

# THE DECLINING INFLUENCE OF ILO STANDARDS IN SHAPING AUSTRALIAN STATUTORY PROVISIONS ON UNFAIR DISMISSAL

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*This article explores the role that International Labour Organisation standards have played in shaping the development of federal termination of employment protections. In particular, the article analyses the influence of ILO Convention 158 and Recommendation 166 in the enactment and subsequent development of the federal statutory unfair dismissal and discriminatory dismissal provisions. The inception of the statutory protections with the Industrial Relations Reform Act 1993 (Cth) is examined, as is their current form in the Workplace Relations Act 1996 (Cth).*

## I INTRODUCTION

Numerous commentators have explored the deterioration in recent years, in Australia's relationship with the international human rights system.<sup>1</sup> Although earlier federal governments have been the subject of criticism for failing to ensure that Australia's international human rights obligations were fully complied with,<sup>2</sup> the period under the current federal government (elected in 1996) has been described by one commentator as a 'new low point' in Australia's relationship with international human rights structures and principles.<sup>3</sup> Several United Nations treaty committees have in the last few years expressed concern, raised questions and made adverse findings against Australia regarding numerous aspects of Australian law, including notably inadequacies regarding Indigenous rights and the treatment of asylum seekers. In addition, these developments have been accompanied by a shift in attitude by the federal government towards the scrutiny of Australian law and government policy by such international bodies, and the reach of the international human rights system more broadly. The

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1 See, eg, Elizabeth Evatt, 'Australia's Performance in Human Rights' (2001) 26 *Alternative Law Journal* 11; Elizabeth Evatt, 'How Australia "Supports" the United Nations Human Rights Treaty System' (2001) 12 *Public Law Review* 3; Dianne Otto, 'From "Reluctance" to "Exceptionalism": The Australian Approach to Domestic Implementation of Human Rights' (2001) 26 *Alternative Law Journal* 219; Margaret Reynolds, 'Testing the Friendship: Australia's Relationship with the United Nations, 1996-2001' (2001) 12 *Polemic* 9; Rochelle L Haller, 'UN Report: Australia's Cold-Shoulder: Setting a Dangerous Precedent for Human Rights Violators' (2001) 17 *New York Law School Journal of Human Rights* 937.

2 See, eg, Hilary Charlesworth, 'The Australian Reluctance About Rights' (1993) 31 *Osgoode Hall Law Journal* 195.

3 Otto, above n 1, 219.

understanding of the current federal government to such matters is markedly different to the views of its predecessor governments. Dianne Otto presents a convincing argument that the current federal Coalition government has responded to criticism from treaty committees by attempting to construct Australia as above or beyond, or an exception to, the international human rights system. By asserting that Australia has strong democratic credentials and an exemplary human rights record, the current federal government represents Australia as a special or exceptional case, and as such, not needing to address the criticisms of treaty committees.<sup>4</sup>

The current federal government's diminished commitment to the international human rights system, both in terms of ensuring that the content of Australian law complies with convention obligations and in terms of government opinion about the applicability of the system to the Australian context, is reflected in many aspects of Australian law, including in the legal regulation of employment and industrial relations. In a speech about industrial relations delivered in April 2002, Kirby J noted that the current federal government 'has, in several ways, reduced Australia's involvement in, and utilisation of, the work of the ILO [International Labour Organisation].'<sup>5</sup> Australia is, under the current federal government, less involved in an institutional sense in the ILO than previously. In addition, the importance given to ILO Conventions and principles in shaping the development of Australian labour law has been downgraded by the current federal government in a number of areas, including in relation to protections regarding termination of employment.<sup>6</sup>

This paper explores the role of ILO conventions and principles in shaping the development of federal termination of employment protections. The statutory rights investigated are referred to as unfair dismissal<sup>7</sup> and discriminatory

<sup>4</sup> Ibid.

<sup>5</sup> Justice Michael Kirby, 'Human Rights and Industrial Relations' (*The Kingsley Laffer Industrial Relations Memorial Lecture*, speech delivered at The University of Sydney, Tuesday 23 April 2002, accessible from [www.highcourt.gov.au/speeches/kirbyj/kirby's\\_kingsley.htm](http://www.highcourt.gov.au/speeches/kirbyj/kirby's_kingsley.htm)).

<sup>6</sup> See, eg, Breen Creighton, 'The Workplace Relations Act in International Perspective' (1997) 10 *Australian Journal of Labour Law* 31.

<sup>7</sup> The terminology of unfair dismissal is used in this paper to refer to the legislative rules at the federal level that enable an employee to challenge his or her dismissal on the ground that the termination lacked a 'valid reason' or was 'harsh, unjust or unreasonable'. The specific rules are the former *Industrial Relations Act 1988* (Cth) s 170DE and the current *Workplace Relations Act 1996* (Cth) s 170CE(1)(a). Note that the *Industrial Relations Act 1988* (Cth) s 170DE(2) was determined to be unconstitutional by the High Court in *Victoria v Commonwealth* (1996) 187 CLR 416, 517-518 (discussed below).

dismissal.<sup>8</sup> These rights first appeared in statutory form in the Keating Labor government's *Industrial Relations Reform Act 1993* (Cth). This Act inserted unfair dismissal and discriminatory dismissal protections into the *Industrial Relations Act 1988* (Cth) ('*IR Act*'). In 1996 the newly elected Coalition government introduced into Parliament what it described as a 'new scheme' relating to termination of employment.<sup>9</sup> This scheme was contained in Schedule 6 of the *Workplace Relations and Other Legislation Amendment Bill 1996* (Cth). After amendments in the Senate, the revised unfair dismissal and discriminatory dismissal protections came into being as part of the *Workplace Relations Act 1996* (Cth) ('*WR Act*'). The provisions took effect from January 1997.

Both Labor and Coalition governments drew on a range of sources in developing these federal statutory rights. One such source was the *ILO Convention Concerning Termination of Employment at the Initiative of the Employer 1982* ('*Convention 158*'), and to a lesser extent, its accompanying Recommendation (Termination of Employment Recommendation 1982 (No 166)). The purpose of this paper is to examine the extent to which *Convention 158* and Recommendation 166 have shaped the enactment and development of the statutory provisions regarding unfair dismissal and discriminatory dismissal. It is argued that although *Convention 158* has provided an important source of ideas and constitutional validity for both the 1993 provisions and the 1996 *WR Act* rules regarding unfair dismissal and discriminatory dismissal, it has not presented a set of obligations that successive federal governments have felt compelled to adhere to. Rather, it appears that both Labor and Coalition governments have drawn on *Convention 158* selectively, and as it has suited their policy objectives at the time. In other words, the obligations in *Convention 158* appear to have been seen by successive governments as a useful, although dispensable, source of ideas and constitutional power for legislation in this area. Moreover, it is argued that the current Coalition government has moved further away from using, and feeling a sense of obligation to adhere to, *Convention 158*, than its predecessor Labor government. It has relied increasingly on ideas and principles that are more 'home grown' than reflective of international norms and standards, at least

<sup>8</sup> The phrase discriminatory dismissal is used to refer to the federal legislative rules that prohibit dismissal on a discriminatory ground including temporary absence from work due to illness or injury, union membership or activities, race, sex, sexual preference, family responsibilities and disability. The specific rules are the former *Industrial Relations Act 1988* (Cth) s 170DF and the current *Workplace Relations Act 1996* (Cth) s 170CK(2). Provisions relating to the giving of notice periods, requirements on employers relating to terminations of employment of 15 or more employees for reasons related to economic, technological or structural reasons were also contained in the scheme enacted into the *Industrial Relations Act 1988* (Cth). These rights for employees have continued largely unaltered with the *Workplace Relations Act 1996* (Cth). See, eg, *Workplace Relations Act 1996* (Cth) s 170CL, s 170CM, Part VIA Div 3 Subdiv D & E. Such rights are not examined in this paper. Some of these provisions appear to be drawn from *Convention 158* (ie s 170FA) whereas other provisions are drawn from sources outside the *Convention 158* (ie s 170CM reflects part of the standard award clause formulated in the federal *Amalgamated Metals, Foundry & Shipwrights' Union v Broken Hill Pty Co Ltd, Whyalla* ('*Termination, Change and Redundancy Case*'), *Supplementary Decision* (1984) 9 IR 115, 120-1.

<sup>9</sup> Peter Reith MP, *Better Pay for Better Work: The Coalition's Industrial Relations Policy*, 18 February 1996, 12.

to the extent that we can say that such norms are encapsulated in *Convention 158*.<sup>10</sup>

Prior to the enactment in 1993 of the federal statutory provisions regarding unfair dismissal and discriminatory dismissal, several areas of law were relevant to questions of arbitrariness in termination of employment. These different areas have been influential in shaping the unfair dismissal and discriminatory dismissal provisions in both the *IR Act* and the *WR Act*. They are accordingly referred to at several points in the body of this article. For this reason, an understanding of them is important. The objective of the first part of this paper is to provide such an overview of these different areas of law regulating arbitrary termination of employment. Following this, the paper provides an outline of the main provisions in *Convention 158* and Recommendation 166. Next, it explores the extent to which *Convention 158* and Recommendation 166 influenced the enactment of the unfair dismissal and discriminatory dismissal provisions in the Keating Labor government's *Industrial Relations Reform Act 1993* (Cth). Amendments made to this scheme a few months after its enactment are also examined. This is followed by an analysis of the scheme enacted as part of the *WR Act*. In important respects this current framework has moved further away from the obligations contained in *Convention 158*. This indicates that the government has relied on sources outside the Convention as reference points in developing its statutory regime. The current legislative agenda of the federal government is also examined for the purpose of establishing further that the government has moved away from the Convention as a source of ideas and standards for its legislation.

## II AUSTRALIAN LEGAL DEVELOPMENTS REGARDING ARBITRARINESS IN DISMISSAL

Several different areas of Australian law have been relevant to questions of fairness in dismissal. As noted above, these different sets of legal rules have influenced the development (to varying degrees) of the federal statutory rights in the *IR Act* and the *WR Act* regarding unfair dismissal and discriminatory dismissal. The main sets of legal rules of relevance are legislative and arbitral developments regarding unfair dismissal at the State level, unfair dismissal provisions in federal awards, reinstatement in settlement of a federal industrial

<sup>10</sup> This article does not directly examine the influence of adjudicative interpretations in developing the federal unfair dismissal and discriminatory dismissal jurisdictions. Such an analysis is beyond the scope of this article. It is acknowledged however that court and AIRC readings of the statutory provisions have been very important in shaping the legal principles in this area of federal law. In particular, many adjudicative readings of the legislative provisions, notably those that draw explicitly on *Convention 158* as an aid to interpretation, have resulted in a closer correlation between the Australian federal legal principles and the content of the Convention. See, eg, *Liddell v Lembke (t/a Cheryl's Unisex Salon)* (1994) 127 ALR 342; *Fryar v Systems Services Pty Ltd* (1995) 130 ALR 168; *Victoria v Commonwealth* (1996) 187 CLR 416 (discussed below); *Konrad v Victoria Police* (1999) 165 ALR 23 (contrast *Sammartino v Mayne Nickless (t/a Wards Skyroad)* (2000) 98 IR 168; *Williams v Commonwealth* (17 October 2000, AIRC, Giudice P, McIntyre VP and Hodder C, Print T2042)).

dispute, union victimisation protections in industrial legislation and anti-discrimination statutes. These different sets of legal rights are examined in this order. Before embarking on this examination though, it is important to acknowledge that several of these jurisdictions overlap significantly. In particular, it is more accurate to conceptualise developments at State level, in federal awards and the federal reinstatement jurisdiction, as being different strands that are interlinked and woven together to form a tapestry of legal protection regarding arbitrary dismissal.<sup>11</sup> Each did not develop in isolation. Rather, each was informed by developments in the other jurisdictions. In addition, each appears to have been informed by developments in other countries, and on the international level, including ILO standards such as *Convention 158*.<sup>12</sup>

Legal developments regarding unfair dismissal at the State level have taken two forms. The first comprises direct legislative rights enabling individual employees to challenge their dismissal on the ground of unfairness. The first effective statute of this type was enacted in 1972 by the Dunstan government in South Australia.<sup>13</sup> This legislation gave individual employees the right to make an application to the State Industrial Court alleging that their dismissal was 'harsh, unjust or unreasonable'.<sup>14</sup> Since this time, all State Parliaments have enacted a direct statutory unfair dismissal jurisdiction as part of the State's industrial relations system.<sup>15</sup> The current State legislation uses various formulae to describe the unfair dismissal standard. These include whether the dismissal was 'harsh, unjust or unreasonable',<sup>16</sup> whether it was for 'invalid reasons'<sup>17</sup> and whether the

<sup>11</sup> Olsson wrote (in 1981) that job security in Australia is the 'very interesting product of a blend of legislative change, arbitral evolution, developing stances adopted by employer and employee organisations and general social attitudes': LT Olsson, 'Job Security - The Australian Scene' (1981) 23 *Journal of Industrial Relations* 529.

