FOREWORD

K D EWING*

I

Labour law has several purposes. The first is what might be referred to as its public law purpose, which relates to the role of the citizen as worker, and the importance of work to the realisation of citizenship within a community which extends beyond the workplace. The second is its private law purpose in terms of the private relationship between the employer and the worker, and the need to regulate what is invariably a relationship of sometimes profound inequality with great capacity for abuse.

The burden of labour law is thus a heavy one, and its active interplay of public and private law is perhaps unrivalled in the law school curriculum. The burden of the labour lawyer is made heavier by the volume of international law by which the discipline should be informed at national level, with the International Labour Organization ('ILO') having produced no fewer than 191 Conventions since its formation in 1919. These Conventions are treaties in international law and once ratified are binding on the countries by which they have been accepted. Australia has ratified 60 ILO Conventions.

ILO instruments emphasise both the public and private dimensions of labour law, and remind us of its inherently political function. As such they address both substance and procedure. The starting point is the ILO Declaration of Philadelphia of 1944, which now appears as an appendix to the ILO Constitution. Part III of the Declaration of Philadelphia (the importance of which was most recently reaffirmed by the ILO Centenary Declaration) contains what has been referred to as a Workers' Bill of Rights, in which two provisions stand out as highlighting the transformative purpose of labour law.

The first is procedural, imposing a duty on the ILO to 'further among the nations of the world programmes which will achieve'

> the effective recognition of the right of collective bargaining, the cooperation of management and labour in the continuous improvement of productive efficiency, and the collaboration of workers and employers in the preparation and application of social and economic measures.

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This is a duty in relation to procedures of a far-reaching nature. It is not a duty simply to promote collective bargaining, but a duty to promote 'the effective recognition' of what is referred to as 'the right of collective bargaining'.

Nor is it confined to collective bargaining and the governance of the enterprise. The duty applies much more widely to matters of economic governance, as made clear in Part I of the Declaration of Philadelphia which refers to 'the war against want' and the need for it to be carried on with 'unrelenting vigour within each nation', and by 'continuous and concerted international effort in which the representatives of workers and employers, enjoying equal status with those of governments, join with them in free discussion and democratic decision with a view to the promotion of the common welfare'.

It would be odd if this commitment to workers' and employers' organisations as participants as equals with government were to be confined to the international plane, to the exclusion of the domestic. On the contrary, when we refer to economic and social governance, what is envisaged is a different form of government from that practised in common law constitutional systems. It requires nothing less than the integration of trade unions on the one hand and employers on the other in the government of the enterprise, the industry or sector, and the national economy. It also requires structures and processes to facilitate such integration.

The second standout provision in the ILO Declaration of Philadelphia is substantive, imposing a duty on ILO Member States to adopt 'policies in regard to wages and earnings, hours and other conditions of work calculated to ensure a just share of the fruits of progress to all'. What is meant by 'a just share of the fruits of progress' is of course contentious. But it is unlikely that when the international community agreed to this objective in Philadelphia in 1944 they had in mind the extremes of wealth and poverty which continue to grow within and between nation states.

On the contrary this important objective points strongly in the direction of a commitment to social justice on both a global and national basis. The objective of a just share eschews any notion of a labour market: markets are where goods are bought and sold; workers stand before the market. Labour is not a commodity. Not only that: the objective of a just share tends to confound Otto Kahn-Freund's claim that '[t]he main object of labour law [is] to be a countervailing force to counteract the inequality of bargaining power which is inherent and must be inherent in the employment relationship'.[1]

Kahn-Freund identifies one object of labour law, but not the only object and not necessarily the main object. The other object is to ensure that workers are properly rewarded and their needs as citizens properly acknowledged not only in relation to the employer but in relation to the community of which they are a part. The obligation to ensure a just share invites high levels of regulation to ensure that income levels are within a prescribed range, and that income is based on the value

1 Sir Otto Kahn-Freund, *Labour and the Law*, ed Paul Davies and Mark Freedland (Stevens & Sons, 3rd ed, 1983) 18.

of the work undertaken having regard to the skill required, but also to the benefit to the community of the work or service provided.

It is in the context of this rich international background that the excellent articles in this Issue are to be read, each to a greater or lesser extent addressing either (i) problems of labour law failure in Australia, or in the case of climate change (ii) the need for labour law adaptation. All make the case in their different ways for significant and sometimes radical labour law reform, and in doing so each highlights an important underlying principle on which a reform process should be constructed if the objectives set out in the Declaration of Philadelphia are to be more fully realised in Australia.

II

The starting point of principle must be the universal application of labour standards. Cue the outstanding article by Andrew Stewart, Mark Irving KC and Pauline Bomball which is critical of recent jurisprudence from the High Court of Australia ('HCA') on the core question of employment status. It is the core question because unless categorized as an employee, the individual will be locked out of basic employment rights. Yet by insisting that 'parties are free to contract as they see fit', the HCA risks sparking an increase in false self-employment, thereby denying the most basic forms of protection to the most precarious and vulnerable workers.

