CHAPTER 3

INTERNATIONAL OBLIGATIONS

Introduction[1]

3.1 In 1996, the Majority Committee Report on the Workplace Relations and Other Legislation Amendment Bill expressed concerns about the possibility that some of the proposed amendments, if enacted, would result in Australia breaching its international obligations under certain International Labour Organisation (ILO) Conventions.[2]

3.2 This warning proved to be well founded. The ILO Committee of Experts has now considered and criticised the 1996 amendments in two separate observations.[3] We preface our remarks by noting the Committee of Experts' comments concerning the general complexity of the Act, and their hope that 'the Government will make available simplified summaries of the legislation to workers and employers.' The Labor Senators concur with this suggestion.

Impact of the Workplace Relations Act

3.3 The evidence available to this Committee clearly indicates that the introduction of the WR Act has placed Australia in breach of its international obligations. In this regard, it is useful to review the specific comments made by the Committee of Experts on the WR Act. Extracts from the Committee of Experts' observations regarding ILO Convention 87 Freedom of Association and Protection of the Right to Organise, and Convention 98 Right to Organise and Collective Bargaining, are set out in Appendix 1.

3.4 The Department has been at pains to minimise the potential embarrassment and damage to Australia's reputation as a good international citizen arising from the

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1 The assistance of Ms Helen Nezeritis, Australian National University Parliamentary Intern, is gratefully acknowledged in the research for this chapter.

2 Report on Consideration of the Workplace Relations and other Legislation Amendment Bill 1996, Senate Economics References Committee, August 1996 pp 231-243. For a brief explanation of the history and processes of the ILO, see pp 231-234

3 CEACR: Individual Observation concerning Convention No. 87, Freedom of Association and Protection of the Right to Organise, 1948 Australia (ratification: 1973) Published: 1999, *http://ilolex.ilo.ch:1567/public/50normes/ilolex/pdconv.pl?host=status01&textbase=iloeng&document=4524&chapter=6&query=%28Australia%29+%40ref+%2B+%28%23classification%3D02%5F01%2A%29+%40ref&highlight=&querytype=bool*, 25 November 1999

CEACR: Individual Observation concerning Convention No. 98, Right to Organise and Collective Bargaining, 1948 Australia (ratification: 1973) Published: 1998 *http://ilolex.ilo.ch:1567/public/50normes/ilolex/pdconv.pl?host=status01&textbase=iloeng&document=4031&chapter=6&query=%28Australia%29+%40ref+%2B+%28%23classification%3D02%5F01%2A%29+%40ref&highlight=&querytype=bool*, 25 November 1999

passage of the 1996 amendments, and the apparent conflict between those amendments and our international obligations under these ILO Conventions.

3.5 For instance, the Department suggests at paragraph 98 of section A(i)(k) of their submission that there were 'only a small number of provisions of the Act about which the ILO Committee of Experts has expressed concerns'.[4] This statement is disingenuous, as the observations express concerns about two of the central features of the 1996 Act: those dealing with bargaining, and the rights of unions and their members. These observations should not be viewed lightly, and the quantity of the observations has no bearing on the important substance of the Committee of Expert's comments.

3.6 The Department also submitted that the Committee of Experts made their observations without the benefit of the Government's full explanation. In a supplementary answer to a question on notice from this Committee, the Department even suggested that 'The CEACR's observations resulted in large part from representations made to the ILO by the Australian Council of Trade Unions (ACTU), in some cases without the value of the Government's response'. The Government also made this contention to the ILO Conference's Committee on the Application of Standards.[5]

3.7 The ILO Committee of Experts include eminent jurists and the world's foremost experts on international labour law, whose charter is as follows:

> The Committee's fundamental principles are those of independence, impartiality and objectivity in noting the extent to which the position in each State appears to conform to the terms of the Conventions and the obligations accepted under the ILO Constitution.[6]

3.8 It is astounding that the Government would suggest that the Committee of Experts had failed to seek its views in evaluating the extent to which Australia's laws comply with its international obligations, and frankly embarrassing that the Government would attempt to claim that the Committee's findings were biased in favour of trade union submissions.

