XI. Treaties

*Tim Reilly**

Treaties—Australia-European Community Nuclear Safeguards Agreement

The following is extracted from a news release of the Department of Foreign Affairs and Trade of 10 September 1993:

> Australia and the European Community exchanged Diplomatic Notes in Brussels on 8 September, 1993 to further update arrangements in place for Australia uranium exports. The Notes cover international obligation exchanges and the possible future retransfer of Australian obligated plutonium to Japan.
>
> Safeguards obligations are attached to nuclear material when supplier countries place requirements on its transfer and use. Australia's requirements reflect its stringent safeguards policy for uranium exports.
>
> An international exchange of safeguards obligations on nuclear material located in different countries enables material with a particular national safeguards obligation to be available at a particular site for processing, without a physical transfer of the material. The commercial advantages include reduced transportation costs.
>
> Under the Exchange of Notes, the Australian Government will consider each request for an obligation exchange involving Australian obligated nuclear material on a case-by-case basis. Australia's strict safeguards requirements and non-proliferation objectives must be fully satisfied before a request is approved. The amount of nuclear material subject to Australian obligations within the network of Australian bilateral safeguards agreements will not be reduced.
>
> An international obligation exchange involves material in two countries, so before it can take place agreements covering obligations exchanges must have been concluded with both bilateral safeguards partners involved. An obligation exchange agreement with the United States was concluded on 19 December 1991. A similar agreement with Canada is expected to be finalised shortly.
>
> The Exchange of Notes on plutonium retransfers provides the European Community with Australia's prior consent for the retransfer of Australian obligated plutonium recovered from reprocessing in Europe of spent fuel from Japan's nuclear power reactors. The consent is limited to retransfers of plutonium which are also subject to the United States/Japan agreement on nuclear cooperation.
>
> Any such transfers of Australian obligated plutonium from Europe to Japan will be subject to the requirements of the Australia/Euratom agreement. In addition, the Note also requires Euratom to provide Australia with direct

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* Report prepared by Tim Reilly, International Organisations Law and International Litigation Group.

assurances on the physical protection arrangements for such transfers. The transfers will also be subject to the very detailed physical protection arrangements for plutonium transport set out in the Japan/United States nuclear cooperation agreement.

Treaties—Australia-Czech Republic Investment Treaty

The following is extracted from a news release of the Minister for Trade, Senator Cook, of 30 September 1993:

> The Minister for Trade, Senator Peter Cook, will today sign an Investment Promotion and Protection Agreement with the visiting Czech Minister for the Economy, Dr Karel Dyba.
>
> "The agreement will provide investors with mutual guarantees of compensation in the case of nationalisation or expropriation and recourse to international arbitration, if required", Senator Cook said.

Treaty negotiations—Proposed Australia-Indonesia Nuclear Science and Technology Agreement

On 17 August 1993 the Minister for Foreign Affairs, Senator Evans, answered a question on notice from Senator Coulter (Australian Democrats, South Australia) concerning the nuclear science and technology agreement with Indonesia. Question and answer follow (Senate, *Debates*, vol 159 (1993), p 87):

> (Q1) At what stage of development is the proposed Indonesia-Australia nuclear science and technology agreement.
>
> (Q2) Will the agreement be tabled in both houses of Parliament; if not, why not.
>
> (Q3) What will be the benefits for Australia in each of the following areas from the Indonesian nuclear science and technology agreement: (a) scientific; (b) commercial; (c) industrial; (d) national interest; and (e) environmental.
>
> (Q4) Does the agreement with Indonesia contain opt-out clauses if commercial and safeguards agreements are broken by either party; if not, why not.
>
> (Q5) Has Australia signed nuclear science, technology and information agreements with other countries; if so, which countries.
>
> (Q6) If Australia has nuclear science, technology and information agreements with other countries: (a) which of these countries have undergone International Atomic Energy Agency Board (IAEA) safety and/or safeguards inspections; and (b) have any of these countries undergone bilateral inspections.
>
> (Q7) What is the membership criteria of the IAEA Board.
>
> (Q8) Are there any countries represented on the IAEA Board that do not possess nuclear facilities such as power or research reactors.
>
> (Q9) Has the Australian Nuclear Science and Technology Organisation (ANSTO) ever invited the IAEA to undertake a safety inspection of HIFAR; if not, why not.
>
> (Q10) How many staff work on safeguards matters within: (a) the Department of Foreign Affairs and Trade; and (b) ANSTO.
>
> (Q11) How many staff work on diplomatic and technical matters within the safeguards areas of: (a) the Department of Foreign Affairs and Trade; and (b) ANSTO.

