



USING THE 'CORPORATIONS POWER' TO MAKE COMMONWEALTH INDUSTRIAL RELATIONS LAWS

The content of Australia's industrial relations laws is a hot topic. The Australian Government is considering far reaching changes that may have the potential to create a more competitive and efficient labour market for employers and employees. Through the ACCI Modern Workplace: Modern Future Blueprint the Australian Chamber of Commerce and Industry is at the forefront of this reform debate.

At the same time as reviewing the content of employment regulation, the government is also examining a different but no less important question – the source of these laws and in particular, whether Australia should have a national industrial relations system in lieu of the current multiple federal and State laws. The mechanism proposed by the government to achieve this objective is the existing corporations power set out in section 51(xx) of the Australian Constitution. This article examines just what is meant by the corporations power, and the implications of its use for the existing industrial relations system.

In a recent speech to the Committee for Economic Development of Australia, the Commonwealth Minister for Employment and Workplace Relations Hon. Kevin Andrews MP said that *"if a national system of corporate and taxation regulation is desirable and achievable, then there is no reason why a unitary or national system is not just as appropriate to govern how those corporations employ their staff. If we are serious about pursuing a system whose focus is on increasing productivity and reducing complexity, then the issue of a national system must be addressed."*

This followed the Prime Minister, Hon. John Howard MP, telling the national media on 6th February 2005 *"I favor a single system...I think there is a lot to be said for a single system."*

These public remarks by the Prime Minister and the Minister for Employment and Workplace Relations are the strongest indication yet made in the history of Australian federation that the Australian Government is contemplating a single national industrial relations system to replace the century-long combination of Commonwealth and State laws.

THE CONSTITUTIONAL RULES

Achieving a national system is only possible if either the Commonwealth parliament has constitutional capacity to

I N S I D E

International Labour Standards Should Not Be Used For Protectionist Purposes

Trade and investment liberalisation has delivered substantial outcomes to reformist countries and the world economy over the past decade or so. However, advocates of freer trade must be wary of the inclusion of labour standards in multilateral, regional and bilateral trade agreements, given that they can represent little more than back-door protectionism.

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Australian Technical Colleges - Raising the Status of the Traditional Trades

During the 2004 Federal Election campaign, the Australian Government promised that if re-elected it would create 24 Australian Technical Colleges in targeted regions as part of its longer-term response to skills shortages and also to raise the status of vocational education and training in Australia. ACCI, the nation's leading employer organisation, has developed a model and a set of guiding principles for these colleges to ensure that the Government's objectives are met.

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establish one by statute, or if agreement is reached between the Commonwealth and one or more State governments for a sharing or transfer of legislative powers.

To assess the case for this reform measure it is necessary to examine the nature of the existing systems and their historical development.

Three principles of constitutional law are relevant:

- For a law enacted by the Commonwealth parliament to be constitutional it must come within a head of legislative power set out in section 51 of the Australian Constitution;
- Where a (valid) Commonwealth law is enacted, it prevails over State laws to the extent of an inconsistency between them (s 109 of the Constitution). It will do this if it 'covers the field' of a subject matter; and
- Unless the Commonwealth makes a law over a subject matter then the State usually has unrestricted power to make laws over that topic.

WHICH INDUSTRIAL RELATIONS LAWS CURRENTLY EXIST

Australia has multiple parliaments making laws about industrial relations. In all States other than Victoria, which referred its powers to the Commonwealth in 1996, there are Commonwealth and State industrial relations laws. In Victoria and both Territories (ACT/NT) there are Commonwealth industrial relations laws only.

Commonwealth and State industrial relations laws deal with almost identical subject matters (minimum wages and employment conditions, creation and powers of industrial tribunals, awards, dispute settling, enterprise bargaining, trade union rights, registration of union and employer bodies and government inspectors). However, Commonwealth and State industrial relations laws

differ in the rights and obligations they set on each of these topics.

WHICH INDUSTRIAL RELATIONS LAWS CURRENTLY APPLY TO WHOM?

In all jurisdictions other than Victoria and the Territories, private sector workplaces have to establish whether they are bound by the Commonwealth laws or the State laws. This is no easy task, and there is no logic to it. Businesses in the same industry competing with each other (even in the same street or shopping centre) may be under different industrial relations laws. In some cases, in the one business employees are under Commonwealth laws but other employees doing different tasks are under State laws.

If a business is not under the Commonwealth law then it is under the State law.

Whether a business is under the Commonwealth laws depends on whether it is bound by a Commonwealth award made by the Australian Industrial Relations Commission. An employer can only be bound by a Commonwealth award if they have been party to an 'interstate industrial dispute' and the AIRC has made an award binding them.

THE 'INTERSTATE INDUSTRIAL DISPUTE POWER' IS CURRENTLY USED

Current Commonwealth industrial relations laws are made using the power in the Constitution over 'interstate industrial disputes'.

This head of power in s 51(xxxv) of the Constitution says that the Commonwealth parliament has powers 'to make laws about conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State'. This is the power that was used in 1904 when Commonwealth industrial relations laws were first made.

