# 11 Industrial Relations

In the space of only four or five years, the underlying consensus of the debate about industrial relations in Australia has shifted remarkably. In particular, there is now surprisingly widespread—though far from universal— agreement centred on two crucial issues.

First, the focus of industrial relations processes has largely shifted away from wages pure and simple to the link between wages and productivity.

Second, the workplace is increasingly seen as the appropriate area for the making of decisions; and, conversely, the rigid and centralised system based on arbitration and conciliation 'courts' is increasingly seen not simply as irrelevant but as incapable of delivering appropriate results.

The initial impetus for these shifts was perhaps concern for the damage done to human rights by the centralised systems; that has now largely given way to wider though not necessarily more important concerns based on international competitiveness, and the understanding that the Australian wage-fixing system could not remain a sheltered enclave in an increasingly open and internationalised economy. Human rights aspects are not entirely neglected; though, curiously, the right of individuals voluntarily to sell their labour on their own terms is still not central to the debate.

What was perhaps the key breakthrough came in 1987 with the decision to establish 'second tier' arrangements for productivity at the national level. Even though the second tier itself is largely forgotten (having been overtaken by later initiatives such as award restructuring), the rhetoric and some of the reality at the national level has now permanently changed.

It *is* important to distinguish between rhetoric and reality. While the language of Federal industrial relations has for the last year or two often been couched in terms of enterprise bargaining, that is

misleading: the key characteristic of current 'enterprise bargains' is that deals are struck between the employer and a larger national union, not the employer and the enterprise workforce. The Federal Labor government has (to oversimplify a little) moved in two quite contrary directions: the decentralising direction epitomised even by its flawed version of enterprise bargaining, and the centralising direction shown in its union amalgamation legislation, its recent moves on independent sub-contractors, and its nostalgic attachment to the Accord. The tension between the two is confusing and unhelpful, and needs to be resolved quickly.

There is no doubt as to the direction in which the confusion will eventually be resolved. Considerations of international competitiveness will not go away; and the current recession has, if anything, intensified the pressures. The steady reduction of tariff protection, still apparently a bipartisan policy, will itself force changes in the labour market. A new factor is now at hand: the employment contracts legislation introduced in New Zealand in May 1991 seems, from early and tentative indications, to be working well, and will increasingly provide a model of competitiveness that Australians will be unable to ignore.

Now the Federal Liberal Party is proposing a radical shift in industrial relations policy, which, although not based on the New Zealand model, would deliver outcomes much like it. We will have a clear choice at the national level, indeed, not simply between two alternative models of industrial relations, but between grasping change and having it forced on us.

The shift in debate at the Federal level has been only unevenly matched at the State level. New South Wales was the first State to seek comprehensively to modernise its industrial relations legislation, but the legislation was regrettably compromised both in its inception and in its passage through the State Parliament. In Queensland, which, under its previous government, forced the pace of change with the South East Queensland Electricity Board and Power Brewing deals, the situation has now probably gone backwards to some degree. Very recently, the new Victorian government has brought down a new, decentralising policy; and a considerably less radical scheme has been set up by the new Tasmanian government. Here in Western Australia, reasoned policy debate on this subject at the political level has been almost invisible.

The Victorian experience was a stormy one, perhaps in some respects needlessly so. Whatever the local reaction, however, in a

State which is still the heartland of unyielding union conservatism, there is no doubt that the essential content of the legislation was correct. Some of the incidental detail is subject to legitimate disagreement. As the controversy recedes, however, the most interesting consequence is likely to be that other States will be forced to compete as Victoria uses labour productivity as the crowning bid for new investment.

That will only apply, however, to the extent that the Federal government's own new legislation, rushed through the Parliament shortly before Christmas, will not effectively undercut or prevail over the Victorian Act. The intent of the new Commonwealth Acts, put simply, is to enable workers who operate under State awards, and who wish to remain within a centralised system, to leapfrog into Federal jurisdiction. Further legislation is promised which would purport to invoke the external affairs power of the Constitution in order to allow the Commonwealth to legislate for the preservation of certain minimum working conditions. The legislation will certainly be subject to challenge in the High Court; early informed opinion has been reasonably clear that such a challenge is unlikely to succeed, given that the Federal government has already indicated that it is prepared to use the 'external affairs' power as its constitutional justification.

All the implications of this latest move are far from clear, but it seems fair to say that it is utterly misconceived.

It will cause very considerable damage to the already fragile federal balance of powers. And it will lock the Federal Labor Party, should it win government for another term, into a policy completely contrary to the national interest, a policy which we should assume will for some time at least be reinforced rather than quietly weakened. (The most instructive parallel to be drawn here is the way the Labor rhetoric on privatisation in 1985–86, espoused for similar reasons of short-term political expediency, crippled that government when privatisation became a necessity a few years later.)

