INTERNATIONAL ASSOCIATION OF LAW SCHOOLS

IALS Conference on
Labour Law and Labour Market in the New World Economy

University of Milan, Italy, 20-22 May 2010

Internationalisation of Labour Law: the Australian Experience

Cameron Roles[1] & Michael Coper[2]

Introduction: local, national, and international tensions

The nation of Australia came into existence in 1901, when six former British colonies came together under the Australian Constitution to form a federal system, in which the national body, the 'Commonwealth of Australia', was to have legislative power over matters of national importance, and the former colonies, now 'states' in the new federal system, were to have legislative power over local matters.[3]

But which matters were national and which were local? The framers of the Constitution drew up a list of national matters.[4] The states were not limited by a list, but if the Commonwealth of Australia legislated validly on a matter within its national list, that legislation prevailed over any inconsistent state legislation.[5] The matters thought to be national in character in 1901 were fairly limited — notable amongst them being defence and international trade — but in many instances were expressed generically enough to pick up developments unimagined in 1901 (for example, aviation). Yet the constitutional scheme was a recipe for disputation, with the High Court of Australia frequently called in to decide the precise ambit of the Commonwealth's powers, as the steady growth in the 20th century of trade, transport, communications, technology, and economic integration generally, put pressure on more and more matters previously thought to be local to be seen as having national and international significance.[6]

Australian labour law is a perfect illustration of how a constitutional framework devised in the 19th century has had to deal with these tensions: first, the tension between local and national regulation of labour, and, secondly, with the growth of internationalism, a further tension between national regulation and compliance with international norms. This paper focuses on the latter tension, but it cannot be properly understood without some attention to the former.

The Australian constitutional framework for labour law[7]

The framers of the Australian Constitution in the 1890s were sharply divided on whether labour law should be regarded as a national or a local matter. By a narrow vote (22 to 19),[8] they agreed

---

[1] Lecturer in Law, ANU College of Law, Australian National University, Canberra, Australia; Co-Convenor, ACT Chapter of the Australian Labour Law Association.

[2] Dean of Law and Robert Garran Professor of Law, ANU College of Law, Australian National University, Canberra, Australia; Member, Governing Board, International Association of Law Schools.

[3] See Michael Coper, 'Three Good Things and Three Not-So-Good Things about the Australian Legal System', paper written for the IALS Suzhou Conference, October 2007, at http://www.ialsnet.org/meetings/enriching/coper.pdf.

[4] These are mainly in Constitution, s 51.

[5] Constitution, s 109.

[6] Of course, the Constitution could always be formally amended (a national referendum is required under Constitution, s 128), but this has happened only rarely in Australia, with change coming mainly through judicial interpretation: see generally Michael Coper, *Encounters with the Australian Constitution* (CCH Limited, 1987).

[7] See generally George Williams, *Labour Law and the Constitution* (The Federation Press, 1998).

[8] See John Quick and Robert Garran, *The Annotated Constitution of the Australian Commonwealth* (1901, reprinted by Legal Books 1976) 645.

to a compromise proposal,[9] which gave the Commonwealth legislative power in relation to 'conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one state'.[10] The compromise supported the growth of a strong quasi-judicial system of conciliation and arbitration of interstate industrial disputes, but it also provoked endless litigation over the course of the 20th century in relation to the meaning of every word and every phrase in this brief description of the ambit of Commonwealth power.[11] Yet the Commonwealth had other powers, which the framers of the Constitution had not anticipated might be used to support national labour law: notably, the power to make laws with respect to 'external affairs',[12] and the power to make laws with respect to 'corporations'.[13]

The corporations power was ultimately to support extensive regulation of the labour conditions of employees of corporations,[14] even if limiting the law to corporations was opportunistic rather than coherent. But it was the external affairs power — the power of the Commonwealth to, inter alia, implement domestically international treaties and other international obligations — that was to connect Australian labour law with international developments. This paper is about these connections, and about how the external affairs power has been a double-edged sword:[15] on the one hand, a productive avenue for the introduction into Australia of international norms, but on the other, constrained by the limits of the power, especially by the necessity for legislation based on it to adhere closely to the terms of the international instrument and not to use it as a launching pad for legislation generally on the subject of the instrument but unrelated to its terms.

