AUSTRALIAN INDUSTRIAL LAW
steps towards harmonisation

The enactment of the *Industrial Relations Reform Act 1993* (Cth) was a major step towards the harmonisation of Australia's industrial laws, but more needs to be done says **Wayne Penning**.

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Caught between Federal and State governments industrial relations law has, until recently, been subject to inconsistency and disparity. The situation has changed with the *Industrial Relations Reform Act 1993* (Cth) (the Reform Act) This has led to a substantial expansion of the Federal industrial relations jurisdiction, clearly at the expense of the States.

By relying on the conventions and recommendations of the International Labour Organisation (ILO), the Commonwealth Government has taken major steps towards harmonising the substance and form of industrial relations in Australia. The Reform Act, together with the Accord, has continued the trend away from centralised wage fixing towards a decentralised labour market based on a system of enterprise bargaining.

In doing so the Government has implemented reform based on principles of efficiency by creating a more flexible labour market while safeguarding equity by providing a safety net of minimum wage conditions for all Australians.

Labour relations and wage determination in Australia: past and present

The turn of the century marked a significant point in the centralisation of labour relations in Australia. Despite some movement towards voluntary conciliation, colonial governments sought to settle industrial disputes via State regulation in the form of compulsory arbitration.

However at the same time the shift from property to commodity and capital based markets saw the paternalistic and regulative view of law decline in contrast to the move towards freedom and flexibility of contract.[1] There was a clash of moralities between the older, more paternal, protective approach; and the newer individualism, stressing risk-taking, free choice, rewards to the enterprising, and devil take the hindmost.

Against this backdrop employers in the 1890's sought to employ non-unionists. Trade unions replied with the refusal to work alongside non-unionists. This led to a spate of strikes and disputes in the shipping and agricultural sectors.[2] The failure of the colonial governments to solve labour and capital disputes, elevated the issue to a national concern.

At the 1897–1898 constitutional convention, Henry Bournes Higgins successfully moved that the Federal Parliament be given power to prevent and settle labour disputes through conciliation and arbitration. The Federal labour power, s 51(xxxv), is a concurrent power under which the Federal Parliament set up the Commonwealth Court of Arbitration and Conciliation. By 1919 arbitration became the dominant means of resolving industrial disputes — a state of affairs which continued until the later part of this century.

The Federal labour power is limited in that it only deals with inter-State disputes. This leaves the States with considerable sovereignty to legislate on industrial relations. Thus the Federal Parliament, could not directly regulate industrial matters across the nation. For example, in the *Boilermakers*[3] case, the High Court and the Privy Council held that the Commonwealth Court of Conciliation and Arbitration was unconstitutional because it infringed the separation of legislative and judicial powers in the Australian constitution. The effect of the *Boilermakers* case was to restrict Federal power to promulgating awards without being able to enforce them.

The sharing of industrial relations power in Australia has meant that there are seven separate industrial law jurisdictions. In 1983 approximately 85% of Australian workers had their wages and industrial relations governed by Federal or State conciliation and arbitration mechanisms. Of these 35% were under Federal and 50% were under State law.[4] Up until the 1980s the State Parliaments had usually adopted Federal standards concerning wage rates, hours of work and annual leave, displaying some degree of uniformity of terms and conditions of labour.

For most of this century wage determination has occurred through centralised regulation — conciliation and arbitration — and as mentioned there has been some consensus between State and Federal jurisdictions on this issue. However the method of determination and degree of uniformity changed dramatically in the 1980s. There was a shift from regulated awards towards a deregulated system of industry bargaining and agreements.

In a response to globalisation and the rise of the international economy, the Federal and State Governments have attempted to create a more 'open' economy through numerous macro and microeconomic reforms designed to increase our international competitiveness, flexibility and dynamism. These reforms have lead to a breadown of the protective barriers to trade which existed previously in the form of tariffs and quota restrictions, the deregulation of financial markets, and the privatisation of government business enterprises.

Many argued that Australia's method of wage determination and industrial relations should also undergo reform so as to provide a flexible and efficient workforce that can support and facilitate industry and economic growth. In 1983 this led the Federal government to implement a series of Accords which aimed to base wage levels and increases on enterprise bargaining and productivity rather than on conciliation and arbitration and indexation. This system has continued. The latest Accord Mark 8 — *Sustaining growth, fairness and low inflation* — was struck between the government and the ACTU in June 1995 and will remain in force until 1999.

