

4. INSTITUTIONS

4.1 INDUSTRIAL TRIBUNALS

ACCI POLICY PRINCIPLES:

“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.”⁵⁵

ACCI has supported, and continues to support a role for industrial tribunals in the workplace relations system. That role must however evolve over time, and be complementary to the overall nature of the system - and not as a party principal in the system.

POLICY AUDIT & ANALYSIS:

- Australia has six separate workplace relations systems and six separate industrial tribunals, all with competing jurisdiction over the same subject – industrial matters.
- The existence of six separate tribunals with a jurisdictional base that does not coherently intersect is inconsistent with the overall objectives of ACCI policy for a single rationalised system, and with sound employment regulation in Australia.
- However achieving that objective does not require the dismantling of the infrastructure of the multiple tribunals. As the ACCI policy indicates, scope exists under a rationalised system for a single tribunal to have state divisions exercising a common and coherent jurisdiction.
- The ACCI policy contemplates that industrial tribunals will have a role in the system in relation to certain minimum standards operating as part of a safety net, together with jurisdiction over voluntary conciliation and arbitration – and certain dispute settling functions. The current federal system confers upon the AIRC these powers (and more) but does not circumscribe these powers in the manner proposed by the ACCI policy.
- It is incompatible, in a new bargaining system, for a third party tribunal to have or retain all of its previous powers over workplace relations. A tribunal which continues to exercise all of its traditional powers on top of a bargaining system would mean a net increase in regulatory control (centralised and decentralised). Rather, the objective of the bargaining system must be to have the centralised third party tribunal vacate the regulatory field (other than for limited purposes) to provide enhanced scope for effective workplace bargaining.
- The limited extent to which the 1993 and 1996 federal reforms (in detail rather than objective) restrict the powers of the centralised tribunal, and the claw back of jurisdiction through subsequent commission and court decisions, and agreement making contrivances (such as dispute resolution clauses conferring compulsory arbitration powers over non allowable matters) means that the centralised tribunal in the current system still remains disproportionately powerful and inhibits the overall objectives of the system itself, contrary to ACCI policy and the public good.
- ACCI policy reflects the fact that industrial tribunals are creatures of statute (that is, creatures of parliamentary policy). They do not have inherent jurisdiction, and (at least at a

federal level) do not exercise judicial power. In reality though, employers and employees see industrial tribunals as having almost equivalent influence to courts of law - by setting standards in awards they make laws which are no less enforceable than laws made by the democratically elected parliaments themselves.

- In this sense, industrial tribunals have great privileges as lawmakers – a role that traditional courts only exercised in their common law jurisdiction and often subject to considerable statutory guidance. And the power is exercised in a “class-action” context, with orders affecting thousands of employers and employees at the one time, unlike traditional courts and tribunals that generally deal with inter-party disputes. There is no doubt that industrial tribunals have been, and continue to be, more prolific lawmakers than traditional courts. Retaining this same power and authority for industrial tribunals is not compatible with a decentralised system. The extent to which the jurisdiction of federal and state industrial tribunals is currently being used by trade unions to seek the imposition of new standards and new employment conditions suggests that unions see industrial tribunals still having a very substantial role in the determination of employment conditions.
- There is a case to examine whether the AIRC should operate less like a court and more like a body conducting inquiries into issues and

advising upon them. A less adversarial and a more inquisitorial approach to the determination of issues may ameliorate some of the tensions between the bargaining system we are moving towards, and the compulsory conciliation and arbitration system we are largely moving away from.