A business does not have to operate in more than one State to be party to an interstate industrial dispute (and bound by the Commonwealth law). It could be wholly operating in one State.

BECOMING BOUND BY COMMONWEALTH INDUSTRIAL RELATIONS LAWS

A business becomes party to an 'interstate industrial dispute' as soon as the federal office of a union makes a demand on that business that the business disagrees with. There does not need to be actual disagreement between employers and employees. There does not need to be any union members. A union letter with written demands suffices, even if the letter is never replied to.

Another way a business becomes party to an 'interstate industrial dispute' is if it becomes a member of an employer organisation that is named in an award as party to an industrial dispute with the union on behalf of its members. Again, the employer organisation does not need to be operating in more than one State.

In practice, unions make lists of businesses they want under Commonwealth laws (for example, by going through the phone book) and then sending letters of demand to create a dispute. Once a dispute is constructed then a Commonwealth award can be made. Once a Commonwealth award is made against that business then its legal obligations move instantly from State laws to Commonwealth laws.

Employers have no choice in these scenarios.

Moreover, once a business is bound by the Commonwealth law it cannot choose to go back to State laws (not even with the agreement of its employees). A business under State laws cannot stop a union creating an interstate dispute (although the AIRC has discretion whether to make an award). Commonwealth awards can (and are) made without a business

being present or knowing that the orders have been made against them. Some businesses continue under State laws unaware they are under Commonwealth laws.

As can be seen, unions and industrial tribunals have huge power in deciding who is bound by what laws.

Not all employers are bound by Commonwealth awards because not all have been subject to the interstate industrial dispute process. This constitutional power cannot give Commonwealth laws 100 per cent coverage.

USING THE CORPORATIONS POWER

It is estimated that the Commonwealth industrial relations laws currently apply to 60 per cent of Australian employees in the private sector. The exact percentage will vary between States.

In February 2005 the Commonwealth Minister announced that he was considering the use of the corporations power to create a national industrial relations system:

“No national government in the 21st-century would seek to establish an institution which limited itself to industrial disputes extending beyond the borders of more than one state. No government would limit the powers of this institution to conciliation and arbitration. No government would introduce a system which was predicated on the creation of disputes in order for them to be solved. These were inherent limitations placed on the original system, and the inherent limitations still inhibit it now.”

In pursuing this case, Minister Andrews outlined arguments for reform that were last articulated in government by then Minister for Employment, Workplace Relations and Small Business Hon. Peter Reith MP in a series of discussion papers in 2000 under the title *Breaking the Gridlock: Towards a Simpler National*

Workplace Relations System. Those discussion papers referred extensively to a wide range of commentators across the industrial and political divide who came to similar conclusions about the inadequacy of current arrangements.

The corporations power is the existing power in section 51(xx) of the Australian Constitution for the federal parliament to make laws with respect to “trading or financial corporations”.

For many years this power was only used to make laws about the affairs of corporations (corporate structure, directors, shareholders, insolvency etc).

Since the 1970s the High Court has ruled that the corporations power can be used to make laws about dealings between corporations and third parties. For example, the Trade Practices Act is based on the corporations power.

If this interpretation by the High Court is applied to industrial relations then the power would allow the federal parliament to make laws about industrial relations between a corporation and its employees. There would no longer be the need for an interstate industrial dispute to exist for Commonwealth laws to apply. Wages and employment conditions between a corporation and its employees could be directly legislated by the federal parliament or by a tribunal set up by federal legislation (such as the AIRC and its awards).

The use of the corporations power for industrial relations purposes has not been challenged in the High Court. It remains to be tested. Most constitutional experts believe that the Court would uphold the validity of such laws. To exclude State industrial relations laws however, the Commonwealth laws would need to be framed to ‘cover the field’ to the exclusion of State laws.

The use of the corporations power for industrial relations purposes already exists in Commonwealth laws to a limited extent.

It was first used by the Keating Government in 1993 for the purposes of establishing the enterprise bargaining system. Under those laws, any company (even one under State laws) could make a collective agreement with a union (and, in limited cases, employees) and then be bound by Commonwealth laws. This use of the corporations power continues to this day.

It was then used by the Howard government in 1996 to create the Australian Workplace Agreement (AWA) system. Any company (even one under State laws) can make an individual agreement with an employee and then be bound by Commonwealth laws. This use of the corporations power also continues to this day.

The corporations power does not currently apply to awards. As mentioned above, awards are still based on the interstate industrial dispute power.

The real heat in the debate that has emerged in 2005 is that the Australian Government is proposing to use the corporations power for Commonwealth awards. In other words, an employer will be bound by federal industrial relations laws and Commonwealth awards simply by virtue of the employer being a company.

For companies already under Commonwealth awards (because they are party to an interstate dispute) there would be no change. The change will be for employers who are companies and who currently employ under State awards. They would automatically be moved from State awards to Commonwealth awards.

If this happened the coverage of Commonwealth laws would move from its current 60 per cent of the private sector workforce to about 85 per cent. In other words, an additional 25 per cent of the workforce (those employees employed by a company under a State award) would be moved to the federal system.

