The Coalition's Plan to Regulate Industrial Relations

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Abstract

In October 1992 the federal coalition released Jobsback, a statement of its industrial relations policies. The article situates Jobsback in the context of the evolution of the coalition's industrial relations policies since the Fraser years, outlines its major features, and provides a critique. Jobsback erects a new regulatory schema under a banner of deregulation. Three key elements are contained in Jobsback. They are tribunal avoidance and the use of the common law, legislatively imposed employment rules to 'aid' the transition from an award to a non-award system, and enterprise confinement. The article draws attention to the coalition's views concerning industrial conflict, constitutional issues, transitional problems associated with establishing legislatively imposed workplace rules, minima in workplace agreements, the Office of the Employee Advocate, equality before the law and good faith bargaining.

> Long ago we stated the reason for labour organisations. We said that they were organised out of the necessities of the situation; that a single employee was helpless in dealing with an employer; that he was dependent ordinarily on his daily wage for the maintenance of himself and his family; that if the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave and resist arbitrary and unfair treatment; that union was essential to give labourers opportunity to deal on an equality with their employer

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> (Supreme Court, United States of America, Quoted in Weiler, 1984, p. 364).
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> There has ... arisen ... a school of thought which asserts that a free struggle among unequal individuals, or combinations of individuals, means the permanent oppression and degradation of those who start handicapped, and inevitably results in a tacit conspiracy among the more favoured classes[1] to maintain or improve their own positions of vantage at the cost of the community at large (Sidney and Beatrice Webb, 1911, p. 598).

Throughout the twentieth century Australia has made extensive use of industrial tribunals to regulate relationships between the owners of capital and employees, on the one hand, and workers and union, on the other hand. Industrial tribunals emerged in response to the perceived problems associated with strikes/lockouts and economic depression experienced during the 1890s. Their creation resulted from the work of middle class intellectuals, persons outside or apart from the traditional struggles between capital and labour. These reformers rejected the nostrums of laissez faire economics; they believed that the state should play an active role in regulating industrial relationships.[2] Henry Bournes Higgins, for example, a prominent figure in the development of Australia's system of industrial regulation, and the second President of the Commonwealth Court of Conciliation and Arbitration between 1907 and 1921, maintained that industrial tribunals would usher in 'a new province for law and order'. He believed that:

> the process of conciliation, with arbitration in the background, is substituted for the rude and barbarous process of strike and lockout. Reason is to displace force; the might of the State is to enforce peace between industrial combatants as well as between other combatants; and all in the interests of the public (Higgins, 1915, p. 14).

While Higgins was a strong advocate and staunch defender of industrial tribunals - particularly of attacks directed against his court (Higgins 1919, 1920) - we need to be wary of overstating the role that he believed they should perform. In his hands industrial tribunals would determine minimum terms and conditions of employment - the most famous example being the 1907 *Harvester* judgement which established such a wage for an adult unskilled male labourer (2 CAR 1) - and provide a vehicle for the resolution of industrial disputes. Higgins stated that 'The ideal of the Court is a collective agreement settled, not by the measurement of economic resource, but on lines of fair play' (Higgins, 1919, p. 190). He also said

> The Court leaves every employer free to carry on the business on his own system, so long as he does not perpetrate industrial trouble or endanger

industrial peace; free to choose his employees on their merits and according to his exigencies; free to make use of new machines, of improved methods, of financial advantages, of advantages of locality, of superior knowledge; free to put the utmost pressure on anything and everything except human life (Higgins, 1915, p. 21).

In November 1991 the federal Liberal and National Parties released *Fightback,* an extensive package of reforms which would be introduced if they were victorious at the next federal election. Fightback extolls the virtues of individual choice and market mechanisms, and outlines what it hopes will be regarded as a deregulatory agenda for Australia. However, a cursory examination reveals that Fightback is somewhat ambiguous concerning deregulation, or reregulation. For example Fightback acknowledges that there is a need for 'strong government'. It also says that 'The reform program set out in this document is based on a single proposition: Australians have all the ability and enterprise this country needs provided they are helped rather than hindered by the action of government' (Fightback, 1991a, pp. 24 and 23). The interesting question here, of course, is whom will benefit, or is the target of such government, or state, help?

Fightback states that 'The centerpiece of the Coalition's economic policies is industrial relations reform' (Fightback, 1991b, p. 131). While the details were to be released at a later date, Fightback indicated the broad contours of reforms that the coalition had in mind. It supported the adoption of enterprise, or workplace agreements, between employers and employees, and an end to compulsory arbitration and the use of national wage cases (Fightback, 1991a, p. 38).

It might be useful to offer some initial thoughts concerning the proposition that industrial relations[3] reform is the 'centerpiece', or key, to economic progress. First, despite the antithesis of their ideological positions, this is a view which Fightback shares with the corporatist, or quasi-corporatist, Accord(s) negotiated by the Australian Labor Party and the Australian Council of Trade Unions. Second, is it conceivable that both Fightback and the Accord(s) have over-emphaised the 'centrality' of industrial relations to economic performance. Other arms of government action, such as fiscal and monetary policy, may be more crucial in sustaining economic growth. Third, in trying to reach an understanding of the economic predicaments Australia finds itself in, how much importance should be attached to financial deregulation and the excesses of the corporate and banking sector which occurred at the end of the 1980s? It is difficult to comprehend what role, if any, industrial relations played in these events. Interestingly, Fightback, in seeking to establish Australia as an international financial centre, says 'An excellent start has been made with the deregulation of the financial sector in the late 1970s and early 1980s, although the process is not yet made

complete and some important mistakes were made.' Fightback advocates further financial deregulation (Fightback, 1991a, pp. 49 and 50).

