A unitary national system of industrial relations?

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Introduction

The question of whether Australia should have a unitary national legal system of industrial relations is a highly political one – proponents often divided along party grounds or on experience as an employer or employee. The question itself has been one of contention since the first *Conciliation and Arbitration Act* was passed in 1904.[1] Establishment of a federal system, given the power to conciliate and arbitrate industrial matters of an interstate nature pursuant to s51(xxxv) of the Constitution, led the states to fear that their role in industrial disputes was about to be usurped. The same concern exists today, and colours the question as to whether a single national industrial relations system could ever be achieved. Examination of the Victorian referral of power to the Commonwealth suggests such a system requires a great deal of consideration before it could be a success.

Critique of the current system

Supporting industrial relations bodies at state and federal level, Australia currently has six industrial relations systems – Victoria having referred power to the Commonwealth in 1996.[2] This co-existence makes the determination of obligations and entitlements complex and difficult. Differences in the operation of laws dealing with the same issue, variance in state and federal awards applying to one enterprise, and the scope of, and ability to access, various tribunals, each causing additional uncertainty and impediment – particularly for employees operating in more than one state.[3] In contradistinction, cooperative federalism and the establishment of a unitary system has been supported by a number of experts as a logical and commonsense proposal.[4]

The critique of the current system is not confined to the difficulties arising from such a number of complex systems, it goes to the disadvantages arising from the current federal system itself. Based on the conciliation and arbitration power, the system cannot be accessed unless evidence of an interstate dispute is provided. As such, federal coverage is said to be "constantly dependant on unions manufacturing appropriate paper disputes",[5] placing administrative burdens on, and potentially alienating, all involved. In *Breaking the Gridlock*, Reith detailed this as "hardly the foundation for a rational regulatory system".[6] One must consequently consider not only whether a unitary system should be developed, but on what grounds such a system should be based.

Creating a national unitary system

The simplest way to achieve a unitary system is via state referral – as exhibited by Victoria. Short of the states agreeing to this course of action, or the Commonwealth extending its powers by referendum, the only mechanism open to create a national system is the utilisation of alternative Constitutional powers. Such powers include the: (a) corporations power (s51(xx)); (b) trade and commerce power (s51(i)); (c) external affairs power (s51(xxix)); (d) incidental power (s51(xxxix)); (e) defence power (s51(vi)); (f) referral power (s57(xxxvii)); and/or (g) territories power (s122).[7] A number of these powers have already been invoked by the Commonwealth to extend the reach of rules and processes enacted under the conciliation and arbitration power.[8]

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The corporations power, coupled with ancillary powers, is the favoured tool to create a unitary system. Adopting a broad view of this power,[9] High Court comment suggests the Commonwealth can legitimately use s51(xx) to pass laws relating to the "activities, functions, relationships or business" of a corporation.[10] In *Re Pacific Coal; Ex parte Construction, Forestry, Mining and Energy Union*,[11] Gaudron J indicated "no doubt [the corporations power] extends to laws prescribing the industrial rights and obligations of corporations and their employees".[12] Evidently, it has been open to the Commonwealth to extend its powers to cover industrial issues at state and federal level for some time. The fact it has not done so lends weight to the suggestion that the current government's concern is not to extend federal coverage, but to critique the opposition and inhibit the power of the union movement.[13]

State opposition to a unitary system

Reduction of state power and inhibition of the union movement are issues behind a perceived state reticence to adopt a unitary system. The question of extending Commonwealth power to cover all employees has been put to a referendum five times, failing at each.[14] State Labor governments are reluctant to relinquish their powers, while the Liberal/National Coalition expresses the view that the Australian Industrial Relations Commission's powers should be curtailed and union involvement decreased.[15] Attempts to attain a national system are described by union officials as "a strategy to destroy the award system and the Industrial Relations Commission, and to eliminate collective bargaining, and with it any effective unionism".[16] Consequently, it is evident that the primary inhibition to achieving a unified system is the politicisation of the issue. The establishment of a unitary system would place control of industrial issues affecting all Australians squarely in the hands of one political party – while Australia has a democratic system of government, this is unlikely to happen.

