The Fair Work Act's Objects Clause – Strengthening the Link to International Labour Standards

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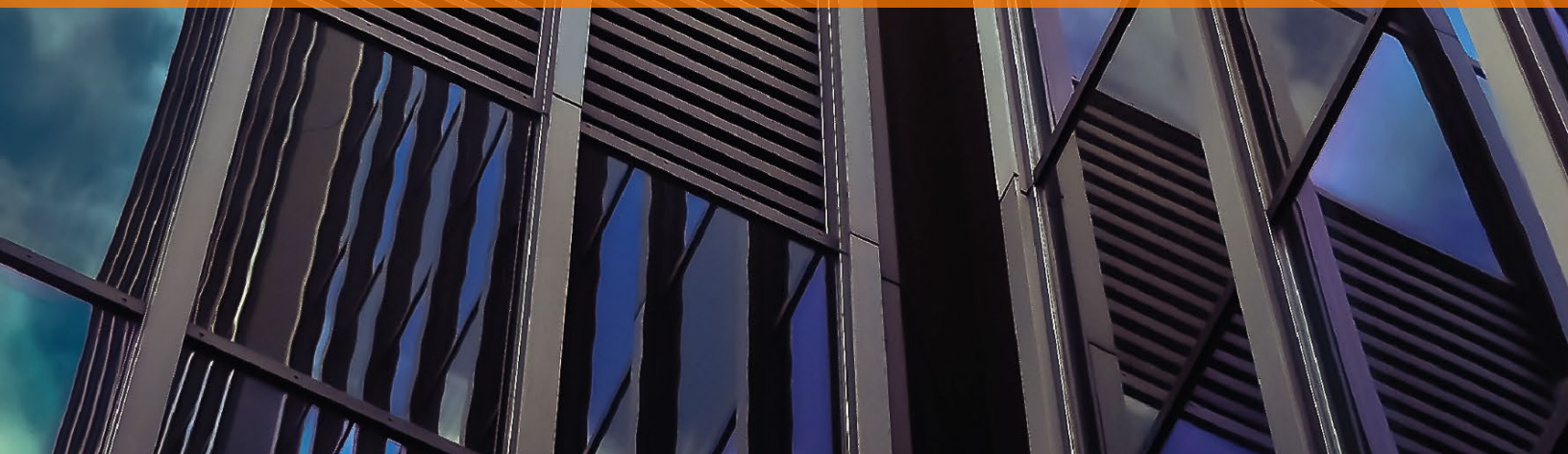

Summary

In order to better meet Australia's international labour obligations and to provide additional interpretative guidance, the objects clause of the *Fair Work Act 2009* (Cth) (FWA) should be amended to include a clause such as the following:

> ***The object of this Act is to provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians by: […]***
>
> ***giving effect, or further effect, to the Australia's international labour obligations […].***

'International labour obligations' should be defined in the Act, or a Schedule to it, to include at least the ten fundamental Conventions of the International Labour Organization, as well as those international labour instruments currently referenced in the Fair Work Act, Convention No. 190 and Recommendation No.198.

The weak reference to international labour obligations in the FWA's objects clause.

The current objects clause in section 3 of the FWA provides in part:

> *The object of this Act is to provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians by:*
>
> *a) providing workplace relations laws that are fair to working Australians, are flexible for businesses, promote productivity and economic growth for Australia's future economic prosperity and* ***take into account Australia's international labour obligations****; […] (emphasis added).*

"Australia's international labour obligations" are not defined in the FWA but it appears from Explanatory Memorandum to the Fair Work Bill that they include a limited number of International Labour Organization (ILO) Conventions that Australia has ratified, as well as two United Nations Conventions and an ILO Recommendation.[1]

1 See paragraph 2251. The Memorandum lists: ILO Convention (No. 100) concerning Equal Remuneration for Men and Women Workers for Work of Equal Value (Geneva, 29 June 1951) [1975] ATS 45; ILO Convention (No. 111) concerning Discrimination in respect of Employment and Occupation (Geneva, 25 June 1958) [1974] ATS 12; the International Covenant on Economic, Social and Cultural Rights (New York, 16 December 1966) [1976] ATS 5; the Convention on the Elimination of All Forms of Discrimination against Women (New York, 18 December 1979) [1983] ATS 9; ILO Convention (No. 156) concerning Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities (Geneva, 23 June 1981) [1991] ATS 7; ILO Convention (No. 158) concerning Termination of Employment at the Initiative of the Employer (Geneva, 22 June 1982) [1994] ATS 4; and ILO Recommendation (No. 166) concerning Termination of Employment at the Initiative of the Employer (Geneva, 22 June 1982).