<sup>12</sup> See, eg, *Termination, Change and Redundancy Case* (1984) 8 IR 34, 37.

<sup>13</sup> There was an earlier attempt in 1967 to introduce a statutory unfair dismissal right by the newly elected South Australian Dunstan government (Industrial Code 1967 (SA) s 26(2)). This attempt is generally not considered to have been successful due to political compromise in its drafting and secondly, the impact of a 1971 decision of the Full Court of the South Australian Supreme Court (*R v Olsson; ex parte Amalgamated Wireless (Australasia)* [1971] 1 SASR 453). See further Anna Chapman, 'The Development of Laws Regulating Unfair Dismissal in Australia' in Tom Bramble, Bill Harley, Richard Hall and Gillian Whitehouse (eds), *Current Research in Industrial Relations: Proceedings of the 11th AIRAANZ Conference, Queensland, 30 January - 1 February* (1997) 423.

<sup>14</sup> *Industrial Conciliation and Arbitration Act 1972* (SA) s 15(1)(e).

<sup>15</sup> On the early provisions see Olsson, above n 11, 534-9; CP Mills, *Industrial Laws, New South Wales* (4th edn, 1977); Andrew Stewart, 'Employment Protection in Australia' (1989) 11 *Comparative Labor Law Journal* 1, 25-31; Andrew Stewart, *Unfair Dismissal in South Australia: A Legal Guide to Claims Under s 31 of the Industrial Conciliation and Arbitration Act, 1972* (1988); Mark R Sherman, 'Unfair Dismissal and the Remedy of Re-employment' (1989) 31 *Journal of Industrial Relations* 212, 214-215. The current provisions include the *Industrial Relations Act 1996* (NSW) Chapter 2, Part 6; *Industrial Relations Act 1999* (Qld) Chapter 3; *Industrial and Employee Relations Act 1994* (SA) Chapter 3, Part 6; *Industrial Relations Act 1979* (WA) s 29; *Industrial Relations Act 1984* (Tas) s 29(1A). Note that as the Victorian Parliament referred its powers over industrial relations to the Commonwealth in 1996, Victoria no longer has a State industrial jurisdiction, including a State unfair dismissal jurisdiction: *Commonwealth Powers (Industrial Relations) Act 1996* (Vic); *Workplace Relations Act 1996* (Cth) Part XV. See further Stuart Kollmorgen, 'Towards a Unitary National System of Industrial Relations?' (1997) 10 *Australian Journal of Labour Law* 158.

<sup>16</sup> See, eg, *Industrial Relations Act 1996* (NSW) s 84(1); *Industrial Relations Act 1999* (Qld) s 73; *Industrial and Employee Relations Act 1994* (SA) s 108.

<sup>17</sup> *Industrial Relations Act 1999* (Qld) s 73.

employee had been 'harshly, oppressively or unfairly dismissed'.<sup>18</sup>

The second type of development at the State level involved the role of State industrial tribunals in arbitrating industrial disputes. By 1980 most State industrial tribunals had begun to deal with applications regarding arbitrary dismissal as part of their jurisdiction over industrial disputes and industrial matters. It was accepted that an application for reinstatement could amount to an industrial matter and/or give rise to an industrial dispute, and as such the relevant State tribunal had jurisdiction over it.<sup>19</sup> In some States these jurisdictions were replaced by the legislative unfair dismissal right described in the previous paragraph.<sup>20</sup> In other States the ability of the industrial tribunal to hear and determine an application alleging arbitrary dismissal as part of its wider arbitral function to resolve industrial disputes continued in parallel with the direct statutory right of unfair dismissal.<sup>21</sup> Creighton and Stewart describe the standards developed in these industrial dispute jurisdictions as being broadly similar to the understandings that developed in relation to the State statutory prohibitions on unfair dismissal. They comment that the industrial dispute jurisdictions have tended to recognise a relatively high degree of managerial prerogative. In particular, a dismissal will not necessarily be unfair merely because the State tribunal may have reached a different decision had it been in the place of the employer.<sup>22</sup> On the other hand, the tribunals (in their arbitral function) are said to have placed 'a strong emphasis' on employers providing procedural fairness to employees, especially in giving an employee a reasonable opportunity to respond to allegations of misconduct or lack of performance on their part.<sup>23</sup> The language that is often used to describe the approach of tribunals to the role of arbitrating industrial disputes is to ask whether the employee 'received less than a fair deal' or whether 'industrial fair play'<sup>24</sup> had occurred. In *Re Loty and Holloway v Australian Workers' Union*, a case that is often quoted as being illustrative of the approach taken in State arbitral jurisdictions, Sheldon J favoured a formulation of

<sup>18</sup> *Industrial Relations Act 1979* (WA) s 29(1)(b)(i). See also *Workplace Agreements Act 1993* (WA) s 18.

<sup>19</sup> AP Davidson, 'Reinstatement of Employees by State Industrial Tribunals' (1980) 54 *Australian Law Journal* 706; Stewart 1989, above n 15, 25-31. See also, AP Davidson, 'Reinstatement in Employment Jurisdiction Under The Industrial Relations Act 1975 (Tas)' (1981) 7 *University of Tasmania Law Review* 62; *Termination, Change and Redundancy Case* (1984) 8 IR 34, 38-40.

<sup>20</sup> In Victoria, the statutory rights were found to be an exclusive code in relation to unfair dismissal: *Downey v Trans Waste Pty Ltd* (1991) 172 CLR 167. Note that Victoria no longer has a State system.

<sup>21</sup> See, eg, *Industrial Relations Act 1996* (NSW) s 137(1)(b), Breen Creighton and Andrew Stewart, *Labour Law: An Introduction* (3rd ed, 2000) [11.56]. The situation in South Australia on this point is said to be unclear as a result of *St John Ambulance Australia SA Inc v Ambulance Employees' Association* (1993) 174 LSJS 34 and *R v Industrial Commission of SA; Ex parte City of Salisbury* (1982) 31 SASR 51, referred to in Creighton and Stewart [11.59] (footnote 234).

<sup>22</sup> Creighton and Stewart, above n 21, [11.65] - [11.66].

<sup>23</sup> *Ibid* [11.66]. See also, Richard Johnstone, Richard Mitchell and Julian Riekert, 'Procedural Fairness in Dismissal Cases: What Should Be the Approach in Victoria?' (1991) 4 *Australian Journal of Labour Law* 99.

<sup>24</sup> *Minchin and Gorman v St Jude's Child Care Centre* (1973) 40 SAIR 106, 116-117; *Hallett Brick Industries Ltd v Kenniwell* (1976) 43 SAIR 477, 488-9 cited in Creighton and Stewart, above n 21, [11.65] (footnote 258).

the tribunal's role as ensuring 'a fair go all round',<sup>25</sup> and stated that the objective of the jurisdiction is always to ensure that 'industrial justice' is done.<sup>26</sup>

Another avenue available to challenge a termination of a contract of employment was to seek an order for reinstatement by way of settling a federal industrial dispute. Until the late 1980s there was doubt as to whether the Federal Industrial Relations Commission had power, as part of its arbitral jurisdiction over industrial disputes, to deal with claims for reinstatement. This uncertainty related to a number of matters, and in particular to the scope of s 51(xxxv) of the *Australian Constitution*.<sup>27</sup> Despite this doubt, members of the Commission are said to have exercised an 'extensive reinstatement jurisdiction'.<sup>28</sup> This de facto jurisdiction arose through the consent of both the employer and employee concerned, and resulted in the member of the Commission making a recommendation. Although not legally binding, it appears that generally recommendations were acted on, in order to preserve 'industrial harmony'.<sup>29</sup> In 1987 the High Court indicated that s 51(xxxv) of the *Australian Constitution* did not present insurmountable obstacles to reinstatement orders and it indicated a number of ways in which the constitutional requirements could be met.<sup>30</sup> In terms of the standard applied by the federal Commission, a Full Bench has described this de facto jurisdiction as generally being to consider whether the decision to dismiss the employee was 'harsh, unjust or unreasonable'. The Full Bench understood this to be similar to the standard utilised by State industrial tribunals.<sup>31</sup>

In 1982 the Australian Council of Trade Unions ('ACTU') initiated a test case before the Full Bench of the Australian Conciliation and Arbitration Commission for the purpose of securing improvements in employment security. The ACTU

<sup>25</sup> *Re Loty and Australian Workers' Union* [1971] AR (NSW) 95, 99. See also *Re Registered Nurses Conciliation and Arbitration Board* (1984) 9 IR 19, 30; *Undercliffe Nursing Home v Federated Miscellaneous Workers Union of Australia* (1985) 65 WA Industrial Gazette Committee 385, 386, cited in Creighton and Stewart, above n 21, [11.65] (footnote 257).

<sup>26</sup> *Re Loty and Australian Workers' Union* [1971] AR (NSW) 95, 99. Stewart identifies the test of 'industrial fairness' articulated in two cases as being of particular importance in the NSW jurisdiction: *Re Loty* and secondly, *Western Suburbs District Ambulance Commission v Tipping* [1957] NSW IR 273; Stewart, 'Employment Protection in Australia', above n 15, 27.

<sup>27</sup> See further, J O'Donovan, 'Reinstatement of Dismissed Employees by the Australian Conciliation and Arbitration Commission: Jurisdiction and Practice' (1976) 50 *Australian Law Journal* 636; WB Creighton, WJ Ford and RJ Mitchell, *Labour Law: Text and Materials* (2nd edn, 1993), [13.16] - [13.24]; RC McCallum and MJ Pittard, *Australian Labour Law: Cases and Materials* (3rd edn, 1995), [11.6] - [11.7], [11.14] - [11.23]; Stewart 'Employment Protection in Australia', above n 15, 31-6; Andrew Stewart, 'Employment Protection at the Federal Level - The Problems of Jurisdiction' (1984) 12 *Australian Business Law Review* 238.

<sup>28</sup> Creighton, Ford and Mitchell, above n 27, [13.26]. See further, O'Donovan, above n 27, 639-640.

<sup>29</sup> GH Sorrell, *Law in Labour Relations: An Australian Essay* (1979), 38.

<sup>30</sup> A series of High Court cases eventually settled this uncertainty by making it clear that the Commission did have a reinstatement jurisdiction in certain circumstances. The main cases were: *Re Ranger Uranium Mines Pty Ltd*; *Ex parte Federated Miscellaneous Workers' Union of Australia* (1987) 163 CLR 656 and *Re Federated Storemen and Packer' Union of Australia*; *Ex parte Wooldumpers (Victoria) Ltd* (1989) 166 CLR 311; *Re Boyne Smelters Ltd*; *Ex parte Federation of Industrial Manufacturing and Engineering Employees of Australia* (1993) 177 CLR 446; *Re Printing & Kindred Industries Union*; *Ex parte Vista Paper Products Pty Ltd* (1993) 67 ALJR 604.

<sup>31</sup> *Termination, Change and Redundancy Case* (1984) 8 IR 34, 43. In describing the test applied by the federal Commission in its de facto jurisdiction, O'Donovan also used the formula of 'harsh, unjust or unreasonable': O'Donovan, above n 27, 639-640.

claim was largely successful, with the Commission drawing on a range of sources in formulating the provision that it granted. These included State developments regarding unfair dismissal, the federal reinstatement jurisdiction, anti-discrimination statutes and to a lesser extent, *Convention 158* and Recommendation 166.<sup>32</sup> The clause that the Commission awarded provided in part:

1. Termination of employment by an employer shall not be harsh, unjust or unreasonable.
2. Without limiting the above, except where a distinction, exclusion or preference is based on the inherent requirements of a particular position, termination on the ground of race, colour, sex, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction and social origin shall constitute a harsh, unjust or unreasonable termination of employment.<sup>33</sup>

This clause became a standard provision in most federal, and many State, awards with the effect that the employment of most employees in Australia was covered by it. However, apart from the period between the years 1988 to 1994, the remedies arising out of a contravention of this award clause were considered to be relatively ineffective.<sup>34</sup> They constituted a penalty only. Orders of compensation and/or reinstatement were not provided for by the legislation. Notably, since the enactment of the provisions contained in the *WR Act* this standard TCR clause can no longer be included in federal awards.<sup>35</sup>

Finally, union victimisation provisions and anti-discrimination statutes complete the main features of the regulatory framework that the federal Parliament drew upon in formulating the unfair dismissal and discriminatory dismissal provisions in both the *IR Act* and the subsequent *WR Act*. Federal and State industrial relations legislation has always enabled a dismissed employee to seek reinstatement or re-employment on the ground that their dismissal was due to

<sup>32</sup> *Termination, Change and Redundancy Case* (1984) 8 IR 34, 38-44. See also Alan Boulton, 'New Job Protection Standards' (1985) 19 *Journal of Australian Political Economy* 43; David Brereton, 'Test Cases and Industrial Reform: The Job Protection Decision' (1984) *Legal Services Bulletin* 278.