That danger is already to be seen in *Deliveroo Australia Pty Ltd v Franco* before the Fair Work Commission, where an unfair dismissal claim was rejected by the Commission on the ground that the applicant was not an employee.[2] This was despite the fact that in the Commission's view the contractual designation of the food delivery rider as a self-employed contractor in business on his own account was wholly at odds with the reality of the relationship. The HCA jurisprudence may thus have created an easy route for employers to avoid statutory obligations, by effectively demanding the agreement of the employee to waive statutory protection.

Second, labour standards must be uncompromising in design and content. Anthony Forsyth and Shae McCrystal highlight a profound failure of Australian labour law relating to collective bargaining and the right to strike, which has contributed to declining levels of collective bargaining coverage, thereby restraining worker power, leading in turn to wage stagnation. These are problems of a tight legal framework under the *Fair Work Act 2009* (Cth) ('*FW Act*') which confers too much power on employers and creates too many hurdles on workers seeking to establish collective bargaining arrangements and exercise collective power.

The latter is by no means a uniquely Australian problem, with political compromises promoted by cautious governments elsewhere leading to defective legislation, particularly in common law jurisdictions, where labour law reform

2 (2022) 317 IR 253.

seems especially intractable. The authors look at recent attempts at reforming the Australian model but find them inadequate, and in an exceptionally well-informed article explore possible options for different collective bargaining models currently being advanced in a number of other common law jurisdictions, including New Zealand, the United Kingdom and the United States.

Third, labour standards must be flexible and purposive in their operation and eschew the drag of formalism, raising questions not only about the criteria used to determine employment status, but also other contractual terms and statutory rights. The former include such unlikely matters as restraint of trade clauses which if unregulated undermine what the Declaration of Philadelphia refers to as the need to ensure 'the employment of workers in the occupations in which they can have the satisfaction of giving the fullest measure of their skill and attainments and make their greatest contribution to the common wellbeing'.

The Declaration of Philadelphia thus provides an important if improbable international background to the stimulating article by Andrew Fell and Elizabeth Rudz, which is a fascinating analysis of how the common law deals with the competing interests of employers and employees in restraint of trade cases. As the authors point out, 'non-compete restraints can cause significant harm to employees', and as they argue, 'these effects are and should be relevant in deciding the reasonableness of non-compete restraints', despite some powerful jurisprudence to the contrary.

Fourth, labour standards must be fully responsive to the lived reality of all workers if they are to be wholly inclusive and reach those who need them most. Labour law must eschew legal formalism not only in contractual validity and interpretation but also in terms of legislative design. Here too Australia has been found lacking, in an indictment of equalities legislation by Caitlin Konzen and Sandy Noakes who provide a compelling critique of legislation that fails to address the situation of 'diverse' women, that is to say women 'who are not of Anglo-ethnic origin, middle class, heterosexual or cisgendered, and able-bodied'.

As argued by Konzen and Noakes, the *Workplace Gender Equality Act 2012* (Cth) ('*WGEA*') specifically lacks 'proper consideration of the complex intersectional inequalities experienced by diverse women in Australian workplaces'. Although the authors' focus is mainly with the limitations of the 2012 Act, their powerful critique is one by which all equalities legislation needs to be assessed, and to which policy makers ought to respond with appropriate legislative design where necessary. Otherwise, in the words of the authors they end up simply 'masking, rather than addressing, intersectional inequality'.

Fifth, labour standards must be effective. The question of course is what is meant by the effectiveness of labour law, surely a question that requires deeper analysis. But at a minimum the ILO Declaration on Social Justice for a Fair Globalization of 2008 suggests that it means first that labour standards should be universal in the sense that they should apply to everyone unless there is a compelling reason to the contrary, but second that they should be strictly enforced to ensure that they reach those to whom they are intended. Hence the reference to the need for 'effective labour inspection systems'.

Yet in Australia we encounter a major problem of 'wage theft', analysed in a remarkable article by Irene Nikoloudakis and Stephen Ranieri. In a strong contribution the authors argue that the 'time is ripe for deliberate wage theft to be criminalised at the federal level'. As they wisely point out, however, 'if these laws are to have meaning, and if they are to be given the practical significance that they deserve, then they must be accompanied by robust enforcement and suitable civil recovery mechanisms that empower workers whose employment rights have been wronged by deliberate wage theft'.

Sixth and finally for present purposes, labour law must be adaptable and respond quickly to the changing environment in which it operates, whether it be austerity, globalisation and now climate change. The implications of the last of these issues is addressed by Gabrielle Golding, Phillipa McCormack and Kerryn Brent, who examine the potential impact of climate change on working life, and argue that 'in responding to the challenges posed by climate change, employment law must develop in a way that promotes climate change adaptation and does not – intentionally or unintentionally – create barriers to this objective'.

This well-argued and insightful piece examines the role of labour law in minimising climate change impacts on employers and workers; the capacity of employment law to adapt to changing circumstances; and the resources, institutions, or mechanisms needed to promote adaptation. In terms of the areas most likely to be affected, the authors focus on the 'three pillars' of unfair dismissal, enterprise bargaining, and occupational health and safety. In doing so they emphasise the need for a collective approach to enable workers to 'resist power imbalances that might otherwise be generated by the changing climate'.

