

## 2. THE SYSTEM



## 2.1 PURPOSE OF THE SYSTEM

### **ACCI POLICY PRINCIPLES:**

“ACCI supports a labour relations system that is characterised by decentralism and voluntarism, under which primacy is given to the interests of the direct employer and employee parties to the employment relationship. ACCI believes that only employers and employees can select the approach that best suits their particular circumstances and maximises their prospects of reaching appropriate agreements of highest mutual benefit.

ACCI’s overarching policy objectives are:

- to achieve legislative reform which will permit greater flexibility and efficiency in the operation of the enterprise
- to convince all political parties, and the community in general, of the necessity for further labour market reform
- to remove misconceptions and concerns about the effects of labour market reform
- to secure coordination of legislative measures taken at federal and state levels.

Specific, immediate policy objectives include:

- the promotion of freedom of choice for employers and employees in their workplace arrangements
- the active promotion and encouragement of the use of enterprise agreements, individual agreements and other options including internal regulation agreements
- a reduction in the influence of awards and tribunals
- the promotion of enterprise development, productivity and efficiency
- the encouragement of participative management approaches
- the encouragement of performance based remuneration
- the development of detailed proposals for legislative change.”<sup>27</sup>

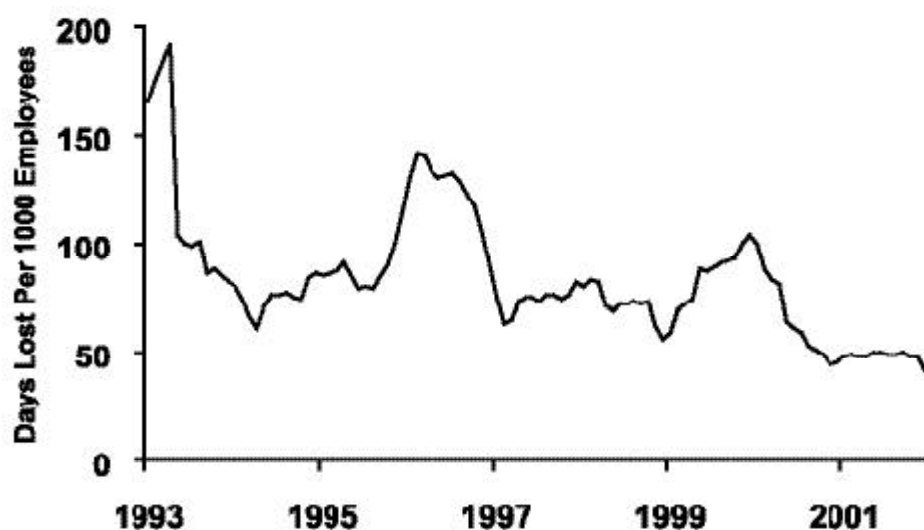
## **POLICY AUDIT & ANALYSIS:**

- The principal objects of the current federal system correctly focus on a combination of economic, industrial and social objectives. The economic objectives highlight the pursuit of high employment, the protection of youth employment, improved living standards, low inflation, international competitiveness and high productivity. The industrial objectives focus on ‘co-operative workplace relations’ and a ‘flexible and fair labour market’, with ‘primary responsibility’ for employment regulation resting with the employer and employee at the workplace level and their choice of the ‘most appropriate form of agreement’, together with a defined role for trade unions, employer organisations and the Australian Industrial Relations Commission. The social objectives relate to a ‘safety net’ of ‘fair and enforceable’ minimum standards of wages and conditions of employment, the balancing of work and family responsibilities and anti-discrimination objectives.
- These objects, and particularly the primacy they give to workplace based decision making, the abandonment of a ‘one size fits all’ approach, and the lesser role they infer for third party intervention represent a clear statement of new priorities and goals for Australian labour relations, which accord much more closely with the broad objectives of ACCI Labour Relations Policy.
- The post 1993 and post 1996 systems sought to modernise labour relations in Australia to meet the circumstances of the modern global economy and the diverse and multi-dimensional labour market. With the deregulation of product markets and financial markets in the 1980s (through the reduction in industry protection and then floating of the dollar) the case for a fundamental reversal of the highly regulated labour relations system that Australia had uniquely established since 1904 became overwhelming.
- The issue is not whether the objectives of the 1993 and 1996 reforms were necessary (they were, and are) but; whether those objectives have been met, to what extent, and what more needs to be done?
- Chapter 1.1 of this Blueprint indicates that the system created since 1993, and particularly since 1996 has coincided with a prolonged period of national economic growth, investment and business activity, increased employment, higher productivity, lower inflation, relatively low interest rates, substantially fewer disputes, higher earnings and more choice in working arrangements and conditions of employment. In turn this has led to an ongoing increase in living standards.
- As mentioned in the introduction to this Blueprint, although no one factor of public policy is in itself responsible for these outcomes, the changes in the structure of the Australian labour relations system have played an important role. What this masks however is that the benefits of reform could have been (and could still be) more extensive if the reforms were more broadly based, less open to compromise by intervening third parties, and are more widely understood, accepted and applied in the workplace:  
  
*“the structural reform effort needs to be sustained, particularly in the area of industrial relations, where the benefits in terms of employment and growth are likely to be significant”* - International Monetary Fund <sup>28</sup>
- It is in the operation of the current system that the application of the objectives of the 1993 and 1996 Acts (and particularly the changes in focus in the post 1996 objects) have been compromised. This has arisen because the current system still combines in varying degrees the three key pillars of compulsory standard setting, compulsory conciliation and compulsory arbitration

which had characterised the traditional Australian conciliation and arbitration system since 1904.

