THE FEDERAL COALITION'S INDUSTRIAL RELATIONS POLICY:

What has been learned from the U.K. and New Zealand experience?

David Lewis*

Introduction

Many years ago Otto Kahn-Freund described how individual contracts of employment serve to mask the underlying inequalities of bargaining power that exist between employer and employee.[1] Nevertheless in the U.K. the Conservative government since 1979 has placed considerable emphasis on the desirability of not interfering in contracts of employment. According to Hayek, trade unions should be opposed because they distort the market,[2] and in order to restrict their role the Conservative government resorted to, using Kahn-Freund's terminology, 'verbal magic'. Thus changes were made in the interests of individual freedom and democracy, to limit the privileges of trade unions and to give rights to the individual worker. To some extent the ideological success of the Conservatives can be measured by the British Labour Party's refusal to repudiate some of the legislative developments.[3]

It is now apparent that similar techniques are being used in Australasia. In New Zealand, the Minister for Commerce, Phillip Burdon, described the aim of the *Employment Contracts Act* 1991 (NZ) (henceforward ECA 1991) as follows: 'to promote the establishment of an efficient labour market that is based on the principles of freedom of association and freedom of contract'. Prior to the launch of 'Jobsback' in October 1992, the Federal Coalition's spokesperson on industrial relations, John Howard, had emphasised the importance of the individual freedom to negotiate and had used 'above the

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* Principal Lecturer in Law, Middlesex University.

1 See Davies and Freedland, *Kahn-Freund's Labour and the Law*, Stevens, London, 1983.

2 See F A Hayek, *The Constitution of Liberty*, London, Routledge and Kegan, 1960.

3 See S Fredman, 'The New Rights: Labour Law and Ideology in the Thatcher Years' (1992) 12 *Oxford Journal of Legal Studies*, 24 - 44.

law' arguments (in relation to trade unions) in order to attack the award system. 'Jobsback' itself refers to a 'fundamental right to work' without being a member of a trade union[4] and insists that 'no person or group should enjoy special privileges'.[5] There is little doubt that the Federal Opposition leader, Dr Hewson, fully supports giving primacy to individual contracts of employment. In an address to business people in January 1992 he expressed his desire for an 'industrial relations system built on common law where employers and employees sit down on an equal common law footing'.

The relationship between awards, collective and individual agreements

In New Zealand the award system was abolished by the ECA 1991 in favour of a system of collective and individual employment contracts. Where employees are not covered by a collective employment contract the employer can enter into individual contracts of employment with them. However, if a collective employment contract does cover a particular worker the individual contract must not be inconsistent with it. The parties may vary a contract by written agreement, and when a collective employment contract expires, its contents form the terms of an individual contract until the parties agree to vary its terms.[6] According to a survey conducted by the New Zealand Employers' Federation in April 1992, 70% of the 1,172 employers covered were using individual employment contracts to some extent.

As regards a 'floor of rights', the *Minimum Wages Act* 1983 (NZ) provides minimum wages for those aged over 20, the *Wages Protection Act* 1983 (NZ) deals with the manner in which wages must be paid, the *Holiday Act* 1981 (NZ) provides minimum entitlements to sick and holiday leave, and the *Equal Pay Act* 1972 (NZ) and the *Parental Leave and Employment Protection Act* 1987 (NZ) all remain in force. In relation to possible coercion, Section 57 of the ECA 1991 gives the Employment Court jurisdiction over 'harsh and oppressive contracts'. The Court can intervene if a contract was procured by 'harsh or oppressive behaviour or by undue influence or duress'. The primary remedy for breach of an employment contract is an order for compliance but every party in breach is also liable to a penalty, $NZ2,000 in the case of individuals and $NZ5,000 for

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4 'Jobsback', p 17.
5 'Jobsback', p 19.
6 *Employment Contracts Act* 1991 (NZ) ss 19 - 20.

corporations.[7] It should also be noted that the Employment Tribunal and Court are specialist bodies with exclusive jurisdiction.

In the U.K., collective agreements still cover about 50% of workers, although less than 40% are unionised. A collective agreement is defined as any agreement or arrangement made by or on behalf of one or more trade unions and one or more employers, or employers' associations, which relates to one or more of the matters mentioned in section 144 of the *Trade Union and Labour Relations Consolidation Act* 1992 (UK) (henceforward TULRCA 1992 (UK)).[8] Such an agreement is conclusively presumed not to have been intended by the parties to be a legally enforceable contract unless the contrary intention is expressed.[9] A collective agreement will be legally binding on individual workers if substantive terms have been expressly or impliedly incorporated into individual contracts of employment. This is true whether or not the employee concerned is a union member. Even where a collective agreement covers a particular workplace, there is no law which prevents an employer negotiating an individual contract with an employee (as long as the terms agreed on do not give rise to claims under the anti-discrimination legislation). Actions for breach of an individual contract of employment are heard in ordinary civil courts, although the transfer of jurisdiction to industrial tribunals has been mooted for several years.