The potential of the external affairs power was not realised until the early 1980s, when two important High Court decisions upheld Commonwealth legislation that implemented international conventions relating to the prohibition of racial discrimination[16] and protection of the environment.[17] The controversial and unresolved issue arising out of these decisions was whether it was enough to support Commonwealth legislation that the Commonwealth executive had entered into an international agreement, irrespective of the subject matter of the agreement, or whether only those agreements could be implemented whose subject matter, apart from the existence of the agreement, was indisputably international in character and not essentially a matter of domestic concern. In choosing between these two views, the Court faced a dilemma: so long as an international agreement could be manufactured, the former view would allow legislation on any subject at all, thus undermining the very idea that the Commonwealth was a body of limited powers, whereas the latter view turned on an impossibly elusive criterion.

Whatever the resolution of this dilemma, and thus whatever the constitutional limits on the reach of national power, commentators speculated about what areas were next for internationalisation. In 1995, Professor Breen Creighton prophesised that 'the internationalisation of labour law is

---

[9] For a discussion of the historical development of conciliation and arbitration in Australia, see Joe Isaac and Stuart Macintyre (eds) *The New Province for Law and Order: 100 years of Australian Industrial Conciliation and Arbitration* (Cambridge University Press, 2004). See also Justice Michael Kirby, 'Industrial Conciliation and Arbitration in Australia – A Centenary Reflection' (2004) 17 *Australian Journal of Labour Law* 229.
[10] Constitution, section 51(xxxv).
[11] For an excellent discussion of this litigation, see Marilyn Pittard and Richard Naughton, *Australian Labour Law: Cases and Materials* (LexisNexis, 4th ed 2003); also Bill Ford, 'Labour Relations Law' in Tony Blackshield, Michael Coper and George Williams, *The Oxford Companion to the High Court of Australia* (Oxford University Press, 2001) 412.
[12] Constitution, s 51(xxix).
[13] Constitution, s 51(xx).
[14] *New South Wales v Commonwealth* (2006) 229 CLR 1.
[15] Michael Coper, 'The Role of the Courts in the Preservation of Federalism' (1989) 63 *Australian Law Journal* 463.
[16] *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168.
[17] *Commonwealth v Tasmania (The Tasmanian Dams Case)* (1983) 158 CLR 1.

inevitable'.[18] His observation was made not long after the Commonwealth enacted the *Industrial Relations Reform Act 1993*, the first Commonwealth statute to directly give effect to Australia's international labour law obligations. Yet subsequent events have proved Creighton to be only partially correct. Whilst International Labour Organisation (ILO) conventions have played a role in shaping Australian labour law over the past two decades, successive Australian governments have displayed an ambivalence about, even antipathy towards, their direct implementation.

Australia and the ILO

The tensions between local, national and international imperatives are examined in this paper through the prism of two ILO conventions: the *Termination of Employment Convention*[19] (C158) and the *Workers with Family Responsibilities Convention*[20] (C156). Both conventions have had a substantial impact on Australian domestic labour law. C158 underpinned Australia's first national legislation on unfair dismissal, and, although this legislation operated for less than three years[21] and largely represented a failure of policy-making, the influence of C158 has hung over unfair dismissal laws up to the present day. C156 has had a more lasting effect, with successive governments using it to underpin provisions concerning parental leave.

Although Australia was a founding member of the ILO and ratified a number of its early conventions,[22] the dominance of the entrenched system of compulsory conciliation and arbitration inhibited the direct implementation of ILO conventions and recommendations. Indeed, this approach to industrial relations, based on provision of a dispute settlement mechanism, inhibited the very idea of legislation directly establishing terms and conditions of employment.[23] Instead, most Australian workers had their employment conditions determined by the product of conciliation and arbitration, namely, awards or determinations of the independent national labour tribunal. These awards, and the employees' contract of employment, set the working conditions for most Australian employees.