100 per cent coverage by Commonwealth laws is not possible using the corporations power because not all employers are companies. About 15 per cent of employees are employed by partnerships and non corporate entities. They would remain under State laws.

In addition to moving award coverage by using the corporations power, the Australian Government is also proposing to use the corporations power as the basis for unfair dismissal laws and trade union right of entry laws. In other words, an employer would be bound by federal unfair dismissal laws and right of entry laws if they are a corporation (and not whether they have a federal or State award or agreement).

THE CASE FOR A NATIONAL SYSTEM

The current multiple systems do not operate in a rational or cohesive manner. Further, 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 to use their powers, on the extent of agreement making and the extent to which trade unions create federal award residency through the artifice of interstate paper disputes.

The limited, piecemeal and ad-hoc usages of constitutional powers have led to an incoherent system where unions and industrial tribunals, not employers and employees, are largely the gate keepers deciding whether the laws of one jurisdiction or another are to apply.

It has also led to a mish-mash of 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 at the whim of unions is substantial, as is the scope for State businesses with differing corporate structures to be bound by different jurisdictions for different industrial purposes (e.g. 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, industrial tribunals) can alter the very jurisdiction under which rights and obligations are formed, at their discretion, and against the wishes of employers and employees in a workplace – and even without their direct knowledge or input in the decision-making.

It is also apparent that even so-called ‘safety net’ standards between 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. This divergence in standards increases compliance costs for employers that employ workers across State borders, or who suddenly find themselves lumbered with different rights and obligations.

This is no mere theory.

The Australian Government’s discussion papers in 2000 pointed to a situation where a country motel operator was sued for tens of thousands of dollars in back pay because years before and without their knowledge or consent they had been arbitrarily moved from a State award to a federal award. The two awards had different pay rates and penalty rates.

In 2003 nearly 20,000 mainly non-union Victorian retailers were forcibly ‘roped-in’ to federal awards through interstate paper disputes initiated years before by the Shop Assistants Union in the Australian Industrial Relations Commission. In none of those businesses were employers and employees actually in disagreement

over their wages and employment conditions.

WHAT ABOUT COMPETITIVE FEDERALISM?

It is sometimes said that a combination of different State laws and Commonwealth laws is good for federalism because different models of regulation can be tried and people can then choose to use the most desirable. In some areas of policy this is a sound argument.

In the industrial relations context this proposition is very questionable. An employer or an employee cannot choose which State law they want to use, or whether they want to use a federal law over a State law or vice versa. Once forced into the federal system by a trade union, a business cannot choose to go back into State laws any more than they choose to go into federal laws in the first place. When it suits them, unions use the constitutional override of federal laws to prevent employers from accessing the jurisdiction of their choice. This is why tens of thousands of employees were forcibly transferred by Victorian unions from the Victorian public sector to federal awards in the mid 1990s, and why thousands more in that State’s private sector were forcibly transferred in 2003/04. None of those employers or employees now have the right to work under their former regulation.

WHERE TO FROM HERE?

The Australian Government has put the proposal for a national system into the public arena and given it strong endorsement. It would see the creation of a near-national system, not a full national system.

To implement it, there would need to be legislation. The legislation, once passed, would need to survive a High Court challenge.

The objective of establishing a national industrial relations system is supported by ACCI. Given that no constitutional power can give the

Commonwealth 100 per cent coverage, and given that a true national system at the end of the day requires 100 per cent coverage, then ACCI policy expresses a preference that this be done co-operatively between Commonwealth and State governments, or in the absence of agreement by other means.

Agreement for a single system was reached in 1996 and 2004 between the Commonwealth and Victoria, but is unlikely in current circumstances in any other State. The Victorian (Labor) government continues to support a single system in that State and has not taken back (as it could) its referral of constitutional power.

The current Australian Government appears to be working on the basis that if its laws were to cover 85 per cent of the Australian private sector (rather than the current 60 per cent) then State governments will over time conclude that an expensive taxpayer funded State system covering unincorporated workplaces only is not in the public interest, and hand over their part of the system to the Commonwealth.

Achieving a national system would be a significant structural reform in its own right, particularly for nationally operating businesses and for the (many) intra-State businesses that are at risk of having their employment obligations changed by being arbitrarily and compulsorily moved by unions or industrial tribunals from one set of industrial relations laws to another.

It is important though that a national system not be seen as the full measure of workplace relations reform that is

needed by Australia. At the end of the day, what matters is the scope that employers and employees have to build direct relationships to set wages and employment conditions that are relevant to them in their workplace. The content of any national system will have a greater impact on outcomes for business people and working people than the existence of a national system itself.

The case for moving towards a national workplace relations system should progress in an orderly way. An open-minded approach should be adopted 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 focus needs to be on 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. If agreement between governments cannot be achieved then leadership by the Australian Government is required. An appropriate use of the Commonwealth corporations power would go a long way to achieving the objective that, over time, may well lead to a single national system.

Once established, we will then all wonder why it took so many years to appreciate just how unreal and inappropriate for a modern economy is the current system. No longer would union officials and industrial tribunals be empowered to alter the legal rights of tens of thousands of businesses by

creating disputes that don't exist with employers who are only known to them as a name and address in the Yellow Pages, and employees who they don't know at all.

