with more traditional prescriptive standards which not only set objectives, but lay down the means by which they are to be achieved.

The promotional character of the two conventions presumably explains why the Committee of Experts has not so far determined that any aspect of law and practice in Australia was in breach of either convention. It has, however, transmitted numerous direct requests seeking detailed information on developments in relation to various aspects of employment discrimination and equality of opportunity in general. It has also recorded its satisfaction with progress in certain areas both in direct requests and published observations.[140]

[139] Report of Australian government to Committee of Experts (1985–87).

[140] See, eg, *Report of the Committee of Experts on the Application of Conventions and Recommendations* (73rd Session, ILC, 1987) Report III (Part 4A) 355–6, where the Committee of Experts noted with satisfaction 'that further progress has been achieved in the implementation of [*Convention (No 111)*], both at the federal and State levels, by the adoption of a wide range of statutory and practical measures.' These included: (i) the passing of the *Affirmative Action (Equal Employment Opportunities for Women) Act 1986* (Cth); (ii) amendments to the *Public Service Reform Act 1984* (Cth) to preclude discrimination on grounds of 'political affiliation, race, colour, ethnic origin, social origin, religion, sex, sexual preference, marital status, pregnancy, age and physical or mental disability' in relation to appointments, transfers or promotions in the Commonwealth public service; (iii) the passing of new equal opportunity legislation in Victoria, South Australia and Western Australia; (iv) the amendment of industrial legislation in Queensland to remove certain discriminatory provisions in relation to female workers; and (v) the establishment of the (federal) Human Rights and Equal Opportunity Commission. See also

On several occasions, most recently in December 1995, the Committee of Experts has used direct requests to comment upon the absence of information concerning the application of *Convention No 111* in Tasmania. This suggests that at some point in the future the continuing absence of comprehensive anti-discrimination legislation in that State may cause the Committee of Experts to elevate its dialogue with the government on this issue to the status of an observation.[141]

C *The Freedom of Association Conventions*

The exhaustive preparatory phase which preceded Australia's ratification of *Convention No 87* and *Convention No 98* may explain why the Committee of Experts did not identify any major compliance issues in relation to either convention between 1973 and 1989. Indeed, the *only* area of non-compliance identified over this period related to the special status accorded to the Civil Service Association of Western Australia under public service legislation in that State. This matter was raised in four direct requests between 1977 and 1985, and was resolved by legislative amendment in 1985. That aside, the only communications concerning *Convention No 87* consisted of requests for information on the meaning or application of various provisions of the *Conciliation and Arbitration Act 1904* (Cth).[142] *Convention No 98* did not rate even a request for information over this period.

The situation changed radically in 1989. In a lengthy direct request in relation to *Convention No 87*, the Committee of Experts raised a number of significant issues concerning: (i) the capacity of the Australian Industrial Relations Commission ('AIRC') to deal with demarcation disputes under what was then s 118 of the *Industrial Relations Act 1988* (Cth); (ii) tort liability of trade unions and their members and officials in respect of industrial action, and (iii) the 'secondary boycott' provision in s 45D of the *Trade Practices Act 1974* (Cth).[143]

Report of the Committee of Experts on the Application of Conventions and Recommendations (82nd Session, ILC, 1995) Report III (Part 4A) 293–4 ('*Committee of Experts 1995 Report*'). For a less sanguine view, see the comments of the Australian workers' member of the Conference Committee on the Application of Conventions and Recommendations: ILO, *Record of Proceedings* (83rd Session, ILC, 1996) 14/34–5.

141 The *Sex Discrimination Act 1994* (Tas) applies only to discrimination on grounds of gender, marital status, pregnancy, parental status and family responsibilities. The Act also deals with sexual harassment and victimisation. Other forms of discrimination in Tasmania are dealt with (if at all) by Commonwealth legislation. A more comprehensive Anti-Discrimination Bill was introduced into the Tasmanian Parliament on 30 April 1998. It lapsed on prorogation of the Parliament in July 1998.

142 Eg, the 'bad character' provision in s 144(1), and the refusal of applications for registration on the basis of the 'conveniently belong' provision in s 142. See now *Workplace Relations Act 1996* (Cth) ss 261(1), 189(1)(j), and the discussion of *Case No 1559* below.

143 This provision was introduced amidst considerable controversy in 1977. It was ostensibly intended to deal with the problem of 'secondary' boycotts imposed by unions upon parties with whom they were not in dispute, and with whom they might not have had any kind of industrial relationship. In fact, it also covered a broad range of 'primary' actions. It did not, however, render unlawful anything which was not already unlawful at common law. In 1993, it was amended and transferred to the *Industrial Relations Act 1988* (Cth). In 1996, it was further amended and restored to the *Trade Practices Act 1974* (Cth) by the *Workplace Relations and Other Legislation Amendment Act 1996* (Cth).

Section 118 of the *Industrial Relations Act 1988* (Cth) gave the AIRC power to make orders in relation to 'demarcation disputes',[144] which would have the effect that a specified union could no longer represent the industrial interests of a given group of workers. While the AIRC did not have the power to direct that workers could no longer be members of a given union, the Committee of Experts was clearly concerned that s 118 might constitute an interference with the right of workers to establish and join organisations of their own choosing as guaranteed by article 2 of *Convention No 87*. This led it to ask the government for its comments on this issue, and for information as to the number and effect of orders under s 118.

It is not entirely clear what caused the Committee of Experts to raise the common law and s 45D issues in 1989, but it is perhaps significant that in the same year the Committee of Experts directed a detailed observation to the British government on the nature and scope of protection against tort liability for industrial action in that country.[145] This in turn was the consequence of a decision by the CFA in February 1989 to defer its examination of a complex complaint against the United Kingdom until the Committee of Experts had had an opportunity to examine the legislation to which the complaint related.[146] It does not seem fanciful to suggest that the Committee of Expert's consideration of the British provisions may have prompted it to look at the situation in other common law jurisdictions.

In its direct request, the Committee of Experts noted that workers and unions in Australia did not appear to have any form of legislative protection against common law liability in respect of industrial action.[147] The Committee of Experts acknowledged that it might be acceptable in terms of *Convention No 87* to impose some restrictions on unions' capacity to take industrial action as part of the quid pro quo for access to the benefits of the conciliation and arbitration system, and 'to place some restrictions upon the capacity of those unions which have chosen to remain outside the system of conciliation and arbitration to take industrial action.'[148] However, it clearly felt that it was not acceptable to maintain a legal regime which had the effect that workers who engaged in almost any form of industrial action, in almost any circumstances, were

144 As defined in s 4(1) of the *Industrial Relations Act 1988* (Cth). This definition is retained in s 4(1) of the *Workplace Relations Act 1996* (Cth).