Lessons from Victoria

Victoria's referral of industrial relations powers to the Commonwealth fulfilled a perceived aim of its Liberal/National Coalition government to create a "unified national system".[17] Closely following the schema of the *Workplace Relations Act* 1996 (Cth) (**Act**), the referral permitted the Commonwealth to extend its powers to encapsulate Victorian employees. However, it did not give the Commonwealth power to legislate with respect to all employees,[18] nor in relation to all matters affecting the workplace. Power to legislate regarding worker's compensation, occupational health and safety, and equal opportunity, for example, was retained by the state. Furthermore, the state retained the power to terminate the referral at any time.[19]

Subsequently, the referral has been criticised by the Victorian Industrial Relations Taskforce as failing to simplify the system for Victorians, nor meet criticisms of the current system.[20] The referral did not provide fair, equitable and enforceable employment conditions to employees previously subject to the Victorian system.[21] Indeed, it was perceived as leaving employees without remedy, other than at common law, in relation to alleged breaches of Schedule 1A of the Act, underpayment of wages, and allegations of victimisation.[22] Consequently, the Taskforce called for the re-establishment of a state system and concluded that there was no hope of achieving a unitary system with the cooperation of the Commonwealth[23] However, since that time there has been evidence of cooperation between the Victorian and Commonwealth governments, evincing a willingness to improve the conditions of Victorian employees, albeit on a piecemeal basis.[24]

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Conclusion

Clearly, the industrial relations arena in Australia is one of intense politicisation, so the answer to the question of whether a unitary national system of industrial relations should be established is consequently subject to political desires. States remain opposed to the idea, while the Liberal attempt to take steps towards unification via Victoria appeared initially to be unsuccessful. Given the ability retained by Victoria to terminate the referral, Victorians remain ever susceptible to further change and confusion should a change in government herald a rolling back of industrial power and return to a system of co-existence. It is the susceptibility of the system to changes in government that makes this topic one ever worthy of discussion. ■

1. Justice Giudice, "Our industrial relations system – what makes it unique?", speech delivered at the Sydney Institute, Sydney, 12 February 2002.
2. Achieved through the *Commonwealth Powers (Industrial Relations) Act* 1996 (Vic), proclaimed 12 December 1996 in conjunction with the *Workplace Relations and Other Legislation Amendment Act (No 2)* 1996 (Cth). For a detailed discussion of the referral, see Stuart Kollmorgen, "Towards a unitary system of industrial relations? *Commonwealth Powers (Industrial Relations) Act* 1996 (Vic); *Workplace Relations and Other Legislation Amendment Act (no 2)* (Cth)" (1997) 10 *Australian Journal of Labour Law* 158.
3. Justice Giudice, speech delivered at the Industrial Relations Society of the ACT Inc Conference, Canberra, 31 March 2004).
4. Bob Herbert, "A unitary industrial relations system: unfinished business of 20th century, impediments to introducing a unitary IR system", speech delivered at the Business Council of Australia Industrial Relations Forum, Melbourne, 17 November 2000.
5. Andrew Stewart, "Federal labour law and new uses for the corporations power" (2001) 14 *Australian Journal of Labour Law* 145, 147.
6. The Honourable Peter Reith MP, *Breaking the Gridlock: Towards a simpler national workplace relations system – discussion paper 1, the case for change*, Department of Employment, Workplace Relations and Small Business, 2000, 11.
7. Stewart, above n6, 148.
8. For examples, see Stewart, above n6, 150.
9. *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323.
10. *Victoria v Commonwealth* (1996) 187 CLR 416.
11. (2000) 172 ALR 257.
12. Ibid, at 275.
13. As suggested by Stewart, above n6, 163.
14. In 1911, 1913, 1926, 1944 and 1946, as discussed by Sam Eichenbaum, in "What chance a single industrial relations system in Australia?" (2002) 76(6) *Law Institute Journal* 66.
15. Ibid.
16. Linda Rubinstein, "Impediments to introducing a unitary IR system", speech delivered at the Business Council of Australia Industrial Relations Forum, Melbourne, 17 November 2000.
17. As once described by The Honourable Phil Gude, "Changing the landscape: employee relations reform in Australia", speech delivered at the Eighth Foenander Lecture in Industrial Relations, 25 October 1993.
18. See Kollmorgen, above n3.
19. Ibid.
20. Industrial Relations Taskforce, *Fairer, Safer, More Secure, More Productive – The Future of Victorian Workplaces* (August 2000).
21. Ibid, 89.
22. As discussed in Susan Zeitz, "The Industrial Relations Taskforce Report: A phoenix from the ashes" (2000) 13 *Australian Journal of Labour Law* 308, 313.
23. Industrial Relations Taskforce, above n22, 182.
24. Consider the *Federal Awards (Uniform System) Act* 2003 (Vic).