The answer to the honourable senator's question is as follows:

(A1) The conclusion of the Nuclear Science and Technology Cooperation Agreement with Indonesia is under discussion with Indonesian authorities.

(A2) Yes. See answer to question on notice No 1257 of 25 February 1992 (*Senate Hansard*, pp 180–181).

(A3) The objective of the proposed Agreement with Indonesia is to enhance existing and mutually beneficial scientific and technological cooperation in the peaceful nuclear field, including in such areas as nuclear medicine, radiation protection, nuclear-related safety information and applications of radioisotopes.

(A4) Full details of the agreement will be made public in the normal way after signature. The Agreement would not provide for commercial transfers of uranium to Indonesia (see my answer to the question without notice in the Senate on 10 December 1991—*Senate Hansard*, pp 4485–4486).

(A5) No. Australia has nuclear cooperation agreements with a number of countries primarily for the transfer of uranium and some of these also provide a general umbrella for wider nuclear cooperation such as nuclear science and technology exchanges. The agreements in the latter category are those with Canada, Egypt, Japan, Republic of Korea, Mexico, Philippines, Russia and the United States of America.

(A6) (a) A basic condition of Australia's nuclear cooperation policy is coverage by IAEA safeguards. All the countries listed in the answer to part (5) have safeguards agreements with the IAEA to enable IAEA safeguards inspections to take place. The IAEA has carried out safety review missions of some civil nuclear facilities in each of these countries.

(b) Pursuant to those agreements under which uranium has been transferred, the Australian Safeguards Office maintains regular contact with its bilateral partner through an exchange of information and visits.

(A7) Article VI.A of the Agency's Statute provides that the Board of Governors shall be composed of 35 members, 13 of whom are designated annually for membership by the outgoing Board as the "most advanced in the technology of atomic energy including the production of source materials" and taking account of geographic distribution. The remaining 22 members of the Board are elected on a geographic basis by the General Conference for two year periods.

(A8) All designated members of the Board such as Australia operate nuclear facilities. Of the current elected members of the Board, Ecuador, Nigeria, Paraguay and Saudi Arabia do not operate nuclear facilities.

(A9) No. Reviews run by the IAEA specifically related to research reactor safety come under the Integrated Safety Assessments of Research Reactors (INSARR) program. This program began in the 1970s and has applied mostly to developing countries to assist in the formulation of their regulatory standards. Before INSARR commenced, the IAEA periodically reviewed the safety of research reactors provided to member states under project agreements with the Agency. These circumstances did not apply to HIFAR. HIFAR's exemplary safety record, as attested by ongoing independent review, has not warranted an INSARR review. In any case, in accordance with Australia's view that ultimate responsibility for the safety of nuclear facilities rests with the sovereign state within whose territory the facilities are situated, final responsibility for the safe operation of HIFAR rests with the Executive Director of ANSTO.

(10) and (11)

(a) 12 staff

(b) 2 staff.

On 19 October Senator Bourne (Australian Democrats, New South Wales) asked the Minister for Foreign Affairs, Senator Evans, a question without notice concerning the Australia-Indonesia nuclear science cooperation treaty. The reply, in part, reads as follows (Senate, *Debates*, vol 160 (1993), p 2079):