- It is noteworthy that the industrial relations system foreshadowed by former Prime Minister Keating in April 1993 (referred to in the Introduction to this Blueprint) contemplated an Industrial Relations Commission which “*advised government and the parties of emerging difficulties and possible improvements.*”⁵⁶ An advisory function to government on possible changes to minimum wages or employment conditions is a materially different system than the one we currently have – and one which would be much closer to meeting key objectives of ACCI policy.
- Even under the current federal system the role of industrial tribunals (the AIRC) is significant. The AIRC’s current jurisdiction, even in the current bargaining system, includes a very wide range of powers. For example, the following 30 powers can be listed, and this is a non-exhaustive list:

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⁵⁵ ACCI Labour Relations Policy

⁵⁶ Prime Minister Paul Keating, (1993) Speech to the Institute of Company Directors, Melbourne, 21 April 1993

EXAMPLES OF THE POWERS OF THE AIRC

1. Power to prevent and settle industrial disputes. This is a power to decide that a dispute exists based on a union demand for increased wages or employment conditions, whether or not the employer and its employees are actually in dispute or not.
2. Power to make a mandatory award binding a workplace that has been found to have been in dispute with a trade union following union demands.
3. Power to remove the rights and obligations of employers and employees in a workplace regulated by State industrial laws, and in lieu impose the obligations of federal industrial laws on that workplace.
4. Power to order that wages be paid at least at a minimum it decides is fair and reasonable.
5. Power to order that new employment conditions on any of the allowable award matters be made on terms that it thinks are fair and reasonable.
6. Power to order that existing minimum employment standards in awards be increased or changed.
7. Power to make exceptional matters orders that impose employment conditions on a workplace beyond the allowable award matters.
8. Power to compulsorily conciliate an industrial dispute.
9. Power to compulsorily arbitrate an industrial dispute (within the scope of the allowable award matters, and limits on the arbitration of disputes over agreements).
10. Power to summons an employer, manager, employer representative, or an employee or trade union official to compulsory hearings.
11. Power to order the production of documents in the possession of employers or employees or other parties.
12. Power to issue certificates accrediting trade union officials to exercise rights of entry into employer premises for specified purposes.
13. Power to make orders that strike action is unlawful.
14. Power to decide whether a secret ballot should be ordered before strike action commences.
15. Power to compel employers to negotiate with trade unions or employees over industrial demands or demands for industrial agreements.
16. Power to certify collective workplace agreements.
17. Power to suspend the right to strike during the making of agreements.
18. Power to arbitrate certified agreements where disputes over agreements endanger life or significantly threaten the economy.
19. Power to arbitrate matters outside of the allowable award matters where agreements confer that power on the Commission.
20. Power to approve individual Australian Workplace Agreements referred to it by the Office of Employment Advocate.
21. Power to conduct its proceedings at its discretion, within the bounds of procedural fairness.
22. Power to set aside awards it has made, or to simplify awards.
23. Power to regulate certain contracts of independent contractors.
24. Power to appoint boards of reference to exercise certain of its powers.
25. Power to enter workplace premises, and inspect work and interview managers and staff.
26. Power to issue a certificate allowing a person damaged by strike action to sue in the courts for recovery of those damages.
27. Power to decide cases alleging unfair dismissal and to make orders for re-employment and back wages, or compensation, and power to hear cases of alleging unlawful discrimination based dismissals.
28. Power to register, deregister and (within limits) to regulate the affairs of industrial associations.
29. Powers to make orders assessing equal remuneration for work of equal value. and
30. Powers to make orders giving effect to certain international labour standards.

RECOMMENDATIONS:

Objective 1: If its terms are acceptable, there should be an orderly and structured implementation of a harmonised national workplace relations system bringing together under the one jurisdiction the multiple federal and state industrial tribunals that currently exist (see section 2).

Objective 2: The AIRC should have, so far as practicable, members exercising powers suited to their particular skills and capacities.

Objective 3: Appointments to the AIRC would usually be full time, but not exclusively so. They could be on a part time or seconded basis so long as no conflict of interest exists and appropriate independence can be brought to judgement on issues. The objective should be to get the best persons for the task, irrespective of term or tenure.

Objective 4: Options should be available for appointment of new commissioners of the AIRC for specified terms (not less than eight years).