The result of the dominance of conciliation and arbitration was that ILO standards played a normative rather than a substantive role in shaping Australian labour law for most of the twentieth century. For instance, C158 was used by the Australian Council of Trade Unions as evidence of international developments in favour of greater job protection when it argued for the insertion of clauses into Commonwealth awards prohibiting unfair dismissal and providing for redundancy payments.[24] However, the High Court cases of the early 1980s, and some frustration on both sides of politics with the rigidities and technicalities of the conciliation and arbitration system, meant that, by the late 1980s, policy-makers were beginning to examine the possibility of using the external affairs power to enact domestic legislation based directly on Australia's ILO obligations.

---

[18] Breen Creighton, 'The ILO and the Internationalisation of Australian Industrial Relations' (1995) 11 *International Journal of Comparative Labour Law and Industrial Relations* 199, 225. In *R v Burgess; Ex Parte Henry* (1936) 55 CLR 608, at 687, Justices Evatt and McTiernan indicated that the scope of the external affairs power may extend to the enactment of legislation based on ILO conventions; however, the comment was obiter, and the constitutionality of such legislation was not tested for another 60 years.

[19] *Termination of Employment Convention (No 158),* opened for signature 22 June 1982, C158 (entered into force 23 November 1985) (hereafter C158).

[20] *Workers with Family Responsibilities Convention (No 156),* opened for signature 23 June 1981, C156 (entered into force 11 August 1983) (hereafter C156).

[21] This Labor government legislation was repealed by legislation of the incoming conservative government in 1996.

[22] For an excellent discussion of Australia's role in the ILO and its early ratification activity, see Rosemary Owens and Joellen Riley, *The Law of Work* (Oxford University Press, 2007) ch 2.

[23] Under the Australian Constitution, the Commonwealth can enact legislation regarding the terms and conditions of employment for particular employees, such as its own public servants: see, for instance, *Maternity Leave (Commonwealth Employees) Act 1973* and the *Long Service Leave (Commonwealth Employees) Act 1976*.

[24] *Termination, Change and Redundancy Decision* (1984) 8 IR 34 and *Termination, Change and Redundancy Supplementary Decision* (1984) 9 IR 115.

These possibilities were realised in 1993 when the Commonwealth relied on the external affairs power in enacting the *Industrial Relations Reform Act*, which sought to re-orient Australian labour law away from compulsory conciliation and arbitration towards a system of enterprise bargaining, and to increase the reach of Commonwealth laws to cover more Australian employees. As part of this re-orientation, the Act created a safety-net of employee rights based substantially on Australia's ILO obligations, which would underpin the new enterprise bargaining regime.[25] For the first time in the history of the Australian nation, important aspects of Australian labour law would be shaped by the provisions of ILO conventions and recommendations.

The Termination of Employment Convention (C158)[26]

It may surprise some readers that C158 was used to underpin Australian unfair dismissal laws.[27] After all, this was a convention designed to protect job security, which came into force against the backdrop of the recession of the early 1980s and which appears to have been strongly influenced by law and practices in Europe.[28] C158 is not a convention about unfair dismissal. It is a convention that promulgates a charter of rights concerned with employment security and job protection, in circumstances in which an employee's employment is terminated at the initiative of the employer.[29]

For instance, the convention makes it unlawful for an employee's employment to be terminated unless there is a valid reason for the termination,[30] and until the employer has given the employee reasonable notice of the termination or payment in lieu of such notice.[31] A termination of employment on grounds of performance or conduct will be unlawful unless the employee has been given an opportunity to respond to allegations of poor performance or misconduct.[32] Termination on grounds of redundancy will also be unlawful, unless the strict consultation obligations have been complied with.[33] Employees made redundant are also entitled to notice of termination of employment, and severance payments. Employees may appeal any termination of employment to an independent adjudicator.[34] Certain employees, such as those on fixed term contracts, probationary and casual employees,[35] could be excluded from the operation of the convention by ratifying states.