145 *Report of the Committee of Experts on the Application of Conventions and Recommendations* (76th Session, ILC, 1989) Report III (Part 4A) 234–41. See also Breen Creighton, 'The ILO and Protection of Freedom of Association in the United Kingdom', in K D Ewing, C A Gearty and B A Hepple (eds), *Human Rights and Labour Law: Essays for Paul O'Higgins* (1994) 1, 10–11, 15–18.

146 *Case 1439 (United Kingdom)* in CFA, Report No 262 (1989) [9], 72 *ILO Official Bulletin* (ser B), No 1. The complaint was subsequently withdrawn without ever being examined by the CFA: CFA, Report No 268 (1989) [9], 72 *ILO Official Bulletin* (ser B), No 3, and Creighton, 'The ILO and Protection of Freedom of Association in the United Kingdom', above n 145, 10–11.

147 Direct request relating to *Convention No 87* from the Committee of Experts to the Australian government (1989).

148 Ibid.

> liable to be sued for damages by employers or other parties who suffer loss as a result of their actions, and (more importantly in practical terms) may be restrained from committing unlawful acts by means of injunctions (issued both on an interlocutory and a permanent basis).[149]

Accordingly, the government was asked to provide information as to the use of these remedies, and 'to indicate the manner in which it proposes to provide some measure of legislative protection against common law liability.'[150]

The Committee of Experts raised similar concerns in relation to s 45D of the *Trade Practices Act 1974* (Cth). It noted that it had never expressed any decided view as to the legitimacy of the internationally recognised right to strike of 'boycotts imposed by workers who are not directly involved in the dispute with the employer against whom the boycott is imposed.'[151] However, it also noted that s 45D seemed to outlaw not only secondary boycotts in this sense, but also those imposed on employers with whom the boycotters *were* in dispute, as well as almost all forms of sympathy action by one group of workers in solidarity with another. The Committee of Experts considered that both forms of action should be lawful in appropriate circumstances. It accordingly asked the government for information as to the use of these provisions in practice, and to indicate whether it had any plans to amend s 45D 'so as to bring it into conformity with the principles of freedom of association.'[152]

In a separate direct request relating to *Convention No 98*, the Committee of Experts asked for information about the operation in practice of s 115 of the *Industrial Relations Act 1988* (Cth) (which dealt with certified industrial agreements), and s 334 (which dealt with victimisation on grounds of trade union membership).[153]

149 Ibid.

150 Ibid.

151 Ibid.

152 Ibid. The government of the day rationalised its decision to introduce s 45D on the basis of recommendations contained in the Committee to Review the *Trade Practices Act 1974*, *Trade Practices Review Committee Report* (1976) [10.22] ('Swanson Committee'). The Swanson Committee noted that some submissions had expressed concern at the possibility that any narrowing of unions' exemption from the *Trade Practices Act 1974* (Cth) — as would be inherent in the introduction of special boycott provisions — might infringe Australia's obligations under *Convention No 87* and *Convention No 98*. Curiously, the Committee of Experts did not express any view on this matter, one way or the other. Internal departmental advice suggested (wrongly, as it transpired) that the proposed s 45D was not inconsistent with the right to strike as guaranteed by *Convention No 87*.

153 Direct request relating to *Convention No 98* from the Committee of Experts to the Australian government (1989). *Industrial Relations Act 1988* (Cth) s 115 was repealed in 1992, and replaced by new provisions (ss 134A–134N) which were intended to further encourage the use of certified agreements. These provisions were in turn repealed in 1993, and replaced by the much more radical pt VIB of the *Industrial Relations Act 1988* (Cth). These provisions were clearly intended to shift the focus of the system away from 'compulsory' conciliation and arbitration, in favour of direct negotiation at the workplace. This process was given further impetus by the *Workplace Relations and Other Legislation Amendment Act 1996* (Cth): Ronald McCallum, 'Australian Workplace Agreements: An Analysis' (1997) 10 *Australian Journal of Labour Law* 50; Marilyn Pittard, 'Collective Employment Relationships: Reforms to Arbitrated Awards and Certified Agreements' (1997) 10 *Australian Journal of Labour Law* 62; Therese MacDermott, 'Industrial Legislation in 1996: The Reform Agenda' (1997) 39 *Journal of Industrial Relations* 52, 55–62.

The government provided its response to both direct requests in February 1991. The information supplied in relation to *Convention No 98* was noted without comment by the Committee of Experts in its 1991 report.[154] This suggests that it did not consider that there were any compliance problems in relation to either of ss 115 or 334.

The situation was very different in relation to *Convention No 87*. In supplying the information requested on the use of the common law and s 45D, the government stated that it had tried to restrict access to both forms of liability in an Industrial Relations Bill which had been introduced in Parliament in 1987, but that it had been obliged to drop its proposals in the face of concerted opposition from the business community. It also pointed out that it had tried to repeal s 45D in 1984, but had been unable to secure the passage of the necessary legislation in the Senate.

As concerned s 118 of the *Industrial Relations Act 1988* (Cth), the government indicated that it had been replaced by s 118A, which provided for the rationalisation of union coverage at particular workplaces by means of orders of the AIRC, without the need to demonstrate the existence of a demarcation dispute.[155] The government argued that neither version of this provision was in any way inconsistent with article 2 of *Convention No 87*. This was because registration under the *Industrial Relations Act 1988* (Cth) was entirely voluntary, and hence workers who were denied the right to be represented by a particular union by reason of a s 118A order could still join, and be represented by, the union of their choice in one or more of the State systems, or outside any of the formal systems. The government also pointed out that these provisions had been adopted in consultation with, and with the agreement of, employer and union peak councils.

The Committee of Experts responded to this information with a further direct request which, inter alia, noted the information which had been supplied in relation to s 118 and its current manifestation in s 118A, and asked for further information as to the number and effect of orders under the new provision.

On the basis of the information provided on civil liability, and the concerns expressed by the CFA at the apparent scope of these liabilities in *Case No 1511*,[156] the Committee of Experts determined that the present state of the law in Australia was not consistent with 'the right of workers and their organisations to take strike action to protect and to promote their economic and social interests.'[157] It reached essentially the same conclusion in relation to s 45D, and called upon the government 'to take steps to bring this legislation into full conformity with the requirements of the Convention.'[158]

[154] *Report of the Committee of Experts on the Application of Conventions and Recommendations* (78th Session, ILC, 1991) Report III (Part 4A) 295.

[155] The requirement for the existence of a demarcation dispute was restored by the *Workplace Relations and Other Legislation Amendment Act 1996* (Cth).

