AN IER BRIEFING

Beyond Groundhog Day: Can productivity and fairness be improved without further labour law reform?

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Anthony Forsyth is Programme Director at the Graduate School of Business & Law at Australian university RMIT. He specialises in labour law and collective bargaining. In a paper designed for presentation at a labour law conference in Sydney, he here presents a comparison of the direction of Australian and UK employment law changes since the financial crisis of 2008. He concludes that Australia would not benefit from following the lead of Britain's Coalition Government and its austerity campaign.

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'Beyond Groundhog Day: Can productivity and fairness be improved without further labour law reform?'

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LABOUR LAW CHANGE FRAMED BY AUSTERITY: RECENT INSIGHTS FROM THE UNITED KINGDOM

Anthony Forsyth, RMIT University

This panel session is devoted to considering what Australian and overseas experience can tell us about the capacity of changes in labour law to deliver key policy outcomes – productivity, and fairness.

My research over the last 5 years has focused mainly on the *Fair Work Act* bargaining framework. Much of that work examines how our collective bargaining laws operate in comparison with the North American 'Wagner Act' systems, based on union recognition and good faith bargaining.

Last year, with colleagues at Melbourne University, I completed an in-depth study for the Fair Work Commission – including interviews with 50 employer, union and individual bargaining representatives; and analysis of all bargaining-related cases before the tribunal in the first three years of the new law's operation.

Our report showed that although Part 2-4 of the *Fair Work Act* has contributed to an increase in the numbers of employees covered by collective agreements – it has had limited impact in extending collective bargaining outside the unionised sectors of the workforce.[1]

We found that good faith bargaining has proven useful in framing the 'ground rules for bargaining' and helping to resolve some bargaining disputes. However the wording of the relevant provisions, and a few unhelpful judicial interpretations, have limited the effectiveness of the good faith obligations in situations where an employer:

- refuses to enter into an agreement ('surface bargaining'); or
- bypasses the union by communicating directly with employees, or submitting an agreement to a ballot prematurely.

Particularly disappointing – and perhaps best illustrating the limits of labour law in effecting practical change in workplaces – has been the low-paid bargaining stream.

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[1] Anthony Forsyth, Peter Gahan, John Howe and Ingrid Landau, *Fair Work Australia's Influence in the Enterprise Bargaining Process*, Fair Work Australia Research Partnership Project, Final Report, 30 September 2012, at: http://www.fwc.gov.au/index.cfm?pagename=admingmreporting&page=research#research2015

There have been only three applications to date, with the most recent one rejected by the FWC:[2]

- in part, because allowing access to low-paid bargaining for nurses in private sector GP clinics would not make for an efficient bargaining process;
- and would result in employers being brought to the negotiating table against their will (I thought that was the whole point!).

I've spoken often about the bargaining framework and its US and Canadian counterparts – including at previous WRC conferences.

Today, instead, I'd like to briefly convey some insights I gleaned from a visit to the U.K. last month.

Apart from the curiosity of the English claiming Andy Murray as one of their own, the thing that struck me most was that the country is still in the grip of 'austerity'.

As in much of Europe, a sense of crisis pervades the political and economic debate. And this has provided the justification for deep cuts to government spending since the Conservative/Liberal-Democrat Coalition Government was elected in 2010.

While I was there the Chancellor, George Osborne, announced a further £11.5 billion in public expenditure cuts for 2015-16 – with the Departments of Justice (including legal aid funding), Work and Pensions, and Local Government among the hardest hit.[3]

It's estimated that by 2018, the Home Office will have had its overall funding reduced by 38%; and the Foreign Office by 64%.[4]

This amounts to a major contraction of the role of the British state. But what effect has it had on U.K. labour law?

The Coalition initiated an 'Employment Law Review' soon after taking office, with the objective of '[making] it as easy as possible for businesses to take people on'.[5]

This process is ongoing, and has already resulted in **major inroads on the *individual* employment rights of British workers** – for example:

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[2] *Australian Nursing Federation v IPN Medical Centres P/L and Others* [2013] FWC 511 (Watson VP, 17 June 2013).

[3] See the contrasting perspectives in 'Spending review: Osborne the axeman', Editorial, *The Guardian*, 27 June 2013; and Chris Giles, 'The hard reality for Britain in the post-crisis world has yet to be faced', *Financial Times*, 27 June 2013.

[4] 'George Osborne may end up inheriting the wind', Editorial, *New Statesman*, 28 June-4 July 2013.