Despite these reforms, the Federal government has been reluctant to relinquish the traditional method of regulating industrial relations. Conversely, the States have sought to implement radical and sweeping reforms to their industrial relations policies.

This has led to major inconsistencies between States and Federal jurisdictions concerning minimum wage levels and other labour standards:

- In 1991 NSW enacted the *Industrial Relations Act*, which enabled parties to choose between awards regulation under the Industrial Relations Commission of NSW and making their own enterprise agreements.

- In 1992 the Tasmanian Government introduced its *Industrial Relations Amendment (Enterprise Bargaining and Workplace Freedom) Act*, which incorporated similar principles.

- Victoria enacted the *Employee Relations Act 1992*, which virtually dismantled the State's conciliation and arbitration scheme — all State awards were abolished, and unless it was agreed between employer and employee the award coverage could not be reinstated leaving employers free to enter into collective or individual contracts with employees.

- Western Australia amended its *Industrial Relations Act* and passed separate statutes concerning minimum conditions of employment and enterprise bargaining.

- In 1994, South Australia, partially deregulated its conciliation and arbitration system.

The Commonwealth Government responded to these disparities by amending the *Industrial Relations Act 1988* to broaden the use of enterprise bargaining.

It still, however, operated within the Federal conciliation and arbitration framework. Such agreements could only be concluded between trade unions and employers, hence trade unions maintained their grip on wage determination within the Federal framework. Many argued that this was a half way measure.

Reform of industrial relations in Australia required reconciling a myriad of major inconsistencies between States and the Federal governments not just in terms of wage levels and other standards, but with respect to the method of wage determination adopted.

The Industrial Relations Reform Act 1993

The Federal Government was faced with the delicate task of balancing the interests of employers, trade unions and the State government, through its limited industrial relations jurisdiction. It sought to answer the call for uniform industrial relations law in Australia with the *Industrial Relations Reform Act 1993*, which made significant amendments to the *Industrial Relations Act 1988*. Not since the turn of the century has there been such sweeping reform of Australia's industrial law.

The main changes are Part VIA and VIB of the Reform Act. Part VIA deals with the implementation of the International Labour Organisation's (ILO) conventions and recommendations concerning: Minimum Wage Fixing; Equal Remuneration

for Men and Women; Equal Opportunities and Equal Treatment for Men and Women Workers; and Termination of Employment. Part VIB deals mainly with enterprise flexibility agreements.

Australia's external affairs power

Under s 51(xxix) of the Australian Constitution, the Federal parliament has the power to legislate with respect to 'external affairs'.

The High Court's decision in the *Franklin Dam* case,[5] endorsed an expansive view of s 51(xxix). Mason, Murphy, Brennan and Deane JJ agreed that the Commonwealth Parliament could legislate to implement any international obligation which the Commonwealth had assumed under a bona fide international treaty, and that the subject matter of the obligation, which might otherwise lie outside the powers conferred on the Commonwealth Parliament, was not relevant to this proposition.

In a series of subsequent cases, the High Court has adhered to a broad approach such that if a topic becomes the subject of international co-operation or an international convention it is necessarily international in character.

It follows that since Australia had entered bona fide into the *Treaty of Versailles*, which established the ILO, the subject matter of the ILO conventions and recommendations concerning: Minimum Wage Fixing; Equal Remuneration for Men and Women; Equal Opportunities and Equal Treatment for men and Women Workers; and Termination of the Employment, stems from an international treaty and therefore would fall within the scope of s 51(xxix).

The Federal Parliament has used its external affairs power to implement several ILO conventions and recommendations which effectively apply to both Federal and State industrial relations.

The 'safety-net' — Part VIA

Given that in substance and form, the provisions of Part VIA, are directly taken from the ILO conventions[6], it follows that there is a 'reasonable proportionality' if not direct compliance between the provisions of the Reform Act, with respect to: minimum wages; equal remuneration; parental and family leave; and termination of employment, and the ILO conventions.[7] In this way Part VIA falls within the legislative power of the Commonwealth Parliament under s 51(xxix).

The effect of these conventions is to provide a 'safety net' of minimum employment conditions designed to protect workers. The Reform Act gives the Industrial Relations Commission the power to set minimum wage rates for any group of eligible employees (s 170PC) and to make orders providing for equal pay between genders for work of equal value, so as to ensure that differential rates of pay are not set for the same job and to prevent gender segmentation in the workplace (s 170BB, 170BC). Part VIA also deals with setting minimum standards concerning parental leave and leave to care for immediate family based on an ILO convention[8].