Jobsback, the coalition's industrial relations policy was released in October 1992, almost a year after the publication of Fightback. This article is concerned with providing an examination and critique of Jobsback. A major argument that will be developed is, despite the coalition's rhetoric, its industrial relations policy is one of labour market regulation (or reregulation). Fightback, for example, states that 'Markets need a clear framework of rules within which to operate properly ... The Liberal and National reform program is not based on a blind faith in markets' (Fightback, 1991a, p. 26).

There are three key elements to the coalition's industrial relations policy. The first is to remove industrial tribunals from dispute resolution and determination of wages and employment conditions; a policy of tribunal avoidance. Common law courts will assume a greater role in regulating, or overseeing, the operation of industrial relations. They will become vehicles for actions against those who do not observe workplace agreements, and for individuals and unions who pursue industrial action. Industrial tribunals will continue to perform functions associated with enforcement, and regulation of the internal affairs of unions. The second is the use of legislatively imposed employment rules to 'aid' the transition from an award to a non-award system.

The final element is what Lord Wedderburn, in examining British labour law during the Thatcher years, has referred to as enterprise confinement. It is a device 'to break with the "coercive" pressure of wider, workers' representations' (Wedderburn, 1989, p. 28). Jobsback extolls the enterprise as the most appropriate location for resolving industrial relations problems. Much play is made of individual, or one to one bargaining, ignoring situations where enterprises/ workplaces are cogs in larger corporate operations.

This article is organised into four sections. Section one examines the changes which have occurred in the coalition's industrial relations policies, beginning with those of the Fraser years. The major features of Jobsback are presented in Section two. The next section offers a critique of Jobsback. The final section draws together the major themes of the discussion.

The Coalition and Industrial Relations[4]

Paul Kelly, in his exhaustive review of Australian politics during the 1980s and early 1990s, claims that a major seed change has occurred within the federal coalition. He points to

> the formal triumph of the free market agenda and re-establishment of policy unity on the basis of dry economics. It meant that the Liberals and the coalition were, in policy and philosophical terms parties of the radical free market right. For the first time in its history, Australian conservatism has been recast as Australian radicalism (Kelly, 1992, p. 601).

Industrial relations reform has been central to the coalition's move from conservatism to the radical right. John Howard, on assuming leadership of the coalition in September 1985 (at the time of writing (February 1993) he is its industrial relations spokesperson) stated

> I think the biggest single economic challenge over the next five to ten years is to free up the labour market and, in doing so, to alter the balance in our industrial relations system (Quoted in Kelly, 1992, pp. 259 and 260).

Speaking very broadly the Labor and non-Labor sides of politics have held different views of the role that should be pursued by industrial tribunals. For Labor, industrial tribunals have been vehicles which held out the prospect of helping to achieve wage justice. With this view legislation should be enacted to aid the ability of tribunals to promote social equity. On the other hand, and again speaking very broadly, non-Labor has believed that industrial tribunals should focus their energy on enforcement, blunting the activities of unions which pursue industrial action[5], and to resist and restrict union claims for increases in wages or improvements to working conditions.

During the Prime Ministership of Malcolm Fraser (1975 to 1983) the coalition enacted legislation which was designed to both control and oversee the internal affairs of unions, and to restrict their external ability to mount industrial campaigns. Amongst other things the Fraser government created the Industrial Relations Bureau, to act as an industrial relations policeman, to enforce the *Conciliation and Arbitration Act* 1904 and awards of the Australian Conciliation and Arbitration Commission.[6] Legislation was also enacted to protect the rights of individuals, the right not to take industrial action, the right of independent contractors not to join a union, secret ballots and democratic control of unions, controls concerning the rules and internal affairs of unions - including auditing and financial management, deregistration of unions, and strengthened sanctions against industrial action including amendments to the *Trade Practices Act* 1974 outlawing secondary boycotts.[7]

In addition the Fraser government introduced two pieces of legislation which enhanced its powers in dealing with Commonwealth public servants. The first was the *Commonwealth Employees (Employment Provisions) Act*

1977 which enabled the government to suspend, stand down or dismiss Commonwealth government employees in the event of industrial action. The second was the *Commonwealth Employees (Redeployment and Retirement) Act* 1979 which increased the ability of public service managers to flexibly use labour in the quest for increased efficiency.[8]

Between April 1975 and July 1981 Australia operated a system of industrial relations regulation known as wage indexation, where wage rises were linked to movements in the consumer price index. During Fraser's period of office the coalition sought to ensure that wage indexation, national wage case, increases were the major, if only source, of wage movements in the economy; and that the commission awarded low or 'conservative' increases because of problems being experienced by the economy. Of the fifteen wage indexation cases heard during Fraser's period as prime minister the coalition argued for a nil increase on seven, and a nil or small increase on three, occasions.[9]

Following the abandonment of wage indexation in July 1981 the Fraser government advocated a decentralised, or case by case, approach to wage determination with a relatively minor role for the commission (National Wage Case, May 1982, pp. 21-25). However, following a deteriorating economy in the second half of 1982, with both inflation and unemployment hovering around ten per cent, it undertook a major U-turn on wages policy. In December 1982 the coalition won the Flinders by-election, in what many pundits regarded as a surprise result, on the basis of a call for a wages freeze. Following this the Fraser government succeeded, in a joint submission with state governments and private employers, of convincing the commission to introduce such a freeze for the private sector in late December 1982 (National Wage Case, December 1982).

