*The Effect of Australia's International Obligations on the Development of Our System of Industrial Relations**

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Over the past decade Australia has been moving into the mainstream of the world economy. Australia's understanding of its place in the world has also become more developed as foreign and international ideas and concepts become blended into our system of law. This is particularly apparent in the area of industrial relations law where the increasing influence of external developments has brought about significant changes to our system of conciliation and arbitration. In fact, the whole field of industrial relations has shed its parochial outlook to become increasingly international in its approach. It now addresses the globalization of the Australian economy and the reality of international competition.

In the past the potential role of International Standards in the development of Australian labour law has been understood but largely untapped, but recent amendments to the *Industrial Relations Act* 1988 (the Act) have ensured that International Standards will play an increasingly significant role in Australian industrial relations.

These reforms came into effect on 30 March 1994, as a result of the *Industrial Relations Reform Act* 1993. One of the most important features of these amendments was their reliance on the 'external affairs' power and International Labour Organisation (ILO) Conventions as a basis for many of the new provisions. As you know, s 51 (xxix) of the Constitution enables Parliament to make laws with respect to 'external affairs'. Under this head of power the Parliament may enact laws relating to the subject matter of any international treaty that Australia has ratified.

* This article is a recension of the 1995 Sir Ninian Stephen Lecture. The Sir Ninian Stephen Lecture was established to mark the arrival of the first group of Bachelor of Laws students at the University of Newcastle in 1993. It is an annual event which is to be delivered by an eminent lawyer at the commencement of each academic year.

Although, as a number of leading scholars in the area of labour law have said, this "adoption of a number of international labour law concepts is a notable departure from Australia's home-grown arbitral system"[1], we have, in our law, a history of jurisprudence which has allowed for the adoption of international concepts and conventions into domestic law. This has developed over time and has provided a relevant and solid foundation on which the interpretation of the new legislation will rest.

It should be noted that the ILO is not the only source of International Standards in the industrial relations area, although it is certainly the most important. For example, there are several United Nations (UN) instruments dealing with discrimination in employment which have been ratified by Australia and used as the basis for our federal anti-discrimination law.[2] There are also two important UN Covenants dealing with freedom of association in relation to trade unions — the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights. Several of these are now expressly referred to in the *Industrial Relations Act*[3].

In this address I propose to review the way in which International Standards as expressed in Conventions and Treaties have been dealt with both by the High Court and the Commission before these legislative amendments, and to demonstrate that the legislation we have today could be considered a part of an evolution leading to the recognition of Australia's responsibility as part of the world community.

Australia and the International Labour Organisation (ILO)

Australia was a founding member of the International Labour Organisation, which came into existence in 1919, and has always played an active role in its operations. The primary role of the ILO is to formulate and promote international labour standards for the protection of workers. It comprises representatives of governments, unions and employer associations from its member nations. It issues Conventions and Recommendations which usually reflect current concerns for the rights and conditions of employees. From time to time the ILO is also asked to deal with complaints and, although it is not a court, its decisions carry considerable weight because its member states are conscious of preserving their status and reputation in the international community.

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1 R Naughton, "The New Bargaining Regime Under the Industrial Relations Reform Act", (1994) 7(2) Australian Journal of Labour Law, 147; and R McCallum, "The Internationalisation of Australian Industrial Law: The Industrial Relations Reform Act 1993" (1994) 16 *Sydney Law Review*, 122.

2 For example, The International Convention on the Elimination of All Forms of Discrimination Against Women.

3 See ss 4 and 170PA.

Once Conventions are ratified by member states they have the effect of a treaty in international law. Ratification obliges a member state to recognise and apply, in law and practice, the provisions of the relevant Convention.

Australia's observance of ILO Conventions demonstrates our commitment to them and our belief that they act as an important indicator of Australia's international standing.

Conventions of the ILO are considered to be an integral part of the system of international cooperation. For a member State to give effect to such instruments should be seen as performing a legitimate part of the conduct of the external affairs of the country. This is of particular importance and relevance to Australia in the 1990's as we are becoming more focused on our place in the international arena.

The *Industrial Relations Reform Act* 1993

The *Industrial Relations Reform Act* 1993, *(Reform Act)* has made ILO Standards specifically relevant to industrial relations in Australia in a number of respects. A new object of the Act, which was introduced in the *Reform Act*, in section 3(6), reads as follows:

> "The principal object of this Act is to provide a framework for the prevention and settlement of industrial disputes which promotes the economic prosperity and welfare of the people of Australia by: ...
> (b) providing the means for:
> ...
> (ii) ensuring that labour standards meet Australia's international obligations..."

