ILO Convention No 138 and Australian Law and Practice Relating to Child Labour

Breen Creighton[1]

The Context

The economic exploitation of children is a matter of increasing concern to the international community. The International Labour Organisation (ILO) has estimated that between 100 and 200 million children under the age of 15 are economically active around the world. The work they perform ranges from "the essential (subsistence agriculture in the poorer countries) through the beneficial (training, skills development) to extremely harmful (as in the most egregious cases of bonded labour)".[2] The plight of children engaged in the carpet, textile, clothing and footwear industries of South Asia have attracted particular attention in this latter context — especially following the murder of a 12-year-old Pakistani in April 1995, allegedly because of his activities in opposing bonded labour in the carpet industry in that country.[3] Various Non-Government Organisations have called for international boycotts on the importation of products manufactured by child labour, and for the establishment and maintenance of linkages between trade liberalisation and the elimination of child labour.[4]

In Australia, the ACTU has consistently urged the importance of international action to combat child labour.[5] In November 1994 the Parliamentary Joint Standing Committee on Foreign Affairs, Defence and Trade recommended that "Australia initiate through the UN and, as necessary and appropriate in the future, the World

---

1 Professor of Law and Legal Studies, La Trobe University. Some of the research upon which this article is based was originally undertaken on behalf of the Commonwealth Department of Industrial Relations. The author wishes to thank the Department for permission to draw upon that work for present purposes. The Department does not, of course, bear any responsibility for the end-result.

2 *Report on Matters Relating to the Exploitation of Children*, tabled in the Senate by the Minister for Trade, 17 November 1994, p 1. For a most useful overview of the nature and extent of the problem of exploitative child labour (albeit from a United States perspective) see Department of Labor, *By the Sweat and Toil of Children* Vols 1 and 2 (Department of Labor, Washington, 1994 and 1995).

3 See for example "Canberra against import ban over forced labour", *Australian Financial Review*, 26 May 1995, p 7, and *"Trading the Work of Children"*, *Australian Financial Review*, 26 July 1995, p 15.

4 See for example International Confederation of Free Trade Unions, *Child Labour: The World's Best-Kept Secret* (ICFTU, Brussels, 1994); ICFTU, *Campaigning Against Child Labour: Campaign Document* (ICFTU, Brussels, 1994). See also Brett B *International Labour in the 21st Century* (Epic Books, London, 1994), pp 54-63.

5 For example a Resolution adopted by the ACTU Congress in September 1995 reaffirmed the trade union movement's condemnation of child labour "as a gross violation of the right of children to human fulfilment", and endorsed various forms of remedial action. These included recommending that affiliated unions should seek to ensure that "where companies are involved in overseas operations, compliance with the social clause (including compliance with ILO Convention 138) is part of enterprise agreements."

Trade Organisation, a campaign to introduce international standards of minimum age and minimum conditions of work for the employed." Some months earlier, the Senate had passed a resolution which reaffirmed "Australia's opposition to the economic exploitation of children, as expressed in Article 32 of the United Nations Convention on the Rights of the Child", and which called on the Government:

> to play an active role in developing within the international community effective measures to eliminate exploitation of children and to examine the feasibility of legislation to prohibit the importation of goods produced by child labour.[6]

Shortly afterwards, the Government announced the establishment of a tripartite Working Party on Labour Standards. This Committee was chaired by a former Attorney-General, Mr Michael Duffy. It received representations from a broad range of interested parties, and was due to report in late 1995.[7] It was expected to focus to a significant extent upon the issue of international action to combat the problem of child labour. In the meantime, the Government indicated that it was:

> taking a number of measures to strengthen its commitment to addressing the global problem of exploitative child labour. These include action in multilateral fora [sic] such as the UN system and in the ILO to raise the profile of, and work on, the issue; strengthening of Australia's international legal obligations in the field; and assisting Asia-Pacific developing countries in achieving equitable and sustainable economic growth, and thus help to ameliorate the underlying conditions for child exploitation. Australia will also emphasise the issue of exploitative child labour in bilateral human rights dialogue with other governments.[8]

One of the means of "strengthening Australia's international obligations" which has most frequently been canvassed in this context is ratification of the Minimum Age Convention (No 138), which was adopted by the International Labour Conference in 1973.[9] Indeed, the Federal Government has recently indicated that it was "consulting with the states and territories as a matter of priority so that we can proceed to ratification of the ILO's minimum age convention No 138 which deals with the issue of child labour comprehensively."[10] The principal purpose of this paper is to consider whether that instrument does indeed constitute an appropriate response to the problem of child labour, and whether ratification would constitute

---

6 Australia, *Hansard (Senate)*, 22 September 1994, pp 1245-57.

7 The Report was not available at the time of writing. It is now expected to be presented to the Minister for Overseas Trade in February 1996. Presumably, it will be made public at some time thereafter.

8 *Report*, above note 2, at 19.

9 Apparently many of the submissions to the Duffy Committee favoured this option. See also, for example, Faust B "Adult position on child labour", *The Australian*, 17-18 June 1995, p 28.

10 Australia, *Hansard (Senate)*, 22 September 1994, p 1252 (Senator Loosley).

either a feasible or an appropriate response on the part of the government of Australia.

The Substantive Requirements of Convention No 138 and Recommendation No 146

Objects

It is clear from the Preamble to Convention No 138 that it proceeds from the assumption that there is a need for special legislative provision relating to the employment of children and young persons, and that that provision should include prescribing a minimum age for admission to employment. The Preamble also leaves no doubt that the Convention is intended to have general application throughout all spheres of economic activity, and that its ultimate objective is the total elimination of child labour:

> . . . the time has come to establish a general instrument on the subject, which would gradually replace the existing ones applicable to limited economic sectors, with a view to achieving the total abolition of child labour.[11]

The intended scope of the Convention is also evident from Article 1:

> Each member for which this Convention is in force undertakes to pursue a national policy designed to ensure the effective abolition of child labour and to raise progressively the minimum age for admission to employment or work to a level consistent with the fullest physical and mental development of young persons.