Even putting aside the additional uncertainty generated by the likelihood of High Court challenges, the Keating–Cook legislation must leave policy-makers at the State level in a state of some perplexity. The great handicap imposed by the legislation is that it seems likely to hinder quite seriously the working of State schemes designed to persuade or push employers and employees from the centralised into decentralised systems.

Much will, of course, depend on the outcome of the Federal election. Oversimplifying somewhat, we can propose four broad scenarios at the State level; two depending on a Labor Federal government, and two depending on a Liberal Federal government.

Should the Labor Party be returned to government, and should it continue to take its own rhetoric seriously, two options seem possible.

The first option (scenario I) is the most dramatic. It would see the State government renounce virtually all responsibility for industrial relations at the State level. The means would lie essentially in repealing the State Industrial Relations Act and related legislation; thus dismantling at one stroke the entire State industrial relations apparatus—including the State Commission, and the Department, along with State-registered unions and employer organisations. Those who wished to stay in a centralised system could then transfer formally to Federal jurisdiction. In place of the current Act, the new government could enact some brief legislation which addressed compulsory unionism and the matter of its relations with its own public service.

This approach would have a number of advantages. It would save the State's taxpayers quite a lot of money—perhaps $30 million. By shifting the focus of much of the local 'IR Club' activities elsewhere, it might lessen the likelihood of some of the sillier deals arrived at, particularly in the PTEs; and, perhaps more importantly, it would weaken the main stronghold of resistance to eventual change for the better at the State level. It would almost certainly add to administrative and political pressures in the Federal system, hastening, even if only marginally, its eventual demise. It has the political virtue of extreme simplicity, and, handled with only a moderate degree of skill, would leave the new government with unspent political capital that might be well used in other, contentious areas of reform.

The second option in this situation (scenario II) would see the State government acknowledge the Federal government's *force majeure*, but try, nevertheless, within the bounds (or crevices) of the new legislation, to draw up and implement its own more sensible State-based reform. The limits of action are effectively to be deduced from the reaction to the Victorian example. The legislation would concentrate on establishing a 'second stream' of mutually-agreed industrial arrangements.

The advantages of this option are clear enough. It would provide an avenue of reform which would in turn, by example, induce further

pressure on the older-style, centralised arrangements. The beneficiaries of the reform are perhaps likely in the first instance to be employers and employees in smaller businesses, already effectively on the fringes of the centralised system.

The first option in the second circumstance (scenario III) can be thought of as being the mirror reverse of scenario I. In the event of a new Federal Liberal government's being returned at the election, a new State administration, which was satisfied with the direction of the new Federal industrial relations legislation, might find it politically advantageous to opt out of the area altogether. Broadly speaking, the advantages identified for scenario I would apply.

The second option in this circumstance (scenario IV) would see the State government, unhindered by any threat of Federal intervention, pursue its own comprehensive scheme of reform—assisted, perhaps, by the repeal of any Federal legislation, such as the recent Cook enactments, which stood in the way of its doing so.

The choices facing a new State government are not usually presented in this way; but they do need to be clearly put and assessed, in view of the very high level of political uncertainty now prevailing. The four scenarios are, of course, a little over-simplified, and would tend in reality to grade into each other, but they should form a useful statement of the extreme positions. The choice will ultimately be a political one, depending both on how the Federal–State confrontation develops, and on a State government's notion of its own political potential and its ability to handle reform issues in a decided order of priority.

Our view is that, in an ideal world, the fourth scenario is the best.

The appropriate question at this point is, Does it matter? Is there, in view of all the initial political downside exemplified by the Victorian experience, any real point in a State government's striking out on its own? After all, the change which we believe is inevitable at the Federal level will, also inevitably, filter down, one way or another, into the State jurisdictions, impelled more strongly by the Victorian experience, to the extent that that will be successful. Furthermore, there is a real possibility that if the change comes from the election of a new Federal Liberal government it will cut across State jurisdictions in a fairly dramatic way. There are already public indications that such a government would seek to use the 'corporations power' (s.51 [xx]) of the Constitution to extend its powers to much of the private sector (and perhaps even some of the corporatised public sector) of the economy.

We believe that it *does* matter, and for some fairly good reasons.