Definitions contained in the relevant ILO Conventions are set out in section 4 of the *Act*, interpretation and the texts of the actual Conventions and Recommendations are attached as schedules to the *Act*.

The *Reform Act* established minimum standards covering wage rates, equal pay for work of equal value, parental leave, family leave and termination of employment, which all rely on ILO conventions.

These standards are set out in Part VIA of the *Act* — *"Minimum Entitlements of Employees"*. This particular part of the *Act* consists of five Divisions:

Division 1 — Minimum Wages
Division 2 — Equal Remuneration for Work of Equal Value
Division 3 — Termination of Employment
Division 4 — Orders and Proceedings
Division 5 — Parental Leave

Each of Divisions 1,2,3 and 5 sets out additional objects which are specific to that Division and which State that the object of the Division is to give effect or further effect to the relevant ILO Conventions and Recommendations. Each Division also contains a section to the effect that expressions used in that Division are to have the same meaning as in the relevant international instrument.

Another major area in which the *Reform Act* has made ILO Standards of particular relevance is in relation to sanctions and the right to strike. In 1991 the ILO's Committee of Experts determined in a Direct Request that civil liability in respect of industrial action in Australia "appeared to the Committee to deny workers the right to take industrial action to protect and promote their economic interests", and was therefore inconsistent with Australia's obligations under the Freedom of Association and Right to Organise Convention 1948 (No 87). The Committee sought "the adoption of enforcement mechanisms which respect the right of workers and their organisations to take strike action to protect and promote their economic and social interests subject to those restrictions which have been considered by the Committee to be permissible".

The *Reform Act* addresses the ILO concerns and Division 4 of Part VIB of the *Act* contains specific provisions which provide legislative protection for the right to strike, subject to certain limitations. As with the Divisions in Part VIA of the *Act*, Division 4 of Part VIB sets out an additional object to Australia's international obligations which arise under various United Nations and ILO Instruments.

The Influence of International Standards

The influence and relevance of ILO Standards on industrial relations in Australia has to a large degree been determined by the character of Australia as a Federal state. From its inception, the ILO Constitution has recognised and made special provision for the possibility that a member State which is federal in character may, according to its own constitution, have sole responsibility for the ratification of an ILO Convention and yet may wholly or partially lack authority to give legislative effect to it.

As you are aware, the Australian Constitution divides responsibility for industrial relations amongst the Commonwealth and the six State governments. The power of the Federal Government to legislate in relation to industrial relations matters specifically, is restricted by s 51(xxxv) of the Constitution which confers powers to make laws with respect to "conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State." The Constitution also gives the Federal Government powers to legislate directly in relation to its own employees and in the Territories. State governments retain residual powers over industrial relations within their own State boundaries.

As a result of this division of powers between the Federal and State governments, Australia has, in the past, approached the question of ratification of ILO Conventions with caution. Although the issue of ratification is one for the federal government alone to decide, in practice, because of the inadmissibility of reservations to ratification, until 1993 the federal government did not ratify ILO Conventions involving the States unless all States had formally agreed to ratification. In addition, the government did not ratify a Convention if it was aware of any point of conflict between the law and practice in any jurisdiction and the provisions of the Convention. In such circumstances the government draws the attention of the State concerned to the apparent point of conflict with a view to legislative action or a reappraisal of its attitude to ratification.

A point of departure from this practice occurred on 28 February 1993 when the Federal Government ratified the ILO Convention on Termination of Employment without the agreement of all States and Territories and with the knowledge that law and practice were not in conformity with the requirements of the Convention.

An examination of the pattern of the ratification of ILO Conventions shows that the relevance of the International Standards in Australia has increased over time. In the 20 years between the formation of the ILO and the start of World War II, Australia had ratified only 12 of the 68 Conventions that had been adopted. None of these 12 was of general significance or application.

In the post-war period there was a substantial improvement in the level of ratification by Australia. The actual rate of ratification did not increase dramatically when compared to the rate of adoption of new Conventions[4], however, the types of Conventions ratified include the major instruments concerning freedom of association, the right to organise, equal remuneration, discrimination and employment policy. This change is reflective of the increasing emphasis placed upon Australia's place in the world from being a 'post-colonial' country to a nation in its own right, and has been accompanied by a judicial trend towards a more expansive view of the Commonwealth Government's powers in relation to external affairs.