In 1984 a major struggle occurred within the coalition - or more particularly the Liberal Party - over the direction of industrial relations policy. The battle was fought between the 'drys', lead by John Howard, and the 'wets' under the leadership of Ian Macphee. The issue at stake was the inclusion of a provision in the coalition's policy to enable employers and employees to opt out of awards of the commission. Howard was ultimately successful in having such a clause included in the coalition's policy.[10]

The 1984 policy foreshadows the creation of a new industrial tribunal with enhanced powers to settle disputes and enforce decisions. The policy also sought 'to encourage the development of collective bargaining between employers and employees at plant, company or industry level' (Policy, 1984, p. 3). The major way this was to be achieved was by the use of voluntary agreements. The policy envisaged that there would be scope for both over-award and under-award bargaining. With respect to the latter a

vetting process was provided for the new tribunal to determine 'whether or not the contract was voluntarily concluded by the parties in the interests of preserving levels of employment or the continued viability of the enterprise' (Policy 1984, p. 6).

Other noteworthy features of the 1984 policy were that the new tribunal, on becoming aware of a breach of an award or contract was obliged to offer mediation or other assistance. In addition, judicial members of this tribunal were empowered to determine damages for such breaches. The policy also supported the creation of industry unions, extolled the virtues of profit sharing and called for the formation of industry unions.

The 1984 policy was the first step down the coalition's path of tribunal avoidance, and held out the prospect of lowering, or attacking, wages and conditions contained in awards. In 1984 the coalition appears to be indifferent about the level at which industrial relations should be conducted, as demonstrated by its support of industry unions and collective bargaining at the 'plant, company or industry level'.

Before proceeding further it might be useful to note the emergence of the H.R. Nicholls Society which occurred in early 1986. The society formed in reaction to the quasi-corporatist Accord(s) negotiated between the Australian Labor Party and the Australian Council of Trade Unions. In essence, the H.R. Nicholls Society, or rather its members, advocate the use of individual contracts between employers and employees, the use of the common law to regulate employment relationships, and to punish unions or individuals who employ industrial action.[11] A number of leading lights of the coalition have been prominent in the affairs of the society, and/or have delivered speeches at its various functions (Stone 1986a, 1986b, 1988, 1991; McLachlan 1986, 1989a, 1989b; Costello 1986, 1989a, 1989b, 1990; Kemp 1986; Chaney 1987, 1988; Reith 1989; and Kemp 1991). The major function performed by the H.R. Nicholls Society has been to act as a 'ginger group' within the coalition to maintain the momentum of the policies which promote tribunal avoidance and reductions in union power.

The 1984 policy had recommended the creation of a new tribunal with enhanced powers to impose damages on those who breached awards and voluntary agreements. The 1986 policy revised this approach in two ways. First the 1986 policy envisaged a continuing role for the commission and national wage cases. The commission is encouraged to pursue a flexible approach in making awards and 'to have regard to the needs and wishes of individual enterprises and their employees' (Industrial, 1986, p. 4). Second, actions for damages will be processed through the common law courts, rather than the new tribunal envisaged in the 1984 policy. This 'new tribunal' had the appearance of being a specialist Labour Court. Interest-

ingly, the 1985 Hancock Report had recommended the creation of such a body (Committee, 1985, pp. 380-398) to overcome problems associated with the 1956 *Boilermakers* case (94 CLR 254). The coalition feared that a 'new tribunal' or Labour Court would not be as tough on 'irresponsible' unions and workers as would be common law judges.

The feature of the 1986 policy which attracted the most attention was that concerning voluntary agreements. The coalition encouraged their use 'commencing with small business employing 50 or fewer employees', and 'will be extended progressively as circumstances justify'. Employers and employees could enter into such agreements subject to a proviso that they 'must provide for at least the relevant award rate of pay for ordinary weekly hours of work for the particular classification of the employee [contained in awards] ... calculated as an hourly rate' (Industrial, 1986, p. 3). While unions need not be involved in the negotiation of such agreements, the policy supported the certification of industrial agreements under the auspices of the *Conciliation and Arbitration Act* 1904. To the extent that disputes arose during the life of agreements, regulations would be introduced to the Act for *private* conciliation and arbitration. The coalition wished to ensure that the commission would not 'have jurisdiction over those industrial matters that are covered by a voluntary agreement whilst [it] is current' (Industrial, 1986, p. 4).

The coalition released a revised or updated version of its policy in July 1988. It expressed strong support for voluntary agreements, removing the size restriction contained in the 1986 policy. The 1988 policy promoted the use of grievance procedures and condoned, unlike the 1986 policy, the commission's involvement in the resolution of such disputes on a fee for service basis. The 1988 policy allowed employees to appoint 'an agent, including a union, to negotiate on their behalf' (Liberal, 1988, p. 4). Financial support would be provided, 'in appropriate circumstances', for those harmed by award breaches. Support was again expressed for the use of certified agreements under the Act. The 1988 policy sought to ensure that voluntary agreements were based on the enterprise, and supported the creation of single enterprise based unions. Legislation would be introduced 'to enable any group of employees proposing to form a union or to amalgamate or fragment an existing union' (Liberal, 1988, pp. 13 and 14).

Prior to the 1990 federal election the coalition issued a new version of its industrial relations policy.[12] The document states that 'Obviously industrial tribunals will remain a major force in regulating wages and conditions of employment for the foreseeable future', and 'trade unions will continue to have a major role to play under a reformed industrial relations system in responsibly promoting the interests of their members' (Industrial, 1990, pp.

1 and 3). The establishment of single bargaining units at each workplace[13] is again supported. The 1990 policy contained three streams or options with which to regulate industrial relations. They were:

1. remain under the jurisdiction of the Australian Industrial Relations Commission;
2. unions and employers to negotiate certified agreements subject to ratification by the commission - the policy indicated that such ratification would not be required in the longer term; and
3. voluntary agreements outside the commission's jurisdiction, which can be negotiated individually or by groups of employees, which will have the force of awards.