The reference to pursuit of a "national policy" in Article 1 is redolent of some of the so-called "promotional" Conventions which have been adopted since the late 1950s.[12] It is the first occasion upon which this form of words has been used in a minimum age Convention,[13] and the preparatory materials for the Convention

---

11 For an overview of ILO standards relating to child labour see Dao, HT "ILO Standards for the Protection of Children" (1989) 58 *Nordic Journal of International Law* 54. See also Betten L *International Labour Law: Selected Issues* (Kluwer, Deventer, 1993), pp 289-327 and Valticos N & von Potobsky G, *International Labour Law* (2nd edn, Kluwer, Deventer, 1995), pp 216-226.

12 See for example Discrimination (Employment and Opportunity) Convention 1958 (No 111), Article 2 and Workers With Family Responsibilities Convention 1981 (No 156), Article 3(1). These "promotional" standards commit ratifying States to the pursuit of a defined policy objective, but then allow considerable latitude as to the manner in which, and the time during which, that objective is to be achieved. This approach is markedly different from that adopted in more traditional "prescriptive" Conventions, which make detailed provision as to what must be done to establish and maintain compliance, and which normally require full compliance within one year of ratification.

13 General Survey by the Committee of Experts on the Application of Conventions and Recommendations, *Minimum Age*, ILC, 67th Session (1981), Report III (Part 4B), para 57 [Henceforth, General Survey]. The Committee of Experts conducts a General Survey each year into one or more Conventions and/or Recommendations dealing with a given topic or topics. They are based on

explicitly state that it was "not intended simply as a static instrument prescribing a fixed minimum standard but as a dynamic one aimed at encouraging the progressive improvement of standards and of promoting sustained action to attain the objectives."[14] But it is important to appreciate that those "objectives" are not open-ended. Rather, they are those set out in the substantive provisions of the Convention and the accompanying Recommendation, and the fact remains that whatever the aspirations of those who framed the Convention, its substantive provisions are highly prescriptive in character. Indeed, they are so prescriptive that they make it very difficult both for developed and developing countries to put them into effect in national law and practice.

It should also be noted that the obligation imposed by Article 1 relates to raising the age of admission to *employment or work*. This form of words is of considerable practical significance:

> The use of the words "employment or work" means that all labour by young persons is covered, whether or not it is performed under a contract of employment.[15]

This means that the relevant age limit must apply to the self-employed as well as to those who work under contracts of employment: that is, to those who work under *contracts for services* as well as to those who work under *contracts of service*.[16] It also means that the law must extend to those who work in family undertakings and in the home.[17] The General Survey suggests that this requirement gives rise to compliance problems in many Member States.[18] As will appear presently, it most certainly gives rise to such problems in the Australian context.

The Specified Minimum — Article 2

The core obligation imposed by Convention No 138 is found in Article 2(1), which requires ratifying States, in a declaration appended to the instrument of ratification, to specify a minimum age for admission to employment within its territory, and on means of transport registered in its territory. This minimum must be not less than the age for completion of compulsory schooling, and in any event must be not less than

---

13 — *Continued*
reports from *all* Member-States, irrespective of whether they have ratified the Convention(s) concerned (see Constitution, Article 19 (5)(e)). They can provide an extremely useful guide to law and practice in relation to their subject-matter, and also to the Committee's views as to the substantive requirements of the instrument(s) they cover.

14 ILO, *Minimum Age for Admission to Employment*, Report IV(1), ILC, 57th Session (1972), p 31.

15 General Survey, para 35. See also paras 61-70 and 90.

16 For further consideration of the nature and effect of this distinction in Australian law see Creighton B & Stewart A *Labour law: An Introduction* (2nd edn, Federation Press, Sydney, 1994), Ch 7, and the sources cited therein.

17 General Survey, para 68.

18 General Survey, para 90.

15.[19] It may, however, be reduced to 14 in the case of States "whose economy and educational facilities are insufficiently developed."[20] That aside, the only permissible derogations from the generality of the Convention are those set out in Articles 4 to 7.

It is clearly appropriate that there be a nexus between the completion of compulsory schooling and the minimum age for entry to employment.[21] But the Committee of Experts has also emphasised that the existence and enforcement of a system of compulsory schooling is not in itself sufficient to demonstrate compliance with Article 2(1). There must also be appropriate restrictions on employment or work outside school hours, and during school holidays:

> Some countries...have no effective minimum age for admission to employment or work, and instead forbid employment for young persons during school hours and times when school is in session. While this limits the times during which young persons may work, it does not meet the Convention's requirement of setting a minimum age for all employment or work.[22]

The Committee has also evinced a certain lack of sympathy for arguments to the effect that permitting young persons to work outside school hours and during school holidays can contribute to their physical and mental development by familiarising them with the realities of working life, and helping to inculcate the "work ethic".[23] In rejecting the proposition that this makes it unnecessary to impose specific restrictions upon such employment, the Committee has indicated that even in countries with "an adequate educational infrastructure", and high levels of school attendance, there are still "many possibilities of abuse inherent in this approach." The Committee has also pointed to the fact that when adopting the Convention the Conference expressly rejected arguments of this character, and had instead determined that the need for work experience etc could adequately be met through the "light work" concept endorsed by Article 7.[24]

Excluded Categories of Employment or Work — Article 4

Article 4 of the Convention allows the competent authority to exclude certain categories of employment or work from the sphere of application of the Convention. It does not, however, specify the categories which may be excluded in reliance upon this provision. This was intended "to leave the competent authorities in each

---

19 Article 2(3).

20 Article 2(4). Of the 46 countries which had ratified the Convention as at 31 December 1994, 25 had specified a minimum age of 15, while 13 had specified 16. The remaining 8 had nominated 14 in reliance upon Article 2(4).