- Since 1993, and more particularly since 1996, the system has grafted a bargaining structure and revised objectives onto these pillars, and sought to limit powers of third party intervention – but not replace them. This is an important point. The 1993 and 1996 changes did not replace an old system with a new one. They grafted a new system onto an old one. In 1996, the federal Act had a new title, but it retained the old Act in an amended form.
- The stated purpose of the federal system remains ‘dispute resolution’. The underlying (un-stated) justification is still advanced as the need to maintain an ‘orderly’ system of workplace relations and to equalise the market power of employees with that of employers.
- The system seeks to ‘resolve disputes’ at a variety of levels:
  - On a multi-industry basis (national arbitral or legislated standards).
  - On an industry basis (awards).
  - On an enterprise basis (agreements and agreement based conciliation and arbitration).
- The system continues to require artificial disputes to be contrived, which then act as triggers for third party (Commission) powers of compulsory conciliation or arbitration.
- There is no question that industrial disputation has declined in Australia from the high levels of previous decades.
- The current system is in transition from the historically centralised system of compulsory conciliation and arbitration to a true decentralised enterprise bargaining system (of collective and individual agreements) characterised by a safety net of simple minimum standards which underpin (but do not constrain) bargaining. The objective must be to achieve this transition more quickly and with minimum complexity.
- The transition to the decentralised system envisaged by ACCI policy involves change. An objective must be to ensure that as change occurs during this transition, it involves minimum complexity, and deals with issues that make a practical difference. It should not be change for the sake of change.

### Industrial Disputes: 1993-2002 (Days Lost Per 1000 Employees)<sup>29</sup>



- It is recognised that industry has a crucial role in the reform agenda. Unless change occurs in the workplace, the economic and social benefits of change will not be realised at micro or macro levels. This requires leadership from employers and from industry representatives in setting out the case for completing the transition and for implementing the available workplace change opportunities.
- The pace and nature of change is influenced by multiple forces. At a policy level, the position of governments and parliaments is crucial. This is because so much of the structure of the current system remains locked into a legislative and regulatory framework. This will mean that change does not occur at a standard rate, given that governments and parliaments alter over time. However, the imperative must be to ensure, at the least, that all change which occurs is in the one policy direction – towards a less centralised system that meets the overall objectives of ACCI policy.
- The objects of the *Workplace Relations Act 1996* are crucial to its interpretation and ongoing application. There should be a review of:
  - The operation of the statutory objects of the *Workplace Relations Act 1996*.
  - The extent to which the objects and their interpretation reflect an appropriate approach in the contemporary Australian workplace relations system.
  - The extent to which they properly embody the intention of the legislation, and properly guide the use and application of the Act.

#### NOTES

<sup>27</sup> ACCI Labour Relations Policy

<sup>28</sup> International Monetary Fund, (2002) Report on Australia, 9 August 2002

<sup>29</sup> Source: ABS Cat No. 6321.0, TABLE 5. Working Days Lost Per Thousand Employees

#### RECOMMENDATIONS:

**Objective 1: Further develop the transition from the centralised system to a decentralised system of workplace relations.**

**Objective 2: Make the transition to a decentralised system of workplace relations practical and effective.**

**Objective 3: Changes to workplace regulation during this transition period must be consistent with the objective of a decentralised system of workplace relations.**

**Objective 4: Review the statutory objects of the *Workplace Relations Act 1996*.**

## 2.2 SCOPE OF REGULATION

### ACCI POLICY PRINCIPLES:

“ACCI supports a labour relations system that is characterised by decentralism and voluntarism...

ACCI believes that only employers and employees can select the approach that best suits their particular circumstances...

ACCI’s overarching policy objectives are: to achieve legislative reform which will permit greater flexibility and efficiency in the operations of the enterprise.

