Coalition Senators' Minority Report

Introduction and Summary of Position

The *Fair Work Amendment (State Referrals and other Measures) Bill 2009* ("**the Bill**") continues the process of seeking to achieve and create a national system of workplace relations, originally commenced by the Howard Coalition Government in 2006.

The Australian Labor Party subsequently adopted this same aim, which it enunciated during the 2007 election campaign.

The advantages of having a national workplace relations system are widely known. The benefits to workplaces, particularly those that operate across State borders, are considerable and there are economic advantages for the public in general. A national system provides consistency of law and the application of that law, minimising the ability for the States to create conditions that vary from each other thereby providing certainty.

The Coalition maintains the view that Australia deserves a national system of workplace relations and to that end the Coalition is broadly supportive of the outcome this Bill seeks to achieve.

Coalition senators do, however, hold several reservations about the way in which the Bill seeks to achieve this aim. In particular, we are concerned, that in achieving a national system, the power to control and determine that system and its operation has effectively been handed to the State Governments which choose to refer their existing powers.

No consultation

The Government has made much of the consultative processes that it has followed when developing and introducing its Fair Work system. This approach is commendable and has utilised a number of processes, including the Committee on Industrial Legislation ("COIL").

Coalition senators do note, however, that in relation to this Bill there has been no such consultation. Witnesses appearing before the Committee gave evidence that the first time they saw the Bill was after its introduction into Parliament[1]. There appears to have been no subsequent formal consultation between stakeholders (including the Opposition) and the Government in relation to the content and effect of this Bill.

This has created significant difficulties for stakeholders given the tight time frames that have existed to consider the effect of, and provide views on, this Bill.

[1] Mr D Mammone, Committee Hansard, 11th November 2009 p.10.

We note that the Government has seen fit to implement a timetable which accommodated consultation through COIL for every other Bill by which the Government proposed general amendments to the federal workplace relations legislation. The rationale for the absence of consultation on this Bill is unclear to Coalition senators. We hope that it is not a sign of things to come for future legislative developments within the national workplace system.

In addition, some witnesses were concerned that this Bill be read in the context of the Inter-Government Agreement ("**IGA**") developed between the States, Territories and the Commonwealth. While a confidential copy of the IGA was provided to members of the Committee, it was not available to the public on 11th November 2009 (or before) and therefore many witnesses appearing before the Committee were missing a crucial element that would enable an appropriate assessment of the effect of this Bill. Witnesses observed that, because of this, they were effectively in the dark about the entire package of referral arrangements proposed by the Bill and the IGA.

Reference system

A reference by a State operates on the basis that industrial relations powers they currently hold will be referred, with respect to particular defined subject areas, to the Commonwealth. As it currently stands, powers held by the States relate only to those workplaces which are not covered by the existing Fair Work laws; being those non-incorporated trading entities such as sole traders, family trusts etc. This includes many small businesses.

This reference is also subject to certain exclusions, such as powers in respect to the State public service and areas of local government. These will remain within the domain of the powers retained by the States.

There are three categories of reference within the Bill, these being an *"initial"* reference, an *"amendment"* reference and a *"transition"* reference.

The *"initial"* reference is, effectively, the basic reference of State power to the Commonwealth in the first instance. This occurs via the creation of a new Division 2B at part 1-3 of the Act, which extends the definition of *national system employer* and *national system employee* to include those previously not subject to the coverage of the Commonwealth laws.

The *"amendment"* reference provides for the Commonwealth to amend laws with respect to the subject matters so referred by the States in their "initial" reference. This means that the Commonwealth will be able to amend the federal laws, with uniform application to all employers and employees in each referring state.

The *"transition"* reference is necessary as it allows for the Commonwealth to transition existing non-national system employers into the national system. This is detailed at schedule 2 of the Bill.

Coalition senators are unconcerned with the "initial" and "transition" reference concepts. We understand that these are necessary to bring the States into a national system. These references are, in simple terms, unconditional in that once a State has referred its powers they become the domain of the Commonwealth. Within the context of the Bill, they are references that are "one-off" in nature.

The "amendment" reference concept is similarly a necessary aspect to facilitate a national system. Taken at face value, Coalition senators accept the conceptual basis for this reference type and its probable necessity. However, concerns arise about this concept when considered in the context of complicated and various mechanisms proposed in the Bill for a State or States seeking to terminate initial, amendment and/or transitional references.

Termination of an Amendment Reference

Coalition senators are gravely concerned in the way that this Bill, taken together with the IGA, in essence, hands control of the Commonwealth laws and system to the States, in exchange for (and as the price of) referral of powers to the Commonwealth.