A major component of the safety net concerns the provision for termination of employment. An employer may only lawfully dismiss an employee, with or without notice, for reasons relating to the employee's capacity or conduct, or because of the operational requirements of the business (s 170DE(1)).

An employer may not terminate an employee by reason of temporary illness or injury; trade union membership or non-membership or on grounds of race, colour, sex, sexual preference, family responsibilities, pregnancy, religion, political opinion, national extraction, or social origin (s 170DE(1)). The Court must decline consideration of an application for unlawful termination if it is satisfied that the employee has access to an adequate alternative remedy, under existing machinery.

Flexibility — Part VIB

To promote enterprise bargaining and to facilitate enterprise flexibility agreements, the Reform Act includes Part VIB, which incorporates a certified agreement or unionised stream and an enterprise flexibility agreements or non-unionised stream.

The certified agreements provisions in the Reform Act, rely on s 51(xxxv), the Federal labour power, for their validity. The Commission must certify an agreement between an employer and union, following an inter-state industrial dispute or industrial situation. However, it may refuse to do so if the agreement does not comply with all the statutory requirements, if such an agreement is discriminatory or if workers are disadvantaged by the agreement (s 170MC).

The Reform Act gives trade unions and employers a limited right to take industrial action. Previous reports from ILO bodies found that the combined effect of various State and Federal laws was to prohibit strikes, rendering them unlawful.

Australia has now provided some freedom, though qualified, to take such action. Where a bargaining process is in operation, industrial action may be organised by a union or any of its members, officials or employees in which they are protected from legal sanction, though this only applies to certified agreement and inter-State disputes of a formal capacity (at least 72 hours notice). Employers in a bargaining period are entitled to lock out all of the relevant employees, irrespective of any industrial action.

Enterprise flexibility agreements under the non-unionised stream, rely on the constitutional corporations power, s 51(xx), for their validity. The corporations power authorises the Australian Parliament to make laws with respect to 'Foreign corporations and trading or financial corporations formed within the limits of the Commonwealth ...'

The current position of the High Court, is that the plenary power contained in s 51(xx) should be regarded as conferring a comprehensive authority on the Commonwealth to make laws with respect to all aspects of its subject, that subject being formed domestic trading and financial and foreign corporations.[9]

Division 3 of Part VIB of the Federal Industrial Relations Act 1988, gives effect to a system of wage determination via enterprise flexibility agreements in which an employer can negotiate with its employees about terms and conditions of work.

It is made clear that such agreements can only be entered into by 'an employer that is a constitutional corporation and carries on an enterprise' (s 170NA(1)). Furthermore, in order to confine this stream to employer corporations which are already governed by Federal industrial law, such constitutional corporations must be bound by Federal awards (s 170NC(1)(b)).

Greater uniformity may have been achieved if the Federal Parliament relied on its external affairs power to implement the ILO convention on collective bargaining[10] so as to include employees from unincorporated sectors. In addition if the external affairs power were relied upon, the provisions which deal only with Federal awards would have extended to State awards.

The economic effects

The Federal Government has claimed that the changes to Australia's industrial law will increase productivity and efficiency by encouraging more workplace negotiations between employees, unions and employers. Critics suggest that despite the increased uniformity between State and Federal industrial law, the Commonwealth, in balancing the interests of all parties involved, has fallen short of providing far reaching reform and of maximising economic benefit.

In line with the rationale underlying the Accord, the aim of the Reform Act is to help improve workplace productivity and our international competitiveness. However the compromise between the political interests of trade unions and employer organisations has meant that given the high degree of qualification and limited scope of much of the provisions, there has been minimal labour market flexibility.

In particular the termination of employment provisions received strong criticism from employer groups, who called the so-called reform a step back in the direction of rigid regulation, rather than a step forward to flexibility and dynamism.

Overseas experience has demonstrated the economic benefits of a decentralised system based on enterprise bargaining. Such a system may be efficient since labour markets are quicker to adjust to problems of unemployment.

