

# THE RIGHT TO STRIKE IN AUSTRALIA: INTERNATIONAL TREATY OBLIGATIONS AND THE EXTERNAL AFFAIRS POWER

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## I INTRODUCTION

In 1993, the Australian Government passed legislation<sup>1</sup> protecting the right to strike pursuant to section 51 (xxix) of the *Australian Constitution*.<sup>2</sup> The legislation was passed in response to various findings by International Labor Organisation ('ILO') committees, charged with monitoring compliance with ILO conventions.<sup>3</sup> The committees had found that Australia breached its obligations under certain ILO conventions by failing to protect the right to strike.<sup>4</sup> In this paper we examine the passage of the right to strike legislation and the subsequent High Court challenge in *Victoria v Commonwealth*<sup>5</sup> before highlighting the risks involved in legislating pursuant to the findings and interpretations of international treaty bodies.

## II THE RIGHT TO STRIKE AND THE ILO

Although the right to strike is not explicitly contained in any ILO conventions, it is said to arise by necessary implication from two ILO conventions ('ILO Conventions'): the *Freedom of Association and Protection of the Right to Organise Convention 1948* ('*Freedom of Association Convention*'),<sup>6</sup> and the *Right to Organise and Collective Bargaining Convention 1949* ('*Right to Organise Convention*').<sup>7</sup> The ILO Committee of Experts on the Application of Conventions and Recommendations ('CEACR')<sup>8</sup> has interpreted these two

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<sup>1</sup> *Industrial Relations Reform Act 1993* (Cth).

<sup>2</sup> *Australian Constitution* s 51(xxix) ('external affairs power').

<sup>3</sup> Commonwealth of Australia, *Explanatory Memorandum to the Industrial Relations Reform Bill 1993* (Cth), 26 October 1993, 6 ('*Explanatory Memorandum*').

<sup>4</sup> See, eg, *Case No 1511 (Australia)*, 277<sup>th</sup> Report of the Committee on Freedom of Association ('*Pilots Strike Case*'); cf *Case No 1963 (Australia)*, 320<sup>th</sup> Report of the Committee on Freedom of Association ('*Waterfront Dispute Case*').

<sup>5</sup> (1996) 187 CLR 416.

<sup>6</sup> Opened for signature 17 July 1948, 68 UNTS 17 (entered into force generally 4 July 1950; entered into force for Australia 28 February 1973).

<sup>7</sup> Opened for signature 1 July 1949, 96 UNTS 257 (entered into force generally 18 July 1951; entered into force for Australia 28 February 1973).

<sup>8</sup> The CEACR was established by a resolution of the International Labour Conference in 1926 to monitor and report on ILO members' compliance with the provisions of ILO conventions to which they are a party.

conventions expansively, stating that the right to strike is an ‘intrinsic corollary’ of the rights contained in the two ILO conventions.<sup>9</sup> The Committee on Freedom of Association (‘CFA’)<sup>10</sup> has described the obligation to protect the right to strike as an essential requirement of the *Freedom of Association Convention*.<sup>11</sup> Both the CEACR and the CFA (‘ILO Supervisory Committees’) have ‘consistently reaffirmed the right to strike.’<sup>12</sup>

### III THE RIGHT TO STRIKE IN AUSTRALIA

Prior to the *Industrial Relations Reform Act 1993* (Cth), the right to strike was not protected by legislation in Australia. Trade unions and trade union members who took industrial action were exposed to actions for damages in tort and contract.<sup>13</sup> The *Industrial Relations Reform Act 1993* (Cth) amended Division 4 of the *Industrial Relations Act 1988* (Cth), inserting a new Part VIB Division 4, which provided for immunity from civil liability for striking employees in limited circumstances.