There are particularly good reasons in a federation for competing jurisdictions, even in an area such as industrial relations (where, in the past, the coexistence of Federal and State jurisdictions has perhaps in some respects been unhelpful). A State may well adopt a better model than any Federal one, and may well then compete successfully for resources. Further, the new Federal model may itself involve some centralisation of residual bureaucratic functions remote from State concerns. As well, a single Federal system is itself open to change for the worse should there be a shift in government policy. Finally, it seems unlikely that any conceivable reformed Federal model would directly tackle the awkward and important question of industrial relations in the States' public sectors. For while a new Federal government may well adopt policies for dealing with that question in its own bureaucracy, it is difficult to see that as implying any binding consequences on State public sectors.

Clearly, then, there is more than a little virtue in a new State government going its own way in industrial relations.

It may be useful at this point to have some idea of the extent of the area we are tackling, and we can best do that by looking at unionisation in the workforce. Three important characteristics are revealed in the relevant statistics.

- Union membership is declining. At the national level, while 45.6 per cent of the total workforce belonged to a union in 1986, only 40.5 per cent belonged in 1990. A similar decline prevails in Western Australia: from 41.1 per cent in 1986 to 35.4 per cent in 1990.
  Union membership is unevenly concentrated. The most obvious discrepancy is between the private and public sectors. At the national level, 66.8 per cent of public sector employees belonged to a union in 1990; 30.8 per cent of private. There are similar discrepancies (1990 figures) between male and female membership (45.0 per cent as against 34.6 per cent), and between full-time and part-time employees (45.7 per cent as against 18.8 per cent).
- Union membership tends to be unevenly spread over areas of the economy: some sectors are very high—79.4 per cent in electricity, gas and water; 76.0 per cent in communications; 62.9 per cent in mining—while others are much lower.

Of course, such figures underestimate the influence of the official, centralised arbitration system, in that awards negotiated before the Federal and State Commissions are the main influence in determining pay and conditions in much of the rest of the private sector. In

Western Australia, for example, 20.8 per cent of the workforce is covered in some way or another by a Federal award and 57.3 per cent by a State award.

Industrial conflict in Western Australia runs at fairly high levels: since 1986 this State's record, measured in working days lost per 1000 employees, has on average been the second worst in Australia.

To look at union coverage and industrial disputes is, however, by no means to imply that Australia's or Western Australia's industrial relations and productivity problems are simply a result of the existence of unions. Far from it. Unions are only half, perhaps less than half, the problem; most reasonable commentators agree that there are very serious problems with the quality of management in Australian business and industry (not to mention Australia's public sector). More to the point, the problem is really that we have for too long tolerated a system of industrial relations which has institutionalised conflict, which has emphasised power over reason, which has bred a self-perpetuating bureaucracy, and which has relieved too many managers of the tasks of real management. Examining the extent of unionisation enables us to assign some notional extent to those areas of the economy where rigidity and consequent poor productivity are likely to be major problems.

The alternative to the centralised system is clear enough; the ideal minimum requirements can be listed simply enough.

- The workplace, or enterprise, has to be the place of negotiation; and negotiation should be as direct as possible between employer and employee.
- Bargaining units formed to represent employees should be appropriate to the circumstances of the enterprise. While in many cases this will mean one unit to each enterprise, that is not a binding condition.
- Such units should be formed as freely as possible, without restriction of size, and without the necessity of belonging to some other larger organisation.
- No person should be obliged by anyone, union or employer, to join any association; closed shops should not be tolerated.
- Each deal between employer and employee should be struck free of external influences; there should be no flow-ons, binding precedents, superimposed awards, common rules, and so on. At the same time, both employee and employer must be able freely to choose their advocates or agents for the bargaining process.

- Deals struck should take the form of contracts in common law, rather than the present awards or determinations, and be appropriately enforceable in the real courts of the land, like any other contracts.
- Contracts may specify any number or variety of agreed conditions, but particularly the term of the agreement, behaviour during the agreement (particularly in respect of industrial action), procedures for settling individual or collective grievances, and the means of renegotiation.
- Strikes as commonly defined in Australia should not be countenanced unless permitted under conditions defined by contractual arrangement.
- Only parties to the contract may have legal standing in subsequent disputes; the normal provisos relating to legal disability (in respect of age, for example) would apply.

The implementation of those principles would mean a very radical change in industrial relations in this State. It may well be thought to be politically impossible; although the boundaries of political possibility are being continually stretched. It would, in time, effectively result in the demise of the State Commission; and it would eliminate the need for a Minister for Labour Relations and much of the relevant Department. It would put unprecedented pressure on managers to assume full responsibility for their own industrial relations; and it is already clear from the debate on the Federal Opposition's policy that many managers simply do not want that. Employer organisations themselves would have to find new roles. It would utterly change the shape and role of unions, which would have to adapt themselves to being providers of services for groups of employees; they would have to compete for business; they would lose most of their political influence.

