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ACCI POLICY REVIEW

CAN 'NEW FEDERALISM' DELIVER A DURABLE NATIONAL IR FRAMEWORK?

The lead-up to the 2007 federal election focused a great deal of attention on the different points of view held by political parties, unions, industry and the broader community, about Australian industrial relations. Less well recognised are important shared aspirations and broadly agreed directions for the future of our industrial relations system.

Principal amongst these is the increasing bipartisan consensus in support of a single, national industrial relations system, and for removing overlapping and inconsistent federal and State regulation of work.

Even at the height of the WorkChoices debate, this issue did not divide most political parties and national employer and union representatives. Differences on this topic came mainly from the State and Territory governments, and even then opinions were expressed in the context of views about WorkChoices. More relevantly, the High Court challenge by the States failed in November 2006.

Government Policy Commitment

The Rudd Government was elected with a commitment to *"give sole traders, partnerships and companies a uniform industrial relations system – a uniform system for Australia's private sector"*. This builds on the significant expansion of the national system under the Howard Government using the corporations law (which was subsequently upheld by the High Court [1]).

In a threshold Issues Paper on this topic, ACCI has previously argued that: *"Reforming the federalism compact for the 21st century on workplace relations and employment matters is vital and overdue. Reform should see the establishment of a unitary federal system of labour law regulation, with appropriate checks and balances…A unitary system of labour law regulation is consistent with the evolving nature of the Australian economy, with changes to the direction of labour law and policy since the 1980s and broadly with changes in our society"* [2].

Of course, from a business perspective the objective of moving to a single system is not to re-centralise or re-regulate industrial relations. This ACCI Issues Paper concluded that a unified national system should set a framework and a safety net, beyond which employees and employers are empowered and encouraged to develop mutually beneficial and reinforcing wages and conditions.

With Commonwealth, State and Territory governments committed to a 'new federalism' (as evident by the 26 March 2008 CoAG meeting) and with legal obstacles largely removed by the High Court, it is time to complete a universal national framework for Australian industrial relations. The challenge in 2008 is to integrate the minority of private sector workplaces that remain subject to state industrial relations systems, even after the major shift into national coverage under *WorkChoices*, into a truly national system.

State System Viability In Doubt

Recent ABS analysis shows just how close to achieving genuinely universal national coverage of private sector employment we are in Australia, and just how marginal and unviable ongoing State industrial relations regulation will become [3].

An estimated 79.1% of employees have their pay set under federal laws. State coverage is just 11.9%, with a further 9.0% of employees for whom coverage could not be determined.

However, looking further into these numbers makes even more stark, the marginal relevance of any ongoing State regulation for the private sector.

1 *New South Wales v Commonwealth* [2006] HCA 52; 81 ALJR 34; 231 ALR 1 (14 November 2006)

2 Functioning Federalism and the Case for a National Workplace Relations System, ACCI Issues Paper (2005) -http://www.acci.asn.au/text_files/Discussion%20Papers/Functioning%20Federalism%20Paper%20Electronic%20Version.pdf

3 Jurisdictional Coverage Of Pay-Setting Arrangements Employees In The Federal Or State Workplace Relations Jurisdictions For Pay-Setting - This article was published in the January 2008 issue of Australian Labour Market Statistics (cat. no. 6105.0). See: http://www.abs.gov.au/AUSSTATS/abs@.nsf/Latestproducts/6105.0Feature%20Article1Jan%202008?opendocument&tabname=Summary&prodno=6105.0&issue=Jan%202008&num=&view

Additional ABS data indicates there are approximately 946,000 State government employees and approximately 125,000 local government employees outside Victoria [4].

Notwithstanding some long standing federal coverage of local government work, this public sector employment (over 1 million persons) is likely to account for the substantial bulk of the 1.75 million Australians the ABS estimates work under state industrial relations systems, or for whom coverage could not be determined.

It is therefore realistic to proceed on the basis that Australia's five remaining State industrial relations systems cover at most 700,000 private sector employees. This would equate to just 6.7% of Australia's 10.5 million labour force. This is simply not a sufficient level of coverage to justify perpetuating costly separate state regulation, particularly in the context of a soon to be expanded national safety net, modernised federal award system, and a significantly beefed up national inspectorate and prosecution service.