[156] *Case No 1511 (Australia)* in CFA, Report No 277 (1991) [151], [235]–[236], 74 *ILO Official Bulletin* (ser B), No 1. See generally below nn 199–204 and accompanying text.

[157] Direct request from the Committee of Experts concerning *Convention No 87* to the Australian government (1991).

[158] Ibid.

The Committee of Experts also raised a number of queries in relation to the *Essential Services Act 1988* (NSW). This measure was introduced amidst considerable controversy by a newly elected Liberal/National government in 1988, and in the face of express warnings from the Commonwealth that it was not consistent with the requirements of *Convention No 87*.[159] In accordance with normal practice, it was forwarded to the International Labour Office as an attachment to the government's article 22 report for 1988–90. Having examined the legislation, the Committee of Experts first summarised its established jurisprudence in relation to strikes in essential services:

> It is permissible to curtail the right to strike in relation to services whose interruption would endanger the life, personal safety or health of the whole or part of the population — so long as appropriate guarantees are afforded to protect workers who are thus denied one of the essential means of defending their occupational interests. These should include access to adequate, impartial and speedy conciliation procedures, in which the awards should in all cases be binding on both parties. Such awards, once rendered, should be rapidly and fully implemented.[160]

It went on to express the view that, in light of these principles, certain aspects of the New South Wales Act appeared to be in breach of *Convention No 87*. In particular, the definition of 'essential service' in s 4(1) appeared to go beyond the accepted ILO meaning of that term.[161] The Committee of Experts was also concerned at the fact that the power vested in the Governor by s 4(2) to declare 'any service to be an essential service for the purposes of the Act'[162] was not conditioned by any reference to the life, personal safety or the health of the whole or part of the population: 'this leaves open the possibility that this power could be used in a manner which would not be compatible with the principles of the Convention.'[163]

On a more positive note, the Committee of Experts considered that s 15 of the *Essential Services Act 1988* (NSW), which provided for reference of disputes in essential services to the New South Wales Industrial Commission (as it then was), seemed to satisfy the 'arbitration' requirement, but was concerned that the provisions relating to deregistration and alteration of union rules in ss 17 and 18 might not be consistent with articles 2 and 3 of *Convention No 87*. The Committee of Experts invited the federal government to draw these matters to the attention of the government of New South Wales 'so that it may take the appro-

[159] Eg, 'Greiner Hits Feds over Strike Law', *The Daily Telegraph* (Sydney), 18 June 1988, 7; Jack Taylor, 'Strike Ban Law Faces Challenge', *The Sunday Telegraph* (Sydney), 11 September 1988, 5.

[160] Direct request from the Committee of Experts concerning *Convention No 87* to the Australian government (1991).

[161] *Essential Services Act 1988* (NSW) s 4(1). For a description of the accepted ILO meaning, see especially Committee of Experts, *General Survey on Freedom of Association*, above n 53, [159]; ILO, *Freedom of Association Digest*, above n 53, [536]–[545]. See also *Workplace Relations Act 1996* (Cth) s 170MW(3)(a).

[162] *Essential Services Act 1988* (NSW) s 4(2).

[163] Direct request from the Committee of Experts concerning *Convention No 87* to the Australian government (1991).

priate action to bring the provisions of the *Essential Services Act 1988* (NSW) into conformity with the principles of freedom of association.'[164] It also asked the government to 'provide full details of essential services legislation which may be extant in other States, and within its own area of legislative competence.'[165]

The content of the 1991 direct request became public in early September 1991.[166] It provoked an exceedingly hostile response in certain quarters. The (then) Shadow Minister for Industrial Relations, John Howard, went so far as to suggest that a future Coalition government could 'cut ties' with the ILO ('the industrial relations club in full plenary international session') because of its 'foolish observations' and 'gratuitous advice'.[167] It also provoked some lively exchanges in both the federal and New South Wales Parliaments.[168]

The government responded to this direct request in February 1992. As well as providing the information requested in the previous year, it also forwarded observations by the ACTU and the CAI on some of the matters raised in the 1991 direct request, comments from the Northern Territory government on essential services legislation in that jurisdiction, and detailed comments by the government of New South Wales on the *Essential Services Act 1998* (NSW). The Commonwealth's views on these comments were incorporated in the response itself. The ACTU observations also drew attention to certain aspects of the recently enacted *Industrial Relations Act 1991* (NSW), which it considered were incompatible with various aspects of *Convention No 87*. The Committee of Experts examined this response at its meeting in March 1993.

On the basis of that examination the Committee of Experts:[169]

(i) concluded that ss 118 and 118A of the *Industrial Relations Act 1988* (Cth) were not inconsistent with article 2;

(ii) asked the government to keep it informed of progress in its attempts to deal with the common law and s 45D matters;

(iii) endorsed ACTU criticism of the *Industrial Relations Act 1991* (NSW) to the extent that it incorporated State equivalents to s 45D, and failed to provide protection against common law liability;

[164] Direct request from the Committee of Experts concerning *Convention No 87* to the Australian government (1991).

[165] Ibid. The Committee of Experts also noted a communication from the International Organisation of Employers in relation to ss 189 and 193 of the *Industrial Relations Act 1988* (Cth). The Committee decided to defer its examination of this issue pending consideration of a complaint to the CFA in relation to the same provisions: see below nn 213–219 and accompanying text.

[166] Michael Millett, 'The Right to Strike, but Not Here', *The Sydney Morning Herald* (Sydney), 2 September 1991, 1.

[167] Andrew Butler, 'Howard Hits Labor Group', *Herald-Sun* (Melbourne), 3 September 1991, 9. See also Michael Millett, 'Govt Finds Sanction Reform Plan Blocked', *The Sydney Morning Herald* (Sydney), 3 September 1991, 7; Shane Green, 'Cook Sides with ILO over Right to Strike', *The Australian* (Sydney), 3 September 1991, 1, 4.

[168] Commonwealth, *Parliamentary Debates*, Senate, 3 September 1991, 1015–17; Commonwealth, *Parliamentary Debates*, Senate, 9 September 1991, 1237–9; Commonwealth, *Parliamentary Debates*, House of Representatives, 5 September 1991, 779–81; New South Wales, *Parliamentary Debates*, Legislative Assembly, 17 September 1991, 1197–9.

[169] Direct request from the Committee of Experts concerning *Convention No 87* to the Australian government (1991).