> Discussions on the conclusion of the nuclear science and technology cooperation agreement are still taking place with Indonesia. The Indonesian minister for science and technology prefers that that nuclear cooperation agreement be signed in the context of a broader complementary science and technology agreement, and discussions on that general agreement are still in progress.
>
> With respect to the second part of Senator Bourne's question, as I have previously stated, the proposed nuclear science and technology cooperation agreement will not provide for commercial transfers of Australian uranium to Indonesia. It does refer to the potential for such commercial transfers in the future. It notes that an appropriate nuclear transfers agreement would be necessary to enable such transfers to take place.
>
> As I said in the Senate on 7 September, the nuclear science and technology cooperation agreement that is under discussion with Indonesia is, like most intergovernmental agreements of its kind, a framework agreement. While setting out the types of areas of intended cooperation, including nuclear safety issues, medical applications and so on, such agreements do not oblige either party to participate in particular projects. It is just a framework document. The proposed agreement is intended to enhance our cooperation with Indonesia in the nuclear area, but in such areas as it shells out: nuclear medicine, radiation protection, nuclear related safety information and technology, and applications of radio isotopes.
>
> With respect to the last part of Senator Bourne's question, our policy does prohibit the disposal in Australia of other countries' radioactive wastes. That has been applied through the Customs (Prohibited Imports) Regulations, under which radioactive materials are listed in schedule B. Importation is not permitted unless authorised by the relevant minister. While we do intend to introduce legislation to prohibit absolutely the importation of high level radioactive wastes of foreign origin, we import a number of goods whose classification as radioactive or waste may be difficult to resolve.
>
> The use of nuclear and radioactive techniques in modern economies occurs in areas as diverse as nuclear medicine, agriculture, water resource management, harbour siltation, biological studies and non-destructive testing of engineering works. All of these activities necessarily involve the production, transport and disposal of some degree of radioactive waste. It is in that context that we have to pick and choose our way fairly carefully through a legislative minefield. But the basic policy is clear and it has not changed.

Treaty implementation—Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents

The second reading speech for the Foreign Evidence Bill 1993, tabled by the Parliamentary Secretary to the Minister for Primary Industries and Energy, Senator Sherry, on 16 December 1993 read in part as follows:

> This bill has 3 purposes.
>
> First, it provides new procedures for enabling authenticated foreign testimony to be admissible, subject to appropriate safeguards, in certain criminal and civil proceedings. Secondly, it includes provisions to implement the Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents and finally it re-enacts, with minor changes, Parts IIIB and IIIC of the Evidence Act 1905...
>
> The Bill contains provisions, in Part 5, implementing the Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents, so that Australia can accede to the Convention.
>
> The Convention abolishes the requirement, imposed by many countries, for legalisation of foreign public documents. Legalisation is a system for authenticating an official document by certificates. Often a chain of certificates is required, and where the document is used in another country, frequently the final certificate is given, upon payment of a fee, by an official of a foreign embassy or consulate of the country where the document is to be used.
>
> The Convention provides for the issue by a Convention country of a single certificate which is sufficient evidence to authenticate the signature or seal on the original document.
>
> While the Convention is concerned specifically only to abolish legalisation by a diplomatic or consular official of the country in which the public document is to be produced, the effect of the Convention is also to render unnecessary previous certificates in a legalisation chain.
>
> After accession Australian residents sending foreign public documents to countries which normally require legalisation, but which are parties to the Convention, will be able to obtain a certificate from an Australian authority, rather than having to get the documents legalised by foreign diplomatic or consular officials.

Treaties—International Labour Organisation Conventions—Ratification

On 28 September 1993 the Minister for Industrial Relations, Mr Brereton, answered a question on notice from Mr Hollis (ALP, Throsby) concerning International Labour Organisation Conventions. Question and answer follow (House of Representatives, *Debates*, vol 189 (1993), p 1286):

> (Q1) Will he bring up-to-date the information provided by his predecessor in the answer to question No. 1805 (*Hansard*, 15 September 1992, page 1090).
>
> (Q2) Did another predecessor assure Senator Bolkus (*Senate Hansard*, 3 June 1987, page 3520) that, once a revised Convention No. 107—Indigenous and Tribal Populations, 1957 had been adopted by the International Labour Conference, Australia would give urgent consideration to its ratification.

(Q3) What priority has been given to ratifying Convention No. 169—Indigenous and Tribal Peoples, 1989 during 1993, the International Year for the World's Indigenous People.

(Q4) Did the former Prime Minister assure the International Labour Conference in Geneva on 10 June 1983 that (a) Australia's ratification of Convention No. 151—Labour Relations (Public Service), 1978 should occur before the end of 1983 and (b) his Government had committed itself to ratifying Convention No. 155—Occupational Safety and Health, 1981 as a matter of course.

(Q5) What progress has been made in ratifying the two conventions referred to in part (4).