The current objects clause may be contrasted with stronger expressions in previous legislation. For instance, section 3 of the Industrial Relations Act 1988, as amended by the Industrial Relations Reform Act 1993[2] provided:

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

The current object clause also contrasts with the language of sections 743, 758, 771 and 784 of the FWA, the objects clauses of Divisions 2 and 3 of Part 6-3 and Divisions 2 and 3 of Part 6-4 of the Act. Unlike most of the FWA, Parts 6-3 and 6-4 continue to rely on the external affairs power in section 51(xxix) of the Constitution. The four objects clauses provide that:

> *The object of this Division is to give effect, or further effect, to* [certain ILO Conventions and Recommendations[3]].

Why stronger reference to international labour obligations is needed.

A major historical reason for the reference to specific ILO instruments in Australian federal labour statutes has been to invoke the external affairs power. This connection to the external affairs power is no longer necessary to sustain most parts of the FWA, given the various referrals of power from the States and the broad interpretation of the corporations power in the "Work Choices" case.[4]

However, providing a constitutional basis is not the sole reason for expressly mentioning international labour instruments in federal labour statutes. There are at least three other reasons, and they explain why the FWA's current objects clause should be amended:

- An objects clause provides interpretative guidance to courts adjudicating disputes about the meaning of FWA provisions;
- It is important to clarify the relevant (or at least the minimum) content of Australia's international labour obligations;
- Certain free trade agreements to which Australia is a party, or to which Australia seeks to be a party, require adherence to specific labour standards.

[2] That legislation relied extensively on the external affairs power in section 51(xxix) of the Constitution. See generally *Victoria v Commonwealth* [1996] HCA 56; (1996) 187 CLR 416. However, see Parts 6-3 and 6-4 of the Fair Work Act (discussed in the main text).
[3] Conventions 111, 156 and 158 and Recommendation 166.
[4] *NSW v Commonwealth (WorkChoices case)* [2006] HCA 52, (2006) 229 CLR 1.

Interpretative guidance

This expression "take into account Australia's international labour obligations" is too vague and weak to assist in the interpretation of the FWA.

Unlike many other jurisdictions, Australia does not have a constitutional or treaty "anchor" which ground normative arguments around labour standards. The objects clauses of legislation thus assume particular importance. Section 15AA of the *Acts Interpretation Act* 1901 (Cth) provides that

> *In interpreting a provision of an Act, the interpretation that would best achieve the purpose or object of the Act (whether or not that purpose or object is expressly stated in the Act) is to be preferred to each other interpretation.*[5]

However, as Justice Gageler has indicated:

"The stated objects of the *Fair Work Act* are too general to permit of a conclusion that one construction would better achieve those objects than the other."[6]

In the absence of a more robust provision requiring consideration of Australia's international labour obligations, Australian courts have approached the interpretation of the FWA with little regard for international instruments, such as ILO Conventions or Recommendations, especially in comparison with courts in other major jurisdictions.[7]

The High Court, in particular, makes little reference to international labour standards when making constructional choices in statutory interpretation, or in developing the common law. For instance, the Court's recent decisions[8] on determining the existence of an employment relationship would appear to be inconsistent with the key ILO recommendation on the matter (Employment Relationship Recommendation, 2006 (No. 198),[9] which is followed in most other major jurisdictions.[10]

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[5] See the discussion in Dennis Pearce, *Statutory Interpretation in Australia,* LexisNexis Butterworths, 2018, 45-54.

[6] Gageler J (dissenting) in *Esso Australia Pty Ltd v The Australian Workers' Union; The Australian Workers' Union v Esso Australia Pty Ltd* [2017] HCA 54 at [69].