In the second reading speech of the Industrial Relations Reform Bill 1993 (Cth), the Minister for Industrial Relations,<sup>14</sup> Laurie Brereton, stated that ‘[t]he legislation will give effect to Australia’s international obligations in respect of the rights of workers to engage in industrial action’.<sup>15</sup> The explanatory memorandum to the *Industrial Relations Reform Act 1993* (Cth) makes it clear that the amendments were made in response to criticism by ILO committees that Australia had failed to meet its ILO convention obligations:

Australia has in recent years been the subject of adverse comment made by the ILO supervisory bodies in respect of the unrestricted exposure of trade unions and their members to damages at common law for industrial action. The new sections of Division 4 of Part VIB aim to restrict that exposure in circumstances where the right to take industrial action is peculiarly in need of protection.<sup>16</sup>

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<sup>9</sup> CEACR, *Conclusions Concerning the Reports Received Under Articles 19 and 22 of the Freedom of Association and Right to Collectively Organise and Collective Agreements, Cooperation in the Undertaking* (81st session, ILC, 1994) Report III (Part 4B) [179].

<sup>10</sup> The CFA was established by the Governing Body of the ILO Executive Council, in 1951 to oversee the *Freedom of Association Convention*. It examines complaints that member states of the ILO are not respecting basic principles of freedom of association.

<sup>11</sup> Jane Hodges-Aeberhard and Alberto Otero de Rios, ‘Principles of the Committee on Freedom of Association Concerning Strikes’ (1987) 126 *International Labour Review* 543, 546.

<sup>12</sup> *Ibid* 544.

<sup>13</sup> See, eg, *Dollar Sweets Pty Ltd v Federated Confectioners Association of Australia* [1986] VR 383; *Australasian Meat Industry Employees’ Union v Mudginberri Station Proprietary Ltd* (1986) 161 CLR 98; see also Greg McGarry, ‘Sanctions and Industrial Action: The Impact of the Industrial Relations Reform Act’ (1994) 7(2) *Australian Journal of Labour Law* 198; Andrew Stuard, ‘Civil Liability for Industrial Action: Updating the Economic Torts’ (1984) 9(3) *Adelaide Law Review* 388.

<sup>14</sup> He was also Minister Assisting the Prime Minister for Public Service Matters at the time.

<sup>15</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 28 October 1993, 2782 (Laurie Brereton, Minister for Industrial Relations).

<sup>16</sup> *Explanatory Memorandum*, above n 3, 6.

Section 170PA of the *Industrial Relations Act 1988* (Cth) identifies specific international law sources said to give rise to an obligation to protect the right to strike:

- (a) Article 8 of the *International Covenant on Economic, Social and Cultural Rights*;<sup>17</sup>
- (b) the *Freedom of Association and Protection of the Right to Organise Convention*, 1948;
- (c) the *Right to Organise and Collective Bargaining Convention*, 1949;
- (d) the *Constitution of the International Labor Organisation*;<sup>18</sup> and
- (e) customary international law relating to freedom of association and the right to strike.

Clearly, the *Industrial Relations Reform Act 1993* (Cth) was intended to give effect to Australia's obligations under the *ILO Conventions*, as interpreted by the ILO Supervisory Committees.

Division 8 of Part VIB of the *Workplace Relations Act 1996* (Cth), the successor to the *Industrial Relations Act 1988* (Cth), retains in part the right to strike provisions,<sup>19</sup> but does not explicitly state the basis for such provisions. However, one of the principal objects of the *Workplace Relations Act 1996* (Cth) is to assist 'in giving effect to Australia's international obligations in relation to labour standards'.<sup>20</sup>

#### IV THE RIGHT TO STRIKE AND THE HIGH COURT

At first glance, it would seem that enacting provisions to protect the right to strike implements the *ILO Conventions* and is therefore a valid exercise of the external affairs power. Indeed, in *Victoria v Commonwealth*, the High Court held, in response to a challenge to the validity of large sections of the *Industrial Relations Act 1988* (Cth), that the provisions for the right to strike were a valid exercise of the external affairs power.<sup>21</sup>

However, the court did not hold that the *Freedom of Association Convention*, the *Right to Organise Convention*, the *Constitution of the ILO* or customary international law created an obligation or constituted an agreement to protect the right to strike, nor did the court analyse the views of the CEACR or the CFA.

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<sup>17</sup> Opened for signature 19 December 1966, 993 UNTS 3, 6 ILM 360 (entered into force generally 3 January 1976; entered into force for Australia 10 March 1976) ('ICESCR').

<sup>18</sup> The Constitution is contained in the *International Labour Organisation Act 1947* (Cth) (the Schedule) adopted 26<sup>th</sup> session ILO 10/5/1947.