Given that C158 is not concerned with unfair dismissal as such, it is no surprise that the termination provisions of the *Industrial Relations Reform Act* focused on the obligations necessary to make a termination of employment lawful, rather than on its overall fairness.[36] For instance, a dismissal would be unlawful unless the prescribed period of notice was given or

---

[25] For a discussion of this new safety-net, see Ronald C McCallum, 'The Internationalisation of Australian Industrial Law: The Industrial Relations Reform Act 1993' (1994) 16 *Sydney Law Review* 122 and Marilyn Pittard 'International Labour Standards in Australia: Wages, Equal Pay, Leave and Termination of Employment' (1994) 7 *Australian Journal of Labour Law* 170.

[26] See above, n19.

[27] C158 also underpinned laws prohibiting termination of employment based on discriminatory grounds, but due to space constraints these developments will not be analysed.

[28] For an excellent discussion of C158, see generally Brian Napier, 'Dismissals - The New ILO Standards' (1983) 12 *Industrial Law Journal* 17.

[29] See above, n19, Art 3.

[30] Ibid Art 4. Note that grounds such as membership of a trade union, and discriminatory grounds such as race, colour, or gender, could never constitute a valid reason – see Art 5.

[31] Ibid, Art 11.

[32] Ibid, Art 7.

[33] Ibid, Division E.

[34] Ibid, Art 8.

[35] Ibid, Art 2(2). Note the further exclusions in Art 2(3-6).

[36] On this point, see the comments of Justice Gray in *Fryar v Systems Services Pty Ltd* (1995) 60 IR 68, 90.

payment in lieu was made.[37] If a termination of employment was based on poor performance or unsatisfactory conduct, an employer was generally required to give the employee an opportunity to respond to such allegations before a dismissal could be lawful.[38] If an employer terminated the employment of 15 or more employees on the ground of redundancy, such a termination was unlawful unless the employer provided the relevant notice to the Commonwealth Employment Service.[39] Finally, a termination could be unlawful if an employee's employment was terminated without a valid reason.[40] Importantly, a reason would not be a valid reason if a termination was harsh, unjust or unreasonable.[41] This meant that an employee's employment could be terminated for an appropriate reason, but such a termination could be unlawful if it was procedurally unfair, or harsh as it applied in the particular circumstances of the employee.

The epithets harsh, unjust and unreasonable are not derived from C158 but from domestic labour law norms. Whether a dismissal was harsh, unjust or unreasonable was the formula used in state unfair dismissal jurisdictions,[42] and later in clauses contained in Commonwealth awards. This linking of domestic labour law concepts with those in C158 proved to be unsuccessful, with the High Court of Australia holding that the provision in question did not have a sufficient connection to C158 to be constitutionally valid.[43] The problem with the use of C158 to underpin domestic unfair dismissal laws was that C158 was not concerned with whether or not a dismissal was fair or unfair, but whether certain procedures had been followed prior to a termination of employment. The domestic legislation enacted to give effect to Australia's obligations under C158 necessarily had to accord closely with the terms of the convention.

This disjunction between the goals of C158 and a system of unfair dismissal protection proved fatal to the use of C158 in regulating dismissals. In 1996, following the election of a more conservative government, Australian unfair dismissal laws were further re-oriented in a way that downgraded the direct influence of C158.[44] The overriding test under the new legislation was whether a termination of employment was harsh, unjust or unreasonable,[45] epithets drawn from the *Termination, Change and Redundancy Decision*[46] rather than from C158. Emphasis under the re-worked legislation was on whether 'a fair go all round'[47] had been accorded to the employee, and considerations contained in C158, such as whether there was a valid reason for the termination or whether an employee was given an opportunity to respond to allegations, were downgraded to factors the tribunal would take into account in determining the overall fairness of a dismissal.[48] The Commonwealth also abandoned its effort to rely exclusively on the external affairs power, and instead sought to support these new unfair dismissal laws on a range of constitutional powers.[49]