Specific, immediate policy objectives include: the promotion of freedom of choice for employers and employees in their workplace arrangements.”<sup>30</sup>

### POLICY AUDIT & ANALYSIS:

- We still have a heavily regulated system. The scope and content of employment regulation in the current system is the combined accumulation of laws made over many decades by parliaments, governments and industrial tribunals based on the disputes and circumstances of the day. ‘Ad-hockery’ has characterised the regulation making process, and in qualitative terms regulation has far too often characterised employers according to the worst possible form of conduct. As a general rule, this is not the correct approach to labour market regulation:

*“Policy makers with a predilection for legislative and judicial solutions usually underestimate the capacity and goodwill of Australian managers and workers to sort things out for themselves.”* Minister for Employment and Workplace Relations, Hon. Tony Abbott<sup>31</sup>

*“You do not approach your response to an industrial relations framework on the basis of the activities of a miniscule minority of people.”* Shadow Minister for Industrial Relations, Robert McClelland<sup>32</sup>

- Critically, employment regulation has continued to apply unless and until removed by the very parliaments or tribunals that made them. There has been no significant mechanism in place that has effectively and systematically revised the regulatory content of the system once that regulation is enacted (award simplification could have, but has generally not achieved this goal). As a result, the regulatory burden of the system has increased step-by-step, year upon year.
- The so-called ‘deregulatory’ initiatives have been outweighed by the continuing accumulation of individual regulatory burdens that of themselves may appear benign but which in combination mean that the current system still remains highly prescriptive in terms of regulatory process and content. Ironically, the overall regulatory burden of the system cannot be eased except by further legislative changes or by further orders of industrial tribunals.
- The current workplace relations system in only a very limited way promotes voluntarism. Legislative standards are mandatory. Compulsory conciliation and compulsory arbitration characterise award making.

Concepts of ‘genuine bargaining’, and some recent decisions implying an obligation of ‘good faith bargaining’ and the broad ‘right to strike’ in agreement making, create a legal and practical compulsion to bargain with third parties and even at times to settle ‘agreements’ on non preferred terms.

- The system also has a long way to go before it reflects either a structure for voluntary conciliation or voluntary arbitration as contemplated by ACCI policy. There is however scope for voluntary mediation in the current system (but no statutory recognition of the concept), and it is subject to all existing mandated ‘rights’ of compulsory conciliation and arbitration. There is also scope for some voluntary arbitration of non-allowable matters (a device though which is being used in dispute resolution provisions in s170LJ agreements to circumvent – not enhance – the statutory limitations on the powers of compulsory arbitration).
- The current system has principal objectives that substantially reflect aspects of the ACCI policy with respect to the primacy of agreement making at the workplace. However the operation of the system provides great scope for this objective to be undermined through third party interference in award setting and agreement making.
- The danger continues to exist that well meaning regulation sought for one purpose may in combination with existing or other proposed regulation undermine the overall objectives of decentralism and the primacy of employer and employee, workplace-based, determination of employment terms and conditions. All new legislative or regulatory proposals must avoid this.
- Fundamental goals of industrial regulation should include:
  - Simplified regulatory obligations, and reduced prescription.
  - Proper recognition that all employers are not the same, and that employment law should not be formulated by reference to the activities of a minority of worst performing businesses, employees or organisations.
  - Promotion and support of mutually beneficial win-win workplace relations.
  - Entrenching ongoing workplace reform and creating more certainty in the impact that the system has on workplaces.
  - Less politicised and polarised workplace relations attitudes and cultures.
  - A reduction in the need to comply with multiple regulatory instruments drawn from both the federal and state jurisdictions.
- A new commitment to implement ‘best practice’ approaches should be sought from regulators. This could be done by regulators adopting (as a matter of policy, practice or legal obligation) an ‘**Employment Regulation Standard**’ (ERS). This would provide that new industrial regulation that increases the cost or compliance burden of employers should not be created unless the following are satisfied:
  1. A regulatory impact assessment is prepared by the regulator in advance of its decision. The regulatory impact statement discloses the nature of the proposed regulatory burden, the estimate of the social, industrial and economic impact on those who would be affected, the factors that mitigate in favour of and against the imposition of the regulatory burden, the measures proposed to minimise the regulatory impact, the

particular impacts that the regulatory burden has on small and medium employers, the extent to which workplace agreements could be used to better achieve the proposed outcome at a workplace level and a clear statement of how the proposed regulatory burden would impact on employment.

2. Any new proposals to vary (increase) the regulatory burden on employers should wherever possible be accompanied by a concomitant proposal to decrease the regulatory burden by at least an equivalent extent.
  3. Proposals to vary the regulatory burden on employers should, wherever possible, be imposed for a set period only and cease to operate beyond that period unless extended by the decision maker following an open review of the actual regulatory impact in the workplace.
- The ERS would act as a charter of mutual regulatory responsibility between policy makers and those who must work under the system. It should set out standards for the operation of employment regulation and the quality of regulation employers and employees are entitled to expect from the system.
  - The key to the standard will be mutuality, and recognition that the obligations on employers

and employees under the system are matched by obligations on the system to properly facilitate employment growth and support and encourage compliance.

- The ERS, or charter of mutual regulatory responsibility, may also for example provide broad principles that:
  - Regulation should be clearly accessible to those who must comply, in an appropriate form to facilitate and support compliance.
  - Regulation should be contained in the minimum possible sources, which can be easily delineated and accessed by users.
  - There should be a presumption against the making (and maintenance) of detailed and delineated obligations.
  - Regulation should change as infrequently as possible.
  - Where there are changes in regulation, these must be supported by proper information and due notice.