The answer to the honourable member's question is as follows:

(A1) Ratification of Conventions

Since 15 September 1992, Australia has ratified the following International Labour Organisation Conventions:

Convention No. 135, Workers' Representatives, 1971, ratified on 26 February 1993

Convention No. 158, Termination of Employment, 1982, ratified on 26 February 1993.

Federal-State consultations

The answer to question No.1805 provided information on consultations with the States and Territories by the Task Force established by the Government to review the ratification prospects of ILO Conventions. The unratified Conventions under consideration by the Task Force have not changed since the answer to that question, except that the ratification of Conventions No. 135 and 158 has removed them from consideration.

Reports to the Director-General

In accordance with Article 22 of the ILO Constitution, Australia reported to the Director-General in 1992 on the effect given to the following 14 Conventions which Australia has ratified:

ILO Convention No 7, Minimum Age (Sea), 1920;

ILO Convention No 9, Placing of Seamen, 1920;

ILO Convention No 11, Right of Association (Agriculture), 1921;

ILO Convention No 47, Forty-Hour Week, 1935;

ILO Convention No 87, Freedom of Association and Protection of the Right to Organise, 1948;

ILO Convention No 99, Minimum Wage Fixing Machinery (Agriculture), 1951;

ILO Convention No 111, Discrimination (Employment and Occupation), 1958;

ILO Convention No 112, Minimum Age (Fishermen), 1959;

ILO Convention No 122, Employment Policy, 1964;

ILO Convention No 131, Minimum Wage Fixing, 1970;

ILO Convention No 137, Dock Work, 1973;

ILO Convention No 144, Tripartite Consultation (International Labour Standards), 1976;

ILO Convention No 156, Workers with Family Responsibilities, 1981; and

ILO Convention No 159, Vocational Rehabilitation and Employment (Disabled Persons), 1983.

Reports under Article 22 on Conventions Nos 11, 47, 87, 112 and 122 were also prepared by the Australian Government in conjunction with the Territory of Norfolk Island.

In accordance with Article 19 of the ILO Constitution, Australia was also due to report to the Director-General in 1992 on the effect which had been given to Recommendation No. 165, Workers with Family Responsibilities, which supplements Convention No 156, Workers with Family Responsibilities, 1981. By arrangement with the ILO, this report was combined with the Article 22 report on that Convention.

Sessions of the International Labour Conference

Since 15 September 1992 one session of the International Labour Conference (the 80th Session) has been held. This took place in Geneva from 2 to 22 June 1993.

Conventions and recommendations adopted and Australian vote

The 80th Session of the International Labour Conference adopted a Convention and an accompanying Recommendation on the Prevention of Major Industrial Accidents.

The Australian Government delegates voted in favour of the above mentioned Convention and Recommendation.

Members of Committee of Experts

The members of the Committee of Experts on the Application of Conventions and Recommendations, their nationality, expiration of current term of office and principal appointment are as follows:

Mr Benjamin AARON (United States) (November 1994)Professor Emeritus of Law and former Director of the Institute of Industrial Relations, University of California, Los Angeles;

Mr Roberto AGO (Italy) (November 1993) Judge of the International Court of Justice;

Mrs Badria AL-AWADHI (Kuwait) (November 1994) Barrister-at-Law;

Mr Prafullachandra Natvarlal BHAGWATI (India) (November 1995) Former Chief Justice of India;

The Right Honourable Sir William DOUGLAS, PC, KCMG (Barbados) (November 1995) High Commissioner; former Chief Justice of Barbados;

Mr Semion A. IVANOV (Russian Federation) (November 1993) Principal researcher at the Institute of State and Law of the Academy of Sciences of the Russian Federation;

Mrs Ewa LETOWSKA (Poland) (November 1995) Professor of Civil Law (Institute of Legal Studies of the Polish Academy of Sciences);

Bernd Baron von MAYDELL (Federal Republic of Germany) (November 1994) Professor of Civil Law, Labour Law and Social Security Law;

Mr Keba MBAYE (Senegal) (November 1994) Former Vice-President of the International Court of Justice, First Honorary President of the Supreme Court of Senegal;

Mr Cassio MESQUITA BARROS (Brazil) (November 1993) Independent lawyer specialising in labour relations;

Mr Benjamin Obi NWABUEZE (Nigeria) (November 1995) Senior Advocate of Nigeria;