<sup>19</sup> *Workplace Relations Act 1996* (Cth) ss 170ML–MU, 170WB–WE. There is extensive literature on this topic; see, eg, Stuart Kollmorgen, 'Qualifying the Right to Strike' (1998) 11(2) *Australian Journal of Labour Law* 128.

<sup>20</sup> *Workplace Relations Act 1996* (Cth) s 3(k).

<sup>21</sup> (1996) 187 CLR 416, 542–7.

The court simply noted that the *ILO Conventions* do not expressly provide for a right to strike:

The closest that the Right to Organise and Collective Bargaining Convention 1949 comes to providing for a “right to strike” is in Art 4 which provides:

Measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers’ organisations and workers’ organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements.<sup>22</sup>

The High Court ultimately held that the right to strike provisions of the *Industrial Relations Reform Act 1993* (Cth) were a valid exercise of the external affairs power<sup>23</sup> on the basis that they gave effect to Australia’s obligations under article 8(1)(d) of the *ICESCR*.<sup>24</sup>

The government was put in an almost impossible position. On the one hand, the CEACR and the CFA have consistently stated that the *ILO Conventions* contain an obligation to protect the right to strike, and that Australia was in breach of that obligation. On the other hand, the High Court was unwilling to find that the *ILO Conventions* contain an obligation to protect the right to strike; therefore, the government could not pass legislation pursuant to the external affairs power protecting the right to strike, at least in so far as the legislation was based on the implementation of ILO convention obligations.<sup>25</sup> In other words, it was held in breach of certain international obligations by one body, but almost deprived of the power to implement those obligations by another.

It was somewhat fortuitous that the legislation could rely on another (non-ILO) treaty, the *ICESCR*, which contains an obligation to ‘ensure the right to strike, provided it is exercised in conformity with the laws of the particular country.’<sup>26</sup> However, the *ICESCR* does not give any indication as to what the right to strike entails, what action a state is required to take to ensure such a right, or what limits a state may place on the right to ensure that it is exercised in conformity with the laws of the particular country.<sup>27</sup> Without article 8(1)(d) of the *ICESCR*, the High Court may well have ruled that the provisions protecting the right to strike are unconstitutional.

## V IMPLICATIONS

In recent years, the Commonwealth has increasingly used the external affairs power to make laws implementing Australia’s international obligations, particularly in circumstances where the *Australian Constitution* does not

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<sup>22</sup> Ibid 544–5.

<sup>23</sup> Ibid 545–6.

<sup>24</sup> *ICESCR*, above n 17, art 8(1) states: ‘The States Parties to the present Convention undertake to ensure: ... (d) the right to strike, provided that it is exercised in conformity with the laws of the particular country’.

<sup>25</sup> *Victoria v Commonwealth* (1996) 187 CLR 416, 544–6.

<sup>26</sup> *ICESCR*, above n 17, art 8(1)(d).

<sup>27</sup> Ibid arts 8(2) and (3) provide some limited guidance.

otherwise provide a head of power for the Commonwealth to make legislation with respect to the subject matter of the treaty.<sup>28</sup> The High Court has held that this is a valid use of the external affairs power, even where the obligations created by the treaty are selectively implemented,<sup>29</sup> provided that the Parliament does not 'depart from the provisions of the treaty ... and enact legislation which goes beyond the treaty or is inconsistent with it.'<sup>30</sup>

This method of making legislation has been controversial for two reasons. First, there is a perception that the Commonwealth is encroaching upon powers traditionally the domain of the States. Second, there is a perception that Australia has ceded some of its sovereignty to treaty supervisory committees.<sup>31</sup> For example, the Australian Chamber of Commerce and Industry has expressed concern that this approach was 'endangering the historic processes of government in Australia.'<sup>32</sup> In relation to the ILO, the Prime Minister, John Howard, has said: 'I would rather nobody use the ILO. I don't think foreigners should dictate Australian law.'<sup>33</sup> The Minister for Employment, Workplace Relations and Small Business, Peter Reith, has stated that 'blindly adopting the observations of the [CEACR] would be a disaster.'<sup>34</sup> The Minister is currently considering extending the reliance on the corporations power in section 51(xx)<sup>35</sup> of the *Australian Constitution* for making industrial relations legislation, to overcome the inadequacies of reliance on the external affairs power and the conciliation and arbitration power (contained in section 51(xxxv) of the *Australian Constitution*).<sup>36</sup>

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<sup>28</sup> See, eg. *Koowarta v Bjelke-Peterson* (1982) 153 CLR 168; *The Commonwealth v Tasmania* (1983) 158 CLR 1 ('*Tasmanian Dams Case*'); *Richardson v The Forestry Commission* (1988) 164 CLR 261; *Victoria v Commonwealth* (1996) 187 CLR 416.

