Human Rights and Industrial Relations*

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Introduction

I well remember sitting on the steps of a large lecture hall to be instructed about Australia's industrial relations system by Professor Edwards (later a member of the Federal Parliament in the interest of the Liberal Party). Until his instruction, I had only seen that topic from the perspective of my lectures in constitutional law. Indeed, the conciliation and arbitration power in the Australian Constitution had been a most fruitful source of litigation in the High Court of Australia from the dawn of federation. Harry Edwards examined the system for its economic efficiency. He was often critical. But he would acknowledge (as I remember well) that some advantages of Australia's industrial relations system could not be measured solely in economic terms. Issues of justice and community were inescapably involved. Moreover, he would agree that, whereas economists would have as many opinions as their number allowed, and then some, lawyers (who for the most part made up the Conciliation and Arbitration Commission in those days) would reach a firm decision. They would do so without delay, on all the matters of dispute. It might be a decision that many regarded as wrong—and at least half of the economists, politicians and parties would do so. But it would be a decision. Decision-making and moving on, he acknowledged, were the strengths of the Australian system of industrial tribunals.

As Professor Alistair Davidson had said, the adoption of s. 51(xxxv) of the federal Constitution, giving the Federal Parliament power over conciliation and arbitration of industrial disputes extending beyond any one State, 'effectively put the major issue of social rights on a national scale—the relations between capital and labour—into the hands of a court'.[1] And courts (or their other-selves, independent tribunals) are trained and expected to make up their minds and solve contests quickly.

Kingsley Laffer was teaching in the School of Industrial Relations of the University of Sydney when I was taking my Economics degree. I knew his work well because I had taken the optional subject of industrial law when studying for my law degree. I read his books. But for one reason or another, I did not, whilst studying in this Faculty, take the course in which he lectured. I knew that his basic instruction was that 'accommodation in industrial relations had to be built on mutual trust'.[2] Often, but by no means always, the venue for searching out and finding the common sources of trust was, in the Australia of those days, the

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network of industrial tribunals, federal and State, that brought the chief contesting parties together. The Constitution seemed to cement those institutions in our national life. Longstanding practice, institutional self-interest and economic need seemed to ensure that things would stay that way for the indefinite future.

Justice Henry Higgins, one of the founders of the Australian Commonwealth, a Justice of the High Court of Australia and one of the eight High Court judges who served on the federal arbitral tribunal, remarked that 'without unions, it is hard to conceive how arbitration could be worked'.[3] The institutional importance of unions, and the counterpart employer organisations, as well as long habit, left no one in doubt, until recent times, that this was the way industrial relations would be conducted in Australia at least for my lifetime.

THE AUSTRALIAN ARBITRATION SYSTEM

Little did I imagine as I sat, literally, at Harry Edwards' feet in 1964 that, within a decade, I would myself be appointed, as I was in December 1974, to be a Deputy President of the Australian Conciliation and Arbitration Commission.

It is not always easy for those born at that time and since, to recapture a sense of the ascendancy of that Commission in Australia's economic, social and industrial relations life up to that time. As a boy and young man growing up in Australia after the Second War, I quickly learned of the importance of the industrial relations tribunals and of the federal one in particular. The High Court of Australia was a distant mystery. But the Arbitration Court (after 1956 the Arbitration Commission) was truly a force to be reckoned with. It fixed the basic wage and margins. It determined great issues of industrial justice. It decided questions such as equal pay for women and for Aboriginal workers. Its place as the guardian of industrial equity and the ultimate enforcer of the Australian nation's commitment to a 'fair go' in industrial relations, seemed incontestable. To be appointed to the national Commission was the highest aspiration of somebody engaged, as I became in my practice as a lawyer, in the field of industrial relations.

So this is the second reason why I am honoured to give this lecture. As a graduate from this Faculty and a one-time member of the national industrial tribunal, I feel a duty to return a little of the debt that I owe to those who instructed me in the intellectual disciplines that prepared me for my professional work.

I can remember my initial reluctance, as a young barrister, to accept a brief in the then State Industrial Commission in New South Wales. The case involved a compulsory conference, called to settle an industrial dispute involving my client, the Teachers' Federation of New South Wales. Successively, the client had dismissed or bypassed its traditional advocates: Lionel Murphy, Jack Sweeney, Neville Wran, Bill Fisher and Jim Staples. As a barrister you feel a certain sense of unease about a brief that is passed down such a hierarchy.

True to the Bar's motto 'servants of all yet of none', I went into the hearing. It took place in a small courtroom in the converted Barracks Building, built by Governor Macquarie to house the soldiers whose job was to keep the convicts in awe. That fine judge, Ian Sheppard, was presiding. I soon learned

two important lessons about arbitral tribunals in Australia. The first was that, like other courts and tribunals, there was no great mystery about them. They were made up of intelligent people striving to reach just and lawful outcomes as efficiently as possible. Secondly, I learned that industrial relations law could often be quite complex and technical. This was especially so in federal matters where constitutional questions commonly presented themselves unexpectedly.

As I entered this specialised field of practice, I came to know the legal and industrial practitioners on both sides of the record. I learned how the redoubtable Jack Sweeney QC would conceive, plan and execute a major test case every year to push forward the boundaries of what the unions asserted was industrial justice. One year, it might concern the claim to bring under State industrial regulation that part of the remuneration of employees of BHP Limited that was called a 'bonus'. In another year, it might be an attempt to increase the allowances for shift workers by proving the dislocation of their lives caused by the repeated disturbance of their circadian rhythms. These test cases were major affairs. And all the time there were other battles to be fought under federal law concerning the integrity of union elections or attempts to secure federal industrial coverage of workers hitherto covered by State industrial awards.