#### **NOTES**

<sup>30</sup> ACCI Labour Relations Policy

<sup>31</sup> Minister for Employment and Workplace Relations, Hon. Tony Abbott MHR, (2002) Speech to Queensland Industrial Relations Society, 5 July 2002

<sup>32</sup> Shadow Minister for Industrial Relations, Robert McClelland (2002) Parliamentary Second Reading Speech, 24 June 2002

**RECOMMENDATIONS:**

**Objective 1: The scope of all industrial regulation must be designed to further the principal objects of the decentralised system envisaged by the 1993 and 1996 federal reforms.**

**Objective 2: A three-step mechanism of regulatory accountability, the Employment Regulation Standard (ERS) should be created as a Charter of Mutual Regulatory Responsibility. It should be adopted by policy makers and introduced to counteract the continuing ad-hoc build-up of employment regulation, and preferably reduce the level of employment regulation. The ERS involves:**

- **pre decision regulatory impact assessments**
- **measures to counterbalance any regulatory impost**
- **reviews of regulatory impact and objectives after set periods.**

**Objective 3: The regulation of workplace agreements should support – not hinder – effective low cost agreement making.**

## 2.3 DUTIES TO USERS OF THE SYSTEM

### **ACCI POLICY PRINCIPLES:**

Employers and employees are entitled to expect the system to provide reasonable support in their ongoing efforts to comply with employment standards.

Employers and employees are entitled to expect concise, targeted and clear standards with which they must comply.

Employers and employees must be given more appropriate opportunities to comply with changing regulation, including greater prospectivity in the coming into effect of changes in regulation.

Employers and employees are entitled to expect greater support for their compliance efforts, including greater support in terms of information and promotion.

Poor regulation is also ineffective regulation. It is costly to government without sufficient return, and detracts from its essential regulatory purpose, and from proper compliance.

### **POLICY AUDIT & ANALYSIS:**

- The current system adopts, in-principle, a framework consistent with ACCI policy – that is a primary role for agreement making at the enterprise level underpinned by minimum legislated standards, supplemented by award-based regulation.
- However, the operation of the system inhibits this objective being fully achieved because of the extensive nature of award regulation, the limited application of award simplification, the extensive array of minimum legislated standards (other than for Schedule 1A employees), and the extensive role for the Commission and third parties in agreement making.
- In addition, a number of court decisions have altered the intended balance of employer/employee/trade union interests – either through interpretation of the federal Act in a manner inconsistent with its primary policy objectives, or in the granting of interim injunctions that frustrate or delay workplace reform where objected to by third parties (based only a low threshold of reasonably arguable, not conclusive findings at law).
- There is no scope under the federal or state systems for an opt-out self-regulatory model for best practice workplaces, other than through the relevant agreement making options (which, as discussed below) when applied in practice does not fully reflect ACCI policy objectives.
- The regulatory system in employment operates in a very top down manner, and does not provide a sufficient level of support to those who must comply with its strictures.
- Employers must satisfy themselves of ongoing changes in complex employment regulation, many of which can leave them in non-compliance and with significant responsibilities for redress. Employer associations play a vital role, but due to limited resources, cannot be expected to provide information to all employers.

- There are also fundamental inadequacies in the regulatory strictures that must be complied with.
- Australian employers are required to comply with a vast array of complex, contradictory and unclear regulatory instruments. This includes over 2000 awards in the federal system, and hundreds of awards in each state system. Even after 'award simplification' awards can and do commonly exceed 10,000 words in length – a thesis of award regulation.
- It is also hard to determine which regulatory instrument must be complied with, even for experts. The award system is a function of historical dispute and circumstance rather than a logical assessment of an appropriate and effective form of regulation. This is compounded by the existence of dual federal and state regulation covering the same employment.
- In addition, there are significant numbers of out of date, un-maintained awards, particularly at a state level. These archaic regulations are hard to comply with and particularly unsuited to the realities of work in the 21<sup>st</sup> century. However, they remain legal obligations on employers, breach of which is a criminal offence, as well as giving rise to civil liability.
- Awards in particular are also highly complex forms of regulation, which despite purported plain English reforms still require technical expertise to interpret and determine obligations.
- This is simply not good enough. As a matter of sound public administration, employers (as taxpayers and persons with obligations under law) are entitled to expect a higher quality of regulation than that currently provided by award systems in particular. This approach to regulation fails to properly support the behaviours the state demands from businesses in their capacity as employers.
- There is a reciprocal duty of the state to the persons it seeks to regulate which is simply not being met in this area of employment law – particularly as made by employment tribunals.
- Having regard to the fact that the rules of the award system are still created in a 'class action' type context, where few if any actual employers are present or participate in the proceedings, it is no longer good enough that the system require employers to satisfy themselves of their employment obligations. In no other system of regulation would the subjects of such onerous compliance requirements be left with so little support by regulators.
- The system has a duty to ensure employers and employees are better informed of changes in their obligations, and are better supported in their compliance efforts.
- Resources should be allocated to appropriately inform employers and employees of their entitlements. Without this essential corollary, there should not be any increase in obligations.