<sup>29</sup> See, eg. *Tasmanian Dams Case* (1983) 158 CLR 1, 268 (Deane J).

<sup>30</sup> *Ibid* 132 (Mason J).

<sup>31</sup> Philip Alston, 'Reform of Treaty-Making Processes: Form Over Substance?' in Philip Alston and Madelaine Chiam (eds), *Treaty Making and Australia: Globalisation Versus Sovereignty?* (1995) 1, 5-7.

<sup>32</sup> G Megalogenis, 'Treaties Undercutting Constitution, Says ACCI', *The Australian* (Sydney), 14 July 1994, 4.

<sup>33</sup> 'Howard Opposes ILO Bid', *The Canberra Times* (Canberra), 30 May 1994, 3.

<sup>34</sup> Peter Reith, *ILO Wrong on Australia's Workplace Relations Act*, Press Release, No 6 (12 March 1999) <<http://www.dewrsb.gov.au/ministers/mediacentre/default.asp>> at 13 December 2000. Despite these comments, the Minister recently sought the ILO's assistance in drafting legislation requiring secret ballots before protected industrial action can be taken. This was done in an attempt to ensure that the legislation would be acceptable to the Democrats, such that the Democrats would support the legislation in the Senate: K Murphy, 'Reith Backpeddles to Geneva', *The Australian Financial Review* (Sydney) 10 November 2000, 3.

<sup>35</sup> Section 51(xx) of the *Australian Constitution* gives the Federal Parliament power to legislate with respect to: 'Foreign corporations, and trading of financial corporations formed with the limits of the Commonwealth'.

<sup>36</sup> Peter Reith, *Breaking the Gridlock: Towards a Simpler National Workplace Relations System*, Speech, 23 October 2000, Hotel Sofitel, Melbourne, <<http://www.dewrsb.gov.au/ministers/mediacentre/default.asp>> at 12 December 2000.

In recent years, the most controversial use of the external affairs power in this manner was the passing of the *Human Rights (Sexual Conduct) Act 1994* (Cth).<sup>37</sup> Like the sections of the *Industrial Relations Reform Act 1993* (Cth) protecting the right to strike, the *Human Rights (Sexual Conduct) Act 1994* (Cth) was passed in response to a finding by a committee overseeing compliance with treaty obligations that Australia was in breach of its obligations.<sup>38</sup>

In *Toonen v Australia*,<sup>39</sup> a claim was brought against the Commonwealth of Australia before the United Nations Human Rights Committee ('UNHRC'), pursuant to the First Optional Protocol to the *International Covenant on Civil and Political Rights* ('ICCPR').<sup>40</sup> It was alleged that provisions of the Tasmanian criminal code<sup>41</sup> criminalising homosexuality were in breach of the ICCPR. The UNHCR found that Australia was in breach of its obligation under article 17 of the ICCPR to not arbitrarily interfere with an individual's privacy.

In response to this finding, the Federal Government passed the *Human Rights (Sexual Conduct) Act 1994* (Cth).<sup>42</sup> Section 4(1) of the Act, the only operative section, states that:

Sexual conduct involving only consenting adults acting in private is not to be subject, by or under any law of the Commonwealth, a State or a Territory, to any arbitrary interference with privacy within the meaning of Article 17 of the International Covenant on Civil and Political Rights.