[7] ILO instruments are regularly cited by the Court of Justice of the European Union, the European Court of Human Rights, the Inter-American Court of Human Rights, the Supreme Court of Canada and Constitutional Court of South Africa: see, for example, the analyses in Janice R. Bellace and Beryl ter Haar (eds), *Research Handbook on Labour, Business and Human Rights Law*, Edward Elgar, Cheltenham, UK, 2019. For an example of the use of ILO instruments in labour jurisprudence see the Supreme Court of Canada's reference to Convention (No. 87) concerning freedom of association and protection of the right to organize *in Saskatchewan Federation of Labour v. Saskatchewan, 2015 SCC 4 , [2015] 1 SCR 245* per Abella (McLachlin C.J. LeBel, Cromwell and Karakatsanis concurring (at [67]).

[8] See Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd [2022] HCA 1. See, for example, the plurality's statement that "In this respect, the principles governing the interpretation of a contract of employment are no different from those that govern the interpretation of contracts generally. The view to the contrary, which has been taken in the United Kingdom[, cannot stand with the statements of the law in Chaplin and Narich" (at [60] per Kiefel CJ, Keane and Edelman JJ); see also *ZG Operations Australia Pty Ltd v Jamsek* [2022] HCA 2 (9 February 2022) and *WorkPac Pty Ltd v Rossato* [2021] HCA 23; (2021) 95 ALJR 681; 392 ALR 39..

[9] See in particular paragraph 9, which refers to the "primacy of fact": "For the purposes of the national policy of protection for workers in an employment relationship, the determination of the existence of such a relationship should be guided primarily by the facts relating to the performance of work and the remuneration of the worker, notwithstanding how the relationship is characterized in any contrary arrangement, contractual or otherwise, that may have been agreed between the parties".

[10] Compare, for example, *Dynamex Operations W. v. Superior Court and Charles Lee, Real Party in Interest,* 4 Cal.5th 903 (Cal. 2018) (California); *Uber BV v Aslam* [2021] UKSC 5 (United Kingdom).

To the extent that the High Court permits consideration of fundamental rights in relation to interpretative questions (e.g. via the "principle of legality"), the relevant rights are not clearly defined, and in any event, do not necessarily align with international labour standards. For example, the Court has given preference to values such as contractual autonomy and formal equality over labour rights, which are often premised on inequality of bargaining power.[11]

In other words, the High Court's approach to the interpretation of labour statutes, as well as its consideration of common law principles relevant to work, tends to entrench certain common law doctrines (often peculiar to Australia) rather than permit a normative consideration of fundamental policy issues reflected in international labour standards and in international jurisprudence.

It is unlikely that this will change unless there is a specific statutory object directing attention to international labour standards.

"International labour obligations"

The term 'international labour obligations" as used in the FWA is vague; it does not assist a court seeking to identify which instruments should, or should not, be considered in interpreting a labour statute. It could refer to, among other possibilities:

- all 190 ILO Conventions;
- those 69 Conventions the ILO's Governing Body has classified as "up to date" (more if those with "interim" status are included);
- those ILO Conventions Australia has ratified (58, or fewer if only those Conventions still in force are included);
- all 206 ILO Recommendations (or only "up to date" ones); and/or
- labour-related provisions in other United Nations human rights treaties.[12]

These possibilities present interpretative bodies, such as courts and tribunals, with little guidance.

Fortunately, it is possible to identify a number of key instruments that could be explicitly listed to give at least minimum content to the expression "international labour obligations" in a revised FWA objects clause.

In 1998, the International Labour Conference, adopted the *Declaration on Fundamental Principles and Rights at Work* ("the Declaration").[13] The Declaration identified eight core labour Conventions.[14] The Conventions concern four categories of fundamental rights and principles: the elimination of discrimination in employment; the abolition of child labour; the elimination of forced labour; and freedom of association and the effective recognition of the right to collective bargaining. Since the adoption of the 1998 Declaration, the core Conventions have been ratified by a large majority of member states and have been referenced in many international trade agreements. The most notable omission from the 1998 Declaration was health and safety at work. However, the International Labour Conference, the ILO's "legislature", decided to remedy this omission in its 2019 Centenary Declaration for the Future of Work, [15] indicating that "safe and healthy working conditions are fundamental to decent work".[16] On 10 June 2022, the International Labour Conference amended the 1998 Declaration to include a fifth category of fundamental rights and