It is fashionable nowadays, in some quarters, to dismiss the industrial relations system that operated in Australia for most of the twentieth century. This was the industrial relations system that Kingsley Laffer knew, described and taught. It was undoubtedly a system that flourished under the stimulus of large, self-confident and powerful unions which, as Justice Higgins had foreshadowed, initiated proceedings in the arbitral tribunals, federal and State, to advance the collective interests of employees.

Much was achieved in those times. But, as with any human institution, there were weaknesses. The system as it developed sometimes produced passivity and resignation on the part of employer organisations. They were on the receiving end of arbitral decisions. Often they had to rely on the growth of the economy and on inflation to absorb the increases in money wages secured as a result of arbitrated awards.[4] The centralised, national system of awards sometimes gave insufficient attention to the efficiencies necessary in smaller enterprises and sometimes diminished workplace efficiency because of the intersecting and competing obligations of industry-wide award provisions. Sometimes there was insufficient stimulus to the parties to bargain and reach agreement, as the market economy would suggest is essential to efficiency, productivity and high employment.

These defects of the old system of compulsory arbitration do not constitute a new discovery. In the first Kingsley Laffer lecture, the former Prime Minister, Bob Hawke, observed in 1993:[5]

> Our system of compulsory arbitration has for too long preserved the myth that the futures of the industrial parties are in the hands of our tribunals. As Kingsley Laffer remarks, in truth, they never were. The history of our system demonstrates that tribunals acting alone cannot control inflation or increase productivity . . . The industrial parties must concede the truth of these observations and accept the responsibility for their futures themselves before we can be confident about the future.

> Like the adage of the horse and water, the industrial relations system can place the responsibility on the parties but it cannot guarantee that it will be accepted. And therein lies the risks of changes to the system.

Two major forces are now at work to secure changes to the traditional Australian system of industrial relations. Each of them has legitimacy. The one is centripetal in its dynamic. It proceeds or directs its energy inwards. The other is centrifugal in its dynamic. It is moving or directed outwards from the centre. Each can call in aid strong economic and intellectual arguments. The one looks at the success of the individual enterprise, viewed in isolation. The economy is made up of millions of such enterprises. The efficient inter-relationship of them with one another and with the whole is what maximises wealth for the whole economy and for the people who make it up. The other looks at the whole. Indeed, it sees our economy in the context of the economies of the region and of the world. It views the industrial relations issues of our nation as, in microcosm, examples of the issues of the global and regional economies and of fundamental rights of people in a wider world.

Each of these perspectives requires attention. Each would deserve its own Kingsley Laffer Lecture. But I must speak from the perspective that I know. And this brings me to the third reason for accepting this invitation.

THE INTERNATIONAL LABOUR ORGANISATION

Many Australians like to see issues solely from the viewpoint of their own country. This is true, whether the issue concerns sport, culture or economics. Partly because of inclination and partly because of experience I tend to see issues from a different perspective. I incline to view them from a broader focus. Each viewpoint is legitimate. Neither has inherent intellectual ascendancy over the other.

Australia is a unique country with its own responsibilities to its own people. But it is also part of its geographical region and part of the global economy. Each viewpoint has something to contribute to the whole. At different times, each viewpoint will be accorded more or less legal and social significance.

My own experience, in seeing legal problems from a global perspective certainly did not arise either in my course in law or in economics at this University. Law, in particular, was invariably confined to a particular jurisdiction. More often than not, that meant one of the subnational jurisdictions of Australia. In most matters of private law, in the 1960s, we still lived in our colonial enclaves.

But then, shortly after my appointment to the Arbitration Commission, I was seconded to help establish the Australian Law Reform Commission. In the performance of that task, I soon became aware of the need to adopt an international perspective to law. Moreover, I came to recognise the dynamic forces of international human rights. Work in the Organisation for Economic Cooperation and Development (OECD) relevant to privacy, in the World Health Organisation relevant to HIV/AIDS and in UNESCO relevant to the rights of peoples to self-determination were a prelude to involvement in the International Labour Organisation (ILO) about which I now wish to speak.

The ILO was established in 1919 by the Treaty of Versailles.[6] Its original Constitution (incorporated into the revised Constitution in 1946)[7] included amongst the basic principles acceptance that 'labour should not be regarded merely as a commodity or article of commerce'; that there is a 'right of association for all lawful purposes by the employed as well as by the employers'; a duty to ensure 'the payment to the employed of a wage adequate to maintain a reasonable standard of life as this is understood in [their] country'; the 'abolition of child labour'; and respect for the 'principle that men and women should receive equal remuneration for work of equal value'.[8]

When it came to re-establishing these principles after the Second World War, there was added a commitment to non-discrimination:

> All human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security *and equal opportunity*.

Both during its phase as an organ of the League of Nations and since its re-appearance as an agency of the United Nations, the ILO has set out to protect fundamental human rights in the context of employment. It has done this in many ways. Crucial to its endeavours has been the negotiation of international treaties to express the basic standards of behaviour to be observed in member countries, out of respect for fundamental human rights.

