

Industrial relations and the failure of federalism

Mike Nahan



Which is more important: States' rights or individual rights? Can the Australian Labor Party act in the public interest on industrial relations? Can reform of the labour market be locked in so that the potential for future policy regression is minimized?

These are the pivotal issues by which the Howard Government's latest industrial relations reforms must be judged.

While debate in the media about the Howard Government's IR reforms has been dominated by the unions' 'Howard plans to steal your holidays' campaign, there is a more serious debate going on among people who support reform but who also support the maintenance of our federal system. The board of the HR Nicholls Society, for instance, is split on the Howard proposals. Although all the members of the Society's board are keenly interested in IR reform, many are also strong federalists and constitutionalists. They are very concerned about Howard's plan to use the corporations power to centralize IR powers in Canberra. Many State Liberal and National Party members who are keen on IR reform have also expressed concerns about the nationalization of IR powers.

Federalism is an area where tradition and liberty can collide. And when they do, one is often forced to make a choice.

Both tradition and liberty have impeccable pedigrees within the broad sweep of 'classical liberal' thought. Richard A Epstein, in *Understanding America*, argues that the differences

between the two, while not insurmountable, are significant.

As Epstein argues, Friedrich Hayek was a traditionalist who 'believed there was a gradual, spontaneous evolution whereby people managed to migrate to a set of efficient norms even though they did not know how those norms were created or why they seemed to work'.

John Stuart Mill, by contrast, was arguably the most illustrious liberal. In *On Liberty* Mill asserts that it is the right of every individual to do as they please in matters that merely concern themselves. Only harm to other individuals justifies using state power to restrain private behaviour.

On IR, both strands of thought agree. Far from evolving in a spontaneous manner to embody an efficient set of norms (as classical liberals would argue), the Australian industrial relations system has been imposed and maintained solely through the powers of the state. As a result, it imposes unnecessary control over people even where their actions have no impact on others.

But on federalism, traditionalist and liberal values conflict. Most traditionalists see the Australian constitutional settlement as having evolved from the sound ideal of framing a government of limited and enumerated powers. By dispersing power across levels of government, the federal structure limited the power of any one government and therefore of all levels of government. The Constitution also specified the powers of government and allocated these across levels of government. Traditionalists see the

centralization of powers, particularly since World War II (but also including current attempts to pull more powers into Canberra) as undermining a constitutional tradition which has worked well and which could, if it were allowed to, work much better.

The traditionalist solution to federalism and industrial relations is to get the Commonwealth out of the area, sheet the power solely to the States, and allow competitive federalism to drive best outcomes.

On the other hand liberals, although appreciating a federal system's potential to limit government, are much more concerned about governments'—state or federal—systematic and traditional tendency wrongly to restrict the rights of individuals. They are, therefore, more interested in changes—even to traditional institutions and norms—that reduce the heavy hand of government in the workplace.

The question for the traditionalist is: can the States do the right thing on industrial relations? That is, will the States allow institutions to develop over time, based on the rights of people freely to contract their labour?

Of course, this comes down to the question of whether State ALP Government are prepared to respect individual people's rights as opposed to union rights.

I think not. The interdependence

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between the union movement and the ALP in financial, political, cultural, and 'people' terms is simply too great, and unions are too dependent on the power of ALP Governments for such governments to act in anything other than the unions' interests.

For example, in 2002, the newly elected Labor Premier of Western Australia, Geoff Gallop, who is a smart, decent and ethical person, introduced a new IR Bill. The central purpose of this Bill was to give lost monopoly powers back to the union movement. The previous Court Government had, in 1993, introduced a dual-track IR system which allowed employers and employees to opt out of the existing regulated system through the use of individual or collective Workplace Agreements. It also made the role of the unions within the regulated system more contestable.

The Court Government's reforms were controversial, but the controversy was predictably generated by the union movement. The reforms were on all counts widely successful. The individual agreement route was quickly and extensively adopted, particularly by the mining sector, with over 300,000 individual agreements registered by 2001. Strikes and industrial disputations declined from already low levels. Labour productivity, in particular, boomed and wages rose.

An independent survey undertaken in 1999 and 2001 found strong support for the availability of individual agreements and for the Court Government's reforms. Indeed, over 70 per cent of respondents thought that the system was still too regulated even then.

In short, there was no reason or community support for change. Yet the Gallop Government went ahead. In 2001, it introduced a new IR act which:

- eliminated State individual agreements;
- gave unions unlimited rights of entry, even for non-unionised work-sites;

- made it easier for unions to force occupations into the award system and thus brought under their influence;
- gave unions special rights under unfair dismissal claims;
- made safety an industrial issue; and encouraged pattern bargaining and collective bargaining.

Why would an otherwise sensible Labor Government impose such restrictions on basic rights and give monopoly power to a now small and declining group? In short, because it had to.

Between 1992 and 2000, under the Court IR Act, union membership in the State declined by just under 50 per cent to 19 per cent of the total workforce and 12 per cent of the private-sector workforce. Furthermore, that membership was lost from the high income and fee-paying mining sector. As a result, WA unions were losing money and losing community influence and support.

This directly affected the ALP's funding and its ability to gain and hold power. The union movement is the major financier of the ALP. Over the ten years to 2003–04, unions provided donations of over \$47 million to the ALP nationwide. The unions also regularly fund political campaign during and between elections in support of the ALP. They also contribute to the many slush funds established for the ALP. The unions supply a majority of delegates to ALP Conferences and make up an organized, majority voting bloc in the party. If the unions' revenues decline, so do those of the ALP. If union influence and funding are threatened, union delegates at ALP Conferences will ensure that the ALP acts in their interests.

The Gallop Government is not alone in this. All the State Labor Government have gone to great lengths to protect the union movement's privilege in the face of declining membership. They have tolerated corruption in the building industry. Indeed, they actively worked to impede the work of the Cole Royal Commission. They have put in

place a raft of laws whose sole function is to give unions more power.

The ALP is no different at the federal level. Its IR policy at the last federal election was effectively written by the union movement and designed to give unions more power.

What is needed is a major shift in legislation across the nation which gives individuals the right to choose their own work arrangements and their own method of negotiation. This needs to be done in a manner that restricts the ability of the ALP/unions to wind back these changes at a later date.

While Howard's way is not perfect, it is a major step towards giving people more rights. It will provide people with a multitude of options, including union collective agreements, non-union collective agreements, individual agreements, common law agreements and individual contracts. It limits the role of third parties, such as unions and industrial commissions, to interfere in the bargaining process. And it limits the extent of compulsion and widens the range of issues over which people can bargain. In short, it gives people far more choice and power over their lives.

Yes, it will further centralize power in Canberra, but to the betterment of liberty. It will augment the risk of catastrophic policy failure. It will put all our eggs in the Canberra basket. It will eliminate the ability of some people to escape an exploitative federal law by going to State jurisdictions. However, the freedom provided by the States has often been short lived. The best, last outcome has been Victoria, where IR power was ceded to Canberra. Moreover, given the politics of the new Senate, ALP control is unlikely in the medium term, which will provide time for a tradition of freedom to evolve in Australian workplaces.

In short, it is not States' rights, but individual rights that are more important. Traditions that are flawed are not worth keeping.

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