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STATUS OF ILO CONVENTIONS IN AUSTRALIA - 1994

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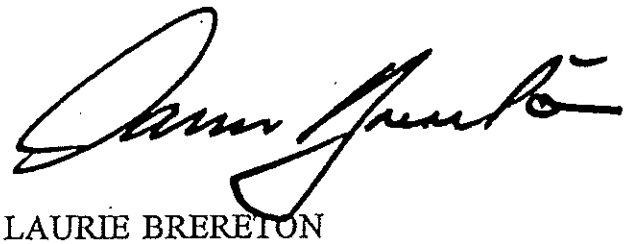
FOREWORD

The *Status of ILO Conventions in Australia 1994* completely revises the 1984 publication *Review of Australian Law and Practice relating to Conventions adopted by the International Labour Conference*. The first edition of the Review was issued in 1969 to celebrate the 50th anniversary of the founding of the ILO. It is therefore appropriate that this edition has been prepared during the ILO's 75th anniversary year.

The *Status of ILO Conventions in Australia 1994* aims to promote a better understanding in the Australian community of the ILO's standard-setting activities and the role that international labour standards play protecting the minimum standards of Australian workers and in the development of employment conditions in Australia. It reviews Australia's position in relation to each ILO Convention as at December 1994.

I would like to thank the State and Territory Governments, and the ACCI and the ACTU as the most representative organisations of employers and workers, for their assistance in the preparation of this useful publication.



LAURIE BRERETON
MINISTER FOR INDUSTRIAL RELATIONS

CONTENTS

PART I

BACKGROUND TO THE APPLICATION OF ILO CONVENTIONS

PART I: BACKGROUND TO THE APPLICATION OF ILO CONVENTIONS

1 History of the International Labour Organisation

The ILO was established as part of the peace settlement at the end of World War I. From 1919 until 1945 it functioned as part of the League of Nations. It survived the demise of the League and, since 1946, has operated as a specialised agency of the United Nations.

The founding principle of the organisation is that "universal and lasting peace can be established only if it is based on social justice". Article 41 of the original Constitution set out a number of "methods and principles" which were considered to be of "special and urgent importance" for the attainment of this objective. These methods and principles are now reflected in the Preamble to the Constitution of the Organisation. They include:

"*the regulation of the hours of work, including the establishment of a maximum working day and week, the regulation of the labour supply, the prevention of unemployment, the provision of an adequate living wage, the protection of the worker against sickness, disease and injury arising out of his employment, the protection of children, young persons and women, provision for old age and injury, protection of the interests of workers when employed in countries other than their own, recognition of the principles of equal remuneration for work of equal value, recognition of the principle of freedom of association, the organisation of vocational and technical education and other measures.*"

This statement of principle is to be read in conjunction with the Declaration of Philadelphia which was adopted by the International Labour Conference in 1944, and which was appended to the Constitution in 1946. Amongst other things, the Declaration:

"*reaffirms the fundamental principles on which the Organisation 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 the 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."*

This latter proposition serves to highlight what is probably the most distinctive feature of the ILO, namely its tripartite structure. This is unique both within the UN system and amongst inter-governmental organisations in general. Representatives of employers and workers in member States participate directly in all of the activities of the Organisation, including the setting and supervision of international labour standards, and the provision of technical assistance to member States.

The ILO attaches particular importance to the need to ensure respect for certain fundamental human rights which have a bearing on the social, economic and physical well-being of working people throughout the world. These include the principle of freedom of association; the right not to be subjected to forced labour; and the right to work free of discrimination on grounds of race, creed, sex and other arbitrary criteria. Respect for the principles of freedom of association is considered to be particularly significant in light of the tripartite structure of the organisation, since meaningful tripartism is impossible without the existence of free and effective organisations of employers and workers.

2. Structure of the ILO

Membership of the International Labour Organisation is open only to nation-states which are recognised as such in international law. In practice most Members of the United Nations are also member States of the ILO. Switzerland is unique in being a member State of the ILO, but not of the United Nations. As at November 1994, there were 171 Member States of the ILO. A full list of member States is set out in Appendix A.

The International Labour Organisation consists of: the General Conference of representatives of member States (normally styled the International Labour Conference); the Governing Body; and the International Labour Office.