Australia has been a member of the ILO since 1919. It is a party to a number of the Conventions of the ILO. Amongst the most important of these are the Convention on Freedom of Association (No. 87);[9] the Convention on Collective Bargaining (No. 98);[10] the Convention on Equal Remuneration (No. 100);[11] and the Convention Against Discrimination in Employment (No. 111).[12]

Federal governments in Australia have on the whole been fairly conservative about the ratification of ILO Conventions. In part, this has been because of specific disagreement with the policies contained in some of the Conventions. Thus, the Indigenous and Tribal Populations Convention 1957 (No. 107) revised by the Indigenous and Tribunal Peoples Convention 1989 (No. 169) was resisted by Australia because of the doubt that the subject matter fell within the competence of the ILO and of its procedures. There was also a concern, in some quarters, that some of the language of the instruments reflected assimilationist policies, not now adopted in Australia with respect to racial discrimination generally or the rights of indigenous peoples in particular.[13]

In part, the caution that has existed in the ratification of ILO Conventions has also been attributed to the federal character of the Australian Constitution and the complex, inter-related system of federal and State regulation of industrial relations. Almost without exception, under successive governments of differing political persuasion, Australia has observed a consistent policy of obedience to the international obligations that are binding on it as a nation. Whilst Australia is a party to a treaty (and without denunciation of its treaty obligations), it takes its international duties seriously. Unlike some countries, it does not ordinarily

join, or remain in, international treaty systems unless it is willing to fulfil the requirements that come with the treaty.

The ILO Convention system has also been important in Australia for constitutional reasons because of the respective constitutional responsibilities and entitlements of the Commonwealth and of the States and Territories. The founders of the Australian Constitution did not provide to the Federal Parliament a general legislative power with respect to employment or industrial relations. Instead, it conferred a power to establish (as was soon done) a national system of conciliation and arbitration.[14] And it conferred particular powers with respect to trade and commerce[15] and certain corporations[16] that have lately proved important. But there was also a power to make laws with respect to external affairs.[17]

The last-mentioned power was recognised, quite early in the history of the Commonwealth, as a valid source, through the ratification of ILO Conventions, for the enactment of federal laws. Such laws might be concerned with aspects of industrial relations that would otherwise have been thought to remain within State regulation. Back in the 1930s it might have been possible for the High Court of Australia to take a restrictive view of this head of power. It could have done so on the footing that it was granted 'subject to this Constitution' and had to be read down lest, read expansively, the unilateral assumption of international obligations by the Federal Government could be used to dismantle the division of powers in the Constitution.

However, in *The King v. Burgess; Ex parte Henry*,[18] a majority of the High Court[19] rejected such a narrow view. In an influential joint opinion, Justices Evatt and McTiernan[20] made specific reference to the possible use of the external affairs power to give effect to ILO Conventions:

> And in our view the fact of an international Convention having been duly made upon a subject brings the subject within the field of international relations so far as such subject is dealt with by the agreement. Accordingly . . . Australia is not 'a federal State the power of which to enter into international conventions on labour matters is subject to limitations [within the meaning of Article 19(9) of the ILO Constitution]'. A contrary view has apparently governed the practice of Commonwealth authorities in relation to the ratification of the draft Conventions of the International Labour Office. In our opinion such view is wrong.

Once this stepping stone to the acquisition of permissible subjects of federal legislative regulation was acquired, the ILO Conventions (and other treaties) took on a much broader significance than they otherwise might have. There remained constitutional limitations inherent in the federal character of the Australian Constitution and in the High Court's duty to characterise a law as being truly one *with respect to* external affairs and truly one within the subject matter of an external obligation that Australia had assumed.[21] But the lesson of the decision in *Ex parte Henry* was that Australia's future federal legislation, specifically in matters covered by ILO Conventions, was bound up with international law. Whatever might be the position under other national Constitutions, with different powers, and in other nations with different

approaches to the ratification of international treaties, the Australian national polity was inextricably tied to freely assumed international obligations binding on the nation.

The extent to which this is still so can be illustrated by reference to a more recent decision of the High Court in *Victoria v. The Commonwealth*.[22] That decision upheld the constitutionality of several provisions involving radical changes to the federal system of industrial relations, established by the *Industrial Relations Act* 1988 (Cth). Many of the changes in question rested on international instruments, including ILO Conventions. Most importantly, the Termination of Employment Convention 1982 (No. 158) was used as a source for several obligations of the new federal Act.[23] The High Court, in a case heard before I joined it, by the affirmative decision of six of the Justices, upheld the validity of the legislation with only minor exceptions.[24]

Since 1996, the present federal government has, in several ways, reduced Australia's involvement in, and utilisation of, the work of the ILO. Its intention to do so was signalled during the federal election campaign that preceded the change of government.[25] Nevertheless, like its predecessors, the present government has not altered the Australian attitude to compliance with the nation's existing commitments under international law. Indeed, a number of the provisions of the *Workplace Relations Act* 1996 (Cwlth), a centrepiece of the government's industrial relations strategy, derive their constitutionality from the external affairs power and do so by reference to relevant ILO standards.[26]

One of the principal objects of the *Workplace Relations Act* is stated to be to 'assist in giving effect to Australia's international obligations in relation to labour standards'.[27] The Government elected not to denounce Australia's ratification of the ILO Convention on Termination of Employment (No. 158). It did this, although there were legitimate complaints and grievances concerning the departure from normal practice when the Keating Government ratified that Convention although no State or Territory of the Commonwealth had agreed to ratification.[28]