The overriding conclusion is that the current basis on which industrial relations laws are made is unfair and untenable. The constitutional underpinning for the framework of law and policy needs to be fundamentally revised. There is a viable alternative - the corporations power. It is not a perfect alternative. However, it would produce a more rational and cohesive basis for a near-national system and should be used.

Editorial Note: Due to the complexity of the current constitutional arrangements that underpin the existing industrial relations systems in Australia, a number of propositions in this article have been condensed to simple generalisations for the ease of reference, even though a range of exceptions and qualifications to the general statements exist. The fact that this note of qualification is required itself highlights the need for a simpler system of regulation. If the current system cannot be simply explained, then it must be reformed so employers and employees can understand the nature and source of their legal obligations.

INTERNATIONAL LABOUR STANDARDS SHOULD NOT BE USED FOR PROTECTIONIST PURPOSES

Trade and investment liberalisation has delivered substantial outcomes to reformist countries and the world economy over the past decade or so. However, advocates of freer trade must be wary of the inclusion of labour standards in multilateral, regional and bilateral trade agreements, given that they can represent little more than back-door protectionism.

One of the most divisive issues in international trade negotiations is the nature and extent of linkages between trade law and labour standards - in particular whether labour and social clauses should be included in international trade agreements.

These often heated debates create sharp divisions between business and union representatives in industrialised nations, and between the governments of many developed countries and most developing countries.

The main arguments of those advocating linking trade and labour standards include that:

- Low wage regimes in developing countries are evidence of poorly protected core labour rights, which in turn underpins 'unfair' competition by exporters of those goods/importers and resellers in developed countries;
- Linkages will provide a mechanism for lifting labour standards in developing countries, to the benefit of the otherwise exploited labour forces in those countries;
- Promoting human rights and values such as openness, transparency and good governance can help cement the broader rule of law, which benefits business; and
- Creating uniform internationally accepted labour rights means there is less of a capacity for them to be misused by developed countries for protectionist purposes, and reduced potential for a loss of relative competitive advantage by developing countries (as all would be lifted equally).

In contrast, opponents of linking trade and labour standards argue that:

- These advocates are often pushing a thinly disguised protectionist agenda, and are seeking to deny developing countries the opportunity to realise their competitive and comparative economic and trade advantages;
- Wage profiles in developing countries reflect the relative abundance of unskilled labour and associated lower labour productivity, which is to be expected given their level of economic development and growth;
- The imposition of developed country labour standards in developing countries is an effort to transfer the burden of structural adjustment from the former to the latter;
- Where international labour standards are incompatible with the level of development in the country concerned, they will inevitably involve costs for the local labour force, most notably in loss of employment; and
- It is trade engagement and liberalisation, and the resulting economic development and growth rather than trade penalties that is the most effective and practical means of enhancing labour practices in developing countries.

ACCI is firmly in the latter camp – we have opposed and will continue to oppose protectionist-inspired moves to link trade and labour market standards in international fora.

EMPIRICAL EVIDENCE

A substantial body of quantitative analyses has emerged over the past decade or so seeking to measure and evaluate the claims of the different sides of the trade and labour standards debate.

The broad message from most of these studies is that many of the problems that developed-country advocates of trade and labour standard linkages are seeking to address are not readily attributable to poor labour standards in developing countries. In other words, the 'cure' does not reflect the 'complaint'.

Contrary to these claims, it is technological change rather than unfair international trade that has been the driving force behind the decline in demand for lower skilled workers in developed countries over the past two decades, with the rise in unemployment amongst unskilled labour reflecting the impediments to wage adjustments.

Economists have also examined the quantitative linkages between trade and labour standards, in particular whether artificially raising labour standards in developing countries improves or diminishes their international trade performance.

Taken as a whole, and given the different analytical approaches and the countries and time periods studied, artificially raising labour standards beyond those justified or sustained by the country's level of economic development tends to come at a cost to its trade performance – or in other

words at a cost to international competitiveness.

Robust analyses have undermined the 'unfair' trade argument (that lower labour standards/practices give developing countries 'unfair' competitive advantages in developed-country markets) finding imports from developing countries manufactured in sectors with allegedly lower labour standards do not have a larger displacement effect on employment and wage levels in developed countries relative to other sectors with purportedly higher labour standards.

The empirical evidence also tends to refute the 'race to the bottom' argument advanced by advocates of linkages between trade and labour standards - that is that developing and transitional economies continually lower their domestic labour standards to attract foreign direct investment.

Rather, multinational firms tend to employ much the same labour practices and production techniques in their foreign production facilities as they do in their home country production, reflecting both operational efficiencies and concern for their commercial reputations.

If anything, the evidence suggests a 'floating to the top' rather than a 'race to the bottom' in labour standards, with the appropriate level being determined by individual countries based on their own circumstances such as their level of economic development, labour endowments, international competitiveness and engagement in trade.

In other words, developing countries have lower wages primarily because they also have lower productivity, whereas productivity-adjusted wages tend to be fairly similar across developed and developing countries.