Objective 5: The internal processes of the AIRC should be as transparent and accountable as possible, and members should be encouraged to visit individual workplaces, and undertake ongoing professional development in their areas of work. Information on process improvement and professional development in other tribunals and quasi-judicial bodies should be examined.

Objective 6: The AIRC should operate less like a court and more like a body conducting inquiries into issues and advising upon them. There should be a less adversarial and a more inquisitorial and/or facilitative approach to the determination of issues.

Objective 7: A number of courts and tribunals have undertaken considerable modernisation and reform, including through the use of less adversarial alternative dispute resolution (ADR) style approaches. There appears to be scope for tribunals to learn from the experiences of other jurisdictions. This should be pursued on an ongoing basis, including through statutory reform where appropriate.

4.2 COURTS

ACCI POLICY PRINCIPLES:

“Legislation should place substantial restrictions and limitations on industrial action . . . common law remedies should be available.”

“Procedures should be prescribed or adopted for the settlement of industrial disputes. These procedures should emphasise the desirability of resolution being achieved at workplace level, rather than through tribunals or courts, and without recourse to industrial action.”⁵⁷

POLICY AUDIT & ANALYSIS:

- ACCI has recognised a proper, but not central, role for the civil courts in the workplace relations system.
- The primary role of the courts should be to enforce the rule of law, where that enforcement is required to bring unlawful behaviour to account, and to deter unlawful conduct.
- The role of the courts in recognising the nature of the common law contract of employment and enforcing the terms of those contracts is also an important part of the system.
- Recourse to courts is however costly and fraught with delay and risks associated with litigation. For employers, it is sometimes a necessary but non-preferred option for dispute resolution. It may be symptomatic of a failing in employer/employee/union relations in the workplace, or it may be indicative of a system that inadequately balances the rights of these parties in their commercial and industrial activities.
- The advocacy ACCI undertook over many years to have laws against secondary boycotts returned to the *Trade Practices Act 1974* (as they now are), and the right we advocate of those who suffer loss and damage from unlawful industrial action to seek recovery in the civil courts for those losses from those who caused the losses, are two key examples of the proper role courts can have in the system.
- Remedies pursued in the courts for breaches, whether against unlawful industrial action or breach of awards, agreements or contracts of employment must be accessible, quick and low cost if they are to reflect the characteristics of the employment relationship and the circumstances employers and employees face when loss or damage is sustained from unlawful industrial activity.
- The system must guard against courts (and applications for interim injunctions) being (mis)used for purely tactical purposes to impose litigation pressure on one party to a dispute in order to secure concessions that would not otherwise be granted and are not merited.
- It is also an important principle that courts enforce and, where necessary, interpret statutory law, but do not make it or strain it to mean something other than it intends or expresses.
- The current federal system provides an interpretation and enforcement role for the civil courts, and – subject to some fundamentally unnecessary limits on accessing actions in tort – provides recourse in cases of unlawful industrial action.

- The current federal system has also moved away from the concept of specialist courts or judicial authorities, instead using the ordinary courts, primarily the Federal Court of Australia.
- The structure of the current system, as it contemplates the role and functioning of the civil courts, is generally consistent with ACCI policy. However in the operation of the principal statute, and in important cases on key statutory concepts, clear deficiencies in the operation of the system have been apparent. These are not reflective of all matters before the courts, but the concerns include:
 - Over-interpretation, where courts interpret key aspects of the legislative regime outside of the statutory intent of the Parliament.
 - Activism, where courts in effect create new law by straining the words of the statute to confer and imply concepts not provided for and not intended.
 - Interventionism, characterised by the awarding of interim injunctions to prevent workplace change based on a low threshold test of a reasonably arguable case, where the awarding of the injunctions changes the workplace relations environment in cases of dispute, thus distorting the balance of statutory rights and obligations in the workplace.
 - Re-hearing of disputes already heard – particularly allowing the re-hearing the merit of cases against unlawful industrial action after the AIRC has already issued certificates under s127 of the *Workplace Relations Act 1996* for the cessation of unlawful strikes.
 - Delays in the judicial and legal process.
- In many cases these concerns with the court process and outcomes are the product of deficiencies or ambiguities in the statutory framework of the system itself, and not judicial decision making *per se*.
- Legal cost and expense, arising from the high cost of litigation is also a concern to employers, employees and their representatives. There is an obvious need for the system, if it is to have integrity, to compel compliance with the rule of law and be able to effectively enforce it as such – subject to principles of natural justice. The cost and expense of the legal process is not simply a matter for the courts, judges or lawyers, nor is it restricted to the industrial system. It is a whole of society issue. Nonetheless, the inability of governments to achieve legislative rectification and reform of industrial legislation through the Parliament – when coupled with cost and delay in legal proceedings – creates a stalemate in the system that does not contribute to a clear understanding or balance between the rights and responsibilities of employers, employees and unions in the workplace.
- The observations of former federal Minister and labour lawyer John Button some 20 years ago may still broadly reflect the sentiment of many employers about the interaction of the industrial and legal systems:

*“Let me say there is something very attractive about an industrial relations system which is able to dispense with the services of lawyers... We have an industrial relations system which is highly legalistic, and riddled with both complexities and lawyers.”*⁵⁸

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⁵⁷ ACCI Labour Relations Policy

⁵⁸ Senator John Button, (1979) “View from the Bar Table” in Evans, G. *Law, Politics and the Labor Movement*, Law Services Bulletin Cooperative, Clayton.

RECOMMENDATIONS:

- Objective 1:** The operation of the judicial aspects of the current federal workplace relations system ought to be kept under ongoing review to assess ongoing consistency with the core public policy purposes of the system.
- Objective 2:** Legislative measures should be taken to minimise delays in accessing remedies by enabling a wider array of civil courts, including state courts and the federal magistrates court to exercise certain prescribed jurisdictions.
- Objective 3:** Given the damage to the interests of employers and employees and third parties created by unlawful industrial action, proceedings in the courts for relief from such action ought to be given listing priority.
- Objective 4:** The *Acts Interpretation Act* should be amended to provide that in the interpretation of workplace relations legislation, the courts ought to have primary regard to the policy intention of the parliament.
- Objective 5:** Consideration should be given to the establishment of a small claims jurisdiction to deal with recovery of monies due.

4.3 EMPLOYMENT ADVOCATE

ACCI POLICY PRINCIPLES:

“Employers and their employees are able to form agreements which genuinely suit them free of the interference of third parties (if that is their wish);

Employees are able to form agreements on an individual rather than collective level under the federal industrial relations system; and

The right of Australians to freely associate or not associate with unions and employer organisations is genuinely protected”⁵⁹

POLICY AUDIT & ANALYSIS:

- ACCI has been a longstanding advocate of the two major principles that underpin the work of the federal Office of the Employment Advocate (OEA) – the right to freedom of association, and the right to enter into individual as well as collective agreements.
- ACCI recognises the legitimate role for a body such as the Employment Advocate, within

statutory constraints, to facilitate the implementation of these policy objectives.

- The OEA has generally worked well since its commencement in 1997. It has sought to establish working relationships with workplace parties, and has exercised an appropriate balance between education and enforcement in its compliance functions.

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⁵⁹ ACCI Labour Relations Policy

RECOMMENDATIONS:

Objective 1: The federal Office of the Employment Advocate should continue to build working relationships with industry, industry representatives and trade unions for the purposes of assisting employers and employees in the making of workplace agreements and the promotion of best practice.

Objective 2: Data and analysis on the compliance activities of the federal Office of the Employment Advocate should be published on an annual basis in an information digest separate from the OEA’s annual report to educate employers and employees on rights and obligations in agreement making and freedom of association.

Objective 3: The OEA should have jurisdiction to certify both individual and collective agreements, at least: (a) in workplaces where both individual AWAs and collective agreements co-exist, (b) more generally in workplaces where employers and employees elect to have their collective agreements approved by the OEA rather than the AIRC. The OEA should also have sole responsibility for the approval of AWAs.