The *International Labour Conference* (ILC) meets annually, usually in Geneva. It is composed of representatives of each of the member States of the Organisation. Each member State is entitled to a delegation of four, comprising two Government representatives, and one representative of each of employers and workers in the country concerned. The employers' and workers' delegates

are appointed by governments in consultation with the representative industrial organisations in their respective countries. In Australia, these comprise the Australian Chamber of Commerce and Industry (ACCI) and the Australian Council of Trade Unions (ACTU).

One of the principal functions of the ILC is the adoption of formal instruments establishing international labour standards. These instruments take the form of Conventions and Recommendations. The ILC has general oversight over the operation of the Organisation, including approval of its budget. It also reviews world developments in the sphere of social and economic affairs and the action taken by member States to ensure the application of ratified Conventions.

The *Governing Body* is composed of 28 government representatives, 14 workers' representatives and 14 employers' representatives. Ten of the government representatives are appointed by the ten member States of chief industrial importance according to Article 7.3 of the ILO Constitution. The other government representatives, as well as the workers' and employers' representatives, are elected every three years by their respective groups at the ILC. There are also 18 government, 14 worker and 14 employer deputy members.

The Governing Body meets in Geneva three times a year. It is responsible for the planning and direction of the work of the Organisation on a day-to-day basis. It has general oversight of the operation of the Office, and appoints the Director-General. It prepares the budget for approval by the ILC, and sets the agenda for the ILC. This includes deciding which issues should be placed before the ILC for the possible adoption of Conventions and/or Recommendations. It also has responsibility for relations between the ILO and other international bodies and agencies, including the United Nations itself.

The Governing Body has established a number of standing committees, including the Program, Financial and Administrative Committee; the Committee on Freedom of Association; the Committee on Employment and Social Policy; the Committee on Legal Issues and International Labour Standards; and the Committee on Sectoral and Technical Meetings and Related Issues. It may also establish committees on an ad hoc basis - for example to deal with a "representation" under Article 24 of the Constitution (see section 4).

With the exception of two terms (1960-63 and 1969-72), Australia has been a government member or deputy member of the Governing Body since 1945, and has provided the Chairman of the Governing Body on two occasions, 1975 and 1989. In addition to the Government, both the President of the ACTU and the Executive Director of the ACCI are presently members of the Governing Body (1993-96).

The *International Labour Office* (the Office), is located in Geneva. It is headed by the Director-General who is appointed by the Governing Body for five-year (renewable) terms of office. Michel Hansenne (a Belgian) has been Director-General since March 1989. He commenced a second five year term in 1994.

The Office is the permanent secretariat of the Organisation. Its functions (Article 10 of the ILO Constitution) include: (i) the collection and dissemination of information on all subjects relating to the conditions of labour in the international context; (ii) the examination of subjects which it is proposed to bring before the ILC with a view to the adoption of Conventions and Recommendations; (iii) the conduct of special investigations ordered by the ILC or the Governing Body; (iv) servicing all meetings of the ILO; (v) the provision of technical assistance to member States in relation to such issues as the drafting of labour legislation, labour inspection, and vocational training; and (vi) the administration of aid programs on behalf of other agencies such as the United Nations Development Program and individual donor countries.

There are regional offices, area offices and national offices around the world. The regional office for Asia and the Pacific is located in Bangkok. The area office for Australia and the South Pacific is located in Suva.

3. International Labour Standards

The ILO has always accorded a very high priority to the setting and supervision of international labour standards. As indicated in section 2, these are normally embodied in Conventions or Recommendations.

Once adopted by the ILC, Conventions are open for ratification by member States, although it is important to appreciate that there is no obligation to ratify. Ratification is a sovereign act by individual member States. However, once ratified, Conventions create binding international obligations for the member State concerned. The ILO has adopted a sophisticated range of procedures which are intended to ensure that ratifying countries honour their international obligations (see section 4).

Recommendations are not intended to create binding obligations in international law. Professor N. Valticos in his book "International Labour Law" at pages 55-57 (details of publication in Appendix L) identifies Recommendations as having three purposes:

(a) they deal with matters not considered yet appropriate for a Convention;
(b) they supplement, and contain more detail about the obligations, of their associated Convention; and

(c) they deal with matters whose nature is so 'technical or detailed' that they require frequent adjustment to the particular circumstances of various countries.

Most recent Recommendations fall into the second of these categories. The guidance provided by a Recommendation is of particular value where the accompanying Convention is expressed in general terms.