21 General Survey, paras 123-125 and 139-145.

22 General Survey, para 132. Australia is listed as one of the countries which adopts this approach. See also paras 386-7.

23 General Survey, paras 133 and 165-7. Both Australia and New Zealand come in for special mention in this context.

24 General Survey, para 165.

country a wide measure of discretion to adapt the application of the Convention to the national situation."[25] Among the possible exclusions mentioned in the preparatory materials were employment in family undertakings, domestic service in private households, homework and other work outside the supervision and control of the employer.[26] However, it is not possible to exclude work which may jeopardise the health, safety or morals of young persons within the meaning of Article 3.[27]

Furthermore, to be permissible, exclusions must be "necessary"; be "limited"; related to "special and substantial problems of application"; be adopted only following consultation with the relevant organisations of employers and workers; and be listed in the first Article 22 report following ratification.[28]

The proposal to include Article 4 in the Convention was strenuously opposed by the Workers' Group and by certain governments. However, all attempts to have it removed were unsuccessful — although its scope was narrowed by the addition of the dangerous work proviso in Paragraph 3.[29] Interestingly, at the time of the 1981 General Survey, no ratifying State had notified any exclusion in reliance upon Article 4,[30] nor have any of the countries which have ratified since that time.

Limitation of Application — Article 5

Article 5(1) permits ratifying States "whose economy and administrative facilities are insufficiently developed" to limit the scope of application of the Convention to only specified sectors of the economy. However, according to Article 5(3), the Convention must as an absolute minimum apply to:

> mining and quarrying; manufacturing; construction; electricity, gas and water; sanitary services; transport, storage and communication; and plantations and other agricultural undertakings mainly producing for commercial purposes, but excluding family and small-scale holdings producing for local consumption and not regularly employing hired workers.

Any limitations adopted in reliance upon this provision must be preceded by consultation with the relevant organisations of employers and workers; must be listed in a declaration appended to the instrument of ratification; and must be subject to periodic reports as required by Article 5(4).

As with Article 4, none of the countries which had ratified the Convention at the date of the 1981 General Survey had notified any limitation under this provision,[31] and

---

25 General Survey, para 71.

26 Ibid.

27 Article 4(3).

28 This report must be submitted within 18 months of ratification. The fact that exclusions must be listed at this stage suggests that the range of exclusions cannot subsequently be extended - for example in response to changing social and economic circumstances or to experience gained through the practical application of the Convention.

29 General Survey, para 78.

30 General Survey, para 79.

31 General Survey, para 104.

again, none of the countries which have ratified since that time has availed itself of the opportunities afforded by Article 5. On the other hand, the Committee did note that a number of reports from non-ratifying States indicated that "the relevant national legislation or provisions on minimum age do not apply to all sectors."[32] Most often, the excluded sector was agriculture.

Education and Training — Article 6

Article 6 provides that the Convention does not apply to work done by children or young persons of any age "in schools for general vocational or technical education or in other training institutions." It is also inapplicable to work performed in "undertakings" by young persons of 14 or more: in other words, to work performed as part of an apprenticeship or similar arrangement.

To fall within the scope of Article 6, work must be carried out in accordance with conditions prescribed by the competent authorities, after consultation with relevant organisations of employers and workers. It must also be an integral part of:

(a) a course of education or training for which a school or training institution is primarily responsible;

(b) a programme of training mainly or entirely in an undertaking, which programme has been approved by the competent authority; or

(c) a programme of guidance or orientation designed to facilitate the choice of an occupation or of a line of training.

According to the Committee of Experts:

> The reason that such an exclusion should be allowed is plain: work in these institutions is normally purely for training purposes, and there is only a very small risk that the young persons doing it will be exposed to the detrimental effects normally associated with their being employed. This is particularly true in view of the Convention's requirement that the work be an integral part of a course of education for which a school or training institution is primarily responsible.[33]

On the other hand:

> . . . a "training" relationship may be a subterfuge to enable an employer to demand heavy and continuous work from children before the legal minimum age for employment, and the benefit from lower labour costs. The competent authorities should take special care to ensure that, when an apprenticeship programme is in operation in a country and allows children under the legal minimum age to become apprentices, supervisory and inspection activities are carried out to "safeguard and supervise the conditions in which children and

32 General Survey, para 107. See in general paras 105-115.
33 General Survey, para 257.

young persons undergo vocational orientation and training" (Paragraph 12(2) of Recommendation No 146).[34]

Light Work and Artistic Performances — Articles 7 and 8

Article 7(1) provides that national laws or regulations may permit the employment or work of young persons of between 13 and 15 on "light work" which is:

(a) not likely to be harmful to their health or development; and

(b) not such as to prejudice their attendance at school, their participation in vocational orientation or training programmes approved by the competent authority or their capacity to benefit from the instruction received.[35]

According to Article 7(3):

> The competent authority shall determine the activities in which employment or work may be permitted under paragraphs 1 and 2 of this Article and shall prescribe the number of hours during which and the conditions in which such employment or work may be undertaken.

