

What's in a Name? The Coalition Government's Third Term Agenda in Industrial Relations

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The Howard Government certainly couldn't be accused of giving up on pursuing legislative change in the industrial relations field.

There are currently no less than thirteen labour law bills doing the rounds in the Federal Parliament. Another two bills were recently rejected by the Senate and are now available as double-dissolution triggers.¹

Clearly, the Government hasn't abandoned the 'legislation fixation' that Minister Abbott suggested it needed to move away from just over a year ago.² If anything, the intensity of legislative activity has increased since then.

The purpose of my address is two-fold. First, I want to look at the main Government bills – going behind some of their colourful and imaginative labels to see what they are really trying to do, and to consider their prospects of becoming law.

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¹ *WR Amendment (Fair Dismissal) Bill 2002 (No 2)*; and *WR Amendment (Secret Ballots for Protected Action) Bill 2002 (No 2)*.

² Hon Tony Abbott, Minister for Employment and Workplace Relations, *Losing the Legislation Fixation*, Speech to the HR Nicholls Society, 23 March 2002.

Secondly (and more importantly), I want to see what these bills – along with other expressions of Government policy – reveal about the Government's third term industrial relations agenda. What are the primary objectives of Government policy, and have these shifted to any considerable extent since it came to office in 1996?

What's in a name?

Notions of 'fairness' and 'protection' for employees feature prominently in the titles of a number of the Government's bills. In one or two cases, the name fits.³ However, you need to peel back the label of some of the more important bills to see what's really going on.

The *Fair Dismissal Bill*⁴ is a good example. It seeks to exempt businesses with less than 20 employees from federal unfair dismissal laws – a proposition that was recently rejected by the Senate for the seventh time. It's not exactly clear what concept of 'fair dismissal' would apply to employees in these small business workplaces if the bill became law. The same goes for the casuals who would be denied access to unfair dismissal remedies under the *Fair Termination Bill*.⁵

Then, of course, there's the *Protecting the Low Paid Bill*.⁶ Here, the Government wants to alter the rules applying to the annual 'Living Wage' case, through which more than a million Australian workers obtain basic award pay increases.

Specifically, the bill directs the Commission – when adjusting the award safety net – to place higher emphasis on the needs of the low paid, the employment prospects of the unemployed, and the cost impact of wage increases on

³ For example, *WR Amendment (Protection for Emergency Management Volunteers) Bill 2003*; and *WR Amendment (Improved Protection for Victorian Workers) Bill 2002* (proposing minor improvements in employment conditions for 'Schedule 1A' workers, now the subject of negotiation between the Victorian and Federal Governments).

⁴ *WR Amendment (Fair Dismissal) Bill 2002 (No 2)*.

business. According to the Parliamentary Library, ‘The implication of this Bill is that high minimum wages are likely to price low paid employed persons out of work, and make it difficult for the unemployed to secure work.’⁷

So, far from protecting the low paid, it has been argued that the Government’s objective is to keep ‘low-paid, low-skilled workers in jobs, no matter how low-paid that might be.’⁸ In any case, the Commission is already required to consider the needs of the low paid – and economic factors, including possible employment consequences – in deciding on matters relating to the award safety net.⁹

This bill – which the ALP and the Greens oppose, and the Democrats seem unlikely to support – has been referred to a Senate Committee.

Another important proposal (although less controversially titled) is the *Termination of Employment Bill*.¹⁰ Here, the Government is experimenting with use of the constitutional corporations power to implement a unitary unfair dismissal system under federal law that will override the state systems.

Employees of ‘corporations’ would only be able to pursue unfair dismissal claims in the federal arena – they would no longer have remedies under state law. As a result, the federal law’s coverage would rise from around 50% to 85% of Australian workers.

The bill contains several other measures, including new criteria intended to limit the compensation that employees can recover in unfair dismissal cases, particularly in small businesses.

⁵ *WR Amendment (Fair Termination) Bill 2002* (seeking to restore the pre-*Hamzy* limits on unfair dismissal claims by ‘short term casual employees’).

⁶ *WR Amendment (Protecting the Low Paid) Bill 2003*.

⁷ Department of the Parliamentary Library, *Workplace Relations Amendment (Protecting the Low Paid) Bill 2003*, Bills Digest No 116, 2002-03, p 4.

⁸ Alan Ramsey, ‘Abbott is king of the limbo’, *Sydney Morning Herald*, 8 March 2003, p 37.

⁹ *Workplace Relations Act 1996*, sections 88B(2) and 90.

¹⁰ *WR Amendment (Termination of Employment) Bill 2002*.