<sup>33</sup> *Termination, Change and Redundancy Case* (1984) 9 IR 115, 118.

<sup>34</sup> During the years 1988 to 1994, this award clause was considered by the Federal Court to be impliedly incorporated into the employee's contract of employment, thereby enabling the employee to seek common law contract damages for its breach. Substantial damages awards were made on this basis in several cases. See further, Creighton, Ford and Mitchell, above n 27, [12.24] - [12.29]; McCallum and Pittard, above n 27, [11.44] - [11.45]; Adrian Brooks, 'Damages for Harsh, Unjust or Unreasonable Dismissal: The Implications of Gorgevski v Bostik (Australia) Pty Ltd' (1995) 8 *Australian Journal of Labour Law* 41; John de Meyrick, 'The Interaction of Awards and Contracts' (1995) 8 *Australian Journal of Labour Law* 1; Amanda Coulthard, 'Damages for Unfair Dismissal: The High Court's Judgement in Byrne and Frew v Australian Airlines' (1996) 9 *Australian Journal of Labour Law* 38.

<sup>35</sup> The *WR Act* s 89A provides that awards are only permitted to contain 'allowable award matters'. The standard TCR clause is not within the allowable award matters. See generally, Marilyn Pittard, 'Collective Employment Relationships: Reforms to Arbitrated Awards and Certified Agreements' (1997) 10 *Australian Journal of Labour Law* 62.



their trade union membership or activities.<sup>36</sup> Notably, the *WR Act* provisions have extended this right to seek reinstatement to employees who are dismissed on account of their non-union membership.<sup>37</sup> Anti-discrimination statutes have existed at the federal level since the mid-1970s. These statutes comprise the *Racial Discrimination Act 1975* (Cth), the *Sex Discrimination Act 1984* (Cth), the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) and the *Disability Discrimination Act 1992* (Cth). Each of these statutes prohibits discrimination in all aspects of employment, including dismissal, on the specific grounds covered by the Act.

These different areas of law comprise the backdrop against which the unfair dismissal and discriminatory dismissal provisions in the *IR Act* were enacted. As most of them continued into the mid-1990s, they also provide the context for the revised scheme of unfair dismissal and discriminatory dismissal enacted with the *WR Act*.

### A CONVENTION 158 AND RECOMMENDATION 166

In June 1982 the International Labour Conference adopted both the *Termination of Employment Convention 1982* (No 158) and the *Termination of Employment Recommendation 1982* (No 166).<sup>38</sup> The main provisions in *Convention 158* were carried over in substantively the same terms from the *Termination of Employment Recommendation 1963* (No 119).<sup>39</sup> Key provisions in the Convention include the following:

- the employment of a worker shall not be terminated at the initiative of the employer unless there is 'a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service';<sup>40</sup>
- the following inclusive list shall not constitute valid reasons for termination: union membership or activities; taking part in legal proceedings against an employer; race; colour; sex; marital status; family responsibilities; pregnancy; religion; political opinion; national extraction or social origin; temporary absence from work due to illness or injury; or being on maternity leave;<sup>41</sup>

<sup>36</sup> *Conciliation and Arbitration Act 1904* (Cth) s 5; *Industrial Relations Act 1988* (Cth) s 334; *Workplace Relations Act 1996* (Cth) Part XA (Freedom of Association). For examples of State legislation, see, eg, *Industrial Relations Act 1996* (NSW) s 210 and *Industrial and Employee Relations Act 1994* (SA) s 117.

<sup>37</sup> *Workplace Relations Act 1996* (Cth) Part XA (Freedom of Association).

<sup>38</sup> On the background to this adoption, and in particular the Termination of Employment Recommendation 1963 (No 119), see Brian Napier, 'Dismissals - The New ILO Standards' (1983) 12 *Industrial Law Journal* 17; Edward Yemin, 'The International Labour Organization and Termination of Employment at the Initiative of the Employer' (1982) 5 *Comparative Labor Law Journal* 340. See also Anna Chapman, WB Creighton, Richard Naughton and Wai-Quen Chan, *Valid Reasons for Termination of Employment: A Research Report Prepared for the Judges of the Industrial Relations Court of Australia* (Working Paper No 12, Centre for Employment and Labour Relations Law, Faculty of Law, University of Melbourne, 1997) 1-3.

<sup>39</sup> Chapman et al, above n 38, 2.

<sup>40</sup> *ILO Convention 158* art 4. See also art 3.

<sup>41</sup> *ILO Convention 158* arts 5 and 6.

- termination for reasons related to the conduct or performance of an employee must not take place until that employee has been provided with an opportunity to defend himself or herself against the allegations made, unless the employer cannot reasonably be expected to provide that opportunity;<sup>42</sup>
- the Convention applies to 'all branches of economic activity and to all employed persons',<sup>43</sup> and
- some categories of employed persons may be excluded by a member state from all or some of the provisions in the Convention. These include workers engaged under a contract of employment for a specified period of time or specified task, workers serving a period of probation or qualifying period that has been determined in advance and is of a reasonable duration, and workers engaged on a casual basis for a short period of time.<sup>44</sup> Two further categories of employees may be excluded under art 2(4) and (5). The first class is employed persons whose terms of employment are governed by special arrangements that provide protection at least equivalent to the protection afforded under the Convention (art 2(4)). The second category is employees in respect of which special problems of a substantial nature arise in light of the particular conditions of employment, or the size or nature of the undertakings in which they are employed (art 2(5)). Importantly though, art 2(6) requires that in order for exclusions made under art 2(4) and (5) to be valid, they must be listed in the first report of the relevant member state.<sup>45</sup>

Recommendation 166 expands on the provisions of *Convention 158* in a number of respects. It recommends the addition of age (subject to national law and practice regarding retirement) and compulsory military service to the list of grounds that are not valid reasons for termination.<sup>46</sup> It also provides that employers ought to furnish written warnings in relation to termination for misconduct or lack of performance, written notice of termination of employment, and, upon request, a written statement of reasons for dismissal. In addition, the Recommendation 166 provides that an employee should be permitted to be assisted by another person in defending himself or herself against allegations of misconduct or lack of performance.<sup>47</sup>

## **B THE INDUSTRIAL RELATIONS REFORM ACT 1993 (Cth)**

Events leading up to the enactment of the *Industrial Relations Reform Act 1993* (Cth) indicate that *Convention 158* played a major role in shaping the legislation. In December 1992, the Labor Prime Minister, Paul Keating, announced that the federal government would rely on ILO Conventions (through the external affairs power in the *Australian Constitution*<sup>48</sup>) to enact certain minimum entitlements for

<sup>42</sup> *ILO Convention 158* art 7.

<sup>43</sup> *ILO Convention 158* art 2(1).

<sup>44</sup> *ILO Convention 158* art 2(2).

<sup>45</sup> Creighton and Stewart, above n 21, [11.41] (especially footnote 177).

<sup>46</sup> ILO Recommendation 166, para 5.

<sup>47</sup> ILO Recommendation 166, paras 7 to 13.

<sup>48</sup> Australian Constitution s 51(xxix).

Australian workers. The announcement indicated that these conditions would cover a range of matters including termination of employment. The Prime Minister's announcement came as part of a speech in which he criticised recent legislation of the Victorian Liberal government (the *Employee Relations Act 1992* (Vic)).<sup>49</sup> As Creighton notes, the view was formed that the Victorian statute had resulted in Australian law no longer complying with several of its international obligations, and, in addition, was now inconsistent with the then unratified *Convention 158*.<sup>50</sup>

The Labor government ratified *Convention 158* on 26 February 1993. As Conventions become binding on the ratifying member state on the first anniversary of the ratification,<sup>51</sup> *Convention 158* became binding on Australia in February 1994. Importantly, ratification of a Convention does not of itself have any direct impact on Australian domestic law. Rather, ratified Conventions may influence Australian domestic law through a number of different mechanisms, including, and importantly, by the enactment of federal legislation to implement the Convention provisions.<sup>52</sup> Such federal legislation came into being as part of the *Industrial Relations Reform Act 1993* (Cth). Most of the provisions in this Act commenced in March 1994.

The federal government has the undoubted legal capacity to ratify Conventions without the need for the agreement of State and Territory governments. However, from 1947 a practice had developed that the federal government would only ratify a Convention when law and practice in all jurisdictions in Australia was in compliance with the Convention and secondly, when all States and Territories had formally agreed to ratification.<sup>53</sup> There have been only two significant departures

<sup>49</sup> Prime Minister's Office, *Press Release*, 2 December 1992, cited in Creighton and Stewart, above n 21, [3.02]. In this paragraph the authors further note that the government's commitments were contained in Accord Mark VII, made between the government and the ACTU just prior to the March 1993 federal election.

<sup>50</sup> Creighton, 'The Workplace Relations Act in International Perspective', above n 6, 34-35; Breen Creighton, 'Industrial Regulation and Australia's International Obligations' in Paul Ronfeldt and Ronald McCallum (eds), *A New Province for Legalism: Legal Issues and the Deregulation of Industrial Relations* (1993), 101-2.

<sup>51</sup> Creighton and Stewart, above n 21, [3.12]; Lammy Betten, *International Labour Law: Selected Issues* (1993) 24. It is important to note that ILO Conventions become binding on a member state following ratification of the Convention by that member state. There is no obligation on a member state to ratify a Convention that has been adopted by the International Labour Conference and unratified Conventions are not generally seen as creating obligations on member states in international law. Recommendations are not open to ratification and are not generally seen as creating binding obligations in international law. By their nature, they are recommendatory rather than obligatory. See Hector Bartolomei de la Cruz, Geraldo von Potobsky and Lee Swebston, *The International Labor Organization: The International Standards System and Basic Human Rights* (1996) 48-55; Betten, 17-28; Creighton and Stewart, above n 21, [3.10] - [3.14].

<sup>52</sup> See generally Creighton and Stewart, above n 21, [3.12]; Creighton, 'Industrial Regulation and Australia's International Obligations', above n 50, 105; Brian R Opekin and Donald R Rothwell (eds), *International Law and Australian Federalism* (1997).

<sup>53</sup> Creighton and Stewart, above n 21, [3.26] - [3.29]; Breen Creighton, 'The ILO and the Protection of Fundamental Human Rights in Australia' (1998) 22 *Melbourne University Law Review* 239, 255.

from this established practice and one of these relates to *Convention 158*.<sup>54</sup> When it ratified *Convention 158*, the federal government did not have the formal agreement of any State or Territory government. In addition, in no Australian jurisdiction was the law and practice in conformity with the Convention requirements.<sup>55</sup>

This sequence of events - the Prime Minister's announcement in December 1992, the ratification of *Convention 158* in February 1993, and the introduction of the Industrial Relations Reform Bill later that year - suggests that the ratification of *Convention 158* provided a convenient mast on which the Keating government could hoist its federal unfair dismissal and discriminatory dismissal legislation. The unusual circumstances in which *Convention 158* was ratified further supports this argument. These events can be read as the government formulating and announcing a policy initiative to bring about the enactment of federal unfair dismissal and discriminatory dismissal legislation, followed by the construction of a constitutional foundation to support the announced initiative by the ratification of *Convention 158*.<sup>56</sup> This ratification provided the federal government with the constitutional ability, through the external affairs head of power in the *Australian Constitution* (s 51(xxix)), to enact legislation in order to incorporate the treaty provisions into domestic legislation. The external affairs head of power in the Constitution was indeed the main source of power used to enact the termination of employment provisions in the *Industrial Relations Reform Act 1993* (Cth).<sup>57</sup>

As noted above, this 1993 Act incorporated a new part into the *IR Act*. The opening section in the new provisions pertaining to termination of employment stated that the objective of the new scheme was to 'give effect, or give further effect' to *Convention 158* and Recommendation 166.<sup>58</sup> There were two main mechanisms through which direct links between the statute and the Convention were created. First, the Act provided that an expression used in the statutory

<sup>54</sup> The other relates to the *Workers with Family Responsibilities Convention, 1981* (No 156). It was ratified in March 1990 without the agreement of New South Wales or the Northern Territory. Creighton and Stewart note however that the law and practice in all jurisdictions in Australia was considered to be in compliance with the Convention requirements. Creighton and Stewart, above n 21, [3.29].

<sup>55</sup> Senate Legal and Constitutional References Committee, *Trick or Treaty? Commonwealth Power to Make and Implement Treaties* (1995) as cited in Creighton and Stewart, above n 21, [3.29]. But as Creighton points out, law and practice was not 'far removed' from the Convention requirements and in addition, an Interdepartmental Taskforce on Ratification of ILO Conventions had identified the Convention as appropriate to ratify: Creighton, 'The Workplace Relations Act in International Perspective', above n 6, 35 (especially footnote 21).