**RECOMMENDATIONS:**

**Objective 1: The Employment Regulation Standard (ERS) should, in principle and with some modifications, apply to employment regulation through multi-employer or industry wide awards.**

**Objective 2: The ERS should expressly recognise the responsibility of industrial tribunals and other regulatory bodies to better account for the impact of their decisions on:**

- **Labour costs**
- **Capacity to employ**
- **Small business.**

**Objective 3: Whilst awards are made and exist in their current form, there should also be duties on unions using the system to create awards to properly meet their responsibilities by maintaining them. In addition to proposals to reconsider the period of operation of awards more generally, where an award is obsolete and defunct there should be scope for either:**

- **The Commission to automatically cease operation of the award**
- **The Commission to, of its own motion, convene a hearing to consider the deletion of the award**
- **A party to apply to the Commission to delete the award on the basis that its non-maintenance is evidence that the original dispute has ceased to exist/threaten.**

**Objective 4: The system should make available means to better inform employers and employees of changes in their regulatory obligations before those obligations come into effect.**

**Objective 5: Implicit in the preceding objectives is a reduction, over time, in the number of regulatory instruments/awards, and their content.**

## 2.4 STATUTORY MINIMUM CONDITIONS

### **ACCI POLICY PRINCIPLES:**

“The legislation should specify certain minimum standards which should be of general application. no award or agreement should provide, at the time it is made or entered into, for less than those minimum standards or their equivalent.

The minimum standards should comprise:

- a minimum hourly wage for adults
- a minimum hourly wage for juniors
- four weeks' paid annual leave
- one weeks' paid sick leave
- twelve months' unpaid parental leave after twelve months' continuous service
- equal pay for men and women workers for work of equal value

The minimum hourly wage for adults and the minimum hourly wage for juniors should be fixed following consideration of recommendations made by the tribunal or other independent body at the request of the responsible Minister. In this process account should be taken of the need to allow for appropriate flexibility in actual wage rates.”<sup>33</sup>

### **POLICY AUDIT & ANALYSIS:**

- Statutory minimum industrial standards in Australia are a combination of federal and state legislative standards, and vary according to federal and State legislation.
  - The statutory minimum standards in all federal and state systems are a combination of legislated standards, together with mandatory standards set in awards made by industrial tribunals, and in decisions of courts on the interpretation of legislative provisions.
  - There is also a role given in the federal and in most state industrial systems for the operation of certain international labour standards to affect domestic obligations.
- The federal minimum standards relate to:
    - Equal remuneration for work of equal value (legislated).
    - Termination of employment standards (legislated).
    - Right to sue for harsh, unjust or unreasonable dismissal (legislated).
    - Parental leave (legislated).
    - Employment classifications and categories of employment (award allowable matters).
    - Working hours (award allowable matter).

- Wages and other allowable award matters including the federal minimum wage (AIRC determination).
- Annual leave and leave loadings (award allowable matter).
- Long service leave (award allowable matter).
- Certain prescribed forms of leave (such as sick leave, carers leave, bereavement leave etc) (award allowable matters).
- Parental leave (including maternity and adoption leave) (award allowable matters).
- Public holidays (award allowable matter).
- Loadings and penalty rates (award allowable matters).
- Redundancy payments (award allowable matter).
- Notice of termination (award allowable matter).
- Stand-down provisions (award allowable matter).
- Dispute settling provisions (award allowable matter).
- Jury service (award allowable matter).
- Superannuation (award allowable matter).
- Pay and conditions of outworkers (award allowable matter).
- In addition, the federal system allows regulation of non allowable matters through:
  - Exceptional matters orders.
  - Provisions in agreements (collective or individual) operating as mandatory standards.
  - Common law contracts also operating as legally enforceable (over award/agreement) minimum standards.
- All federal and state systems prescribe standards in excess of the ACCI policy. The federal standards that apply for schedule 1A employers and employees (that is, non award/non agreement workplaces) in Victoria is the structure that most closely resembles the ACCI policy on minimum standards.
- There is no coherent pattern in the federal system as to why certain matters are prescribed as statutory minimum standards, and others are award based standards, other than to say (in the most general of terms which is often not consistent with workplace practice) that the federal standards are more broadly based principles of core minima.
- State legislated standards do not only apply to persons employed under state industrial systems. For example, there is significant scope for state standards to prescribe minimum legislated rights and obligations for persons employed under the federal system in areas where the federal systems does not have inconsistent laws that 'cover the field'. For example, state legislation generally prescribes minimum legislated standards with respect to public holidays, long service leave which generally (but not exclusively) applies to federally governed employees as well – in addition to other state standards applying only to state award governed employees, and award free employees. This adds further jurisdictional complexity between systems, even in the application of minimum legislated standards.