Table 1 - State IR System Coverage

	Proportion of Overall State Employment[5]	Estimated State Coverage (Priv Sector)
NSW	45.5%	318,283
QLD	27.1%	189,756
WA	13.6%	95,210
SA	10.5%	73,595
TAS	3.3%	23,156

Table 1 distributes the estimated 700,000 private sector employees on a population basis across the remaining State industrial relations systems (note: Victoria, having referred it's IR powers since 1997 is not included in the table' the Territories do not operate separate systems).

These estimates approximate the marginal numbers of private sector employees remaining subject to each of Australia's five remaining State industrial relations systems.

It is also relevant to note that through WorkChoices, employees of trading corporations have moved into the federal system. This means that the remaining State coverage is now an accident of the legal structuring of each employer, rather than the product of any coordinated or strategic decision in favour of State coverage. In other words, State coverage in addition to being marginal, is increasingly piecemeal and ad-hoc for the private sector.

Duplication of Taxpayer's Dollars

Aside from regulatory complexity arising from multiple IR systems, the practical reality is that in 2008, separate State industrial relations systems are not servicing the interests of the private sector. The loss of the Victorian State IR system in 1997 has barely been noticed, and no serious union, business or government voice has called for its return. In fact, the 1997 referral by the then Coalition Victorian State Government was followed up by a wider referral of powers by the Labor State Government in 2005.

Taxpayers' interests are also ill served as States attempt to expand information, arbitration and enforcement functions in the face of falling private sector coverage. Australia's five remaining State industrial relations systems cost taxpayers at least $122 million per year. This is very costly public expenditure for just 700,000 private sector employees. It comes on top of a vastly expanding federal system costing at least $312 million per year [6].

The Way Forward

Recognising the extent to which Australia has already moved away from competing regulation in the private sector should provide the foundation for an orderly and complete transfer of remaining State coverage into the national system, commencing in 2008 and completed by 2010.

From the States' side, Victoria led the way in 1997 with the straightforward, essentially unconditional referral of legislative powers to the Commonwealth.

This Victorian approach, with only minimal changes, should be the model for the transfer of legislative powers by the remaining States. The completion of the transfer of private sector industrial relations into a genuinely national system should be implemented through that referral of legislative powers.

Recent NSW Proposals Flawed

Unfortunately, the approach recently recommended by Professor George Williams to the New South Wales Government comprehensively fails this test. In his report, *Report on Inquiry into Options for a New National Industrial Relations System*, Professor Williams identifies a so called "optimal model" for the completion of a national system.

4 Source: 6248.0.55.001 *Wage and Salary Earners, Public Sector, Australia*

5 Derived from 2006 census data, adjusted to exclude the State of Victoria.

6 Source: State and Commonwealth budget papers and annual reports.

This 'Williams model' would exchange the referral of residual State private sector coverage (the 700,000 employees identified above) for essentially two things:

- the creation of a Ministerial Council of the Australian and State Governments. Majority approval of this Council would be required for future amendments to national workplace relations legislation.
- a standing capacity for States to opt out of the national system at any stage in the future in whole or part, for whatever reason.

Such caveats or conditions for the completion of any national system are unsustainable.

A Ministerial Council of this character could polarise decision making in industrial relations, and freeze the system in its 2008 form unless the agreement of a majority of the states could be secured.

- the proposal would effectively deliver the States a veto over national reform, and over the essential ongoing evolution of the system.
- this is at odds with what we know about the need for industrial relations laws to be responsive to changed circumstances. Reasonably substantial amendments to the national industrial relations statute (industrial relations amendment acts) have been passed in 16 of the past 20 years, with more to come in 2008 (1988, 1990, 1991, 1992 1993, 1994, 1995, 1996, 1997, 1999, 2000, 2001, 2002, 2003, 2005, and 2007).
- the proposal could deliver a policy veto in exchange for what is essentially a one off transfer of just 6-7% of overall employment. This seems disproportionate and unjustifiable.

Compounding this, a standing capacity to opt out would make any national system only as strong as the ongoing capacity of the Australian Government and State Governments to agree on policy detail. It would be far from ideal if decisions by States to opt out and incentives to opt back in again became common whenever different views emerged on Australian industrial relations policy.

