The Coalition and Voluntary Industrial Agreements: Some Constitutional Questions

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Abstract

In an earlier issue of this Journal the Shadow Minister for Industrial Relations outlined the Coalition's industrial relations policy. A major ingredient of that policy is the provision of voluntary industrial agreements. This article reviews the constitutional heads of power under which any future Coalition government may seek to legislate for voluntary industrial agreements. It suggests that they could be major impediments to such legislation.

1. Introduction

This article is directed at a consideration of the constitutionality of the Coalition's industrial aagreements policy. It does not concern itself with the correctness or otherwise of the industrial agreement policy as matters of industrial relations. It should be noted at the outset that the article is based upon certain assumptions, some concerning policy contents. For example, it is assumed that the policy in its final form will be aimed broadly at re-directing Australia's industrial relations system from one primarily based

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upon compulsory arbitration, to one centrring on voluntary agreements between employers and employees.

Further assumptions are made about certain legal aspects of the implementation of the policy. First, and centrally, it is assumed that the policy will need to be effected by the passage of Commonwealth legislation. Secondly, such an Act will necessarily deal at least with certain key regulatory matters. These would include the status of 'voluntary' and 'enterprise' agreements in law generally; the relationship of such agreements with any remaining award system which might continue to exist at Commonwealth level; the relationship of agreements with State (as opposed to Commonwealth) industrial laws and awards; and agreement registration.

Of course, the key question in considering the constitutionality of the Coalition policy is whether the Constitution authorizes the enactment of such legislation by the Commonwealth Parliament. This in turn raises a number of issues. First, one must consider whether there is any available head of power in the Constitution under which the Commonwealth may legislate. Secondly, one must assess whether, even if such a head of power exists, it is of such a nature that, were it resorted to, serious legislative and regulatory gaps would nevertheless arise. Finally, one must determine whether other major complications of a constitutional nature might arise.

2. Constitutional Heads of Power

Real difficulties attend the enactment of industrial agreement legislation by the Parliament of the Commonwealth. Put simply, there is no fully satisfactory head of power for the passage of such legislation. This section reviews the potential heads of power.

2.1 Section 51 (35) - conciliation and arbitration power

No detailed consideration will be given to this power, as it is generally (and rightly) conceded that it would not justify the enactment of comprehensive industrial agreement legislation. In general terms, the power is one which of its nature looks to laws which deal with aggregated industrial interests, whereas the policy of the Coalition looks to the legislative individualisation of precisely those interests. The conciliation and arbitration power simply would be inapt for industrial agreement legislation.

More specifically, two very obvious problems would attend the use of section 51 (35) for the enactment of this type of legislation. First, it would be extremely difficult to characterise a law with respect to voluntary

industrial agreements as a law with respect to 'conciliation' and 'arbitration'. Secondly, it could be difficult to make out the element of 'inter-stateness' which is an indispensable element of a law made under section 51 (35). The effect is that a Coalition government would have to look elsewhere in the Constitution for an appropriate head of power.

2.2 Section 51 (20) - corporations power

The corporations power has been immensely expanded by the High Court over the last twenty years, and attained its greatest extent in *Tasmania v. Commonwealth* (the Dams case) ((1983) 46 A.L.R. 625). The question in the present context is whether it would extend so far as to substantially justify a law concerning voluntary industrial agreements? The immediate issue is whether section 51 (20) would allow the Commonwealth to enact a law concerning employment agreements entered into between a corporation and its employees. This turns upon the question of whether such a law could be characterized as being a law with respect to 'corporations' - or more correctly, with respect to 'trading' or 'financial' corporations' - within the meaning of section 51(20).

The answer, on balance, is that such a law would indeed probably fall within the scope of section 51 (20), on the basis of one or both of two separate lines of reasoning. First, it could be argued that the law would be one with respect to trading corporations in the sense that it was a law for the protection and enhancement of their trade, drawing upon dicta in *Actors and Announcers Equity Association v. Fontana Films Pty. Ltd.* ((1982) 150 C.L.R. 169). Secondly, it could be maintained that the law was one with respect to trading corporations in the sense that it regulated activities undertaken by such corporations for the purpose of trade. This would be based on the assumption that the entry by a corporation into an employment contract was an act undertaken for the purpose of trade, and could thus be regulated under section 51 (20) on the basis of the dominant dicta in the *Dams* case. It should not be thought, however, that a finding of constitutionality on one or other of these bases would be inevitable: validation of the law on either ground would involve a significant increase in the scope of each.

Even assuming, however, that the corporations power does permit the enactment of industrial agreement legislation applying to a wide range of corporations, there nevertheless remains the problem that such a law would be subject to huge regulatory gaps. This is because, of its very nature, it could only apply to industrial agreements which involved a corporate actor - it could not apply at all within the non-corporate employment sector. Yet

large sections of the Australian employment market are indeed non-corporatised, including many of the small businesses which the Coalition hopes to relieve from the burden of 'excessive industrial regulation'.

