Jeff Kennett's industrial revolution has severely embarrassed his federal colleagues. But as PETER GAHAN reports, John Howard may have to resort to Kennett-style compulsion in order to get his new industrial dystopia under way.

Since the accession of the Kennett government last November Victorians have endured an industrial relations revolution of a kind which probably few had expected. Even the federal Coalition, whose own industrial relations policy is hardly cupidic, have been severely embarrassed by the Victorian Coalition's 'reforms', both by the speed and lack of consultation with which they have been implemented, and by their primitive and compulsory nature.

The federal government has not been slow to seize on this embarrassment, painting Victoria as a dry run of the Coalition's policies federally. This has put the federal Coalition in an even more difficult position. If they repudiate the Victorian revolution they will be seen as repudiating elements of their own industrial relations platform. But if they support it they will be seen as supporting Jeff Kennett's punitive and unilateral approach.

Just how similar are the industrial relations policies of the Victorian and federal Coalitions? And how significant are the differences? In short, the answer seems to be that the differences as well as similarities highlight some of the contradictions of the federal Coalition's industrial relations model.

There are two notable differences between the Victorian and federal Coalition's policies and their likely effects. First, the fact that industrial relations is a shared power between the state and commonwealth governments implies that the safety net provided by the two policies will have a different impact in each case. And second, the federal coalition's professed intention to achieve a new workplace culture based on teamwork and co-operation will clearly require a different method of implementation to that used by the Kennett government.

First, the matter of jurisdiction. The federal government has limited powers to legislate in industrial relations. The major source of its industrial relations powers lies in its ability to make laws to prevent and settle interstate industrial disputes. These powers are limited to creating arbitration and conciliation agents to deal with such matters on their behalf, rather than legislating directly.

Historically, this has meant that unions and arbitration courts have a limited ability to carve out a common rule, so that awards cover all workers in a given industry or occupation. Thus the ability of the arbitration system to act as an effective safety net has been limited.

More recently, however, the High Court has interpreted this aspect of the constitution more widely. As a result, the jurisdiction of the Industrial Relations Commission (IRC) has increased significantly over the last 20 years or so. And the federal government may derive power from other sections of the constitution to directly regulate industrial matters, although the exercise of these powers remains controversial. These include the external affairs power (which allows the federal government, as a signatory, to enforce international treaties and agreements) and the corporations power (which allows the regulation of corporations formed within Australia).
The federal Coalition intends to make full use of these other powers to allow it to take a more direct role in the regulation of industrial relations. If Jobsback! is implemented, compulsory arbitration will be abolished. Instead, employees and employers will have to negotiate an employment agreement either collectively or individually. These agreements will have the legal status of a contract and, as such, will be subject to common and criminal law proceedings. If strikes occur during the life of, or in breach of, an agreement, employers will be able to sue individual employees for breach of contract and seek to recoup any economic losses.

The legal protection given to trade unions will be abolished. While the formation of enterprise unions is encouraged, the legal status of unions is not clear. Jobsback! intends to remove legal protections for trade unions, yet it is intended that unions will be registered. The most likely result of this ambiguity is that any registration procedure will stand as little more than a legal fiction. This is reinforced by the intention to provide a reconstituted IRC with the ability to take control of union funds and their internal organisation. Here is the rub: unions will effectively be denied any legal status or protections at the federal level. They will be left with fewer and less adequate minima (such as the $5 minimum youth wage) which do not apply to all workers (they do not apply to contractors or non-award workers, for instance), and which have decreasing coverage over time.

Attempts to revert to state jurisdiction—where unions are also denied legal recognition but at least have the ‘protection’ of minima with common rule status—will also be blocked. The broader coverage of state minima stems from the constitution. While the federal government is by and large limited to indirect means, the state governments have the power to directly legislate to cover all workers. Additionally, where they do exist in state jurisdictions, awards also have common rule status.

The difference may seem slight in the scheme of things, especially given that minimum conditions vary between the Victorian system and the Jobsback! proposal. Nevertheless, for many employees such limited protection may be quite fundamental to how they live their lives in a world where global restructuring has already considerably diminished their labour market opportunities.

This having been said, however, it is clear that the similarities between the two packages far outweigh any differences between them, despite the federal Coalition’s attempts to distance Jobsback! from Victorian developments. The federal Coalition spokesperson on industrial relations, John Howard, has repeatedly stated that federal changes would be introduced in a far less confrontationist way—especially since Jobsback! is intended to engender a shared ideology and a ‘team approach’ to industrial relations.

However, despite the rhetorical differences between the two policies, John Howard may find that political reality will dictate a similar policy outcome to that of the Kennett government—including, ironically, a far more interventionist role for government in industrial relations. And this interventionist role will have, of necessity, to be based on compulsion and punitive sanctions rather than the overriding philosophy of minimal government intervention expressed in Jobsback! or Howard’s political rhetoric.

While the focus of Fightback! was on the GST, embedded within it is a plan for a radical change in the conduct of industrial relations and the structure of labour markets. The hub of that plan is that wages outcomes and the conduct of industrial relations will occur solely at the workplace and at the discretion of that workplace. This, it is stated, will demand an end to the highly interventionist role of the government and arbitration machinery, through such things as National Wage Cases.