So despite the growing consensus for change, there is still reason to believe that optimal change would be quite strongly resisted. (This is not to say that sensible change will necessarily bring forth riots and martyrs and blood on the streets. Sensible and moderately courageous ministers must be heartened by the relatively peaceful nature of the transition in New Zealand, and by the degree to which all parties have so far adapted to the changes there. Despite the fuss in Victoria, much the same seems to be happening there.)

To improve the chances for the success of appropriate reform, we recommend the adoption of a *'dual-stream'* industrial relations system. One stream can be thought of as being *contractual*, the other as

the *registration* stream. This is effectively a political compromise, but can be achieved in such a way as not to compromise the achieving of longer-term reform of the right kind.

The *contractual* stream is one based on the nine principles outlined above. Wages and conditions, obligations and rights, penalties and benefits, are specified in contracts enforceable at law, negotiated between employer and employee. Completion of the contract would require no official endorsement or registration. To the fullest extent possible, third parties (not least the government and the Commission) are excluded at every stage. Various parties—Commission, unions, employer groups—may offer *(on a commercial basis)* assistance with the drafting of contracts and with negotiation, but not to the exclusion of other agencies (lawyers and other commercial arbitrators) which might spring up.

The government has, of course, the statutory power to specify some of the contents of contracts. Some would advocate, for instance, that contracts contain some minimum level of wages and annual leave. That would be a political compromise which would probably be regrettable and unnecessary. It would, in particular, tend to disadvantage further those sections of the labour market (the young and the late-middle-aged unemployed) already suffering from such rigidities. Adult individuals, who manage quite well to look after themselves when contracting for homes or cars, can be trusted to know and to look after their own best interests. (Legal minors, of course, will need some protection as they do in other respects.)

The second stream represents a formalised version of the first, a centralised form of decentralised bargaining, with *registered agreements* taking the place of contracts. Various versions of this have been promoted over the last year or so. They vary essentially in how much of the present system survives into a new one. There is enough common ground, however, for us not to have to describe such a system in any detail; the reader can refer to the proposals of the Confederation of Australian Industry (or its member organisations) as a representative sample, while remembering that such proposals are at best intermediate compromises. The fine detail of such systems is not as important as the overall direction; however it works, the system adopted must not be such as to stand in the way of the adoption of a better long-term system. Nor should there be any rigid lines drawn between the two streams. Not only should it be made as easy as possible to opt from the registered to the contractual stream; but

some pressure should be built into the system to make the choice between the two streams both deliberate and repeated.

One very important subject not usually much canvassed in this area needs to be mentioned here: industrial relations within the public sector. Whatever a new State government may decide in terms of the four scenarios outlined above in respect of the private sector, it must resolutely tackle the problems of industrial relations within its own domain. Here the matter of productivity is most acute, especially in the PTE sector. As in the private sector industrial relations debate, some mixed progress has been made; even the Commonwealth government released, last August, a set of proposals on 'workplace bargaining in the Australian Public Service', although, as usual, the reality there falls short of the rhetoric.

Two important principles need to be implemented. First, industrial relations management within the public sector needs to be decentralised and deregulated. Decentralising means giving the essential management of wages and conditions to public sector managers, within such discrete workplace units as are practicable; deregulating means the effective removal of standardised terms of employment across the whole public sector. The second principle is to ensure that public sector employees have the same option of enterprise-based agreements based on mutual consent as we have advocated for the private sector.

Detailed design of public sector industrial relations will depend on a wide range of other factors—such as the future of permanency in the public service, the structure of the bureaucracy, the nature of the budget process, and so on—which will need decisions. It will therefore be simpler, but politically more difficult, to start the process in the PTEs. This is, however, one political decision which cannot be deferred. It is, again, worth pointing out that there are examples of successful reform at hand. Examples such as the South East Queensland Electricity Board stand out; but, closer to home, the productivity gains in Westrail (achieved under a Labor government) show that, well-managed, the task is far from impossible.

Two concluding observations are worth making.

First, the one essential perspective missing in the heat of the current debate is that most Australian employees already operate quite happily outside the centralised systems of wage-fixing and dispute-settling. Many (increasingly, most) employees have never belonged to a union; many have never had more than the most informal employment contracts. The notion that radical change will bring

a dramatic shift to the worst excesses of the Industrial Revolution is a self-serving fiction which does not stand up to common-sense observation. The debate could indeed do with a substantial transfusion of common sense.

Second, *there is no alternative*, and in two senses. Industrial relations will be a very important component of the competitive edge that this State must seek to regain if it is to be a successful bidder against other States for resources, human and physical. Far overriding that is the national need for the competitive edge in succeeding in the world economy. If the State can contribute to that in even a fairly small way, it will be more than worth a degree of transient political pain.