Recommendations which fall into the first category may sometimes help pave the way for the adoption of a Convention at some later date: for example the *Termination of Employment Recommendation, 1963 (No. 119)* formed the basis of the *Termination of Employment Convention, 1982 (No. 158)* and accompanying Recommendation No. 166.

The adoption of Conventions and Recommendations is normally preceded by an extensive process of investigation and consultation involving governments, organisations of employers and workers and independent experts, and this process usually extends over many years.

Once a proposal for the adoption of an instrument has been placed upon the agenda of the ILC by the Governing Body, it is then formally examined at two successive sessions of the ILC. This includes detailed examination by a special Committee of the ILC, which then reports back to the ILC in Plenary Session. After a second discussion the following year, an instrument may be adopted if agreed to by a two-thirds majority of delegates present and voting.

Each of the two "discussions" by the ILC is preceded by the circulation of background reports and draft instruments for examination and comment by member States. Organisations of employers and workers in each country are also required to be given an opportunity to comment on such drafts - either through the government concerned, or direct to the Office.

As at 30 November 1994 the ILC had adopted 357 standard-setting instruments (175 Conventions and 182 Recommendations). They deal with a wide range of issues, including: basic working conditions; minimum wages; the working conditions of certain categories of workers (for example children, young persons or women); social security; labour administration; industrial relations; employment policy; occupational health and safety; and the needs of special occupational groups (for example seafarers, fishermen, dock workers, nurses). Consistent with the ILO's concern with fundamental human rights, they also deal with freedom of association, abolition of forced labour and the elimination of discrimination in employment. In 1989 the ILC also adopted an important Convention (No. 169) dealing with the rights of indigenous and tribal peoples. A list of the Conventions and Recommendations and their titles is at Appendix B, and Appendix C consists of a full subject index to Conventions and Recommendations.

4. Supervision of the Application of labour standards

The ILO has no capacity to "legislate" for the internal affairs of any member State, nor can it take any form of coercive action against a country which defaults in its obligations under ratified Conventions. It relies instead on the force of international public opinion to ensure compliance with the norms established under the auspices of the ILC and by the Constitution of the Organisation. To that end, the ILO has developed a number of supervisory procedures which seek to ensure that member States do in fact honour their international obligations. These procedures fall into two broad categories: the first category centres upon the examination of routine reports on the effect given to Conventions and Recommendations within each member State, the second centres upon the examination of complaints and representations relating to alleged failure of member States to honour their obligations under ratified Conventions or under the Constitution.

The Committee of Experts

Member States are required to report to the Office at regular intervals on the effect given to ratified Conventions within their area of responsibility. Article 22 of the Constitution gives the impression that such reports are to be provided on an annual basis. In practice, reports on "priority Conventions" (such as those dealing with fundamental human rights, employment policy, labour inspection and tripartite consultation) are normally requested every two years. Reports on other Conventions are normally requested every five years. Reports may be requested on a more frequent basis in certain circumstances - for example where there are concerns about the effect being given to a particular Convention in a given country.

Primary responsibility for the examination of reports on ratified Conventions is vested in the Committee of Experts on the Application of Conventions and Recommendations. This Committee, which was established in 1927, consists of 20 independent eminent international jurists. Members are appointed by the Governing Body for three year (renewable) terms. Unusually in ILO terms, it is not tripartite in character. This reflects the fact that members are selected for their eminence as judges, academics and administrators, rather than as representatives of the social partners. It meets in Geneva for three weeks each year. In 1993 the first Australian, Ms R Layton QC, was appointed as a member of the Committee.

If the Committee has concerns that there may be an element of non-compliance with respect to the implementation of a Convention in a particular country, it may decide to open a dialogue with the government concerned.

This dialogue is normally conducted by means of *direct requests* and *observations*. Direct requests are communications from the Committee direct to governments asking for comments on the matters which are of concern. They are not published by the ILO, but as matter of policy many governments do in fact make them public, or at least make them available to the employer and worker representatives within the country. Observations are published in the annual General Report of the Committee of Experts. In default of a reference to the International Court of Justice under Article 37 of the ILO Constitution, these observations stand as the most authoritative statement of the meaning and effect of ILO Conventions.