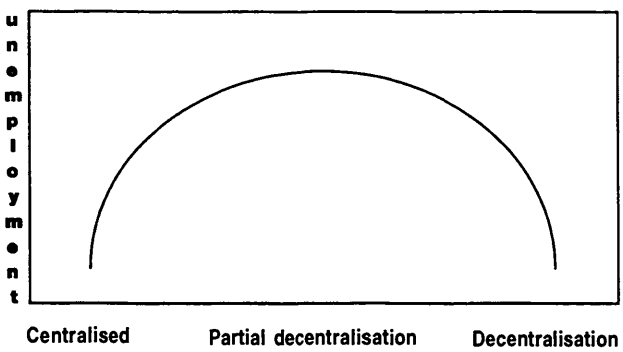
At the same time any industrial relations policy must also be concerned with principles of equity and fairness. On this point the 'safety net' envisaged by the Federal government, plays a crucial role in maintaining uniformity between the States and the Australian government, so as to provide a code which protects Australian workers and strengthens their security of employment. This is a goal which is often heralded by proponents of a centralised wage determination.

While business organisations supported the moves towards enterprise bargaining, several suggested that the scope of the 'safety net' was unsustainable, in particular the provision concerning unfair dismissals and termination, and that it would effectively restrain employment growth. In response the Federal government made several amendments in June 1994, in which those earning over $60 000/year and who were not covered by State or Federal awards were not entitled to access to unfair dismissals procedures, and those who were under such awards had compensation capped.

Despite the banner of flexibility, productivity and globalisation, under which the Reform Act has been heralded, the likely economic effects of the

Act are reduced because of the failure of the Federal Government to adopt a complete and consistent system of industrial regulation. In order to achieve maximum economic benefit the government must choose between a centralised or decentralised system.

At best we have achieved partial decentralisation which according to Calmfors and Driffill[11] is worse for unemployment than having either full centralisation or full decentralisation (see diagram).



Given our long history of conciliation and arbitration and union power, the process of transformation is one which involves balancing political interests. Uniformity of law is important economically, since it provides consistency and certainty, concepts which are essential in attaining economic growth.

Conclusion

The need for consistency has become even more important given our involvement in a globalised economy. Uniformity does not necessarily mean that flexibility is sacrificed. In the case of the industrial relations, players are left with considerable scope to enter agreements, but with a 'safety net' which provides 'protection of human rights, in the dignity and worth of human persons, and in the equal rights of men and women'.[12]

While the Reform Act has been criticised as being 'complex and limiting', one must acknowledge the foundation which the government has laid, in which the Reform Act along with the Accord has begun to overcome the inconsistencies which have previously existed, between the States and the Federal Parliaments.

By relying on an external body, the ILO, the Federal government has been able to restore uniformity in industrial regulations law. The new industrial machine, though requiring some fine tuning, should provide an important basis upon which a consensus of industrial relations law will flourish.

Endnotes

1. Atiyah, *The Rise and Fall of Freedom of Contract*, p 167–177.
2. See JT Sutcliffe, *A History of Trade Unionism in Australia*, Melbourne: MacMillan, 1967, p 90–109.
3. *R v Kirby; Ex parte Boilermakers Society of Australia* (1956), 94 CLR 254.
4. See *Report of the Committee of Inquiry into Australian Industrial Relations Law and Systems*, Vol 2, AGPS, (1985) at para 6.1.
5. *Commonwealth v Tasmania* (1983) 158 CLR 1.
6. McCallum suggests that the possible reason for the implementation of the ILO recommendations and conventions is due to a report by the committee of Experts of ILO which criticised the Australian Government for its failure to observe ILO standards of granting workers some right to withdraw their labour. See WB Creighton, Enforcement in the Federal Industrial Relations System: An Australian Paradox' (1991) 4 *AJLL* 197 at 199–206.
7. *Minimum Wage Fixing Convention*, (1970, Convention No 131 ILO, Vol 2 at 949.) ILO conventions on equal remuneration, (1951, Convention No 100, ILO Vol 1 at 529) and discrimination (1958, Convention No 111, ILO, Vol 1 at 702).
8. *Workers and Family Responsibilities Convention*, Convention No 156 ILO, Vol 2 at 1244.
9. *New South Wales v Commonwealth* (1990) 169 CLR 482 at 49–8 per Mason CJ, Brennan, Dawson, Toohey, Gaudron and McHugh JJ, at 507–13 per Deane J.
10. *Right to Organise and Collective Bargain*, No 98, 1949.
11. Calmfors and Driffill J 'Centralisation of Wage Bargaining', *Economic Policy*, April (1988).
12. From the opening recital of the Charter of the United Nations.