[11] See, for example, the analysis in Pauline Bomball, 'Contractual Autonomy, Public Policy and the Protective Domain of Labour Law' (2021) 44(2) *Melbourne University Law Review* 502.
[12] Such as International Covenant on Economic, Social and Cultural Rights and the Convention on the Elimination of All Forms of Discrimination against Women, which were referred to the Industrial Relations Act 1988: see note 2 above.
[13] Adopted by the International Labour Conference at its Eighty-sixth Session, Geneva, 18 June 1998
[14] Conventions Nos. 29, 87, 98, 100, 105, 111, 138 and 182. The full titles are set out in the Annex.
[15] Adopted by the International Labour Conference at its One Hundred and Eighth (Centenary) Session, Geneva, 21 June 2019.
[16] At II.D

principles: a safe and healthy working environment.[17] The Conference identified two OSH Conventions which would now be fundamental:

- Occupational Safety and Health Convention, 1981 (No. 155); and
- The Promotional Framework for Occupational Safety and Health Convention, 2006 (No. 187).[18]

Since the fundamental Conventions are widely recognised in ILO member states and international trade agreements as constituting an indispensable core of labour standards, it is appropriate that they are explicitly included in the FWA. A court making a constructional choice in the context of provisions involving, for example, freedom of association, collective bargaining or anti-discrimination, should be asked to consider which interpretation would best give effect to Australia's international labour obligations under the relevant fundamental Conventions (in this case Conventions No 87, 98 and 111).[19] To be sure, some of the fundamental Conventions pertaining to matters which are primarily regulated in other legislation (such as the work health and safety laws applicable in each state and territory). However, referring to all fundamental Conventions in the FWA is important to ensuring consistency across all relevant statutes.

Several of the fundamental Conventions have associated Recommendations.[20] The Declaration does not refer to these Recommendations and so the case for expressly referring to them is less strong. Some may not be of direct relevance to the FWA (for example, Recommendation No.35 on forced labour) and the merits of specifically including them could be considered on a caseby-case basis.

In addition to the core Conventions, there are strong arguments that can be made for specific references to certain other non-core ILO Conventions and Recommendations. First, those already expressly named in the Fair Work Act. These are the Workers with Family Responsibilities Convention, 1981 (No. 156) and the Termination of Employment Convention, 1982 (No. 158), together with their associated recommendations.

Second, the Violence and Harassment Convention, 2019 (Convention No. 190) is a strong candidate for inclusion. Its ratification was recommended in the Sex Discrimination Commissioner's landmark Respect@Work: Sexual Harassment National Inquiry Report in 2020.[21] It is relevant to FWA provisions including those concerning general protections and bullying.

Third, the Employment Relationship Recommendation, 2006 (Recommendation No.198) should be included. It addresses the question of determining which workers should be covered by employment protection legislation, such as the FWA. As indicated above, Australian law is now out of alignment with one of the core principles of this Recommendation, the primacy of fact over contractual arrangements, and it is appropriate that it be considered in future cases.

An indicative and non-exhaustive list of ILO instruments which could be expressly referenced in the FWA is set out in the Annex.

[17] Resolution on the inclusion of a safe and healthy working environment in the ILO's framework of fundamental principles and rights at work, Adopted by the International Labour Conference at its One Hundred and Tenth Session, Geneva, 10 June, 2022.
[18] There were a number of consequential amendments to ILO documents, notably the ILO Declaration on Social Justice for a Fair Globalization, 2008.
[19] It is anomalous that only one of these Conventions (Convention No.111) are referred to in the FWA, notwithstanding the clear relevance of others (especially Conventions No.87, No. 98 and No.100)) to the matters regulated in the statute.
[20] Forced Labour (Indirect Compulsion) Recommendation, 1930 (No. 35) (this is relevant to developing countries) ; Equal Remuneration Recommendation, 1951 (No. 90); Discrimination (Employment and Occupation) Recommendation, 1958 (No. 111); Minimum Age Recommendation, 1973 (No. 146); Occupational Safety and Health Recommendation, 1981 (No. 164); Worst Forms of Child Labour Recommendation, 1999 (No. 190) and ; Promotional Framework for Occupational Safety and Health Recommendation, 2006 (No. 197).
[21] Recommendation 15.