[5] Department for Business Innovation and Skills, *Employment Law Review*, at: www.bis.gov.uk/policies/employment-matters/employment-law-review. See also Department for Business Innovation and Skills, *Employment Law 2013: Progress on Reform*, March 2013, at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/184892/13-P136-employment-law-2013-progress-on-reform2.pdf.

- Introduction of the concept of **'shares for rights'**, enabling employers 'to set up an 'employee-ownership' scheme whereby workers agree to give up fundamental rights to redundancy pay, to claim unfair dismissal, and to request flexible working conditions and training in return for [between £2,000 and £50,000] in shares.'[6] While operating on a voluntary basis, the concern is that new employees could be required to trade off rights for shares as a condition of getting the job. From an Australian perspective, this sounds like an extraordinary erosion of employment rights (I doubt we would ever tolerate this kind of contracting out of statutory rights). And there was certainly considerable opposition to the proposal in the U.K. – not just from unions, but also from business chambers and ten Tory members of the House of Lords who voted against it. In fact, it seems that the shares for rights scheme might be a solution in search of a problem: although it doesn't commence operation until September 2013, as at the end of June, the Government had received just six enquiries from businesses about taking up the new 'employee owner' contracts (compared with Treasury expectations of up to 6,000 companies joining the scheme).[7]

- Significant new **limits on employees' access to employment tribunals**. For example, the qualifying period for an employee to bring an unfair dismissal claim has been increased from one to two years' employment.[8] And from 29 July 2013, claimants will face fees of £250 when lodging claims of unfair dismissal, discrimination and equal pay; followed by a £950 hearing fee if the matter proceeds that far (although the claimant would recover from the employer all fees paid, if the claim is ultimately successful). [9] These are much higher disincentives to bringing a claim than the $65.50 fee applicable to unfair dismissal and general protections claims in Australia.

- The increasing use of **'zero hours contracts'** – a precarious form of work arrangement, whereby the employee is 'not guaranteed any work at all. Their employer may call them into work at any time, and will pay them only for the hours actually worked. For some this may be 60 hours per week. For others it may be nothing at all.'[10] This is probably sounding a bit like what we would call casual employment. But many of the protections afforded to casuals in Australia – e.g. casual loadings, and minimum shift hours provisions in awards – do not apply under zero hours contracts in the U.K. Some workers are engaged on pay rates below the National Minimum Wage. Overall, the

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[6] 'Shares for rights scheme passed – facts about the new law', Institute of Employment Rights, 25 April 2013, at: http://www.ier.org.uk/news/shares-rights-scheme-passed-facts-about-new-law; see also Nicola Countouris, Mark Freedland and Jeremias Prassl, 'Implementing Employee Owner Status: an IER Response', Institute of Employment Rights, 2 November 2012; Mark Hall, 'Controversial 'shares for rights' employment status', European Industrial Relations Observatory Online, 15 February 2013, at: http://www.eurofound.europa.eu/eiro/2012/12/articles/uk1212049i.htm.

[7] Elizabeth Rigby, 'Chancellor's 'shares for rights' plan flops', *Financial Times*, 28 June 2013, at: http://www.ft.com/cms/s/0/6ec7934e-e005-11e2-bf9d-00144feab7de.html#axzz2ZGYjQjax

[8] David Renton and Anna Macey, 'Justice Deferred: a critical guide to the Coalition's employment tribunal reforms', *Institute of Employment Rights*, February 2013, pages 4-5.

[9] Ibid, pages 27-28.

[10] Sarah Glenister, 'What the Coalition wishes it could ignore: the hidden scandal of zero hours contracts', Institute of Employment Rights, 11 July 2013, at: http://www.ier.org.uk/blog/what-coalition-wishes-it-could-ignore-hidden-scandal-zero-hours-contracts.

number of zero hours contracts in operation has increased to 208,000, from 134,000 in 2006.[11] In particular, their use has grown in areas of the public sector such as the NHS and social care, under pressure to increase efficiency arising from the spending cuts. The Government recently announced a review, stating that: 'There has been anecdotal evidence of abuse by certain employers – including in the public sector – of some vulnerable workers at the margins of the labour market.' It is unlikely that the review will lead to a ban on zero-hours contracts, although some improved protections for employees could eventuate.[12]

Speaking to other academics, union officials and public policy experts, I detected a strong sense that people in the U.K. consider themselves very lucky to have a job – and are therefore willing to accept a position on the employer's terms. This is not surprising, with 2.56 million Britons unemployed (7.9%), and youth unemployment at 20%.