<sup>56</sup> Although there is debate over whether such action in a federal system is desirable, clearly it is lawful: Creighton, 'The Workplace Relations Act in International Perspective', above n 6, 35. On Australian federalism and the external affairs head of power in the Constitution, see generally, Opeskin and Rothwell, above n 52.

<sup>57</sup> Marilyn J Pittard, 'International Labour Standards in Australia: Wages, Equal Pay, Leave and Termination of Employment' (1994) 7 *Australian Journal of Labour Law* 170; Ronald C McCallum, 'The Internationalisation of Australian Industrial Law: The Industrial Relations Reform Act 1993' (1994) 16 *Sydney Law Review* 122, 128.

<sup>58</sup> *IR Act* s 170CA. This assertion is also contained in the second reading speech on the Bill: Commonwealth, *Parliamentary Debates*, House of Representatives, 28 October 1993, 2780 (Brereton, Kingsford-Smith, Minister for Industrial Relations).

provisions had the same meaning as in *Convention 158*.<sup>59</sup> For convenience, the Convention and the Recommendation were annexed as Schedules to the Act.<sup>60</sup> This was an important linking of the Act with the Convention and in particular carried the consequence that the words 'termination' and 'termination of employment' used in the statute meant termination of employment 'at the initiative of the employer', the expression used in the Convention.<sup>61</sup> This meant that the statutory provisions only related to terminations of employment at the instigation of the employer, and not for example, to genuine resignations. The second link was that the statute provided that an adjudicator must refuse to consider an application under the statute if satisfied that an 'adequate alternative remedy' was available to the employee concerned to challenge his or her dismissal under another law of the Commonwealth, State or Territory. This test of adequacy was to be assessed by asking whether the alternative remedy satisfied *Convention 158*.<sup>62</sup> It was decided in a series of cases that most State unfair dismissal systems, with the exception of Queensland, were not such an 'adequate alternative remedy'.<sup>63</sup> The effect of these cases was to extend the breadth of the federal system at the expense of the State systems.

The key substantive provisions (as enacted) in relation to unfair dismissal and discriminatory dismissal were as follows:<sup>64</sup>

- an employer must not terminate an employee's employment unless there is 'a valid reason or valid reasons, connected with the employee's capacity or conduct or based on the operational requirements of the undertaking, establishment or service';<sup>65</sup>
- a reason was not valid if, having regard to the employee's capacity and conduct and the operational requirements of the employer, the termination was 'harsh, unjust or unreasonable';<sup>66</sup>
- an employer must not terminate an employee's employment for any one or more of a number of listed discriminatory grounds, including: temporary absence from work due to illness or injury; union membership or activities; non-membership of a union; taking part in legal proceedings against the employer; race; colour; sex; sexual preference; age; disability; marital status; family responsibilities; pregnancy; religion; political opinion; national

<sup>59</sup> *IR Act* s 170CB; *IR Regulations* reg 30A(2).

<sup>60</sup> *IR Act* Schedules 10 and 11.

<sup>61</sup> *ILO Convention 158* art 3.

<sup>62</sup> *IR Act* s 170EB. Note that this provision was altered in technical respects from January 1996. After this date, see *IR Act* s 170ED(4), (5).

<sup>63</sup> See, eg, *Liddell v Lembke* (1994) 127 ALR 342; *Fryar v Systems Services Pty Ltd* (1995) 130 ALR 168; Daniel Star and Rick Catanzariti, 'Just What Is an Adequate Alternative Remedy?' (1995) 8 *Australian Journal of Labour Law* 169.

<sup>64</sup> These provisions were contained in the *IR Act*, Part VIA Division 3, and the *IR Regulations* Part 5A. On these provisions, see generally, Pittard, above n 57, 171-192; Andrew Stewart, 'The Industrial Relations Reform Act 1993: Counting the Cost' (1994) 20 *Australian Bulletin of Labour* 140, 147-152; Andrew Stewart, 'And (Industrial) Justice For All? Protecting Workers Against Unfair Dismissal' (1995) 1 *Flinders Journal of Law Reform* 85, 96 ff.

<sup>65</sup> *IR Act* s 170DE(1).

<sup>66</sup> *IR Act* s 170DE(2).

extraction or social origin, or absence from work during maternity or other parental leave.<sup>67</sup> These later grounds of race, sex and so on were stated to be subject to two exceptions. First, where the reason for termination of employment was based on the inherent requirements of the particular position, and, secondly, where the termination was of a staff member of a religious institution and the employment was terminated in good faith in order to avoid injury to the religious susceptibilities of people of that religion;<sup>68</sup>

- an employer must not terminate an employee's employment for reasons related to the employee's conduct or performance unless the employee had been given an opportunity to defend himself or herself against the allegations. The employer need not however provide such an opportunity where that would not reasonably be expected;<sup>69</sup> and
- regulations might be made to exclude employees from the operation of the Act where the exclusion of that group was permitted by art 2(2) in the Convention.<sup>70</sup> Regulations were put into place to exclude such categories of employees. These groups were: employees engaged under a contract of employment for a specified period of time or specified task, employees serving a period of probation that was determined in advance and was of a reasonable duration, and employees engaged on a casual basis for a short period of time.<sup>71</sup>

The parallels between the content of these substantive provisions and *Convention 158* are substantial. It can be inferred from the similarities in wording that the Convention was a strong influence in the drafting of the federal statutory rights. Some commentators have suggested that the numerous instances of parallel wording between the *Industrial Relations Reform Act 1993* (Cth) provisions on termination of employment and the Convention reflects the 'extreme caution' shown by the federal government in invoking the external affairs head of power in the *Australian Constitution*.<sup>72</sup> Notably, though, there are a few major differences between the statutory provisions and the Convention. These differences indicate that other sources have also been influential in shaping the content of the legislative rights.

Although the central requirement in s 170DE(1) that there be a 'valid reason' for the termination is in all material respects identical to the obligation appearing in the Convention, the additional principle in s 170DE(2) prohibiting dismissal that is 'harsh, unjust or unreasonable' was not drawn from *Convention 158*. Rather, it was derived from some of the other areas of Australian law discussed above that were of relevance in 1993 to questions of arbitrariness in dismissal. These include State legislative rights regarding unfair dismissal, reinstatement by way

<sup>67</sup> *IR Act* s 170DF(1).

<sup>68</sup> *IR Act* s 170DF(2), s 170DF(3).

<sup>69</sup> *IR Act* s 170DC.

<sup>70</sup> *IR Act* s 170CC.

<sup>71</sup> *IR Regulations* reg 30B.

<sup>72</sup> Creighton and Stewart, above n 21, [11.41]. A similar point is made in Stewart, 'And (Industrial) Justice For All?', above n 64, 97.

of settling a federal industrial dispute and the standard award clause formulated in the *Termination, Change and Redundancy Case*.<sup>73</sup>

In 1996 the High Court held that the 'harsh, unjust or unreasonable' principle in s 170DE(2) of the *IR Act* was unconstitutional as it did not constitute a valid enactment under the external affairs head of power in the *Australian Constitution*. The reasoning was that the requirement relating to 'harsh, unjust or unreasonable' was beyond the terms of *Convention 158* because it went, according to the High Court, 'not to the reason for the termination, but to the overall effects of the termination'.<sup>74</sup> The Court held that the provisions in *Convention 158* were limited to proscriptions regarding the reasons for the termination of the contract of employment.<sup>75</sup> In the result, s 170DE(2) was held to be inoperative. Importantly though, the proscription on termination without a 'valid reason' in s 170DE(1) continued in force.

Creighton has argued that the concept of 'valid reason' may encompass the principle of 'harsh, unjust or unreasonable'.<sup>76</sup> In Creighton's view, the substantive requirement that a dismissal not be 'harsh, unjust or unreasonable' complies with the *Convention 158* requirement that there be a 'valid reason' for the dismissal.<sup>77</sup> He points to a 1974 report from the ILO's Committee of Experts on the Application of Conventions and Recommendations ('Committee') indicating that the concept of valid reason may be satisfied by a test of harsh, unjust or unreasonable. The relevant extract from the Committee report is as follows:

Whether or not the concept of termination which involves an abuse of power or is harsh, unjust or unreasonable may be equivalent to the requirement of a valid reason for termination, depends upon how the provisions concerned are applied or interpreted by the courts, labour tribunals or other bodies responsible for their enforcement. The position in this regard will depend both upon conceptions of what constitutes abuse or what is harsh, unjust or unreasonable and upon where the burden of proof lies.<sup>78</sup>

Creighton notes that in using the words 'harsh, unjust or unreasonable', the Committee explicitly referred (solely) to the South Australian statutory provision against unfair dismissal. It is clear, therefore, that the Committee was referring in this passage to the South Australian formulation of unfair dismissal as being a dismissal that is 'harsh, unjust or unreasonable'.<sup>79</sup> As Creighton notes, this

<sup>73</sup> *Termination, Change and Redundancy Case* (1984) 8 IR 34, 38-44.

<sup>74</sup> *Victoria v Commonwealth* (1996) 187 CLR 416, 517-518.

<sup>75</sup> *Ibid.*

<sup>76</sup> Creighton, 'The Workplace Relations Act in International Perspective', above n 6, 40 (especially footnote 53). See also Chapman *et al*, above n 38, 1-4.

<sup>77</sup> Creighton, 'The Workplace Relations Act in International Perspective', above n 50, 39.

<sup>78</sup> ILO Committee of Experts on the Application of Conventions and Recommendations, *General Survey of the Reports Relating to the Termination of Employment Recommendation 1963 (No 119)* (1974) [36]. Creighton acknowledges that this general survey related to Recommendation 119, not *Convention 158*, but notes that there is no relevant difference in wording between the two instruments in this regard. Creighton, 'The Workplace Relations Act in International Perspective', above n 6, 39.

<sup>79</sup> Creighton, 'The Workplace Relations Act in International Perspective', above n 6, 39 (especially footnote 51).

passage suggests that a test of 'harsh unjust or unreasonable' may satisfy the Convention requirement of a 'valid reason'. Interestingly, the Full Bench of the Australian Conciliation and Arbitration Commission in the 1984 *Termination, Change and Redundancy Case* indicated that in its view the tests of 'valid reason' and 'harsh, unjust or unreasonable' were of the same import.<sup>80</sup> It seems therefore that there is a division of opinion on whether the test of 'harsh, unjust or unreasonable' conforms to the Convention requirement that there be a 'valid reason' for termination. High Court authority suggests that it does not; the Committee report indicates that it may. The effect of the decision in *Victoria v Commonwealth* was to bring the federal statutory provisions further back into conformity with that court's construction of the obligations contained in *Convention 158*. In this sense the High Court shaped the federal legislation relating to unfair dismissal in a way that tied it more explicitly to the Convention.<sup>81</sup>

Notably, the statutory provisions relating to discriminatory dismissal contained all the grounds listed in the Convention plus the additional grounds of sexual preference, age, disability and absence from work whilst on parental leave. The first three of these grounds were not included in the original Bill but were added in the Senate during debates.<sup>82</sup> The Act stated that these additional matters were included for the purpose of giving effect to two other ILO Conventions and their accompanying Recommendations: the *Discrimination (Employment and Occupation) Convention, 1958* (No 111), its accompanying Recommendation, the *Workers with Family Responsibilities Convention, 1981* (No 156) and its accompanying Recommendation.<sup>83</sup> In addition, *Convention 158* does not contain the exceptions relating to the inherent requirements of the position and the religious practices of religious institutions. These provisions are commonly found in discrimination statutes and the main impetus for including them in the *IR Act* scheme was their use in such discrimination statutes, in particular the *Human Rights and Equal Opportunity Commission Act 1986* (Cth).<sup>84</sup>

The legislative requirement of giving an employee an opportunity to answer allegations reflects the requirement in art 7 of *Convention 158*. There were no material differences between the Convention and the federal statutory provision in this respect.<sup>85</sup>

In terms of the groups of employees excluded from the legislative rights as originally enacted, these groups were largely, but not necessarily wholly,

<sup>80</sup> (1984) 8 IR 34, 44.

<sup>81</sup> The point is made above that the federal government exhibited 'extreme caution' when it used the external affairs head of power in the Australian Constitution to enact the *Industrial Relations Reform Act 1993* (Cth). See above n 68 and accompanying text. In light of the High Court approach in *Victoria v Commonwealth*, it appears that this caution was well-founded.

<sup>82</sup> Pittard, above n 57, 181.

<sup>83</sup> *IR Act* s 170CA(2), (3).

<sup>84</sup> Further Supplementary Explanatory Memorandum: Industrial Relations Reform Bill 1993 (Cth) 1.