The External Affairs Power

The possible uses of the Commonwealth's powers in relation to external affairs have been the subject of increasing public attention and discussion in recent years. This has been the case particularly in relation to an expansion of the conciliation and arbitration power of the Commonwealth by use of the adoption or ratification of international treaties and agreements such as ILO Conventions.

[4] At 30 June 1994 Australia had ratified only 54 of the 175 adopted Conventions.

However, the use of the external affairs head of power as a basis for domestic legislation in Australia is not necessarily new. In 1936 the High Court in *R v Burgess ex parte Henry*[5], had to decide whether a person had been properly convicted of an offence under Commonwealth regulations made by virtue of the *Air Navigation Act* 1920 (Cth). This Act authorised the making of regulations for the purpose of carrying out and giving effect to the Air Navigation Convention of 1919 which was an international treaty.

The court was of the unanimous opinion that the external affairs power of the Constitution did enable the Commonwealth Parliament to make or authorise laws to carry the Convention into effect, notwithstanding that in doing so the law regulated intrastate aviation which was a matter otherwise exclusively within State power.

In their joint judgment, Evatt and McTiernan JJ, stated:

> "It is true that such subject matters as air navigation, the manufacture of munitions, the suppression of the drug traffic and standard hours of work in industry are not made express or separate subject matters of Commonwealth legislative powers. But there is, in our view, an undoubted capacity in His Majesty to enter into international conventions dealing with any of these subject matters and necessarily binding upon and in respect of the Commonwealth."[6]

The two judges went on to conclude:

> "The Commonwealth has power both to enter into international agreements and to pass legislation to secure the carrying out of such agreements according to their tenor even although the subject matter of the agreement is not otherwise within Commonwealth legislative jurisdiction. The subject matter of these agreements may properly include such matters as... *regulation of labour conditions* (my emphasis)."[7]

The external affairs power in relation to Australian domestic law was little utilised for almost four decades after the Burgess decision. Then in 1982 the High Court decided the matter of *Koowarta v Bjelke-Petersen and others*[8]. In that case the Court considered the validity of certain sections of the Commonwealth *Racial Discrimination Act* 1975 as an exercise of the external affairs power. The relevant sections were held to be a discharge of Australia's obligations under the International Convention on the elimination of all forms of racial discrimination.

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5 (1936) 55 CLR 608.
6 (1936) 55 CLR 608, at 681.
7 (1936) 55 CLR 608, at 696.
8 (1982) 153 CLR 168.

Justice Mason, as he then was, who comprised one of the four majority judges in the matter, later identified the main differences between the views of the majority and those of the minority in his judgment in *Commonwealth of Australia and Another v State of Tasmania and Others (the Tasmanian Dam case)*[9]. He stated:

> "[The legislation] prohibited various forms of racial discrimination in Australia; in accordance with the Convention, they dealt with matters that were purely domestic affecting the conduct of people in Australia in relation to each other, having no relationship with other countries except in so far as the sections gave effect to an obligation imposed by an international convention. The purely domestic character of the matters dealt with was the point of departure between the majority and the minority, the latter taking the view that the external affairs powers did not extend to the enactment of legislation on matters of that character."[10]

In *Koowarta*, Justice Mason had said:

> "The consequence of the expansion in external affairs is that in some instances the Commonwealth now legislates on matters not formerly within the scope of its specific powers, to the detriment of the exercise of State powers. But in the light of current experience there is little, if anything, to indicate that there is a likelihood of a substantial disturbance of the balance of powers as distributed by the Constitution. *To the extent that there is such disturbance, then it is a necessary disturbance, one essential to Australia's participation in world affairs...* (my emphasis)... Increasing emphasis is given in the United Nations and in regional organisations to the pursuit by international treaties of idealistic and humanitarian goals. It is important that the Commonwealth should retain its full capacity through the external affairs power to represent Australia, to commit it to a participation in these developments when appropriate and to give effect to obligations thereby undertaken."[11]

In the year following the *Koowarta* decision, the High Court had to once again decide a matter concerning the extent of the external affairs power. The *Tasmanian Dam case* concerned the validity of a number of pieces of Commonwealth legislation which related to matters such as National Parks and World Heritage listings. The relevant international treaty which had been relied upon for the enactment of the legislation was the United Nations Convention for the Protection of the World Cultural and National Heritage. Once again the opinion of the members of the Court was divided. However, the majority of Justices Mason, Murphy, Brennan and Deane upheld the Commonwealth's reliance on s 51 (xxix).

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[9] (1983) 158 CLR 1.
[10] (1983) 158 CLR 1, at 121.
[11] (1982) 153 CLR 168, at 229-30.