Each year the Governing Body determines that member States should be asked to report on the effect given to a particular standard or group of standards (including Recommendations) - irrespective of whether they have ratified the Convention(s) concerned. These reports, requested under Article 19 of the ILO Constitution, are then used by the Committee of Experts as the basis for a General Survey on the subject(s) to which the standard(s) relate. These General Surveys both provide useful guidance as to law and practice amongst member States, and constitute a quite invaluable statement of the Committee's understanding of the requirements of the instruments concerned. Like the Committee's General Report, the General Survey is used as a basis for discussion in the Conference Committee on the Application of Conventions and Recommendations. A chronological list of General Surveys since 1950 appears at Appendix D, whilst the subject-index of Conventions and Recommendations at Appendix C also includes reference to recent General Surveys.

The Conference Committee on the Application of Conventions and Recommendations

The Reports of the Committee of Experts are used as the basis of discussion in the Conference Committee on the Application of Conventions and Recommendations.

As its title suggests, this is a committee of the ILC, and is tripartite in structure. It examines selected cases of non-compliance with ratified Conventions. Member States are "invited" to attend the Conference Committee to provide an explanation for their non-compliance. Debate can be extended and vigorous. The Conference Committee reports to the ILC in Plenary Session, and its Report often contains hard-hitting criticism of governments for their failure to honour their international obligations. In particularly serious cases these criticisms may be contained in a "special paragraph" of the Committee's report.

Australia has not been called upon to defend itself before this Committee.

Representations of non-observance

Under Article 24 of the ILO Constitution, an industrial association of employers or workers may make a representation to the International Labour Office concerning any member State which has failed to secure the effective observance of any Convention to which it is a party.

Representations are normally referred to a Governing Body Committee composed of one representative of each of Government, Employer and Worker members. The Committee examines submissions from the Government concerned and the association that made the representation. The Governing Body considers the report of the Committee and, in so doing, invites a representative of the Government concerned to take part in the proceedings. The Governing Body may also direct that the representation and the government's reply are to be published.

There have been over 40 representations in the history of the ILO. The great majority of these have been submitted since 1980. None have involved Australia.

Complaints of non-observance

Under Article 26 of the Constitution a member State which has ratified a given Convention has the right to make a complaint of non-compliance against any other member State which has also ratified that Convention. Complaints may also be lodged by any delegate to the ILC. In practice complaints are very rarely lodged by member States. From time to time, however, they are lodged by delegates to the ILC.

Complaints are first considered by the Governing Body. If it considers that the matter should be taken further, it can appoint a Commission of Inquiry. This can be regarded as the ILO's equivalent of an Australian Royal Commission. A Commission would normally consist of three distinguished jurists. It would visit the country concerned, hear submissions from interested parties, conduct on-the-spot inquiries etc, and report back to the Governing Body.

There have been around 20 complaints under Article 26, which have resulted in the establishment of nine Commissions of Inquiry. The most recent involved allegations of discrimination against ethnic minorities in Romania (1991). To date, no complaint has been lodged against Australia.

Special Procedures Relating to Freedom of Association

As indicated earlier, respect for the principles of freedom of association is considered to be of special significance for the ILO as a tripartite organisation. This is because meaningful tripartism is premised upon the existence of independent and effective organisations of employers and workers. That in turn requires that proper respect be accorded to the principles of freedom of association.

This imperative is considered to be so significant that a commitment to respect the principles of freedom of association is taken to be inherent in the mere fact of joining the ILO. Two special procedures have been established in order to try to ensure that all member States honour this commitment - irrespective of whether they have ratified the Freedom of Association Conventions (No. 87 and No. 98).

The first of these is the Fact-Finding and Conciliation Commission on Freedom of Association. This procedure has been little relied upon in practice: in fact the Commission has dealt with only six cases since its establishment in 1951. The most recent related to South Africa (1992). None have concerned Australia.

The second is the Governing Body's Committee on Freedom of Association. This is a tripartite Committee consisting of three representatives of each of governments, employers and workers, plus an independent Chair. It meets three times a year prior to each meeting of the Governing Body to consider complaints of alleged breaches of the principles of freedom of association brought by national or international organisations of employers or workers.

The "principles" applied by the Committee are similar, but not identical, to the requirements of the Freedom of Association Conventions. This means that even countries which have not ratified those Conventions are still required to observe essentially the same principles as those which have ratified them - and can be called to account for failure to do so. Countries which have ratified the Conventions are subject to both the normal supervisory procedures for ratified Conventions and the special freedom of association procedures.