<sup>85</sup> Interestingly, the Commission in the *Termination, Change and Redundancy Case* declined to include such a right in the standard award clause it formulated: (1984) 8 IR 34, 46-47. The ACTU argued for the inclusion of such a right based on *ILO Convention 158*, UK practice and State unfair dismissal jurisdictions.



analogous to those that the Convention provides may be excluded from all or some of the substantive rights contained in the Convention.<sup>86</sup> The main difference lies in a slightly different delineation of the types of casual employees excluded from the ability to challenge their termination of employment. The Convention refers to 'workers engaged on a casual basis for a short period'.<sup>87</sup> The regulations delineated the group of workers excluded by reference to a time period of six months, a concept of 'regular and systematic' engagement, and an expectation of continuing employment by the employee.<sup>88</sup> Clearly these legislative provisions were neither identical to the Convention, nor were they necessarily encompassed within the Convention concept.<sup>89</sup> The salient point to be made is that although the two instruments were not identical in regard to which casual employees were to be excluded, it seems clear that *Convention 158* provided the idea and justification for the exclusion of the group of casual employees described in the *IR Act* provisions. This nexus is confirmed by the Act itself. It provided that Regulations may exclude specified employees only to the extent that the exclusion is permitted by art 2 of the Convention.<sup>90</sup>

### C AMENDMENTS TO THE INDUSTRIAL RELATIONS SCHEME

The *IR Act* provisions were subsequently amended in June 1994 and January 1996.<sup>91</sup> The main impetus for these amendments came from employer groups concerned over what they saw as excessive costs to them imposed by the dismissal protections.<sup>92</sup> In his second reading speech on the June amendments, the Minister acknowledged that the Bill was 'in direct response to some

<sup>86</sup> Notably the federal statutory rights are bestowed on 'employees'. This feature has been continued with the *WR Act*. It was thought that the federal statutory rights applied only in relation to employees in the common law sense (that is, engaged under a contract of employment), and not to all workers who provide labour in return for payment. Although this view was displaced by *Konrad v Victoria Police* (1999) 165 ALR 23, subsequent cases have taken a narrower view of the matter. See *Sammartino v Mayne Nickless (t/a Wards Skyoadd)* (2000) 98 IR 168; *Williams v Commonwealth* (17 October 2000, AIRC, Giudice P, McIntyre VP and Hodder C, Print T2042).

<sup>87</sup> *ILO Convention 158* art 2(c).

<sup>88</sup> *IR Regulations* regs 30B(1)(d) and 30B(3).

<sup>89</sup> In November 2001 the Federal Court struck down *WR Regulations* 30B(1)(d) and 30B(3) as not being authorised by s 170CC of the *WR Act*: *Hamzy v Tricon International Restaurants v/as KFC* [2001] FCA 1589. This case, and subsequent developments, are discussed later in this article.

<sup>90</sup> *IR Act* s 170CC.

<sup>91</sup> *Industrial Relations Amendment Act* (No 2) 1994 (Cth); *Industrial Relations and Other Legislation Amendment Act* 1995 (Cth). See generally Marilyn J Pittard, 'Statutory Unlawful Termination of Employment: Review and Revision' (1995) 8 *Australian Journal of Labour Law* 238.

<sup>92</sup> From the early 1980s employer groups had made their objection to the content of *ILO Convention 158* and its accompanying Recommendation clear. In the *Termination, Change and Redundancy Case* the Confederation of Australian Industry made clear its objection to the content of *Convention 158* and Recommendation 166 ((1984) 8 IR 34, 37). The concerns of employers were articulated more recently in the Australian Chamber of Commerce and Industry, *Unfair Dismissal in Australia - A Discussion Paper* (1995). In this paper ACCI (the successor entity of the CAI) notes that it opposed both the adoption of *Convention 158* and Recommendation 166 by the International Labour Conference and secondly, Australia's ratification of the Convention in February 1993. It adds that it was unaware of Australia's ratification until after the 1993 federal election. In the view of ACCI, by ratifying *Convention 158* Australia placed itself at a competitive disadvantage with other nations (at 4).

employers' views' on the termination of employment provisions.<sup>93</sup> The provisions inserted by the *Industrial Relations Reform Act 1993* (Cth) had, almost from their commencement, been the subject of much heated discussion by employers.<sup>94</sup> Stewart refers to the 'hysteria' expressed by some employers in the early days of the scheme established under the 1993 Act.<sup>95</sup> At least some employers genuinely seemed to have failed to understand that the unfair dismissal scheme in the 1993 legislation was never drafted to be merely a codification of existing legal principles relating to arbitrary dismissal, found in, for example, awards, State legislation, and the federal reinstatement jurisdiction. The legislation went considerably further than that. The 1993 Act established, in the words of Gray J in a 1995 decision, a 'charter of rights for employees', a 'realm' separate to, and distinct from, the 'fair go all round' sphere of the pre-existing principles regarding arbitrary dismissal found in the State unfair dismissal systems.<sup>96</sup>

The principal alterations were contained in the June 1994 amendments.<sup>97</sup> In most respects this set of alterations left the statutory scheme at odds with the ILO Convention provisions. In one important respect though, the amendments strengthened the link between the legislation and the Convention.<sup>98</sup> The amending legislation increased the categories of employees excluded from bringing an application under the legislation. The original 1993 statutory provisions enabled the promulgation of Regulations to exclude the employees described in art 2(2) of *Convention 158*. The June 1994 amendments altered this to enable Regulations to be made to exclude the categories of employees described under art 2(2), (4) and (5) of the Convention.<sup>99</sup> The content of art 2(4)

<sup>93</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 9 June 1994, 1782 (Johns, Assistant Minister for Industrial Relations). See also Commonwealth, *Parliamentary Debates*, House of Representatives, 30 August 1995, 819 (Petrie, Special Minister of State). On these amendments generally, see Pittard, above n 91.

<sup>94</sup> The debate over these provisions is noted in, for example, Pittard 'International Labour Standards in Australia', above n 57, 186; Stewart, 'The Industrial Relations Reform Act 1993: Counting the Cost', above n 64, 147, 150; Stewart, 'And (Industrial) Justice For All?', above n 64, 96, 106-107; Creighton and Stewart, above n 21, [11.42]; Mark Davis, 'Why Employers are Dismissive of the New Federal Legislation' *Australian Financial Review*, 15 May 1994; Nicholas Johnston, 'Unions Angry Over Sacking Law Change' *The Age*, 31 May 1994; Senate Economics References Committee, Parliament of Australia, *Report on Consideration of the Workplace Relations and other Legislation Amendment Bill 1996* (1996), [4.335], [5.121].

<sup>95</sup> Stewart, 'And (Industrial) Justice For All?', above n 64, 107.

<sup>96</sup> *Fryar v Systems Services Pty Ltd* (1995) 130 ALR 168, 189.

<sup>97</sup> The main amendments introduced by Schedule 2 of the *Industrial Relations and Other Legislation Amendment Act 1995* (Cth) were the following: applications were to be made to the AIRC which in the first instance would conduct a process of conciliation; the AIRC was given a new jurisdiction to arbitrate with the consent of the parties; the AIRC was directed to consider all the circumstances of the case in adjudicating applications and in awarding remedies; the provisions regarding adequate alternative remedies to the federal statutory rights were clarified, and, provisions enabling the Industrial Relations Court of Australia to order costs were introduced. See generally Pittard, 'Statutory Unlawful Termination of Employment', above n 91.

<sup>98</sup> In another respect the 1994 amendments stayed in tune with the Convention provisions. The amending legislation provided for the employer to bear the onus of proof to establish that there was a valid reason for the dismissal within the meaning of the legislation whilst the employee, should he or she seek to rely on s 170DE(2), bore the onus of establishing that the dismissal was 'harsh, unjust or unreasonable' (s 170EDA). Placing the burden on the employer to establish the existence of a valid reason is contemplated within the ILO provisions as an appropriate onus of proof (*ILO Convention 158* art 9(2)(b)). This view is confirmed in Betten, *International Labour Law*, above n 51, 226 and Napier, 'Dismissals - The New ILO Standards', above n 38, 21.

<sup>99</sup> *IR Act* s 170CC.

and (5) has been described above.<sup>100</sup>

Amendments were also made to the *IR Regulations* in 1994 and 1995. Of interest was the exclusion from November 1994 of some trainees (reg 30BA) and people engaged under the *Australian Federal Police Act 1979* (Cth).<sup>101</sup> The exclusion of both groups of employees might fit within the description contained in art 2(4) or (5) of the Convention. Creighton suggests they probably do as the engagement of both groups of workers are regulated by special legislative schemes. These separate statutory schemes appear to provide protection that is equivalent to the Convention protections.<sup>102</sup> Importantly though, as the promulgation of these Regulations was not listed in Australia's first report under *Convention 158* (submitted in September 1995), the requirements in art 2(6) were not complied with. In effect this means that according to the Convention, these Regulations did not comply with art 2 of the Convention.<sup>103</sup>

In other respects the June 1994 legislative amendments were at odds with the provisions in the Convention. Such disjunctures suggest that the government prioritised non-Convention ideas and principles over those contained in *Convention 158*. Importantly, in June 1994 an exception in relation to high income earners was introduced. This statutory provision meant that employees who were not engaged under an industrial award or registered agreement and who earned over a certain amount were not entitled to lodge an unfair dismissal application under the Act.<sup>104</sup> This category of employees were those whose per annum remuneration exceeded a specified indexed amount (originally \$60,000) and who were not employed under a federal award or a registered federal agreement.<sup>105</sup> It is difficult to see how this exclusion can be justified in terms of the requirements of *Convention 158*. Article 2(1) of the Convention states that it applies to 'all employed persons'. It seems unlikely that the statutory exclusion of high income earners would fall within either art 2(4) or (5). There are no 'special arrangements' providing equivalent protection to high income earners in relation to dismissal from employment.

<sup>100</sup> See above n 41 and accompanying text.

<sup>101</sup> In addition, from November 1994, a variation to the exclusion relating to contracts for a specified period of time commenced. This provided that the following group of employees was excluded from the Act: employees engaged under a contract of employment for a specified period of time, being a contract that was entered into on or after 16 November 1994, where that specified period is less than 6 months (*IR Regulations* reg 30B(1)(aa)). This revised exemption means that if the contract is longer than six months in duration and was entered into after 16 November 1994, the employee may have recourse to the unfair dismissal and discriminatory dismissal provisions in the Act. This exemption was revised a further time in 1996. See below n 160. This alteration in the scope of the exclusion conforms with *Convention 158* as the Convention provides only that workers engaged under a contract of employment for a specified period of time may be excluded. It is not a requirement under the Convention that all such workers be excluded; this is merely discretionary.

<sup>102</sup> Creighton, 'The Workplace Relations Act in International Perspective', above n 6, 41.

<sup>103</sup> Creighton and Stewart, above n 21, [11.41] (especially footnote 177). The Committee of Experts has explained that the rationale behind art 2(6) is to ensure that countries do not contract the application of the Convention to them over time: ILO Committee of Experts on the Application of Conventions and Recommendations, *Protection Against Unjustified Dismissal* (1995), [73].

<sup>104</sup> Note that this exemption did not apply to the discriminatory dismissal provisions.

<sup>105</sup> *IR Act* s 170CD.

It seems unlikely that the common law action of wrongful dismissal, State jurisdictions of unfair dismissal, the federal industrial disputes jurisdiction, or federal or State discrimination statutes, would fit this description. The ILO Committee of Experts on the Application of Conventions and Recommendations expressed the view in 1995 that the common law 'cannot provide the full scope of the protection prescribed by' *Convention 158*.<sup>106</sup> In addition, the only 'special problems' and 'particular conditions of employment' identified in relation to high income earners relate to cost factors involved in compensating this group of employees when they have been adjudged to have been unfairly dismissed. Nonetheless, as Creighton notes, it does appear that in 1995 the Committee was prepared to accept that 'persons in executive positions or positions of responsibility or trust' legitimately come within the ambit of art 2(5).<sup>107</sup>

Several points are worth making here. First, the extract in which the Committee developed this idea is highly problematic in that it suggests (in a footnote) some misunderstandings on the part of the Committee about law and practice in Australia.<sup>108</sup> Importantly, the group of employees identified by the Committee is not necessarily congruent with the group of non-award (or registered agreement) high income earners excluded from the Australian federal unfair dismissal protections.<sup>109</sup> This view is strengthened by an appreciation that the statutory exclusion does not exclude all high income earners, it only precludes those who are not employed under an award or registered agreement. In addition, the fact that the government introduced the high income earner exception as an amendment to the statute rather than as a regulation promulgated under s 170CC (revised to refer explicitly to art 2(4) and (5)) suggests that the government itself did not see the high income earner exemption as sufficiently encompassed within the Convention concepts in art 2(4) and (5). Notably, the high income earner exclusion was not listed in Australia's first report under the Convention as being in furtherance of either art 2(4) or (5). It seems therefore that this June 1994 amendment to exclude high income earners represents a backing away by the government from reliance on *Convention 158* as a source of ideas and justification for the statutory rules. Notably this move by the government came a mere three months after the commencement of the new statutory scheme. It resulted from the Labor government responding to the perceived political needs of the time – the very loud and at time vociferous resistance of many employers and employer organisations to the enactment of these federal statutory provisions.