III

The excellent articles in this outstanding collection thus illuminate in different ways some of the principles required to give effect to the two core ILO objectives of economic democracy and social justice highlighted in Part I. The role of labour law and labour lawyers at a national level is to ensure that these principles are fully implemented. There is no prescribed method by which compliance should be secured, requiring the intervention of governments, legislatures and courts. Yet as this Issue clearly reveals, Australian labour law has been tested and found wanting.

It is a notable feature of the articles in this Issue that with varying degrees of tentativeness and forcefulness the authors propose solutions to the problems they identify in what is a comprehensive and wide-ranging manifesto for labour law reform. Many of the proposals are informed by developments and practices in other countries as authors engage with the evolution of the common law as well as legislative initiatives elsewhere. Several bring us back to the ILO, and to the Conventions and Recommendations designed to implement the objectives set out in the Declaration of Philadelphia and other Declarations.

These instruments are an appropriate place to begin in terms of responding to the issues raised in this Issue. Although Australia has ratified 60 Conventions, it is

seriously questionable whether it fully meets its obligations, which raises perhaps an even more fundamental principle. This is the principle of the rule of law, which is presumed to operate at the heart of liberal democracy. Although not expressly mentioned in the Australian Constitution, the 'rule of law' is said nevertheless to be 'assumed', acknowledged on the Attorney General's website as a working principle.[3]

There we are told that the Attorney General 'support[s] the Australian Government in being accountable for actions' and that 'the rule of law underpins the way Australian society is governed. Everyone – including citizens and the government – is bound by and entitled to the benefit of laws'. Although the meaning of the principle is contestable, at its core it thus requires everyone to obey the law. 'Everyone' includes the government, and the 'law' includes international law voluntarily accepted. Yet serious questions about Australia's compliance with its ILO obligations have been raised by the ILO supervisory bodies.

Both the Committee of Experts and the Committee of Freedom of Association respectively have raised wide-ranging concerns about compliance with ILO Conventions 87 and 98 (on freedom of association) relating specifically to the restrictions on the right to bargain collectively and the right to strike for reasons similar to those identified by Forsyth and McCrystal in this Issue. So far as the jurisprudence of these Committees is concerned, compliance with ILO obligations would require some fundamental rethinking by all of Australia's major political parties, and an extensive rewriting of the *FW Act*.

Since 2007, the Committee of Experts has also raised concerns about other treaties, notably ILO Convention 29, on the use of prison labour in privately run prisons in four States; ILO Convention 182, on the lawful engagement of children under the age of 18 for the purposes of commercial sexual exploitation in NSW; ILO Conventions 100 and 111, on the limitations of the *WGEA*; and ILO Convention 155, on the failure of South Australia to comply with health and safety obligations in the event of situations presenting imminent and serious danger.

There are in addition multiple other treaties in relation to which the Australian Council of Trade Unions has made representations, in response to which the Committee of Experts has simply made or repeated requests for information. In many cases if these were pushed to a conclusion, it is not implausible to believe that there would be suggestions of further breaches of ILO standards. These include ILO Convention 122, on employment policy; ILO Convention 156, on workers with family responsibilities; ILO Convention 158, on termination of employment; and ILO Convention 81, on labour inspection.

In reducing the rule of law to a farce, it is no consolation or justification that Australia is not alone in its failure to comply with its international obligations. The same has been true of the United Kingdom since 1989, and it will remain true regardless of the outcome of the next general election as a result of leadership changes and the reorientation of the Labour Party. Nor is it any consolation or justification that some of the problems identified in this Issue are to be found in

3 'Rule of Law', *Attorney-General's Department (Cth)* (Web Page) <https://www.ag.gov.au/about-us/what-we-do/rule-law>.

other leading liberal democracies, sometimes – notably in the United States – in an even more exaggerated form.

It would be interesting to know whether our colleagues in other legal disciplines can point to such a vast discrepancy by national law with international obligations. In the meantime, the responsibility of labour lawyers is to work towards the realisation of these standards and the objectives by which they are driven, notably economic democracy and social justice, as expressed in the Declaration of Philadelphia. But especially in common law jurisdictions where there are few if any constitutionally entrenched social rights, we do so in the knowledge that gains are likely to be transient, subject to the ebb and flow of political power.

Those who engage in this endless struggle will be much inspired by this admirable collection of articles which provide a compelling framework of interacting principles with which to contest these political battles. Labour standards must be universal in their application, uncompromising in their design and content, responsive to the lived reality of all workers, flexible and purposive in their operation and eschew the drag of formalism, effective in terms of robust enforcement, and adaptable with a capacity to respond quickly to changing circumstances.

The editors and the authors are to be warmly congratulated for having thus equipped us in such an accomplished manner.

THEMATIC
POWER, WORKERS AND THE LAW

Artwork by Jacqui Adams