Objective 4: Over time, there should be a single administrative approval authority solely responsible for the approval of collective agreements and individual agreements on an administrative basis.

4.4 NATIONAL LABOUR CONSULTATIVE COUNCIL (NLCC)

ACCI POLICY PRINCIPLES:

“ACCI's overarching policy objectives are . . . to achieve legislative reform which will permit greater flexibility and efficiency in the operation of the enterprise and . . . to convince all political parties, and the community in general, of the necessity for further labour market reform . . .

Specific, immediate policy objectives include . . . the development of detailed proposals for legislative change.”⁶⁰

POLICY AUDIT & ANALYSIS:

- The NLCC is the peak Australian tripartite (federal government, trade unions and employer representatives) consultative body on workplace relations matters.
- ACCI has supported the establishment and ongoing work of the NLCC. It is of particular value as a forum to disengage policy concepts from day-to-day political debate over industrial reform, and to have the NLCC's sub committee on industrial legislation scrutinise legislative proposals prior to and during their introduction into parliament.
- In supporting the work of the NLCC, ACCI acknowledges that the NLCC is far distant from the primary focus of the system where workplace decision-making and change should be directed – employers and employees in individual enterprises.
- The work of restructuring the federal *Workplace Relations Act* into a more useable and simplified piece of legislation is an appropriate task for the NLCC's sub-committee on industrial legislation, COIL. This task commenced in concept in 2001, but has not significantly progressed. It should be resumed on the basis that legislative restructuring is itself a desirable objective for users of the system.
- Government legislative proposals generally proceed through the COIL process. This does not occur with respect to private member Bills. Some benefit may exist to private members of parliament if they had access to the confidential views and analysis of the peak tripartite body on policy or technical issues arising from the legislative proposals.

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⁶⁰ ACCI Labour Relations Policy

RECOMMENDATIONS:

- Objective 1:** The NLCC's Committee on Industrial Legislation (COIL) should meet on a quarterly basis over the next two years to oversee the redrafting of the federal *Workplace Relations Act 1996* into a simplified form.
- Objective 2:** Should the concept of a harmonised national workplace relations system be adopted, the membership of the NLCC ought to be extended to include a representative of state governments participating in the system.
- Objective 3:** Individual members of the Federal Parliament introducing private members Bills on workplace relations matters should be given the opportunity (if they so wish) of first submitting their legislative proposals to the NLCC's Committee on Industrial Legislation (COIL) for analysis and comment.
- Objective 4:** A representative of the WRMC (a State Minister) should be invited to attend NLCC, particularly to support the proper discussion of options for harmonisation.

4.5 WORKPLACE RELATIONS MINISTERS COUNCIL (WRMC)

ACCI POLICY PRINCIPLES:

“ACCI's overarching policy objectives are: . . . to secure coordination of legislative measures taken at federal and state levels.”⁶¹

POLICY AUDIT & ANALYSIS:

- The Workplace Relations Ministers Council (WRMC) is a formal consultative forum between the federal and all state governments on workplace relations policy and administration (as well as workers compensation and occupational health and safety policy). It is not a statutory body, but is formed under the auspices of the Council of Australian Governments (COAG).
- ACCI acknowledges the need for a formal consultative forum of this nature between governments that can assist in information sharing and the co-ordination of policy or administrative matters.
- The WRMC has its limitations in terms of policy development given the continuing changes in political profile and industrial policy of Australian governments. Given these limitations, WRMC cannot be expected to achieve resolution of fundamental issues of principle, but should act as a forum where matters of mutual interest can be identified and actioned for the good of employers and employees and the operation of the system.
- The WRMC can be expected to be one of the consultative forums involved in the development of a harmonised national workplace relations system, but discussion within WRMC cannot be expected to be a substitute for bilateral discussions between the federal and State governments of the day.

