# The ILO to the Rescue? A Note on Japanese and Australian Experiences

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In the aftermath of the Victorian State election in 1992, the election of a conservative administration and the enactment of new State labour laws, momentum gathered within the labour movement to utilise ILO Conventions as a means of striking down the Victorian laws. The idea was: the ILO to the rescue; that the external affairs power of the Commonwealth Constitution together with legislation based on ratified ILO Conventions might be utilised to salvage some important trade union and related rights.

At different periods in the post-War histories of the Australian and Japanese labour movements, there have been calls for utilising International Labour Organisation Conventions in order to salvage some important trade union rights that those movements have fought to achieve over this century. This idea is very relevant to comparative Japanese-Australian industrial relations because its interesting to compare the contemporary discussion in Australia with the debates that occurred in Japan in the 1960s, including the clamour for ILO Convention 87 to be ratified by the Japanese Government. This was a move led by Japan's Leading peak union council, Sohyo, and the bulk of the Japanese labour movement, and the actual outcome was not in keeping with the expectations of many of the proponents of ILO regulation in the Japanese industrial relations system.

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The idea of using the external affairs power was championed by Gough Whitlam in his 1954 Chifley Memorial Lecture, 'The Constitution Versus Labor':

> A Labor Government should make more use of the external affairs power to extend its legislative competence, in particular by implementing conventions and treaties, such as those made through the International Labour Organisation and the World Health Organisation. The Commonwealth Government's representatives at International Labour Conferences have voted in favour of 67 out of more than one hundred conventions adopted by the Organisation; the Commonwealth Parliament has ratified 18 of them, one after a lapse of 18 years and three after a lapse of 14 years; the Commonwealth and States are considering ratifying another six. The excuse is made that the implementation of such conventions must rest with the Arbitration Court or with the State Parliaments. Since our States have no International representation or recognition, our Federal excuse is somewhat of a standing joke at ILO assemblies.[1]

This view of the utility for Australian political purposes of ILO Conventions had some antecedents in Australian labour movement history. Soon after the Treaty of Versailles and the adoption of the charter of the ILO, one Australian commentator urged that

> ...it will be seen that the Labor Convention involves the complete change of the present day economic order and the attitude of the nations towards the principles enunciated in that convention will be 'the acid test of sincerity'. Moreover the Labor movement in Australia has now important precedent for developing along true industrial lines and advocating the complete establishment of the Labor principles of the Treaty.[2]

However, the provisions of the Treaty of Versailles which specified the rights of the States in federations and therefore the limitations on the Australian Government to bid the States in international law, as well as the limitations of the industrial relations and the external affairs powers of the Australian constitution, provided grounds for suggesting that ILO Conventions would only be guides to action so far as their putative consequences in Australian law.[3] Orwell de R. Foenender in his study of *Industrial Conciliation and Arbitration in Australia* commented with respect to the external affairs power (paragraph XXIX) of section 51 of the Australian Constitution that 'The paragraph can therefore be dismissed, for the time being at least, in considering the sources, nature and extent of the authority of the Commonwealth in connection with labour affairs'.[4]

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Nonetheless there were some significant dissenting voices. The President of the NSW Trade Union Secretaries Association, Oscar Schreiber, asserted in 1936 that

> The Commonwealth Parliament, under the External Affairs section of the Constitution, can directly legislate to ratify the 40-hour week and other conventions of ILO. Outstanding constitutional lawyers both in Australia and England, declare that such ratification would be valid.
>
> Labor upon taking office in the Federal Parliament will legislate for the uniform application of a 40-hour week throughout Australia in industries subject to Trade Union legislation.[5]

In part, Schreiber could rely on the authority of two High Court Justices, Evatt and McTiema who in commentary on the powers of the Australian Government to legislate on international treaty matters, asserted 'In truth, the King's power to enter into International conventions cannot be limited in advance of the international situations which may from time to time arise'.[6] Moreover, in arguing for a wide view of what falls within the province of International affairs, those Justices stated

> By way of illustration, let us note that Part XII of the Treaty of Versailles declares that universal peace can be established only if it is based upon social justice and that labour unrest caused by unsatisfactory conditions of labour imperils the peace of the world.[7]

They stated, even arguing that recommendations of the ILO might be firm grounds for Australian legislation,

> But it is not to be assumed that the legislative power over 'external affairs' is limited to the execution of treaties or conventions; and, to pursue the illustration previously referred to, the Parliament may well be deemed competent to legislate for the carrying out of 'recommendations' as well as the 'draft International conventions' resolved by the International Labour Organisation or of other international recommendations or requests upon other subject matters of concern to Australia as a member of the family of nations. The power is a great and important one.[8]

However, as Foenander noted in his above-mentioned work, the High Court did not subsequently deal with the Commonwealth powers with respect to industrial laws and the ILO Conventions.