Collective agreements in the U.K. can be of indefinite duration and, unless they are legally binding, variation or termination may occur at any time. Obviously terms that have been incorporated into individual contracts of employment cannot be unilaterally altered. As regards a 'floor of rights', there is no general legislation on minimum wages, hours of work, holidays or holiday pay, paternity leave or the conditions of young workers despite pressure from the European Community. The Thatcher Government rescinded the Fair Wages Resolution (which dealt with a 'going rate') and limited Wages Councils (which exist only in 'sweated trades') to the determination of minimum hourly and overtime rates of pay. Despite its title, the *Unfair Contract Terms Act* 1977 (UK) provides no general safeguard for employees since it deals only with unfair exemption clauses.

In Australia, the award system provides rights for about 80% of the workforce, about half are covered by Federal and half by State awards.

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7 *Ibid*, ss 43 and 53.
8 *Trade Union and Labour Relations Consolidation Act* 1992 (UK) s 178.
9 *Ibid*, s 179.

Registered associations can also make consent awards or certified agreements under both Federal and State legislation. According to 'Jobsback', there would no longer be a system of compulsory arbitration and both awards and certified agreements would expire on their anniversaries.[10] It is intended that employers and employees will negotiate workplace agreements which will be signed by them and contain a disputes procedure. Since unions and employer organisations cannot be parties to a workplace agreement,[11] it is difficult to see how such a document can accurately be described as a collective agreement. It might be more properly regarded as a basket of individual contracts. Workplace agreements would be for a specified term but, like enterprise agreements, would continue to have effect after expiry subject to the right of either party to terminate the relationship by giving notice in writing. As with awards, certified and enterprise agreements, workplace agreements would be legally enforceable, but the Coalition would limit an employee's liability for breach at common law to $5,000.

Under the 'Jobsback' proposals, individuals may be covered by award conditions or a workplace agreement that has superceded them. If the employer and employees do not opt for the award conditions and fail to reach a workplace agreement, the award conditions will be incorporated into individual contracts of employment. No doubt for good reason, 'Jobsback' goes to great lengths to avoid mentioning the words 'individual contracts'. Thus the document describes the process of incorporation as follows:

> This outcome will be achieved by legislating to incorporate those terms and conditions into the relationship which will arise between such an employee and his or her employer when the award terminates.[12]

It would appear that the debate over 'opting into' or 'opting out of' the award system seems to have been resolved, at Federal level at least, in favour of the former. However, it is worth noting that although the Premier of New South Wales praised the adoption of his State's approach, employers and employees in New South Wales must 'opt out' in order to conclude an enterprise agreement. Indeed, enterprise agreements in this State are negotiated between collective parties, cover any person employed in a trade

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10 Space does not permit an examination of the constitutionality of these proposals.
11 'Jobsback', p 11.
12 *Ibid*, p 13.

which falls within the scope of the agreement, and are subject to a more comprehensive set of minimum conditions than those prescribed in 'Jobsback'.

Subject to certain statutory safeguards, the current position is that awards do not apply to the extent that certified and enterprise agreements cover a particular term of employment. According to 'Jobsback', young workers would get a minimum hourly wage and adult wages would be set by reference to the base minimum rate in existing awards. Apart from State legislation governing long service leave, public holidays and occupational health and safety, the other minima will be four weeks annual leave, two weeks non-cumulative sick leave and twelve months' unpaid maternity leave. Thus all other entitlements, for example redundancy arrangements, penalty rates, holiday loadings, superannuation beyond the *Superannuation Guarantee Act* are subject to negotiation.

As regards specific safeguards against coercion, the existing position is that an agreement may not be certified if the Industrial Relations Commission is satisfied that the workers will be disadvantaged overall. By way of contrast, Section 133 of the *Industrial Relations Act* 1991 (NSW) empowers the Industrial Court to declare an enterprise agreement wholly or partly void if it finds it to be unfair, harsh or unconscionable or was entered into under duress. 'Jobsback' considers that the establishment of a new Office of the Employee Advocate will provide an additional safety net:

> employees who have legitimate claims for unpaid wages or other entitlements, or who may have been unfairly dismissed or treated, will be able to have these matters pursued by the employee advocate on their behalf without expense.

The advocate will have no power to order redress but must pursue claims through the existing courts. Not surprisingly, many questions have been asked about the nature of 'legitimate' claims, the funding of such an Office and the ability of the courts to deal with matters expeditiously.

Union membership and negotiating rights

In the U.K. it is unlawful to discriminate against workers at any time on the grounds of union membership or non-membership.[13] In New Zealand,

13 *TULRCA, supra n 8,* ss 137, 146, 152.