Mr Edilbert RAZAFINDRALAMBO (Madagascar) (November 1994) Honorary First President of the Supreme Court of Madagascar;

Mr Jose Maria RUDA (Argentina) (November 1995) Former President of the International Court of Justice; president of the United States-Iran Claims Tribunal;

Mr Antti Johannes SUVIRANTA (Finland) (November 1993) President of the Supreme Administrative Court of Finland;

Mr Boon Chiang TAN (Singapore) (November 1993) Barrister-at-Law and Solicitor;

Mr Fernando URIBE RESTREPO (Colombia) (November 1994) Barrister-at-law;

Mr Jean Maurice VERDIER (France) (November 1994) Professor of Labour Law at the University of Paris;

Mr Budislav VUKAS (Croatia) (November 1994) Professor of Public International Law at the University of Zagreb;

Sir John WOOD (United Kingdom) (November 1994) Barrister; Edward Bramley Professor of Law at the University of Sheffield;

Mr Toshio YAMAGUCHI (Japan) (November 1993) Honorary Professor of Law at the University of Tokyo, Professor of Law at the University of Chiba.

(A2) Yes.

(A3) The Government appreciates the significance of 1993 as the International Year of the World's Indigenous People. At the same time, the Government recognises the need for Aboriginal and Torres Strait Islander people to be involved in considering ratification of this Convention, in light of its significance for issues affecting them. Consultations with Aboriginal and Torres Strait Islander communities and organisations are being conducted by the Aboriginal and Torres Strait Islander Commission in order to assist the Government in its consideration of the ratification of the Convention.

(A4) (a) Yes. (b) Yes.

(A5) The Government remains committed to pursuing the ratification of appropriate international conventions, particularly those which protect important rights. This commitment motivated the establishment in 1991 of the Task Force, referred to in (1), to review and accelerate Australian ratification of ILO Conventions.

An important part of the process of pursuing the ratification of international conventions involves consulting the States and Territories. Both Convention No.

151 and Convention No. 155 have been the subject of consultations with State and Territory Governments, at Ministerial and officer level, in accordance with the normal arrangements for proposed ratification of ILO Conventions. they have also been the subject of discussions by the Task Force with State and Territory representatives. A majority of States have agreed to ratification.

Both Conventions have been identified as suitable targets for ratification in the Third Report of the Task Force. The Government hopes soon to be in a position to make a decision on ratification of these conventions.

Treaties—International Labour Organisation Conventions—Compatibility with Australian legislation

The following is extracted from the 1993 majority Report of the Senate Standing Committee on Employment, Education and Training entitled "The Operation of Sections 45D and 45E of the Trade Practices Act 1974":

ILO Conventions

(3.3) There is no "right to strike" recognised in Australian law. (Refer 3.14) In 1975 Australia ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR). Article 8(1) of this Covenant expressly deals with fundamental freedoms of association for trade union purposes. Under Article 8(1)(d) signatories to the Covenant "undertake to ensure...the right to strike, provided that it is exercised in conformity with the laws of the particular country". While such a statement is open to different interpretations, there seems to be a *prima facie* recognition here that the right to strike is a fundamental human right. The legal history surrounding Article 8(1)(d) suggests that unless a group of people are able to take lawful steps, including striking, to advance their interests, then in practical terms their right to freedom of association is null and void.

(3.4) In 1973, Australia ratified ILO Convention No. 87 on Freedom of Association and Protection of the Right to Organise, and ILO Convention No. 98 on Application of the principles of the Right to Organise and to Bargain Collectively. While these Conventions do not exhaust what is meant by the Freedom of Association, they have reached a high level of acceptance in the international community, giving them a special authority in relation to Freedom of Association principles, and substantial respect as standards for international human rights.

(3.5) While no right to strike is explicitly stated in these Conventions, the Committee of Experts on the Application of Conventions and Recommendations, along with the Committee on Freedom of Association, has declared in the General Survey (Report 111, 1983, Paragraph 200) that:

> the right to strike is one of the essential means available to workers and their organisations for the promotion and protection of their economic and social interests.

Moreover:

> The Committees have taken the view that legislative or common law provisions which expose workers and/or their unions to actions for damages and/or injunctions in respect of the legitimated exercises of the right to strike may deprive workers of the right to take strike action in order to protect and promote their economic and social interests.