(iv) reiterated its previous concerns about the definition of essential services in the *Essential Services Act 1988* (NSW), but accepted the government's explanation of the enforcement provisions of that Act;

(v) expressed concern about the scope and effect of essential service provisions in the Northern Territory, Victoria, Queensland, Tasmania and South Australia, and in the Commonwealth sphere;

(vi) expressed concern about restrictions on the capacity of federal public servants to take industrial action contained in s 30J of the *Crimes Act 1914* (Cth) and s 66 of the *Public Service Act 1922* (Cth); and

(vii) endorsed the findings of the CFA in *Case No 1559*[170] in relation to the 10,000-member requirement for registration, or continued registration, under the federal *Industrial Relations Act 1988* (Cth).[171]

In a 1995 observation, the Committee of Experts noted with satisfaction that the 10,000-member requirement had been reduced to 100, and that various provisions of the *Industrial Relations Reform Act 1993* (Cth) had 'responded' to the Committee of Experts' concerns about the capacity of Commonwealth public servants to take industrial action, and protection against dismissal for engaging or proposing to engage in industrial action.[172] In an accompanying direct request, the Committee of Experts 'noted with interest' the introduction of a measure of protection against common law liability for industrial action.[173] It also noted that the scope of s 45D of the *Trade Practices Act 1974* (Cth) had been narrowed somewhat, but indicated that the legislation still did not conform to the principle that 'workers should be able to take sympathy action provided the initial strike they are supporting is itself lawful.'[174] Finally, it reiterated its concerns about the scope of essential services legislation in various jurisdictions.

In a further observation in 1997, the Committee of Experts:[175]

(i) 'noted' the then-pending removal of secondary boycott provisions from the *Industrial Relations Act 1988* (Cth), and their return to the *Trade Practices Act 1974* (Cth);[176]

(ii) 'noted' the repeal of secondary boycott legislation in New South Wales in 1996;[177]

(iii) expressed continuing concerns about the retention of the 'essential service' provisions in ss 30J and 30K of the *Crimes Act 1914* (Cth);[178]

[170] *Case No 1559 (Australia)* in CFA, Report No 281 (1992) [326], 75 *ILO Official Bulletin* (ser B), No 1; discussed further in CFA, Report No 284 (1992) [200], 75 *ILO Official Bulletin* (ser B), No 3.

[171] See below nn 213–219 and accompanying text.

[172] *Committee of Experts 1995 Report*, above n 140, 150.

[173] Direct request from the Committee of Experts concerning *Convention No 87* to the Australian government (1995).

[174] Ibid.

[175] *Report of the Committee of Experts on the Application of Conventions and Recommendations* (85th Session, ILC, 1997) Report III (Part 1A) 146–8 ('*Committee of Experts 1997 Report*').

[176] Ibid 146. See also above n 143.

[177] *Committee of Experts 1997 Report*, above n 175, 147: *Industrial Relations Act 1996* (NSW) which repealed the secondary boycott provisions of the *Industrial Relations Act 1991* (NSW).

[178] *Committee of Experts 1997 Report*, above n 175, 147; Breen Creighton, William Ford and Richard Mitchell, *Labour Law: Text and Materials* (2nd ed, 1993) 1148–50.

(iv) expressed 'satisfaction' at the repeal of certain residual features of 19th century British industrial legislation in South Australia and Tasmania;[179]

(v) 'noted' information provided by the State government about essential services legislation in Victoria;[180] and

(vi) 'noted with interest' that the constitutionality of the right to strike provisions which had been introduced in 1993 had been upheld by the High Court in *Victoria v Commonwealth*.[181]

Interestingly, the Committee of Experts made no mention of the position in relation to essential services legislation elsewhere than in Victoria and the Commonwealth, or to the adequacy or otherwise of protection against common law liability in the various jurisdictions. Furthermore, the Committee of Experts' examination of Australian law and practice did not take any account of the changes effected by the *Workplace Relations and Other Legislation Amendment Act 1996* (Cth).[182]

This changed in 1998, when in an observation under *Convention No 98*, the Committee of Experts determined that a number of aspects of the new legislation were not consistent with Australia's international obligations in relation to freedom of association.[183] The areas of non-compliance identified by the Committee of Experts related in particular to articles 1 and 4 of *Convention No 98*.

It will be recalled that article 1 requires that employees should enjoy adequate protection against acts of anti-union discrimination, including termination of employment on grounds of union membership or activity. The only permissible exceptions are those concerning the police, armed forces and public servants engaged in the administration of the state as set out in articles 5 and 6. The Committee of Experts considered that the categories of employees who were denied protection against unfair dismissal and unlawful termination under the *Workplace Relations Act 1996* (Cth) went significantly beyond the permissible exceptions, and that as such the provisions were inconsistent with the requirements of article 1.[184] It recognised that the anti-victimisation provisions in ss 170MU and 298K of the *Workplace Relations Act 1996* (Cth) went part of the way towards filling the gap. But they were considered not to be sufficiently comprehensive to satisfy the requirements of article 1.[185]

[179] *Committee of Experts 1997 Report*, above n 175, 147; The provisions in question (*Criminal Law Consolidation Act 1935–75* (SA) s 26 and *Conspiracy and Protection of Property Act 1889* (Tas)) were local versions of the offences formerly contained in s 7 of the *Conspiracy and Protection of Property Act 1875* (UK) 38 & 39 Vict, c 86. (See now *Trade Union and Labour Relations (Consolidation) Act 1992* (UK) c 52, s 241).

[180] *Committee of Experts 1997 Report*, above n 175, 147–8.

[181] Ibid 148; *Victoria v Commonwealth* (1996) 187 CLR 416. See above n 114 and accompanying text.

[182] Creighton, 'The *Workplace Relations Act* in International Perspective', above n 115, 43–6.

[183] *Report of the Committee of Experts on the Application of Conventions and Recommendations* (86th Session, ILC, 1998) Report III (Part 1A) 222–6 ('*Committee of Experts 1998 Report*').

[184] Ibid 222.

[185] Ibid.

Turning to article 4 of *Convention No 98*, the Committee of Experts identified five sets of issues:[186]

(i) the fact that the provisions relating to Australian workplace agreements accorded primacy to individual over collective agreements[187] was adjudged not to be consistent with the obligations to 'encourage and promote collective bargaining';[188]

(ii) those aspects of the legislation which encouraged the making of single-business agreements, and accorded them primacy over multi-business agreements,[189] were found not to be consistent with the requirement that it should be for the parties to choose the level of bargaining;

(iii) the exclusion of strike pay from the permissible subject matter of bargaining[190] was considered to be an unacceptable interference with the autonomy of the parties to the bargaining;

(iv) the fact that the legislation did not accommodate the principle that unions should be able to negotiate agreements on behalf of their own members in situations where no union represented a majority of the workers;[191] and

(v) the 'greenfields' provision[192] appeared to be framed in such a manner as to give employers, rather than workers, the right to determine who should represent workers for the purposes of collective bargaining.[193]

The Committee of Experts also identified compliance problems in a number of the State jurisdictions. In the cases of Queensland and Western Australia these related to inadequate protection against victimisation on grounds of union membership or activity, and according preference to industrial agreements over collective instruments. It also raised a number of queries about protection against victimisation and promotion of collective bargaining in New South Wales and South Australia, although these concerns appeared to be rather less acute than in relation to the Commonwealth, Queensland and Western Australian jurisdictions.[194]

186 Ibid 223–4.

187 *Workplace Relations Act 1996* (Cth) s 170VG(1).