Sections 6 and 7 of the ECA 1991 provide similar protection but significantly refer to 'employee organisations' rather than unions. The New Zealand Employers' Federation survey referred to above revealed that only 13% of contracts continue to provide for the notification of new employees' names to the union; 70% of contracts no longer specify deduction of union dues; and 66% of contracts no longer include right of access provisions for union officials. According to the ACTU, the union movement in New Zealand has lost about 20% of its membership. In Australia it is Coalition policy to outlaw compulsory unionism and preference clauses. Individuals who wish to belong to a union will be able to join the industry, enterprise, craft or other union of their choice. The existing requirement for unions to have at least 10,000 members would be abolished. In extending union membership rights to independent contractors 'Jobsback' goes further than the U.K. Government has so far dared to tread.

In the U.K., the statutory machinery dealing with the recognition of unions for negotiating purposes was repealed in 1980. This leaves employers legally free to recognise or de-recognise at will, even though a number of statutory rights can only be exercised if recognition is established. Where recognition is granted there is no general duty to bargain in good faith. In New Zealand, Sections 9 and 10 of the ECA 1991 allow individuals to decide whether to negotiate their own contract or have a bargaining agent negotiate for them. The Employers' Federation survey indicates that unions were used as bargaining agents in only one of three cases. Although Section 12 of the ECA 1991 obliges an employer to recognise the authority of the appointed bargaining agent this does not appear to impose an obligation to negotiate. According to 'Jobsback', employees in Australia will be able to use whatever bargaining agent they want and the negotiation of workplace agreements will have to be conducted in good faith.[14] It is somewhat puzzling, therefore, to read later on that 'it will not be permissible for there to be more than one registered enterprise union covering the particular workplace'.[15]

Industrial action

In the U.K., the law on industrial action is exceedingly complex. Even if unions manage to adhere to the detailed balloting requirements and secure majority support at a workplace, they may still be liable for any ensuing

14 'Jobsback', p 12.
15 *Ibid,* p 19.

industrial action. For example, if the action does not commence within four weeks of the ballot result, there was a secondary boycott, the purpose of the action was to enforce a closed shop or support workers sacked for unofficial industrial action, or a tort was committed for which no statutory immunity is available. Three further points may be of interest. First, individuals who engage in industrial action breach their contracts of employment and may be dismissed for doing so.[16] Second, it is unlawful for a union to penalise a member for refusing to participate in industrial action.[17] Third, no-strike clauses are entirely optional.

In New Zealand, strikes and lockouts are lawful if they relate to the negotiation of a collective employment contract for the employees involved or to health and safety.[18] Section 63 of the ECA 1991 provides that strikes are unlawful if: the workers involved are covered by a collective employment contract; they relate to union membership, personal grievances and disputes; they take place in an essential industry and notice has not been given; they concern the issue of whether a collective employment contract should cover more than one employer; or they occur in breach of a court order.

In Australia, sections 45D and E of the *Trade Practices Act* 1974 (Cth) and the availability of the common law industrial torts have led many to conclude that there are not many freedoms left to erode. Although the Business Council of Australia has suggested that workers be given the right to strike during the contract negotiating period, the Coalition has not accepted this. Indeed, 'Jobsback' proposes that the Industrial Relations Commission should be able to issue directions, enforceable by injunctions in the Federal Court, to stop or prevent industrial disputes. Two other aspects of 'Jobsback' should also be noted. First, workplace agreements will be required to include a clause preventing industrial action which is designed to vary agreed conditions. Second, it is intended to outlaw strike pay from an employer.

Conclusion

We have observed that in preferring individual contracts to collective modes of regulation the Coalition policy is in line with the thinking of Conservative governments in New Zealand and the U.K. Some

16 *TULRCA, supra n 8*, s 238 provides very limited protection against selective sackings.
17 *Employment Act* 1988, s 3.
18 *Employment Contracts Act, supra n 6*, ss 64 and 71.

commentators have suggested that a move towards individual arrangements would make it more difficult to deal with discrimination at the workplace. Others doubt whether employers who have been used to an award system will really be prepared to devote the time necessary to negotiating individual agreements. Nevertheless, the most obvious objection to individual negotiations is that employees and employers do not normally possess equal bargaining power. In the safeguards provided against exploitation it would seem that 'Jobsback' is following the U.K. lead and offering less protection than in New Zealand.

As regards freedom of association, although both the U.K. and New Zealand governments have attempted to limit the negotiating rights of trade unions, neither have gone so far as to insist that only one union should be allowed to cover a particular workplace. In relation to industrial action, none of the countries discussed provide individuals with a true 'right to strike' but it would seem that Coalition policy would specifically outlaw certain forms of action which might well give rise to union immunity in New Zealand and the U.K., for example, primary action during a contract negotiating period. Arguably, John Howard has learned much from both the U.K. and New Zealand experience and has decided to offer Australians a more restrictive system of his own.