This lack of legislative coverage under the corporations power raises real questions for the Coalition concerning the implementation of its policy, assuming that the policy is indeed constitutionally based primarily upon section 51 (20). Necessarily, it will have to consider whether there is some other constitutional head of power which provides a more comprehensive foundation for voluntary industrial agreements.

2.3 Section 51 (29) - external affairs power

At least since the *Dams* case, the Commonwealth Parliament has had the power under section 51 (29) to legislate in the implementation of treaty obligations, and possibly further (see *e.g. Richardson v. Forestry Commission* (1988) 164 C.L.R. 261). There is, however, an obvious initial problem in a conservative government seeking to secure the enactment of key legislation in reliance upon the external affairs power. Here, the conservative (and generally federalist) side of politics has regarded the excessive use of the external affairs power to invade the domain of the States as smacking of constitutional illegitimacy. Assuming that such scruples were to be cast aside, the difficulty would be in finding a suitable treaty in pursuance of which legislation might be made. This is a serious difficulty, as the most obviously eligible international documents - a wide variety of labour conventions - are directed primarily to such matters as the right of labour to organise and to strike, and thus would be entirely useless for the present purpose.

This is not to say that it would be absoloutely impossible to locate some international document which would be of at least vague relevance to the issue of voluntary industrial agreements, but the danger would still exist that the language and import of such an instrument might not necessarily be sufficiently specific as to lend itself to 'implementation' under section 51 (29). Beyond the context of written treaties and conventions, it is an utterly implausible suggestion that Australia's international trade balance and other international economic considerations would justify the enactment of voluntary industrial agreement legislation pursuant to the external affairs power.

2.4 Implied power from nationhood

It would appear that the Commonwealth Parliament possesses certain legislative powers which spring from the fact of its existence as a national polity (see *e.g. Victoria v. Commonwealth* (the A.A.P. case) ((1975) 134 C.L.R. 338). The scope of these powers and their nature is extremely vague, but it would seem that they extend to authorizing legislation with respect to matters which are peculiarly the subject of concern to a national government.

Extraordinarily optimistic statements are sometimes made that this implied power would support a law with respect to industrial agreements, on the basis that such legislation is imperative for the nation's economic health, and thus of peculiar concern to the national government. This is constitutional nonsense of the first order. To extend the implied power from nationhood in this way would have the practical effect that the Commonwealth was enabled to make any law which it liked, provided only that it could plausibly assert that the law in question was in the national interest. Such a view would completely undermine the federal division of power, and would be unacceptable to the High Court in even its most centralist incarnation.

2.5 The interstate and overseas trade and commerce power - Section 51 (1)

The trade and commerce power is not a highly developed head of constitutional power in Australia (see Zines, 1987, pp. 46-9), although it has been of immense importance in the United States. To some extent, it has been overtaken in Australia in recent years by the use of the corporations power.

Arguably, however, the trade and commerce power could be used to extend the scope of an industrial agreement law beyond the area which it could cover were it to be enacted in exclusive reliance upon the corporations power. Thus, under this power, a law relating to industrial agreements could perhaps be extended to apply not only to corporations, but also to those engaged in interstate and overseas trade and commerce, although such an extension would not be without constitutional doubt. Nevertheless, even assuming that the trade and commerce power would stretch so far, legislative gaps similar to those arising in relation to the corporations power would occur. Notably, the trade and commerce power can (in general terms) only be exerted in relation to the interstate and overseas activities of those engaged in interstate and overseas trade and commerce, and therefore could

not affect any intra-state industrial activity. Again, in the context of industrial agreements, this would be a particular problem in relation to the activities of small business.

2.6 Conclusion concerning heads of constitutional power

It is thus apparent that no head of Commonwealth power provides a fully satisfactory base for comprehensive industrial agreement legislation to be passed by the Commonwealth Parliament. Those heads of power which seem to be applicable (corporations, trade and commerce) would undeniably produce legislation with serious regulatory gaps, and their invocation is not in any event free from constitutional doubt. Other powers, whose use is sometimes urged, such as the external affairs power and the suggested power from nationhood, seem largely inapplicable. An at least partial recognition of these facts has meant that one further constitutional option is occasionally advanced, namely the reference of power by the States.

3. Reference of Power by the States Under Section 51 (37)

Pursuant to section 51 (37) of the Constitution, the States - collectively or individually - can refer any power which they possess to the Commonwealth Parliament. Thereupon, the Commonwealth can legislate in pursuance of that power. Accordingly, in theory, were the States to refer all power over industrial agreements (or indeed over industrial relations generally) to the Commonwealth, there would be no difficulty in arguing that the Commonwealth possessed the necessary legislative power to enact industrial agreement legislation.

In reality, however, State reference legislation would provide an impossibly unstable base for Commonwealth industrial agreement legislation. The first thing to note here is the obvious threshold political difficulty, that it would be extremely difficult to persuade all the States to agree to such a reference. At the very least, States with Labor governments presumably would refuse. If one or more States remained aloof from a reference, the best that could be hoped for in relation to industrial agreement legislation would be a far from desirable checkerboard regulatory coverage.