As such, imposing developed-country labour standards on developing countries may not necessarily raise labour costs in developing countries, but may well merely involve a diversion of money wages into 'non-

money benefits', so reducing the household disposable income and reducing the practical living standards of those impacted.

Insofar as differences in wage levels reflect differences in productivity and skills profiles of developing vs developed countries, economic and trade efficiency, and international competitiveness calls for a variety, rather than a narrow set, of labour practices across nations.

DEVELOPING COUNTRIES

A core pillar of the argument for linking trade and labour standards is the expected benefits such arrangements would have for developing countries – or that people in developing countries would be 'better off' with higher labour standards.

However, insofar as labour standards are raised above the level of productivity and the competitiveness of developing countries, such initiatives are in fact likely to be detrimental.

Economic research by respected agencies such as the Organisation for Economic Co-Operation and Development and the US International Trade Commission on the effects of labour standards on the exports of unskilled labour-intensive manufactures (the comparative advantage of developing countries) has found that:

- Labour standards tend to be higher in export-oriented, than in non-traded, sectors of the economies of developing countries and higher in sectors with greater levels of foreign equity/investment, suggesting the better strategy is international economic engagement and trade and investment liberalisation;
- Practical labour standards tend to be higher in firms/industries in developing countries with a better educated labour force suggesting a better strategy for developing countries and foreign aid agencies

is to invest in, at the very least, primary/secondary education;

- There is a negative relationship between higher core labour standards and the comparative advantage of developing countries in low-skilled, labour intensive manufactured exports - that is, higher labour standards diminish the export competitiveness of developing countries;
- Developing countries with higher labour standards generally do not have higher penetration rates for the exports into developed country markets than comparable countries with lower labour standards indicating that higher labour standards are not a source of competitive advantage for developing countries; and
- The export performance of developing countries can be negatively correlated with the ratification of certain international conventions on labour standards, such as those dealing with freedom of association, collective bargaining and non-discrimination in employment

LEGAL PROBLEMS

Any formal efforts to link trade and labour standards under international law (whether through labour or trade law streams) would encounter a number of substantive legal problems.

Amongst these problems are the coherence and content of these different legal streams, different fora (labour standards are the domain of the International Labour Organisation or ILO while trade law falls under the World Trade Organisation or WTO), and the appropriate forum for the resolution of complaints.

These problems would be compounded by the largely voluntary (and uneven) nature of the adoption of ILO conventions, and the fact that WTO law addresses public law (regulatory measures taken by States parties) and not private law (employment practices within domestic enterprises).

More specifically, any attempts to link, let alone harmonise or integrate, trade law and labour standards would be impaired by clear differences in approach, which have major implications for the adjudication of any dispute and enforcement of any decision.

The ILO tends to rely on moral suasion, educational programs and technical assistance, while the WTO also has the capacity for formal enforcement procedures under its Dispute Settlement Mechanism (a structural element not present in the ILO system).

Other key differences between international trade law and labour standards include:

- International labour standards tend to be non-binding and non-enforceable, in contrast to international trade law;
- International labour standards tend to favour broader statements of principle, while international trade law prefers specific commitments; and
- International labour law outlines obligations owed by governments to their own nationals, while international trade law sets down obligations between national governments.

Enforcement would also be problematic, reflecting the different nature of the obligations of the parties to different streams of international law.

Ratification of an ILO instrument can signal a commitment to make progress on the subject matter of the relevant convention or recommendation, while ratification of a WTO agreement imposes immediate minimum obligations and performance requirements.

The grounds for action also differ - under international labour standards it would likely be actions that actually harm labour security whereas under international trade law it would be breaches of rules that nullify or impair

an expectation of conditions of competition.

Enforcement under the WTO requires the injury or the subsidy paid to be measurable. Establishing valid minimum criteria, let alone quantifying the 'damage' caused by the breach of a particular labour standard would be difficult for many countries.

Advocates of the linkage of trade and labour standards have held out Article XX (the General Exceptions provision - sometimes misrepresented as the 'social clause') of the General Agreement on Tariffs and Trade (GATT) as a vehicle for progressing these matters.

This argument rests on the claim GATT Article XX is intended to accommodate non-trade matters, such as the environment and human rights (the latter through Article XX(e) dealing with prison labour).

These advocates further argue, based on a creative reading of certain WTO Panel decisions, that GATT Article XX authorises domestic laws prohibiting imports from States that do not respect international environmental standards, and by inference international labour standards.

These arguments are flawed in several aspects - WTO jurisprudence in this area has not been fully resolved (reflecting a number of inconsistent Panel decisions); it relates to a specific provision on environmental matters (GATT Article XX(g)); and the inferential extension to international labour standards is suspect, given there is no general labour element within Article XX.

Any attempt to link trade and labour standards under Article XX is also likely to fail given that Article XX itself prohibits "... a *disguised restriction on international trade*..."

Another argument of those calling for structured linkages between trade and labour standards is the potential recourse to the formal dispute

settlement mechanism of the WTO, which contrasts with the absence of comparable enforcement procedures within the International Labour Organisation.