During the 1990 federal election campaign the coalition played down the importance of voluntary agreements, maintaining that they would be mainly relevant for small business. Following their loss in the election John Howard emphasised the potential role or stature of such agreements. He saw them as being 'the spearhead [of coalition policy], because without the voluntary agreement, in effect taking centre stage, then you won't bring about the change in the whole atmosphere of industrial relations' (*The Australian*, 16 April, 1990).

Jobsback: An Outline

In October 1992 the coalition released Jobsback the final, and apparently major, component of its Fightback strategy to achieve electoral success.[14] The major purpose of the document is to provide additional information concerning the development of an industrial relations system based on workplace agreements. Jobsback represents an amalgam of the conservative policies of the Fraser years and moves to tribunal avoidance, common law regulation and enterprise confinement as progressively developed in the policy statements from 1984 to 1990. Jobsback states that

> The Coalition believes that the single most important industrial relations reform needed in Australia is to allow employers and employees to enter into direct contractual arrangements with each other regarding pay and working conditions without the mandatory intervention of trade unions, employer organisations or industrial tribunals (Jobsback, 1992, p. 3).

The coalition's policy concerning voluntary or workplace agreements as developed in its statements from 1984 to 1990 was based on 'opting out', or moving away from awards and the jurisdiction of the commission. Such 'opting out' was dependent on agreement between the parties concerned,

with either side being able to veto the desire of the other to avoid award coverage. Jobsback turns this approach on its head by developing the notion of 'opting in'. Industrial tribunals, and their traditional functions of award determination and dispute settlement, will only be available to those groups of parties who agree to have their relationships so regulated. The import of this change is that Jobsback empowers any party to veto the desire of another, or others, to have access to an industrial tribunal. As Jobsback states there 'will [be an] end to compulsory arbitration because no party will be bound to accept a determination of an industrial tribunal unless it voluntarily submits to its jurisdiction' (Jobsback, 1992, p. 4). Jobsback, unlike coalition policy statements from 1984 to 1990, will not allow parties to make use of certified agreements under the *Industrial Relations Act* 1988. No explanation is given for this decision.

Jobsback states that where an award was in place, and now has expired, and the parties concerned cannot agree whether they should be covered by an award or a workplace agreement, the workers concerned

> nevertheless will continue to enjoy the terms and conditions which applied under the award prior to its termination. This outcome will be achieved by legislating to incorporate those terms and conditions into the relationship which will arise between such an employer and his or her employers when the award terminates ... Although the award pay and conditions will continue, that relationship between the employer and employee will not be legally governed by an award. Therefore any future variation of that relationship will need to be negotiated between the employer and employee (Jobsback, 1992, pp. 13 and 14).

It is unclear from Jobsback whether such legislatively imposed employment rules would 'govern' industrial relations at the appropriate location, or whether employers could dismiss such workers and substitute them with employees who were prepared to be employed on an inferior workplace agreement. If the latter is the case, Jobsback would be a recipe for industrial conflict with two different categories of workers struggling over limited employment opportunities. Picket lines and scabs would become prominent features of Australian industrial relations. Alternatively, the former interpretation of Jobsback could apply. That is, legislation will impose the terms of the expired award, terms which cannot be undermined by workers offering themselves at lower levels of remuneration. In saying this, however, it should be noted that the above extract from Jobsback does not specify how such legislatively determined employment rules will be legally governed. For example, what protection would workers have if an employer breached the terms of these legislatively determined employment

rules? Would they be funnelled into the mechanisms available for redress in the workplace agreement stream?, or what?

Jobsback assumes that it is workers and unions, rather than employers, who will prefer to remain within the award stream. It is conceivable, however, that workers and unions in strategically placed sectors of the economy could perceive advantages in escaping from the jurisdiction of industrial tribunals, and using workplace agreements, in opposition to the wishes of their employers. A well organised union may decide to orchestrate a series of campaigns where it 'picks off' employers one at a time.

A second situation can be identified of tension between parties concerning movement between the award and workplace streams. This is where the status quo is a workplace agreement. The desire of a party to move to the award stream can be thwarted by the party favouring workplace agreements. To the extent that industrial action is employed, these concerned would be subject to common law actions.

If a workplace agreement has expired, and the parties cannot agree on new terms, Jobsback states that the terms of the old agreement will continue 'subject to the right of either party to terminate the relationship by giving one month's written notice to the other' (Jobsback, 1992, p. 15). Should we regard this as a legislatively imposed workplace agreement? Presumably, the significance of this provision is that it gives workers, previously covered by a workplace agreement, one month to consider whether they should accept the new terms and conditions being offered, or seek employment elsewhere.

Jobsback provides two mechanisms for resolving disputes which may arise during the life of a workplace agreement. The first is a requirement that all agreements must contain a dispute procedure where the use of private arbitration will be encouraged. Such a service may be provided by individual members of the commission on a fee for service basis. The weakness of this proposal is that an individual worker, or a group of workers at a small workplace, may find the costs of mounting a private arbitration, including payment to the said private arbitrator, prohibitive. Would such workers find alternative means to vent their grievances?

Second, workers covered by workplace agreements 'who have legitimate claims for unpaid wages or other entitlements, or who may have been unfairly dismissed or treated' will be able to call on the Office of the Employee Advocate to act on their behalf. The Employee Advocate will investigate such claims, provide advice, and fund 'appropriate claims on behalf of employees in state and federal courts of competent jurisdiction' (Jobsback, 1992, p. 25). Problems associated with the Employee Advocate will be examined in the next section.

Jobsback stipulates that workplace agreements must observe certain minimum terms and conditions of employment. In the case of full time employees five minima are specified. They are:

1. a minimum hourly rate linked to the relevant award, former industrial agreement, or other industrial agreement;
2. a minimum hourly rate for youths of $3 an hour for 15 to 17 year olds, and $3.50 an hour for 18 to 20 year olds;
3. four weeks annual leave;
4. two weeks non-cumulative sick leave; and
5. twelve months unpaid maternity leave for twelve months continuous service.