Since its establishment in 1951, the Committee has dealt with more than 1700 complaints. Twelve of these have been brought against the Government of Australia.

5. Australia's obligations in respect of ILO standards

Once adopted by ILC, Conventions are communicated to all member States "for ratification" (Article 19(5)(a)). However, as noted earlier, there is no obligation to ratify. Rather, each member State is required, within a period of no more than 18 months, to "bring the Convention before the authority or authorities within whose competence the matter lies, for the enactment of legislation or other action" (Article 19(5)(b)). In most countries, including Australia, the legislature constitutes the "competent authority" for these purposes.

These provisions are clearly intended to create a presumption in favour of ratification. However, the "other action" to which Article 19(5)(b) refers can quite properly consist of a decision not to ratify.

Recommendations are also communicated to member States after adoption for "consideration with a view to effect being given to it by national legislation or otherwise" (Article 19(6)(a)). Once again the text is to be drawn to the attention of the competent authorities for the enactment of legislation or other action, and again, the "other action" can quite properly consist of a decision to do nothing further to give effect to the Recommendation.

In the case of both Conventions and Recommendations member States are required to advise the Director-General of the measures taken to bring each instrument to the attention of the competent authorities, and as to the outcome of their deliberations. Failure to do so is a breach of a member State's obligations under Article 19, and can lead to adverse comment by either or both of the Committee of Experts and the Conference Committee on the Application of Conventions and Recommendations. It must be emphasised again, however, that the breach would reside in the failure to draw the Convention or the Recommendation to the attention of the competent authorities and to report back to the Director-General. It would *not* reside in the failure to ratify or to implement.

Article 19(7) of the Constitution makes special provision for federal States such as Australia where there is a division of legislative responsibility between the federal Parliament and the constituent states in relation to the implementation of Conventions and Recommendations.

Where the subject matter of a Convention or a Recommendation falls within the sole area of competence of the federal authorities, then Australia's obligations under Article 19 are the same as for a unitary State.

Where the subject matter falls wholly or in part within the area of competence of the constituent states then the Commonwealth Government must:

(i) make effective arrangements for the reference of newly-adopted Conventions and Recommendations, not later than 18 months from the closing of the session of the ILC, to the appropriate Commonwealth, State and Territory authorities for the enactment of legislation or other action;

(ii) arrange for periodical consultations between the Commonwealth, State and Territory authorities with a view to promoting within Australia coordinated action to give effect to the provisions of the instrument concerned; and

(iii) inform the ILO of the measures taken to bring the instrument before the appropriate Commonwealth, State and Territory authorities and of the action taken by them.

Most ILO Conventions come into force in international law 12 months after they receive their second ratification. Some - especially maritime Conventions and those adopted before 1947 - use differing formulae for this purpose. Sometimes they depend upon a specified number of ratifications, sometimes upon ratification by some or all of a specified list of countries.

Conventions become binding on any given country 12 months after the date upon which that country ratified the Convention in question. For example, the *Termination of Employment Convention, 1982 (No. 158)* came into force on 23 November 1985, which was the first anniversary of the date upon which it received its second ratification. It was ratified by Australia on 23 February 1993, which means that it came into force for Australia on 23 February 1994.

Once ratified, Conventions become binding upon the member State concerned unless or until denounced. Denunciation is possible during a 12 month period commencing on each tenth anniversary of the date upon which the Convention first entered into force in international law. For example, denunciation of Convention No. 158 would be possible at any time during the 12 months commencing 23 November 1995. After the expiry of that period, denunciation will not be possible until the 12 month period commencing 23 November 2005, and so on in perpetuity.

6. Australian ratification policy and practice

The approach to ratification of Conventions by Australia is that this occurs only where two preconditions are satisfied:

- that law and practice in all relevant jurisdictions is in compliance with the Convention in question, and

- that all State and Territory governments have formally agreed to ratification (except for those Conventions whose subject matter falls within the jurisdiction of the Commonwealth Government alone).

It is important to appreciate that these conditions are not laid down in the Australian Constitution, or in any other law. Strictly speaking, ratification of ILO Conventions, like the signing of any other international treaty, falls within the prerogative powers of the Crown in right of the Commonwealth. However, these procedures have been adopted in recognition of the fact that there is a division of legislative responsibility between the Commonwealth and the States and the Territories in relation to the subject-matter of many Conventions. It is highly desirable and prudent, therefore, that the Commonwealth should normally enter into international obligations with the agreement of those governments who have sole or partial responsibility for implementing them.