Industrial relations, where it is hard enough to achieve consensus between union and business stakeholders, would become a horse-trading issue between governments. A durable and stable industrial relations system could also be exposed to trade-offs between the Commonwealth and the States in other policy areas.

This would not enhance the position of employers, employees, employment or productivity, and it will not reflect the reality that over 90% of private sector employment already falls within the federal system.

Further, under the Williams model, the policy gridlock that the system would likely encounter would make it unable to further evolve in the face of competitive pressures and an increasingly internationalised economy and labour market, where quick domestic policy responses may be needed.

Put simply, the benefits of a national industrial relations system will be compromised if unnecessary conditions upon the further referral of State legislative powers are imposed.

In this context, the Williams model is not the best way forward for a truly Australian industrial relations system.

National Business Resolution

There is an important responsibility for Australia's business organisations to be active in assisting governments bringing about a resolution to this issue within a reasonable timeframe.

In Sydney on 4 April 2008 the 35 leading State and Territory Chambers of Commerce and national industry organisations within the ACCI network met to discuss this issue in light of the new industrial relations policies of the Rudd government.

These organisations, representing some 350,000 Australian businesses, and with historical connections to both the Commonwealth and State industrial relations systems, passed an important resolution maintaining support for a national industrial relations framework. Through this resolution business is recognising that a national industrial relations system is a reform outcome in its own right, notwithstanding that the content of the system will vary from time to time according to the colour and complexion of the national government and parliament.

In expressing this position, ACCI and business organisations are maintaining a consistent position in both the pre and post WorkChoices environment. In both cases, the national system which we support ought to be characterised by laws whose content prescribes a simple national safety net beyond which descisions about wages and conditions are largely determined through workplace agreements and productivity based collective bargaining.

ACCI National Council also expressed the need for cooperative negotiations between the Commonwealth and States.

The terms of the ACCI National Council resolution are as follows:

'ACCI National Council:

- Reiterates the value of completing a genuinely national workplace relations system, expanding the application of the *Workplace Relations Act 1996* to regulate those (essentially unincorporated) private sector workplaces remaining in State systems.
- Calls for a truly national system to be implemented in as unambiguous and comprehensive a manner as possible which will:
  - operate simply and comprehensibly as possible for employers.
  - operate nationally on a sustained basis, with no regions or States excluded.
  - develop in discussions with State Governments, employer and union stakeholders but without a State veto over future national reform, policy or legislation.
- Notes the Williams' model released by the NSW Government and its contribution to the debate but considers it to be flawed.
- Supports instead an approach based on a constitutional referral of powers (the Victorian model).
- Encourages members to communicate with State governments in the terms of this resolution / employers' views on implementing a national system.'

Foundation For Progress Exists

A foundation for agreement without unnecessary caveats does exist. The States and the Rudd Government have the opportunity to build on the spirit of realism and pragmatism shown at recent CoAG and intergovernmental meetings, and to apply this to the completion of a sustainable, stable national industrial relations system.

States should be involved in discussions about the transition to a fully national system - as should business and union interests. However, the focus of those discussions should be on how large and expensive State infrastructure can be best utilised within a national system, not about future control over national policy.

If agreement on these matters is reached, then New South Wales, Queensland, Western Australia, South Australia and Tasmania should, by 2010, deliver the type of referral of legislative powers over industrial relations which Victoria implemented more than a decade ago.

Conclusion

The Rudd Government has chosen 1 January 2010 for the full implementation of its new industrial relations system. Including a wholly national IR system is possible only if the issues move beyond traditional IR horse trading, and a strong commitment by political leaders and industrial relations stakeholders.

The States and the Commonwealth should seize the opportunity provided by the election of the Rudd Government, its goal of a new federalism, and the ALP being in power federally, and in all States. Consultation with industry, unions and other users of the system will be essential to ensuring reform in this area is durable and sustainable.

For the Rudd Government, the productive and efficient national IR system it has promised, and which employers, unions and employees need, will be achieved by insisting on progressing a truly national system in as sustainable and straightforward a manner as possible.

Australian industry, and ACCI and its member organisations in particular, stand ready to constructively assist our governments in this task.