---

[37] *Industrial Relations Reform Act 1993* (Cth) s 170DB(1). This requirement does not apply if the termination is for misconduct.
[38] *Industrial Relations Reform Act 1993* (Cth) s 170DC. This prohibition does not apply if the employer could not reasonably be expected to provide that opportunity.
[39] *Industrial Relations Reform Act 1993* (Cth) s 170DD.
[40] *Industrial Relations Reform Act 1993* (Cth) s 170DE(1).
[41] *Industrial Relations Reform Act 1993* (Cth) s 170DE(2).
[42] The formula can be traced back at least to the *Industrial Conciliation and Arbitration Act* 1972 (South Australia).
[43] *Victoria v The Commonwealth* (1996) 187 CLR 416, 517-518.
[44] For a discussion of the changes brought about by the Howard government's *Workplace Relations Act 1996* (Cth), see Anna Chapman, 'Termination of Employment under the *Workplace Relations Act 1996* (Cth)' (1997) 10 *Australian Journal of Labour Law* 89.
[45] *Workplace Relations Act 1996* (Cth) s 170CE.
[46] (1984) 8 IR 34.
[47] *Workplace Relations Act 1996* (Cth), s 170CA(2).
[48] *Workplace Relations Act 1996* (Cth) s 170CG(3).
[49] For a discussion of these powers, see Chapman, above n44.

No government since 1996 has sought to reinstate unfair dismissal laws based on C158. If anything, laws since 1996 have moved further away from compliance with its terms.[50] Although C158 has proven to be a failure as an instrument regulating unfair dismissals in this country, it is interesting to observe that concepts derived from the convention continue to influence Australian domestic law. The most obvious example is the inclusion in the current Commonwealth statute, the *Fair Work Act* 2009, of the prohibitions on discriminatory dismissals contained in C158.[51] Another is the ongoing requirement that the tribunal, when determining the fairness or otherwise of a dismissal, must consider whether the employer had a valid reason for terminating the employment of the employee. This concept would not have found its way into Australian labour law without C158. It has been retained, despite the fact that the tribunal has struggled to define, in anything other than the broadest terms, what is meant by a 'valid reason'. Finally, some exclusions from C158 have been reflected in the *Fair Work Act*, such as those relating to casual employees.[52] As such, C158 continues to exercise a normative influence on current Australian labour law, albeit a downgraded one.

The Workers with Family Responsibilities Convention (C156)[53]

Broadly speaking, C156 aims to improve equality of opportunity for male and female workers with family responsibilities to participate in work activities. In 1993, the then Labor Government decided to rely on C156 to underpin a parental leave scheme, to be included as part of the safety-net of employee rights in the *Industrial Relations Reform Act*. Although C156 says nothing about parental leave, the High Court held that one means of discharging Australia's obligations under C156 was to legislate for parental leave.[54] Although the actual content of the legislative standards ultimately adopted owed much to tribunal decisions concerning entitlements to parental leave under Commonwealth awards, the significance of C156 is that it provided the constitutional underpinnings for the first Commonwealth parental leave legislation which applied universally to all Australian employees.

Speaking generally, the legislation provided that the primary care-giver was entitled to 52 weeks unpaid maternity or paternity leave, with the spouse entitled to one week at the time of birth.[55] Regulations were made providing for adoption leave in similar terms.[56] Importantly, employers were required to employ the employee in the same or a comparable position following a return from maternity or paternity leave. Subsequent Australian governments have continued to provide for this standard, the latest iteration of which goes further than its predecessors in allowing parents a right to request a further one year's unpaid parental leave.[57] In short, the legacy of C156 is that it facilitated a universal standard of parental leave for all Australian employees.