This logic finds expression in a number of procedures which have been adopted in order to facilitate and encourage consultation and agreement between the Commonwealth and the States and Territories in relation to the ratification of ILO Conventions and the implementation of Recommendations. These were formalised in a Resolution on ILO matters adopted by Commonwealth and State Ministers for Labour in 1947 and revised in 1973, and include:

> Officials (Technical Officers) from each State and Territory Department for Labour meet annually (or more often if necessary) with Commonwealth officials to assess the extent to which Australian law and practice is in compliance with the provisions of unratified Conventions.
>
> The Departments of Labour Standing Committee (DOLAC) meets annually to consider, inter alia, the recommendations of the Technical Officers' Meeting. DOLAC is made up of the Heads of Commonwealth and State Departments of Labour.

DOLAC reports to the Commonwealth and State Labour Ministers Council (LMC), which considers, inter alia, which Conventions are suitable targets for ratification.

- The Commonwealth forwards to States and Territories the texts of any new Conventions or Recommendations adopted by the ILC, and seeks their views.

In recent years, the Commonwealth has on two occasions ratified ILO Conventions without the formal agreement of the States and Territories (apart from those Conventions whose subject matter falls within the jurisdiction of the Commonwealth alone).

- The Commonwealth aimed to ratify the *Workers with Family Responsibilities Convention, 1981* (No. 156) on the 15th anniversary of International Women's Day (8 March 1990) and to this end had advised the States and Territories that this Convention was of the highest priority for early 1990; there was compliance with the provisions of the Convention but New South Wales and the Northern Territory had not provided formal agreement by the time of ratification.

- In February 1993 the *Termination of Employment Convention, 1982* (No. 158) was ratified; ratification was unusual in that law and practice was not fully in compliance with the provisions of the Convention; however the federal Government indicated that it would legislate using the external affairs power to ensure compliance with the provisions of the Convention before it came into force. The Commonwealth reiterated its preference for a co-operative approach with the States and Territories but noted that the ratification of Convention No. 158 was a special case necessitated by the removal or possible removal in a number of jurisdictions of previously accepted employment conditions. The Commonwealth also reserved the right to take such action in the future should other special cases arise. The Minister made this clear in written advice to the State and Territory Labour Ministers dated 9 July 1993.

In November 1990 the LMC agreed on more detailed arrangements for consultation on the ratification of ILO Conventions. These were intended to raise the priority accorded to the ratification of particular Conventions and speed up the ratification process generally. They included:

- a revised process of classifying unratified Conventions;
- the adoption of specified criteria for the selection of priority Conventions;
- the adoption of a list of priority Conventions;
- the encouragement of a higher level of commitment to the ratification process, including more senior representation at Technical Officer

meetings, and more frequent meetings; and
a reduction in the number of Conventions examined annually by Technical Officers.

At the same meeting in 1990, the New South Wales Minister proposed that, in appropriate cases, a 'Federal Statement' be included in future instruments of ratification of ILO Conventions. The Federal Statement would indicate that implementation of the Convention concerned will be by the Commonwealth, State and Territory authorities having regard to their respective constitutional powers and accepted arrangements concerning their exercise. In November 1991, following consultations with the ILO, the Prime Minister, the Minister for Foreign Affairs and the Attorney-General, the Minister for Industrial Relations indicated to the States and Territories that the Commonwealth would agree to the use of a 'Federal Statement' in future ratifications of ILO Conventions where appropriate.

In 1991 the then Minister for Industrial Relations established an interdepartmental ILO Ratification Task Force for the purpose of conducting an examination of 75 unratified ILO Conventions. At the commencement of the process Australia had ratified 48 of the 172 Conventions which had been adopted by the ILC at that time. Of the 123 Conventions not ratified by Australia, 49 were no longer open to ratification or were obsolete (Appendix E). The 75 Conventions remitted to the Task Force constituted the balance.

The Task Force comprised officers of the Department of Industrial Relations, the Attorney-General's Department, the Department of Foreign Affairs and Trade and other Commonwealth departments and agencies as necessary to deal with particular Conventions. The Commonwealth also engaged a full-time consultant for a period of 12 months to help co-ordinate the work of the Task Force, assist with analysis of law and practice in relation to each of the Conventions, and to facilitate consultation with the States and Territories and the social partners.