In addition, the June 1994 amendments addressed the issue of remedy. The alterations were designed to ensure that reinstatement was to be the primary remedy, and that compensation was to be ordered only where the adjudicator had formed the view that reinstatement was 'impracticable'.<sup>110</sup> Although this provision

<sup>106</sup> ILO Committee of Experts on the Application of Conventions and Recommendations, *Protection Against Unjustified Dismissal* (1995) [25] discussed in Breen Creighton, 'Protection Against Unjustified Dismissal' (1995) 8 *Australian Journal of Labour Law* 226, 228.

<sup>107</sup> *Ibid.*

<sup>108</sup> *Ibid.*

<sup>109</sup> Creighton, 'Protection Against Unjustified Dismissal', above n 106, 228.

appears to conform to art 10 of the Convention, the amendments to remedies went further to specify that orders for compensation must not exceed specified amounts (an indexed amount, originally \$30,000 or six months remuneration).<sup>111</sup> Employers had urged the government to impose such a cap since the inception of the *Industrial Relations Reform Act 1993* (Cth) provisions.<sup>112</sup> Stewart writes that the introduction of the cap was an attempt by the government to quell employer concerns over the possibility of large compensation orders.<sup>113</sup> Imposing a cap on the amount of compensation that may be ordered does not conform to the Convention requirements. The Convention requires that machinery be established under which employees can appeal to an impartial body that has the power to grant a remedy.<sup>114</sup> The impartial body must have the capacity to order that 'adequate compensation' be paid to the unfairly dismissed employee.<sup>115</sup> Although a maximum amount of six months remuneration, or the indexed amount, may provide 'adequate compensation' in many circumstances of proven unfair dismissal, so too it is likely to be inadequate in other cases where a dismissal has been adjudged to be unfair. Creighton suggests that these caps may result in inadequate compensation where dismissal has taken place for a discriminatory reason such as on the ground of gender, race or disability. Creighton finds support for his view in a statement from the Committee that 'it would be desirable for the compensation awarded for termination for a reason which impairs a fundamental human right to be commensurate with the prejudice suffered, and higher than for other kinds of termination'.<sup>116</sup> In addition, Stewart has identified a further scenario where the cap on compensation may mean that compensation is not adequate. This arises where, due possibly to the age and/or lack of skills of the dismissed employee, he or she might spend considerably more than six months without employment.<sup>117</sup>

It is clear that *Convention 158* played a central role in shaping the content of the unfair dismissal and discriminatory dismissal provisions in the *Industrial Relations Reform Act 1993* (Cth). This can be inferred from the sequence, and timing, of events leading up to the enactment of the statute, the explicit linking of the statute with *Convention 158*, and the many instances of parallel wording between the statute and the Convention. Although an important source of ideas used by the legislative drafters, *Convention 158* was not the sole source of inspiration for the legislation. Other sets of legal rights such as State unfair dismissal jurisdictions, the *Termination, Change and Redundancy Case*<sup>118</sup> and anti-discrimination statutes also played a role in shaping the content of the statutory rules. The federal legislative scheme was amended in June 1994. Some

<sup>110</sup> *IR Act* s 170EE(2).

<sup>111</sup> *IR Act* s 170EE(3), (4).

<sup>112</sup> Australian Chamber of Commerce and Industry, above n 92, 1.

<sup>113</sup> Stewart, 'And(Industrial) Justice For All?', above n 64, 116.

<sup>114</sup> *ILO Convention 158* art 8.

<sup>115</sup> *ILO Convention 158* art 10.

<sup>116</sup> ILO Committee of Experts on the Application of Conventions and Recommendations, above n 106; Creighton, 'The Workplace Relations Act in International Perspective', above n 6, 42.

<sup>117</sup> Stewart, 'And(Industrial) Justice For All?', above n 64, 116.

<sup>118</sup> *Termination, Change and Redundancy Case* (1984) 8 IR 34.

of these amendments continued a clear nexus with the Convention provisions. Other alterations though, particularly the high-income earner exemption and the cap on compensation, present a break with the Convention principles. These amendments indicate that the government backed away from the commitments contained in *Convention 158* when domestic political needs were seen to be more pressing. In particular, when some of the statutory provisions proved politically troublesome for the government, it bowed to pressure from employers and imposed a ceiling on the amount of compensation that could be ordered, in addition to excluding non-award/agreement high income earners from the ambit of the statutory rights.

### **D THE WORKPLACE RELATIONS ACT 1996 (Cth)**

The Howard Liberal-National government was elected in March 1996. It is clearly less interested in the work of the ILO than its predecessor. This is reflected in a number of decisions that the government made soon after its election. These include declining to stand a candidate for re-election to the Governing Body, reducing the size of the Australian delegation to the International Labour Conference, and recalling the Australian Special Labour Adviser from Geneva.<sup>119</sup> In addition, the government announced that it would revise the procedures through which Australia ratified treaties and Conventions. This announcement was at least partly in response to the controversial circumstances under which *Convention 158* was ratified.<sup>120</sup> Perhaps most tellingly, the current government has not ratified any ILO Conventions since it took office.<sup>121</sup> Although less committed to the work of the ILO than the previous Labor government, the current federal government has clearly not rejected the ILO and its role in labour standard setting and enforcement in its entirety. Notably, the incumbent Coalition government had the opportunity to denounce

<sup>119</sup> Creighton and Stewart, above n 21, [3.01] - [3.05], [3.22] - [3.23]; Creighton, 'The Workplace Relations Act in International Perspective', above n 6, 32-33. The position of Special Labour Adviser was established by a Labor government in the early 1970s. Based in Geneva, the role of the Adviser was to liaise between the Australian government and various organs of the ILO, and to provide administrative support to Australian delegations and the Australian members of the Governing Body. Creighton, 'The Workplace Relations Act in International Perspective', above n 6, 32. This government winding back of its ILO involvement was criticised at the time by both union and employer bodies: Nicholas Way, 'Employers Upset by Reith's ILO Pullout' *Business Review Weekly*, 5 August 1996, 32.

<sup>120</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 2 May 1996, 277 (Peter Reith, Minister for Industrial Relations). See Senate Legal and Constitutional References Committee, above n 55, 126-9. On these revisions, see generally, Anne Twomey, 'International Law and the Executive', Chapter 3 in Opeskin and Rothwell 1997, above n 52, 89-94.

<sup>121</sup> Australia has not ratified the range of ILO Conventions dealing with occupational health and safety issues. These instruments, and in particular the *Occupational Safety and Health Convention 1981* (No 155) opened for signature 22 June 1981 (entered into force 11 August 1983), are obvious examples of Conventions that could be usefully ratified by Australia. Creighton and Stewart, above n 21, [3.33]. This lack of enthusiasm for ratification should however be seen in the context of a world-wide slowing down in the rate of ratifications.

*Convention 158*, but chose not to.<sup>122</sup>

The Coalition's industrial relations policy, released prior to the March 1996 federal election, echoed the concerns expressed by many employers and employer groups that the *IR Act* scheme of unfair dismissal was 'far too detailed, too prescriptive and too legalistic and hence a disincentive to employment'.<sup>123</sup> The government announced that it would bring about the enactment of 'a new scheme' of unfair dismissal based on the principle of a 'fair go all round'.<sup>124</sup> It stated that this new scheme would 'accord with Australia's international obligations'.<sup>125</sup> In addition, the Minister for Industrial Relations, before the Bill was introduced, stated that 'in redrafting these provisions, we will of course abide by international standards, and so we should. But we are not going to be treaty-driven, as the previous government was'.<sup>126</sup> Soon after coming to power the new government introduced a comprehensive Bill to make substantial amendments to the federal legislative scheme regulating termination of employment. After undergoing numerous alterations in the Senate, the Bill passed both Houses of Parliament and the new provisions on unfair dismissal and discriminatory dismissal commenced on 31 December 1996.<sup>127</sup>

In enacting, and subsequently amending the *WR Act* provisions, the government has drawn on a range of ideas and sources of legal rights regarding dismissal.<sup>128</sup> *Convention 158* has been one of these sources, although it has been less influential in shaping the legislative agenda of the current government than it was

<sup>122</sup> Most ILO Conventions can be denounced by member states that have ratified them during a 12 month period commencing on each 10th anniversary of the date on which the Convention first entered into force. This date is when it received its second ratification. See de la Cruz, von Potobsky and Swepston, above n 51, 55-56; Betten, above n 51, 24-25. *Convention 158* was open to denunciation by Australia from 23 November 1995 to 22 November 1996.

<sup>123</sup> Reith, above n 9, 11. Mr Abbott, the current Minister for Employment, Workplace Relations and Small Business, has recently described the 'problem' of the 'old unfair dismissal regime' as that 'it has cost jobs and depressed employment': Commonwealth, *Parliamentary Debates*, House of Representatives, 9 August 2001, 29382 (Tony Abbott, Minister for Employment).

<sup>124</sup> This expression is attributed to Sheldon J in an early case in the NSW unfair dismissal jurisdiction: *Re Loty and Holloway and Australian Workers' Union* [1971] AR (NSW) 95. This case, and the State jurisdictions on unfair dismissal, are discussed above. The principle of 'fair go all round' is also discussed further below.

<sup>125</sup> *Ibid.* This assertion is repeated in Department of Industrial Relations, *The Reform of Workplace Relations Legislation Guide* (May 1996), [6.1].

<sup>126</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 2 May 1996, 278 (Peter Reith, Minister for Employment, Workplace Relations and Small Business). This passage is quoted in Creighton, 'The Workplace Relations Act in International Perspective', above n 6, 33. It appears from the context of the statement that the Minister was referring to the unfair dismissal provisions.

<sup>127</sup> The Bill was titled the Workplace Relations and Other Legislation Amendment Bill 1996 (Cth). It passed both Houses of Parliament in November 1996, and, after some 170 amendments in the Senate became the *Workplace Relations and Other Legislation Amendment Act 1996* (Cth). One of the amendments made by this Act was to rename the *Industrial Relations Act 1988* (Cth) the *Workplace Relations Act 1996* (Cth).

<sup>128</sup> The main amendments to the scheme were contained in the *Workplace Relations and Other Legislation Amendment Act 1997* (Cth) and the *Workplace Relations Amendment (Termination of Employment) Act 2001* (Cth) (passed by Parliament in August 2001).

in shaping the legislation of the previous Keating Labor government.<sup>129</sup> The ambivalence that the current government appears to feel towards the role of *Convention 158* in shaping the federal statutory rights, and in particular the unfair dismissal provisions, can be inferred from a number of matters. These include statements made by various representatives of the government (including those recited in the paragraph above), an alteration in the constitutional bases of the unfair dismissal provisions away from the external affairs power, the use in the unfair dismissal provisions of domestic legal concepts such as 'harsh, unjust or unreasonable' and 'fair go all round' in preference to the Convention principle of 'valid reason', and an exacerbation in the ways in which the current *WR Act* scheme does not comply with the requirements of *Convention 158*. These matters are explored in this part of the article. As with the June 1994 amendments made to the *IR Act*, many of these features of the *WR Act* scheme are a response by the government to the concerns expressed by employers, and particularly the small business lobby, regarding the unfair dismissal rights.

The attitude of the incumbent federal government towards the Convention appears to be reflected in a view expressed by the Department of Industrial Relations in its submission to the Senate Inquiry into the Bill that formed the basis of the *WR Act*. The Department emphasised that Australia's obligations under *Convention 158* were not to be met by federal legislation alone but rather the government intended that a combination of federal, State and Territory law and practice would together satisfy the Convention provisions. In its submission to the Senate Inquiry the Department wrote: '[t]he Government intends that certain Articles of this Convention will in future be given effect by the separate federal and [S]tate unfair dismissal systems, with the remaining Articles being given effect by a range of means, but with compliance secured by provisions in the proposed *WR Act* as a safety net'.<sup>130</sup> This suggests a decline in the part played by the federal legislation in satisfying the obligations contained in *Convention 158*.<sup>131</sup> Conversely, it indicates that *Convention 158* is to play a reduced role in shaping the *WR Act* scheme.