This is manifested in various mechanisms; some contained in this Bill and some arising from the Inter-government Agreement ("IGA").

We understand the proposed arrangements to be as follows:

1. A state wishing to amend or terminate its referral of powers to the Commonwealth, will give the Commonwealth not less than 6 months written notice (IGA Item 2.5). In this event, that state ceases to be a 'referring state".

2. Should all States wish to terminate their amendment reference of their powers, they can do so by proclamation of the State Governors with six months' notice, if the amendment references of the other States all terminate at the same time. In so doing, they do not cease to be 'referring states";

3. An individual State can terminate their amendment reference by proclamation of the individual State Governor with three months' notice, if the said State Governor considers that an amendment to the Fair Work Act is inconsistent with the "*fundamental workplace relations principles*". In that event, that state does not cease to be a 'referring state'; and

4. A future amendment to the *Fair Work Act 2009* will not proceed unless it is endorsed by a two-thirds majority of the referring State and Territory Governments (IGA Item 2.18).

Item 1 above
We note that *Item 1* above does not appear to be replicated in the Bill.

Items 2 and 3 above

The amendment reference termination mechanisms referred to in items 2 and 3 above are additional and different from other termination mechanisms contemplated by the Bill for initial, amendment and transition references. They introduce uncertainty and complexity. The Committee was not provided with clear evidence as to either the purpose or effect of the Bill's express provision that a state or states terminating amendment references in either of these two specific ways, did not (in so doing) forgo their status as a 'referring' state. Coalition Senators are concerned that there may be undesirable consequences of states terminating amendment references yet remaining 'referring' states, including:

- Those states are intended to retain powers under the IGA (eg to vote to veto future federal workplace relations amendments no longer covered by the package of federal laws)

- Much of the system of workplace laws covering non-constitutional corporations and their employees will continue to be administered and resourced by the Commonwealth (even though those laws will have fallen out of kilter with the then operative federal laws.)

Item 2 above

In respect of item 2 above, the Department provided evidence to the Committee that 'the six month provision is the standard provision that exists in Commonwealth referral schemes'[2]. However, it is unclear whether it is the six-month aspect **alone** in this provision, which is 'standard', and whether it is so provided in other Commonwealth referral legislation. We also note that subsection 30B(6) of the Fair Work Act envisages that a termination of reference is total in nature, representing a complete withdrawal for a referring State and does not stipulate any required time frames for such withdrawal.

Item 3 above

In the view of Coalition senators, *Item 3* proposes a number of difficulties.

Firstly, the terms of the "fundamental workplace relations principles" are particularly unclear. This lack of clarity arises from the broad nature of those principles and the potential for them to be interpreted to mean virtually anything.

Evidence before the Committee confirmed this lack of clarity with even the Department being unable to provide a definitive answer to questions about this issue. However, the Department did concede that an alteration to an associated Regulation or the terms of a Code (eg the Small Business Fair Dismissal Code) could result in the circumstances in item 3 becoming enlivened.

In short, virtually *any* endeavour to amend the Fair Work laws could be interpreted by any one State as offending the fundamental principles.

[2] Ms E Perdikogiannis, Committee Hansard, 11th November 2009 p.28.

Secondly, there is only a requirement that a particular State Governor (presumably, but not necessarily, in accordance with the wishes of the relevant state Government) "considers" that an amendment offends the principles. There is no requirement, for example, for the State Governor to be *satisfied on reasonable grounds* that an amendment offends the fundamental principles. This provision, in effect, gives the State Governors an ability to terminate an amendment reference at a whim in virtually any circumstance.

It makes a nonsense of any notion that if a state activates this termination mechanism, then the Commonwealth, in amending federal laws, must have breached a 'fundamental principle'. In fact, it makes a nonsense of a state having to be seen to justify, or proffer any reason, for termination of an amendment reference.

Thirdly, termination of an amendment reference will return workplace relations to a situation where different laws would apply to different States and, in addition, different laws within a particular State. As the submission of ACCI observes:

> *If the termination of an amendment reference is ever invoked by a State Government, this will cause confusion and unnecessary dislocation for referral employers, as non-referred employers continue to be bound by the fair work laws, but their referral counterparts do not. It also appears to indicate that State Governments are not fully committed to achieving a national system for the private sector.*[3]

Coalition senators agree with the concerns outlined by ACCI.