188 *Convention No 98*, above n 23, art 4.

189 *Workplace Relations Act 1996* (Cth) s 170LC.

190 *Workplace Relations Act 1996* (Cth) s 124; see also ss 187AA–187AD.

191 *Committee of Experts 1998 Report*, above n 183, 224; ILO, *Freedom of Association Digest*, above n 53, [241].

192 *Workplace Relations Act 1996* (Cth) s 170LL.

193 *Committee of Experts 1998 Report*, above n 183, 224.

194 This observation was the subject of lengthy debate in the Conference Committee on the Application of Conventions and Recommendations at the ILC in 1998. This was the first occasion on which Australian compliance with a ratified convention had ever been singled out for discussion in the Conference Committee: Conference Committee on the Application of Conventions and Recommendations, *Record of Proceedings* (86th Session, ILC, 1998) 18/106–14; Valticos and von Potobsky, above n 28, 286–7.

D *The Committee on Freedom of Association*

It will be recalled that the jurisdiction of the CFA is not in any way dependent upon ratification of the freedom of association conventions — all that matters is that the respondent government be a member of the ILO. Interestingly, however, the first complaint against Australia was not presented to the CFA until June 1974, just four months after the ratification of *Convention No 87* and *Convention No 98*.[195] Since that time, the CFA has examined a further 10 complaints against Australia.[196] A further complaint which was lodged by the ACCI in June 1994 was withdrawn before it had been examined by the CFA,[197] whilst a complaint lodged by the International Confederation of Free Trade Unions in May 1998 in the context of the then current waterfront dispute had not been considered by the CFA at the time of writing.

Only one of these cases has resulted in an unequivocal finding that Australia had breached its obligations under the principles of freedom of association. However, the CFA has clearly been unhappy about certain aspects of law and

[195] *Case No 757 (Australia)* in CFA, Report No 143 (1974) [137], Supp 57 *ILO Official Bulletin*; discussed further in CFA, Report No 149 (1975) [44], 58 *ILO Official Bulletin* (ser B), No 3; CFA, Report No 158 (1976) [76], 59 *ILO Official Bulletin* (ser B), No 3.

[196] *Case No 846 (Australia)* in CFA, Report No 164 (1977) [45], 60 *ILO Official Bulletin* (ser B), No 2; *Case No 902 (Australia)* in CFA, Report No 187 (1978) [302], 61 *ILO Official Bulletin* (ser B), No 3; discussed further in CFA, Report No 199 (1980) [227], 63 *ILO Official Bulletin* (ser B), No 1; CFA, Report No 204 (1980) [135], 63 *ILO Official Bulletin* (ser B), No 3; *Case No 1180 (Australia)* in CFA, Report No 230 (1983) [44], 66 *ILO Official Bulletin* (ser B), No 3; *Case No 1241 (Australia)* in CFA, Report No 234 (1984) [329], 63 *ILO Official Bulletin* (ser B), No 2; discussed further in CFA, Report No 241 (1985) [16], 63 *ILO Official Bulletin* (ser B), No 3; *Case No 1324 (Australia)* in CFA, Report No 241 (1985) [375], 68 *ILO Official Bulletin* (ser B), No 3; *Case No 1345 (Australia)* in CFA, Report No 244 (1986) [157], 69 *ILO Official Bulletin* (ser B), No 2; *Case No 1371 (Australia)* in CFA, Report No 248 (1987) [228], 70 *ILO Official Bulletin* (ser B), No 1; *Case No 1415 (Australia)* in CFA, Report No 254 (1988) [255], 71 *ILO Official Bulletin* (ser B), No 1; discussed further in CFA, Report No 256 (1988) [23], 71 *ILO Official Bulletin* (ser B), No 2; CFA, Report No 259 (1988) [23], 71 *ILO Official Bulletin* (ser B), No 3; CFA, Report No 262 (1989) [21], 72 *ILO Official Bulletin* (ser B), No 1; *Case No 1511 (Australia)* in CFA, Report No 272 (1990) [8], 73 *ILO Official Bulletin* (ser B), No 2; discussed further in CFA, Report No 275 (1990) [6], 73 *ILO Official Bulletin* (ser B), No 3; CFA, Report No 277 (1991) [151], 74 *ILO Official Bulletin* (ser B), No 1; CFA, Report No 278 (1991) [17], 74 *ILO Official Bulletin* (ser B), No 2; CFA, Report No 279 (1991) [8], 75 *ILO Official Bulletin* (ser B), No 2; CFA, Report No 281 (1992) [18], 75 *ILO Official Bulletin* (ser B), No 1; CFA, Report No 283 (1992) [18], 75 *ILO Official Bulletin* (ser B), No 2; *Case No 1559 (Australia)* in CFA, Report No 281 (1992) [326], 75 *ILO Official Bulletin* (ser B), No 1; discussed further in CFA, Report No 284 (1992) [200], 75 *ILO Official Bulletin* (ser B), No 3.

[197] *Case No 1774 (Australia)* in CFA, Report No 302 (1996) [11], 79 *ILO Official Bulletin* (ser B), No 1. This complaint consisted of a wide-ranging challenge to the system of industrial regulation established under the *Industrial Relations Act 1988* (Cth). The issues raised were so complex that the government suggested to the Committee that the International Labour Office should send a Direct Contact mission to Australia to examine the situation at first hand. The mission's visit took place in September 1995, and the Committee was due to consider the ACCI's allegations at its meeting in March 1996, taking account of the report of the mission. However the complaint was withdrawn just before the March meeting. Apparently the complainant considered that it was no longer necessary or appropriate to proceed with the matter in light of the election earlier that month of a Coalition government, with a mandate to reform radically the federal system of industrial regulation.

practice in this country on a number of occasions. In *Case No 1511*,[198] for example, the CFA expressed strong reservations about the nature and extent of common law liability for industrial action in Australia. This case arose out of a protracted and bitter dispute in the airline industry in 1989.[199] One of the outcomes of the dispute was an award of $6.48 million in common law damages against the Australian Federation of Air Pilots and six of its officers.[200] A further outcome was that, in October 1989, the International Federation of Air Line Pilots Associations presented a complaint to the CFA on behalf of its Australian affiliate. Among the complainant's allegations was the assertion that if damages awards of this nature became the norm:

> [I]t would be impossible for any representative organisation to organise industrial action, or for any employee to contemplate participating in any such action, without running the risk of being sued in damages by their employer. This would tip the balance in employer/employee relations heavily in favour of employers, and would constitute a return to an era preceding the establishment of the trade union rights which the ILO has fought so painstakingly to define.[201]

The CFA found that this aspect of the complaint could not be sustained. This was because the industrial action which had given rise to the damages action had taken place in defiance of an order of a tribunal (the AIRC) to whose jurisdiction the Australian Federation of Air Pilots had voluntarily submitted, and in breach of a provision of the *Industrial Relations Act 1988* (Cth)[202] which constituted a 'legitimate means of seeking to protect the integrity of the processes of conciliation and arbitration which are set out in that Act.'[203] This meant that the union and its officers had failed to respect the law of the land as required by article 8(1) of *Convention No 87*. However, the CFA went on to state that it could not:

> [V]iew with equanimity a set of legal rules which: (i) appears to treat virtually all industrial action as a breach of contract on the part of those who participate therein; (ii) makes any trade union or official thereof who instigates such breaches of contract liable in damages for any losses incurred in consequence of their actions; and (iii) enables an employer faced with such action to obtain an injunction to prevent the commencement (or continuation) of the unlawful conduct. The cumulative effect of such provisions could be to deprive workers

198 *Case No 1511 (Australia)* in CFA, Report No 272 (1990) [8], 73 *ILO Official Bulletin* (ser B), No 2. This complaint was considered by the CFA on a number of subsequent occasions as outlined in above n 196.

199 See, eg, Kathleen McEvoy and Rosemary Owens, 'The Flight of Icarus: Legal Aspects of the Pilots' Dispute' (1990) 3 *Australian Journal of Labour Law* 87; Kathleen McEvoy and Rosemary Owens, 'On a Wing and a Prayer: The Pilots' Dispute in the International Context' (1993) 6 *Australian Journal of Labour Law* 1.

200 *Ansett Transport Industries v Australian Federation of Air Pilots* [1991] 1 VR 637. No action has ever been taken to recover the damages in this case.

201 *Case No 1511 (Australia)* in CFA, Report No 277 (1991) [151], [165], 74 *ILO Official Bulletin* (ser B), No 1.

202 Section 312 made it an offence for an officer or agent of an organisation bound by an award to incite boycott of that award. This provision was repealed in 1993.

203 *Case No 1511 (Australia)* in CFA, Report No 277 (1991) [151], [233], 74 *ILO Official Bulletin* (ser B), No 1. For a more detailed analysis of this aspect of the decision, see McEvoy and Owens, 'On a Wing and a Prayer', above n 199, 13–16.

> of the capacity lawfully to take strike action to promote and defend their economic and social interests.[204]

These concerns were clearly reflected in the Committee of Experts' direct request of 1991 which was discussed earlier. However, it is important to appreciate that that Committee had already raised this issue in its 1989 direct request, which had been transmitted to the government before the commencement of the pilots' dispute.

Other cases where the CFA expressed some unease about certain aspects of Australian law and practice include:

(i) two complaints presented by the Australian Building Construction Employees' and Builders' Labourers' Federation ('BLF') in the mid-1980s;[205]

(ii) *Case No 902*, where the CFA determined that certain provisions of the *Commonwealth Employees (Employment Provisions) Act 1977* (Cth) were inconsistent with the spirit, if not the letter, of ILO principles relating to the right to strike;[206] and

(iii) *Case No 1241*, where the CFA found that an unregistered union of Northern Territory public servants should be permitted access to its members through meetings and the distribution of literature at the workplace, but also stated that the fact that registered unions obtained certain legal advantages did not in itself involve any breach of the freedom of association principles.[207]

In addition, the CFA has stated on no fewer than three occasions that the unilateral withdrawal of check-off facilities[208] should be avoided: first, because it 'could lead to financial difficulties for trade union organisations',[209] and second, because it 'is not conducive to the development of harmonious industrial

[204] *Case No 1511 (Australia)* in CFA, Report No 277 (1991) [151], [236], 74 *ILO Official Bulletin* (ser B), No 1.

[205] *Case No 1345 (Australia)* in CFA, Report No 244 (1986) [157], 69 *ILO Official Bulletin* (ser B), No 2; and *Case No 1371 (Australia)* in CFA, Report No 248 (1987) [228], 70 *ILO Official Bulletin* (ser B), No 1: see, eg, Laura Bennett, 'Legislative Policy and Design: Federal Deregistration and the "Destruction" of the Builders' Labourers' Federation' (1991) 4 *Australian Journal of Labour Law* 18.

[206] *Case No 902 (Australia)* in CFA, Report No 187 (1978) [302], [344]–[349], 61 *ILO Official Bulletin* (ser B), No 3; discussed further in CFA, Report No 199 (1980) [227], [253]–[259], 63 *ILO Official Bulletin* (ser B), No 1; CFA, Report No 204 (1980) [135], [135]–[147], 63 *ILO Official Bulletin* (ser B), No 3.

[207] *Case 1241 (Australia)* in CFA, Report No 234 (1984) [329], [329]–[342], 63 *ILO Official Bulletin* (ser B), No 2; discussed further in CFA, Report No 241 (1985) [16], 63 *ILO Official Bulletin* (ser B), No 3 (where the CFA noted 'with interest' that the union had been granted the facilities referred to in its earlier decision).

[208] That is, an arrangement under which employers deduct union dues from the wages or salaries of union members in their employment and pay them to the union concerned: Di Yerbury and Maria Karlsson, *CCH Macquarie Dictionary of Employment and Industrial Relations* (1992) 54.

[209] *Case No 902 (Australia)* in CFA, Report No 199 (1980) [227], [257], 63 *ILO Official Bulletin* (ser B), No 1; discussed further in CFA, Report No 204 (1980) [135], [146], 63 *ILO Official Bulletin* (ser B), No 3; *Case No 1324 (Australia)* in CFA, Report No 241 (1985) [375], [384], 68 *ILO Official Bulletin* (ser B), No 3.

relations.'[210] It is important to appreciate, however, that it is not inconsistent with the principles of freedom of association for employers to refuse to enter into check-off agreements, or even for the law to forbid them.[211] The point is that once a check-off arrangement has been put in place, it should not arbitrarily be terminated, as had happened in all three Australian cases.[212]

The first occasion on which the CFA formally determined that law and practice in Australia were in breach of the principles of freedom of association was in the context of a complaint presented in 1990 by the CAI with the support of the International Organisation of Employers.[213] This complaint related to two issues:

(i) the requirement in s 189(1)(c) of the *Industrial Relations Act 1988* (Cth) that to be registered as an organisation of workers under that Act a trade union had to have at least 10,000 members, or be able to demonstrate the existence of 'special circumstances' justifying its registration despite its size; and

(ii) ss 193 and 193A of the *Industrial Relations Act 1988* (Cth), which provided for the review over a period of years of the continued registration of trade unions having fewer than 1,000 members (s 193) and 10,000 members (s 193A). These provisions were alleged to constitute an impermissible interference with workers' right to belong to the union of their choice as guaranteed by article 2 of *Convention No 87*.