This was later detailed with the launch of Jobsback! The philosophical underpinning of this policy—and one which John Howard has been at pains to impress—is freedom of contract. In other words, the federal Coalition’s policy is supposed to provide employee and employer with a greater capacity to make decisions about how their employment relationship should be structured. In this view, the role of unions, state institutions and direct intervention of the state through legislation simply serve to ‘distort’ a relationship that is otherwise natural and can result in greater efficiencies and shared benefits. Thus the parties are ‘free’ to contract between themselves on such matters as hours of work (when and for how long), redundancy arrangements, penalty rates, holiday loading and other such matters.

The intention of Jobsback! is thus the withdrawal of the state from the sphere of industrial relations and the provision of a minimal institutional framework. The regulation of the employment contract is to be indistinguishable from other commercial contracts. Remedies against breaches will be sought through civil court action. Collectivities such as unions have no special status before the law. The outcome, according to this view, is that workplace ‘bargaining’ becomes the sovereign sphere of decision making over work issues—and all for the greater good.

As with the federal Coalition, the focus of the Victorian reforms has been a concern with the impact of arbitration and unions on the individual.
conduct of workplace industrial relations. Both are seen to inhibit the proper conduct of industrial relations, inhibiting workplace flexibility and productivity in particular. Thus, the primary goal is said to be to provide employees and employers with the ability to freely regulate employment conditions to suit the needs of the enterprise within the market.

However, in initiating these changes the Victorian government has taken a decidedly interventionist role. The effect of the Employment Relations Act 1992 has been to thwart the capacity of workers to continue to undertake collective actions to protect their wages and working conditions, subjecting them to criminal and common law sanctions. Under the Act, employees will have their terms and conditions set by one or more of four legal means. At the base level, the contract of employment will be the chief instrument of common law. Second, individual employees can negotiate an individual employment agreement directly with their employer. Third, as an alternative to individual agreements, employees—with the consent of the employer—can decide to negotiate a collective employment agreement. Finally, if there is consent from both employees and employer, the collective agreement may be ratified by a new Employee Relations Commission (ERC) as an industrial award.

Yet, despite this range of alternatives, the Act makes it difficult for a group of workers to elect for a collective employment agreement or an industrial award as the source of their terms of employment—for two reasons. The most obvious one is that the Act removes the legal impunities for trade unions—impunities which remained largely intact even under the Thatcher government in the UK. Likewise, the ability of unions to gain legal status and protection of bargaining rights have remained features of US labour law also, despite 'union bashing' tactics on the part of employers.

The second reason lies in the changed structure of the legal regulation of industrial relations itself—particularly in the case of the diminished role of the new Victorian ERC. This body has fewer powers to deal with industrial disputes unless both parties consent. This, as historical experience with voluntary arbitration shows, is so unlikely as to render it ineffective. The major exception to this 'imposed voluntarism' is the case of unfair dismissals. However, the procedures which individual employees are required to undertake to respond to unfair dismissal will make this a costly and lengthy process.

Instead of awards and the use of due process through tribunal regulation, employees will be forced over time to 'negotiate' individual or collective employment agreements. Even here, the bias towards individual agreements will make collective ones difficult in many cases. While the compulsion to submit to the jurisdiction of the ERC is removed, it is substituted for the compulsory jurisdiction of the new Industrial Division of the Magistrates Court. The court is armed with considerable punitive remedies to compel unions and employees to agree to the new industrial regulations.

Jobsback! is couched in the political rhetoric of freedom. The impending changes are supposed to free the workplace from the shackles of over-regulation so that those at the workplace will be better able to decide such matters on equal terms themselves. The role of the state, so Jobsback! tells us, is to back off. It is to end the compulsory submission of both workers and employers to over-zealous governments and the specially-created jurisdictions that provide certain interest groups with a status not enjoyed by other individuals and groups in society.

The reality of the intended policy is, however, diametrically opposed to the rhetoric and ideology of a free and happy workplace culture. Like the Victorian changes, Jobsback! is not so much about the withdrawal of the state from the regulation of employment matters and an end to compulsion but, rather, the substitution of one compulsory jurisdiction for another.

Common law regulation requires that the parties submit their disputes over breach of contract at the request of one party only—as is currently the case with arbitration. In other words, it is not possible for the jurisdiction of common (and criminal) law courts to be denied simply because one party does not wish to submit to it.

The replacement of the jurisdiction of the IRC with that of common law courts cannot be reasonably interpreted as empowering the parties to make their own decisions freely in an unconstrained manner, for the good of all concerned. Rather, it amounts to the replacement of one compulsory jurisdiction, historically created to ameliorate the imbalance of power between capital and labour, with another compulsory jurisdiction that has historically been hostile to the interests of working people and the institutions created to protect them in their working lives. The result will not increase freedom but, rather, greater compulsion, as the balance of bargaining power dramatically shifts towards employers with considerable resources and institutional support in their favour. Thus, whatever the intention, in practice the federal Coalition’s 'deregulatory' industrial relations policies may have to be implemented with the same degree of coercive government intervention as the Victorian reforms which so embarrass John Howard.

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