Free trade agreements

Australia's obligations to international labour standards do not derive solely from ratification of international instruments. They are also set out in several free trade agreements,

It is common now for free trade agreements, especially those involving the European Union and the United States, to require observance of the fundamental ILO Conventions, although the precise nature of the obligations varies depending on the text of the relevant agreement.

For example, the Comprehensive and Progressive Agreement for Trans-Pacific Partnership[22] incorporates provisions[23] which require parties (including Australia) to "adopt and maintain in its statutes, regulations and practices thereunder" the rights stated in the 1998 ILO Declaration.[24]

In its current negotiations on a free trade agreement with Australia, the European Union has proposed even stronger text (consistent with its general approach to labour rights in trade agreements). The EU's draft article X.3.(2), provides that:

> *In accordance with the ILO Constitution and the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up, adopted by the International Labour Conference at its 86th Session in 1998, each Party shall respect, promote and effectively implement the internationally recognised core labour standards, as defined in the fundamental ILO Conventions*

While this is obviously subject to negotiation, the clause indicates the centrality of the ILO's fundamental Conventions to labour aspects of trade agreements. The European Union has required other states which have not ratified and implemented fundamental ILO Conventions to do so prior to signing a free trade agreement; this occurred, for example, in the case of the EU-Vietnam free trade agreement.

An express reference to the fundamental Conventions in the FWA would provide clear evidence that Australia is 'effectively implement[ing] the internationally recognised core labour standards'. This would assist not only in proving compliance with existing free trade agreements but also in negotiating future ones.

[22] Entered into force 30th December 2018. The current parties to the Agreement are Australia, Canada, Japan, Mexico, New Zealand, Peru, Singapore and Vietnam.

[23] From the Trans-Pacific Partnership, which, owing largely to the withdrawal of the United States from negotiations, has not yet entered into force.

[24] See article 19.3. *Declaration on Fundamental Principles and Rights at Work and its Follow-up (1998).* See also Korea-Australia Free Trade Agreement (entered into force 12th December, 2014) Chapter 17.

ANNEX: NON-EXHAUSTIVE LIST OF POTENTIAL INSTRUMENTS TO BE REFERENCED IN FWA OBJECTS CLAUSE

ILO INSTRUMENT	REASON FOR INCLUSION
CONVENTIONS	
Forced Labour Convention, 1930 (No. 29)	Fundamental Convention
Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87)	Fundamental Convention
Right to Organise and Collective Bargaining Convention, 1949 (No. 98)	Fundamental Convention
Equal Remuneration Convention, 1951 (No. 100)	Fundamental Convention
Abolition of Forced Labour Convention, 1957 (No. 105)	Fundamental Convention
Discrimination (Employment and Occupation) Convention, 1958 (No. 111)	Fundamental Convention and referred to in FWA (section 771)
Minimum Age Convention, 1973 (No. 138)*	Fundamental Convention
Occupational Safety and Health Convention, 1981 (No. 155)	Fundamental Convention
Worst Forms of Child Labour Convention, 1999 (No. 182)	Fundamental Convention
Promotional Framework for Occupational Safety and Health Convention, 2006 (No. 187)*	Fundamental Convention
Workers with Family Responsibilities Convention, 1981 (No. 156)	Currently included in FWA (sections 743, 771)
Termination of Employment Convention, 1982 (No. 158)	Currently included in FWA (sections 722, 758, 771, 784)
Violence and Harassment Convention, 2019 (No. 190)*	Respect@Work: Sexual Harassment National Inquiry Report (2020) Recommendation No.15 calls for ratification of this Convention
RECOMMENDATIONS	
Workers with Family Responsibilities Recommendation, 1981 (Recommendation No. R165)	Currently included in FWA (section 743)
Termination of Employment Recommendation, 1982 (Recommendation No. R166)	Currently included in FWA (sections 758, 771, 784)
Recommendation No. 198 on the Employment Relationship	Leading international instrument on defining employee for the purposes of labour standards.

* Not yet ratified by Australia.

Conventions No 155 and 187 were added to the list of fundamental Conventions in June, 2022.