In addition state legislation governing long service leave, public holidays and occupational health and safety (but note not affirmative action and equal employment opportunity[15]) will continue to apply. Part-time employees must be paid the appropriate hourly rate plus other minima on a pro-rata basis, casual employees the equivalent hourly rate of permanent employees plus a fifteen per cent loading in lieu of other entitlements, and piece rate employees the hourly rate of equivalent permanent employees. Other than superannuation entitlements under the *Superannuation Guarantee Act* 1992 at the time of the election, other matters will be left to negotiations between employers and employees (Jobsback, 1992, pp. 8-10).

Jobsback specifies that the 'Parties involved in negotiating workplace agreements will be required to recognise bona fide bargaining agents and conduct all negotiations in good faith' (Jobsback, 1992, p. 12). Workers can call on the services of unions to negotiate on their behalf; however, they are precluded from being parties to the agreement reached.

The most confusing aspect of Jobsback is its position on *written* workplace agreements. At one point it is said that 'All workplace agreements will have to be in writing and signed ... to demonstrate the decision of the parties to those agreements to either leave or not be subject to the award jurisdiction'. Compare this to the next two sentences:

> Written agreements will not be required for employment relationships in non-award areas. Nor will those non-award relationships be subject to any of the minimum conditions applying to workplace agreements (Jobsback, 1992, p. 11).

These sentences not only undermine the minima contained in Jobsback, but appear to be an open invitation to 'unscrupulous employers' (Jobsback, 1992, p. 5) to take advantage of unsuspecting and guillible workers. In the absence of a written contract it is difficult to envisage how workers could

be helped by the Employee Advocate. Presumably, such workers, not covered by a federal award and in the absence of a written workplace agreement, could seek redress under the common rule provisions of state awards.

Other than for making awards and resolving disputes of those parties which 'opt in' to its orbit, the Australian Industrial Relations Commission is seen, under Jobsback, as adopting a more aggressive role with respect to enforcement and the dispensation of punishment to misbehaving unions. National wage cases will be ended under Jobsback.

Jobsback supports freedom of association, for individuals to be able to join any type of union, though strong support is expressed for enterprise unions. Greater autonomy is afforded to public sector managers, though they are precluded from agreeing to the automatic deduction of union membership dues in negotiating workplace agreements. Jobsback foreshadows the reintroduction of the *Commonwealth Employees (Employment Provisions) Act* 1977 and the *Commonwealth Employees (Redeployment and Retirement Act* 1979 used in the Fraser years. Essential services legislation will be introduced, independent contractors cannot be forced to become union members, profit sharing and incentive schemes will be encouraged,[16] secret ballots before strikes will be encouraged, unions will be required to maintain proper and audited accounts and will not be allowed to use monies collected on a tax deductible basis for (party) political donations.

A Critique

Jobsback states that 'It is a truism that enterprises which foster good relations with their employers consistently perform better than enterprises with a poor industrial relations record' (Jobsback, 1992, p. 28). A truism is 'something' which is apparently beyond refutation; it is so obviously correct there is no need to consider or test its veracity. The coalition wants its policy of promoting workplace agreements to be regarded as promoting 'good industrial relations'. Any criticisms or attacks of its policy can be deflected with the counter charge that they will promote bad industrial relations and poor enterprise performance.

If the above truism is correct, it would presumably mean that the mining industry, particularly coal mining, which provides Australia with much of its export income and reductions in levels of international indebtedness (which are major goals of Fightback) has been a repository for good industrial relations. While there is more to industrial relations performance than levels of industrial disputation, throughout this century mining, and

particularly coal mining, has recorded substantially higher levels of lost time from industrial disputes than other sectors of the economy (Dabscheck, 1991).

The issues which needs to be considered here is what does the term 'good industrial relations' mean? For example, Gerard Henderson equates good industrial relations with decisions which 'are made according to tough-minded economic criteria'[17] (Henderson, 1983, p. 29). For Herbert Larratt good industrial relations is where 'every worker should go to work each day expecting to be sacked' (quoted in Thompson, 1992, p. 153). The Business Council of Australia quotes the example of an American firm, with apparent favour, where 'management halved the workforce [and] cut wages by about 30 per cent for every employee at the site, including office personnel and managers'. It has also stated that 'More and more enterprises competing in global markets are building their production strategies around the concept that the real capacity of a plant is limited only by its physical and engineering limits' (BCA, 1989, pp. 71 and 67). Such an attachment to technological determinism would seem to bode ill for the human resources involved in the production process. Workers and unions would equate good industrial relations with improvements, in wages and working conditions, to work in a safe environment, and to be treated with dignity and respect. The various Accords negotiated since 1983 have sought to enhance and promote good industrial relations.

Different groups and individuals will have attach different meanings to the term 'good industrial relations', which will be a function of their respective positions in the production process and their associated needs and interests. Industrial relations scholarship, and hitherto, much policy making, is based on the recognition of such differences; that in pursuing their respective goals those involved in industrial relations are involved in a conflictual relationship. For industrial relations scholars the major issue associated with conflict is not its existence but whether or not there are means for its regulation. For conflict to be 'effectively regulated' the parties concerned, in the words of Dahrendorf, have to accept 'the conflict for what it is, namely an inevitable out-growth of the authority structure of [organisations]' Dahrendorf, 1959, p. 225).