In his judgment Justice Murphy, said:

> "It was recognised in *Burgess*, and is even clearer now, that along with other countries, Australia's domestic affairs are becoming more and more involved with those of humanity generally in its various political entities and groups. Increasingly, use of the external affairs power will not be exceptional or extraordinary but a regular way in which Australia will harmonize its internal order with the world order. The Constitution... recognizes that while most Australians are residents of States as well as of the Commonwealth they are also part of humanity. Under the Constitution Parliament has the authority to take Australia into the 'one world', sharing its responsibilities as well as its cultural and natural heritage."[12]

There have also been more recent cases concerning the use of the external affairs powers which have seen the High Court consistently upholding Commonwealth legislation giving effect to arrangements entered into by Australia under a convention or treaty. *Richardson v Forestry Commission*[13], *Queensland and Another v Commonwealth of Australia*[14] and *Polyukhovich v Commonwealth of Australia*[15] are prominent examples of this.

The Influence of ILO Standards at the Commission

Whilst the High Court has been evolving a more expansive interpretation of the Federal Government's use of the external affairs power, ILO Standards have been considered in major decisions of the Australian Industrial Relations Commission and its predecessor. In 1969, a Full Bench of the then Australian Conciliation and Arbitration Commission in a decision awarding equal pay for work of equal value, noted that the relevant ILO Conventions and Recommendations represented international thinking on the question of equal pay.

The growing influence of ILO Standards on the Commission is demonstrated clearly in the decision in the *Rockhampton City Council Case*[16]. In this matter a full bench of the Commission held that the forced retirement of a librarian upon her marriage was clearly discriminatory and contrary to the avowed aims of the ILO and the Federal Government.

ILO instruments and their relevance and applicability to the Australian situation have also been considered by the Commission in major test cases such as the *Termination, Change and Redundancy matter*[17], and the *Maternity Leave*[18] and *Parental Leave*[19] cases.

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[12] (1983) 158 CLR 1, at 170.
[13] (1988) 164 CLR 261.
[14] (1989) 167 CLR 232.
[15] (1991) 172 CLR 501.
[16] (1978) 203 CAR 584.
[17] (1984) 294 CAR 175 and 295 CAR 673.
[18] (1979) 218 CAR 120.
[19] (1990) AILR 284.

These judicial trends and the increasing use by the Commission of International Standards as a benchmark for its own decisions no doubt influenced the Federal Governments decision to introduce the wide-ranging changes I referred to at the beginning of my address. Certainly they relied very heavily upon the use of the ILO Conventions and the external affairs power.

The Operation of the *Reform Act* in the Past Year

Since March 1994 the High Court or even the new Industrial Court which now hears matters arising under the *Industrial Relations Act*, have not heard and determined any cases relating to the constitutional validity of the new legislation.

The termination of employment provisions have been extensively considered by the Industrial Court particularly in relation to the adequacy of the State remedies for unfair dismissal. The Court has interpreted the Federal standard based on International Standards strictly, which has had the effect of increasing the number of applications to the Federal Court.

In relation to Family Leave, the Australian Industrial Relations Commission has heard and determined a test case bought by the ACTU to establish a right to family leave as a condition of employment in Australia. Evidence heard by the Bench demonstrated the widespread recognition of the need for such leave but its relevance in the new *Act* was based upon the International Convention. The standard established compares well to the current international practice particularly of OECD countries.

The Commission has also had to determine its approach to protected industrial action in the *ABC Case*[20]. There have been thousands of notices of intention to take protected action filed with the Commission, but to date, only sporadic use of the new right. The Commission has terminated or suspended the bargaining period on one occasion, and thus the right to protected action, having found a party to be bargaining in bad faith. There have been a few instances of employers using their comparable rights to lock out.

To date, there have been no applications under the equal pay provisions, although the matter is reported in the press as a priority for the ACTU.

[20] Unreported, 31 August 1994 (Australian Industrial Relations Commission).

Conclusion

The current Commonwealth system of industrial relations has comprehensibly recognised Australia's international obligations in this area. In respect of the Government's policy of promoting equity in the workplace as a corollary to its policy of promoting bargaining at the enterprise, it is too soon, after a year to judge the long term effect of such measures. One would expect, between 1995 and the end of the century to see many test cases heard and precedents established as part of the continuing evolution of industrial relations law and practice.

The increasing awareness of our status as a nation and our place in the world together with the specific reliance on ILO instruments in the *Act* as it is today, will create an environment which will lead to an increased relevance of the ILO Standards to industrial relations in Australia.

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