The austerity agenda has had less significant effects on *collective* labour law. This is not surprising, given the Thatcher-era legacy of legal constraints on union organisation, collective bargaining and industrial action – largely maintained by New Labour.

While there has been little more for the Coalition Government to do, some further measures have been proposed – for example:

- The **reduction of support for trade union representation in the civil service** and local government, through limits on workplace facilities and time off for representatives to attend to their union responsibilities (i.e. no more than 50% of their time is to be spent on union activities). While workplace union representatives have a statutory right to reasonable paid and unpaid time off to attend to union duties, the Government argues that in the public sector this results in excessive taxpayer support for unions.[13]

- In response to strikes in 2011 by public sector unions over pension changes and government spending cuts, the leading employer body, CBI, argued for **changes to U.K. legislation on industrial action**. The CBI called for the introduction of a requirement that at least 40% of the workforce supports industrial action in a ballot – in addition to the existing requirement of majority support among those voting. The Government has not taken up these proposals to date, although it has spoken of the possibility of doing so in the

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[11] Matthew Pennycook, 'The forward march of zero-hours contracts must be halted', The Resolution Foundation, 25 June 2013, at: http://www.resolutionfoundation.org/blog/2013/Jun/25/forward-march-zero-hours-contracts-must-be-halted/.

[12] Andrew Grice, ''Zero-hours' contracts for workers to be reviewed by Coalition', *The Independent*, 12 June 2013.

[13] Cabinet Office, *Consultation on reform to Trade Union facility time and facilities in the Civil Service: Government Response*, 8 October 2012, at: https://www.gov.uk/government/consultations/reform-to-trade-union-facility-time-and-facilities-in-the-civil-service; cf. Alan Bogg and K D Ewing, *The political attack on workplace representation – a legal response*, Institute of Employment Rights, May 2013, pages 12-16.

event of further industrial action causing economic disruption.[14] The Mayor of London, Boris Johnson, has expressed support for new restrictions on strike action in light of several disputes affecting the London Underground.[15]

U.K. unions are completely on the defensive. **Union membership density fell further in 2011**, to 26% of the workforce – and the number of union members in the public sector fell considerably (as a result of job losses associated with the government's austerity measures).[16]

Further, the **trade union recognition procedure for collective bargaining** – introduced by the Blair Labour Government – has become largely irrelevant. There were just 28 applications by unions under the procedure in 2010-11 and 43 applications in 2011-12 (down from a peak of 118 in 2001-02). According to Alan Bogg of Oxford University: 'The statutory recognition procedure is dying – not with a bang, but with a whimper.'[17] Although the same could not be said of Australia's collective bargaining framework, there are some parallels – i.e. the steady decline in applications to the FWC for bargaining orders, majority support determinations and scope orders under Part 2-4 of the Fair Work Act over the four years of its operation.[18]

So, what lessons does this account of recent developments in the U.K. provide for the (seemingly endless) debate about labour law reform in Australia?

I think it highlights one thing very clearly: the austerity model is not one that we should seek to emulate.

Although our economic conditions are worsening, there is unlikely to be an imperative to cut government spending on anything like the scale that has occurred in Europe over the last few years.

An incoming Coalition Government will seek to reduce the size of the public service fairly significantly (in fact the Rudd Government has recently made a start on this front).[19] But I don't think that a U.K.-style re-casting of the role of the state would be possible here.

And certainly not in workplace relations. If the Work Choices experiment taught us anything, it is that Australians have an enduring faith in – and attachment to – public

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[14] Mark Hall, 'Uncertainty over calls for further restrictions on strikes', European Industrial Relations Observatory Online, 18 August 2011, at: http://www.eurofound.europa.eu/eiro/2011/07/articles/uk1107029i.htm.

[15] Polly Curtis, 'Strike laws could be toughened, warn ministers', *The Guardian*, 16 June 2011.

[16] Nikkie Brownlie, *Trade Union Membership 2011*, Department for Business Innovation and Skills, at: http://www.bis.gov.uk/assets/biscore/employment-matters/docs/t/12-p77-trade-union-membership-2011.pdf. Union membership density in the U.K. is still higher than in Australia (18.2% in 2012).

[17] Alan Bogg, 'The Death of Statutory Union Recognition in the United Kingdom' (2012) 54:3 *Journal of Industrial Relations* 409 at 410.