These provisions carry the clear inference that employment or work under the age of 15 (or 14 where appropriate) is not to be permitted in any circumstances. They also seem to require that there be formal legal provision relating to the *amount* of light work that may be undertaken, and as to the conditions in which it may be performed.

In the 1981 General Survey the Committee of Experts noted that "a large number of countries...seem to have adopted no provisions to allow and regulate the work of young persons below the minimum age for admission to regular employment."[36] The Committee also noted that "there are very few countries which have decided that light work should not be allowed for younger children."[37] In other words, most countries permit some work by children below the minimum age for admission to employment stipulated by the Convention, and most have made little attempt to regulate the amount of such work, or the conditions under which it is performed. This, according to the Committee, is not consistent with the Convention.[38] Quite clearly, this reading of the substantive requirements of the Convention must inhibit the capacity of many countries — developed and developing — to ratify and implement it.

In addition to the "light work" concept embodied in Article 7, Article 8 envisages a further limited category of exception. This is "for such purposes as participation in artistic performances." There must be prior consultation with the organisations of

---

34 General Survey, para 398.

35 In the case of countries which have specified a minimum age of 14 under Article 3(4), the permissible age-range for light work is 12 to 14 years (Article 7(4)).

36 General Survey, para 390.

37 General Survey, para 391.

38 General Survey, paras 165-7 and 391-2.

employers and workers concerned, and the permissible exceptions must be on the basis of a system of permits granted on the basis of individual application. Such permits must limit the number of hours to be worked, and the conditions under which work is to be performed. There does not appear to be any lower age limit below which such permits may not be granted.

Dangerous Work — Article 3

Article 3(1) requires that there be a minimum age of 18 for admission to "any type of work which by its nature or the circumstances in which it is carried out is likely to jeopardise the health, safety or morals of young persons." Paragraph (2) goes on to provide that the types of employment to which this requirement is to apply must be determined by the competent national authority after consultation with the relevant organisations of employers and workers.[39] Employment in otherwise hazardous circumstances may be permitted after the age of 16 provided there has been prior consultation with relevant organisations of employers and workers, and provided "the health, safety and morals of the young persons concerned are fully protected and that the young persons have received adequate specific instruction or vocational training in the relevant branch of activity".[40]

At first blush, this provision seems to carry the rather curious connotation that work which endangers health, safety or morals may be more acceptable after the workers concerned have attained the age of 18 than it is before that age. However, the Committee of Experts has explained that the underlying rationale is to protect young persons against exposure to hazardous work before they have formed the judgment necessary to undertake such work in safety. Employment before they have acquired this facility presents a danger not only to themselves but also to their fellow-workers.[41]

The Committee has also explained that dangers to health and safety are "normally simple to define, and easily identifiable." However:

> Dangers to the morals of young persons...are more difficult to classify, but should also be regulated by national authorities and forbidden to the young persons concerned.[42]

The General Survey noted relatively few examples among Member States of legislative prohibition of morally dangerous work. Those that were identified included employment "in establishments which sell alcoholic beverages, or more generally in cabarets, night clubs etc."[43] A more common form of prohibition was

---

39 Paragraph 10 of Recommendation No 146 offers further guidance as to the determination of the types of employment or work which are to be subject to special regulation for these purposes.

40 Article 3(3).

41 General Survey, para 394.

42 General Survey, para 215.

43 General Survey, para 246.

"employment or work in making, selling or distributing writings, pictures or other items which are likely to be injurious to their morals."[44]

Although Article 3 permits considerable discretion as to the determination of the types of employment or work to which there is to be restricted access for young persons, it is clear that a determination *must* be made for these purposes.[45] Not only that, it must be fairly specific in character:

> The Committee considers that a general prohibition on dangerous work, without additional measures, is unlikely to have much practical effect. If the types of employment or work which are too dangerous for young persons to perform are not designated specifically, there is usually no way for a young person to be prohibited from performing a particular dangerous job.[46]

Overall, the Committee found that most countries had adopted some measures to prohibit or restrict dangerous work by young persons, but that very few had done so in a manner that was consistent with the requirements of the Convention.[47] With many countries now adopting a more "deregulated" approach to occupational health and safety issues, it seems unlikely that levels of compliance with this provision will have improved to any significant extent since 1981. Indeed, they may well have deteriorated.

Enforcement — Article 9

Article 9(1) requires that "all necessary measures" must be taken for ensuring the effective enforcement of the provisions of the Convention. These should include "the provision of appropriate penalties". It is clear from Paragraph 14 of Recommendation No 146 that they should also include an adequately resourced and trained labour inspectorate.[48] Furthermore:

> Whatever the severity of the penalties laid down, they will only be effective if they are in fact applied, which requires measures whereby they can be brought to the attention of the judicial and administrative authorities, and if there is a will on the part of these authorities to require compliance.[49]

According to Article 9(2), national laws or regulations or the competent authority "shall define the persons responsible for compliance with the provisions giving effect to the Convention." This does not mean the enforcement authorities referred to in the previous paragraph. Rather, it means those persons upon whom legal obligations are imposed in order to give effect to the requirements of the Conven-

---

44 General Survey, para 247.
45 General Survey, para 216.
46 General Survey, para 225. See also para 230.
47 General Survey, paras 222-3 and 395.
48 General Survey, para 404.
49 General Survey, para 326.

tion. Most obviously, this would include employers. In certain circumstances, it could also include parents.[50]

For legal controls on child labour to be effective, it is clearly necessary that there be some means of verifying the ages of those for whose protection the Convention is designed. This finds recognition in Article 9(3):

> National laws or regulations or the competent authority shall prescribe the registers or other documents which shall be kept and made available by the employer; such registers or other documents shall contain the names and ages or dates of birth, duly certified wherever possible, of persons whom he [sic] employs or who work for him and who are less than 18 years of age.[51]

According to Paragraph 16 of Recommendation No 146, the following measures should be taken in order to facilitate the verification of age: (a) the maintenance of an effective system of registration and certification of births; (b) obliging employers to keep registers etc of dates of birth both of young persons employed by them, and of those "receiving vocational orientation or training in their undertakings"; and (c) the use of licensing schemes for children and young persons engaged in activities such as street trading etc where the inspection of employers' records is impracticable.