**NOTES**

<sup>33</sup> ACCI Labour Relations Policy

**RECOMMENDATIONS:**

- Objective 1:** A dedicated federal *Minimum Conditions Act* should be created to more sensibly codify core minimum standards (as per ACCI policy), and to create an alternative basis for underpinning agreement making to the existing award approach. It must not however be used as a basis for centrally re-regulating employment arrangements beyond those core minimum standards, or undermining the objectives of the reformed workplace relations system.
- Objective 2:** The imposition of any new minimum standards should be subject to the three-step Employment Regulation Standard (ERS).
- Objective 3:** Minimum standards should only apply where essential and necessary to be prescribed as a minimum right or obligation.
- Objective 4:** Some award standards should, over time, become statutory minimum standards in lieu of award standards.
- Objective 5:** Minimum standards should not be developed or prescribed on the assumption that all employers should be regulated by standards designed to protect against the isolated conduct of a minority of employers.
- Objective 6:** The Federal Government and each state government should jointly review those common standards that each jurisdiction regulates with a view to agreeing upon common content of the minimum standard for each existing subject matter (eg long service leave, sick leave).

## 2.5 IMPACT OF OTHER REGULATION

### ACCI POLICY PRINCIPLES:

“ACCI believes that only employers and employees can select the approach that best suits their particular circumstances and maximises their prospects of reaching appropriate agreements of highest mutual benefit.

The legislative framework should be changed in order to implement the objectives of: . . . a reduction in complexity.”<sup>34</sup>

### POLICY AUDIT & ANALYSIS:

- The current workplace relations system does not operate in isolation from other legislative regimes that impact upon workplaces. An assessment of the extent to which industrial regulation meets the overall objective of ACCI policy (that is, a system where employers and employees by and large determine their rights and responsibilities without unwanted third party intervention and subject to minimum standards) requires an analysis of the impact of non workplace relations regulation.
- The forms of other regulation that have an impact on industrial matters include:
  - Legislation governing the form or hours of business operation (primarily state).
  - Legislation governing workers compensation (primarily state).
  - Legislation governing occupational health and safety (primarily state).
  - Legislation governing privacy (federal and state).
  - Legislation imposing business taxation (eg income tax, payroll tax) (federal and state).
  - Legislation regulating contractor relationships for specified purposes (superannuation, workers compensation, occupational health and safety) (federal and state).
  - Legislation governing superannuation and retirement incomes (primarily federal).
  - Legislation governing equal opportunity and sex discrimination (federal and state).
  - Legislation governing age discrimination (state and, in part, federal).
  - Legislation governing corporate governance (including aspects of financial regulations) (primarily federal).
  - Legislation governing trade practices (primarily federal).
  - Legislation governing training, apprenticeships and schooling (federal and state).
  - Ratification of international treaty instruments (primarily federal).
- The overall regulatory scheme, and the costs of compliance are a product of these other legislative interventions combined with specific workplace relations regulation. Many of these other forms of legislative intervention create their own institutional infrastructure and

enforcement mechanisms – exposing employers and employees to the authority of multiple issue specific administrative, quasi-judicial or judicial bodies.

**NOTES**

<sup>34</sup> ACCI Labour Relations Policy

**RECOMMENDATIONS:**

**Objective 1: Federal Parliament should consider, at least as an over-riding principle, simplified and common drafting approaches in workplace relations legislation and in related legislation and regulation.**

**Objective 2: There should be legislative barriers to forum shopping or the awarding of dual remedies arising from the same conduct.**

**Objective 3: Information about rights and obligations of employers and employees published by governments or government agencies should be comprehensive, and take into account the existence of all relevant legislative or regulatory instruments that affect the employment relationship – whether or not they are contained within single or multiple laws or enactments.**

## 2.6 HARMONISED NATIONAL SYSTEM

### **ACCI POLICY PRINCIPLES:**

“ACCI's overarching policy objectives are . . . to secure coordination of legislative measures taken at federal and state levels.

The Federal Government and each state government have established separate labour relations systems. While co-operation between the different systems has increased in recent years, unnecessary and artificial conflict still frequently occurs.

The current federal/state systems should be rationalised through the enactment of complementary federal/state legislation or, in the absence of such legislation, through other means which would lead to the implementation of ACCI policy. The rationalised system should reflect the regional nature of Australia, through the establishment of state divisions of a single tribunal. Those divisions should comprise the existing state tribunals and local matters should be dealt with by members of those tribunals.