The government denied that there was any infringement of article 2:[214] first, because registration under the *Industrial Relations Act 1988* (Cth) was voluntary, as evidenced by the fact that more than 60 per cent of unions were not registered under that measure; and second, because unions with fewer than the prescribed number of members could register or retain registration if they could establish the existence of 'special circumstances' within the meaning of the legislation.[215] The government's submissions were formally supported by the ACTU, to which virtually all Australian unions, registered and otherwise, were affiliated.

The CFA rejected the government's arguments. It acknowledged that neither it nor the Committee of Experts 'had ever found the federal system to be inconsistent with the guarantees provided by Articles 2 and 3 of the *Convention*

[210] Ibid.

[211] See ILO, *Freedom of Association Digest*, above n 53, [100]–[103]. This means that the state of the law as set out in *Re Alcan Australia; Ex parte Federation of Industrial, Manufacturing and Engineering Employees* (1994) 181 CLR 96 would not be inconsistent with the principles of freedom of association. See further above nn 53–55 and accompanying text.

[212] *Case No 757 (Australia)* in CFA, Report No 143 (1974) [137], [156], Supp 57 *ILO Official Bulletin*; discussed further in CFA, Report No 149 (1975) [44], [53], 58 *ILO Official Bulletin* (ser B), No 3; and CFA, Report No 158 (1976) [76], [89]–[90], 59 *ILO Official Bulletin* (ser B), No 3; *Case No 902 (Australia)* in CFA, Report No 199 (1980) [227], [257], 63 *ILO Official Bulletin* (ser B), No 1; discussed further in CFA, Report No 204 (1980) [135], [146], 63 *ILO Official Bulletin* (ser B), No 3; *Case No 1324 (Australia)* in CFA, Report No 241 (1985) [375], [384]–[385], 68 *ILO Official Bulletin* (ser B), No 3.

[213] *Case No 1559 (Australia)* in CFA, Report No 281 (1992) [326], 75 *ILO Official Bulletin* (ser B), No 1; discussed further in CFA, Report No 284 (1992) [200], 75 *ILO Official Bulletin* (ser B), No 3.

[214] *Case No 1559 (Australia)* in CFA, Report No 284 (1992) [200], [206]–[219], [232]–[252], 75 *ILO Official Bulletin* (ser B), No 3.

[215] *Industrial Relations Act 1988* (Cth) s 189(1)(d)(ii).

No 87.'[216] However, it considered that the 10,000-member requirement constituted a 'new factor,' which meant that the matter must be viewed in a new light:

> The government measure ... could, in the Committee's opinion, influence unduly the workers' free choice of union to which they wish to belong, even when they realise that federal registration is only one of the alternatives available for protecting their rights. The Committee has come to this conclusion bearing in mind what a worker expects from union membership, namely maximum support. It has gauged the importance of the federal industrial relations system established by the Industrial Relations Act and, while noting the statistics provided on the level of state registration, considers that a workers' organisation which has less than 10,000 members and which can come within the [*Industrial Relations Act*'s] jurisdiction should have the same rights as a larger union to claim access to the benefits deriving from registration under the federal system, as well as accepting the obligations of registration.[217]

As to the 'special circumstances' exception:

> The Committee notes the Government's emphasis on the width and flexibility of the special circumstances test, but does not consider that it meets the Committee's concerns. The Committee considers that the new circumstances introduced by the amendments place too great a burden on unions which had previously been able to apply for federal registration (although subject to certain other requirements which have not been found to be inconsistent with freedom of association by the ILO supervisory bodies). Workers, knowing that under-10,000 member unions will be called to justify their continued enjoyment of the benefits of federal registration, could be influenced in their choice of union. Organisations applying for registration, or already registered with fewer than 10,000 members may have been forced to react for fear of being refused those benefits.[218]

On the basis of these findings, the CFA called upon the government 'to take measures so that it is not a requirement that a union have 10,000 members or demonstrate special circumstances to claim access to the benefits deriving from registration under the federal system.'[219]

Leaving aside the rather stylised analysis of the choices facing potential union members under the federal system, these findings are not easy to reconcile with the understandings upon which Australia ratified *Convention No 87* in 1973.[220]

Furthermore, despite the CFA's express reservation of its position in relation to 'other' registration requirements, it is very hard to see how even the modified 'conveniently belong' concept now embodied in s 189(1)(j) and (2) of the *Workplace Relations Act 1996* (Cth) could be said to be consistent with article 2. The same is true for the 'organisational coverage' provision in s 118A — even

[216] *Case No 1559 (Australia)* in CFA, Report No 284 (1992) [200], [260], 75 *ILO Official Bulletin* (ser B), No 3.
[217] Ibid.
[218] Ibid [261].
[219] Ibid [263(b)].
[220] See above nn 127–133 and accompanying text.

though, in the year after the CFA's decision in *Case No 1559*,[221] the Committee of Experts expressly stated that that provision was not inconsistent with article 2![222]

Prior to the CFA's decision, the government indicated that if the Committee ruled against it in *Case No 1559*, then the *Industrial Relations Act 1988* (Cth) would be amended to bring it into line with the requirements of *Convention No 87* as interpreted by the CFA. In doing so, it also intimated that in the interests of consistency and parity it would need to give effect to the Committee of Experts' 1991 rulings on the right to strike.[223] These commitments were confirmed after the CFA's decision was handed down in November 1992,[224] and they were honoured in the *Industrial Relations Reform Act 1993* (Cth) which repealed ss 193 and 193A in their entirety, and reduced the membership threshold for registration to 100.[225]

VI THE ILO STANDARDS IN PERSPECTIVE

ILO human rights standards have assumed a new prominence in recent years in the context of possible linkages between labour standards and the liberalisation of international trade.[226] This has provided a much-needed boost to the standing and relevance of the ILO as it struggles to redefine its role in the post-Cold War environment.[227]

Despite its modest overall record in relation to ratification of ILO conventions, Australia has ratified all but one of the seven conventions which constitute the centre-piece of the debate on labour standards and trade.[228] It has also maintained a generally high level of compliance with its obligations under those standards, and in relation to its duty to respect the principles of freedom of association.