On its face, this section does not legalise homosexuality. It merely implements article 17 of the ICCPR in relation to sexual privacy, which on its

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<sup>37</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 12 October 1994, 1775 (Michael Lavarch, Attorney-General). There is extensive literature on the use of the external affairs power; see, eg, Breen Creighton, 'The Workplace Relations Act in International Perspective' (1997) 10(1) *Australian Journal of Labour Law* 31; Peter Heerey, 'The Commonwealth's Use of the External Affairs Power' (1995) 14(2) *University of Tasmania Law Review* 189; Andrew Byrnes, 'The Implementation of Treaties in Australia After the *Tasmanian Dam Case*: The External Affairs Power and the Influence of Federalism' (1985) 8(2) *Boston College International and Comparative Law Review* 275; Paul Lane, 'The Federal Parliament's External Affairs Power: the *Tasmanian Dam Case*' (1983) 57(10) *Australian Law Journal* 554; Paul Lane, 'The Federal Parliament's External Affairs Power: *Koowarta's Case*' (1982) 56(10) *Australian Law Journal* 519.

<sup>38</sup> Nick Toonen, a member of the Tasmanian Gay and Lesbian Rights Group, referred a complaint to the United Nations Human Rights Committee (UNHRC) in order to determine whether the existence of homosexuality offences violated art 17 of the ICCPR. In 1994 the UNHRC handed down its decision on the merits upholding the complaint.

<sup>39</sup> United Nations Human Rights Committee, *Communication No 488/1992* (31 March 1994), UN Doc. C/1992/50/D/488 (1992).

<sup>40</sup> Opened for signature 19 December 1966, 999 UNTS 171, 6 ILM 383 (entered into force generally 23 March 1976; entered into force for Australia 13 August 1980).

<sup>41</sup> *Criminal Code Act 1924* ( Tas ), ss 122(a), 122(c), 123.

<sup>42</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 12 October 1994, 1780 (Philip Ruddock, Member). There is extensive literature on this subject; see, eg, Simon Bonnitt, 'The Right to Sexual Privacy, Sado-Masochism and the *Human Rights (Sexual Conduct) Act 1994* (Cth)' (1995) 2(1) *Australian Journal of Human Rights* 59; Simon Bonnitt, 'Legislation Comment: Protecting Sexual Privacy Under the Criminal Law: the *Human Rights (Sexual Conduct) Act 1994* (Cth)' (1995) 19(4) *Criminal Law Journal* 222; Peter O'Keefe, 'Parliament, Sex and Conscience: a Case Study of Australia's *Human Rights (Sexual Conduct) Act 1994*' (1995) 70 *Parliamentarian* 195.

face does not prohibit the criminalisation of homosexuality. Article 17 of the *ICCPR* reads:

- 1 No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
- 2 Everyone has the right to the protection of the law against such interference or attacks.

The federal parliament passed legislation predicated on the assumption that the UNHRC's interpretation of the obligations created by article 17 of the *ICCPR* was correct. This led a coalition of seven business and industry groups to conclude that 'committees of UN 'experts' have now become the final arbiters' of Australia's compliance with its international treaty obligations.<sup>43</sup> However, the decision in *Victoria v Commonwealth* makes it clear who is the final arbiter of Australia's international treaty obligations, at least with respect to the constitutionality of a piece of legislation: the High Court.

## VI CONCLUSION

The decision of the High Court in *Victoria v Commonwealth*, in relation to the right to strike provisions of the *Industrial Relations Reform Act 1993* (Cth), is important because it demonstrates that the High Court, not the committees which oversee international treaties, is the final arbiter of Australia's treaty obligations for the purposes of *domestic* law. Consequently, when Australia signs an international treaty overseen by an international supervisory committee, Australia does not cede some of its sovereignty to that treaty supervisory committee.

The decision also highlights the risk in legislating on the assumption that laws made pursuant to the views expressed by a treaty supervisory committee will invariably be a valid exercise of the external affairs power. The fact that a treaty supervisory committee has interpreted a treaty as giving rise to certain obligations does not guarantee the constitutional validity of legislation implementing the committee's understanding of Australia's international obligations. The High Court must be satisfied that the treaty gives rise to those obligations for the legislation to be constitutionally valid, and the Court is not bound to agree with the views of the international committee as to Australia's international obligations. If the Court differs as to the content or the very existence of an obligation identified by a treaty supervisory committee, the Commonwealth may be unable to pass legislation pursuant to the external affairs power to meet that obligation.

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<sup>43</sup> 'Australia's Treaty-Making Processes: Industry Reform Proposals', *Business Council Bulletin* (1994) 109, 6.