Can Australia Demonstrate Compliance with Convention No 138?

General

Australia has not ratified Convention No 138. A Task Force on the Ratification of ILO Conventions which was established by the Minister for Industrial Relations in May 1991[52] determined that the Convention did not constitute a suitable target for ratification by Australia.[53] In doing so, the Task Force seems to have been influenced by a number of factors: (i) a perception that the detailed requirements of the Convention, especially as interpreted by the Committee of Experts, were unduly prescriptive in certain respects; (ii) the identification of perceived compliance problems in relation to Articles 2, 3 and 7, and (iii) a recognition that it was most unlikely that the various legislatures within whose areas of competence implementation of the Convention fell would be prepared to introduce the measures which would be necessary to establish compliance.

The reluctance of the States and Territories to take the necessary remedial action to ensure compliance with Convention No 138 is entirely consistent with their attitude to the implementation of ILO standards in general.[54] In the absence of co-operation

---

50 General Survey, paras 328 and 330.

51 See also General Survey, para 403.

52 See further *Status of ILO Conventions in Australia 1994*, (DIR, Canberra, 1994) pp 24-25.

53 Ibid at 301.

54 See further Creighton & Stewart, above note 16, pp 50-51.

from the States and Territories, it would be open to the Commonwealth to ratify the Convention, and then to seek to give effect to the obligations incurred thereby through legislation passed in reliance upon the external affairs power in s 51(xxix) of the Constitution.[55]

Such a course would inevitably be highly controversial in character: if only because it would be seen as a further incursion by the Commonwealth into areas of traditional State responsibility. In practice, it is likely to be even more controversial than other attempts to legislate in reliance upon s 51(xxix) by virtue of the fact that the requirements of Convention No 138 appear to run counter to prevailing community values in a number of significant respects. These considerations make it exceedingly unlikely that any Commonwealth Government would be prepared to incur the wrath of the States and Territories, and quite possibly of the electorate, by trying to exercise the "external affairs" option to give effect to Convention No 138.

That said, the Commonwealth appears generally to have taken the view that law and practice in Australia were already in *substantial* compliance with the requirements of the Convention. This assessment was based on the fact that legislative provision in the various States and Territories requires compulsory school attendance up to the age of 15 (16 in Tasmania), and that child welfare and occupational health and safety legislation in all jurisdictions provided at least a measure of compliance with certain of the substantive requirements of the Convention. However, as noted earlier, the Committee of Experts has left no doubt that these measures are not sufficient in themselves to permit ratification. Furthermore, close examination of the Convention and the 1981 General Survey suggests that the extent of non-compliance may be rather greater than had previously been assumed to be the case.

Objects

Australia cannot realistically be said to have a "national policy" of the kind envisaged by Article 1 of the Convention. In part this may reflect a perception that there is no need for one, since child labour is not generally considered to be a major problem in this country.[56] It also reflects the fact that there does not appear to be a national policy to the effect that the minimum age for entry to work should progressively be raised to 16.

---

55 A majority of the High Court endorsed this option (obiter) in relation to ILO Conventions in *R v Burgess; Ex parte Henry* (1936) 55 CLR 608 (see especially Evatt and McTiernan JJ at 681-682 and 687). However, it was not until 1993 that the Commonwealth finally decided to avail itself of the opportunities identified by the Court in *Henry* - see now *Industrial Relations Act* 1988 (Cth), Part VIA. For more detailed consideration of the possible use of the external affairs power as a basis for Federal regulation of industrial relations see Creighton B "Industrial Regulation and Australia's International Obligations" in Ronfeldt P & McCallum R (eds), *A New Province for Legalism: Legal Issues and the Deregulation of Industrial Relations* (ACIRRT, Sydney, 1993), 101 at 107-115.

56 But see the Report on the National Outwork Information Campaign, *The Hidden Cost of Fashion* (Textile, Clothing and Footwear Union of Australia, Sydney, 1995), pp 20 and 31.

An even more fundamental problem in relation to Article 1 is the requirement that the policy, and the measures taken to implement it, must relate to *employment or work*. As noted earlier, the Committee of Experts has insisted that this form of words means that "all labour performed by young people is covered, whether or not it is performed under a contract of employment." On the evidence available, very few of the measures in reliance upon which Australia has formerly sought to demonstrate compliance with the Convention would extend to employment other than under a contract of employment. For example, award provision relating to the minimum age for performance of certain types of work or to conditions of work for apprentices or trainees, would not apply to non-employees.[57] This could clearly give rise to compliance problems in relation to Articles 2, 3, 6, 7, 8 and 9. Legislative provision relating to compulsory school attendance, child welfare etc appears to be subject to similar limitations.[58]

The Specified Minimum — Article 2

Law and practice in Australia appear to fall short of the requirements of Article 2 in a number of significant respects.

The most basic resides in the fact that Australia has not set a minimum age for admission to employment or work as required by Article 2(1). It is true that State and Territory legislation requires compulsory school attendance up to the age of 15 (16 in Tasmania). But as noted earlier, the Committee of Experts has expressly stated that that in itself is not sufficient for purposes of establishing compliance with the requirements of the Convention: it is necessary also to impose comprehensive restrictions on employment outside school hours and during school holidays. While there is *some* provision of that character in various jurisdictions, it is not sufficiently comprehensive in scope to satisfy the requirements of the Convention.