In effect, they argue the WTO provides a potential vehicle (the Dispute Settlement Mechanism) to enforce international labour standards, which is absent from the ILO.

This view is flawed however and involves at best a misunderstanding, and at worst a misrepresentation of the function and role of the WTO dispute settlement mechanism.

The WTO's dispute settlement mechanism was created solely to deal with trade disputes, primarily through the withdrawal of measures that are inconsistent with WTO agreements.

The ethos of trade retaliation and sanctions proposed by advocates of trade and labour standards linkages (WTO enforced trade penalties for those who fail to meet 'agreed international labour standards') is inconsistent with the objectives and functioning of the WTO system, and contrary to its goal of trade liberalisation.

The inclusion of labour standards within the WTO per se, or as a judicable matter within the WTO's dispute settlement mechanism, would likely place excessive strains on WTO members, potentially to the extent of their own commitment to, and membership of, the multilateral rules-based trading system.

In short, the costs to the world economy and community of nations caused by the damage to the international trading system by using its dispute settlement procedures to enforce international labour standards would be likely to far and away exceed any marginal gains to particular groups in some countries.

WHICH LABOUR STANDARDS?

Finally, discussion on trade and labour standards is impeded by the lack of

definition of ‘what/which labour standards?’

While the ILO contains some 180 Conventions and more than 190 Recommendations, not even the most strident advocate of linking trade and labour standards has seriously argued all of these labour regulations constituted core labour standards.

The ILO categorised ‘core labour standards’ in its 1998 Declaration on the Fundamental Principles and Rights at Work highlighting what Member States regard as basic labour rights regardless of the level of economic development.

The Declaration set down four fundamental rights: freedom of association and effective recognition of the rights to collective bargaining; the elimination of all forms of forced or compulsory labour; the effective abolition of child labour; and the elimination of discrimination in employment and occupation.

Adoption of the Declaration was facilitated by a perception the fundamental rights concerned were

more about rights to a process, rather than rights to a particular outcome – it did not, for example, prescribe minimum wage setting procedures, let alone appropriate paid wages.

CONCLUSION

The issue of potential structured linkages between trade and labour standards has already been considered – and rejected – by the WTO.

At the first WTO Ministerial Conference in Singapore in December 1996 the issue was taken up and addressed in the Ministerial Declaration, which stated:

“We renew our commitment to the observance of internationally recognized core labour standards. The International Labour Organization (ILO) is the competent body to set and deal with these standards, and we affirm our support for its work in promoting them.”

“We believe that economic growth and development fostered by increased trade and further trade liberalization contribute to the promotion of these standards.”

“We reject the use of labour standards for protectionist purposes, and agree that the comparative advantage of countries, particularly low-wage developing countries, must in no way be put into question. In this regard, we note that the WTO and ILO Secretariats will continue their existing collaboration.”

ACCI endorses these sentiments. We believe that the adoption and enforcement of multilateral labour standards is the primary responsibility of the ILO while the adoption and enforcement of multilateral trade law and regulations is the primary responsibility of the WTO.

Where interactions between multilateral labour standards and trade laws are identified, they should continue to be handled in a cooperative manner between these two bodies.

Market-based economic policies including openness to international trade and investment offers the best prospect for improving labour practices and living standards.

AUSTRALIAN TECHNICAL COLLEGES - RAISING THE STATUS OF THE TRADITIONAL TRADES

During the 2004 Federal Election campaign, the Australian Government promised that if re-elected it would create 24 Australian Technical Colleges in targeted regions as part of its longer-term response to skills shortages and also to raise the status of vocational education and training in Australia. ACCI, the nation’s leading employer organisation, has developed a model and a set of guiding principles for these colleges to ensure that the Government’s objectives are met.

The Department of Employment and Workplace Relations (DEWR) has been monitoring and assessing skill shortages for over 25 years. While no trade has been in constant shortage, some trades have been in shortage for the majority of that time. Labour and skill shortages are exacerbated in times of economic growth and low unemployment.

Labour and skill shortages are complex labour market problems for

which there is no quick fix. As unpopular as that notion is, industry has been active in working with governments to address shortages through a mix of initiatives and strategies including:

- Preparation of career information for students and parents on available occupations and opportunities in the range of industries affected by shortages.

- Promotion to employers of the benefits of New Apprenticeships and other Vocational Education and Training (VET) activity in schools.
- Working with the education sector to improve understanding of employer views and requirements of education and training, including employability skills.
- Encouraging governments to link all public funding to choice by the

employer of their preferred provider (User Choice).

- Establishing new, innovative pathways to a qualification (which suit a broader number of individuals and businesses), including School Based New Apprenticeships (SBNAs).
- Industrial relations reform.
- Lifting the image of VET in the minds of young people and parents, and attracting a broader range of young Australians into areas with labour and skill shortages rather than other education and training options.