Fourthly, the provision allows the termination of reference ability to become a political tool for the States to control the future of the Commonwealth workplace system. Again, ACCI observes:

> *It would be unfortunate if it was ever used by States as a tool to extract concessions from the Commonwealth in modifying or refusing to modify the fair work laws in the future. And with a confidentiality clause in an IGA, we may all be none the wiser. Whilst it appears Victoria has introduced amendment legislation which would align their referral to these provisions, Victoria has not had such provisions since 1997 and this has not caused any problems to date. Whilst such action would not be supported by employers, a State which is truly concerned with future amendments to the fair work laws should withdraw from the system in toto, rather than cherry pick which parts it does or does not like.*[4]

This observation from ACCI also raises a fifth concern, being the ability for the States to "cherry pick" the parts of the Fair Work laws that it may agree with at a particular point in time. Coalition senators postulate this scenario, using the national employment standards:

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[3] ACCI Submission November 2009 p.16.

[4] ACCI Submission November 2009 p.16.

1. South Australia and Queensland refer their remaining power to the Commonwealth in accordance with the terms of the Bill as proposed;
2. The Commonwealth determines that it would like to increase the NES for Annual leave from 4 weeks to 6 weeks;
3. South Australia agrees with this amendment and chooses to not terminate its amendment reference;
4. Queensland does not agree with the amendment and terminates its amendment reference;
5. 6 weeks annual leave becomes the NES for both the Commonwealth and South Australia.

The effect of the above example becomes:

NES	**Commonwealth**	**SA**	**QLD**
Annual Leave:	6 weeks	6 weeks	4 weeks

The above confusion is exacerbated by the fact that the different NES conditions would also be different for employers *within* both South Australia and Queensland dependent upon whether or not they are considered to be national system employers (NSE) under the provisions of the Fair Work Act as it currently stands.

NES	**Commonwealth**	**SA**	**QLD**
Annual Leave:	6 weeks	6 weeks	4 weeks (6 weeks for NSE)

The above example, entirely possible under the provisions of the Bill as currently drafted, represents a situation that would create chaos and uncertainty within States and between States.

A simpler approach

A much simpler approach would be for the Bill to simply provide the States an ability to terminate their amendment reference at *any* time and for *any* reason, subject to the provision of an appropriate notice period. This dispenses with the complexity and confusion created by the Bill's array of termination mechanisms, and replicates the substance of existing provisions in the Fair Work Act.

Such an approach would provide certainty to the States about the future of the Commonwealth system, while concurrently encouraging them to refer State powers in the first instance. Significantly, it would not allow the States to "pick and choose" which refinements of the national scheme they will accept, thus avoiding the "checkerboard" effect of industrial laws which could result from the Rudd Government's approach.

The supposed "rationale" intimated to the Committee would be also be satisfied, in a manner that removes any pretence that a terminating state will do so under the guise of a legislated justification for so doing.

It substantially simplifies the Bill, both in its terms and effect. In addition, it would assist the Commonwealth to amend the Fair Work laws efficiently and effectively, in the event that circumstances warrant change.

Item 4 above

Item 4 above also creates unnecessary uncertainty for workplaces and fundamentally undermines the role of both the Commonwealth and the continued evolution of a national workplace system.

AiG's evidence presented to the Committee established that, subsequent to the introduction of the Workplace Relations Act 1996, there were many subsequent changes to the laws, the requirement for which were unforseen[5]. Should a similar circumstance arise in the future as it relates to the Fair Work laws, there would be a requirement for the States to be consulted and their approval gained, prior to the proposal or amendment being moved. This would create an unnecessary delay which would likely operate to the detriment of workplaces that require such an amendment or proposal.[6]

In a worst case scenario, the IGA seems to contemplate that referring States would have the ability to veto the proposal or amendment, undermining the role of the Commonwealth Parliament and the fundamental nature of a federal system of workplace laws.

Providing the States with the power to control the future evolution of the national Fair Work system is inherently dangerous. Not only is the role and purpose of the Commonwealth Parliament undermined, it provides control to jurisdictions who, in some circumstances, have to date created State industrial relations systems that are, at best, unworkable and, at worst, oppressive. Nowhere is this more apparent than in New South Wales, where the industrial relations system has acted as a disincentive to investment, employment and economic growth. A commonly held view is that the NSW system of industrial relations, its tribunal and its safety laws are the "ball and chain" of the NSW economy, and have directly and significantly contributed to the perilous economic position in which it now finds itself. Allowing a State government, with a record like that of New South Wales, to control national workplace laws would be a national disaster for Australia's future prosperity, economic growth and infrastructure development.