International norms: influential but resistant to direct adoption

In hindsight, the enactment of the *Industrial Relations Reform Act* 1993 by a Labor government can be seen as a bold attempt to use ILO conventions and recommendations to increase employee rights and broaden the coverage of Commonwealth labour law. However, the experience

[50] By way of example, the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) exempted from unfair dismissal laws employers employing 100 or fewer employees, as well as dismissals for 'operational reasons' – see ss 643(10) and 643(8) respectively. The successor legislation, the *Fair Work Act 2009* (Cth), permits businesses employing 15 or fewer employees to comply with a fair dismissal code, which imposes less onerous obligations on such businesses – see ss 385 and 388.
[51] See *Fair Work Act* 2009 (Cth), s 772.
[52] For the limitations on casual employees seeking relief for unfair dismissal, see *Fair Work Act* 2009 (Cth), s 384(2)(a).
[53] See above, n20.
[54] *Victoria v The Commonwealth* (1996) 187 CLR 416, 524.
[55] *Industrial Relations Reform Act 1993* (Cth) Schedule 14.
[56] Marilyn Pittard, above n 25.
[57] On parental leave rights generally under Commonwealth laws, see *Fair Work Act* 2009 (Cth) Part 2-2, Division 5.

discussed above concerning unfair dismissal protections, and an ambivalence on the part of the conservative government from 1996 to 2007 toward Australia's international obligations and the ILO itself, meant that subsequent governments were reluctant to use the external affairs power to underpin domestic labour legislation. Instead, governments turned to a range of other constitutional powers in an effort to achieve a more national system of industrial relations: first, the power to make laws with respect to trading, foreign or financial corporations,[58] and, more recently, the power to make laws on matters not otherwise within the Commonwealth's list of powers but referred to the Commonwealth by the states.[59]

Over time, the corporations power became the dominant source of constitutional validity for domestic labour law. This dominance became even more pronounced following the High Court's decision in the *Work Choices Case* in 2006,[60] in which the High Court upheld the validity of the conservative government's controversial legislation[61] (soon to be repealed by the incoming Labor government) regulating the employment conditions of employees of corporations. But how to overcome the anomaly that legislation based on the corporations power could reach only corporate employees? How to plug the gaps and have a comprehensive system applying to all employees, whether employed by corporations or by individuals? Blessed by the good fortune of an unusual alignment of Commonwealth and state governments of the same political persuasion, the Commonwealth and the states[62] made an historic agreement in 2009 to create a comprehensive national industrial relations system for the private sector, by resort to the hitherto little-used Commonwealth power to legislate on matters referred to it by the states.[63] The combined potential of the corporations and referral powers has now all but marginalised the use of the external affairs power as a source of validity for domestic labour laws.

It seems that the more things change the more they stay the same. For most of the 20th century, the dominance of conciliation and arbitration meant that ILO standards were to play a normative rather than a substantive role in shaping Australian labour laws.[64] Current trends indicate that, for different reasons, the same appears to be the case for the role of ILO standards in the 21st century.

Conclusion

Australia as a small but progressive and outward-looking nation has historically sought to play an influential role on the international stage, as evidenced both in the formation of the United Nations, when Dr HV Evatt was the first President of the General Assembly, and in the formation and work of the ILO. Australia and Australians have been much involved, and often leaders, in the development and application of international norms. However, the story of the domestic influence in Australia of the two ILO conventions outlined in this paper illustrates how, at the end of the day, a federal nation endeavours, first of all, to navigate its own internal constitutional limitations on national power, and, secondly, in any event, to balance its attention to international norms with its sovereign right to make its own decisions (albeit hotly contested politically, and variable according to which government is in power) about what kind of labour regulation is appropriate for its own domestic circumstances.

[58] Constitution, s 51 (xx).
[59] Constitution, s 51 (xxxvii).
[60] *New South Wales v Commonwealth* (2006) 229 CLR 1.
[61] *Workplace Relations Amendment (Work Choices) Act 2005* (Cth).
[62] Other than Western Australia, which still retains a state system for a small percentage of workers.
[63] On the moves toward a national system for the private sector, see Rosemary Owens 'Unfinished Constitutional Business: Building a National System to Regulate Work' (2009) 22(3) *Australian Journal of Labour Law* 258.
[64] As stated earlier, this paper tells the story of the internationalisation of Australian labour law through the prism of two particular ILO conventions. There is a much broader paper to be written on the extent of international influence on the development of Australian labour law.