Australian Technical Colleges (ATCs) will address a number of these issues - in particular:

- Providing a boost to SBNA commencements in the traditional trades. In 2003, of the 12,300 SBNAs in Australia, only 13.4 per cent were in general construction, metals and engineering, automotive industry retail, service and repair and hairdressing.¹ Whilst retail, hospitality and other service industries are important to the economy and opportunities must be provided in those industries, growth in the traditional trades is necessary.
- Tackling the low awareness by some businesses of the wide range of options available under SBNAs including block release and job sharing through Group Training Organisations.
- Encouraging some students into this option who have settled on a career choice but wish to leave their options open for university.
- Addressing the desire of parents, students and employers to have business and employability skills as a clear strand of learning.
- Establishing an integrated, professional employment education and training option which has the credibility of business and entrance standards set by education providers and employers which enhance the status of the institutions.
- Encouraging young people to maintain their education,

particularly in maths, English and science, to meet the higher level of literacy and numeracy requirements of employers.

- Recognising that other training pathways may be more appropriate for students who have not chosen their desired area by the end of Year 10, including unpaid VET in Schools, work experience and SBNAs later in Year 11 and 12.

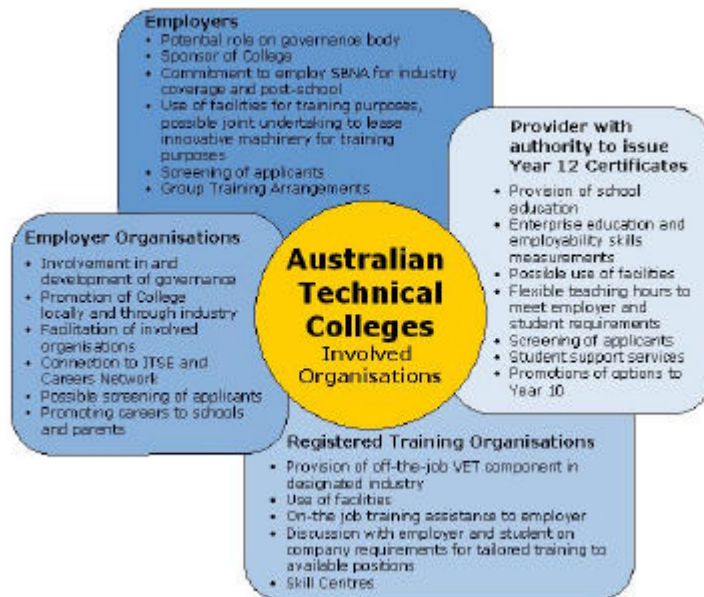
ACCI'S PROPOSED ATC MODEL

Since the Federal Election, ACCI has had extensive discussions with its member organisations and the wider business community on how ATCs should operate, the level of employer involvement and the essential outcomes for students. ACCI has now developed a proposed model and set of key principles on their establishment (see Figure 1) and will assess any ATC proposal against these principles prior to endorsing them.

Key Principles on Assessing ATC Proposals

- Each consortium should be business led taking into account the importance of the school-VET pathway.
- Additional Federal funding should not be used to duplicate existing infrastructure.

Figure 1
ACCI's Model for Australian Technical Colleges



- Opportunities should be taken to introduce innovative responses, particularly the involvement and use of enterprises and their facilities, the use of technology by the school and Registered Training Organisation (RTO), and block release for students to undertake SBNAs.
- Recognition that the approach is to specifically increase SBNAs in traditional trades and raise the status of activity in the minds of parents. It is not expected that other important options like SBNAs later in schooling, VET in Schools for Years 11 and 12, or vocational learning in Year 9 are to be replaced or lesser options for some students.
- The model needs flexibility in deciding what is appropriate for a given region, including the need to take account of the impact of ATCs on existing school enrolments. Sub-contracting by an ATC governing council for school and RTO services may be the best option.
- Industry must be involved in the governance arrangements.
- Total specialisation in one industry sector is not supported as it cannot reflect the diversity of the local labour market opportunities and limits the ongoing versatility and flexibility of options in the future.

- Tendered arrangements are not appropriate given the venture is not commercial and the disparate interests which may be involved in each region. One goal should be to connect all interested parties to maximise regional economic benefits of the initiative.
- Interested parties need to be mindful of the size and scope of industry coverage, availability of funds and the ability to effectively service a region.
- The Commonwealth and States and Territories and the relevant Boards of Study should develop protocols to ensure that the traditional trades training is included in the students' Tertiary Entrance Score or equivalent.
- Each ATC should be encouraged to demonstrate Best Practice and be used as models of employment and training practice at regional levels.
- The present high standards of VET must be maintained and be applied stringently to ATC operations.
- The four elements of the ACCI model must be in all successful ATC operations.

These four elements are:

1. Employers

As with RTOs, employers already engage in a range of partnership arrangements for the delivery of the range of existing VET options in schools. In addition to involvement in governance structures, the role of individual employers will be to provide employment and training options through a training contract with the student who will become an employee. This will involve employment from the commencement of Year 11.

As with other staffing arrangements some involvement in selection processes and use of provider bodies such as Group Training Organisations may be appropriate. Closer linkages with the ATC would be encouraged and where appropriate, the employer may offer the use of their facilities for education and training purposes.