To some extent, this compliance record may reflect the long-standing policy of successive governments of ratifying conventions only where law and practice are

221 *Case No 1559 (Australia)* in CFA, Report No 281 (1992) [326], 75 *ILO Official Bulletin* (ser B), No 1; discussed further in CFA, Report No 284 (1992) [200], 75 *ILO Official Bulletin* (ser B), No 3.

222 See above n 169 and accompanying text.

223 Shane Green, 'Cook Warns Employers on Right to Strike Law', *The Australian* (Sydney), 17 March 1992, 2.

224 See, eg, Cathy Bolt, 'Geneva Ruling May Save Smaller Trade Unions', *The Australian Financial Review* (Sydney), 5 November 1992, 7.

225 The *Workplace Relations and Other Legislation Amendment Act 1996* (Cth) further reduced the membership threshold to 50, and also purported to relax the 'conveniently belong' test. See also Naughton, above n 54, 120–2, 124–6.

226 There is already an extensive literature on this issue. See, eg, Amanda Coulthard, 'Minimum Labour Standards in the Asia-Pacific Region: A Social Clause in APEC', in Richard Mitchell and Jesse Min Aun Wu (eds), *Facing the Challenge in the Asia Pacific Region* (1997) 48; Nigel Haworth and Stephen Hughes, 'Trade and International Labour Standards: Issues and Debates over a Social Clause' (1997) 39 *Journal of Industrial Relations* 179, and the sources cited therein. See also Organisation for Economic Cooperation and Development, *Trade, Employment and Labour Standards: A Study of Core Workers' Rights and International Trade* (1996).

227 Creighton, 'The ILO and the Internationalisation of Australian Labour Law', above n 113, 207–20.

228 For government reaffirmation of Australia's commitment to these principles, see Mark Davis, 'Canberra Backs ILO's Work Standards Push', *The Australian Financial Review* (Sydney), 9 July 1997, 4.

in full compliance, and where all jurisdictions have been prepared to agree to ratification — thereby impliedly committing themselves to maintaining compliance with the instrument concerned. However, there is also some reason to suppose that the generally high level of compliance reflects a genuine commitment to the principles embodied in at least the core conventions. As noted earlier, legislative initiatives in the industrial relations area, such as the introduction of s 45D of the *Trade Practices Act 1974* (Cth), or special measures to deal with the BLF in the mid-1980s, are routinely checked for conformity with freedom of association standards.

Notwithstanding its lukewarm attitude towards the ILO,[229] the Howard government appears to have gone to some lengths to ensure that its 1996 reforms to the industrial relations system maintained compliance with Australia's existing commitments — especially in the area of freedom of association.[230] Even if this reflected nothing more noble than a grudging recognition that the legislation might not be passed by the Senate if it exhibited a flagrant disregard for ILO standards, that in itself would tend to confirm the positive impact of ILO human rights standards on law and policy in Australia.

Similarly, policy initiatives in relation to issues such as the 'privatisation' of prison services, or the introduction of 'work-for-the-dole' schemes have been conditioned by a recognised need to ensure continued compliance with the forced labour conventions.[231] In addition, there have also been numerous instances over the years where State and federal governments have introduced legislation to establish compliance, or to ensure continued compliance, with ratified conventions in relation to freedom of association,[232] forced labour[233] and equal opportunity.[234]

[229] As reflected in the withdrawal of Australia's special labour adviser in Geneva, and the decision not to seek re-election to the Governing Body as either a titular or alternate member for the first time in over 50 years. See Commonwealth, *Parliamentary Debates*, House of Representatives, 2 May 1996, 277–8. The marginalisation of the ILO is also reflected in the severe reduction in the size of the Australian delegation to the ILC in the period since the election of the Coalition government. See too Mark Davis, 'The International Rules Australia Won't Play By', *The Australian Financial Review* (Sydney), 11 September 1996, 15, 17.

[230] Nevertheless, the *Workplace Relations Act 1996* (Cth) does introduce a number of new areas of non-compliance, as well as perpetuating and exacerbating existing ones: Creighton, 'The *Workplace Relations Act* in International Perspective', above n 115.

[231] See Eve Landau, *The Influence of ILO Standards on Australian Labour Law and Practices* (1990) 58. This work provides some useful information on the impact of ILO standards in Australia, but it should be treated with caution due to the large number of factual inaccuracies it contains.

[232] Eg, the changes to registration requirements for trade unions, and the right to strike, noted above.

[233] See, eg, the changes to apprenticeship legislation in New South Wales, Victoria and South Australia which were noted in *Report of the Committee of Experts on the Application of Conventions and Recommendations* (59th Session, ILC, 1974) Report III (Part 4A) 171.

[234] See, eg, *Industrial Relations Act 1988* (Cth) pt VIA div 2, which was introduced in 1993 in circumstances where changes introduced by the *Employee Relations Act 1992* (Vic) were thought to have jeopardised Australia's capacity to demonstrate compliance with *Convention No 100*, above n 24. At the insistence of the Australian Democrats, this provision was retained in the *Workplace Relations Act 1996* (Cth), despite the government's original intention that it be repealed: Commonwealth, *Agreement between the Commonwealth Government and the Australian Democrats on the Workplace Relations Bill* (October 1996).

There are, of course, exceptions. These include the decision of the New South Wales government in 1988 to press ahead with essential services legislation despite advice from the Commonwealth that its proposals were contrary to the requirements of *Convention No 87*,[235] and the decision of the Western Australian government in 1997 to introduce changes to industrial relations legislation in that State[236] in the face of an informal opinion from the ILO to the effect that they would breach *Convention No 87* in a number of respects.[237] The Howard government's dismissive response to the views of the Committee of Experts on the changes effected by the *Workplace Relations and Other Legislation Amendment Act 1996* (Cth) is also a cause for some concern.[238] Nevertheless, it remains the case that deliberate and informed disregard for Australia's international obligations under ILO human rights instruments is still highly unusual.

This seems to bear out the proposition set out in the introduction that these standards have played a markedly effective — if largely unacknowledged — role in protecting fundamental human rights in a country where the *Constitution* affords little protection (formal or informal) to those rights, and where human rights issues in general conspicuously fail to excite the imagination of either the public or their elected representatives.

235 See above n 159; *Essential Services Act 1988* (NSW).

236 *Labour Relations Legislation Amendment Act 1997* (WA).

237 Cathy Bolt, 'WA Unions Muster Support from ILO', *The Australian Financial Review* (Sydney), 17 June 1997, 9.

238 Katharine Murphy and Fred Brenchley, 'Act Breaches Conventions, Says ILO', *The Australian Financial Review* (Sydney), 12 March 1998, 6; Judy Hughes, 'Workplace Act "Breaches International Convention"', *The Australian* (Sydney), 12 March 1998, 4.