3.9 The Government clearly believes that the world's foremost international labour lawyers' observations were poorly founded, and incorrect. The Labor Senators assume that this is also why the Government is conducting 'continuing dialogue' with the ILO regarding the observations, in attempt to persuade the ILO that that

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4 Submission No. 329, Department of Employment, Workplace Relations and Small Business, vol. 11 p. 2193

5 Tom Fisher, International Labour Conference, 86th Session, Geneva, June 1998, Committee on the Application of Standards, 16th sitting, 12 June 1998, p. 61

6 ILO Handbook of Procedures Relating to International Labour Conventions and Recommendation, paragraph 53.

Committee of Experts were wrong. This dialogue was referred to by the Department in evidence before the Committee:

> …the dialogue is of a nature where the government is trying to convince the ILO that it is wrong.[7]

3.10 The Labor Senators do not accept the Government's position regarding the Committee of Experts' observations on a number of grounds. Firstly, there is evidence that the experts, at least in their observation concerning Convention 87, had before them all the relevant information, including the Government's views. The Committee of Experts made the following introductory statement to their observation:

> The Committee notes **the information provided in the Government's report, in particular the adoption of the *Workplace Relations Act 1996,* which according to the Government, substantially amended the *Industrial Relations Act 1988*,** and the recent adoption of legislation in certain States: the Labour Relations Legislation Amendment Act, 1997, of Western Australia, amending the Industrial Relations Act, 1979; the Workplace Relations Act, 1997, and the Industrial Organizations Act, 1997, of Queensland; and the Industrial Relations Act, 1996, of New South Wales. The Committee also takes note of the comments of the Australian Council of Trade Unions (ACTU) and the National Union of Workers (New South Wales Branch), **and the Government replies to these comments**. (emphasis added).[8]

3.11 As for the observation relating to Convention 98, there is a possibility that the Government were late in responding to the Committee of Experts:

> Apparently the Government had not replied within a reasonable time, because the Committee of Experts had received it too late – probably during the Committee of Experts' meeting in December – to be considered. The Worker members deeply deplore this negligence on the part of the Government.[9]

3.12 The Department also attempted to convey to the Committee the impression that the ILO does not view the potential breaches of Conventions 87 and 98 as a serious matter. Although never explicitly expressed, the Department's supplementary response on this issue makes a calculated effort to communicate this view:

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7 Evidence, Mr Barry Leahy, Canberra, 1 October 1999, p. 7

8 CEACR: Individual Observation concerning Convention No. 87, Freedom of Association and Protection of the Right to Organise, 1948 Australia (ratification: 1973) Published: 1999 *http://ilolex.ilo.ch:1567/public/50normes/ilolex/pdconv.pl?host=status01&textbase=iloeng&document=4524&chapter=6&query=%28Australia%29+%40ref+%2B+%28%23classification%3D02%5F01%2A%29+%40ref&highlight=&querytype=bool,* 25 November 1999

9 International Labour Conference, 86th Session, Geneva, June 1998; Committee on the Application of Standards, 16th sitting, 12 June 1998, p 66

> If the CEACR had considered that it wanted an urgent response to its observations on Conventions 87 and 98, it would have asked Australia to report in the following year.[10]

3.13 As the Department submits, it is true that the CEACR did not ask Australia to report the following year. However, the Department failed to mention that the Committee on the Application of Standards, to whom the CEACR reports, did ask Australia to report the following year.[11]

3.14 We question the value, if any, of the Government's 'continuing dialogue'. In particular, we question whether the dialogue holds any likelihood of success - which in the Department's and the Government's terms no doubt means convincing the ILO and the Committee of Experts that their observations concerning Convention 98 and perhaps Convention 87 are incorrect.

Conclusions

3.15 It is the view of the Labor Senators that we should accept the Committee of Experts' assessment of the 1996 legislation, and their interpretations of the relevant ILO Conventions. The Committee of Experts includes the world's foremost authorities on international labour law, and eminent jurists completely capable of understanding and interpreting the provisions of the WR Act.

3.16 The Department's evidence to this inquiry appeared to give the impression that 'dialogue' is the full measure of our requirements and duties as an ILO member. We contend that this is not only wrong, it is mischievously wrong. Australia, as a sovereign state, has ratified ILO Conventions 87 and 98. The ratification of international conventions brings with it obligations under international law. States must comply with international obligations that they have voluntarily entered into with responsibility and integrity. It is not acceptable for a state to simply breach its obligations at international law. If the Government seriously considers that these obligations are no longer relevant, or inappropriate, then there are formal mechanisms for repudiating the conventions.