As Professor Ron McCallum has recently suggested, this bill has profound implications. As a first step towards achieving the Government's ambition of a national system of workplace regulation, it 'may mean the beginning of the end of state employment regulation in Australia'.¹¹

A Senate Committee has reported on the bill. Labor opposes it in its entirety, while the Democrats support the idea of a single federal dismissal jurisdiction, but not the other aspects of the bill.

Pinpointing the Government's third term agenda

From the bills I've looked at so far, it seems hard to identify a unifying theme underpinning the Government's program. However, once the other bills and Minister Abbott's recent public statements are also examined, some more definite objectives emerge.

Many of the remaining bills are 'leftovers' from the Govt's failed 'second wave' package¹² – for example, the bills dealing with further award simplification,¹³ improved remedies for unprotected action,¹⁴ simplifying agreement making,¹⁵ and restricting 'pattern bargaining'.¹⁶

Other bills seem like ad hoc responses to circumstances as they have arisen – such as certain Federal Court decisions relating to 'transmission of business',¹⁷ and the imposition by unions of compulsory bargaining fees on non-unionists.¹⁸

¹¹ Ron McCallum, *The Future of State Employment Regulation in Australia*, Paper to the 11th Annual Labour Law Conference, ACIRRT, Sydney, 4 April 2003.

¹² *WR Legislation Amendment (More Jobs, Better Pay) Bill 1999*.

¹³ *WR Amendment (Award Simplification) Bill 2002*.

¹⁴ *WR Amendment (Improved Remedies for Unprotected Action) Bill 2002*.

¹⁵ *WR Amendment (Simplifying Agreement-making) Bill 2002*.

¹⁶ See now the *WR Amendment (Genuine Bargaining) Act 2002*.

¹⁷ *WR Amendment (Transmission of Business) Bill 2002*.

In one sense, the agenda revealed by the current raft of legislative proposals perhaps appears less visionary than that pursued by the Government in its first two terms.

Then, the Government's objectives were for 'big picture' reform: a major transformation of Australia's industrial relations system, focused on the removal of 'unwarranted third party intervention' – such as industrial tribunals and unions – leaving employers and employees to reach agreements suited to their own particular needs, including non-union and individual agreements. Awards and prescriptive regulation had to be wound back. And freedom of association – including the right not to join a union – was to be enshrined in law.

Of course, much of this was achieved in the Government's first term with the passage of the *Workplace Relations Act*. But (in reaching the compromise with the Democrats) the Government didn't get everything it wanted, and its efforts to build on this initial reform package have largely faltered.

Since the 1996 Act, the Government has secured the passage of only a fraction of its subsequent legislative proposals, mainly:

- some tinkering with the unfair dismissal provisions;¹⁹
- just one item of the 'second wave' award simplification measures;²⁰
- a raft of (in the end) relatively uncontroversial changes to the regulation of registered organisations;²¹
- and (more significantly) the recently-passed laws on genuine bargaining and the prohibition of compulsory union fees.²²

¹⁸ See now the *WR Amendment (Prohibition of Compulsory Union Fees) Act 2002*.

¹⁹ *WR Amendment (Termination of Employment) Act 2001*.

²⁰ *WR Amendment (Tallies) Act 2001*.

²¹ *WR Amendment (Registration and Accountability of Organisations) Act 2001*; *WR Legislation Amendment (Registration and Accountability of Organisations) (Consequential Provisions) Act 2002*.

The Government has clearly been frustrated by its failure to obtain further substantial legislative changes. In the HR Nicholls address last year, Minister Abbott gave voice to the Government's frustration and indicated how it proposed to respond. He said:

The challenge of the next three years is not confined to new legislation ... as much as ensuring that the workplace culture better reflects the freedoms and opportunities already (if imperfectly) available under the Workplace Relations Act. Because the legislative process can be so easily hijacked or stalled, the Government needs to focus at least as much on what can be achieved by executive act and good example as on what might be possible under Bills which have to run the gauntlet of an unpredictable Senate.²³

The Minister then encouraged employers to make more effective use of the legal options already available to them – by pursuing remedies against unions for unlawful industrial action, and taking a more pro-active approach to Commission processes rather than just responding to union applications.²⁴ In addition, the Government should take a more interventionist role in law enforcement:

Where there are clear cases of abuse of power or breach of the peace by industrial heavy weights, in fairness to people who would otherwise be denied their rights, the government should consider its options for acting as industrial policeman.²⁵

In the HR Nicholls speech, the Minister also referred to the 'contemptuous' behaviour of union officials who breached court orders and refused to pay fines.²⁶ This issue is tackled in the *Compliance with Court and Tribunal Orders Bill*,²⁷ which proposes tougher sanctions – including fines and disqualification from office – for officials who flout the authority of Commission and Federal Court 'return to work' orders and injunctions. The bill would also enable the Minister to

²² See above.