The Committee of Experts has not expressed a considered view as to the use of boycotts, but in the General Survey mentioned above it stated (Paragraph 217) that:

> where a boycott relates directly to the social and economic interests of the workers involved in either or both of the original dispute and the secondary action, and where the original dispute and the secondary action are not unlawful in themselves...

then the boycott is a legitimate strike activity.

(3.7) However, on an earlier occasion, the Freedom of Association Committee declared that:

> The boycott is a very special form of action which, in some cases may involve a trade union whose members continue their work and are not directly involved in the dispute with the employer against whom the boycott is imposed. In these circumstances the prohibition of boycotts by law does not necessarily appear to involve an interference with trade union rights.

Clearly care is required when attempting to provide universal judgments about the acceptability of certain forms of industrial action...

(3.10) The ILO Committee of Experts and the Committee of Freedom of Association have declared that some restrictions on the right to strike are acceptable in certain circumstances—for example in certain public sector and essential services contexts. They have also agreed that governments may impose certain requirements on the taking of strike action—such as giving notice of a strike, the holding of ballots and recourse to compulsory conciliation and arbitration.

(3.11) In its 1991 Direct Request to the Australian Government, the ILO Committee of Experts noted the Government's attempts to secure tripartite support for compliance mechanisms within the normal industrial relations framework of legislation.

> The Committee trusts that these tripartite consultations will result in the adoption of enforcement mechanisms which respect the right of workers and their organisations to take strike action to protect their social and economic interests...—subject to those restrictions which have been considered by the Committee to be permissible (1983 General Survey, paragraphs 204–223). The present state of law in Australia is not in conformity with these principles.

(3.12) with regard to section 45D of the Trade Practices Act, that same Direct Request stated that:

> The Committee remains of the view that section 45D and its associated provisions render unlawful certain forms of industrial action which ought to be permissible. Accordingly, it calls upon the Government to take steps to bring this legislation into full conformity with the requirements of the Convention.

Given that the ILO is probably best placed to assess whether Australia is in breach of ILO Conventions, the above suggests that Australia is not regarded by the ILO as being in conformity with its obligations as a signatory to ICESCR, as a member of ILO, or as a party to ILO Convention No. 87. It is clear that there remain certain areas of Australia's industrial and related legislation which are

not in accordance with the requirements of ILO Conventions or Covenants. As far as sections 45D&E are concerned, the susceptibility of workers to substantial penalties and damages through the civil courts has been identified by the ILO as a significant problem. The Senate Committee therefore takes the view that sections 45D&E, in their own right, are "restrictive when compared with ILO conventions".

Treaties—International Labour Organisation Conventions and Recommendations—Domestic implementation under external affairs power

The following is extracted from the 1993 majority Report of the Senate Standing Committee on Employment, Education and Training entitled "Inquiry Concerning Aspects of the Industrial Relations Reform Bill 1993":

Term of Reference 2

The implications for the States of the proposals in the Bill with respect to the States rights and responsibilities

Introduction

The Australian Constitution outlines the rights and responsibilities of the Commonwealth in relation to its abilities to make laws. Section 51 outlines the powers available to the Commonwealth. For the purpose of this Bill, the relevant powers are:

(xx) Foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth:

(xxix) External affairs:

(xxxv) Conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State.

Residual powers to make laws are exercisable by the State. Because s51 of the Constitution does not explicitly give the Commonwealth the right to deal with industrial relations beyond what is specified above, the residual power to do so rests with the States.

Part A of the *Industrial Relations Reform Bill 1993* provides for minimum entitlements commensurate with the standards of ILO Conventions and Recommendations. The Federal Government intends to use its constitutional powers—notably its external affairs power—to underpin the implementation of these conventions and recommendations. The conventions and recommendations appear in schedule to the Bill and are listed in Appendix 2.

Implications for the States

It was argued before the Committee that the Federal Government's use of the external affairs and corporations powers to underpin laws dealing with industrial relations was an intrusion on the rights and responsibilities of the States in this arena.

Section 109 of the Constitution provides that:

> When a law of a State is inconsistent with a law of the Commonwealth, the later shall prevail, and the former shall, to the extent of the inconsistency, be invalid.