3.17 The Committee of Experts in their observation concerning Convention 87 (where they had the full benefit of the Government's views) perhaps best express our obligations:

> The Committee hopes that the Government will indicate in its next report measures taken or envisaged to amend the provisions of the Workplace

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10 Department of Employment, Workplace Relations and Small Business, Questions Arising from Hearing 1 October 1999, p. 2

11 *ibid*, p 80

> Relations Act referred to above, to bring the legislation into conformity with the requirements of the Convention.[12]

3.18 The Government's continuing refusal to address these significant problems raises two possibilities. Either the Department is not competent to deal with such matters, or the Government is deliberately determined to ignore Australia's obligations under ILO Conventions and is willing to bring Australia into disrepute in the international community of nations as a consequence.

3.19 The Labor Senators recommend that the Government immediately comply with the Committee of Experts' request to provide an outline of measures that will be taken to amend the WR Act to bring the Act into conformity with Australia's international obligations.

3.20 The Labor Senators also suggest that the Government review its current approach to the ILO, and take a more serious and considered attitude to Australia's participation in the development and implementation of international labour standards. In this regard, the Labor Senators note that the Government made completely inappropriate representations to the 1999 International Labour Conference, informing the ILO that the Australian Government supported pregnancy testing of women by employers before hiring them.[13] This would seem to have been either a sick joke or the result of complete incompetence, and will bring Australia into disrepute within the international community.

Amendments proposed in the Bill

3.21 The rest of this chapter deals with the proposed amendments to the Act set out in the Bill, and their potential impact on Australia's international obligations. Despite the criticisms of the WR Act by the ILO Committee of Experts, it appears that the Government is determined to bring further shame and embarrassment to the nation by enacting more amendments that would place Australia even further in breach of its international obligations:

> It is the very real fear of the Foundation that certain aspects of the proposed legislation will run counter to these charters of civil and political rights and that the good standing in which Australia is generally held in the family of nations may be further impugned by possible future negative determinations by the...Committee of Experts, such as occurred after the passage of the Workplace Relations Act 1996…The new suggested reforms contained in [the Bill] would seem to invite further hostile criticism by the Committee of

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12 CEACR: Individual Observation concerning Convention No. 87, Freedom of Association and Protection of the Right to Organise, 1948 Australia (ratification: 1973) Published: 1999 *http://ilolex.ilo.ch:1567/public/50normes/ilolex/pdconv.pl?host=status01&textbase=iloeng&document=4524&chapter=6&query=%28Australia%29+%40ref+%2B+%28%23classification%3D02%5F01%2A%29+%40ref&highlight=&querytype=bool,* 25 November 1999

13 *Sydney Morning Herald*, 7 October 1999, p. 19

> Experts. Quite simply these suggested reforms would put Australia at odds with our clear obligations under Conventions 87…and 98…[14]

Right of entry

3.22 Convention 87 protects two basic rights: the right of workers and employers to form and join organisations of their choice, and secondly, the organisational autonomy of trade union and employer associations.[15]

> In interpreting the principles of freedom of association and the right to organise, the Freedom of Association Committee of the Governing Body of the ILO has held that: *Workers representatives should enjoy such facilities as may be necessary for the proper exercise of their functions, including the right of access to workplaces*.[16]

3.23 Schedule 13 of the Bill tightens provisions for the right of entry of unions into workplaces. The Bill imposes a stringent and heavily regulated system of access to the workplace. The proposed amendments compound what are already stringently regulated access rights of unions from the 1996 Act. The provisions would probably also not conform with the provisions of Convention No. 35, Workers' Representatives 1971, which Australia has ratified.[17]

3.24 Restrictions upon union entry rights and the resulting limits upon investigating breaches of industrial law, undermine workers fundamental rights of freedom of association and the right to collectively organise. Stronger regulation of entry rights restrains the essential service of monitoring compliance with industrial instruments not only for existing members but also to eligible members in the workplace.