Secondly, as the States would be able to set the terms of the reference, it is highly likely that those terms would be very far from those truly desired by a Coalition government, and could contain numerous unacceptable reservations and qualifications (see Craven, 1990, pp. 288-9).

Thirdly, and perhaps most importantly, it would appear on the basis of

High Court authority that a State could revoke its reference at any time. The effect of revocation would seem to be that thereupon the Commonwealth would lose its power to legislate in pursuance of the reference, and - even more importantly - all legislation hitherto made dependent upon that reference falls to the ground (*R. v. Public Vehicles Licensing Appeal Tribunal (Tasmania); ex parte Australian National Airways Pty. Ltd.* (1964) 113 C.L.R. 207). The consequences of such an eventuality within the context of a Commonwealth legislative scheme for voluntary industrial agreements would be catastrophic.

4. A Further Constitutional Problem

A further difficulty relates to the ability of Commonwealth industrial agreement legislation to protect agreements made under it from interference by State laws and awards. The legislation obviously would need to display such an ability were any scheme of industrial agreements to be effective. Otherwise, hostile States could frustrate the agreement system simply by enacting legislation which provided for the making of detailed State industrial awards, or the setting up or extension of compulsory State arbitration systems, as soon as the Commonwealth attempted to vacate the field in favour of voluntary agreements.

In a sense, the Commonwealth has always faced a similar task in seeking to protect its own industrial awards from State legislative interference. Here, it has been able to ensure that its awards prevail over contrary State laws by resort to section 109 of the Commonwealth Constitution, which provides that a Commonwealth law will prevail over all 'inconsistent' State laws. Of course, this section does not directly protect Commonwealth awards, as they are not 'laws' of the Commonwealth in the relevant sense.

But in *Ex parte McClean* ((1930) 43 C.L.R. 472), the High Court held that section 109 did operate indirectly to protect Commonwealth industrial awards against inconsistent State legislation, not because the State laws were inconsistent in a constitutional sense with the awards as such, but because such an inconsistency arose between the relevant State law and the Commonwealth act under which the awards were made, that act evincing an intention that the award system was to cover the policy field concerned. Admittedly, this is a somewhat subtle distinction, and the practical effect of *McClean* for most purposes has been that State laws can be struck down for inconsistency with Commonwealth awards.

Thus, assuming that the Commonwealth can indeed find a head of power to support voluntary industrial agreement legislation in the first place, it also

presumably will have to ensure that such agreements receive a similarly privileged status in relation to State laws as do existing Commonwealth awards. In strict legal theory, the *McClean* reasoning should be sufficient to achieve this result, on the basis that it will still be possible to argue that the enacted industrial agreement legislation reveals an intention that the system of voluntary agreements for which it provides should cover the relevant field or fields to the exclusion of State legislative interference.

However, consistently with what has been said above in the context of section 109 inconsistency and Commonwealth industrial awards, the practical effect of acceptance of this line of reasoning would be that a mere contractual agreement between individuals would be accorded legal primacy over State awards, and even State laws, including acts of the quasi-sovereign State Parliaments. It may well be that the High Court will prove somewhat reluctant to accept this conclusion. The Court might well resort to an argument based broadly upon principles concerning the delegation of legislative power by the Commonwealth Parliament, and the separation of powers generally. It might argue that by practically giving to industrial agreements legislative force for the purposes of section 109 inconsistency, the Commonwealth Parliament was in real terms making a delegation of legislative power in the relevant context to any group of employees and employers who cared to use it. This reasoning could, in turn, be relied upon to bring into play possible limitations upon the delegation of Commonwealth legislative power expressed in cases like *Victorian Stevedoring & General Contracting Co. Pty. Ltd. v. Dignan* (1931) 46 C.L.R. 73). Such limitations would then be used for the purpose of invalidating the head Commonwealth industrial agreement legislation.

Were the High Court determined to take this course, it would be comparatively easy for it to distinguish the current constitutional position concerning awards from that presented by the new system of industrial agreements. After all, an award is at least made by a body which is the formal emanation of the State, and so it could be argued that to confer upon such an instrument derivative legislative effect is constitutionally legitimate. By contrast a voluntary industrial agreement is simply a private agreement between individuals.

One consequence of all this is that, at the very least, there is probably a need for the Coalition to dress up a legislative regime concerning voluntary industrial agreements so that it more closely resembles a system of state regulation, rather than a private scheme of contractual arrangements. The most obvious possibilities here would be the institution of a registration procedure, in order that a government body might be seen to be giving its imprimatur to each agreement, and the creation of a series of minimum

conditions and terms to be included in all agreements. But even such measures as these would not necessarily save the legislation.

6. Conclusion

The major point of this article has been to suggest that the uncritical assumption that Commonwealth legislation implementing the Coalition's industrial agreement policy would indeed be constitutional is quite unjustified. In fact, such legislation will be attended by major constitutional difficulties. It may be that these difficulties will not prove insuperable, but they are undeniably significant, and pose real questions over the ultimate achievability of the Coalition's industrial programme.

References

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