As also noted earlier, the Committee of Experts has unequivocally rejected suggestions by Australia, and a number of other countries, that work outside school hours and during school holidays can contribute to the physical and mental development of young persons, and that it does not need to be regulated due to the operation of legislative provision relating to compulsory school attendance. The Committee was not entirely unsympathetic to the argument that some such work can be beneficial to young people, but felt that those positive effects could adequately be accommodated through the "light work" concept in Article 7. As will appear

---

57 See, for example, the definitions of "employee" and "industrial dispute" in s 4(1) of the *Industrial Relations Act* 1988 (Cth). Essentially similar considerations would arise in the various State systems, although some non-employees are treated as "employees" for purposes of some State systems - see for example *Industrial Relations Act* 1991 (NSW), s 5 and Schedule 1. It should also be noted that s 150A(2)(b) of the *Industrial Relations Act* 1988 (Cth) requires the amendment of Federal awards to remove discrimination on grounds of age (but subject to the effect of ss 92AB and 150A(4) in relation to wage rates for employees who have not reached a particular age).

58 See for example *Children (Care and Protection) Act* 1987 (NSW), ss 50-54B and *Education (General Provisions) Act* 1989 (Qld), s 62 - cf *Community Services Act* 1970 (Vic), ss 75-77.

presently, Australia would also find it very difficult to demonstrate compliance with that provision.

Compliance problems in relation to Article 2 are compounded by the fact that in several jurisdictions it is possible for young persons to enter into full-time employment from the age of 14 onwards, provided they have obtained permission from the relevant authorities. These provisions are little relied upon in practice, but there appears to be a general perception that they should be retained for use in appropriate circumstances. Assuming that Australia cannot credibly claim to be a country "whose economy and educational facilities are insufficiently developed" for purposes of Article 2(4), it is very hard to see how retention of these provisions can be reconciled with the Convention. Even in the unlikely event that it *could* establish "insufficiency" in the requisite sense, Australia still would not be able to demonstrate compliance with the fundamental requirement to fix a *general* minimum age for entry to employment or work, even at age 14.

Excluded Categories of Employment or Work — Article 4

It will be recalled that this provision can be used as a basis for exclusion from the requirements of the Convention only to the extent *necessary* in relation to *limited categories* of employment or work in respect of which there are *special and substantial problems of application.* It cannot, in other words, be used as a basis for general exclusion from the requirements of the Convention. That being the case, it is hard to see that this provision would be of any real assistance in resolving Australia's apparent compliance problems. These difficulties do not relate to specific categories of employment or work, or to special and substantial problems of application. Rather, they relate to the fact that Australian law and practice taken as a whole simply do not comply with the requirements of the Convention.

Limitation of Application — Article 5

This provision also appears to be of no practical relevance in assessing the nature and extent of compliance with the Convention in light of the fact that it is most unlikely that Australia could, or would wish, to establish that it is a country whose "economy and administrative facilities are insufficiently developed" to enable it to take advantage of the limited exclusion permitted by this provision.

Education and Training — Article 6

Clearly there are significant numbers of young persons in Australia who work under the kinds of arrangements to which Article 6 is intended to apply. Since the effect of coming within the scope of this Article is to exclude the application of the Convention, it might appear that there would not be any significant compliance problems in relation to this issue. However, it is important to appreciate that to come within the scope of Article 6 work must be "carried out in accordance with conditions prescribed by the competent authority." Presumably this requirement could be satisfied through award regulation and other minimum standard provision.

The problem is that such provisions generally apply only to those who work under contracts of employment. It follows that if a young person was working under an arrangement other than a contract of employment, then there might not be any appropriate measure of "prescription" for purposes of Article 6.

Light Work and Artistic Performances — Article 7 and 8

Law and practice in Australia clearly do not comply with the requirements of Article 7 relating to "light work". There is no formal legislative recognition of that concept in any jurisdiction. There is no formal requirement that work performed outside school hours must be of the character described in Article 7(1). There is no formal determination as to the permissible forms of activity, or as to the number of hours that may be worked, or the conditions under which work may be performed. Of course, *some* of these matters may be regulated in *some* instances — for example through relevant award or legislative provision. The point is that there is no generalised regulation of the kind envisaged by Article 7.

Furthermore, there is no general proscription of employment under the age of 13. It is true that children under school-leaving age could not lawfully engage in full-time employment, and some jurisdictions do restrict the employment of children under certain ages in certain activities. But, once again, there is no comprehensive restriction of the kind required by Article 7.

Article 8 deals with the specific issue of artistic performances. There is some provision relating to this issue in some of the Australian jurisdictions. [59] But in no case does it appear to be fully consistent with the requirements of Article 8, and there seems to be no specific provision whatsoever relating to this issue in some jurisdictions.

Dangerous Work — Article 3

There is no general provision in any Australian jurisdiction which prohibits the employment of young persons under 18 years from engaging in work which is dangerous to their health, safety or morals. There is, however, a range of provisions which deal with various aspects of the health and safety of young persons. There is also a number of provisions which go at least some way to protecting their morals. However, it seems clear that this hotch potch of legislative and award provisions would not provide an adequate basis for compliance with Article 3.