Despite rhetoric on both sides of politics and undoubted differences of emphasis, strategy, interest and empathy with respect to ILO Conventions and international law generally, Professor Breen Creighton has concluded that the present legislation 'does not mark as dramatic a break with the previous regulatory regime as either the proponents or the opponents of the legislation might like to suggest'.[29] According to him, the *Workplace Relations Act* 'still draws upon the external affairs power for its constitutional underpinning.'Professor Creighton has concluded:

> International standards, especially those adopted under the auspices of the ILO continue to serve as the constitutional foundation for the legislation in several areas—notably unlawful termination of employment, equal remuneration for work of equal value, workers with family responsibilities and discrimination in employment and occupation. The government also appears to have been at some pains to maintain compliance with ratified Conventions in framing its legislative changes. It may have done so with a degree of reluctance, but it has done so nonetheless.[30]

ILO WORK IN THE FIELD

It is against this background of our own country's long involvement with, and utilisation of, the work of the ILO that I wish to describe an involvement of my own in ILO activities that I believe provides a useful illustration of the positive function that this oldest of the United Nations agencies continues to perform. It did not involve Australia as such. But if, like me, you take the view that fundamental human rights are universal, aspects of our common humanity, work of the ILO in another country, greatly in need, is work for Australia whose citizens share the planet with people who suffer unjustly everywhere.

In 1950, the ILO established a Fact-Finding and Conciliation Commission on Freedom of Association.[31] The function of that Commission is to examine cases of alleged infringements of the rights of trade unions and employer organisations such as are referred to it. It is mandated to ascertain the relevant facts, to discuss with the government concerned any perceived departure from ILO standards and thereafter to report to the governing body of the ILO on its findings. Where a member country is a party to a Convention adopted by the ILO, a complaint may sometimes be investigated without consent. Where a country is not a member of the ILO, or is not a party to the particular Convention concerned, consent of the government is required before an ILO investigation can take place.

In 1988, during the Apartheid years, the Congress of South African Trade Unions (COSATU) lodged with the ILO a complaint against the Republic of South Africa. That country, although, like Australia, a foundation member of the ILO, had in 1966 withdrawn from membership. It did so shortly before a proposal to expel it was due to be debated. It was therefore necessary for the investigation which the Commission proposed to be referred to the Economic and Social Council of the United Nations. That body requested South Africa to give its consent to the reference of the COSATU complaint to the ILO. Ultimately, such consent was forthcoming. However, that was not before the Apartheid government had secured amendment of the labour laws of South Africa which, it claimed, removed the substance of COSATU's complaint.

The complaint alleged that amendments to the *Labour Relations Act* 1956 (SAf), given effect in 1988, had favoured and protected unions open only to 'white' members. Complaints were also made relating to the alleged infringement of the Act on the freedom to withdraw labour (or strike), guaranteed implicitly by ILO Conventions and (as it was put) by customary international law supported by such Conventions. By an amending Act of 1991, the offending provisions of the statute were removed. The provisions said to countenance racial discrimination in registering unions were also repealed. The prohibition on sympathy strikes was likewise abolished. The presumption of union liability for an alleged strike by its members was removed. Other specific complaints listed by COSATU were attended to.

Nevertheless, COSATU pressed on with its complaint to the ILO. On the eve of the dramatic constitutional changes that were to occur in South Africa, the ILO authorised the establishment of a panel to proceed with the investigation. I was appointed a member of that panel. The chairman was Sir William Douglas, past Chief Justice of Barbados. The other member was Justice

Rajsoomer Lallah, subsequently Chief Justice of Mauritius. The panel conducted its mission to South Africa. It took as its guiding principles the relevant instruments of international law, including the *Declaration of Philadelphia* adopted by the General Conference of the ILO in 1944, together with Conventions 87 and 98 of the ILO dealing with freedom of association and the right to organise.

The panel received the full cooperation of the de Klerk Government and its officials. It met Mr Nelson Mandela, freed from Robben Island but awaiting the constitutional changes that would result in his election as President. It visited all parts of the country. It spoke with employer, union and governmental representatives. The panel's report on behalf of the Commission found that, in important respects, South African labour law, even as amended in 1991, fell short of compliance with the ILO standards with which the government had agreed to 'associate itself' in anticipation of rejoining the ILO.

Particular attention was called to the needs of the law to provide protection to vulnerable workers. These included farm workers and domestic workers, at the time excluded from the protection of the *Labour Relations Act*. Limitations on members of the public service joining unions were held to be in conflict with ILO standards. Rules governing the constitution of trade unions, such as those prohibiting political affiliation, were also held to be in breach of ILO Conventions. The cumbersome procedures for the registration of unions were found to be an inhibition upon freedom of association. The legal restrictions on trade union activities were, in some respects, found incompatible with ILO norms. So were provisions of the law permitting the executive government to interfere in the collective bargaining process between parties to an industrial dispute.

The work of the panel uncovered much evidence of covert funding of pseudo union bodies inimical to COSATU in a government sponsored design to undermine the effectiveness of union solidarity. The lack of protection for unionists in the so-called 'Homelands' was exposed. South Africa's international obligations in respect of compliance with international law in those areas was emphasised.