This reduction in the importance accorded to *Convention 158* and Recommendation 166 in shaping the federal legislation can be seen in the

<sup>129</sup> The Coalition government's hesitancy about the role of international standards in shaping the termination of employment provisions appears to reflect a broader pattern of ambivalence towards international standards in other provisions in the *Workplace Relations Act*, such as, for example, the right to bargain collectively. Creighton, 'The Workplace Relations Act', above n 6, 37. For an examination of the *WR Act* (but not the termination of employment provisions) and human rights, see, Therese MacDermott, 'Labour Law and Human Rights' in David Kinley (ed), *Human Rights in Australian Law* (1998), 194. On the role of ILO standards in Australia generally, Creighton, 'The ILO and the Protection of Fundamental Human Rights in Australia', above n 53; Nick Ruskin and Luke Smith, 'The Role and Impact of International Labour Organisation Standards in Australian Workplaces' (1998) 40 *Journal of Industrial Relations* 315; Braham Dabscheck, 'Human Rights and Industrial Relations' (1997) 7 *Labour & Industry* 1.

<sup>130</sup> Commonwealth Department of Industrial Relations, *Submission to the Senate Economics References Committee's Inquiry into the Workplace Relations and Other Legislation Amendments Bill 1996*, Submission No 1016, 62.

<sup>131</sup> The majority Senate report drew on a submission by Andrew Stewart to criticise what it referred to as this 'abdication of responsibility' by the Commonwealth Parliament: Senate Economics References Committee, above n 94, [11.36].



introductory provisions in the *WR Act* regarding termination of employment. In contrast to the 1993 scheme, the *WR Act* jurisdiction provides that one of its principal objectives is 'to assist in giving effect to the Termination of Employment Convention'.<sup>132</sup> As noted above, the previous statutory scheme stated that its (sole) object was 'to give effect, or give further effect' to *Convention 158* and Recommendation 166.<sup>133</sup> Notably this change in wording from 'to give effect, or give further effect', to 'assist' conveys a meaning that accords with the view expressed in the previous paragraph by the Department of Industrial Relations. In contrast to this distancing of the Act from the Convention, one important link between the two instruments has been carried over from the *IR Act*. As with the *IR Act*, the *WR Act* provides that an expression used in the Act has the same meaning as in the Convention.<sup>134</sup> For convenience, *Convention 158* has been retained as a Schedule to the *WR Act*, as it was in the *IR Act*.<sup>135</sup> Although the Convention continues as a central aid in the interpretation of the statutory provisions, any potential role that Recommendation 166 might have in this regard has been substantially reduced under the *WR Act*. Not only has a reference to the Recommendation been deleted from the objects clause in the termination of employment provisions in the *WR Act*,<sup>136</sup> but Recommendation 166 has been removed from the annexures to the statute. This suggests a substantial diminution in the role accorded to Recommendation 166 in the *WR Act* provisions. The Australian Chamber of Commerce and Industry had argued strongly since 1994 that all references in the legislation to Recommendation 166 ought to be removed.<sup>137</sup> The incumbent Coalition government responded to this call.

The decline in the importance of *Convention 158* and Recommendation 166 in the federal statutory scheme can additionally be seen in the altered constitutional bases of the *WR Act* provisions. The current unfair dismissal provisions in the *WR Act* rely on a mixture of heads of power in the *Australian Constitution*, including the conciliation and arbitration power, the corporations power, the Territories power, the Commonwealth public sector power, the interstate or overseas trade and commerce power, and the referral of power from the Victorian Parliament.<sup>138</sup> Importantly though, the external affairs power still provides the

<sup>132</sup> *WR Act* s 170CA(1)(e). See also s 170CB(5), (6) and s 170CK(1). The latter provision states that in addition to the objective stated in s 170CA(1), the object of the discriminatory dismissal provisions is 'to assist in giving effect to' the *Convention Concerning Discrimination in Respect of Employment and Occupation, and the Family Responsibilities Convention*. Note also that s 93A requires the AIRC in performing its functions to take into account the principles embodied in the *Workers with Family Responsibilities Convention*, 1981.

<sup>133</sup> *IR Act* s 170CA(1).

<sup>134</sup> *WR Act* s 170CD(2), *WR Regulations* reg 30A(2). Note s 170CD(1B) inserted by the *Workplace Relations Amendment (Termination of Employment) Act 2001* (Cth).

<sup>135</sup> *WR Act* Schedule 10.

<sup>136</sup> *WR Act* s 170CA(1)(e). See also s 170CB(5), (6).

<sup>137</sup> Australian Chamber of Commerce and Industry, above n 92, 11.

<sup>138</sup> *WR Act* s 170CB(1), s 492. The provisions in the *Australian Constitution* are, respectively, the following: s 51(xx); s 122; s 52(ii); s 51(i); s 51(xxxvii). See WJ Ford, 'Reconstructing Australian Labour Law: A Constitutional Perspective' (1997) 10 *Australian Journal of Labour Law* 1, 20. On the Victorian referral of power, see Victorian Industrial Relations Taskforce, *Independent Report of the Victorian Industrial Relations Taskforce* (2000) Chapter 4.

main source of validity for the prohibition on discriminatory dismissal.<sup>139</sup>

The key substantive provisions in the *WR Act* scheme prohibiting unfair dismissal and discriminatory dismissal are as follows:<sup>140</sup>

- an employee whose employment has been terminated at the initiative of the employer may make an application to the Australian Industrial Relations Commission ('AIRC') on the ground that the termination was 'harsh, unjust or unreasonable';<sup>141</sup> and
- guidance on the meaning of 'harsh, unjust or unreasonable' is provided by two interacting factors: the express statement of legislative purpose as being to provide a system to ensure a 'fair go all round' is accorded to both the employer and employee concerned<sup>142</sup> and the following list of matters that the AIRC is required to take into account in arbitrating a claim of harsh, unjust or unreasonable dismissal:
  - (a) whether there was 'a valid reason for the termination related to the capacity or conduct of the employee or to the operational requirements of the employer's undertaking, establishment or service; and
  - (b) whether the employee was notified of that reason; and
  - (c) whether the employee was given an opportunity to respond to any reason related to the capacity or conduct of the employee; and
  - (d) if the termination related to unsatisfactory performance by the employee - whether the employee had been warned about that unsatisfactory performance before the termination; and
  - (da) the degree to which the size of the employer's undertaking, establishment or service would be likely to impact on the procedures followed in effecting the termination; and
  - (db) the degree to which the absence of dedicated human resource management specialists or expertise in the undertaking, establishment or service would be likely to impact on the procedures followed in effecting the termination; and
  - (e) any other matters that the Commission considers relevant;<sup>143</sup>

<sup>139</sup> *WR Act* s 170CB(5), (6), s 170CK(1).

<sup>140</sup> On these provisions, see generally Creighton and Stewart, above n 21, [11.37] - [11.76]; Andrew Gotting, 'Termination of Employment' in John HC Colvin and Graeme Watson, *The Workplace Relations Handbook: A Guide to the Workplace Relations Act 1996 (Cth)* (1998); Anna Chapman, 'Termination of Employment Under the Workplace Relations Act 1996 (Cth)' (1997) 10 *Australian Journal of Labour Law* 89.

<sup>141</sup> *WR Act* s 170CE(1)(a). On the meaning of termination of employment, see s 170CD(1), (2).

<sup>142</sup> *WR Act* s 170CA(2). The Explanatory Memorandum issued with the Bill describes the principle of 'fair go all round' as a 'fundamental objective' of the relevant subdivision in the Act: Explanatory Memorandum [7.19].

<sup>143</sup> *WR Act* s 170CG(3). Section 170CG(3)(da) and (db) were inserted by the Workplace Relations Amendment (Termination of Employment) Act 2001 (Cth).

- dismissal on specified discriminatory grounds is explicitly prohibited.<sup>144</sup> An employee whose employment has been terminated at the initiative of the employer may make an application to the AIRC on the ground that the termination was in contravention of this prohibition.<sup>145</sup> The grounds of discrimination are identical to the list in the 1993 Act save for one additional matter – refusing to negotiate in connection with a specified type of registered agreement (an Australian Workplace Agreement). In addition, the 1996 legislation contains the same two exceptions included in the 1993 Act – the inherent requirements of the particular position and, secondly, the bona fide religious practices of religious institutions.<sup>146</sup> In theory, the 'fair go all round' principle applies in relation to an application alleging discriminatory dismissal,<sup>147</sup> and
- as with the 1993 statutory scheme, the current protections do not apply to all employees in Australia. Whether any particular employee is entitled to lodge an application under the *WR Act* provisions depends on the interaction of two main factors – the constitutional bases of the legislative provisions in question (as reflected in s 170CB), and secondly, whether the particular employee has been excluded by Regulations made under s 170CC. These matters are discussed further below. In addition, amending legislation passed by Parliament in August 2001 introduced a requirement that employees serve a qualifying period before being entitled to make a claim for unfair dismissal.<sup>148</sup> This new exclusion appears to comply with the Convention provisions.<sup>149</sup>

The government's preference for Australian-derived concepts over the international principle of 'valid reason' contained in *Convention 158* can be seen in the prominence accorded to the concepts of 'harsh, unjust or unreasonable' and 'fair go all round' in the *WR Act* unfair dismissal provisions.<sup>150</sup> The altered constitutional bases of the unfair dismissal provisions in the *WR Act* makes it constitutionally viable to reintroduce the concept of 'harsh, unjust or unreasonable' into the federal statutory provisions. Both 'harsh, unjust or unreasonable' and 'fair go all round' are concepts that originated in State unfair dismissal jurisdictions in the 1970s and 1980s (as discussed above). In particular, the formula of 'harsh, unjust or unreasonable' appeared in the 1972 South Australian statute, and was endorsed at the federal award level in the 1984

<sup>144</sup> *WR Act* s 170CK(2).

<sup>145</sup> *WR Act* s 170CE(1)(b). On the meaning of termination of employment, see s 170CD(1), (2).

<sup>146</sup> *WR Act* s 170CK(3), (4).

<sup>147</sup> *WR Act* s 170CA(2). For a critique of the applicability of the 'fair go all round' principle in the discriminatory dismissal context, see Chapman, above n 140, 95.

<sup>148</sup> *WR Act* s 170CE(5A) and (5B) introduced by the *Workplace Relations Amendment (Termination of Employment) Act 2001* (Cth). Note that the qualifying period is either three months, or, a shorter period or no period if that is agreed to in (prior) writing, or, a longer period determined by (prior) written agreement where that period is of a reasonable duration having regard to the nature and circumstances of the employment.

<sup>149</sup> *ILO Convention 158* art 2(2)(b).

<sup>150</sup> Employers had (unsuccessfully) urged the previous Labor government to adopt a 'fair go all round' concept in the legislation: Australian Chamber of Commerce and Industry, above n 92, 4-5. The ACCI viewed the 'fair go all round' principle as involving a 'pragmatic assessment' leading to a more 'balanced' approach.

<sup>151</sup> (1984) 8 IR 34, 38-44.

*Termination Change and Redundancy Case.*<sup>151</sup> The 'fair go all round' idea is generally attributed to Sheldon J in the 1971 New South Wales decision of *Re Loty and Holloway v Australian Workers' Union*.<sup>152</sup>

The question of whether the termination of employment was 'harsh, unjust or unreasonable' is now the central issue to be addressed in an employee's application for a remedy under s 170CE(1)(a). Factors reflecting more directly the Convention provisions such as whether there was a 'valid reason' for the dismissal related to the employee's capacity or conduct, or the employer's operational requirements, and whether the employee had been given an opportunity to answer allegations of alleged misconduct or lack of performance, are now merely indicia that the AIRC is directed to take into account in its consideration of whether the termination in question was, on the facts, 'harsh, unjust or unreasonable'. The role of procedural fairness under the *IR Act* (such as the requirement on an employer to give an employee a reasonable opportunity to respond to allegations of misconduct or lack of performance<sup>153</sup>) was one of the main criticisms of the 1993 provisions voiced by employers, and its reduced role under the *WR Act* is clearly an attempt to address these concerns.<sup>154</sup> The introduction of the new factors in s 170CG(3) pertaining to the size of the employer's business and the absence of dedicated human resource management expertise (s 170CG(3)(da) and (db)) by amending legislation in August 2001 is a further attempt by the government to address employer agitation regarding the unfair dismissal provisions.<sup>155</sup> In his second reading speech of the original Bill that was later to become this amending statute, the Minister for Employment, Workplace Relations and Small Business indicated that these provisions were designed to reduce what he described as the 'special burden' of unfair dismissal claims on small businesses.<sup>156</sup> Notably, there is nothing in *Convention 158* to suggest that small business should be accorded special consideration. Downgrading the importance of 'valid reason' and procedural fairness in the legislative rules, in addition to the introduction of s 170CG(3)(da) and (db), suggest that the government may have prioritised domestic political concerns over any perceived need for the *WR Act* provisions to reflect the requirements of *Convention 158*.

The discriminatory dismissal provisions in the *WR Act* have been carried over from the 1993 statute in a largely unaltered form. They have occupied less of the current (and former) government's legislative energy than has the unfair dismissal scheme. Notably, the small business lobby has not expressed major concerns

<sup>151</sup> (1984) 8 IR 34, 38-44.