3.25 Under the Bill proposals, people who are not union members would not be able to invite a union to their workplace to meet with them or to investigate possible award or agreement breaches. People who are not presently union members would therefore be denied the ability to freely associate and the right to organise:

> The 1999 Bill…curtails even more seriously the right of unions to organise employees. Under the Bill, a non-member would not be able to invite a union representative into their workplace either for the purpose of investigating a suspected breach or for the purpose of holding discussions

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14 Submission No. 290, The Evatt Foundation, vol. 7, p.1343

15 Creighton, B., 1998, *The ILO and Protection of Fundamental Human Right in Australia*, Melbourne University Review, vol. 22(2), p. 247

16 Submission No. 460, International Centre for Trade Union Rights, vol. 22, p. 5566

17 See comments of International Labour Office in WA Trades and Labour Council (Sep. 1999), submission to Senate Employment, Workplace Relations Small Business and Education Legislation Committee, Schedule B

> with that person. This severely limits the freedom of association of individuals and the rights of unions to organise.[18]

Industrial action

3.26 The 1996 Act was criticised for breaching Convention 87 on the grounds that the subject matter of lawful or protected strikes was limited. The WR Act prohibits the right to strike in negotiation of multi-employer agreements and grants wide scope to the Commission to terminate a bargaining period, which limits the capacity to take industrial action. The very fact that a differentiation is made between protected and non-protected action, and penalties are set to remedy unprotected action that does take place, impinges on ILO standards of the basic right of all workers' to withdraw their labour and strike.

3.27 The proposed amendments would compound Australia's current breaches of international obligations by 'strengthening' section 127 orders so that they are available almost automatically and in a broader range of circumstances, by outlawing 'pattern bargaining' and by broadening the circumstances in which the Commission would be required to suspend or terminate bargaining periods:

- Section 170ML would ensure that only unionised employees whose employment is to be covered by the proposed certified agreement can undertake protected action.
- Section 170LG, the pattern bargaining provision, introduces an exacerbation of an already existing breach of international conventions by the WR Act. It requires the Commission to refuse an application for a secret ballot to allow protected strike action to take place if pattern bargaining is considered to exist. The 1996 amendments were criticised by the experts for the excessive restrictions imposed upon multi-employer and industry wide agreement seeking.
- The 1996 Act was criticised by the ILO experts because of section '170MW Power of Commission to terminate a bargaining period'. The 1999 Bill goes further in the offending direction. For example, the Commission must arbitrarily suspend a bargaining period after 14 days of protected industrial action to allow for a 'cooling off' period for negotiations to take place between the parties. A bargaining period can now also be suspended if unprotected industrial action takes place during negotiations.

3.28 The International Centre for Trade Unions Rights provided a detailed critique of the proposed amendments to industrial action provisions[19], concluding:

> The net effect of these amendments will be to take Australia even further out of compliance with our industrial obligations regarding the right to strike.[20]

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18 Submission No. 460, International Centre for Trade Union Rights, vol. 22, p. 5574.

19 *ibid,* pp. 5544-50

3.29 The Bill would also curtail the ability of workers to collectively organise and take industrial action by introducing a requirement for secret ballots (schedule 12):

> By placing restrictions on the right of people to unite for the common purpose of taking action to seek better working conditions, the Australian Government are in breach of the Convention for the Right to Organise and Collective Bargaining…The introduction of secret ballots is likely to isolate workers and break up the group spirit.[21]

3.30 The extensive regulation of the process of conducting a secret ballot contravenes the principle that organisations should be free to organise their administration and to formulate their programs. The International Labour Office was critical of similar provisions in the Western Australian *Labour Relations Amendment Bill 1997*.[22]

3.31 A group of eighty industrial lawyers has described the secret ballot rules as 'cumbersome, complex, and time consuming'.[23] They argue that that the aim is purely to make it more difficult for employees to take industrial action. The ACTU goes one step further, describing the secret ballots provisions as an attempt to nullify industrial action all together.[24]

Collective bargaining

3.32 Collective bargaining has long been recognised in international law as critical in addressing the inherent imbalance in the employment relationship.

3.33 The Committee of Experts condemned the clear bias to individual agreement making over collective bargaining in their 1998 report. The 1999 Bill takes another step away from collective bargaining. The promotion of AWAs and individual agreements continues to undermine the collective bargaining process and in all likelihood exacerbate the breaches of ILO conventions identified.

3.34 The 1999 Bill proposes that the process leading to AWAs be further simplified and streamlined. AWAs are to be given primacy over federal, state awards and certified agreements, and do not include a role for unions, or the institutional framework that protects the rights of workers in an unequal bargaining situation.[25] Some AWAs are offered on a 'take it or leave it basis',[26] which illustrates most

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20 *ibid*, p. 5545

21 Submission No. 480, Working Women's Centre Tasmania, vol. 24, p. 6132

22 Submission No. 434, Trades and Labour Council of Western Australia, vol. 21, Schedule B

23 'A Critical Analysis of the Reith Proposals by over 80 of Australia's Leading Industrial Barristers and Solicitors', 2 July 1999, p.7.