The Commission did not simply put forward the personal opinions of the members of the panel. In each case of criticism of South African law, reference was made to the specific standards of the ILO Conventions and certain other international Conventions found to be applicable.[32] The panel called in aid the jurisprudence that had developed around the International Conventions as a result of decisions of the Governing Body of the ILO and the recommendations and findings of the Committee of Experts on the application of Conventions and recommendations.[33]

One basic principle of international law that is incontestable is that which stands against irrelevant discrimination between people on the ground of their race.[34] The panel's report concluded, in this respect:

> No trade union or employer's organisation should be entitled by law to limit its membership by reference to race. There should be a transitional period during which a special officer should be appointed with a statutory duty to facilitate, within a given time, the removal of all provisions whereby membership of

> such organisations or the holding of office in them, is confined to persons of a particular race.[35]

In the big picture of the struggle for equality, freedom and human dignity in South Africa, the work of the ILO Mission constitutes no more than a footnote. Nevertheless, on the cusp of constitutional change, the last Apartheid government felt the pull of the forces of international obligations with respect to the subject of industrial relations. The incoming Mandela government committed itself to implement the recommendations of the ILO report. So, eventually, it did.

Because of my own professional experience in the working of the Australian industrial tribunals, I was aware of the weaknesses and inefficiencies that could sometimes mark the system of formalised industrial relations that we had followed in Australia to that time. But I was also aware that, sometimes, those institutions could perform extremely useful functions. Often this was done not by invoking the procedures of arbitration (the outcome of which might leave both sides profoundly discontented, planting the seeds for future industrial disputes). The real value that I often saw in Australia's industrial tribunals was their capacity to bring disputes rapidly before an independent person in an available facility where, in effect, the parties to the contest were locked together and encouraged, cajoled, stimulated and sometimes hassled into an outcome for their dispute upon which they were able to agree. Agreement between parties was usually much more likely to be lasting than awards imposed by outsiders—that is unless those awards were themselves the formal manifestation of what the parties had already agreed.

In South Africa, before the ILO mission, the parties to industrial disputes were often left to the general courts of law to facilitate legal disposition of their contests. Their cases took months or years to be heard in the courts. In the meantime havoc or injustice played out their usual consequences. The new South African law laid emphasis on speedy access to facilities for mediation. Since its enactment in South Africa, it has been copied in neighbouring countries, notably Lesotho and Namibia.

HUMAN RIGHTS AND DECISION-MAKERS

Not every Australian judge or tribunal member can take part in the institutional work of the ILO. Yet, I am not alone in having had the privilege to do so. Thus, Commissioner Greg Smith of the federal Commission has worked as an adviser to countries in Southern Africa, extending the principles that the ILO panel on South Africa endorsed. Justice Alan Boulton, Senior Deputy President of the federal Commission, is currently on leave of absence from his duties, working in Indonesia. He is helping that country to build an infrastructure of law and policy in industrial relations. Justice Mary Gaudron, on her retirement from the High Court in February 2003, will take up a high position on the Administrative Tribunal of the ILO. Doubtless, there are other instances. Judges engaged in labour law cases, and tribunal members in discharging their duties, can also take into account applicable principles of international law as they perform their

functions. They can especially do this where those principles concern fundamental human rights.

No Australian judge or tribunal member should forget the important step stated in the reasoning of the High Court in *Mabo v. Queensland [No. 2]*.[36] The Court was there faced with the question whether the common law's refusal to acknowledge native title to land could still be accepted as stating the law, although it was so clearly discriminatory and unjust. In his reasons, which were endorsed in this regard by Chief Justice Mason and Justice McHugh, Justice Brennan pointed out:[37]

> The opening up of international remedies to individuals pursuant to Australia's accession to the Optional Protocol to the *International Covenant on Civil and Political Rights* brings to bear on the common law the powerful influence of the Covenant and the international standards it imports. The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights. A common law doctrine founded on unjust discrimination in the enjoyment of civil and political rights demands reconsideration. It is contrary both to international standards and to the fundamental values of our common law to entrench a discriminatory rule . . .

This principle is not, of course, confined to the *International Covenant on Civil and Political Rights*. It is one of general application. It extends to international law as declared by other binding treaties, certainly those to which Australia is a party. It therefore includes the international Conventions of the ILO which Australia has ratified.

Where the common law has no exact precedent, where a statute is ambiguous and, in my view, where the Constitution yields competing interpretations, universal principles of international law may be used to resolve the uncertainty.[38] Use of this principle with respect to constitutional interpretation may still be controversial. But use of it in the elucidation of common law principle and the ordinary functions of statutory interpretation is, in my view, wholly orthodox. The common law application is expressly endorsed in *Mabo [No. 2]*. The use in elucidating ambiguous statutory language is conformable with a longstanding principle of interpretation that attributes to parliaments a purpose (in the absence of clear and express language to the contrary) to respect and uphold the fundamental civil rights of the people.[39]

In Australia, industrial relations courts and tribunals have already made use of this approach in exercising their jurisdiction and discharging their powers. Thus in *Re Equal Remuneration Principle*,[40] five members of the Full Bench of the Industrial Relations Commission of New South Wales made explicit reference to the fundamental principles of human rights in the course of their reasoning. By that decision, the Full Bench established a new equal remuneration or equal pay principle intended to provide remedies for gender affected under-valuation of wage and salary rates involving workers in the State of New South Wales subject to the jurisdiction of the Commission. In the course of giving its reasons,

the result enunciated was founded squarely on a human rights approach. I am aware of no more explicit recognition by an industrial tribunal in Australia of the significance of international human rights norms for Australian industrial relations law and practice.