At the conclusion of this review in 1993, five additional Conventions had been ratified; 27 Conventions had been classified as suitable targets for ratification; 37 had been categorised unsuitable for ratification; and 6 remained unclassified (Appendix F). Since then, a further four Conventions (all dealing with work in the fishing industry) have been determined as unsuitable targets for ratification, and one Convention dealing with migrant workers has been included with the suitable targets for ratification.

Commonwealth, State and Territory officials have adopted a Workplan, whereby consideration of relevant unratified Conventions is spread over several years. The current Workplan (Appendix G) covers 1995 - 1997.

In addition to the arrangements described above relating to consultation with the States and Territories, the Commonwealth also engages in regular consultation with the most representative employer and worker organisations (ACCI and ACTU) on matters relating to the adoption, examination and ratification of ILO instruments. The National Labour Consultative Council (NLCC) has established a Committee on International Labour Affairs (ILAC) whose terms of reference include the consideration of matters of substance relating to the ILO and other international labour matters. These arrangements are consistent with the requirements of the *Tripartite Consultation (International Labour Standards) Convention, 1976* (No. 144), which was ratified by Australia in 1979. A list of Conventions which have been endorsed by NLCC as suitable targets for ratification is at Appendix H.

As at 30 November 1994 Australia had ratified 54 of the 175 Conventions adopted by the ILC (Appendix I). A list of members of APEC and OECD and the Conventions ratified by each as at 1 January 1994 is at Appendix J.

7. Application of ratified Conventions to Non-Metropolitan Territories, including Norfolk Island

Article 35 of the ILO Constitution obliges member States, as soon as possible after a Convention is ratified, to bring the Convention to the notice of governments of its external ("non-metropolitan") territories; following which the member State, in agreement with the governments of the territories, is to advise the ILO (by means of a Declaration) as to how the Convention is to be implemented in the territories. Declarations may indicate that the Convention is applicable, applicable with modification or inapplicable; and they may be varied from time to time if circumstances within the territory change.

Declarations are required for each territory in relation to each the ILO Conventions ratified by Australia, and a further eight unratified Conventions which are appended to the *Labour Standards (Non-Metropolitan Territories) Convention, 1947 (No 83)*.

Australia has three non-metropolitan territories: Norfolk Island, the Cocos (Keeling) Islands and Christmas Island.

Relevant declarations relating to Norfolk Island are listed in Appendix K, and are referred to in respect of the Status Report on each appropriate Convention under the heading *Australian Position*.

No declarations have yet been made in respect of Cocos Islands or Christmas Island, although the Department of Industrial Relations and the Department of the Environment, Sport and the Territories regularly review the situation. The

present position is that no declaration will be made until an appropriate legislative framework is in place for both territories.

8. Status Reports on ILO Conventions in Australia

Individual status reports on each Convention adopted by the ILC are set out in Part II. The information covered includes:

- Title
- Ratification Status (ratified, suitable target, not being pursued, closed)
- Substantive Requirements (summary)
- Entry into force (number of ratifications, etc.)
- Related Conventions and Recommendations
- Australian Position (including Norfolk Island).

9. Availability of texts of ILO Conventions and Recommendations

The summaries of the substantive requirements of each Convention included in the Status Reports are necessarily brief. Copies of the full text of Conventions and Recommendations may be obtained from: Assistant Secretary, International Branch, Department of Industrial Relations, GPO Box 9879, Canberra, ACT 2601 (telephone 06 - 243 7920; fax 06 - 243 7907).

At Appendix L are some suggestions for further reading on the ILO in general, and in relation to its influence on Australian law and practice in particular.

ILO publications are generally available from the libraries in the federal Department of Industrial Relations and the State and Northern Territory Departments responsible for labour matters. ILO publications may be purchased from the UN sales agent in Australia:

Hunter Publications
58a Gipps Street
COLLINGWOOD VIC 3066
(telephone: 03 - 417 5361; fax: 03 - 419 7154).

Department of Industrial Relations
Canberra

December 1994

Convention No. 138

MINIMUM AGE, 1973

Ratification Status: Yet to be determined.

Substantive Requirements

The Convention requires ratifying member States to undertake to pursue a national policy designed to ensure the effective abolition of child labour and progressively to raise the minimum age for admission to employment to a level consistent with the fullest physical and mental development of young persons.