The discussion may be aided by examining Chamberlain and Kuhn's distinction between co-operative and conjunctive bargaining. Co-operative bargaining involves situations where both sides derive benefits from entering into a relationship. Conjunctive bargaining, on the other hand, is based on a colder, more hard-edged view of the world. Chamberlain and Kuhn state

Conjunctive bargaining ... does not arise because of one party's

> sympathetic regard for the other or because of its voluntary choice of the other as partner; it arises from the absolute requirement that some agreement - *any* agreement - be reached so that the operations on which both are dependent may continue ... Coercion is the principal ingredient of conjunctive bargaining power. The resolution of divergent interests through conjunctive bargaining provides a basis for the operation of the enterprise - and nothing more. With whatever coercive powers are at its disposal each party has wrested the maximum advantage possible, without much regard for the effect of this on the other. The bargaining relationship comes into being because it is inescapable, and neither party grants more than is necessary (Chamberlain and Kuhn, 1965, pp. 425 and 426).

At the risk of making a rash historical generalisation, industrial tribunals in Australia have sought to promote co-operative bargaining, whilst acknowledging the existence of conjunctive bargaining. To the extent that tribunals have found themselves involved with conjunctive bargainers, they have sought to counter and blunt the effects of coercion and coercive power. Jobsback, with its policy of enabling any party to veto access to industrial tribunals, would seem to help promote conjunctive rather than co-operative bargaining, or 'good industrial relations'. As Kemp has said

> The ideology of 'consensus' fails to pay adequate recognition to the fact that there can be no resolution of institutional tension. There can only be the transference of conflict to other institutional settings. The attitudes expressed in conflict may change, and the rules by which conflict is conducted may be altered, but conflict is inevitable in a system of multiple decision takers seeking to reduce uncertainty by control over others (Kemp, 1983, p. 219).

A further issue which requires consideration is whether Jobsback, or components of Jobsback, is constitutional. The Australian Constitution specifies various powers which fall within the jurisdiction of the Commonwealth Parliament; with powers not so assigned residing with the states. The major industrial relations power which has traditionally been available to the Commonwealth is Section 51, paragraph xxxv of the Constitution. It states

> The Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to ... (xxxv) Conciliation and Arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State.

This section should be read alongside Section 109 which provides a mechanism for resolving jurisdictional issues between the Commonwealth

and the states. Section 109 states that 'When a law of a state is inconsistent with a law of the Commonwealth, the latter should prevail, and the former shall, to the extent of the inconsistency, be invalid'.

The significance of Section 51 (xxxv) is that it has provided the Commonwealth with an indirect industrial relations power in the private sector. It has been precluded from directly legislating in industrial relations, subject to other powers in the Constitution; being forced to delegate powers to resolve industrial disputes to industrial tribunals. This may suggest that the 'direct intervention' contained in Jobsback would be unconstitutional. It might be added, in passing, that workplace agreements, do not need to based on legislation, because of the protection, or status, they have attained in the common law.

The coalition believes that other powers in the Constitution will sustain Jobsback.[18] Particular attention has been drawn to Section 51, paragraph xx, which enables the Commonwealth to enact laws concerning 'Foreign corporations, and trading or financial corporation formed within the limits of the Commonwealth'.[19]

In the *Huddart Parker* case of 1909 (8 CLR 330) the High Court ruled that the Commonwealth did not have the power to enact laws based on the corporations power. This decision was mainly based on the doctrine of reserved powers (the need to protect state rights) which dominated the High Court's thinking until the *Engineers'* case of 1920 (28 CLR 129). The corporations power was not tested again until the *Concrete Pipes* case in 1971 (124 CLR 468). On that occasion the High Court ruled that parts of the *Trade Practices Act* 1965 were validly based on the corporations power.

Concrete Pipes opened up the prospect that the corporations power could expand the scope of the Commonwealth's jurisdiction. Such a proposition has received support from a string of High Court decisions (*St. George County Council*, 130 CLR 533; *Australian Industrial Court*, 136 CLR 235; *Kuring-gai Co-operative Building Society*, 22 ALR 621; *Adamson*, 143 CLR 190; *Actors Equity*, 150 CLR 169; *State Superannuation Board*, 150 CLR 282; *Fencott*, 152 CLR 570; and *Tasmanian Dam*, 46 ALR 625) The major issue which has exercised the mind of commentators is whether Section 51 (xx) will be interpreted narrowly or broadly, to specific or all aspects of the affairs of such corporations (O'Donovan, 1977; Smith and McCallum, 1984; Lindall, 1984; Smith, 1985, Spry, 1986; Spry, 1987; McCallum, Pittard and Smith, 1990, pp. 346 and 347; Craven, 1992; Solomon, 1992, pp. 52-63 and 107-119; Zines, 1992, pp. 70-93; and Hulme, 1992). For example does the corporations power extend to the internal affairs and management, and industrial relations activities, of Section 51 (xx) corporations?

Three possible constitutional problems associated with Jobsback will be identified. First, consider the situation of legislatively imposed employment rules - the solution ostensibly proposed by Jobsback where an award has expired and the parties cannot agree on staying within the award, or moving to the workplace agreement, stream. Would the High Court decide that legislatively imposed employment rules to resolve this industrial dispute were constitutional? After all, the Constitution does contain a specific power with which to resolve industrial disputes. Moreover, to the extent that this mechanism in Jobsback blocks access to a federal tribunal, would the High Court sanction the desire of an aggrieved party for coverage under a state award?

Second, only those corporations which fall within the purview of section 51 (xx) will (tautologically) be subject to its reach.[20] In other words, non-incorporated bodies, such as small businesses, would not be covered by Jobsback. Third, Jobsback wants workplace agreements to have the force of an award, and block access to the common rule provisions of state awards. It is unclear that such an employment contract would have precedence over a state award i.e. that a contract would prevail over legisation. It seems inevitable that Jobsback would lead to constitutional challenges based on Section 109 of the Constitution.