It is true that the General Survey seems to suggest that there does not have to be comprehensive provision in relation to this matter, but on the other hand the Committee does insist that there be a determination as to the forms of work to which young persons should be permitted access. It seems unlikely that the more or less random series of restrictions and prohibitions noted in the previous paragraph would be sufficient either to constitute a "determination" or (in the case of young persons

---

59 See, for example, Part 4 of the *Children (Care and Protection) Act* 1987 (NSW).

between the ages of 16 and 18) to come within the permissible exception in Article 3(3).

Occupational health and safety legislation in all jurisdictions now places employers under a general duty to ensure, so far as reasonably practicable, the health, safety and welfare of *all* of their employees.[60] Clearly, permitting a young person to do certain work before they were sufficiently mature (physically or mentally) to do so could constitute a contravention of such provisions. The same would be true where an employer provided insufficient training adequately to equip a young person to do certain work. But whether this could be used in order to demonstrate compliance with Article 3 must be somewhat problematic in light of the Committee of Experts' insistence that "a general prohibition on dangerous work, without additional measures is unlikely to have much practical effect."[61]

Whatever room for debate there may be in relation to the protection of the health and safety of young persons, it seems quite clear that there is insufficient provision relating to the protection of the *moral* well-being of such workers in Australia to satisfy the requirements of Article 3.

Enforcement — Article 9

To the extent that there is substantive provision in Australia which conforms to the requirements of the Convention, it can credibly be said that there is adequate provision for enforcement: at least in terms of the availability of penalties and the existence of labour inspectorates. Some observers might question the adequacy of the resources made available to those inspectorates, or the preparedness of the relevant authorities to "require compliance" as stipulated by the Committee of Experts. But given that Australia appears to have encountered little difficulty in complying with its responsibilities under the Labour Inspection Convention 1947 (No 81),[62] it seems reasonable to suppose that Australia it would be able to demonstrate compliance with Article 9(1) and (2).

There also seems to be a possible basis for compliance with Article 9(3) in the sense that Australia does have a comprehensive system of registration and certification of births. However, employers are not under any general duty to maintain registers containing the "names and ages and dates of birth...of persons whom he [sic] employs or who work for him and who are less than 18 years of age." This suggests that Australia could not in fact demonstrate compliance with Article 9(3).

---

60 See for example *Occupational Health and Safety Act* 1983 (NSW), ss 16 and 56 and *Occupational Health and Safety Act* 1985 (Vic), s 21.

61 General Survey, para 225.

62 This Convention was ratified by Australia on 24 June 1975. The companion Labour Inspection (Agriculture) Convention 1969 (No 129) was identified by the Ratifications Task Force as a suitable target for ratification. However, it has not yet been ratified, despite the fact that there appears to be compliance in all jurisdictions. See *Status of ILO Conventions in Australia* 1994, above note 52, pp 282-283.

It is also important to appreciate that no matter how comprehensive and effective enforcement mechanisms may be, they cannot compensate for a failure to make adequate provision in relation to the substantive requirements of the Convention.

Is Convention No 138 a suitable target for ratification by Australia?

It seems clear, therefore, that law and practice in Australia are not in compliance with the requirements of Convention No 138 in a number of critical respects. It remains to consider whether it matters that Australia should find itself unable to ratify the principal international standard dealing with a fundamental human rights issue such as the exploitative labour of children. Put differently: *should* Australia be trying to ratify Convention No 138?

In purely domestic terms there is a strong case for saying that it should not. There is little evidence that there is a significant problem of exploitative child labour in this country. Most young people who work do so at weekends and in school holidays in order to supplement their pocket-money, or to help pay their way through school or to fund tertiary studies. Such activity may also reasonably be expected to help them acquire important life skills.

Furthermore, there is little reason to suppose that these young people are subject to the kinds of social and economic pressures which sustain exploitative child labour in the developing countries of Africa, Asia and Latin America. There is a highly developed educational system, with compulsory schooling up to the age of 15 (or in one case, 16). There is a mature and sophisticated system of industrial regulation which ensures that all workers are entitled to certain minimum employment conditions. There are also comprehensive health and social security systems.

Why then should Australia worry unduly about ratification of an instrument which appears to be out of sympathy with the needs and circumstances of this country — especially in light of the fact that the States and Territories have shown no inclination to introduce the remedial measures which would be necessary to remove perceived non-compliance? Indeed, the requirements of the Convention might well be thought to be so out of sympathy with community values on this issue that it would be socially and politically very difficult to try to legislate to eliminate the most common forms of child labour, or to subject it to a high degree of legal regulation — even assuming that it was considered appropriate in policy terms to try to do so.[63]

Nevertheless, it must be recognised that there *is* at least some danger of exploitation of vulnerable young people in some instances — especially in times of high

---

63 Australia is a Party to the United Nations Convention on the Rights of the Child. Inter alia, Article 32 of that instrument requires States parties to "provide for a minimum age or ages for admission to employment; provide for appropriate regulation of the hours and conditions of employment; provide for appropriate penalties or other sanctions to ensure the effective enforcement of the present Article." Whilst they are not as prescriptive as Convention No 138, there must still be considerable room for doubt as to whether Australian law and practice comply with these provisions.

unemployment and of static or falling living standards. The recently published studies by the Textile, Clothing and Footwear Union suggest that this possibility of abuse is no mere academic construct.[64] But it does not necessarily follow that the problem is so serious, or of such a character, that it requires the adoption of the kinds of remedial measures which appear to be needed in order to establish compliance with Convention No 138.

That in turn lends support to the proposition that Convention No 138 should not be regarded as a suitable target for ratification by virtue of the fact that it adopts an approach to the issue of child labour which simply is not relevant to the circumstances of a developed country such as Australia. This is borne out by the fact that it has been ratified by only a small number of developed countries, and that it appears to have generated considerable compliance problems for those countries that have ratified it. The fact that it has not been ratified by most of the countries where child labour is commonly perceived to be a major social and economic problem may be thought to cast further doubt on the efficacy of the Convention as a response to this issue in either the developing or the developed world.