[18] See Forsyth, Gahan, Howe and Landau, note 1 above; 'Dismissal claims rise, bargaining activity slows', *Workplace Express*, 13 February 2013; 'Surge in adverse action claims, bargaining quiet,' *Workplace Express*, 24 May 2013.

[19] Verona Burgess, 'Gen Y-bloated service feels little pain in cuts', *The Australian Financial Review*, 17 July 2013.

institutions (like the FWC) which safeguard decent minimum employment standards. These things are not easily dismantled.

It seems that the Coalition may have learnt this lesson, with its IR Policy setting out only minimalist reforms to be implemented in its first term of office (if elected).[20]

The real focus of attention would then be on the proposed Productivity Commission review of the *Fair Work Act*, and how much cover that gives the Coalition for more far-reaching changes in its second term of government.

But the Coalition must tread warily. The U.K. shares for rights scheme illustrates the futility of allowing ideology to dictate policy and regulatory outcomes.

There is another example of this from much earlier U.K. experience of labour law reform, which is particularly relevant in light of the Coalition's proposal to establish a Registered Organisations Commission. Targeted at 'dodgy' union officials, this body's functions would include the provision of information to union members about their rights, and dealing with complaints from members.[21]

In 1988, the Thatcher Government established a Commissioner for the Rights of Trade Union Members (CRTUM). This agency was able to provide advice and assistance to union members considering taking legal action for breaches of union rules or relevant statutory obligations (e.g. relating to the conduct of industrial action ballots, proceedings of union committees, or the inspection of union accounts). CRTUM could even fund the pursuit of such litigation by a union member. The rationale for creating CRTUM was that members were not sufficiently empowered to take on their union, therefore: 'there was a need for a public authority to play a role in securing access to and observance of the law …'.[22]

But it seems that in reality, there wasn't any such *need* at all: in the first 3 years and 4 month's of CRTUM's operation, only 137 applications were made by union members seeking assistance. And the agency brought just a handful of cases in the courts in that period.[23] According to one assessment, it turned out that it was 'difficult … to justify the role of the Commissioner on the grounds of the extent of, or the serious consequences of, abuse of union power.'[24] The Blair Government abolished CRTUM in 1999.

(In 1993, another similar body was created: the Commissioner for Protection against Unlawful Industrial Action, which could provide assistance to members of the public wanting to sue a union because of the effects of a strike on the supply of goods or

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[20] *The Coalition's Policy to Improve the Fair Work Laws*, May 2013.
[21] Ibid; 'Tony Abbott's industrial relations policy will crackdown on 'dodgy union officials', *News Limited Network*, 9 May 2013.
[22] Debra Morris, 'The Commissioner for the Rights of Trade Union Members – A Framework for the Future?' (1993) 22:2 *Industrial Law Journal* 104 at 104-105.
[23] J R Carby-Hall, '"The Commissioner for the Rights of Trade Union Members': An Evaluation of Her Work and Achievements' (1992) 34 *Managerial Law* 4 at 17.
[24] Morris, above note 22, at 116.

services. This agency received just one application in its first 18 months of operation,[25] and was also abolished in 1999.)

Following the Health Services Union scandal, there was definitely a need to re-visit the regulation of Australian unions. But the measures implemented by the *Fair Work (Registered Organisations) Amendment Act 2012* (including stricter reporting and disclosure obligations for unions) were sufficient.

There may be some sense in transferring the regulatory oversight of unions and employer organisations to a new statutory body separate from the FWC. However, there is no demonstrated need for a Registered Organisations Commission[26] to act as a kind of 'union ombudsman'.

Despite this, if the Coalition is elected, it's likely we'll see the HSU saga used to justify increased scrutiny of all Australian unions[27] – perhaps starting with a Royal Commission. One thing is for certain: none of that will help improve fairness or productivity in Australian workplaces.

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[25] See: http://www.eurofound.europa.eu/emire/UNITED%20KINGDOM/COMMISSIONERFORPROTECTIONAGAINSTUNLAWFULINDUSTRIALACTION-EN.htm.

[26] Another predecessor (closer to home) is the Fraser Government's Industrial Relations Bureau which operated from 1978-1983: see Andrew O'Brien, 'Back to the future, but not exactly', reported in 'Coalition watchdog will have it easy: consultant', *Workplace Express*, 27 May 2013.

[27] O'Brien (above note 26) describes the HSU scandal as: 'the gift that keeps on giving – so it is no surprise to understand the Coalition's policy response to registered organisations and the politics behind it. Is there an Opposition Party that would not take the opportunity presented?'