²³ Abbott, *Losing the Legislation Fixation* (above), p 4.

²⁴ Abbott, *Losing the Legislation Fixation*, pp 4-5.

²⁵ Abbott, *Losing the Legislation Fixation*, p 4.

²⁶ Abbott, *Losing the Legislation Fixation*, p 5.

²⁷ *WR Amendment (Compliance with Court and Tribunal Orders) Bill 2003*.

pursue remedies against recalcitrant officials. The Democrats have expressed support for the notion that the law should be obeyed, but may balk at the detail of this bill.

The Minister's public comments,²⁸ and the package of bills cracking down on unlawful industrial action and the behaviour of officials,²⁹ indicate that the reduction of union power and influence is now the main theme framing the shape and direction of Government policy.

Of course, this has been a major focus of the Government's industrial relations agenda since it came to office in 1996 – the confrontation with the Maritime Union was a defining episode of the first term. But the heat has clearly been turned up on the unions in this third term, and curbing their power has become a much more explicit feature of the Government's policy rhetoric and program. A new site for taking on the unions has also been established – the Cole Royal Commission.

The recommendations of the Royal Commission into the Building and Construction Industry will be the vehicle for the implementation of the Government's industrial relations policy for the remainder of the third term (and into the fourth, should this eventuate).

Through this process, the Government is seeking to deliver the type of cultural change that Minister Abbott has argued for – confronting the unions, arming employers with the legal weapons to deal with unlawful industrial action, and beefing up law enforcement. We can expect that the Cole Royal Commission

²⁸ Abbott, *Losing the Legislation Fixation* (above); see also *The High Price of Militant Unions*, Speech to Confectioners' Lunch, 7 December 2001; and the Minister's address to the AMMA National Conference, Melbourne, 27 February 2003, highlighting again the importance of law enforcement and the need for government intervention in major industrial disputes.

²⁹ In addition to the *Compliance with Court and Tribunal Orders Bill* (above), there are the *Secret Ballots* and *Improved Remedies* bills (referred to above) and the *Trade Practices Amendment (Small Business Protection) Bill*.

Report might also provide the blueprint for reform in other sectors of the economy into the future.

Some of the major recommendations in the Cole Report replicate much of the Government's recent and current legislative agenda – for example:

- abolishing pattern bargaining;
- requiring industrial action secret ballots;
- holding unions accountable for losses caused by unlawful industrial action;
- penalties and disqualification for officials who act unlawfully; and
- simplifying and reducing the level of award regulation.

However, in other respects, the Cole agenda demonstrates a considerable shift in the Government's approach from its first two terms in office. Instead of deregulation and a reduced role for government, we're now going to see a whole new layer of detailed regulation of labour relations arrangements in a specific industry – through separate legislation and a separate government agency.

A cornerstone of the Cole Report is the recommendation that a specialist body – the Australian Building and Construction Commission (ABCC) – be established to oversee the industry. The ABCC will be an influential new player in Australian industrial relations – with strong powers to pursue its broad remit as the 'one stop shop' for complaints about illicit industrial action, secondary boycotts, and breaches of freedom of association laws in the construction industry.

All of this looks very much like 'uninvited third party intervention' on a whole new scale. Combined with the Government's proposed new role as 'industrial

policeman', it is rather difficult to square with the commitment to 'placing people and businesses first; the system and its institutions second.'³⁰

Federal Cabinet has agreed to establish the ABCC, and to implement other key recommendations of the Cole Report. The ALP and the Greens have indicated that they will block any laws implementing the Cole reforms. The Democrats are still considering the Report, but have expressed reservations about setting up a new industrial body. Their final position may not be clear until the Government's legislation emerges, probably in the Spring session of Parliament.

So, in my view, constraining union power has emerged as the Government's primary third term objective. Of course, it's also unfinished business from the first and second terms, but it has now assumed top priority in its own right – even if it means interposing an institutional structure in industrial relations of the kind that the Government would have found objectionable only a few years ago.

At least, once the dust has settled, we can look forward to a 'restructuring and renumbering bill' – a plain English version of the Act, so we can all understand it. I suspect that few of us would argue with that!

³⁰ Liberal/National Coalition, *More Jobs, Better Pay*, 1998 Workplace Relations Policy, p 9; similar rhetoric was employed in former Minister Reith's *Breaking the Gridlock* papers on changing the constitutional basis of federal industrial law.