That said, there is a number of persuasive reasons why Australia needs to look very closely at possible ratification of Convention No 138:

(i) the issue of exploitative child labour is of such over-arching importance that it is necessary for developed countries like Australia to be seen to subscribe to the norms of the international community on the matter;

(ii) in particular, attempts by Australia to encourage governments of developing countries to address the problem of child labour in a radical and systematic manner would be much more credible if this country could itself be seen to adhere to the relevant international standards on the matter, and

(iii) the child labour issue is already a focus of considerable international attention in the context of attempts by some governments and non-governmental bodies to build a "social dimension" into the process of liberalising world trade. Even if attempts to adopt a fully-fledged "social clause" founder, there is a distinct possibility that there will be mounting pressure on countries like Australia to demonstrate good faith in the matter by adhering to international instruments such as Convention No 138.

However persuasive these considerations may be, they do not alter the fact that as law and practice presently stand, Australia does not comply with the requirements of Convention No 138. On the basis of current arrangements relating to the ratification of ILO Conventions, it follows that Australia is not in a position to ratify the Convention.[65] It is also important to recognise that no matter what the pressure to

---

64 See note 56, above.

65 See *Status of ILO Conventions in Australia* 1994, above note 52, pp 22-25. The only Convention to have been ratified in full knowledge that law and practice were not in compliance was the

ratify, it would be most unwise to ratify an instrument which adopts an inappropriate approach to the issues with which it deals.

This really is the crux of the matter. It is clear that Convention No 138 is not well-suited to the needs and circumstances of developed countries such as Australia. It is beyond the scope of the present exercise to consider in detail whether the Convention is suited to the needs and circumstances of those developing countries where exploitative child labour is a major social problem. However, the poor ratification record, together with the apparently inexorable increase in the numbers of children and young persons who appear to be subjected to child labour, do suggest that it is ill-suited to the circumstances of those countries as well. Of course it is possible that the Convention *is* apt to its purpose, and that its apparent lack of impact reflects an unwillingness or inability on the part of the governments concerned seriously to try to come to grips with the requirements of the Convention. However, even on that assumption, there must come a time at which there is no point in persevering with an instrument which embodies entirely laudable objectives and which, within its own terms, may be technically quite sophisticated, if it bears little or no relation to the circumstances with which it is ostensibly intended to deal.

All of this suggests that there is a strong case for revision of Convention No 138. On the other hand, the standard-setting function of the ILO is widely regarded as being in a state of crisis,[66] which suggests that this would not be a propitious moment at which to seek to adopt a rigorous new standard on a sensitive and complex issue such as child labour. The Workers Group on the Governing Body and at the Conference could be expected to be extremely wary of any proposal that they think might lead to a dilution of existing standards. By the same token, employers and governments could be expected to be wary of any new standard that seems to entail further regulation of the labour market. As against that, as indicated at the outset, there is a widespread perception that exploitative child labour is a major social problem, and that the international community has a moral responsibility to facilitate its elimination, and pending elimination, to mitigate some of its more offensive manifestations. In other words, the issue is simply too important to be permitted to go by default.

65—*Continued*
Termination of Employment Convention 1982 (No 158), which was ratified on 26 February 1993. Law and practice in *no* jurisdiction were in compliance, and *no* State or Territory had agreed to ratification. The only other Convention to have been ratified without the agreement of all States and Territories was the Workers with Family Responsibilities Convention 1981 (No 156), which was ratified on 30 March 1992 without the agreement of New South Wales and the Northern Territory. The Northern Territory provided its agreement in 1990, but New South Wales did not do so until after the election of the Carr Government in 1995.

66 See further Creighton B "The Internationalisation of Labour Law" in Mitchell RJ (ed), *Redefining Labour Law: New Perspectives on the Future of Teaching and Research* (Centre for Employment and Labour Relations Law, University of Melbourne, Melbourne, 1996), and the sources cited therein.

This suggests that it ought to be possible to develop and sustain a consensus in favour of the adoption of a new standard that is more attuned to the nature of the problem of child labour, and to the differing needs and circumstances of countries that are in different stages of economic development, than Convention No 138. Given that it has always played a prominent role in the activities of the ILO,[67] Australia might reasonably be supposed to be in a position to provide part of the impetus for the adoption of such a standard. It certainly seems important to make the effort. If the ILO is to have a continuing role as a source of international labour standards in the new millennium it must demonstrate a capacity to adopt a standard which deals in an efficacious and appropriate manner with one of the most significant and intractable human rights issues with which the international community is presently confronted. If it is not capable of doing so, then the future of the Organisation is indeed bleak.[68]

---

67 See for example the address by the Deputy Director General of the ILO (Dr Mary Chinery-Hesse) to the ILO 75th Anniversary Conference, held in Melbourne in September 1994 (*Conference Proceedings*, Department of Industrial Relations, Canberra, 1994, pp 9- 10).

68 The Governing Body discussed a number of initiatives relating to child labour at its meeting in November 1995. As a result of that discussion, it was decided to place the issue of child labour on the agenda for the Conference in 1998, and to move to the adoption in 1999 of a new instrument dealing with the banning of "intolerable forms of exploitation of children (bonded labours, servitude, traffic or sale of children for employment or prostitution, other contemporary forms of slavery etc)" — Governing Body, *Proposals for the Agenda of the 1998 Session of the Conference*, GB 264/2, Para 21. However, there was no evidence of widespread support for the revision of Convention No 138.