The following paragraphs in the reasons of the Full Bench explain what was done:[41]

> Every person has a basic human right to be treated equally and fairly in the sense that the person should not be dealt with on the basis of irrelevant considerations such as the person's sex, race or age and with a right not to be discriminated against by reference to such considerations . . . This right is reflected in various statutory provisions in New South Wales. The fixing of a rate of pay for, or the payment of a wage or salary to, a woman where that rate of pay, salary or wage has been fixed differently because of the woman's sex is presumptively an infringement of her human rights and inconsistent with the provisions of the 1996 Act.
>
> The right of women to equal treatment irrespective of their gender generally and specifically in relation to the question of equal pay is also recognised, essentially for the purpose of the protection of the right, by a variety of international covenants . . .
>
> The statutory provisions which are particularly relevant for our consideration in the present proceedings are provisions which exemplify human rights and the human rights concepts and which protect or enforce such rights. Both the High Court and the Human Rights and Equal Opportunities Commission have emphasised the special responsibility of courts and tribunals, in construing such legislation, to take account of and give effect to the statutory purpose whether found in a statutory object or otherwise.

Later in the Full Bench's reasons appears the following paragraph:[42]

> We have concluded that it is appropriate to adopt a principle, albeit not one in the terms proposed by the various parties, which deals with the issue of equal remuneration. We have done so for a number of reasons. The first is the considerations we have earlier referred to. That is the significance both in policy terms and the requirements of the Act . . . reflecting as they do important human rights, and that wage fixing principles in relation to the question of equal pay reflect the priorities, importance and the failure hitherto of some awards to address appropriately the issue of equal pay for equal or comparable work . . .

An illustration of the way in which principles of human rights can inform and influence construction of legislation may also be seen in a decision of the Federal Court of Australia in *Italiano v. Bethesda Hospital*.[43] That case concerned discrimination and harassment at work. It raised the question whether the hospital, as employer, had unlawfully terminated a worker's employment in contravention of the *Workplace Relations Act* 1996 (Cwlth).[44] The hospital's defence was that the applicant had resigned of his own volition. The evidence suggested that he had done so in reaction to persistent harassment that he had suffered from staff of the hospital.

Bill Italiano was employed as a part-time chef at the hospital. Six months after commencing that employment he disclosed to other staff members that he was homosexual. From that time until his employment ceased two years later, it was found that he was subjected to 'ongoing and systematic harassment' on the grounds of his sexual orientation (called in the applicable federal legislation his 'sexual preference'). The harassment ranged from derogatory name-calling, to mocking the applicant with 'extreme mannerisms' in a 'derogatory representation of a homosexual male'.[45] In one incident, Bill Italiano was locked in a cupboard. He was told 'now you are going back in the closet'. He alleged that this conduct continued in spite of his objections. The evidence established that he was significantly affected by the harassment. Medical evidence was brought that his poor relationship with his manager had contributed to ongoing depression. It was found that he eventually resigned as a result of the harassment.

The Judicial Registrar deciding the case concluded that, for the purposes of the Act, Bill Italiano fell within the phrase 'termination at the initiative of the employer'.[46] Of course, a narrow construction of that phrase would have warranted the conclusion that Bill Italiano's termination was on his own initiative. But a broad construction would bring him within the protection of the Act. In deciding between the narrow and the broad, the Federal Court has held it to be legitimate to take into account the purposes of the legislation. Where a person is driven to resign, so as to terminate intolerable conduct caused or sanctioned by an employer, it has been held possible to classify the *cause* of the termination as the antecedent conduct, not the act of resignation to which that conduct gives rise.[47]

When the high importance of upholding the purposes of the protection of human rights and fundamental human dignity expressed in the legislation are kept in mind, the adoption of a broad interpretation may more accurately carry into effect the protective legislative purpose. The adoption of a narrow construction would frustrate the achievement of the objects of Parliament. Where those objects are designed to carry into effect in Australian domestic law, ILO or other Conventions having a high human rights purpose, it is not unreasonable to prefer the meaning that accomplishes such purpose rather than that which would frustrate and obstruct its attainment.

It is sad indeed, in this day and age, to read a case such as that involving Bill Italiano and his workmates at the Bethesda Hospital in Richmond, Victoria. That such irrational conduct could still happen seems quite appalling. That it could happen today in Australia, the land of the 'fair go', is astonishing. Those who say that there is no need for legal protection against such conduct have never themselves been on the receiving end of harassment, denigration and humiliation. But many women have. Many Aboriginal Australians have. Many people of non-European race have, and not only in South Africa. Many of minority religions have. Many homosexuals have. Many living with HIV and AIDS have.[48] Some have suffered on the grounds of age.[49] Others by reason of disabilities irrelevant to their work performance.

Discrimination of such kinds can manifest itself in almost every aspect of life. But in so far as it appears in the context of employment, fundamental issues of

human rights and human dignity are presented. To do nothing may be to accept the intolerable. A just society, as I believe Australia to be, will not permit such wrongs to go unanswered whether at work or anywhere else. Statute and the common law will respond. Where the law permits it, the courts and tribunals of the nation will uphold the principle of justice protecting individual human rights and human dignity.