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⁶¹ ACCI Labour Relations Policy

RECOMMENDATIONS:

Objective 1: The WRMC should continue to meet on matters of mutual interest with a view to practical decision making on harmonisation of federal and State systems (at least on those non contentious areas of industrial administration and resource sharing between jurisdictions).

Objective 2: The WRMC should make its agenda publicly available prior to each meeting, at least to peak employer and trade union councils, and continue to publicly distribute a report on its meetings, discussions and outcomes.

Objective 3: The WRMC should adopt the principles and policy directions outlined in *Modern Workplace: Modern Future* as the blueprint for future policy development in federal, state and territory jurisdictions.

Objective 4: The WRMC should provide a report to the Council of Australian Governments (COAG) on the recommendations of the Taskforce of Inquiry into a national harmonised system prior to the proposed consideration of the issue by COAG.

Objective 5: Employer and employee representatives of the NLCC should be invited to attend the WRMC as observers.

4.6 INTERNATIONAL LABOUR RELATIONS

ACCI POLICY PRINCIPLES:

ACCI has a long involvement in international labour relations, and in representing Australian employers in international forums and meetings.

ACCI has played an important role in improving international standards and approaches and in ensuring Australian employers can properly address Australian proposals based on international developments.

POLICY AUDIT & ANALYSIS:

- ACCI has been an active and strong participant in international labour relations bodies (particularly the International Labour Organisation (ILO), the International Organisation of Employers (IOE) and the Organisation for Economic Co-operation and Development (OECD)). Constructive participation by Australian representatives in policy debate on labour relations practices, standards and outcomes is healthy and desirable. This is particularly so given the high profile that industrial debate has in domestic Australian policy.
- An analysis of international trends and opinions should not be exclusively focused on the ILO. The OECD and the International Monetary Fund (IMF) also regularly contribute to the debate on the nature and form of labour market regulation and standard setting.
- Many emerging factors justify a continuing strong participation by Australian business interests in international labour relations issues:
 - The increasing effect of the global economy on Australian trade and commerce.
 - The imperative that domestic Australian policy, in key areas of economic performance such as labour relations, be internationally competitive.
 - The increasing movement by Australian and foreign owned companies of senior or specialist staff across international borders.
 - The emergence of developing nations, particularly in our region, with differing levels of labour regulation.
 - The need to uphold and foster good international relations and respect the civilising force of labour relations standards and international forums in the face of a changing world following events such as those of 11 September 2001 and 12 October 2002.
- ACCI has also been a strong proponent for appropriate reform to decision making within international bodies, particularly the ILO.
- Equally, ACCI has been committed to ensure that Australian domestic labour relations policy and practice be wholly determined by domestic decision makers. International instruments should not be supported or ratified unless

appropriate to our local circumstances, subject to an open period of domestic consultation and assessment, and only where full prior compliance with Australian law and practice exists. International industrial developments should inform our domestic debate, but not regulate it.

- The current federal system generally applies these principles advocated by ACCI. There is however undesirable scope remaining within the federal system for the inappropriate use of international standards to regulate or influence decision making of the Australian Industrial Relations Commission and courts. That scope should be constrained.

RECOMMENDATIONS:

Objective 1: Australia should maintain, and in appropriate circumstances, increase its participation in international labour relations forums, including in the work of the ILO both globally and in our region.

Objective 2: The Australian Government should seek election to the Governing Body of the ILO at the next available opportunity.

Objective 3: Australian employers, through their peak council, should continue to actively participate in the International Labour Affairs Committee established by the National Labour Consultative Council and report to the NLCC on its activities.

Objective 4: Australian interests (government, employers and trade unions) should support and promote further reform of the ILO and international labour relations, including the modernisation, simplification, and consolidation of standards, and exercise appropriate caution in adoption or ratification of standards.

Objective 5: The views of relevant international bodies on labour market and workplace policy including the OECD, the ILO and the IMF be widely distributed within government, industry and the broader community.