Recently that, of course, has changed in that the High Court's interpretation of the treaty making powers of the Commonwealth has become more liberal. This is usefully summarised in Terry Ludeke's recent article on this subject.[9]

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Why though has the debate about the use of ILO Conventions been so limited within the Australian labour movement? For despite Whitlam's arguments and those of other labour movement authorities, the enthusiasm for the ILO has been a new found thing.

One reason is the provisions of the Treaty of Versailles limiting the authority of the control government in federated states. However those provisions lapsed with the formation of the United Nations (with a constitution significantly different from the League of Nations) and a revised ILO (also with a new Constitution) after the War.[10] So why didn't the debates about using ILO Conventions revive in the post-war period? A bit of the explanation has to, do with the 'what can foreigners teach us' school of thought within the movement. But not much. The main explanation is that it didn't suit the industrial relations establishment to experiment with the ILO's views of collective bargaining and the rights of individuals to organise in unions of their choice.

Traditionally, the ILO's interpretation of Australia's conciliation and arbitration system has been a problem. For example, Mr Colin Polites, a former head of the Confederation of Australian industry, at a ceremony marking the ILO's Fiftieth Anniversary observed

> It seems to me that the ILO Freedom of Association Committee, for some reason or another, has misunderstood the Australian system of conciliation and arbitration and the registration provisions of that system. On the view the committee now holds of our system of industrial regulation, Australia would, if it ratified the Freedom of Association Convention, be guilty of a breach of the Convention 1 and perhaps even earn for itself a place on the 'special list' of the Conference Committee on the application of Conventions and Recommendations. We would earn this place because it would be said by the committee that on the experts' interpretation of our system of industrial regulation, Australia prohibits the formation of trade unions and employer associations. All of you know that nothing could be further from the truth. We can form any organisation we like.
>
> It is not obligatory to register a trade union under the Conciliation and Arbitration Act. What that Act says is that if you want to obtain certain of the benefits of the conciliation and arbitration system, you have to register under the Act and accept the obligations of the Act and the system. It is a voluntary decision and no statement by the Committee of Experts can change this fact. If the Committee of Experts cannot appreciate all this, then I am against ratification on that score alone.[11]

Professor John Niland remarked about this view, 'the Australian industrial relations club does not allow itself to be inconvenienced by ILO

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standards'.[12] The most significant reason for a revival or a sudden awakening of interest in ILO standards within Australian labour movement is that it suits the times. Not only is this because of the threat from Conservative States (and a future hostile Federal Government), but also with respect to changes in attitudes about the conciliation and arbitration system and the new orthodoxy that enterprise bargaining should be an alternative to the Australian Industrial Relations Commission's authority to shape the whole of the industrial relations system.

The call within the Australian labour movement for the legislative adoption of ILO Conventions by the Federal Government is not only aimed to oust some of the anti-union features of State legislation. The use of ILO Conventions to establish industrial rights in Australian law also flared up after the Victorian Supreme Court ruled several years ago in dealing with the air pilots dispute, that there is no legal right to strike. There were calls for the Australian Government to legislate to apply ILO Conventions 87 and 98 so that the common law tort against strike action could be replaced by the right of unions to take industrial action. This kind of talk became suddenly relevant in the second part of 1992 when the Federal Government proposed to adopt a number of ILO Conventions as part of sweeping industrial relations reforms. The Federal Government believed that with the support of the ACTU this was the way to beat Jeff Kennett's anti-union 1992 Victorian Industrial Relations Act. The old consensus represented in terms like the 'industrial relations club' is now over. Indeed the employers are reported to be considering going to the Freedom of Association Committee of the ILO, to seek the striking down of legislation wherever it exists in Australia supporting compulsory conciliation and arbitration. As new labour laws are being prepared some have wondered whether ILO Conventions might actually prevent the continuation of compulsory conciliation and arbitration, and would be used to strike down the 10,000 rule as to the registration of organisations, would prevent union monopoly rights in industrial negotiations and undermine the binding impact of the award system. Accordingly, there has been a rethinking as to the worth of the ILO Conventions. Is it too much of a headache to contemplate?