THE EVER CHANGING SCENE

The influence of ILO Conventions in our country will wax and wane. The utilisation of their principles in Australian law will vary over time. The greatest challenges for the ILO lie not in countries such as Australia but in lands where even the rudimentary rules of human rights are not obeyed and where minorities are killed or suffer other grievous deprivations. In such countries, as I believe my mission to South Africa showed, the ILO still plays a crucial educative role. In the field of industrial relations, its Conventions and standards afford a stimulus to industrial justice that is beneficial and potent.

In Australia, the human rights standards of the ILO and those stated in other international instruments will play a lesser role, simply because our representative democracy and independent courts and tribunals will generally ensure that, ultimately, industrial justice is attained. The growth of global and regional markets makes it likely that, in advanced societies and developed economies, the global principles of human rights will continue to influence to some degree our own industrial relations law. In a sense, the one is a counterpart of the other.[50]

Of course, there will be plenty of room for political debate and difference of opinion concerning the extent and content of that influence. But the great lesson of the new century, already taught, is that no nation today can totally go it alone. Now, truly, no land is an island, entire unto itself. The days when Australia could hide behind tariff walls cocooned in the national system of compulsory arbitration have gone forever. Yet in opening up our borders to the forces of international trade we inevitably open them to the influence of other international ideas and forces.[51] Amongst those ideas are those in the ILO Conventions. And amongst the most powerful ideas affecting our planet at this time are those that assert the common obligation to respect and defend fundamental human rights and human dignity in all aspects of life.[52]

The scene of industrial relations has changed markedly since Kingsley Laffer taught the subject at this University half a century ago when I was here. But the quest for justice and human dignity in work, as in other human activities, is even more powerful today. And some of the power comes from the global dynamic of universal human rights.

There are those who dislike this message and wish to have nothing to do with the ILO and its works. But with global markets come global forces of basic rights. This is what China is discovering as Russia and other nations did earlier. And the lesson is universal. It is even relevant to Australia.

Kingsley Laffer would be surprised if he could see the world of industrial relations today. The diminished role of the tribunals and their awards. The heightened concern with the workplace enterprise. The renewed attention to

conciliation and agreement. The falling membership of industrial organisations. Calls for a return to the ordinary courts, applying the general law. And so on. Yet I do not think he would be specially puzzled by the changes. After all his discipline was always an intensely practical one. It always responded to the changing moods of politics. And in the end it was always about securing the best possible outcomes to the struggle between economic profit and industrial justice: two wild horses locked together in a harness that commits them to eventual harmony and a common direction. Now they gallop in a global arena sniffing the breeze of global forces. For industrial relations today, the venues of Australia are no longer big enough.

NOTES

1. A Davidson, *From Subject to Citizenship in the Twentieth Century* (1997) 56, cited R McCallum, 'Collective Labour Law, Citizenship and the Future' (1998) 22 *Melbourne University Law Review* 42 at 58.
2. Kingsley Laffer cited in RJL Hawke, 'Industrial Relations in Australia: A Turbulent Past—An Uncertain Future' (Inaugural Kingsley Laffer Industrial Relations Memorial Lecture) 23 May 1993 (hereafter 'Hawke'), 3.
3. H Higgins, *A New Province for Law and Order* (1922), 15–16 cited R Naughton, 'Sailing Into Unchartered Seas: The Role of Unions Under the *Workplace Relations Act* 1996 (Cth)' (1997) 10 *Australian Journal of Labour Law* 112 at 115.
4. Hawke, above n 2, 6.
5. ibid. 11.
6. Treaty of Peace Between the Allied and Associated Powers and Germany, 28 June 1919; 2 Bevans 43. See B Creighton, 'The ILO and the Protection of Fundamental Human Rights in Australia' (1998) 22 *Melbourne University Law Review* 239 at 241 ('Creighton').
7. International Labour Office, Convention of the International Labour Organisation and Standing Orders of the International Labour Conference (1994) in Creighton, above n 6, 241.
8. Creighton, above n 6, 241.
9. The Freedom of Association and Protection of the Right to Organise Convention 1948 (No. 87). See Creighton, above n 6, 243.
10. The Right to Organise and Collective Bargain Convention 1949 (No. 98).
11. The Equal Remuneration Convention 1951 (No. 100).
12. The Discrimination (Employment and Occupation) Convention 1958 (No 111).
13. Creighton above n 6, 245.
14. Constitution, s. 51(xxxv).
15. Constitution, s. 51(i).
16. Constitution, s. 51(xx).
17. Constitution, s. 51(xxix). See *Koowarta v. Bjelke Paterson* (1982) 153 CLR 168; *The Commonwealth v. Tasmania* (1983) 158 CLR 1; *Richardson v. Forestry Commission* (1988) 164 CLR 261; *Queensland v. The Commonwealth* (1989) 167 CLR 232; *Polyhukovich v. The Commonwealth* (1991) 172 CLR 501; cf H P Lee, 'The High Court and the External Affairs Power' in H P Lee and G Winterton (eds) *Australian Constitutional Perspectives* (1992); D R Rothwell, 'The High Court and the External Affairs Power: A Consideration of its Outer and Inner Limits' (1993) 15 *Adelaide Law Review* 219; G Williams, 'Treaties and the Parliamentary Process' (1996) 7 *Public Law Review* 199 at 202–203.
18. (1936) 55 CLR 608.
19. Latham CJ, Evatt and McTiernan JJ.
20. (1936) 55 CLR 608 at 681–682.
21. *Grain Pool of Western Australia v. The Commonwealth* (2000) 202 CLR 479 at 517 [95].
22. (1996) 187 CLR 416.
23. R McCallum, 'The Internationalisation of Australian Industrial Law: The *Industrial Relations Reform Act* 1993' (1994) 16 *Sydney Law Review* 122; M Pittard, 'International Labour Standards in Australia: Wages, Equal Pay, Leave and Termination of Employment' (1994) 7 *Australian Journal of Labour Law* 170.