<sup>152</sup> [1971] AR (NSW) 95. See note directly following *WR Act* s 170CA(2). This case, and the jurisdiction from which it is drawn, are discussed above.

<sup>153</sup> *IR Act* s 170DC.

<sup>154</sup> Australian Chamber of Commerce and Industry, above n 92, 10. Acknowledgement of these concerns appears in the Explanatory Memorandum to the Bill. See Explanatory Memorandum, Workplace Relations Bill 1996 (Cth) [7.44].

<sup>155</sup> These sub-sections were introduced by the *Workplace Relations Amendment (Termination of Employment) Act 2001* (Cth).

<sup>156</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 26 June 2000, 18325 (Peter Reith, Minister for Employment, Workplace Relations and Small Business). See also 18324.

about these rules regarding dismissal on a prohibited ground. The few new features of the discriminatory dismissal scheme that were inserted with the *WR Act* include the addition of the ground relating to negotiating an Australian Workplace Agreement and the introduction of the 'fair go all round' principle. As neither of these concepts are drawn from *Convention 158*, it can be seen that these new features mark a further reduction in the influence of the Convention on the federal legislative rights in this area.

The section in the *WR Act* that permits the making of Regulations to exempt certain types of employees has been redrafted to remove all direct references to the various paragraphs in art 2 of the Convention and instead lists the classes of employees that may be excluded by regulation.<sup>157</sup> Although references to art 2 have been removed, the list in the section does largely parallel the content of art 2. It comprises the classes of employees covered by art 2(2) as well as classes that are similar, but not identical, to the categories of employees delineated in art 2(4) and (5). The specific wording in the *WR Act* is that Regulations may be made to exclude employees whose terms of employment are 'governed by special arrangements providing particular protection in respect of termination of employment either generally or in particular circumstances' and 'employees in relation to whom the operation of the provisions causes or would cause substantial problems because of their ... particular conditions of employment or ... the size or nature of the undertakings in which they are employed'.<sup>158</sup> These categories broadly reflect the Convention provisions, although they are clearly not identical. The most obvious point of disjuncture is that there is no requirement in the Act, as there is in the Convention, that the 'special arrangements' referred to in relation to the first group of employees provide as a whole protection that is at least equivalent to the protection afforded under the Convention. Importantly, these exclusions in the *WR Act* are not consistent with the Convention because they were not, and due to timing could not be, listed in Australia's first report on *Convention 158* in September 1995. They would need to be so noted in order to comply with art 2(6). This redrafting of the legislation to remove references to the Convention would appear to be a conscious decision by the government to sever some of the explicit links between the legislation and the Convention. In this sense it represents a reduction in the role of the Convention in shaping the legislation.

Regulations made under the *WR Act* excluding certain employees from accessing the statutory rights largely reflect the groups of employees excluded under the previous *IR Act* scheme.<sup>159</sup> There have however been a number of developments in the precise parameters of some of these categories of employees excluded. An alteration in the exclusion of employees engaged under contracts for a specified period of time brings the current Regulations back to a parallel position with

<sup>157</sup> *WR Act* s 170CC.

<sup>158</sup> *WR Act* s 170CC(1)(d), (e).

<sup>159</sup> Note the Workplace Relations Amendment (Fair Termination) Bill 2002 [No2] (Cth), introduced into Parliament on 20 February 2002. If enacted this statute will, amongst other things, lift the provisions excluding various categories of employees out of the *WR Regulations* and place them in the body of the Act. This Bill is discussed further below.

*Convention 158*.<sup>160</sup> In contrast, the redrafted exclusion relating to probationers puts the current Regulations somewhat at odds with the Convention.<sup>161</sup>

There have been a number of developments in the exclusion of casual employees. These generally confirm a growing disparity between the legislation and the Convention. The Convention permits the exclusion of 'workers engaged on a casual basis for a short period of time'.<sup>162</sup> The previous *IR Regulations* delineated the group excluded by reference to whether the casual employee had been engaged on a 'regular and systematic' basis during a period of at least six months, and had a reasonable expectation of continuing employment with that employer.<sup>163</sup> The *WR Regulations* increased the stated period from 6 months to 12 months.<sup>164</sup> In November 2001 the full bench of the Federal Court determined that these *WR Regulations* were invalid as they were not authorised by s 170CC of the *WR Act*.<sup>165</sup> As section 170CC uses identical wording to the Convention, except that it applies to 'employees', whereas the Convention refers to 'workers', this decision of the Federal Court confirms that the formulation used in the *WR Regulations* did not conform to the Convention. The response of the government to this decision has been to introduce a Bill into Parliament, that, if enacted, will remove the formulation of this casual employee exclusion from the invalid *WR Regulations* and insert it (using identical wording) as a new section in the *WR Act*.<sup>166</sup> This change in the placement of the formulation, from the Regulations to the Act itself, does nothing to ameliorate the disparity that exists between the legislative scheme and the *Convention 158* on the exclusion of casual employees, a disparity confirmed by a full bench of the Federal Court.

In terms of other groups of employees excluded from the statutory protections, the high income earner exemption (introduced in June 1994 to the *IR Act*) has been continued with the *WR Act*.<sup>167</sup> This exclusion was discussed above and it was shown that its presence in the legislation presents a major rupture from the Convention provisions. Another major break with the Convention was the amendment to the *IR Act* in June 1994 to impose limits on the maximum amount

<sup>160</sup> The November 1994 alteration that excluded employees engaged under contracts of employment for a specified period of time of less than six months in duration was not carried over to the *WR Regulations*. The current Regulations revert to the pre November 1994 exclusion of all employees on contracts for a specified period of time (reg 30B(1)(a)).

<sup>161</sup> The *WR Regulations* introduced an amendment to the exclusion relating to probationers. The previous specification that the probation period be determined in advance and be of a reasonable duration was altered to read that the probation period be determined in advance and that the period be either three months or less, or if more than three months, be of a reasonable duration having regard to the nature and circumstances of the employment (reg 30B(1)(c)). The Convention provides only that the probation period be determined in advance and be of a reasonable duration.

<sup>162</sup> *ILO Convention 158* art 2(c).

<sup>163</sup> *IR Regulations* reg 30B(1)(d) and 30B(3).

<sup>164</sup> *WR Regulations* reg 30B(1)(d) and 30B(3).

<sup>165</sup> *Hamzy v Tricon International Restaurants t/as KFC* [2001] FCA 1589.

<sup>166</sup> The Workplace Relations Amendment (Fair Termination) Bill 2002 (Cth) was introduced into Parliament on 20 February 2002. The Bill will insert a new s 170CBA into the *WR Act*. It is important to note that Regulations were promulgated on 7 December 2001 to act as a 'stop gap' until the Bill is passed. The Regulations are the *Workplace Relations Amendment Regulations 2001 (No 2)* (Cth).

<sup>167</sup> *WR Act* s 170CC(2) to (4), *WR Regulations* reg 30BB, reg 30BC.

of compensation that could be ordered by the AIRC and the Federal Court. These caps have been continued under the *WR Act*<sup>168</sup> and, as has been shown, present an important split from the Convention provisions. This gap between the statute and the Convention requirement that the adjudicative body be empowered to order the payment of 'adequate compensation' may be widened by the introduction of a new provision with the *WR Act*. This new rule directs the AIRC to take into account a number of matters in assessing the appropriate order to make. One of these is the 'the effect of the order on the viability of the employer's undertaking, establishment or service'.<sup>169</sup> Such a principle is not found in *Convention 158*. It was an initiative of the Coalition government that was strongly supported by employer groups.<sup>170</sup> This might, in a particular case, mean that the AIRC is unable to order compensation that satisfies the Convention requirement of adequacy. It can be inferred from these points of disjuncture between the legislation and *Convention 158* that the Convention has played a lesser role in shaping the statutory provisions than has been assigned to domestic political concerns.

There is a further way in which the federal unfair dismissal provisions may, in the future, fall further foul of *Convention 158*. The federal government has a clear agenda to exclude small businesses (defined as those with less than 15, or, more recently, 20, employees) from the operation of the unfair dismissal provisions. The exclusion is not intended to apply to discriminatory dismissals. The government's rationale is that unfair dismissal laws dampen employment creation in small businesses.<sup>171</sup> The government has attempted unsuccessfully since 1997 to give legal effect to this policy through a series of Bills and Regulations. These attempts have to date been either rejected in the Upper House, or disallowed by Parliament.<sup>172</sup> The introduction of such an exemption would present a further way in which the Act does not conform to the Convention requirements. Although a small business exemption might arguably be within the contemplation of art 2(5) of *Convention 158*, the government has not, and cannot, now comply with art 2(6) of the Convention. Regardless, the government appears determined to push ahead with its policy of exempting small businesses from the unfair dismissal rules. Its agenda in this respect represents a further way in which the government

<sup>168</sup> *WR Act* s 170CH (8), (9), s 170CR(2).

<sup>169</sup> *WR Act* s 170CH(2)(a). See further, Chapman, 'Termination of Employment Under the Workplace Relations Act', above n 140, 109. The introduction of this principle was criticised by a majority of the Economics References Committee: Senate Economics References Committee, above n 94, [4.347], [4.350].

<sup>170</sup> Senate Economics References Committee, above n 94, [4.339] - [4.341].

<sup>171</sup> See most recently, Commonwealth, *Parliamentary Debates*, House of Representatives, 13 February 2002, 47 (Tony Abbot, Minister for Employment and Workplace Relations), Second Reading Speech on the Workplace Relations Amendment (Fair Dismissal) Bill 2002 (Cth). In 1999, the government endorsed a claim made by small business groups that the planned exemption would create 'at least 50,000 new jobs': (Peter Reith, *The Continuing Reform of Workplace Relations: Implementation of More Jobs, Better Pay*, Parliament House (1999), [110]). The Full Bench of the Federal Court has recently expressed its opinion that the claimed relationship between unfair dismissal law and employment growth is mere assertion, and has not been established by empirical or other research: *Hamzy v Tricon International Restaurants t/as KFC* [2001] FCA 1589, 67-69.

<sup>172</sup> For a very useful overview of these developments, see Marilyn Pittard, 'Unfair Dismissal Laws: The Problem of Application to Small Businesses' (2002) 15 *Australian Journal of Labour Law* 154.

has dispensed with the need to ensure that the federal legislation complies with the Convention rules.

The termination of employment scheme introduced with the *WR Act* contains several 'new' features in the legislative rights regarding unfair dismissal and discriminatory dismissal. The introduction of these new features largely reflects the preparedness of the incumbent government to respond to the calls for amendment from vocal employer groups. Most of these matters, including the concepts of 'harsh, unjust or unreasonable' and 'fair go all round', reflect a preference for domestic ideas over international principles. In this sense, the influence of *Convention 158* in shaping the legislation has been diluted by the pre-eminence given to powerful domestic political concerns.

### III CONCLUSIONS

This article has examined the role played by *Convention 158* and Recommendation 166 in shaping the enactment and subsequent development of Australian federal statutory law on unfair dismissal and discriminatory dismissal. The article provided a brief overview of the context into which statutory unfair dismissal and discriminatory dismissal provisions were enacted. This included State unfair dismissal jurisdictions, federal award clauses and the federal reinstatement jurisdiction. The paper then turned to outline the main substantive provisions in *Convention 158* requiring a 'valid reason' for termination and the discriminatory grounds such as race and sex that render a dismissal as lacking a valid reason. Following this, the article explored the central role played by *Convention 158* in the enactment and subsequent amendment of the federal legislative provisions brought about through the Keating Labor government's *Industrial Relations Reform Act 1993* (Cth). As enacted, the legislation combined both a 'valid reason' requirement and a 'harsh, unjust or unreasonable' concept.

The second half of the article examined the current federal unfair dismissal scheme contained in the *WR Act*, and the government's agenda for reform in this area. It was seen that *Convention 158* (and Recommendation 166) have played a reduced role as reference points in the scheme contained in the *WR Act*. The current federal government has not felt compelled to adhere closely to the Convention requirements. Rather, it appears that in the eyes of the current government, *Convention 158* is a dispensable source of ideas and concepts. The content of the statutory rights contained in the *WR Act* regarding unfair dismissal and discriminatory dismissal indicate that at several points the current federal government has preferred more 'home grown' concepts such as 'fair go all round' in preference to the principles and standards contained in the Convention. The progressive distancing of the federal legislation regarding unfair dismissal and discriminatory dismissal from the international labour standards contained in *Convention 158* reflects the current government's broader movement away from the international human rights system. This shift away from international standards can be seen in relation to many areas of Australian law, including, as



has been explored in this article, the federal termination of employment statutory protections. In this sense this paper provides a detailed case study on this 'new low point' in Australia's relationship with international human rights systems, including ILO labour standards.<sup>173</sup>

<sup>173</sup> The quote 'new low point' is taken from Otto's work, and is discussed in the opening paragraph of this article. See Otto, above n 1.