For some of us familiar with Japanese labour movement's history there are some eerie comparisons. (An appendix compares the two countries' ILO ratification record.) Although the Japanese Government endorsed the ILO's Convention 98 in 1953, it has hesitated about endorsing ILO Convention 87 until the mid 1960s. Partly this was because the latter Convention would affect public sector industrial relations in significant ways. The ICFTU and the Japanese trade union centres lodged complaints with the ILO that led to an inspection by an ILO mission of the Japanese industrial relations system

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in 1964. Earlier in the decade fierce demonstrations were organised by Japanese trade unions in favour of the Government modernising its labour laws consistent with ILO conventions. That inspection, as well as various ILO conferences in the early part of the 1960s, chided the Japanese Government for not allowing full rights to bargain and to organise consistent with ILO Convention 87 and other ILO Conventions. Without going into the details of all that happened in the '60s (there are various articles in the bibliography that outline some of this), the Japanese Government decided to allow legislation consistent with ILO Convention 87 but it will not adopt all that the unions wished and we would utilise some of the conditions of other ILO conventions to limit the right to strike in some sections of the public service, including essential services, and the private sector relevant to essential services, and limit the rights of unionists to recruit supervisory and managerial employees who are excluded by some of the ILO Conventions. The upshot of the 1965 Industrial Relations reforms was hardly what the unions had expected and led to significant organising difficulties, some of them crippling in some industries, for the trade union movement. So it pays to study what happened in Japan thirty years ago.

However, this is not to sound too alarmist or to exaggerate the comparison. As always, it pays to be careful before leaping into a new regulatory system. And I speak as someone in favour of enacting relevant ILO Conventions as part of the Australian industrial relations regulatory environment.[14] In addition the Australian Government's position is not to make Australia a 'colony of the ILO'.[15] Rather, its position is to address the criticisms of the ILO concerning Australian industrial laws and the failure to provide for reasonable rights to industrial action[16]. And opportunistically to utilise ILO conventions to establish minimum rights in a more deregulated Australian industrial relations system. In part those rights are based on ILO Conventions. But only in part; the Australian debate is mostly shaped by what the main participants think, rather than what the ILO decrees. The Industrial Relations Reform Act (1993) carried by the Australian Parliament at the end of 1993 is based on the Trade and Commerce and the specific Industrial Relations powers of the Constitution as well as the External Treaty powers.

Nonetheless, as Alice Cook has remarked about Japanese experiences, there are important questions raised about the ILO's impact on domestic politics; questions relevant to industrial relations in Australia and Japan.

> The question ... is whether the ILO has had a beneficial effect on the labor relations of developed countries in its efforts at standard setting. It is obvious that the answer is not clear in the case of Japan, but it is also evident that the experience there raises more questions than it

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> answers. The effect of ratifying ILO Convention No. 87 in Japan has been unquestionably to bring about considerable change both inside the unions in government employment and in their relations with the government, as employer. Is this what ILO ratification is meant to do? What are the purposes of ILO intervention in a domestic labor relations system? Can the ILO guess, much less determine, what ends may be served by the addition of a Convention to a sophisticated and complex labor relations system of other than western European or American elements? When some of the consequences of the legislation are in fact retrogressive by ILO standards, do the parties deleteriously affected have the recourse to the ILO for revisions and reconsiderations on the ground of its subversion of established national policy?[17]

Japan still comes before ILO Conferences for breaches, for example, of the rights of fire fighters to form their own unions. There continues to be some controversy about the relevance and applicability of 'universal labor standards'. Unintended consequences and the dynamism of the economic, societal and legal forces within a country will always influence that debate – and the evolving industrial relations system. It may be too early to comprehend the full impact of recent Australian changes. In Australia, in Japan and elsewhere, the impact and utility of the changes remain unclear. The future pattern of interaction of the ILO with governments, employers and unions is uncertain. Debates on the issues raised, unexplained concerns for social justice and economic activity, will remain controversial matters in industrial relations.

## Notes

1. See Whitlam (1957) in Whitlam (1977) pp. 40-41.
2. See Bodcand (1919) p. l0. In those days *The Australian Highway*, the journal of the Workers' Educational Association (itself an organisation formed by the Labor Council of NSW and other parts of the labour movement), was very close to the trade union movement.
3. But see the discussion by Staricoff (1935) and other articles in the bibliography.
4. de R. Foenander (1959) p. 4; de R. Foenander notes the theoretical significance of Evatts' views (referred to below) but draws attention to the court not dealing with an actual case involving industrial law and the external affairs power.
5. See Schreiber (1936) p. 3.
6. See the joint judgement by Evatt, J. and McTiernan J. in the King V. Burgess; Exparte Henry (1936) p. 681.
7. *Ibid.*
8. *Ibid*, p. 687.
9. See Ludeke (1993) *passim.*
10. See ILO (1944).

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11. See Colin Polites speech in Department of Labour and National Service (1970).
12. Quoted in Fn. 3 of Landau, C.E. (1987) p. 688.
13. See the article by Bolt (1993).
14. See Easson (1993).
15. See Howard (1993).
16. See Brereton (1993b). This media release appends a statement by the ILO's Committee of Experts on Freedom of Association concerning possible breaches in Australian law of ILO Convention 87.
17. See Cook (1969) p. 398.

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