This will mean that, in certain circumstances, State legislation on industrial relations may be overridden. In particular, when the relevant State law does not make adequate provisions for minimum entitlements, employees will have access to those entitlements via the provisions in the new Bill.

There were five main issues which emerged on this matter during the Committee's inquiry...

The fifth and last issue is that the provisions of the Bill may be challenged for constitutional validity. The use of the external affairs and corporations powers has been criticised by some States on the basis that it changes the balance of power between the Commonwealth and the States and creates a precedent that the Commonwealth may use in the future to pursue its policy goals. Legal advice to the New South Wales Government is that a challenge in the High Court to the constitutionality of the Bill would have limited prospect of success.

Concerns by some of the State Governments about the legality of the Commonwealth's powers in relation to this Bill, were shared to some extent by employer groups. The ACM, for example, argued that ILO recommendations do not have the status of ILO conventions, and are therefore not capable of ratification.

The Committee sought a response to these concerns, and DIR has stated in evidence that advice from the Attorney-General's Department on the use of Commonwealth Constitutional power provides a legislative basis for implementing both the ILO Conventions and Recommendations. Legal advice from the Attorney-General's Department to DIR on the use of the external affairs power to support ILO Recommendations is at Appendix 1...

APPENDIX 1

Legal advice concerning the use of ILO Conventions and recommendations

The Department have advised that it has received the following advice from the Attorney-General's Department:

> The reference in the legislation to ILO Recommendations, as distinct from ILO Conventions, is entirely appropriate, notwithstanding that the Recommendations, unlike the Conventions, are not treaty instruments.
>
> The High Court has on several occasions expressed the view that the external affairs power extends to ILO Recommendations or, at least, to some classes of them.
>
> In general terms, ILO Recommendations may be relied on as a basis for the exercise of the external affairs power where they supplement ILO Conventions. It is established ILO practice to adopt, on the same subject, *both* a convention laying down the basic rules *and* a Recommendation containing more detailed provisions for their application. These provisions are intended by the ILO to act as guidelines for governments in applying the Convention.
>
> All the ILO Recommendations contained in the Bill fall into this class. They all operate as supplements to ILO Conventions of similar title and were intended by the ILO for use by governments as an integral part of implementing the Conventions.

> Another function of ILO Recommendations is to deal with matters concerning which the standards laid down are of so technical and detailed a character that they call for frequent adjustment to the situation in different countries, or the nature of which is such that there are wide variations in circumstances and practices from country to country. Among such matters, reference can be made to the employment of workers with family responsibilities, the outlawing of discrimination in respect of employment and occupation and the principle of equal remuneration for work of equal value. Implementation of this category if ILO Recommendations would also be regarded as a valid exercise of the external affairs power.
>
> The importance attached by the ILO Constitution to Recommendations is demonstrated by the fact that the Constitution requires member States of the ILO to report to the Director-General, at appropriate intervals, as requested by the ILO Governing Body, on the position of the law and practice in their country with regard to matters dealt with in Recommendations, showing the extent to which effect has been given, or is proposed to be given, to the provisions of each Recommendation, and such modifications of those provisions as has been found or may be found necessary to make in adopting or applying the (Article 19). These reports are examined by the ILO together with the reports required by Article 22 of the ILO Constitution (on the measures taken by member States to give effect to the provisions of ILO Conventions to which they are parties). Moreover, as the periodical reports issued by the ILO indicate, in most instances both Conventions and Recommendations on the same subject are considered together.

DIR also advise that:

> The International Conventions and Recommendations are appended to the bill only for the purposes of the references in the bill to those conventions and Recommendations. Appending these international instruments to the bill does not itself give legal effect in Australia to those instruments; it merely provides convenient access to the text of those instruments for the purposes of applying the provisions of the bill that refer to those Conventions and Recommendations.

Treaties—Information on Australian Treaty action

Current information concerning treaties which Australia has signed, ratified or acceded to is available from:

Treaties Support Unit
Legal Office
Department of Foreign Affairs and Trade
PARKES ACT 2600

Treaties—Tabling of texts in Parliament

Texts of all treaties on which Australia had taken action in the preceding six-month period were tabled in both the Senate and the House of Representatives on 10 May 1993 and 23 November 1993.