During committee proceedings it was suggested that the rationale for the "amendment referral termination" provisions comes from an attempt to achieve two outcomes for referring States. Firstly, the provisions provide encouragement for the States to refer their powers and, secondly, to provide the States with certainty about the potential for any future "mischief" that might occur to the Commonwealth laws and the effect upon them in that circumstance.[7]

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[5] Mr Smith, Committee Hansard, 11th November 2009 p.13.

[6] Mr Smith, Committee Hansard, 11th November 2009 p.15.

[7] Senator Collins, Committee Hansard, 11th November 2009, p.18.

While this might superficially appear to be a logical rationale, it raises the sobering spectre that the State Governments (even those who have signed the IGA) are not genuinely committed to achieving a nationally consistent set of workplace laws. Additionally, as noted above, it gives the States the ability to make workplace laws a political tool and encourages threats to block any amendment reference.

To this end, Coalition senators are concerned that the referral 'package' of the IGA and the Bill create new uncertainties and substantially reduces the role of the Commonwealth in shaping a workplace system over which it has primary responsibility. It is cold comfort that this aspect of the IGA is not proposed to be legislated in the Bill.

Problems with Fair Work Act 2009

Coalition senators note that there remains, in our view, a significant number of problems with the implementation of the Fair Work Act thus far.

Primarily, the so-called “award modernisation” process currently being dealt with by the Australian Industrial Relations Commission is increasingly viewed by many varying stakeholders as, at best, problematic and, at worst, bordering on farcical. The Minister for Employment and Workplace Relations has had cause, on many occasions, to intervene in this process. In the view of Coalition senators, the process has not met the expectations so vehemently promised by the Minister nor have the intentions, objects or stated aims of this process been satisfied.

That the so-called modern award system is due to commence on 1 January 2010 is of significant concern to Coalition senators, particularly given that the award modernisation process is not completed and will not be until at least December 2009. We believe that workplaces will simply not have the time they both need and deserve to appropriately understand and implement the changes required to accommodate the terms of modern awards.

The above observation is especially acute for those in the small business sector. In the context of this Bill, many of the workplaces that will become subject to the *Fair Work Act 2009* are likely to be small businesses, such as sole traders and related entities not previously captured by the Corporations powers.

A question that looms large in the mind of Coalition senators goes to whether or not it is appropriate for a large number of small private sector businesses, currently outside of the Commonwealth laws, to become subject to those Commonwealth laws and the associated system that has so far failed to meet its stated aims or live up to the rhetoric associated with its introduction.

As stated earlier, Coalition senators believe that Australia deserves a national workplace relations system. However, it is reasonable to expect that such a national system should be one

that works appropriately and without significant problems, such as those arising from the approach taken to award modernisation.

We consider that, notwithstanding our desire to facilitate building on the reforms commenced by the Howard Coalition Government in 2006, there is much to be said for ensuring that the existing system gets it right before enveloping thousands of small businesses which stand to be, in some sectors, adversely affected.

Conclusion

We reiterate our view that Australia deserves a truly national system of workplace relations. It is logical that a move to this end is necessary for a sophisticated economy such as Australia and to this end Coalition senators support the outcome this Bill seeks to achieve.

We do, however, remain gravely concerned that, in moving towards a national system, the power and role of the Commonwealth Parliament may be undermined by the States as provided in both this Bill and the associated IGA. We are concerned that the Bill as drafted introduces new complexities and uncertainties, provides scope for a future "chequerboard" application of the Commonwealth laws and allows the workplace relations system to become a political tool rather than an essential element in balancing workplace fairness, strong economic conditions and the promotion of jobs and job growth.

Additionally, there is a potential for the workplaces in small businesses to be adversely affected if they become subject to the Commonwealth laws. We should be careful to ensure that the Commonwealth laws deliver appropriate outcomes and there are valid reasons why this should occur prior to the States handing over their existing powers.

Senator Gary Humphries
Deputy Chair

Senator Michaelia Cash

Senator Mary Jo Fisher

Qualification – Senator Michaelia Cash – Western Australia

The states have the constitutional power to determine whether or not they refer any of their state based industrial relations powers to the Commonwealth. Some states have made or intend to make such a referral.

Whilst not challenging the constitutional right of those states who have made a decision to refer their powers, as a Senator for Western Australia, I support the previously stated decision of the Western Australian Government not to refer its state based industrial relations powers to the Commonwealth but rather "to work co-operatively with the Commonwealth to build a harmonised industrial relations system without handing over Western Australia's long-held, constitutionally established role and powers."