24. Creighton, above n 6, 257.
25. B Creighton, 'The *Workplace Relations Act* in International Perspective' (1997) 10 *Australian Journal of Labour Law* 31 at 32, 49; R McClelland, 'Does Australia Remain Committed to the International Labor Organisation', *Polemic*, Vol. 9, Issue 1, 12.
26. Creighton, above n 6, 279.
27. *Workplace Relations Act* 1996 (Cth), s. 3(k); cf *Industrial Relations Act* 1993 (Cth), s. 3(b)(ii). The reference was not contained in the original Bill but was added in response to an agreement between the Government and the Australian Democrats in October 1996 made to ensure passage of the Bill through the Australian Senate.
28. Creighton, above n 25, 33–34. The external affairs power still underpins the equal remuneration provisions of Pt VIB, Div 2 of the *Workplace Relations Act* and those aspects of Pt V1A, Div 3 of that Act dealing with termination for prohibited reasons, notification of redundancies, consultations in advance of redundancy and redundancy pay. In performing its obligations the Australian Industrial Relations Commission is still obliged to take account of the Workers with Family Responsibilities Convention and Convention No 156 still underpins the parental leave provisions of Pt VIA, Div 5. See Creighton, above n 25, 37.
29. Creighton, above n 25, 49.
30. ibid.
31. International Labour Organisation, Minutes of the Governing Body, 110th Session (1992), 62–90. The establishment and procedures of the ILO Commission are explained in Chapter 1 of its report: *Prelude to Change: Industrial Relations Reform in South Africa* (ILO, Geneva, 1992).
32. See eg Workers' Representative Convention 1995 (No. 135) of the ILO.
33. See ILO, *Freedom of Association and Collective Bargaining—General Survey of the Committee of Experts on the Application of Conventions and Recommendations* (ILO, Geneva, 1992); ILO, *Freedom of Association—Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO* (3rd edn, Geneva, 1985).
34. *Kartinyeri v. The Commonwealth* (1998) 195 CLR 337 at 419 [167].
35. ILO Report on South Africa, Ch. 14, Recommendations.
36. (1992) 175 CLR 1.
37. (1992) 175 CLR 1 at 42. Footnote omitted.
38. *Kartinyeri v. The Commonwealth* (1998) 195 CLR 337 at 417–422 [166]–[175].
39. cf *Bropho v. Western Australia* (1990) 171 CLR 1 at 17; *Wik Peoples v. Queensland* (1996) 185 CLR at 146–147; *Durham Holdings Pty Ltd v. New South Wales* (2001) 75 ALJR 501 at 506–508 [27]–[38].
40. (2001) 104 IR 438; [2000] NSW IR Comm 113; cf CE Landau, 'Recent Australian Legislation and Case-Law on Sex Equality at Work' (1985) 124 *International Labor Review* 335. There have been similar developments in Canada: C Parker, 'Public Rights in Private Government: Corporate Compliance with Sexual Harassment Legislation' (1998) 5 *Australian Journal of Human Rights* 159 citing *Public Service Alliance of Canada v. Treasury Board* (a decision of the Canadian Human Rights Commission).
41. [2000] NSW IR Comm 113 [43]–[45].
42. [2000] NSW IR Comm 113 at [64].
43. [1998] FCA 712, discussed J Catanzariti, 'Federal Court Urges Use of Harassment Policies', *Law Society Journal (NSW)*, August 1998, 35. See also A Chapman, 'Sexuality and Workplace Oppression' (1995) 20 *Melbourne University Law Review* 311; J Colangelo-Bryan, 'Discrimination Down Under: Lessons from the Australian Experience in Prohibiting Employment Discrimination on the Basis of Sexual Orientation' (1998) 7 *Pacific Rim Law and Policy Journal* 377; J Mathews, 'Protection of Minorities and Equal Opportunities' (1988) 11 *UNSWLJ* 1 at 18.
44. s. 170CK(2)(f).
45. [1998] FCA 712 at [7].
46. *Workplace Relations Act*, s. 170CD(1).
47. These are explained in Catanzariti, above n 43.
48. *IW v. City of Perth* (1998) 191 CLR 1.
49. *Qantas Airways Limited v. Christie* (1998) 193 CLR 280.
50. R Redman and K O'Connell, 'Achieving Pay Equity Through Human Rights Law in Australia' (2000) 6 *Australian Journal of Human Rights* 107.

51. See generally B Dabscheck, 'Human Rights and Industrial Relations' (1998) 4 *Australian Journal of Human Rights* 10; T MacDermott, 'Who's Rocking the Cradle?' (1996) 21 *Alternative Law Journal* 207.
52. R Callus and R D Lansbury, 'Working Futures: Australia in a Global Context' in R Callus and RD Lansbury (eds) *Working Future* (2002) 233.