Business leadership, knowledge and expertise in the thinking of community based governance structures is clearly an area where employers might contribute to the operation of ATCs. By utilising their networks, they are also likely to have their finger on the pulse of industry needs at the regional level. This sort of intelligence will be critical to the success of the ATCs.

There will also be the need to instigate at a national level industrial relations reform which allows an Award-based process to remunerate SBNA's in all traditional trades areas.

2. Employer Organisations

Employer organisations are often cast in the role of "honest broker" especially at the regional level and can bring interested parties to the table and facilitate their involvement.

The value of employer networks in providing assistance to ATCs cannot be underestimated. Individual employers, especially small business operators, may not have time for the complexities of governance in broader industry perspectives. Business thinking and a business approach rather than a bureaucratic approach are the domain of individual employers. The support and expertise of employer organisations plus utilisation of the networks they are involved in, adds value to this venture. They may also be in a position to provide assistance to individual employers in screening processes.

At the macro level connections can be provided to other government initiatives with employer leadership such as the Institute for Trade Skill Excellence and the Australian Network of Industry Careers Advisers. The delivery of accurate, up-to-date industry information to students and their parents will be critically important support mechanisms for the ATCs. Parents need to be aware of the opportunities and current financial benefits of participating in the traditional trades today. They also need to understand

the role of technology and understand the way in which industry has changed if they are to give appropriate advice that is current.

3. Registered Training Organisations

While the ATC could be a school, partnership arrangements with RTOs will be an essential feature. The RTO may be an existing school, a TAFE provider or a privately run Skill Centre. Quality delivery will be assured through Australian Quality Training Framework processes. Partnerships/auspicing arrangements with RTOs already feature in school operations in other VET areas but this allows a fully integrated option at each designated region.

An essential ingredient in the ATC mix will be engagement with industry and responsiveness to industry needs. For RTOs this will most likely involve flexible delivery including some up front off the job training in areas such as occupational health and safety. Clear communication and operational arrangements will need to be developed, building on best practice which exists already in some regions. Flexible arrangements will be necessary to provide the framework for delivery of the VET component of an SBNA.

4. Provider with Authority to Issue Year 12 Certificate

ACCI expects that a school will operate as an ATC itself or act in partnership with a number of schools in a region. In some cases, TAFE has been delegated the authority to offer Year 11 and 12 courses.

The school will need to be flexible in delivery, particularly when students may need to be released in a block to undertake on-the-job training. This may require innovative IT based learning and delivery options.

There will be a requirement that teachers are suitably trained and have an understanding of employer and industry expectations. In some cases,

this may involve ATCs purchasing specialist expertise.

Relevant courses at a tertiary level of study such as business studies already exist in all jurisdictions. Work has commenced to incorporate employability skills into curriculum frameworks and pilot work to record and recognise them. In addition, work needs to be undertaken to identify how the New Apprenticeship can contribute to university entrance.

New packaging to bring these elements together and completion of work on employability skills will provide the necessary architecture to issue students with the relevant certification to reflect the course of studies they have undertaken.

The Victorian Certificate of Applied Learning offers a good model in that it is possible to register tailored options rather than a one size fits all approach. The Victorian Qualifications Authority has shown initiative in ensuring quality outcomes with flexible delivery options.

ESSENTIAL STUDENT OUTCOMES

It is important that the ATCs capture the interest of parents and young Australians but also provide an exciting opportunity to learn in the classroom and at work and earn money.

ACCI believes there are three essential student outcomes from the ATCs:

- Partial completion of an SBNA which would be offered from the commencement of Year 11, with a commitment by an employer and the apprentice to complete the qualification after Year 12.
- A Tertiary Entrance Score.
- An outline of employability and business skills attained.

The ATC option is not suited to students who are still deciding in which industry they will work in the future. It is for students who, with their parents, have made a clear decision to seek an employment outcome while continuing their school studies. While the academic offerings won't mean students will be locked out of future study options and allow the flexibility to change one's mind, the candidate will be attracted to an ATC on the understanding they will have made a decision to enter a certain industry that is experiencing a skill shortage.

Preparation for the possibility of self-employment through specific focus on employability and business skills will further assist the student to continue in the industry once a training period is finished.

The emphasis of ATCs on ensuring all graduates meet university entrance requirements contributes to a well-rounded education and also keeps options open - an important

consideration for parents and the student.

ATC graduates will be highly skilled individuals, gaining skills from industry experience and capable of running their own business in the future. They will be nurtured by their industry of choice and encouraged to stay there. Future study options will be available to them and they will provide role models to younger students.

Industry cannot afford to lag behind the times if it is to compete in the global market. A cultural shift is needed to make this possible and can be led by well-prepared, skilled individuals.

CONCLUSION

Without doubt ATCs mark the beginning of a bold new approach by the Australian Government as part of a suite of strategies to address Australia's skill shortage problem.

This initiative complements other work in this area and attempts to tackle some of the attitudinal barriers to parent and student perceptions about the trades. Given the long-term nature of the skill shortage crisis in the traditional trades it is clear that all barriers need to be addressed where it is possible.

NOTES

- ¹ National Centre for Vocational Education and Research *VET in Schools* 2003.

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