The best approach would be for the Federal and state governments to agree on the terms of legislation to be enacted jointly. In this way the involvement of the state in the legislation and any future legislation would be maximised, in that their agreement to change would be required.”<sup>35</sup>

### **POLICY AUDIT & ANALYSIS:**

- The current workplace relations system in Australia comprises six separate statutory systems – the federal system and a state system in each state jurisdiction (other than, since 1997, in Victoria).
- The multiple systems do not operate in a coherent or cohesive manner.
- The federal system has overriding legislative pre-eminence over state systems where there is inconsistency in laws (s109 of the Constitution).
- The federal system's legislative scope is however limited by the restricted legislative power of the Commonwealth in s51 of the Constitution. This has historically limited the Commonwealth to constitutional power over conciliation and arbitration of interstate disputes. That concept has been interpreted and re-interpreted by the High Court to mean that the Commonwealth's legislative reach extends to settling paper or artificial disputes (eg union letters making unreal or exorbitant demands).
- Decades of High Court interpretation and the creation of the federal industrial statute have also seen the creation of an entrenched, institutionalised and ongoing federal award system underpinned by the interstate dispute settlement power. The consequences of this is that almost all federal employment standards are derived from the contrivance of artificially created disputes between third parties and 'settled' by imposing a standard against an industry or occupational group.
- In addition the Commonwealth has legislative power with respect to corporations, and also external affairs that can (and have) been used to legislate industrial matters.

- Not only does the current mix of federal and State systems operate in an incoherent legal manner, the scope and reach of each system rises and falls depending on court interpretations of constitutional powers, on the willingness of different parliaments to legislate using the full extent of their powers, and the extent to which trade unions manufacture interstate paper disputes and create federal jurisdiction over workplaces through ambit logs of claim and interstate dispute findings. Whilst the federal award system operates on the basis of single employer responsivity (a concept increasingly undermined by business transmission), state award systems operate on a common rule basis.
- In addition, the federal system uses different constitutional powers for different purposes. Unfair dismissal laws are a mix of the corporations power and the territories power. Agreement making provisions are a mix of the corporations power and the interstate dispute power. Federal awards still rely on the interstate dispute power except in Victoria (which uses a referred power) and the ACT and NT (which use the territories power to create federal common rule awards in those territories only).
- The limited, piecemeal and ad-hoc usages of constitutional powers provide an environment for a system of regulation which is more complex than it should be – with different minimum standards and regulatory instruments, different rights and obligations, different choices and restraints applying to different workplaces in the same industries. Whilst this is a major problem for nationally operating businesses, it is not exclusively their problem. The scope for wholly intra-State operating businesses to be roped into the federal system (or less likely, out of it) is substantial, as is the scope for State businesses with differing corporate structures to be bound by different jurisdictions for different industrial purposes (eg unfair dismissal laws).
- This also means that the standards and regulatory regime that is imposed on one workplace today may not be the same as the system that is imposed on that workplace tomorrow. Third parties (unions, the federal commission) can alter the very jurisdiction under which rights and obligations are formed, at their discretion, and over the opposition of employers and employees in a workplace – even without their direct knowledge or input in the decision-making.
- It is also apparent that standards in the federal and state systems are increasingly diverging, particularly with the current use of certain state systems by trade unions to advance particular industrial objectives.
- The President of the Australian Industrial Relations Commission, Justice Giudice, has recently commented on this issue in the following terms:

*“Our regulatory framework should be designed in a way which accords a high priority to consistency of treatment... There is an important related issue concerning minimum standards referred to in Federal industrial legislation as the award safety net. A great deal has been done in the last 20 years or so to coordinate many basic entitlements through the State and federal industrial award systems. But there are still differences in the nature and level of entitlements. Where those differences have no rational basis but are accidents of industrial or political history they advantage some citizens and disadvantage others. This too is a lack of equality and it undermines our society in a significant way.”*<sup>36</sup>
- This analysis would suggest a far less than optimum system and one that is well distant from the objective of the ACCI policy for a rationalised federal/state system. It is not a system for a modern society or modern economy. It would be inconceivable that such a structure would be established in modern

Australia if we were to design a system from scratch.

- There is a significant body of support in the community for the move towards a harmonised national workplace relations system. This support, at least at a conceptual level, crosses the political and industrial divide.

*“A simpler national workplace relations system must be designed to benefit outcomes and access for employers and employees, and the national interest. It should not be viewed as change for change’s sake. But it does need to commence at the source of the problem – the constitutional structure on which the system has been built.”* Former Minister for Employment, Workplace Relations and Small Business, Peter Reith<sup>37</sup>

*“Variations in State laws are also time consuming and frustrating for employers. It is ridiculous there are more than 130 pieces of State and federal legislation pertaining to industrial law...we believe the ALP with its coast to coast governments is in a unique position to improve legislative uniformity...Now is the time when Australia has the opportunity to lift our standards and have ‘best practice’ legislation in every State.”* Australian Workers Union National Secretary, Bill Shorten<sup>38</sup>

*“A national economy should regulate workplace relations on a national basis just as it regulates interest rates, tax and corporate law on a national basis...In workplace relations, there is no reason why particular arrangements can’t be made at every workplace under a regulatory system which is the same right around the country”* Minister for Employment and Workplace Relations, Tony Abbott MHR<sup>39</sup>