The discussion will now turn to issues associated with the transition from an expired award to legislatively imposed employment rules. It has already been noted that this process could be undermined if Jobsback enables employers to replace such employees with persons employed on inferior workplace agreements. While noting this possibility, would the procedure contained in Jobsback be such that the legislatively imposed employment rules would replicate the expired award holus bolus, or would there be provision to entertain arguments to omit certain clauses? The expired award would presumably contain clauses which involved industrial tribunals - such as a grievance procedure. Remember, Jobsback precludes tribunals from having any jurisdiction where an award has expired, and the parties disagree as to how their future relationships should be governed. Will such clauses be hived off in the legislatively imposed employment rules? If the answer to this is yes, how will such hiving off be processed?

What will be the term of legislatively imposed employment rules? Should they be the same as those contained in the expired award, or what? And what procedure will be followed once the term of these legislative rules has expired?

Jobsback specifies a number of minima which must be included in workplace agreements. For example, minimum wages for adults are linked to award classifications. Jobsback, however, states that it expects to 'sharply reduce the number of employees covered by awards' (Jobsback,

1992, p. 22). If this expectation is realised how, and to what, will adult minimum wages be moored? Will the coalition legislate to link minimum wages to the few remaining awards, for example at the state level, and introduce a new system of comparative wage justice? Or will it be necessary to legislate for such minima, or empower an independent body, to undertake such reviews?

In discussing minimum wages it is also important to consider the coalition's policies concerning social welfare and unemployment. Fightback wishes to reduce expenditure on social welfare by a combination of reducing benefits, and stricter rules for access to, or receipt of such benefits.[21] As a result, increasing numbers of welfare recipients will be forced into the lower reaches of the labour market, in competition with those who have jobs. Ceteris paribus, we would expect the pressures of supply and demand to lower wages for such workers. Those workers with limited bargaining power - such as women, youths, migrants and the aged - may be somewhat bemused to learn that they were benefiting from 'a high productivity, high wages policy' (Jobsback, 1992, p. iii).

Under Jobsback the Office of the Employee Advocate will act for employees with grievances against employers who have not observed the terms of workplace agreements. The ability of the Employee Advocate to undertake these functions will undoubtedly be dependent on the resources received to process such claims. If an appropriate level of funding is not provided a backlog of cases will quickly develop and/or there will be long delays in resolving grievances.

The Employee Advocate may encounter some major problems in performing its functions. Under an award system it is relatively easy to decide whether or not an aggrieved party has a claim concerning a breach of an award. All one has to do is to identify the appropriate award - with copies available in the registry of an industrial tribunal - examine its contents, compare it the facts of the case and reach a decision. A problem with employment contracts under Jobsback is how will the Employee Advocate proceed if an aggrieved worker no longer possesses a copy of their contract. Will the Employee Advocate be able to obtain a copy from the employer? It should also be noted that there is a major ambiguity in Jobsback concerning the requirement for written contracts in the non-award area (see above). Will the Employee Advocate be prepared, or restrained by regulation, to risk several thousand dollars in a case involving the recovery of a few hundred dollars? Finally, what protection will the Employee Advocate provide to aggrieved employees who are dismissed, in accord with the notice period contained in the workplace agreement, following the notification of a complaint to the Employee Advocate?

Jobsback states that the coalition is 'absolutely committed to the equality of all Australians before the law. No person or group should enjoy special privileges' (Jobsback, 1992, p. 19). The coalition supports the introduction of legislation to remove the taxation obligations of employees who obtain shares in their company at a discounted price (Jobsback, 1992, p. 30). How is this not a special privilege? Why should employees in companies that don't issue shares, and the rest of the tax paying community, subsidise the income of employees in share issuing companies? Should this aspect of Jobsback be regarded as nothing more than an attempt to purchase industrial peace, at the expense of the taxpayer?[22]

Jobsback supports the use of the common law to regulate industrial relations.[23] With respect to employment, the common law is based upon and perpetuates asymmetric power relationships. Employment common law is derived from nineteenth century nostrums concerning the master-servant relationship. To quote Graham Smith

> The truth is that in our legal system, the common law contract of employment is fundamentally different to other forms of contract. It contains far more terms which are implied automatically by operation of laws than any other form of contract. These are 'court imposed' terms. And these terms are balanced heavily in favour of employers. No other form of contracts imports a term ... that one party *and one type of party only* must obey the order of the other (Smith, 1992, p. 106).

Where the common law empowers employers to sue striking workers for damages because they have breached a contract,[24] similar rights are not afforded to employees. The common law does not incorporate a notion of wrongful dismissal and/or reinstatement of such workers. All a worker is entitled to is the receipt of whatever monies their employer was obliged to pay them under their contract of employment.[25] As already mentioned Jobsback encourages workers who have been unfairly dismissed to make use of the Employee Advocate. However, it has not defined what constitutes an 'unfair dismissal', nor the remedies that can be pursued by the Employee Advocate. Could it be suggested that these are significant defects of an industrial relations policy which purports to be based on notions of fairness and equity.

In promoting its various policies the coalition has made much use of the notion of the level playing field. Its industrial relations policies, based on the common law, involve a 'contest' where one group of players are only allowed to 'compete' on terms which are acceptable to, or defined by other players. To the extent that these players display any initiative, or seek to advance their position, referees will call them 'off-side', accompanied by

threats of fines and dismissal from the contest. In revising Fightback in December 1992 the coalition gave 'an absolute assurance that they will not legislate to remove the common law right to strike' (Fightback, 1992, p. 43). The magnanimity of this gesture is blunted by a realisation that the common law does not recognise such a right.