It requires ratifying member States to specify a minimum age for admission to employment which shall not be less than the age of completion of compulsory education, and in any case not less then 15 years of age.

The minimum age for admission to any type of employment which by its nature or the circumstances in which it is carried out is likely to jeopardise the health, safety or morals of young persons must be not less then 18 years. However, such work may be authorised from 16 years if health, safety and morals are fully protected and if those concerned have received adequate specific instruction or vocational training in the relevant branch of economic activity.

National laws or regulations may permit the employment of young persons on light work from the ages of 13 to 15 (or to the end of compulsory schooling). Specific categories of suitable light work are required to be identified. The Convention does not apply to work done in educational establishments for vocational training or to work in undertakings by persons over 14 years of age if it is part of a training, guidance or orientation course carried out in accordance with conditions prescribed by the competent authority. Work in relation to artistic performances and similar activities may be authorised by means of individual permits by the competent authority, under conditions prescribed in each case, without any restriction as to age.

The Convention requires all necessary measures to be taken to enforce the provisions; setting penalties for violations; defining persons responsible for compliance; and the keeping of registers by employers of all employees under 18 years of age.

The Convention revises the following Conventions: *Minimum Age (Industry), 1919 (No. 5)*; *Minimum Age (Sea), 1921 (No. 7)*; *Minimum Age (Sea), 1921 (No. 10)*; *Minimum Age (Trimmers and Stokers), 1921 (No. 15)*; *Minimum Age (Non-Industrial Employment), 1932 (No. 33)*; *Minimum Age (Sea) (Revised), 1936 (No. 58)*; *Minimum Age (Industry) (Revised), 1937 (No. 59)*; *Minimum Age (Non-Industrial Employment) (Revised), 1937 (No. 60)*; *Minimum Age (Fishermen), 1959 (No. 112)*; and *Minimum Age (Underground Work), 1965 (No. 123)*. Conventions No. 58, 59, 60 112 and 123 are not closed to further ratification. However, Conventions No. 5, 7, 10 15 and 33 are closed to further ratifications.

Entry into force

This Convention entered into force on 19 June 1976 and as at 1 January 1994 had received 46 ratifications. There have been no denunciations.

The ILO promotes ratification of this Convention.

Related Conventions and Recommendations

C. 5, Minimum Age (Industry), 1919
C. 7, Minimum Age (Sea), 1920
C. 10, Minimum Age (Agriculture), 1921
C. 15, Minimum Age (Trimmers and Stokers), 1921
C. 33, Minimum Age (Non-Industrial Employment), 1932
C. 58, Minimum Age (Sea)(Revised), 1936
C. 59, Minimum Age (Industry)(Revised), 1937
C. 60, Minimum Age (Non-Industrial Employment)(Revised), 1937
C. 112, Minimum Age (Fishermen), 1959
C. 123, Minimum Age (Underground Work), 1965
R. 146, Minimum Age, 1973
R.153, Protection of Young Seafarers, 1976

Australian position

Australia has not ratified this Convention. No State or Territory has formally agreed to ratification.

The ILO Ratification Task Force classified the Convention as not suitable for ratification, in light of the fact that Australia was found not to comply with its provisions, especially those relating to: legislative provision for light work for young persons aged between 13 and 15; the absence of a prohibition on employment under the age of 13 except for artistic performances; and the absence of a specific provision relating to work which is likely to jeopardise the health, safety or morals of young persons (as opposed to adults). However, further consideration is being given to this matter because of the importance of the subject of the Convention. In particular the Commonwealth is exploring the possibility that the Convention may allow for greater flexibility than has hitherto been assumed to be the case.

Minimum age for employment is determined in Australia by virtue of education legislation in the States and Territories, which requires children aged up to 15 years (16 years in Tasmania) to attend school. However, this is not sufficient for compliance with the Convention.

In 1986 a Commonwealth Task Force on ILO Maritime Conventions recommended that high priority be given to ratification of the *Merchant Shipping (Minimum Standards) Convention, 1976 (No. 147)*. Substantial equivalence must be demonstrated with one or other of Conventions No. 7, No. 58 or No. 138, amongst others, in order to comply with and ratify Convention No. 147. Australia has already ratified both Conventions No. 7 and No. 58. It is not, therefore, necessary to establish substantial equivalence with Convention No. 138 in the context of attempts to ratify Convention No. 147.