*“We are going to have greater prospects of achieving national uniformity of industrial relations standards if it is done on a co-operative tripartite basis.”* Shadow Minister for Industrial Relations, Robert McClelland<sup>40</sup>

*“In particular it seems to me that there is a good deal of support amongst the parties to*

*industrial relations and, dare I say it, at the political level as well, that there should be some rationalisation of our industrial relations system, meaning by that the various Acts of the State and Federal parliaments and the courts and tribunals which administer and enforce those laws.”* Justice Geoffrey Giudice, President of the Australian Industrial Relations Commission<sup>41</sup>

*“It is important to move towards establishing a single national industrial relations system and move away from the complicated array of federal and state frameworks...”* International Monetary Fund<sup>42</sup>

*“The overall success of industrial relations reform also depends on the harmonisation of federal and state legislation.”* OECD<sup>43</sup>

- It is important that a national harmonised system not be seen as an end in itself. At the end of the day, it is the scope that employers and employees have to build direct relationships and exercise choice in agreement making and association that matters. The content and operation of any harmonised system will have a greater impact on outcomes for business people and working people than the harmonised system itself.
- The case for moving towards a harmonised national workplace relations system could be assessed in a nine-step orderly development phase. The objective would need to focus on exploring the concept with the maximum possible bipartisan national support, and in a constructive non-political manner. An open-minded approach would need to be adopted, particularly by governments (federal and State) – with a recognition by all parties of the legitimate role each jurisdiction has historically had and currently exercises in the system. The initial focus would have to be on confidence building and an objective analysis of options and models for change – without requiring any interested party to commit a position or formulate definitive policy during the development phase. At the end of the day,

the content of the system will determine whether it has acceptance by employer and employee interests.

- Step 1: Release of a final discussion paper by the Federal Government consolidating the responses received to the November 2000 discussion paper series *‘Breaking the Gridlock: Towards a Simpler National Workplace Relations System’*.
- Step 2: A reference by the Federal Government to the Productivity Commission on the transaction costs of the existing multiple jurisdictional systems.
- Step 3: A national summit on the status of the debate with ACCI, the ACTU and other parties including federal and state governments invited to participate. (Step 3 could occur simultaneously with steps 1 or 2, or precede them).
- Step 4: Appointment by the Federal Government (with appropriate mechanisms for input from state governments, federal opposition, the Australian Democrats, ACCI and the ACTU) of a five person taskforce of inquiry to develop and recommend options and models for transition to a harmonised national system of workplace relations.
- Step 5: Presentation of taskforce report to a special Council of Australian Governments (COAG) meeting to consider the recommendations of the taskforce of inquiry.
- Step 6: Adoption of a consensus or preferred policy model or models by the Federal Government.
- Step 7: If in acceptable terms, introduction of legislation.
- Step 8: Passage of legislation and commencement of transitional provisions.
- Step 9: Completion of transition and implementation of a harmonised national system.

#### NOTES

<sup>35</sup> ACCI Labour Relations Policy

<sup>36</sup> AIRC President Justice Geoffrey Giudice, (2001) Address to Bar Association of Queensland Industrial and Employment Law Conference, 20 April 2001. These remarks were specifically endorsed by a Full Bench of the AIRC in a decision of 7 August 2002 (*Re: Minimum Wage Orders* [Print PR 921046])

<sup>37</sup> Minister for Employment, Workplace Relations and Small Business Hon. Peter Reith MP, (2000) *Breaking the Gridlock: Towards a Simpler National Workplace Relations System*, 23 October 2000

<sup>38</sup> Australian Workers Union National Secretary, Bill Shorten, Speech to the National Press Club, 20 February 2002)

<sup>39</sup> Minister for Employment and Workplace Relations Hon. Tony Abbott MHR (2002) Speech to Australian Food and Grocery Council, 9 May 2002

<sup>40</sup> Shadow Minister for Industrial Relations, Robert McClelland MP, Speech to Australian Mines and Metals Association, 1 March 2002

<sup>41</sup> Justice Geoffrey Giudice, President of the Australian Industrial Relations Commission, (2002) Speech to Australian Workers’ Union Conference, 19 April 2002

<sup>42</sup> International Monetary Fund, (2002) Report on Australia, 9 August 2002

<sup>43</sup> OECD (2001) Economic Survey: Australia

**RECOMMENDATIONS:**

**Objective 1: The case for moving towards a harmonised national workplace relations system should be assessed in a nine-step orderly development phase that involves a national summit, a national taskforce and, if proceeded with, a special meeting of the Council of Australian Governments.**

**Objective 2: The scope to move towards a harmonised national system could be tested by creating, in the interim, a more uniform national system covering issue specific subject matters in appropriate areas as and when they come before the Parliament.**

**Objective 3: There should be no net increase in the regulatory burden created by a harmonised national system, and the move towards such a system should be designed to reduce regulatory burdens created by duplication and compliance with existing multiple systems.**