24 Submission No. 423, Australian Council of Trade Unions, vol. 19, p. 4471

25 Submission No. 456, Jim Nolan, vol. 22, p.5363

26 See, for instance, Evidence, Ms Sally McManus, Sydney, 22 October 199, p. 263

graphically the logic behind the encouragement of collective bargaining, as enunciated in Convention 98. Notably, neither these amendments, nor those proposed in 1996, proposed penalties for refusing to hire someone if they have no desire to sign an AWA.

3.35 The submission by the Department to the Inquiry asserts that the Committee of Experts' judgement of the WR Act on this issue was unjustified. The explanation provided is 'while the WR Act does not require collective bargaining for AWAs, it does not prohibit or prevent collective bargaining'.[27] This explanation is facile. The Bill may allow access to collective bargaining but clearly individual agreement making is encouraged over collective bargaining. The convention is clear: it requires the promotion of collective bargaining.

3.36 Labor Senators also note that the Government indicates in the most recent Article 22 report to the ILO on Convention 98 that 'when a certified agreement has been certified and is in operation, the certified agreement prevails over an inconsistent Australian Workplace Agreement which takes effect during that period.'[28] This statement was presumably made in defence of the Government's position that the WR Act does not undermine collective bargaining so is therefore not in breach of the Convention.

3.37 Unfortunately, the Government will no longer be able to rely on this argument if the Bill is enacted. The proposed amendments would ensure that individual AWAs take precedence over collective certified agreements:

> During its period of operation, an AWA operates to the exclusion of any certified agreement or old IR agreement that would otherwise apply to the employee's employment…[29]

3.38 Before moving away from collective bargaining and the framework of bargaining established by the WR Act, it is discussed elsewhere in this report (Chapter 7 'The needs of workers vulnerable to discrimination') that the deregulated bargaining environment created by the WR Act has had a negative effect on equal remuneration for women, with the gender pay gap appearing to increase. In this context, the WR Act purports to ensure equal remuneration under Division 2 of Part VIA, to give effect to Anti-Discrimination Conventions and Equal Remuneration Convention. The Government clearly needs to assess the interaction of the bargaining framework established by the WR Act and Australia's obligations under these conventions more carefully.

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27 Submission No. 423, Department of Employment, Workplace Relations and Small Business, vol. 11, p. 2209

28 Article 22 Report on the Right to Organise and Collective Bargaining Convention 1949 (No. 98) for the period 1 July 1997 to 30 June 1999, p.34

29 Proposed section 170VD, Item 1 of Schedule 9 to the Bill

Conclusions

3.39 This report does not pretend to provide a complete review of the evidence before the Committee that dealt with the issue of Australia's international obligations. Within the limitations of this report writing process, the most obvious examples are dealt with. There were many other examples bought to our attention.[30]

3.40 The 'reforms' that are being pursued by the Government are largely an extension of the 1996 amendments. The Bill would further extend Australia's non-compliance with international standards without attempting to rectify the previously identified breaches.

3.41 The general theme of all submissions dealing with this area was, however, consistent. Almost without exception, those whose submissions dealt with this issue concluded, as we do, that the provisions of this Bill will again put Australia out of step with the international community, and make us again the subject of an embarrassing review of our legislation by the relevant ILO bodies. The only exception is the submission of the Department, representing the Government, which, given the foregoing, cannot be accorded any weight.

3.42 Labor Senators recommend the Act be amended to ensure Australia is able to meet its international obligations regarding labour standards.

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30 See, for instance: Human Rights and Equal Opportunity Commission, Submission No. 472, vol. 23, pp. 5818-24; Australian Medical Association, Submission No. 461, vol. 22, pp. 2622-29; Kingsford Legal Centre, Submission No. 253, vol. 6, pp. 1155-6; Liberty Victoria, Submission No. 172, pp. 0810-15; Australian Council of Trade Unions, Submission No. 423, vol. 19, pp. 4373-78; International Centre for Trade Unions Rights, Submission No. 460, vol. 22, pp. 5472-5621; Newcastle Trades Hall Council, Submission No. 430, vol. 20, p. 4998