Jobsback stipulates that negotiations of workplace agreements must be conducted in 'good faith'. Unfortunately, no indication or guidance is provided concerning the meaning of this term. Would the following, for example, constitute 'good faith' bargaining. An employer approaches an employee working under a workplace agreement (or an award), with a brief period of notice, and informs them that their services will no longer be required unless they agree to sign a new document with lowered pay, and worse terms and conditions of employment. Employees, with dependents to support and other financial obligations may be coerced into signing such a document, rather than face the spectre of unemployment. Should this form of conjunctive bargaining, where a 'take it or leave it' offer is made be regarded as 'good faith' bargaining? Would an employee who believed that they had been coerced into signing such a document receive support from the Employee Advocate? Would the Employee Advocate only examine the contract to determine whether its contents did not fall below the minima established by Jobsback? A series of cases would presumably be mounted to determine the meaning of 'good faith' bargaining. American collective labour law has been based on such a principle since the *Wagner Act* of 1935. Notwithstanding the introduction of legislation championing 'good faith' bargaining American unions have been reduced to virtual impotence, and constitute little more than a minor irritant for employers who flout American labour laws (Weiler, 1983, 1984, 1990; Atleson, 1983; Woodiwiss, 1990; Geoghegan, 1991; Gottesman, 1991; and Bennett, 1992). If the collectives which represent American workers have found it difficult to achieve 'good faith' bargaining with their employers, why should we expect Australian workers, particularly in the context of a policy stressing individualism, to experience any more success?

Conclusion

The coalition's industrial relations policy, as contained in Jobsback, in apparently seeking to enhance market mechanisms proposes a new regulatory system to govern Australian industrial relations. Or, as Lord Wedderburn has said in examining developments in British labour law during the Thatcher years 'Deregulation leads to reregulation by a State determined to protect the market order' (Wedderburn, 1989, p. 18).

Jobsback provides a new vehicle for the realisation of the conservative policies of the Fraser years. It contains three key elements. They are tribunal avoidance and use of the common law, legislatively imposed employment rules to 'aid' in the transition from an award to non-award system, and enterprise confinement. Despite its rhetoric on shared values and interests Jobsback is designed to enhance the power of capital and employers in dealing with employees. In developing an industrial relations policy which fails to understand that industrial conflict flows from differences in power and authority in employment relationships, the coalition will exacerbate, and increase the difficulties associated with regulating industrial relations.

Notes

1. The Webbs employed the term class as being equivalent to an interest or pressure group.
2. For further details concerning the emergence of industrial tribunals see Macintyre and Mitchell (1989).
3. For the Business Council of Australia (1989) the need for an enterprise focus was such that they felt that there was a need to abolish the term industrial relations altogether, and recommended the adoption of something called employee relations.
4. The section will only focus on the coalition's industrial relations policies at the federal level. It will ignore policies developed by the Queensland Bjelke-Petersen and New South Wales Griener/Fahey governments, as well as the more recent developments of Tasmania's Groom and Victoria's Kennett governments, respectively.
5. As the 1949 coal miners and 1989-1990 pilots disputes demonstrated, Labor governments are not above vigorous opposition to industrial action by unions.
6. For an account of the activities of the Industrial Relations Bureau see Byrne (1982).
7. See Mitchell (1979) for a critical evaluation of this legislation.
8. For a thorough analysis of this legislation see Hughes (1984).
9. For a summary of these decisions see Dabscheck (1989), p. 32). In 1977 Fraser sought to introduce a voluntary three month freeze of wages and prices. For details see Dabscheck and Kitay (1991).
10. For an account of this contest see Carney (1988, pp. 115-118), and Kelly 1992, pp. 111-122.
11. For critiques see Dabscheck (1989, pp. 113-141), and Creighton (1987). Also see Sawer (1982), and Coghill (1987).
12. Also see Future Directions (1988) and Economic Action Plan (1989).
13. In July 1989 the Business Council of Australia released a study supporting enterprise bargaining (BCA, 1989). For critiques see Dabscheck (1990a), Frenkel and Peetz (1990), and Jamieson (1990).
14. Nothing is ever final. In December 1992 the coalition announced a series of changes to Fightback, to deflect criticisms which had been mounted against it. See Fightback (1992).

15. While both Fightback and Jobsback champion the rights of the individual the coalition has decided that it will reduce expenditure on the Human Rights and Equal Opportunity Commission (Fightback, 1991b, p. 245).
16. Will this make them legal and beyond the reach of common law actions?
17. Which has an aura of the need to devise policies to override normal market mechanisms.
18. It pointedly refuses, however, to embrace the external affairs power. See Jobsback (1992, p. 6).
19. The Hancock Report regarded the use of the corporations and external affairs powers for industrial relations purposes as being 'exotic'. See Committee (1985, p. 334).
20. The Advisory Committee to the Constitutional Commission appointed in December 1985 which examined 'Trade and National Economic Management' recommended changes to Section 51 (xx) to overcome legislative problems experienced by the Commonwealth. See Advisory (1987, pp. 131-137).
21. See Cass (1992). Also see Deakin and Wilkinson (1989); Muckenberger and Deakin (1989).
22. For a discussion of problems associated with employee share schemes as a tool to enhance industrial relations performance see Aitken and Wood (1989).
23. It is somewhat ironic to note that dissatisfaction has been expressed concerning the common law in commercial disputes, with suggestions for the adoption of umpires, mediation and arbitration; techniques which have traditionally been a feature of Australian industrial relations. For further details see Attorney-General (1986) and Astor and Chinkin (1992).
24. Jobsback provides a $5,000 cap on damages for individuals who breach agreements. No limitations are provided for unions or their leaders.
25. Though as we learnt in 1992 this can be circumvented by shuffling assets from one company to another, leaving the obligated company without the wherewithal to meet the terms of such contracts.

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